

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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January 8, 2002

NATHAN B. HARVEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 2001-38-D
v.	:	HOPE CD 2000-01
	:	
MINGO LOGAN COAL COMPANY,	:	Mountaineer Mine
Respondent	:	Mine ID 46-06958

DECISION

Appearances: Nathan B. Harvey, Complainant, Man, West Virginia, *pro se*;
Mark E. Heath, Esq., Heenan, Althen & Roles, LLP, Charleston, West Virginia,
and Anne Wathen O'Donnell, Assistant General Counsel, ARCH COAL, Inc., St.
Louis, Missouri, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Nathan B. Harvey against Mingo Logan Coal Company under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Logan, West Virginia. For the reasons set forth below, I find that the Complainant was not discharged by Mingo Logan because he engaged in activities protected under the Act.

Harvey filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA), pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on November 17, 2000.¹ On January 30, 2001, MSHA informed him that, on the basis of its investigation, it had determined that "a violation of Section 105(c) of the Act has not occurred." Harvey then instituted this proceeding with the Commission, under section 105(c)(3), 30 U.S.C. § 815(c)(3), on February 6, 2001.²

¹ Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

² Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his

(continued...)

Background

Mingo Logan operates the Mountaineer Mine complex in Mingo County, West Virginia. The complex is made up of two underground coal mines, one in the upper seam, known as the Lower Cedar Grove, and the other in the bottom seam, known as the Alma A. There is a 50 foot buffer between the two seams, but the mines are entered by a common portal. Mining is by continuous mining, room and pillaring and longwall methods.

Nathan Harvey began working at the mine on March 31, 1993. He was hired because he had electrical training and because he was certified, by the state of West Virginia, as a foreman. During his time with the company he also became a certified electrician. For the most part, he performed duties as an electrician, although on occasion he was asked to act as a foreman. Harvey was fired on September 28, 2001.

As a result of his termination, Harvey filed a discrimination complaint against the company. In it, he stated: "I feel I was discriminated against because I complained to management about being rock dusted, illegal equipment move practices and being forced to participate in them by management, which was a safety hazard." He later asserted at the hearing that he had also expressed concern "about how much dynamite they were shooting at the Alma Mines (*sic*)." (TrI. 178.)³

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of 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 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984).

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. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it

²(...continued)
own behalf before the Commission"

³ A separate transcript, beginning with page 1, was prepared for each day of the hearing. The transcript for September 5 will be referred to as "TrI." and the transcript for September 6 will be referred to as "TrII."

nevertheless may defend affirmatively 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.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. 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).

I find that Harvey has failed to demonstrate that he engaged in protected activity. I further find that, even if he did engage in protected activity, he did not show that his discharge was motivated in any part by that activity, while the Respondent has convincingly established that the discharge was in no part motivated by such activity.

Did Not Engage in Protected Activity

Rock Dusting Complaint

The Complainant testified that sometime in 1998, he was sent by his foreman, John Morgan, to move some equipment and then to clean power distribution boxes for the belt heads in the two and three mains. He stated that during the time he was performing these tasks, the area he was working in was rock dusted. As he described it, "while I was cleaning in the boxes and stuff, when I got through, I looked out and I couldn't see because of the dust. I couldn't breathe, so I had to finally get over to fresh air." (TrI. 92.) Harvey believed that this was done to him intentionally.

The evidence, however, is to the contrary. In the first place, almost all of the witnesses testified that at least once in their career they had been rock dusted. None believed that it had been done to them intentionally; all felt that it had been accidental. Furthermore, everyone knew, including Harvey, that if they found themselves being rock dusted, they were to go to fresh air.

With regard to the specific incident involving the Complainant, Benny Lee Blankenship, Harvey's brother-in-law, testified that he was the one doing the rock dusting that night and that he did not intentionally rock dust the Complainant. Morgan, who had nothing to do with the rock dusting, stated that he tried to find Harvey during the shift and could not. He denied that he deliberately sent Harvey to work in an area that was being rock dusted.⁴

⁴ Morgan testified that:

I was trying to find him because it had been quite a while since I'd heard from him and I couldn't locate him, and I guess about 6:00 he came out and I asked him where [he]'d been. He said, "You know where I've been." I said, "No, I don't or I wouldn't be asking." He said "I've been up working in the rock dust where you sent

(continued...)

