FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 26, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MARTY P. BODEN, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 95-417-D
v.	:	
LION COAL COMPANY, COUGAR COAL COMPANY, successor to LION COAL COMPANY, Respondent	:	Swanson Mine Mine I.D. 48-00082

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Brian W. Steffensen, Esq., counsel and registered agent, Cougar Coal Company, Corporate Secretary, Lion Coal Company, for Respondent.

Before: Judge Cetti

This case is before me upon the complaint by the Secretary of Labor on behalf of Marty P. Boden under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act". The complaint alleges that Lion Coal Company (Lion Coal) violated § 105(c)(1)[1] of the Act when it

[1] Section 105(c)(1) in pertinent part provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment

discharged Marty P. Boden from his position as belt foreman at the Swanson Mine. For the reasons discussed below, I find that Respondent Lion Coal violated section 105(c)(1) when it discharged Mr. Boden in the afternoon of the same day that there had been an early morning Code-a-Phone inspection of the operator's Swanson Mine. It is undisputed that the Code-a-Phone inspection resulted from Boden's report to MSHA about unsafe conditions at the Swanson Mine.

Liability is also assessed against Respondent, Cougar Coal Company (Cougar Coal), as the successor to Lion Coal for the reasons set forth in my decision in Secretary of Labor, on behalf of Marty P. Boden, v. Lion Coal Company and Cougar Coal Company, successor to Lion Coal Company. 9 FMSHRC 1620, 1624 (Sept. 1995).

Having considered the evidence presented at the hearing and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. At all relevant times, Respondent Lion Coal and its successor Cougar Coal engaged in the production of coal at the Swanson Mine and, therefore, each is an operator within the meaning of section 3(d) of the Mine Act.

2. The Swanson Mine is an underground coal mine and is a mine as defined by section 3(h) of the Mine Act, the products of which affect interstate commerce.

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

4. Matt Breneman at all relevant times was the mine superintendent and manager at the Swanson Mine. He was the

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has filed or made a complaint under or related to this Act, including a com-
plaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

person with the highest authority at the mine site and had authority from the operator of the Swanson Mine to discharge Boden.

5. 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. Boden's phone calls of November 7, 1994, caused MSHA to perform a Code-a-Phone inspection at the Swanson Mine on November 9, 1994.

6. The Code-a-Phone message had safety complaints that were the same complaints that Boden had repeatedly made to management. The mine superintendent Breneman could tell from the complaints in the Code-a-Phone message that Boden was the one who made the complaints to MSHA that resulted in the inspection. After the Code-a-Phone inspection was completed, Matt Breneman talked to the mine's Board of Directors in Salt Lake City. Board members put the call on a speaker phone and board members R. Anderson (Dick), J. Lipscomb and Brian Steffensen participated in the call. Breneman discussed with them the inspection and the complaints set forth in the Code-a-Phone mes-sage. In the course of that conversation, Mr. Steffensen told Breneman to fire Marty Boden. Immediately on hanging up the phone Breneman discharged Mr. Boden.

7. Mr. Boden was discharged the afternoon of November 9, 1994, in retaliation for his complaints to MSHA about unsafe conditions at the Swanson Mine. Boden's complaints to MSHA resulted in the MSHA Code-a-Phone inspection of the mine on the morning of November 9, 1994.

8. Boden was discharged for engaging in the above refer-enced protected activity. No affirmative defense was estab-lished.

9. At the time of his discharge on November 9, 1994, Marty Boden's regular rate of pay was $1,000 - a week.

10. Marty Boden's job at the Swanson Mine, but for his illegal discharge on November 9, 1994, would have continued up through April 17, 1995, the date his replacement, Dennis Keller, was laid off due to lack of work.

11. Because of credit problems, the shareholders of Lion Coal voted to create Cougar Coal in order to continue the opera-tion of the Swanson Mine. Cougar Coal was incorporated in the state of Wyoming on November 29, 1994.

12. On November 29, 1994, Lion Coal sold the company for a nominal fee and transferred its coal mining business and most of its assets to the newly formed Cougar Coal Company.

13. After the November 29, 1994, sale and transfer stated above Cougar Coal continued to mine coal at its Swanson Mine without a break during the change of the operator from Lion Coal to Cougar Coal.

14. Cougar Coal is the successor of the Lion Coal Company.

15. At the August 29, 1995, hearing, Cougar Coal filed a Notice of Bankruptcy stating that "Respondent Cougar Coal Company is the Debtor in Possession in Bankruptcy No. 95C-21320, United States Bankruptcy Court for the District of Utah, Central Division. Cougar's voluntary petition for relief under Chapter 11 of the Bankruptcy Code was filed on March 15, 1995." This Notice of Bankruptcy was handed to Judge Cetti by counsel Brian W. Steffensen while Judge Cetti was sitting on the bench just moments before going back on the record with the hearing in this matter at 9 a.m. on August 29, 1995, with the request that it be filed. (Tr. I of 8/29/95 pg. 8).

16. Counsel Brian W. Steffensen at all relevent times, was the secretary for Lion Coal and the secretary and a registered agent for Cougar Coal.

DISCUSSION AND FURTHER FINDINGS

The general principles governing analysis of discrimination cases under the Mine Act are well established. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in some part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (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 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. If an 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 activ-

ity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). The Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the (protected) activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity, and coincidence in time between the protected activity and the adverse action. Chacon, supra at 2510.

The Secretary presented the testimony of the mine manager and superintendent 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 duties as belt foreman when Boden was discharged; Ron Hoffman and Tara Whittaker.

