FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 28, 2001

GREG POLLOCK, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2000-625-DM
v.	:	
	:	Bingham Canyon Mine
KENNECOTT UTAH COPPER CORP., Respondent	:	Mine I.D. 42-00149

DECISION

Appearances: Harry Tuggle, United Steelworkers of America, Pittsburgh, Pennsylvania, for Complainant;
James M. Elegante, Esq., Kennecott Utah Copper Corp., Magna, Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Greg Pollock against Kennecott Utah Copper Corporation ("Kennecott") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). The complaint alleges that Kennecott issued a written warning to Mr. Pollock in January 2000 after he called the Department of Labor's Mine Safety and Health Administration ("MSHA") about an accident that occurred at the mine. Mr. Pollock contends that the written warning was issued in violation of section 105(c) of the Mine Act. Harry Tuggle, Mine Safety and Health Specialist with the United Steelworkers of America ("USWA"), entered an appearance on behalf of Mr. Pollock after the complaint was filed. An evidentiary hearing was held in Salt Lake City, Utah. For the reasons set forth below, I find that Mr. Pollock did not establish that he was discriminated against and I dismiss his complaint of discrimination.

I. FINDINGS OF FACT

Kennecott is the operator of the Bingham Canyon Mine, a large open pit copper mine in Salt Lake County, Utah. Mr. Pollock has worked at the mine in various positions for about 24 years. Mr. Pollock has been president of the USWA local at the mine for about eight years. The case arose as a result of events that occurred in late December 1999 and January 2000, as described below.

On December 30, 1999, Thomas R. Lohrenz, a senior employee relations representative with Kennecott, called a meeting of local union presidents to present and discuss the company's incentive program for the year 2000. Kennecott started an incentive program in 1999 that was designed to pass on certain cost savings to employees. Mr. Lohrenz called the meeting to inform the local union leaders of the changes the company proposed for the year 2000. He used a projector and slides to present the information.

When the meeting began at 7:30 a.m., representatives were present from the clerical union, the electrical workers union, the transportation workers union, the machinists' union, and the operating engineers' union. Mr. Pollock was not present. When Lohrenz asked those present whether he should go ahead and start the meeting, the consensus was that he should wait a few minutes. After waiting a few more minutes, Lohrenz announced that he was going to start in order to avoid delaying everyone. Lohrenz began by introducing the topic and asking that they hold their questions to the end because the slide presentation may answer many of the questions.

At about 7:40 a.m., Mr. Pollock entered the meeting. Lohrenz again asked everyone to hold their questions until the end. Pollock immediately asked Lohrenz questions about the incentive program and about other employee relations issues. Again, Lohrenz asked that Pollock hold his questions until the end. At that point, Dale Evans, chairman of the local electrical workers union (IBEW), through either a hand signal or through spoken words asked Mr. Pollock to be quiet. In response, Mr. Pollock blew up and became very abusive towards Mr. Evans. Using profanity, Pollock said that nobody could tell him to shut up and that he could ask any questions he wanted. Lohrenz remembers Pollock verbally attacking Mr. Evans and insulting the IBEW. Evans testified that he did not take any of Pollock's remarks personally.

During this altercation, Lohrenz asked Pollock to sit down and be quiet. Pollock refused to do so. Lohrenz walked over to where Pollock was standing and told him to leave the meeting. Lohrenz testified that he was angry at Pollock and that he believed that Pollock's outburst at the meeting was totally uncalled for. Lohrenz followed Pollock out of the meeting and told Pollock that he was out of line. Lohrenz advised Pollock that he would not allow him back in the meeting but that he would give Pollock his own separate briefing at a later time. Lohrenz returned to the meeting which lasted about one hour with questions and answers.

