FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 26, 1996

DONALD S. WALLACE, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEST 95-282-DM
	:	MSHA Case No. WE MD 95-01
BARRICK GOLDSTRIKE MINES, INC., Respondent	:	Mine I. D. # 26-01089
	:	Barrick Goldstrike Mine

DECISION

Appearances: James L. Kennedy, Jr., Esq., Ketchum, Idaho, for Complainant;
Charles R. Zeh, Esq., Zeh, Polaha, Spoo and

Before: Judge Amchan

Procedural History

On October 21, 1994, Donald Wallace filed a complaint with the Mine Safety and Health Administration (MSHA) alleging that he had been fired from his job at Barrick Goldstrike Mines in retaliation for activities protected by section 105(c) of the Federal Mine Safety and Health Act. On February 17, 1995, MSHA notified Mr. Wallace that it had determined that no violation of the Act had occurred. Mr. Wallace filed a complaint on his own behalf with the Commission.

On January 17, 1996, I denied the parties= cross-motions for summary judgment in this matter, 18 FMSHRC 103. Wallace=s motion was denied because I concluded that Mr. Wallace was not engaging in activity protected by the Federal Mine Safety and Health Act when he advised a fellow miner over his radio to Apunch through@ or skip his assigned lunch break. Wallace told his friend to take two or three Delay-80s (an unscheduled break to combat fatigue) later if necessary. Respondent contends that this

conversation, which occurred on September 26-27, 1994, the last night Complainant was allowed to work for Barrick Goldstrike, led to his termination.

I denied Respondent=s motion for summary judgment because Mr. Wallace alleged that he would not have been discharged had he not engaged in other activities, which appeared to be protected under the Act. A hearing was held in Elko, Nevada, on March 28-29, 1996, to afford Complainant an opportunity to establish that his discharge was related to these protected activities.

Findings of Fact

Donald S. Wallace worked for Respondent at its mine near Carlin, Nevada, from September 1990 until September 27, 1994, when he was suspended and then terminated (Tr. 336, 361-62). Mr. Wallace worked as a haul truck driver, sometimes on the night shift. At the time of his discharge, this was a 12 **2**-hour shift, beginning at 7:00 p.m. Miners were allotted a 30 minute lunch break and two 15-minute scheduled breaks during each shift (Tr. 75-77). Respondent also allowed for unscheduled bathroom breaks (ADelay-40s@) and unscheduled breaks to combat fatigue (ADelay-80s@) (Tr. 77, Exh. R-1, Tab 26).

Mr. Wallace=s first involvement with Respondent=s discipli - nary program occurred in November, 1993. Prior to this time, shovel operators on Wallace=s shift worked with an oiler, who assisted the operator in running and maintaining the shovel. Respondent abruptly stopped assigning employees to work as oilers. When Wallace discovered this, he got on the radio in his haul truck and asked shovel operator Donald Randall whether Randall was working without an oiler. When Randall responded in the affirmative, Wallace made a comment questioning the safety of this practice (Tr. 210-14, 340-41).

Wallace was then summoned to the office of his foreman, Vern Goglio. Mr. Goglio orally reprimanded Mr. Wallace for making his comments about the lack of an oiler over the radio (Tr. 74, 340-41, 465-66, Exh. R-1, Tab 8)

Mr. Wallace=s second brush with Respondent=s disciplinary program occurred in January, 1994. At this time, Complainant was given Adecision-making leave@ as the result of another comment he

made over the radio in his truck. Mr. Wallace was put on a one-year probation as the result of this incident (Tr. 51-52, 70-71, Exh. R-1, Tabs 14 & 15).

Respondent was in the process of changing its lunch-break system for the night shift. Previously, miners on the night shift had some discretion as to when they took their lunch break. Barrick was implementing a system in which miners would eat at times assigned by the supervisory employee serving as dispatcher. This change was implemented so that equipment continued to operate at maximum efficiency throughout the shift. A number of miners did not like the change (Tr. 72-76).