Carlos Porter, the shift foreman, testified that rock dusting was normally done on the weekend, but that this was “an isolated incident. We had a dusty condition that needed to get some rock dust on.” (TrII. 55.) He further stated that he was surprised that Harvey had been rock dusted because Harvey was “a certified foreman, and everybody knows it’s a standard policy that if you get in rock dust, to get in the intake and get out of the rock dust” (TrII. 53.)

The Complainant has not cited any rules or regulations that prohibit rock dusting while miners are working in the mine.⁵ Nor am I aware of any. Harvey has taken what was plainly an unfortunate accident and attempted to turn it in to a personal vendetta. While complaining to management about rock dusting when others are in the mine could be construed to be a safety complaint, even though it is not prohibited, it is apparent in this instance that what Harvey was complaining about was not that it was unsafe, but that it was done to him on purpose.

There is no evidence to support that claim. Indeed, the evidence is overwhelming that it was not intentional. Thus, it is apparent that Harvey was not making a safety complaint at the time of the incident, but has decided since his termination that that was what he was doing. I conclude that he was not engaging in protected activity at the time. Further, it is obvious that this incident, which occurred at least three years earlier, is much too remote to be connected to his discharge even if it were protected activity.

Equipment Move Practices

Harvey testified that he conducted equipment moves in the mine and thought he was doing a good job. However, he claimed that he later started getting concerned because people in the mine were saying that the moves were not being performed legally. To make sure he was doing it correctly, he stated that he asked Porter to talk him through a move. Even though Porter informed him, after having Harvey relate to him how he conducted a move, that he was doing it correctly, he began refusing to act as a foreman on moves. Although Harvey asserted at the hearing that he did this because he still thought the move procedure was unsafe, he admitted that he told his supervisors that it was because he did not get paid for it. (TrI. 101, 139.)

⁴(...continued)

me.” And I told him, I said, “No, Nathan, I didn’t send you to work in the rock dust. You could have come out by. You could have went to fresh air intake. I did not intend for you to work in no rock dust.”

(TrI. 223-24.)

⁵ He requested that I take judicial notice of section 75.321, 30 C.F.R. § 75.321, which deals with “Air Quality.” (TrII. 55-56.) That regulation clearly has no application to rock dusting.

There is nothing in the record to support Harvey's allegations on this issue. Indeed, the evidence is compelling that, contrary to his assertion, he refused to perform equipment moves because he felt that he was not being paid for being certified both as an electrician and a foreman. For instance, on April 23, 1999, foreman Malcolm Walls put the following in a memorandum:

On 4-23-99 we had 3 scoops to move. The outby hourly certified foreman was off. Informed Nathan Harvey that Jim Davidson would be the new electrician & you would be the move foreman. He stated he would not be the move foreman. I ask why not and he replied that he didn't want to use his foreman papers.

I told him that we paid him to use all his certificates. He said they didn't pay him for being a certified foreman & he said he still didn't want to use his certificate.

(Resp. Ex. 4.) When Walls reported this to Porter, Porter called Harvey in and asked him about it. In the Incident Report that Porter wrote up after the discussion, he noted that Harvey "said we should pay him an hour more to use his certification." (Resp. Ex. 5.)

Porter had a follow-up meeting with Harvey on April 27. Porter then wrote the following in an Incident Report:

I called Mr. Harvey in to discuss the problem about him not wanting to be the foreman on equipment moves.

I asked Nathan why he didn't want to move equipment[.] I got the same reply as I did on 4-23-99, I don't want to use my foreman's certification, I don't get paid enough and I don't like the responsibility of being the foreman[.] I then said well that's the way you feel about the matter and he said yes it is.

(Resp. Ex. 6.) Porter then had Harvey moved to another section where he worked only as an electrician and did not have to use his foreman papers.⁶

These memoranda are particularly significant because they were written at the time of the incident when no one at the company had a knowledge that Harvey would be making a discrimination complaint. No where is there any mention that Harvey believed the moves were being conducted unsafely.