Lohrenz was very angry with Pollock in part because this was not the first time that he had to talk to Pollock about his personal behavior at the mine. Lohrenz was particularly concerned because he felt that Pollock's attacks were personal and very disruptive. He believed that some type of disciplinary action should be brought against Mr. Pollock for his behavior. Later that afternoon, Lohrenz began drafting a proposed letter of discipline to be issued to Mr. Pollock. (Tr. 210; Ex. R-10). This letter would constitute a written warning under the mine's labor agreement. He discussed the events and his proposed discipline with Nancy Arritt, the director of employee relations for Kennecott, who was Lohrenz's supervisor . (Tr. 243-44).

On the morning of December 31, 1999, Mr. Lohrenz sent an e-mail to Ms. Arritt. (Tr.210; Ex. R-12). He attached his draft disciplinary letter and asked for her advice. Later that

day, Lohrenz discussed this matter with her. They discussed how Pollock should be disciplined, when the USWA's Utah staff representative should be notified, and who should issue the discipline. (Tr. 211, 243-47). It is Mr. Lohrenz's understanding that, as of December 31, a decision had been made to discipline Mr. Pollock for his disruptive and abusive behavior at the incentive plan meeting, but that all the details had not been worked out. (Tr. 211-13).

On January 1, 2000, there was an accident at the mine. Jerry Martinez was operating a large truck when he drove over a smaller truck. The operator of the smaller vehicle was able to escape his vehicle before it was run over. Consequently, no miners were injured. After conducting an investigation, Kennecott determined that Mr. Martinez was at fault and issued a notice of investigation and hearing against him with the intent to terminate him from employment.

On January 5, 2000, Kennecott managers held a meeting to discuss the proposed discipline against Mr. Pollock. The meeting was attended by Ms. Arritt, Mr. Lohrenz, and Ed Morrison, counsel in the labor relations department. (Tr. 248-). On January 11, Ms. Arritt drafted a disciplinary letter to be issued to Mr. Pollock. It was similar to the one that Lohrenz had drafted but, because Ms. Arritt decided that she should issue the letter rather than Lohrenz, she reworked it using her own language. (Tr. 254).

A meeting was held on Kennecott's proposed termination of Martinez on January 12, 2000, at about 8 a.m. Lohrenz, Pollock, and Martinez were present. (Tr. 216-17). John Kinneberg, Kennecott's operations superintendent was also present. As the local president, Pollock argued that the company's proposed termination was not fair because the miner in the smaller vehicle was not being disciplined. (Tr. 72). It was Pollock's position that the other driver was as much at fault as Martinez. Near the end of the meeting, Pollock said that if Martinez is fired, "then I've got no recourse but to go to MSHA because you're not taking care of the problem, you're trying to sweep it under the rug. . . ." *Id.* Martinez was terminated by Kennecott. Pollock called MSHA at the end of this meeting. Lohrenz told Arritt that Martinez had been terminated.

On January 12, 2000, at about 11:30 a.m., Ms. Arritt sent an e-mail, with her proposed disciplinary letter attached, to a number of Kennecott managers to get their comments. (Ex. R-13). The distribution list included Chris Robison, the mine manager, and Ed Morrison. Arritt proposed that the letter be sent to Pollock via an overnight delivery service. Morrison thought that it should be delivered in person. Arritt agreed with his recommendation and did not send out the letter.

At about 1 p.m., on January 12, MSHA Inspector Terry Powers arrived at the mine. A Kennecott safety representative called Lohrenz to ask him to sit in on the meeting with MSHA because there were no operations people available at that time. (Tr. 221). It was quite unusual for someone from employee relations to be involved in MSHA matters. (Tr. 314). The meeting with Inspector Powers lasted several hours and was attended by a company safety representative, Kinneberg, Lohrenz, Pollock, and others. Pollock told the inspector that "the company was

trying to lay this whole thing off on one person and that [the union had] some problems with it." (Tr. 73). Pollock testified that Kinneberg became very upset that he had called MSHA. He testified that Kinneberg became quite angry at this meeting, especially after he was advised by the inspector that citations would be issued. (Tr. 73-74). Lohrenz testified that "Kinneberg's deportment was nothing but professional" and that he did appear to be angry. (Tr. 222-23).