On January 12, 1994, a shovel broke down and foreman Mo Cunliffe announced that lunch breaks would start at 11:00 p.m.. Mr. Wallace sarcastically asked over his radio, A[w]hy don=t you give us our breaks at the beginning of the shift and just work us the rest of the night@ (Tr. 339, 344). Wallace was thereupon summoned to Mr. Cunliffe=s office and was reprimanded for making an insubordinate remark over the radio. During Wallace=s discussion with Cunliffe, both lost their temper.

Afterwards, Complainant was given a Adecision-making leave day (DMLD)@ for making disruptive comments over the radio. On this day, he was not allowed to come to work, but was paid. The objective of the DMLD was to make an employee aware of the seriousness of his violation of company policy. The DMLD was a step in Respondent=s progressive discipline program beyond verbal and written reprimands (Exh. R-1, Tab 15, Tab 38, Policy and/or Procedure 90-202, pp. 2-3, Tr. 465-66)).

Mr. Wallace had a meeting with Respondent=s Human Resources

Glenn Wyman, general foreman of mine operations at this time, stated that under the old system not enough equipment operators were choosing an early lunch break, thus causing inefficiencies in equipment utilization. Foremen were also unsystematically assigning employees an early lunch to make up for the lack of volunteers, creating tension among some operators who believed the early lunch breaks were assigned inequitably (Tr. 430).

Manager Ron Sled and Assistant Mine Manager Ron Johnson in

February 1994, to discuss the DMLD. Following this meeting, Wallace signed a form which advised him that Aany further policy or procedure violations may cause other discipline or termination of employment.@ He also executed a statement indicating his willingness to change his behavior to conform to Respondent=s policies. Further, he acknowledged his understanding of his position in the progressive discipline policy (Exh. R-1, Tab 15).

The decision-making leave day form remained active in Mr. Wallace=s personnel file for one year. Seven and a half months after he signed it, the incident which led to his termination occurred.

During this period, Respondent continued to have difficulty establishing a lunch break system for the night shift that satisfied management and the equipment operators. It tried a Amass break@ system whereby the entire pit shut down at the same time and then abandoned it. In September Barrick changed to an Aautobreak@ system, whereby lunch was assigned to operators by computer (Tr. 419-20, 430-34, 504).

Respondent also experimented with its procedure for equip- ment operators to take unscheduled breaks to combat fatigue. To take such a break an operator entered the code Adelay-80" on the computer onboard his truck (Tr. 420). In late September 1994 Respondent was concerned on the one hand, that some miners were not taking Adelay-80" breaks when they should, and on the other hand, that some miners were abusing the Adelay-80" breaks (Tr. 183-86, Exh. R-1, tabs 24 & 28).

At about midnight on September 26-27, 1994, miner David Paules was notified by a computer message that he had been scheduled for a midnight lunch break. Paules complained to the dispatcher over his radio that he had been assigned an Aearly@ lunch break several nights in a row (Tr. 199-200).

The dispatcher told Paules to take his lunch break as assigned. He apparently promised to try to rectify the situation afterwards. After a few minutes Complainant Wallace got on the radio (Tr. 200).

Wallace said to Paules, ADave, why don=t you punch through lunch and take two or three Delay-80s later when needed to help

you make it through the night.@ These remarks were heard by everyone in the pit (Tr. 74, 201, 206-07, 266, Wallace Deposition I: 131-32).

At the conclusion of the night shift on the morning of September 27, 1994, Complainant was suspended from his employment by Terry Sheehan, Mine Operations Superintendent. Wallace described Sheehan as being Avery agitated@ (Tr. 361-62). On September 28, Wallace had a meeting with Jeff Marrott from Barrick=s Human Relations Department and Glenn Wyman, a general foreman in Respondent=s Mine Operations Department. They discussed with him his comment over the radio to Mr. Paules and decided to recommend that the suspension become a termination of Wallace=s employment (Tr. 425-30, 476-77).