The Respondent presented primarily the testimony of management witnesses who testified that they were not satisfied with Mr. Boden's work performance as belt foreman and were also con-

cerned about his use or possible misuse of a company gas card and company telephone. Their testimony indicated that Lion Coal management was in the process of investigating Mr. Boden's work performance and were planning to make a closer check on his work performance with the view of possibly terminating his employment before they became aware of Marty Boden's Code-a-Phone message to MSHA.

I was impressed with the credibility of the testimony of Matt Breneman, the mine superintendent and manager of the Swanson mine. I credit his testimony. He, as well as other witnesses, testified that the safety complaints in the Code-a-Phone message were the same complaints that Boden had repeatedly made to management, and he (Breneman) could tell from the complaints set forth in the Code-a-Phone message that Boden was the one who made the complaints to MSHA. After the Code-a-Phone message was received at the mine and the Code-a-Phone inspection completed, Matt Breneman in a long distance phone call to Salt Lake City discussed the matter with the mine's Board of Directors. The board members 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 inspection and the complaints set forth in the Code-a-Phone message. In the course of that conversation Brian Steffensen admittedly told Breneman that he was "not afraid" 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 would have to do what he was told to do. He fired Boden. Boden then immediately left the mine.

The record satisfactorily establishes that the reason given for firing Boden, "malfeasance", was pretextual. The evidence presented fails to establish that Boden misused the company gas card or misused the company phones as asserted by Respondent.

It is worthy of note that Boden had no prior disciplinary action taken against him nor were there any letters of reprimand in his personnel file. He received no reprimands or warnings of any kind. Matt Breneman, Boden's supervisor, was certainly the person in the best position to evaluate Boden's work and testified that Boden had satisfactorily performed all duties. One of the miners on Boden's crew, Greg Brown, testified that Boden was a good supervisor and worked with the crew to get things done.

While it is true that some needed maintenance work was not performed, the reason being that management would not authorize

the necessary funds. It satisfactorily appears from the record that Boden did the best job he could do with what he had to work with.

The preponderance of the evidence established that Boden was discharged on November 9, 1994, in retaliation for his protected activity in violation of § 105(c) of the Mine Act.

The purpose of reinstatement is to place a miner, as closely as possible, in the situation he would have occupied, but for the illegal discrimination. Boden was employed by Lion Coal from September 1994 through November 9, 1994, as a belt foreman. His normal rate of pay was $1,000 a week. On his illegal discharge Boden was replaced by Dennis Keller who took over Boden's job of supervising the belt crew and his other duties as belt foreman. Dennis Keller was "laid off" April 17, 1996 due to lack of work at the Swanson Mine. The mine was closing down at that time. The Secretary contends that Boden is entitled to back-pay at his normal rate of $1,000 a week from November 9, 1994, the date of his illegal termination, to April 17, 1995, the date Dennis Keller, who replaced him, was laid off due to lack of work. On review and evaluation of the evidence of record, I agree with the Secretary that Boden is entitled to back pay at the rate of $1,000 a week for the period from the 9th of November 1994 through the 17th of April 1995.

COUGAR COAL COMPANY, SUCCESSOR TO LION COAL COMPANY

It has been established that Respondent Cougar Coal is the successor to Lion Coal in the case of Lion Coal Company, Cougar Coal Company as successor to Lion Coal Company. 17 FMSHRC 1620 (Sept. 1995).

The evidence established that on November 29, 1994, for $10.00 and other consideration, Cougar Coal assumed the right to the title and an interest in all assets of Lion Coal except for claims against the Selengos and their affiliates, cash on hand, current accounts receivable and inventory. (Gov't. Ex. 10-B). After the November 29, 1994, transaction, the day-to-day operations at Swanson Mine continued by Cougar Coal without a break. 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, who have been employed at this mine for several years continued their employment with Cougar Coal.

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

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

> 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. (Gov't. Ex. 10-A, pg. 4, Tr. 479).

In addition, the corporate officers and directors for Lion Coal Company and Cougar Coal Company are substantially the same 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 secretary and registered agent for Cougar Coal Company. Brian Steffensen is also counsel of record who was present and participated in all proceedings in this matter.

Thus, under the nine-factor successorship guideline enunciated Munsey v. Smitty Baker Coal Company Inc., 2 FMSHRC 3463 (1980) Cougar Coal is the successor to Lion Coal and, as such, along with Lion Coal, is properly subject to joint and several liability for back-pay to Marty Boden and the civil penalty for the violation of 105(c) of the Act.

On consideration of the statutory criteria in section 110(i) of the Act that is relevant in this discrimination case, particularly the financial situation of the Respondents inability to continue mining, the closure of the mine and the continuing bankruptcy proceeding of the successor Cougar Coal Company, I conclude the appropriate civil penalty in this case is $400.00.

ORDER

It is **ORDERED** that the Respondent, Lion Coal Company and Cougar Coal Company jointly and severally:

1. Pay Marty P. Boden full back-pay with interest for the period from November 9, 1994, through April 17, 1995, at his normal rate of pay of $1,000.00 a week less appropriate Federal and State tax withholding payable to said governmental agencies.

2. Expunge from Marty P. Boden's personnel records all references to his discharge and the circumstances involved in the discharge.

3. Pay a civil penalty in the amount of $400.00 to the Secretary of Labor for the violation of section 105(c) of the Act.

4. This decision constitutes my final disposition of this proceeding.

August F. Cetti
Administrative Law Judge

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