FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

August 1, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of	:	
LEONARD M. BERNARDYN,	:	Docket No. PENN 99-158-D
Complainant	:	WILK CD 99-01
	:	
v.	:	Docket No. PENN 99-129-D
	:	WILK CD 99-01
READING ANTHRACITE COMPANY,	:	
Respondent	:	Wadesville Pit
	:	Mine ID 36-01977

DECISION ON REMAND

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, Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

The Statement of the Case

This discrimination proceeding is before me based on the Commission's decision in this matter, 22 FMSHRC 298 (March 2000) which vacated my initial decision in this case, 21 FMSHRC 819 (July 1999), and remanded this matter for "further analysis" of the issue of whether Respondent had established its affirmative defense that Bernardyn would have been fired in any event based on his unprotected activities i.e., the use of profanity over a C.B. radio, and the use of threatening language he directed at Wapinski, the general superintendent at the site. On May 5, 2000, Respondent filed a brief. The Secretary's brief was received on May 30, 2000. On June 9, 2000 Respondent's reply brief was received.

I. Bernardyn's Statement Constituted a Threat.

According to Bernardyn, after he was stopped by Wapinski for going too slow, he stated, over the C.B. radio, that he was being harassed, and that he was asked to drive faster than warranted by the road conditions. Bernardyn indicated that he did use curse words at the time. He did not contradict or impeach the testimony of Derrick, that he (Bernardyn) used the following language over the C.B. radio "I will get the little f----r".

Bernardyn testified that he had never threatened anybody in his life. I find this general statement insufficient to contradict or impeach Derrick's testimony regarding the specific language used by Bernardyn. Further, although Bernardyn might, in his own mind, have considered the language that he used not to have constituted a threat, I do not find this dispositive of the issue of whether the words used by him constituted an expression of an intent to inflict harm on Wapinski . To the contrary, I find more significant the objective context in which Bernardyn uttered the statement at issue. I note that the statement was made over the C.B. by Bernardyn in an attempt to contact his union representative, in reaction to the incident in which Wapinski stopped him and told him that he was going too slow at a time when Bernardyn had concluded that the road was getting slippery. Also, Bernardyn conceded that he did use curse words at the time, evidencing a degree of animus. Within this framework, I conclude that Bernardyn's statement over the C.B. constituted a threat, i.e., an expression of an intent to inflict harm on another. (See, Webster Third New International Dictionary) (1986 edition)).

II. The 1987 Policy and the 1998 Policy.

In its decision, the Commission noted the dispute between the parties as to which disciplinary policy was in effect at the time of Bernardyn's discharge i.e., a 1987 policy which provided, that, inter alia "[r]efusal to obey orders or failure to carry out instructions or assignments ('Insubordination') to be a serious offense, and that the offending miner would be discharged after "complete exhaustion of disciplinary warnings and suspensions," or a 1998 policy providing that insubordination will result in discharge without exhausting disciplinary warnings and suspensions. In this connection, I note that a letter from Reading's attorney, Howard A. Rosenthal, to Daniel J. Kane, executive board member of the United Mine Workers of America, dated August 4, 1998, states, as pertinent, "... the Company will implement the attached Code of Conduct following the conclusion of the current negotiations and ratification of the new collective bargaining agreement." Hence, the Company committed itself to implement the 1998 policy upon ratification of the new collective bargaining agreement. Jay Berger, District Executive Board Member of the United Mine Workers, testified that the new agreement was not ratified until November 16, 1998, i.e., subsequent to the adverse action taken against Bernardyn. This statement appears to be coorborated in language contained in a letter written by Rosenthal to Kane, dated November 17, 1998, which contains the following language "this letter confirms that the Company has accepted the changes to the Supplemental Memorandum of Agreement dated October 27, 1998, which we understand was ratified, in advance by the UMWA." Within this

context, I find that it was more probable than not that the 1998 disciplinary policy was not in effect at the time of Bernardyn's termination.

III. Whether Bernardyn Suffered Disparate Treatment.

I take cognizance of the fact that 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 that he attended, it "c[a]me out" (Tr. 28, May 18, 1999) that Edward Mitchell, a truck driver employed by Reading, who had 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 the 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. Also, three other individuals working for Reading who had used profanity directed against their foremen had only been given warnings.

However, based on Derrick's testimony, that I find credible, inasmuch as it was not impeached or contradicted, that, in contrast to these individuals who just received warnings, Bernardyn used threatening language over the C.B. radio, whereas the other individuals did not use threatening language, and did not broadcast their profanity over the C.B. radio. Further, the other individuals made a profane remark only once, whereas Bernardyn used profanity "non stop" (Tr. 21, May 19, 1999) for approximately 8 to 10 minutes. I thus find that Bernardyn's conduct was more egregious, and thus not in the same category as the others who were merely warned.

IV. Provocation

The only evidence in the record relating to whether Reading's agents' actions or words provoked or incited Bernardyn to curse and issue a threat, is Bernardyn's testimony that when he was stopped by Wapinski and told that he was going too slow, he explained to Wapinski that it was getting slippery, and Wapinski responded by telling him "get the thing moving and get going". Wapinski testified that he told Bernardyn "pick it up when and where you can". It also appears that Bernardyn felt that he was being harassed and expressed this over the C.B.

