

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 24, 1998

MARVIN E. CARMICHAEL, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. SE 93-39-D
: MSHA Case No. BARB CD 92-08
JIM WALTER RESOURCES, INC., :
Respondent : No. 7 Mine
: Mine I.D. 01-01401

DECISION ON REMAND

Before: Judge Hodgdon

On May 14, 1998, the Commission issued a decision vacating my decision¹ and remanding the case for further analysis. *Marvin E. Carmichael*, Docket No. SE 93-39-D (May 14, 1998).² The Commission directed that I consider the evidence adduced in support of Carmichael's claim that he was discharged for refusing to falsify a training form.³ Slip op. at 8. The Commission further instructed that I address all record evidence relevant to Carmichael's claim, with appropriate credibility determinations, explaining the reasons for [my] decision. Slip op. at 8-9. Finding that Carmichael has failed to meet his burden of proof, I conclude that his case should be dismissed.

Carmichael's case consisted of 11 pages of direct examination in the transcript. (Tr. 6-17.) He called no other witnesses and presented no other evidence. He was never asked what protected activity he claimed to have engaged in, why he believed he had been suspended or whether he had been asked to falsify a training form. His counsel did not allude to such a claim in his opening statement. The only mention the Complainant made of a training form occurred as follows:

Q. Can you tell the court what occurred to cause you to not work on this machine?

¹ *Marvin E. Carmichael*, 19 FMSHRC 770 (April 1997).

² Forthcoming as *Marvin E. Carmichael*, 20 FMSHRC 479 (May 1998).

³ Carmichael was never actually discharged. He was suspended for 5 days with intent to discharge. The suspension was subsequently reduced to a 2-day suspension after which Carmichael returned to work.

A. We were told that we were going to have to run this piece of equipment and that we were to be test [sic] 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.

I asked if we could sign it under protest. They said: No, you cannot.

(Tr. 9.)

The Complainant was not questioned on cross examination about being asked to falsify a training certificate, nor did he mention it. There was no redirect examination. However, after sitting down, Carmichael retook the stand to relate an incident, date unspecified, in which he claimed that an acquaintance of his had been permitted to be task trained on a scoop under protest. No details were provided. (Tr. 30-31.) With that, the Complainant rested.

Carmichael also testified in rebuttal to the company's case. With regard to the training certificate, he testified as follows:

Q. After you met with Mr. Buzbee and before you met with Mr. Looney that day, Mr. Ken Looney, did Mr. Buzbee produce a copy of this form to you to have you sign it that you had been checked out?

A. Yes. We did participate in the training with Mr. Buzbee. The machine was not operating correctly. We did participate in that and was still asked to sign that or we were terminated by Mr. Looney.

There was nothing ever mentioned about Mr. Looney showing us the procedures of running the machinery on the section.

Q. You were asked to sign this form after you were checked out by Mr. Buzbee; is that correct?

A. Yes. I asked if we could sign it under protest before we left the section.

Q. Who did you ask that of?

A. I asked Kenny Looney and I asked the other -- I can't remember -- Bruce, whatever his name is. Bailey.

Q. Bailey?

A. Right. We were refused to sign it under protest at all.

(Tr. 89-90.)

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, 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). In this case, the Complainant has not established that he engaged in protected activity, that is, that he refused to falsify a training certificate.

Even if Carmichael's testimony were credible, he has failed to present a *prima facie* case that he engaged in protected activity by refusing to falsify a training certificate, much less prove it by a preponderance of the evidence. None of the evidence he presented mentions anything about falsifying a training certificate. The statement given on direct examination about signing the task training certificate is a true statement. After being task trained, the miner signs the task training certificate indicating that he has been task trained. The statement about signing it under protest was not elaborated upon. The testimony on rebuttal is equivocal at best. In short, Carmichael not only did not offer any evidence in support of his claim filed with MSHA, he did not even restate the claim itself at the hearing.⁴

Furthermore, the Complainant's testimony is not believable. It does not appear that in most instances he was being deliberately deceitful, but his testimony is lacking in detail, filled with gaps, failures to remember and logical inconsistencies and, thus, unreliable. For instance, he testified on cross-examination that he did not remember what a super-section was or that at the time of the alleged discrimination he was working on a super-section. He stated concerning the

