

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041
April 16, 1997

MARVIN E. CARMICHAEL, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. SE 93-39-D
: :
JIM WALTER RESOURCES, INC., : BARB CD 92-08
Respondent :
: No. 7 Mine

DECISION

Appearances: Tommy E. Tucker, Esq., Bessemer, Alabama, for Complainant;
Arnold W. Umbach, III, Esq., Bradley, Arant, Rose & White,
Birmingham, Alabama, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Marvin E. Carmichael against Jim Walter Resources, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c). For the reasons set forth below, I find that the Complainant was not discriminated against because he did not engage in activities that are protected under the Act.

Carmichael filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA) pursuant to section 105(c)(2) of the Act, 30 U.S.C. ' 815(c)(2),¹ on December 2, 1991. On October 8, 1992, MSHA informed both the company and the Complainant that on the basis of its investigation it had determined that a violation of Section 105(c) of the Act has not occurred. Carmichael instituted this proceeding before the Commission, on October 23, 1992, under section 105(c)(3), 30 U.S.C. ' 815(c)(3).²

A hearing in the case was scheduled for May 26, 1993. However, the date was continued and, on June 1, 1993, proceedings in the case were stayed until such time as the complainant is

¹ Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

² Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission"

medically able to proceed.³ The stay was lifted on September 18, 1996, and a hearing was held on October 16, 1996, in Birmingham, Alabama.

The parties were given the opportunity to file post-hearing briefs in this matter. However, only the Respondent filed a brief.

Background

On October 10, 1991, the Complainant and three fellow roof bolters were working the evening shift in the No. 6 section. They were informed by one of the section foremen, Mark Buzbee, that in the time before they had to begin roof bolting, and during the time when no bolting was required throughout the shift, they were going to be task trained³ on operating a scoop.³ The miners refused to take the training. Consequently, they were escorted out of the mine and informed that they were being given a five day suspension with intent to discharge for insubordination.

After meetings with mine management, as required under the collective bargaining agreement, the discharge was converted to a two day suspension without pay. The miners agreed not to file a grievance seeking back pay and returned to work on Monday, October 14. On that day, the four miners were task trained on the scoop without incident.

Carmichael asserts that he refused to be trained to operate the scoop for safety reasons and that his suspension was, therefore, a violation of section 105(c) of the Act. The company maintains that the suspension had nothing to do with safety but was imposed for insubordination, which is not protected by the Act.

Findings of Fact and Conclusions of Law

³ This was to comply with section 48.7 of the Regulations, 30 C.F.R. ' 48.7, entitled: **Training of miners assigned to a task to which they have had no previous experience; minimum courses of instruction.**

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,⁴ a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) 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 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

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. *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 was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

Carmichael alleges that he refused to be trained on the scoop because he was afraid of it.
He testified:

We were told that we were going to have to run this piece of equipment and that we were to be test trained by Mark Buzbee, and I told them that I had never run this piece of equipment.

I wasn't familiar with it. I was actually afraid of that piece of equipment, to operate it. Besides that, we were told we had to sign the task training paper stating that you had been task trained on that.

(Tr. 9.) He further claimed that he refused to work on the scoop because I didn't know how to operate it. The machine was not operating right. It was broke. (Tr. 15.)

⁴ Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation; (2) he is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101; (3) he has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding; or, (4) he has exercised on behalf of himself or others . . . any statutory right afforded by this Act.

Trent Thrasher testified that he was the Shift Mine Foreman in charge of the evening shift on October 10. He related that he directed the shift foremen, Buzbee and Looney, to task train the four roof bolters on the No. 6 section on the operation of the scoop. He stated that sometime after the shift began he received a call from Looney advising that the miners were refusing the training. Thrasher narrated that he went underground to see what the problem was and that as he was going in the mine he met Assistant Mine Foreman Bruce Bailey bringing the four miners out of the mine. After determining that Bailey did not know what had transpired between the miners and the foremen, Thrasher took the miners back to the section to talk to the foremen.

Thrasher said that he talked to the foremen for about 30 minutes and they told him that they had barely gotten started with the training when ~~At~~the guys told them that they weren't going to accept the training, they knew how to do the job, they didn't want to be trained, they weren't going to run the scoop and they weren't going to sign the forms.@ (Tr. 42.) He testified that the foremen also told him that the roof bolters had said that ~~At~~they weren't going to take another man's job.@ (*Id.*)

Thrasher provided the following testimony concerning the resolution of the matter:

Q. Did you attempt to task train them?

A. No.

Q. Why not?

A. I went back to get the story and to make sure they had been given every option to accept the training including given some ultimatums of discipline [which] would follow.

Once I proved it to myself they had every opportunity to accept the training, I went back to the track where Bruce Bailey was and talked to Bruce, and Bruce, who was assistant mine foreman as I said, he was trying, not at that time, but he said that he had tried to get them to take the training as well.

They wasn't interested in it. So, at that point I told them that they were under suspension and given five days suspension with intent to discharge and I was taking them out of the mines [*sic*].

Q. You told the men that?

A. Right.

Q. Was there any discussion between you and the men as you were taking them out of the mine?

A. Yes.

Q. Tell us what they said.

A. Someone asked for a committeeman, safety committeeman. I don't know which one because the diesel engine is just a foot away from my head. I am facing one direction. They are sitting behind me.

One of them asked for a safety committeeman. I didn't provide them one because there wasn't a safety issue. It was training. Another reason was the suspension had already been given.

(Tr. 45-46.)

The Commission has held that a miner's refusal to perform work is protected activity under the Act if it is based on a reasonable, good faith belief that the work involves a hazard. *Pasula, supra*, 2 FMSHRC at 2789-96; *Robinette, supra*, 3 FMSHRC at 807-12; *Secretary on behalf of Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133-38 (February 1982). *See also Secretary on behalf of Cameron v. Consolidation Coal Co.*, 7 FMSHRC 319, 321-24 (March 1985), *aff'd sub nom. Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 366-68 (4th Cir. 1986); *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 229-30 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985). In this case, Carmichael's refusal to accept task training on the scoop does not meet this test.

In the first place, the purpose of the task training was to teach the Complainant how to safely operate the scoop. In the second place, neither Carmichael nor any of the other miners advanced a basis, reasonable or otherwise, as to how the task training involved a hazard.⁵ Furthermore, since such training is required by section 48.7, Carmichael's refusal to accept it could hardly be protected activity. Therefore, I conclude that Carmichael's refusal to be task trained was not activity protected under the Act.

ORDER

Accordingly, since the Complainant has failed to show that he was suspended for engaging in activity protected under the Act, it is **ORDERED** that the complaint of Marvin E. Carmichael against Jim Walter Resources, Inc., under section 105(c) of the Act, is **DISMISSED**.

⁵ Carmichael testified that he learned subsequent to this incident that Buzbee may not have been qualified to train on the scoop. However, he admitted that he did not think this at the time he refused the training.

T. Todd Hodgdon
Administrative Law Judge

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