

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 21, 1995

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA), :
on behalf of : Docket No. WEST 95-308-D
MARTY P. BODEN, :
Complainant :
 : Swanson Mine
v. : I.D. 48-00082
 :
LION COAL COMPANY, :
COUGAR COAL COMPANY, successor :
to LION COAL CO., :
Respondent :

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Complainant;
Brian W. Steffensen, Salt Lake City, Utah,
for Respondent.

Before: Judge Cetti

This proceeding is before me upon request for hearing filed by the operators of the Swanson Mine, I.D. No. 48-00082, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., the "Act", and under Commission Rule 45(b), 29 C.F.R. ' 2700.45(b), to contest the Secretary of Labor's Application for Temporary Reinstatement on behalf of miner Marty P. Boden.

I

It is undisputed that Marty P. Boden was employed as a belt foreman at the Swanson Mine prior to his discharge on November 9, 1994. Under date of November 14, 1994, Mr. Boden filed with MSHA a complaint of discrimination which reads in part as follows:

I continued to complain to the Company Officers, the Board of Directors and to Matt Breneman about the violations in the entire beltline and about not having enough employees to correct the violations that I could. I also complained about the return entries after walking them to follow the secondary escapeway out to the surface. I complained about the dusty roadways in the main intakes.

I complained about the build up of float dust in the mine and the lack of rock dust in the mine. However, this complaining seemed to fall on deaf ears.

Then on Monday, November 7, 1994, I spoke with Anita Goodman for advice on the violations at the mine and the unwillingness of the four individuals who run every aspect of our company and the mine to correct such violations. Ms. Goodman advised me to contact the MSHA Headquarters in Arlington, Virginia. I immediately contacted the MSHA Headquarters and registered my complaints. On November 9, 1994, Mr. Steve Teetman, the MSHA inspector came to the mine with what was to begin as a Triple A inspection and was changed to a BAD inspection upon receiving my "Miner's Complaint". At approximately 2:30 p.m. this same afternoon, Brian Steffensen, James Lipscomb, Hal Rosen and Richard Anderson ordered the mine manager, Mr. Matt Breneman to fire me for "malfeasance". Due to the fact that the list of complaints is the same things I have continued to complain about, these four men apparently knew that I was the one who called MSHA and they fired me for exercising my Miner's Rights.

II

Temporary reinstatement proceedings are governed by Commission Rule 45(c), 29 C.F.R. ' 2700.45(c) which provides as follows:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought.

The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

III

The Secretary filed a timely Application for Temporary Reinstatement stating that as a result of a formal investigation the Secretary determined that Mr. Boden's complaint was not frivolously brought. The Secretary specifically requests an Order requiring the operator of the Swanson Mine, Lion Coal Company and, by later amendment its successor Cougar Coal Company, to temporarily reinstate the miner, Marty P. Boden, to the position of belt foreman which he held immediately prior to his discharge on November 9, 1994, or to a similar position at the same rate of pay and with the same or equivalent duties.

The Secretary's Application for Temporary Reinstatement alleges that Respondent terminated the employment of the belt foreman Marty Boden "contrary to section 105(c) of the Act for exercising his statutory rights under the Act." The Secretary specifically states Mr. Boden contacted MSHA offices in Delta, Colorado, and Arlington, Virginia, on November 7, 1994, to complain about unsafe conditions at Lion Coal Company's Swanson Mine. As a result of Boden's safety complaints to MSHA, a Code-a-Phone spot inspection was initiated by MSHA on November 9, 1994. Mr. Boden, was terminated later that same day, November 9, 1994. The Secretary states his employment was terminated as a result of his safety complaints to MSHA.

The application's accompanying affidavit required by Commission Rule 45(a) was executed by William G. Denning. The affidavit, in relevant part, certifies the following:

- a. At all relevant times, Respondent Swanson Mine, Lion Coal Company, engaged in the production of coal and is therefore an operator within the meaning of section 3(d) of the Mine Act.

b. At all relevant times, Marty Boden was employed by Respondent as a belt foreman and is a miner as defined by section 3(g) of the Mine Act.

c. Swanson Mine, Lion Coal Company, is a mine as defined by section 3(h) of the Mine Act, the products of which affect interstate commerce.

d. The alleged act of discrimination occurred on November 9, 1994, when Marty Boden was discharged by Matt Breneman, Mine Manager.

e. Marty Boden engaged in protected activity when on November 7, 1994, Mr. Boden contacted the MSHA offices in Delta, Colorado, and Arlington, Virginia, to report unsafe working conditions at the Swanson Mine. Specifically, he complained about the belt rollers, the rock dusting and the returns. These phone calls caused MSHA to perform a Code-a-Phone inspection at the Swanson Mine on November 9, 1994.

f. During the course of Ms. Lorenzo's investigation, she conducted interviews with a number of employees, both hourly and managerial, and also conducted a review of documents provided by the mine. As a result of Ms. Lorenzo's investigation, I determined that Mr. Boden was discharged in retaliation because of his report to MSHA about unsafe conditions at the Swanson mine which caused a Code-a-Phone inspection by MSHA. Most of the miners I interviewed agree with Mr. Boden that the beltline was not safe.

g. Mr. Boden has always met an acceptable level of performance at the mine, and was characterized as a good worker by his supervisors. The mine contends that Mr. Boden was already designated for termination before the MSHA Code-a-Phone inspection because of maleficence (sic) and theft.

Ms. Lorenzo's interviews with other employees of the mine do not give any credence to these charges.

IV

At the hearing the Secretary presented the testimony of the mine manager Matt Breneman, the belt foreman and Complainant Marty Boden, the MSHA special investigator Leslie Y. Lorenzo, the former company safety manager Anna Marie Boden, Ron Kalvis, a shop foreman, Greg Brown, who worked under Boden on the belts, Dennis Keller, who took over Boden's job as belt foreman when Boden was terminated, Ron Hoffman and Tara Whittaker.