On October 3, 1994, a committee of managers from the Mine Operations Department formally recommended that Mr. Wallace be terminated(Exh. R-1, tab 35). This committee consisted of Marrott and Wyman, Terry Steinhausen, another general foreman, Terry Sheehan and George Bee, Mine Division Manager (Tr. 61-62). On October 10, 1994, Wallace met with Charles Geary, Vice-President and General Manager of the mine, to appeal his termination. At this meeting, Wallace told Geary that he believed that he was being terminated because he had inquired about a Aminers= representative@ at the mine and because he had contacted MSHA about safety and health concerns at the mine. Mr. Geary ratified Complainant=s termination (Tr. 314-16, Exh . R-1, tab 36).

Complainant=s allegations of protected activity

Complainant alleges that the comments for which he was counseled in November 1993, concerned safety. Pursuant to a sudden change in policy, Respondent required an operator to run and maintain a large electric shovel by himself. Wallace contends his comments over the radio were intended to raise concerns over the safety of this decision (Tr. 340-41).

On July 28, 1994, Complainant contacted State of Nevada Mine Safety officials to complain of a lack of air conditioning in his haul truck. Drivers sit near the vehicle=s engine which generates heat (Tr. 141, 352). The air conditioning in Complainant=s vehicle had not been working for 5**2** shifts prior to

this telephone call. Wallace had brought this to Respondent=s attention without result. The day after his call the air conditioning was repaired (Tr. 347-53, Wallace deposition I: 68-75).

Wallace never informed management of this phone call and there is insufficient evidence to establish that Respondent knew of it. Complainant informed several fellow miners that he made the call, but there is no evidence that any of them informed any supervisory employees (Tr. 349-51).

On one occasion in the late summer or early fall of 1994, haul truck driver William Pennell approached foreman Mo Cunliffe and asked if Cunliffe could get his truck=s air conditioner fixed (Tr. 145-46). Cunliffe pointed to Wallace, who was in his office. Without any apparent hostility, the foreman said, A[h]ere=s the man who can get your air conditioner fixed@ (Tr. 145-6, 148, 366-68). I am unable to conclude from this remark that Cunliffe had determined that Wallace had been responsible for the MSHA inspection.

Wallace had a reputation for being one of the most outspoken employees at Respondent=s mine, if not the most outspoken miner (Tr. I: 267-70, 275, 468). Cunliffe=s comment may simply have been a reference to Wallace=s willingness to let management know what was bothering him, including inoperable air conditioning (Tr. 368). Moreover, even if Cunliffe thought Complainant called MSHA, there is no evidence that he bore Wallace any animus as a result. Wallace testified that he got along Awell enough@ with Cunliffe and only had a problem with him regarding the lunch break system (Tr. 366).

John Kirkwood is a haul truck driver who was terminated by Respondent in March 1995 (Tr. 151-53, 166-67). He testified that in mid-August 1994, he was sitting at a computer terminal in the foremen=s office when he heard Vern Goglio, one of the foremen who superivsed Mr. Wallace, talking to another foreman. According to Kirkwood, Goglio said:

> Something to the effect that, since Don [Wallace] had called MSHA it wasn=t going to be tolerated, something to do with nails and coffins, he had driven a nail in a coffin or something like that. (Tr. 155)

Mr. Kirkwood also testified that in September 1994, while turning in his time card, he overheard one foreman say to two other foremen, A[t]hat could result in somebody calling MSHA.@ Then Mr. Kirkwood states that foreman John Simler responded, A[n]o , they know what happens around here if you call MSHA@ (Tr. 158).

I find Mr. Kirkwood=s testimony regarding these alleged conversations to be insufficiently credible to support any factual findings. In addition to his animus towards Respondent regarding his own termination, there are other puzzling aspects to Kirkwood=s testimony. I can understand why Mr. Kirkwood may not have reported these conversations to Barrick Goldstrike management or MSHA (Tr. 168). However, if Mr. Goglio made the remarks attributed to him, I cannot understand why Kirkwood did not warn Complainant. There is no evidence from either Kirkwood or Wallace that he did so.