⁴ He also did not raise the contention in his brief to the Commission, instead stating that the basis for his discrimination claim was JWR's insistence that he operate the scoop, a machine on which he had not been sufficiently trained. Slip op. at 5.

events in question: AI remember some of it and some what I have read on the documents there and what I have been told by other people involved with me as to what happened to us and to me.@ (Tr. 19.) When asked whether the other three miners with him had filed a complaint with MSHA, he replied: AI don't know. I don't remember filing a complaint, not with MSHA. I must have. I don't remember it. I must have.@ (Tr. 25.) When asked whether he had been task trained on the scoop on the day he returned to work, he claimed: AI don't remember what day we went back to work. I don't remember what day we went back to work. I don't remember being task trained again. I don't know.@ (Tr. 26.)

In at least one instance, I find that his testimony was disingenuous. The company was operating a super-section on the No. 6 section. It had five more men and more equipment on it than a normal section. However, because no scoop operators had been assigned to the section, the roof bolters were being required to work Aout of classification@by operating a scoop during periods that they were not roof bolting. Several days prior to the incident, the union had filed a grievance over this procedure. It is apparent that the four miners=refusal to be task trained on the scoop was a job action brought about by their disgruntlement at having to work out of classification. Carmichael's claim that he did not remember that the union had filed a grievance or that there was any such problem on the section, a matter that was clearly a prominent topic at the mine, is not only self-serving, in that it shielded him from having to answer any questions on the subject, but also inherently incredible.

I am also skeptical of the Complainant's professed fear of operating the scoop. I find it hard to believe that a person who had been a miner for 20 years and had, therefore, been around and worked with innumerable scoops, would be afraid of one. This skepticism is increased by the fact that he had already been task trained to operate a shuttle car, a similar type of equipment, and a roof bolter.

The Commission views Carmichael's rebuttal testimony, quoted above, as Atestimony that, subsequent to accepting the oral portion of the training, he was terminated after refusing to falsify a training form.@ Slip op. at 7. I understood Carmichael's testimony, and that of Thrasher's, the company's witness, as well, to be that refusing to sign the form was the same thing as refusing to take the task training. Nor did I understand Carmichael to testify that he was ready and willing to accept any training offered him, but that the company only offered the Aoral portion of the training@and then demanded that he sign the training certificate to show that he had been task trained. However, if that interpretation is the law of this case, then, in view of Carmichael's lack of credibility, I give the testimony no weight. Furthermore, there is no other evidence in the record to corroborate such a claim.

Sometime during the incident, at least one of the four miners requested the presence of a union safety committeeman. This request was refused. As with most aspects of this case, there is a serious lack of evidence in the record concerning this request. The union contract was not put into evidence, and Carmichael did not present any evidence concerning under what circumstances a miner could request a safety committeeman. Therefore, there is no way of knowing whether the request was valid or not. While the request could have some tendency to support Carmichael's

claim that the miners were asked to falsify training certificates, it could also have some tendency to support the company's claim that the miners were doing everything they could to avoid the training. Therefore, without more information, I conclude that the request is a neutral factor in the case.

It is unfortunate that the Complainant chose to rely solely on his admittedly faulty memory in this case. There clearly was other evidence available. The three other miners involved with him still work for the company. Carmichael stated that he still talks to one of them, Bruce Ivey, from time to time. (Tr. 94-95.) No explanation was offered as to why none of them was called. One reason, however, might be that they do not support his claim. In view of the fact that the union, although able to reduce the suspension with intent to discharge to a 2-day suspension with loss of pay, apparently did not pursue the matter any further on the Complainant's behalf, it is entirely possible that they do not. One would expect that if a miner had suffered adverse action for refusing to falsify a training certificate, the union would be actively involved in attempting to right the wrong. The inference that no such thing occurred is made even stronger by the fact that MSHA investigated his complaint immediately after it was made, when memories were fresh, and found that a violation of section 105(c) had not occurred.

In conclusion, I find that the Complainant's insubstantial, unsupported and uncorroborated assertions made at the hearing, which require supposition as to what he meant to even associate them with his initial complaint to MSHA, have not established that he was asked to, and refused to, falsify a training certificate and was suspended as a result thereof. Consequently, he has not shown that he engaged in protected activity which entitles him to protection under the Act.

ORDER

Accordingly, the complaint of Marvin E. Carmichael against Jim Walter Resources, Inc., under section 105(c) of the Act, is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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