On January 13, Inspector Powers issued three significant and substantial ("S&S") citations. Each citation was issued for the conduct of Mr. Martinez. (Ex. C-7). No citations were issued for the conduct of the driver of the smaller truck. One citation was issued because Martinez failed to sound a warning before moving his haul truck. Another was issued because Martinez moved the haul truck without a signal from the spotter to do so. The third citation was issued because Martinez failed to maintain control of his haul truck.

On January 17, 2000, Ms. Arritt talked with Carl Collins, Pollock's immediate supervisor, to schedule a meeting with Pollock to deliver the disciplinary letter. A meeting was scheduled for January 18. The meeting had to be postponed because Pollock had a conflict on that day. Unknown to Ms. Arritt, Pollock was at an MSHA close-out conference on that date with respect to an unrelated MSHA inspection. (Tr. 260-61). On January 20, Arritt attempted to reschedule the meeting. The meeting was held on January 21, 2000, in Ms. Arritt's office at Arbor Park in Magna, Utah. Arritt, Collins, and Pollock were in attendance. Arritt handed Pollock the letter at this meeting. (Exs. C-3, R-19). She also explained why the letter was being issued. (Tr. 267). The letter is dated January 18 because that was the date that the meeting was originally scheduled.

The letter states that Mr. Pollock was being disciplined because of his disruptive behavior at the December 30 meeting. (Exs. C-3, R-19). The letter recounts the events at the meeting. It states that Pollock had been counseled in the past for similar behavior. It states that "you have left us with no choice but to issue this letter as a warning to you that further obstructive and harassing behavior such as you exhibited on the morning of December 30th when you disrupted a meeting on company business will not be tolerated." *Id.* The letter further states that Pollock remains free to conduct union business, but that he does not have the "the freedom to disrupt or take over or otherwise make it impossible to continue meetings such as Tom Lohrenz was conducting for the company. . . ." Finally, the letter states that if another similar incident should occur "a hearing will be held to determine the level of disciplinary action to be taken, up to and including termination of your employment." *Id.* The letter is quite similar to the one drafted by Mr. Lohrenz on December 31, 1999. (Ex. R-10).

In response, Pollock stated that the letter violated the labor agreement. (Tr. 267-68; Ex. R-21). He also stated that Lohrenz started the incident and that he was acting in his capacity as a union officer at the meeting and could behave however he wanted. Pollock told Arritt that he would be filing charges with the National Labor Relations Board.

Pollock filed a complaint of discrimination with MSHA under the Mine Act on January 30, 2000. Pollock alleged that the disciplinary letter was issued by Kennecott because he called MSHA to the mine to investigate the Martinez accident. On August 16, 2000, MSHA

"determined that the facts disclosed during [its] investigation do not constitute a violation of section 105(c)." Mr. Pollock filed this case under section 105(c)(3) on September 18, 2000.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The mine 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 mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend 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.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Did Greg Pollock engage in protected activity?

Mr. Pollock engaged in protected activity when he called MSHA on January 12, 2000, to complain about the truck accident that occurred on January 1. He called MSHA because he believed that the company was trying to sweep the causes of the accident under the rug by blaming only Martinez for the accident. He apparently believes that Kennecott should change its procedures to prevent such accidents. Instead of placing total responsibility on the operators of large haul trucks, he apparently believes that the operators of smaller vehicles should be required to take steps to notify the haul truck operators of their presence. Although MSHA apparently did not agree with Pollock's position as evidenced by the citations that were issued, his actions in calling MSHA are protected.

B. Was Kennecott's written warning to Greg Pollock motivated in any part by his protected activity?

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely

encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted).