Finally, if Goglio was looking for an excuse to have Complainant fired, one would think that this would be revealed in Goglio=s attitude towards Mr. Wallace prior to his discharge. To the contrary, Wallace testified that he got along well with Goglio (Tr. 367).

The comment attributed to Foreman Simler is similarly suspect because there appears to have been no reason for him to make it. There may have been a belief amongst miners after Mr. Wallace=s discharge that his termination was related to calling MSHA (Tr. 147). However, there is no indication prior to Wallace=s discharge that Respondent had taken any action that would lead miners to think that a call to MSHA would lead to retaliation.

State MSHA officials conducted an inspection pursuant to Wallace=s complaint and Wallace=s air conditioning was repaired almost immediately following this inspection. However, the inspectors did not talk to Wallace or inspect his haul truck (Tr. 352-53, Wallace deposition I: 68-75). Repair of his vehicle on July 29, may have had nothing to do with the inspection (Tr. 258).

Mr. Wallace was not the only equipment operator who complained about his air conditioning (Tr. 368). There were

approximately 120-130 miners working on his crew (Tr. 500). Thus, the shift on which he worked was sufficiently large that Barrick could not necessarily identify Complainant as the source of the inspection request by process of elimination. Finally, there is no evidence that any state or federal MSHA official violated the law in identifying Wallace to Barrick as the source of the complaint (Tr. 351).

There is no evidence that any citations resulted from this inspection (Tr. 361). This makes it very difficult to infer that Barrick management would have retained sufficient animus towards Wallace to consider this inspection in terminating him two and a half months later--assuming that it did suspect him of initiating the inspection.

Between September 1 and September 10, 1994, Wallace contacted State mine inspector Norman Pickett on at least two occasions. He asked Pickett about the procedures for designating a Aminers= representative@ at Respondent=s mine. He had a similar discussion or discussions with Federal MSHA Inspector James Watson during this period. There is no evidence that Respondent was aware of either inquiry (Tr. 354-55, 358, 406).

A Aminer=s representative@ is a person who represents two or more miners for purposes related to the Mine Safety and Health Act, 30 C. F. R. Part 40. Such a representative has the authority to ask MSHA for an inspection of a mine pursuant to section 103(g) of the Act. The representative must also be afforded the opportunity to accompany a MSHA inspector and management representative during an inspection, and an opportunity to participate in pre-inspection or post inspection conferences held at the mine, '103(f) of the Act. There were no Aminers= representatives@ at Barrick Goldstrike in September 1994 (Tr. 356).

Wallace=s September 17, 1994 discussion with General Foreman Glenn Wyman

Immediately after Wallace=s crew assembled for their shift on Saturday, September 17, 1994, General Foreman Glenn Wyman approached Complainant and asked for his opinion regarding a

safety meeting at which the lunch breaks and the Adelay-80s@ were discussed (Tr. 357-59, 383-86, 410-13, Exh. R-1, Tab 23).

Wallace told Wyman he thought Respondent was making the new computerized Aautobreak@ system fail. Wyman denied this and told Wallace that the company was trying to find a way to make the system work.

The two men then discussed two recent incidents which almost resulted in serious accidents. Wyman told Wallace that both drivers in these incidents had just had a break and therefore he believed they were not related to the new lunch break system (Tr. 411-12).

Complainant then asked Wyman if there should be a Aminers= representative@ at the mine (Tr. 357-359, 383-86, 410-413). Wyman said that he did not think that was necessary because Barrick=s open-door policy and other company procedures were adequate to address employee concerns. Although Wallace described Wyman as Auncomfortable@ with his suggestion, there is no evidence that Wyman exhibited anger or hostility either to Wallace or to the suggestion. Wallace then went to work (Tr. 359, 412-13).