Matt Breneman, the mine manager at Swanson Mine, testified substantially as follows: The Code-a-Phone message had safety complaints, the same complaints that Boden had continuously made to management, and he could tell from the complaints in the Code-a-Phone message that Boden must have been the one who made the complaints to MSHA. After the Code-a-Phone message was received at the mine, Matt Breneman called management in Salt Lake City and talked to the Board of Directors. They put his call on a speaker phone, and R. Anderson (Dick), J. Lipscomb and Brian Steffensen participated in the call. Breneman discussed with them the Code-a-Phone message and the complaints set forth in the Code-a-Phone message. Breneman testified that in the course of that conversation Brian Steffensen told Breneman to fire Marty Boden. The mine manager replied he had no reason to fire Boden. Brian Steffensen then told him to fire Boden for "malfeasance". Breneman hung up the phone, looked at Boden and said "they want me to fire you" for "malfeasance." He briefly discussed the situation with Boden and it was determined that in order not to jeopardize his own job, Breneman should do what he was told to do. He fired Boden. Boden then left the mine immediately .

The Respondent primarily presented the testimony of management witnesses who testified that they were not satisfied with Mr. Boden's work performance as belt foreman and were concerned about his use of a company gas card and his charging mileage. Their testimony indicated that Lion Coal management was in the process of investigating Mr. Boden's work performance and were seriously considering terminating his employment before they were even aware of Marty Boden's Code-a-Phone message to MSHA.

On review of the entire record I find the testimony of the witnesses called by the Secretary, taken together, support the allegations in the Secretary's Application for Temporary Reinstatement and the assertions in its accompanying affidavit. Their testimony and the Secretary's documentary evidence clearly establish that the miner's complaint was not frivolously brought.

COUGAR COAL COMPANY, SUCCESSOR TO LION COAL COMPANY

On June 28, 1995, over the objection of counsel Brian Steffensen, I granted the Secretary's motion to amend all pleadings to add as a Respondent Cougar Coal Company as successor to Lion Coal Company. The evidence established that on November 29, 1994, for \$10.00 and other consideration, Cougar Coal Company assumed the right to the title and an interest in all assets except for claims against the Selengos and their affiliates, cash on hand, current accounts receivable and inventory. (Gov't. Ex. 10-B). Evidence was presented that after the November 29, 1994, transaction, the day-to-day operations at Swanson Mine continued without a break and the mine continued to produce coal. The mine and the appurtenances associated with the mining activities remained the same. The workforce remained substantially the same.

Both Mine Superintendent Gene Picco and Mine Manager George Herne have been employed at this mine for several years and after November 29, 1994, continued their employment. In addition, the corporate officers and directors for Lion Coal Company and Cougar Coal Company are substantially the same. They are as follows:

JAMES LIPSCOMB - Chairman and President of Lion Coal Company and President of Cougar Coal Company

HAL ROSEN - Treasurer of Lion Coal Company and Treasurer of Cougar Coal Company

RICHARD ANDERSON - Vice-President of Lion Coal Company and Vice-President of Cougar Coal Company

BRIAN STEFFENSEN - Secretary of Lion Coal Company and registered agent for Cougar Coal Company

Mining methods and procedures did not change and the same jobs were required to be filled. Cougar Coal Company adopted all of Lion Coal Company's MSHA approved plans and stated that they anticipate no change in mining practices. Cougar Coal Company used the same machinery, equipment and methods of production.

George Herne, mine manager for Cougar Coal Company in his letter to the MSHA District Manager, under the letterhead of Cougar Coal Company dated January 13, 1995 states as follows:

RE: The Swanson Mine
I.D. # 48-00082

Dear Mr. Kuzar,

Cougar Coal Company has taken over the operations of the Swanson Mine, ID #48-00082, from Lion Coal Company. At this time Cougar Coal anticipates no change in the mining practices employed at the Swanson Mine. For this reason Cougar Coal Company will continue to operate under Lion Coal Company's approved mining plans, and accepts these mining plans as their own.

Thank you:

/s/

George Herne

Mine Manager (Gov't. Ex. 10A pg. 4, Tr. 479)

Under the nine-factor successorship guideline enunciated in Munsey v. Smitty Baker Coal Company Inc., 2 FMSHRC 3463 (1980), I find that the Cougar Coal Company is a successor to Lion Coal Company and, as such, along with Lion Coal Company, is properly subject to the Order temporarily reinstating Marty Boden.

CONCLUSION

At the conclusion of the hearing in this matter on August 30, 1995, after evaluating the entire record I ruled from the bench that the Secretary had sustained his burden of proof in establishing that the discrimination complaint was "not frivolously brought". I concluded that the Secretary made a sufficient showing of the elements of a complaint under section 105(c) of the Act and I orally issued the reinstatement order requested by the Secretary against the operators of the Swanson Mine, Lion Coal Company and Cougar Coal Company as the successor to Lion Coal Company.

In this decision I hereby affirm in writing the oral ruling made from the bench at the conclusion of the hearing on August 30, 1995.

ORDER

As stated in my ruling from the bench at the conclusion of the hearing on this matter, the Secretary's Application for the Order of Temporary Reinstatement of Marty P. Boden is **GRANTED**. Respondents Lion Coal Company and Cougar Coal Company as successor to Lion Coal Company, are jointly and severally **ORDERED** to temporarily reinstate Marty P. Boden to the position of belt foreman which he held at the time of his discharge, or to a similar position, at the same rate of pay and with the same or equivalent duties.

August F. Cetti
Administrative Law Judge

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