

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

July 26, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-158-D
on behalf of	:	
LEONARD M. BERNARDYN,	:	WILK CD 99-01
Complainant	:	
v.	:	Wadesville Pit
	:	Mine ID 36-01977
READING ANTHRACITE COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant;  
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, P.C., Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

### 1. Introduction

This case is before me based upon a Complaint of Discrimination filed by the Secretary of Labor ("Secretary") on behalf of Leonard M. Bernardyn alleging that Bernardyn was discharged by Reading Anthracite Company ("Reading") in violation of section 105(c) of the Federal Mine Safety and Health Act of 1997 ("the Act").<sup>1</sup> Pursuant to notice, the case was heard on May 18, 1999, in Harrisburg, Pennsylvania.<sup>2</sup> On July 15, 1999, the Parties filed Proposed Findings of Fact, and Briefs.

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<sup>1</sup>/ On March 4, 1999, the Secretary, on behalf of Bernardyn, filed an Application for Temporary Reinstatement. Subsequent to an evidentiary hearing on this application held on March 16, 1999, an order was issued directing Reading to reinstate Bernardyn (*Secretary of Labor on behalf of Leonard M. Bernardyn v. Reading Anthracite Company*, 21 FMSHRC 339 (March 19, 1999)).

<sup>2</sup>/ At the March 18, 1999 hearing, the transcript of the temporary reinstatement proceeding, 21 FMSHRC, supra, and the exhibits admitted at that proceeding, were ordered incorporated into the record of the instant proceeding.

## II. Applicable Law

The Commission, in *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, *Tri-Star*, at 2463-2464, stated as follows:

The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3<sup>rd</sup> Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 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 part motivated by protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. *Pasula*, 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation, v. United Castle Coal Co., 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987).

## III. The Secretary's Prima Facie Case

### A. The Secretary's Witnesses

Leonard Bernardyn, a truck driver at the pit in question, testified that at the start of the shift on November 10, 1998, the weather was misty, and the road was starting to get slick.<sup>3</sup> Bernardyn indicated that on the morning of November 10, he felt that if he were to go at his normal speed he would go in circles.<sup>4</sup> He indicated that he was stopped by Stanley Wapinski, the general superintendent at Reading, who told him that he was going too slow. Bernardyn told Wapinski that it was getting slippery, and Wapinski informed him to get moving.

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<sup>3</sup>/ Bernardyn testified at the March 16, 1999 hearing.

<sup>4</sup>/ In general, the truck drivers are not informed by the company as to the maximum speed at which the trucks are to be driven.

Bernardyn utilized a CB radio that was in his truck to attempt to contact Thomas Dodds, another truck driver, who was a union representative. Bernardyn broadcasted over the CB radio that he was being harassed, and was asked to drive faster than warranted by the road conditions. Bernardyn conceded that he did use curse words at the time.

Shortly thereafter, Bernardyn was stopped again by Wapinski who told him that he was holding everything up, and directed him to park. After Bernardyn stopped the truck, Frank Derrick, Reading's general manager, informed him that he was fired. According to Bernardyn, Derrick did not tell him that he was being fired for cursing, or for using threatening language.

Dodds<sup>5</sup> confirmed that on the morning at issue the roads were slick. He also confirmed Bernardyn's testimony with regard to what Bernardyn communicated over the CB radio. Dodds indicated that generally miners on the site at issue do not use curse words on the CB radio.

Thomas Goodman,<sup>6</sup> a retired Reading employee and former truck driver, confirmed that the roads were slick on the morning at issue. Goodman testified that at approximately 8:00 a.m., the truck that he was driving began to slide. He also essentially confirmed Bernardyn's testimony as to what Bernardyn had said over the CB radio.

Dale Coombe, a truck driver employed by Reading, who worked at the site on the date in question, confirmed that it was raining. He indicated that generally when it rained the roadways become slick, and that Titan trucks easily spin around in such conditions. He confirmed that he heard Derrick ask Wapinski, over the CB radio, what was holding up the Titan trucks, and Wapinski stated that the drivers were driving cautiously as the conditions were slippery. He also confirmed that during his second trip of the day, he heard Derrick tell Wapinski over the CB ". . . to tell the driver to park the truck and send him out of the pit" (Tr. 16, May 18, 1999).

Coombe indicated that one time a Titan truck that he was driving had spun around in the mud, and the foreman, Robert Shellhammer, called him a "f---ing liar" and that "I was f---ing dangerous, and that he would get me fired if it was the last thing he would do (Tr. 19, May 18, 1999). Coombe was asked at what speed he was, "on a general basis," told to drive, and he answered as follows: "[t]hey want you to drive as fastly as you can as long as you do it safely . . ." (sic) (Tr. 19, May 18, 1999).

John Downey, the President of the local union, who had worked for Reading for approximately 20 years until June 1998, indicated that in September 1998, at a grievance hearing

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<sup>5</sup>/ Dodds testified at the March 16, 1999 hearing.

<sup>6</sup>/ Goodman testified at the March 16, 1999 hearing.

that he attended it “c[a]me out” (Tr. 28, May 18, 1999) that Edward Mitchell, a truck driver employed by Reading, who alleged he was “forced” to drive a truck not in his classification, directed the following towards his supervisor: “you can s--- my d--- if you think I will drive that truck” (Tr. 29, May 18, 1999). According to Downey, Mitchell was not discharged by Reading for the use of this profanity, but instead was fired for refusing to perform a job task that was not in his classification. Downey stated that Mitchell was rehired the following day.