Three days later, on Tuesday, September 20, Wyman mentioned his conversation with Wallace to Jeff Marrott, of Respondent=s Human Resources Department (Tr. 417). Marrott recalled Wyman saying that Wallace expressed a desire for rank and file miners to have more input at the mine. Wyman also told Marrott that he thought Wallace was Apushing for a union@ (Tr. 487, Also see Tr. II: 323). A little more than a week later, Wyman and Marrott decided that Wallace should be terminated after his comments to David Paules over his truck radio (Tr. 452).

In early October 1994, Barrick=s Human Resources manager Ron Sled conducted an investigation of Wallace=s allegations of

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Wyman testified that he did not understand that Wallace was suggesting a Aminers= representative@ for MSHA purposes (Tr. 416). Nevertheless, I credit Wallace=s testimony that this is what he was suggesting and thus find the discussion to constitute protected activity under the Act.

retaliatory discharge. When Sled interviewed Wyman, the latter said that he recalled Wallace stating that the miners needed Asome representation.@ Wyman told Sled that he did not recall any mention of MSHA and that he thought that Wallace meant union representation (Tr. 323).

Wallace=s call to MSHA the day before his termination

On September 26, 1994, Wallace left a message with MSHA that the air conditioning in his truck was not operating again. There is no evidence that Respondent knew of this call (Tr. 359-60).

Analysis of Mr. Wallace=s Complaint

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

> 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 because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. 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 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing (1) that he engaged in protected activity and (2) that an adverse action was motivated in part by the protected activity.

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 the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

Complainant=s termination would not have occurred but for his radio communication with David Paules on September 27, 1994. If I were to conclude that the comment was protected activity under section 105(c), I would find that his discharge violated the Act. However, I reach the opposite conclusion.

A good faith safety or health complaint made to management is protected by section 105(c). However, Mr. Wallace has not established that his comment was a safety and health complaint. Wallace contends that he thought Respondent=s new system for assigning lunch breaks was dangerous because it left some equipment operators with seven hours until the end of the shift and only one 15-minute break (Wallace deposition I: 166-68).

I find, however, on the basis of the evidence before me, that Wallace=s radio communication was not a good faith safety complaint. First, it was not directed to management, but instead was directed to fellow-miner David Paules and could have encouraged Paules to disregard company policy with regard to lunch breaks. Second, Wallace had no grounds for concluding that Paules= objection to an early lunch-break was made for safety reasons (Wallace deposition II: 48).

The evidence before me is insufficient to indicate that there was anything inherently hazardous about Respondent=s new lunch break policy for its night shift. In this regard, I note that the Mine Communication Sheet dated September 22, 1994 (Exh . R-1, Tab 24), allows for more than a 15-minute Adelay-80" break if deemed necessary by a supervisor. More than two Adelay 80" breaks in one shift also could be taken with the approval of a supervisor (Exh. R-1, Tab 28).

In conclusion, I find that Mr. Wallace=s comment of September 27, 1994, was not protected activity. Therefore, to establish that his discharge violated section 105(c) of the Act

he must establish that he would not have been terminated but for other activities that are protected.

Complainant=s communications with MSHA

While Mr. Wallace has established that he engaged in activities protected by the Mine Act, he has failed to prove that his termination is related to these activities. As the Commission and Federal Courts have repeatedly noted, it is rare that a link between the discharge and the protected activity will be supplied exclusively by direct evidence. Usually discrimination can be proven only by circumstantial evidence upon which the trier of fact draws an inference regarding the employer=s motivation, Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508, 2510 (November 1981).

The most common circumstances upon which such an inference may be based are the employer=s knowledge of the protected activity, hostility towards the protected activity (animus), coincidence in time between the protected activity and the discharge or other adverse action, and disparate treatment of the complainant and similarly situated employees, Ibid., at 2510. Mr. Wallace fails to establish a link between his discharge and calls to MSHA primarily because there is insufficient direct or circumstantial evidence that Respondent was aware of them.

Moreover, assuming Barrick knew or surmised that Complainant had engaged in any of these protected acts, there are insuffi - cient grounds to conclude that Respondent bore sufficient animus towards these activities for them to have contributed to his termination.