Mr. Pollock relies on a number of facts and arguments in support of his case. First, he argues that letter was in violation of the labor agreement and past practices at the mine. He states that the fact that Kennecott failed to follow customary practices indicates that there were other reasons for his discipline. First, Pollock contends that Kennecott was required to hold a hearing before he was disciplined. The labor agreement, however, provides that a hearing is required only when Kennecott is proposing that the employee be suspended or discharged. If an employee is not being discharged or suspended, the employee is only required to be notified of the discipline. In this case, Kennecott determined that Pollock should be issued a written warning for his conduct at the December 30 meeting.

In addition, Pollock argues that the fact that the written warning was issued in the form of a letter on 8½ by 11 paper shows disparate treatment. Kennecott has pre-printed forms that it generally uses for discipline under the labor agreement. One is entitled "Notice of Investigation and Hearing." It is used when suspension or discharge is contemplated by Kennecott. The other form is entitled "Notice of Disciplinary Action." The supervisor who fills it out must check one of two boxes labeled "written" or "verbal" warning. This form measures about 5½ by 4½ inches and contains a small area to write the reasons for the discipline. I find that Pollock has not established that he was treated differently. Other employees have been issued written warning letters. (Tr. 284-85). It would have been impossible for Ms. Arritt to set forth the reasons for Mr. Pollock's written warning on the space provided on the pre-printed form.

Mr. Pollock testified that when Mr. Lohrenz escorted him out of the December 30 meeting, he said "I'm warning you." Pollock contends that Kennecott cannot issue both a verbal and written warning for the same incident. I reject this argument. There is no evidence that Lohrenz intended that statement, if made, to constitute a verbal warning under the labor agreement. It is the general practice to write up a verbal warning to memorialize it for future reference. Mr. Lohrenz did not write up such a verbal warning in this case.

Mr. Pollock's most convincing argument concerns the timing of the written warning. The letter was issued to Mr. Pollock seven days after MSHA Inspector Powers issued three S&S citations against the company following Mr. Pollock's complaint. In analyzing whether Kennecott was motivated in any part by Mr. Pollock's protected activity, I must look for any circumstantial evidence of discriminatory intent. Commission judges typically consider management's knowledge of the protected activity, management's hostility or animus towards the protected activity, the coincidence in time between the protected activity and the adverse action, and any disparate treatment of the complainant. *See Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991). I analyze these factors below.

I find that Kennecott management had knowledge of Mr. Pollock's protected activity on January 21, 2000, the date the warning letter was issued. Mr. Lohrenz was at the meeting with MSHA on January 12. Nevertheless, I credit the testimony of Lohrenz and Arritt that the decision to issue the warning letter was made prior to that date. Ms. Arritt made the final decision to issue the warning letter prior to January 11. (Tr. 281-82). Ms. Arritt wanted to send the warning letter to Mr. Pollock on January 12 after she received final clearance from the mine manager. She agreed to hand deliver the letter on advice of counsel. Pollock did not raise any MSHA issues concerning the January 1 accident until the disciplinary meeting with Martinez and Lohrenz on the morning of January 12. Arritt made the final decision to issue the warning letter before she learned that Pollock had called MSHA following the Martinez meeting. She did not know that Pollock called MSHA in January 2000 until February of that year. (Tr. 274).

Pollock contends that Kinneberg's demeanor at the MSHA meeting on January 12 illustrates management's hostility towards his protected activity. He testified that Kinneberg was visibly upset during the meeting with MSHA Inspector Powers. (Tr. 72-74). Mr. Lohrenz, who also attended this meeting, testified that Kinneberg behaved in a professional manner and did not appear to be angry. (Tr. 222-23). I credit the testimony of Lohrenz over that of Pollock. At the hearing, Mr. Pollock made statements on a number of occasions that, upon further examination, were shown to have little basis in fact or were greatly exaggerated. For example, Pollock testified that by the time he got back from the meeting in Arbor Park "everyone at the plants knew that I'd been given the written warning, because the company made such a spectacle of it, in my words, by taking me to Arbor Park and giving me this discipline." (Tr. 88). He further testified the company "paraded me in front of everyone up in Arbor Park." (Tr. 94). Upon further examination, it is clear that the company neither "paraded" him in front of others nor made a "spectacle" of his discipline. The meeting was around lunch time and it is not clear that anyone saw him go to the Arbor Park office complex or walk to Ms. Arritt's office once he was there except for the receptionist. (Tr. 94-95, 269-70). Indeed, Mr. Evans did not know that Pollock had been disciplined until the day before the hearing. (Tr. 130). It is highly likely that many people at the mine quickly learned that Pollock had been issued the warning letter, but it is clear that there was no parade or spectacle. I have given greater weight to the testimony of Lohrenz and Arritt than the testimony of Pollock in this proceeding when there was a direct conflict.