Downey testified that he was cursed at by Wapinski who used the following language: “you’re a f---n committee man” (Tr. 30, May 18, 1999). According to Downey, on another occasion, Wapinski said to him as follows: “why don’t [you] go get an f---ing job at the mall” (sic) (Tr. 31, May 18, 1999). Downey indicated that a meeting had been arranged between the Union and Reading to resolve the issue of cursing at the site.

Jay Berger testified that in his capacity as a UMW Executive Board Member, he has attended grievance hearings at the mine, and that it is “common” for profanity to be used at these hearings (Tr. 47, May 18, 1999).

#### B. Reading’s Witnesses

Derrick, Shellhammer,<sup>7</sup> and Wapinski,<sup>8</sup> testified on behalf of Reading, that on the date at issue, the roads were slippery, that Bernardyn was going slower than the normal speed due to the road conditions, that Wapinski told him to get moving, that Wapinski stopped him a second time and told him that he was holding everything up, and that shortly thereafter Derrick informed him that he was being fired.

#### C. Discussion

Based on the essentially uncontroverted evidence I find that Bernardyn engaged in protected activities by driving at a speed consistent with the road conditions, and that Reading took action adverse to him by firing him. Moreover, due to the coincidence in time between Derrick’s ordering Wapinski to stop Bernardyn twice for holding things up, and his (Derrick’s) firing Bernardyn, I find that the Secretary has established that Bernardyn’s termination by Reading was motivated, in some part, by his protected activities.

#### IV. Reading’s Affirmative Defense

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<sup>7</sup>/ Shellhammer testified at the March 16, 1999 hearing.

<sup>8</sup>/ Wapinski testified at the March 16, 1999 hearing.

Reading presents an affirmative defense that, in essence, Bernardyn would have been fired in any event based on his unprotected activities, i.e., the use of profanity over a CB radio, and the use of threatening language he directed at Wapinski.

It is the Secretary position, in contrast, that Reading has not established its affirmative defense. In support of its position, the Secretary cites the fact that there was no evidence adduced that Bernardyn was warned concerning the use of profanity, that there was no evidence adduced that Reading had any company policy prohibiting swearing, that, according to the testimony of Coombes, Downey, and Berger, profanity was used at the mine by miners and management, and that, according to the testimony of Downey, on one occasion, a miner had directed profanity against a supervisor, but was not discharged by Reading.

On the other hand, Derrick testified that after he had directed Wapinski to stop Bernardyn a second time for driving too slow, and to meet him at the dump area, he (Derrick) had intended to transfer Bernardyn from his usual run, and put him instead on the coal run using a different truck. Derrick indicated that such a reassignment is not considered to be disciplinary, and he related four instances wherein he had reassigned individuals to other jobs after it had become apparent that they were not performing their original jobs satisfactorily.

Derrick asserted that his decision to terminate Bernardyn was based upon the fact that he heard Bernardyn use the following threatening language over the CB directed against Wapinski "I'll get the little f---r" (Tr. 90, March 16, 1999). He also indicated that there was no disparity between his decision to terminate Bernardyn for the use of profanity, and his decision to only give warnings to three other individuals who had used profanity directed against their foreman. He explained that Bernardyn, in contrast to these individuals, used language threatening a foreman over the CB radio, whereas the other three individuals did not use threatening language, and did not broadcast their profanity over the CB radio. Also, he noted that whereas these three individuals made a profane remark only once, Bernardyn used profanity "nonstop" (Tr. 71, May 18, 1999) for approximately 8-10 minutes.

In evaluating the evidence regarding the events at issue, I note that Bernardyn conceded that he did curse over the CB. Also, the Secretary did not impeach or call any witnesses to contradict or rebut Derrick's testimony that Bernardyn cursed "nonstop" over the CB radio for approximately 10 minutes, and used threatening language directed against Wapinsky, his supervisor.<sup>9</sup> I thus accept Derrick's testimony in these regards. Accordingly, I find credible Derrick's testimony that his decision to immediately terminate Bernardyn was made when Bernardyn cursed and threatened his supervisor over the CB. Hence, I thus find that Reading has

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<sup>9</sup>/ Barnardyn was asked whether he threatened anybody on the CB and he answered as follows: "No. I never threatened anybody in my life." (Tr. 32, March 16, 1999). However, he did not testify on rebuttal to rebut Derrick's testimony regarding the specific words he used directed against Wapinski. It thus is reasonable to draw an inference that he used these words, but did not consider them to constitute a threat.

established that its decision to immediately terminate Bernardyn would have been taken in either event based upon Bernardyn's unprotected activities, i.e., excessive profanity, and threatening profane language directed over the CB radio against his supervisor. I find that this decision by Derrick not to have been an unsound business decision of such a degree as to lead to an inference that it was pretextual.

Therefore, for all the above reasons, I find that although the Secretary has established a prima facie case, Reading has prevailed in establishing its affirmative defense. I thus conclude that the Secretary has not prevailed in establishing that Barnardyn was discharged in violation of section 105(c) of the Act. Therefore, the Complaint shall be dismissed.

### **ORDER**

It is **ORDERED** that the Order of Temporary Reinstatement, issued on March 19, 1999, (21 FMSHRC, supra) is hereby **DISSOLVED**. It is further **ORDERED** that the Complaint filed in this case shall be **DISMISSED**, and that this case shall be **DISMISSED**.

Avram Weisberger  
Administrative Law Judge

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