The November 1993 radio conversation regarding the lack of oilers on shovels and the January 1994 comment regarding the early lunch break.

Complainant contends that he commented upon Respondent=s decision to cease assigning oilers to its shovels in November 1993, and the early lunch break of January 12, 1994, out of concern for the safety of equipment operators. I conclude that he has not established that the January incident constituted a good faith safety complaint protected by the Act.

The comment regarding the shovel is a closer question. However, I conclude that it is unnecessary to decide whether it is protected because I see no substantial link between this incident and Wallace=s termination, which occurred ten months later.

The September 17, 1994, discussion with Glenn Wyman regarding miners= representatives.

The conversation with Glenn Wyman provides two common indicia of discriminatory intent: knowledge of protected activities and proximity in time to Wallace=s discharge. Indeed, with regard to the latter, Wyman and Jeff Marrott, the two individuals who decided to fire Wallace, discussed his request for Arepresentation@ little more than a week before making this decision.

My reason for declining to inferentially find a relationship between this conversation and the termination is the complete lack of evidence of hostility or animus on the part of Respondent to Wallace=s protected activity. The fact that Foreman Wyman did not agree with Complainant does not constitute hostility or animus sufficient to allow an inference that Wyman was motivated by this discussion in recommending Wallace=s termination.

Wallace testified that he believed that he could talk to Wyman about his concerns regarding the break system (Tr. 358). Nothing in his description of the conversation indicates that Wyman reacted to his suggestion with anger or hostility. The closest the record comes to suggesting animus is the fact that Wyman thought Wallace=s discussion regarding Arepresentation@ sufficiently significant that he told Marrott about it three days later. However, I conclude this fails to provide sufficient basis for drawing an inference that Wyman or Marrott, the only two management officials aware of this conversation, were motivated by it when recommending Wallace=s termination.

If Wyman and/or Marrott would not have recommended termi - nation but for activities protected by the Mine Act, I would deem it irrelevant that others involved in the termination were not aware of these activities. I would find a section 105(c) violation. However, in addition to finding an insufficient nexus between the September 17, 1994 discussion and Wallace=s

termination, I conclude that retaliation, if it did occur, was not for activity protected by the Mine Act.

There is no suggestion that Wyman or Marrott were hostile or concerned with the possibility that Wallace or another miner would become Aminer=s representative.@ While this might not be true with regard to the inception of campaign for a union, such considerations are beyond the purview of the Federal Mine Safety and Health Act.

Complainant=s argument that his discharge must have been motivated by his protected activities because Respondent could not have possibly fired him for the September 26-27, 1994 radio comment.

Much of Complainant=s case is directed to showing that no reasonable employer would have fired him for suggesting to Mr. Paules that he skip the lunch break and take Adelay-80s@ later, if he needed them. To the contrary, I conclude that Respondent had sufficient non-protected reasons to fire him.

Mr. Wallace appears to have been genuinely concerned with the welfare of his fellow miners. Further, his work record appears to have been unblemished apart from his use of the truck radio to communicate his disagreement with management decisions on at least three occasions. One might agree with Complainant that Respondent should not have fired him. However, that does not mean that he has established that his discharge violated section 105(c) of the Act.

Respondent=s witnesses have established that the scheduling of lunch breaks was a very sensitive issue at the mine in 1994 (Tr. 419-20, 504). Barrick had tried several methods of balancing its concerns for productivity with the wishes of its equipment operators. Each of these apparently met with some resistance from its employees.

In this context, the company might have reacted very strongly to a suggestion from one employee to another, regarding the lunch break that appeared to be inconsistent with the instructions of their supervisors. This is all the more true when this suggestion was made over the mine radio system whereby all employees could hear it.

Finally, when an employee is on a probationary status for criticizing management over the radio, it is certainly possible that he would be fired if he again made remarks over the radio that management could interpret as another challenge to its authority.

In conclusion, I find that Complainant has not established that his termination violated section 105(c) of the Act. His complaint is therefore **DISMISSED**.

Arthur J. Amchan
Administrative Law Judge

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