⁶ Interestingly, as a result of Harvey's complaint, electricians with foreman papers were given a 10 cents an hour raise beginning in August 1999.

If Harvey really believed that the moves were unsafe, after Porter informed him he was performing them correctly, there is no evidence that he ever told that to management. Porter, who no longer worked for Mingo Logan at the time of the hearing, testified that Harvey never claimed that the moves were unsafe. (TrII. 48.) Perhaps even more significantly, Harvey surreptitiously made three tape recordings of conversations he had with four supervisors. These conversations occurred with Porter in August 1998, (Comp. Ex. 7, Resp. Ex. 16.),⁷ with Gary Griffith, maintenance supervisor, in March 2000, (Comp. Ex. 8, side A, Resp. Ex. 17), and with Griffith and David Runyon, Mine Manager, in March 2000, (Comp. Ex. 8, side B, Resp. Ex. 18). In all three of the tapes Harvey's aversion to using his foreman papers to conduct moves was discussed. In none of them does he claim, or even intimate, that he believes that the moves are not safe and that is why he refuses to make them.

The evidence supports the company's position that Harvey refused to use his foreman's papers for monetary, not safety, reasons. Accordingly, I conclude that Harvey did not engage in protected activity concerning equipment moves. Furthermore, even if Harvey's actions did qualify as protected activity, since the alleged complaints occurred in 1998 and 1999, there is not a coincidence in time between the protected activity and the adverse action.

Mingo Logan's Blasting Practices

Harvey testified that "I had made some complaints because of the shots that were going on at Alma, and there was a lot of talk between the men that they were shooting way too hard and way too much and that somebody was going to get hurt." (TrI. 106.) He admitted, however, that he was not involved in the shooting. (TrI. 176.)

Harvey claimed he informed an MSHA inspector about the blasting and that the inspector later came to the mine and issued some citations concerning blasting violations. He also stated in his opening statement, (TrI. 7), although not when he testified under oath, that he complained to a mine foreman about the blasting.

If Harvey, in fact, made such complaints, they would clearly be protected activity. Inasmuch as he did not mention this activity when he filed his discrimination complaint, however, it is doubtful that, if he had any concerns at all about the company's blasting policies, he never did more than voice them to other miners. There is no evidence that he ever complained to management about it or that management was in any way made aware of his concern.

Although Harvey admitted that he did not tell management that he believed the company was blasting unsafely and that he was not aware that the MSHA inspector had told management that he was the miner who had complained, (TrI. 171-72), he hypothesized that two foreman may have seen him talking to the inspector and "that Mingo Logan assumed I had called" the

⁷ The Complainant's exhibit is the tape of the conversation, the Respondent's exhibit is a transcript of the tape.

inspector. (TrI. 109.) However, one of the two foremen that he named testified credibly that he recalled that the inspector in question inspected the mine on several occasions but that he did not recall seeing Harvey talking with him. (TrII. 7-9.)

Thus, even if Harvey did complain to MSHA about blasting safety, there is no evidence that the company management was aware of his complaints. Accordingly, I find that Harvey did not engage in protected activity with regard to his alleged blasting complaints.

Discharge Not the Result of Protected Activity

The evidence does not support the Complainant's claim that he engaged in protected activity. However, even if Harvey's unsupported claims are accepted at face value, he has offered no evidence to connect his activity with his discharge. As nearly as can be discerned, none of the activity occurred in proximity to his dismissal. On the other hand, the record conclusively substantiates Mingo Logan's claim that it fired Harvey because of his "bad attitude" and not because of any safety complaints made by him.

It appears that initially Harvey was viewed as a good employee, but that about three years prior to his termination, his attitude began going downhill. As Porter, who worked with him the entire time he was at the mine, testified:

It got really bad. You couldn't do anything to help him. It was like he had a grudge against the world, a chip on the shoulder type attitude.

He showed it by anything you tried to do to help him, he didn't get along with employees anymore, his co-workers, he didn't get along with them. He didn't get along with his foremen, and like I said, I talked to him several times about it, and there was no helping him. He didn't want any help.