I find that although Bernardyn may have subjectively felt that he was being harassed by Wapinski, the Secretary has failed to establish that Reading provoked Bernardyn into using profanity and issuing a threat over a C.B. radio. I note that the Secretary did not cite, nor does the record contain, any actions or conduct on the part of any of Reading's agents that might constitute an act of provocation. Further, the only statement by Reading's agents that might be seen as provocation, was Wapinski's response to Bernardyn's protected activity of slowing down due to poor road conditions wherein he stated "get this thing moving and get going" or "pick it up when and where you can." I find that the words in these statements are devoid of any threat or expression of any animus toward Bernardyn or his protected activity. I find that Bernardyn's unprotected activities, in using profanity for 8 to 10 minutes directed not against Wapinski but

over a C.B. radio, and using words constituting a threat over a C.B. radio, to have been out of proportion to the one-time, brief statements Wapinski made to him. I thus find that, within the circumstances of this case viewed in their totality, that it has not been established that any conduct, statements, or actions of Reading's agents constituted a provocation which justified or excused Bernardyn's using profanity, and voicing a threat. [1]

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[1]The cases cited and relied by the Secretary are in inapposite to the facts presented in the case at bar. In NLRB v. M & B Headwear Co., 349 F 2nd 170 (4th Cir. 1965), the Fourth Circuit upheld the reinstatement of a worker who, after a discriminatory layoff, threatened a supervisor because the unjust and discriminatory treatment of [the worker] gave rise to the antagonistic environment in which these remarks were made. 349 F 2nd supra, at 174. In M & B Headwear, supra, in contrast to the case at bar, the employer had subjected the discharged employee to surveillance when the former was engaging in protected activities. Also, she was transferred to a different job six days after she had engaged in protected activities, and she was told by a supervisor that it was unfair of her to attempt to organize the plant without telling the company's officers. The Court found that there was sufficient evidence to support the Board's conclusion that her layoff was discriminatory. In this context the Court found that the unjust and discriminatory treatment of the worker gave rise to the antagonistic environment in which the worker's subsequent threats and rudeness were made. In contrast, in the case at bar, there is no evidence of any unjust and discriminatory treatment of Bernardyn to lead to a conclusion that any wrongful provocation existed.

Similarly, in NLRB v. Steinerfilm, Inc. 669 F 2nd 845 (1st Cir. 1982), the Court, in upholding the decision of the Board that had held that a discharge of an employee was unlawful, noted that the company had engaged in a series of unfair labor practices, including threats to the discharged employee. Also, the company had issued a warning, which the Court found that the Board was fully justified in concluding had been unlawful. The Court held that the Board could reasonably conclude that the discharged employee's abusive language was an excusable action to the unjustified warning he had received just minutes before, and therefor the discharge was improper. In contrast, in the case at bar, Bernardyn's use of excessive profanity did not follow any unlawful warning or other unlawful act on the part of Respondent.

Lastly, in Trustees of Boston University vs. NLRB 548 F 2nd 391 (1st Cir. 1977), the First Circuit upheld an Administrative Law Judge's decision excusing an employee's misconduct because it was stimulated by the employer's own wrongful conduct. In the instant case, in contrast, it has not been established that Bernardyn's use of profanity and threatening language was stimulated by Respondent's wrongful conduct. Specifically, the plain meaning of the words used by Wapinski in response to Bernardyn's driving slowly due to slippery conditions, do not contain any threat or animus toward Bernardyn relating to his protected activity under the Act, i.e., driving slow due to slippery conditions, and hence were not "wrongful".

V. Conclusion

The critical issue to be resolved is the nexus between Bernardyn's protected activity and the adverse action taken against him by Respondent. The disciplinary policy of 1987 in effect when Bernardyn was terminated did not specifically grant Respondent the right to terminate an employee based upon the latter's use of profanity, and the issuance by the latter of a threat against a supervisor. However, the Secretary cannot prevail if the operator establishes that it would have terminated Bernardyn anyway for the unprotected activity alone. (See, Bradley v. Bela Coal Co. 4 FMSHRC 992, 993 (June 1992).[2] In this connection, I reiterate the finding that I made in the original decision, 21 FMSHRC supra at 823, accepting Derrick's testimony that was not impeached or contracted, that Bernardyn cursed "unstop" over the C.B. radio, and used threatening language directed against Wapinski , his supervisor. Accordingly, I find credible Derrick's testimony that his decision to immediately terminate Bernardino was made when Bernardino cursed and threatened his supervisor over the C.B.. I thus find that Reading has established that it's decision to immediately terminate Bernardino would have been taken in either event based upon Bernardino's unprotected activities, i.e., excessive profanity, and threatening profane language directed over the C.B. radio against his supervisor.

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

(Footnote 1 continued)

Further, in Boston University, supra , the discharged employee's conduct consisted of being "offensive" on a number of occasions in dealing with supervisors, and brandising a pair of scissors. (The court, Boston University, supra at 392, n. 2., found the decision of the NLRB that this episode was not perceived as a serious threat, to be a supportable characterization.) In contrast, in the case at bar, the employee misconduct of Bernardyn, was most egregious, as he used profanity for 8 to 10 minutes over the C.B., and issued a verbal threat.

[2] It thus is not for this forum to determine whether the termination was consistent with agreements (policies) negotiated between the operator and the union.

VI. Order

It is **ORDERED** that the Complaint filed in this case be dismissed, and that this case shall be dismissed.

Avram Weisberger
Administrative Law Judge

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