

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW
Suite 9500
Washington, DC 20001

September 24, 2003

SECRETARY OF LABOR, MSHA, on : TEMPORARY REINSTATEMENT
behalf of ROBERT C. GOULD, JR., : PROCEEDING
Complainant :
v. : Docket No. WEST 2003-405-DM
: WE MD 2003-12
: :
GULF TRANSPORT, L.L.C., : Mine ID 26-00500 F176
Respondent : Newmont Gold Quarry

ORDER FOR TEMPORARY REINSTATEMENT

Before: Judge Schroeder

This case is before me on an application filed on September 4, 2003, by the Secretary of Labor on behalf of Robert C. Gould, Jr., pursuant to Section 105(c) of the Mine Safety and Health Act of 1977. The application seeks the temporary reinstatement of Mr. Gould to his prior employment by Gulf Transport, L.L.C. , as a miner employed to drive a truck. According to the affidavit filed with the application, Mr. Gould’s employment by Gulf was terminated on July 24, 2003, following an MSHA investigation of an accident that involved a vehicle operated by Mr. Gould. The Secretary asks that Mr. Gould be reinstated to his employment pending completion of the investigation by the Secretary of Mr. Gould’s complaint of discrimination under Section 105.

Under the procedural rules of the Commission, particularly 29 C.F.R. § 2700.45, the respondent in an application for temporary reinstatement has ten days from respondent’s receipt of the application to request a hearing on the application. The application includes a certificate of service that indicates a copy of the application was delivered to the respondent by electronic facsimile on September 4, 2003, and by physical delivery on September 5, 2003. Delivery by facsimile is effective under the Commission’s procedures. A request for a hearing was due no later than the close of business on Monday, September 15, 2003. I assume without deciding that the ten day period is subject to enlargement on a showing of “good cause” even though I have been unable to find any authority stating that the time period is subject to enlargement.

On September 17, 2003, I received an electronic mail message from Mr. Jamie Cooper, Chief Executive of Gulf Transport, requesting a hearing. I consider his message to also be an application for enlargement of time to request a hearing since it was then two days late. As I understand the message from Mr. Cooper, he makes two claims of “good cause” for relief from

the time limitation on a request for a hearing. First, he claims to have only recently understood the procedures for consideration of a request for temporary reinstatement. Second, he claims that his distance from the scene (he apparently spends most of his time in Australia) made it difficult to make a timely request for a hearing. I find both of these arguments unpersuasive.

First, any person or organization in the business of mining in the United States should be held responsible for being familiar with the employee protections afforded by Section 105 of the Mine Safety Act. Second, upon being assigned this case on September 5, 2003, I telephoned the office of Gulf Transport in Elko, Nevada to verify service of the application. I spoke to the local manager and offered to answer any questions the manager had about the procedures used by the Commission to consider such applications. The manager indicated he would be in contact with Mr. Cooper in Australia concerning the matter. I also telephoned counsel for the Secretary to advise him of my conversation with the Gulf Transport manager and to encourage immediate communication between the parties concerning the possibility of a hearing. I find as a matter of fact that Gulf Transport had knowledge of the opportunity for a hearing (a fact also described in the moving papers by which the Secretary sought reinstatement of Mr. Gould) well before the deadline for making a hearing request. The availability of electronic transmission of information, including actual documents by facsimile, undercuts the argument based on distance of upper management from the scene. I find Gulf Transport, L.L.C., has not demonstrated good cause for its failure to request a hearing within the ten day period for making such requests. It is, therefore, my responsibility to determine the application on the basis of the record now before me that includes a brief statement from Mr. Gould along with an affidavit from the Department of Labor investigator, Mr. Horn.

The legal standard for evaluating an application for temporary reinstatement is whether the application is “not frivolous.” *Secretary v. Perry Transport, Inc.*, 14 FMSHRC 2086 (December 1992). It is clear to me that this standard is far less demanding than the standard applied in the District Courts to applications for temporary restraining orders, i.e. the probability of success on the merits combined with a balance of harm to the respective parties. In providing this interim relief procedure under the Mine Safety Act, the Congress demonstrated that its concern was only for the harm to a worker not receiving a pay cheque. For the period necessary for the Secretary to complete an investigation into a claim of discrimination (a whistle blower protection designed to encourage disclosure of safety problems) the Congress wanted miners to feel secure in keeping food on the table. Under the Mine Safety Act, the Secretary has 90 days to complete an investigation of the complaint of discrimination.

The record in this case indicates the miner was terminated within a few days of the miner engaging in conversations with representatives of the Secretary concerning an accident that occurred during mine operations. The close proximity in time of the two events provides sufficient basis to imply a connection for purposes of the “not frivolous” test for temporary reinstatement. *Secretary v. A & K Earth Movers, Inc.*, 22 FMSHRC 3232 (March 2000). The standard has been satisfied in this case based on this record.

ORDER

It is ORDERED that Mr. Robert C. Gould be reinstated in his position as truck driver for Gulf Transport, L.L.C., in its Elko, Nevada operations at his previous rate of pay and with his previous benefits. This order is effective as of the date given above and will remain effective until completion by the Secretary of an investigation of Mr. Gould's complaint of discrimination filed with the Secretary on August 4, 2003.

Irwin Schroeder
Administrative Law Judge

Distribution: (Certified Mail)

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