Pollock maintains that Kennecott's hostility towards his MSHA activity is also evidenced by a notice that was posted on the bulletin board at the mine. (Ex. C-6). The bulletin, entitled "Significant Safety Incident" is dated January 25, 2000, and signed by Mr. Robison. It describes the Martinez accident and includes the following paragraph:

> MSHA was called and investigated the incident. They found the employee had violated three procedures, failure to honk when about to move, failure to follow directions from the spotter, and failure to keep his truck under control. All three citations are classified as S&S, and are posted for you to read. The mine will also be required to pay fines on these citations directly impacting our costs.

Id. Although I can appreciate Mr. Pollock's concern, I agree with the company that this bulletin was designed to promote safety by cautioning employees to follow the mine's operating procedures to avoid serious accidents. This bulletin does not indicate that Kennecott was hostile to Pollock's safety activities.

Mr. Pollock also argues that the extraordinarily long delay between the December 30 meeting and the January 21 written warning raises a strong inference that the letter was issued, at least in part, as a result of the events of January 12 and 13 when Pollock called MSHA. The letter was issued only a few days after Inspector Powers issued the citations. Pollock testified that disciplinary warnings are usually given immediately or within a few days after the disputed conduct. Lohrenz and Arritt gave a detailed chronology of the events between December 30 and January 21. I credit their testimony in this regard. Arritt made the decision to issue the written warning by January 11. Because Pollock was a local union president and the circumstances of his discipline were unusual, the company researched the labor relations issues before the letter was issued. (Tr. 254-55). Lohrenz and Arritt testified that the decision to issue the warning letter was not influenced by Pollock's MSHA activities. (Tr. 214-15, 274, 278-79). Arritt is no longer employed by Kennecott. I find that Kennecott's delay in issuing the warning letter was not the result of any discriminatory motive prohibited by the Mine Act. The coincidence in time between the MSHA inspection and the warning letter was just a coincidence.

Pollock is also claiming disparate treatment. Many of these arguments center around the unique nature of the events such as the fact that he was issued a letter rather than a pre-printed warning slip. I have already disposed of most of these issues. He also argues that other union officials have disrupted meetings without receiving any discipline. At a meeting that was attended by various union officials in September 2000, the head of the mechanists' union made derogatory and vulgar remarks to Pollock as everyone was assembling. (Tr.85-87). Pollock testified that Lohrenz simply held his head down and Kinneberg started laughing at the remarks. While these events are unfortunate, the conduct of the head of the mechanists' union is quite different than Mr. Pollock's conduct at the December meeting. The September 2000 meeting was not disrupted. The offending individual did not interrupt or interfere with the conduct of the meeting.

I find that Mr. Pollock was disciplined solely because of his "obstructive and harassing behavior" at the December 30 meeting, as set forth in the written warning. (Ex. R-19). It appears that Mr. Pollock has a quick temper which he has difficulty controlling. Mr. Pollock believes that his warning letter was unfair, given the normal give and take involved in labor relations at this mine. I do not have the authority to determine whether this discipline was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted). I find that Kennecott's written warning was not motivated in any part by Pollock's protected activities.

III. ORDER

For the reasons set forth above, the complaint filed by Greg Pollock against Kennecott Utah Copper Corporation under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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