(TrII. 37-38.) Griffith testified:

His attitude just changed. He went from having an acceptable attitude and trying to do what I considered a decent job to one of just not caring, not wanting to do what he was assigned to do, and just didn't care whether he done anything or not. He just appeared to be irate all the time. So it went from acceptable to very poor.

(TrI. 259.)

The record is replete with evidence of miners telling their supervisor that they did not want to work with Harvey, of Harvey refusing to speak to supervisors, even going so far as not acknowledging receipt of work assignments, of his failing to check back with supervisors to find out his next assignment after completing one, of supervisors having to check up on him to make sure he was doing his job and of his otherwise uncooperative attitude.

Harvey's actions on his final day of work, which precipitated his discharge, provide a good example of the reasons for his termination. On the morning of September 27, he was assigned to go to the Alma mine with another electrician to work on some belts that were down. When he got to the Alma entrance he delayed getting into the mantrip to go into the mine. Harvey admitted that he caused a delay, but claimed that he was just "clowning around." (TrI. 116-17.) Evidently, he was the only one who thought it was funny, because the foreman at the Alma mine reported the incident to Harvey's supervisor, Bob Tilley.

Later that day in the electricians' shop, Tilley instructed Harvey to get his gear together to go underground to work on another belt. According to Tilley, Harvey reacted to these instructions by taking small, slow steps toward his locker, while looking at the ceiling. As a result, Tilley, who, had been receiving complaints about Harvey for three or four weeks, "was upset with the way [Harvey] walked to the back room" and "already had one foreman complaining to me that morning about him," called Harvey into his office for a meeting. (TrI. 318.)

Tilley, who even the Respondent admitted was one of the easiest-going foreman at the mine, began by asking Harvey "why he wouldn't talk to [him] or the other men and why he wasn't doing his job like he should." (Resp. Ex. 9, TrI. 318.) Harvey responded by complaining that he was always assigned the worst jobs and that Tilley did not consider him as good an electrician as the other men. Harvey concluded by stating that "he would start doing his job when he was treated like everyone else." (Resp. Ex. 9.)

Tilley, still aggravated by Harvey's attitude, reported the matter to Griffith, his supervisor. When Griffith heard the story, he "couldn't believe it" since he considered Harvey's response to be insubordination. (TrI. 274.) As a result, Griffith went to Runyon and recommended that Harvey be discharged. Runyon did not want to do that because the company had a shortage of electricians. Instead, he decided to have a meeting with Harvey to give him a chance to agree to change his attitude, straighten up and try to be a better employee.

Runyon, Griffith and Buddy Johnston, Mingo Logan's Human Resources Manager, met with Harvey on September 28. Runyon testified that he began the meeting by going through the three year history of the company's problems with Harvey's attitude, noting that his attitude had gotten progressively worse to the point that no one wanted to work with him. Runyon then told Harvey that the problem had become so serious that something had to be done, that his attitude had to change. Harvey responded: "I don't have a bad attitude; you-all got a bad attitude." (TrII.

106-7.) When Runyon asked Harvey if he understood how serious the situation had become, Harvey said: “You’re telling me I’m fired. Are you telling me I’m fired?” (TrII. 105.)

In response to this, Runyon reiterated that the purpose of the meeting was not to fire Harvey, but to get him to commit to changing his attitude. Again Harvey asked: “Are you telling me I’m fired?” At that point, Johnston, who thought that Harvey was being very combative and antagonistic, said: “Is that what you want, Nathan? Do you want us to fire you?” (TrI. 197, TrII. 106.) As this type of dialogue continued, it became apparent that no progress was being made, so the three men asked Harvey to step out of the room.

The three supervisors then discussed what had occurred. Johnston and Griffith were of the opinion that Harvey had to be discharged. Runyon wanted to give him one more chance to say that he would try to improve. They called Harvey back in. Runyon testified that:

I moved my chair from around the desk. I got real close to him where I could see him, you know, eyeball to eyeball, and I said, “Nathan,” I said, “Buddy, do you understand how serious this is today? I’m telling you your problems, what you got. I went through this whole conversation and I’ve explained everything to you.” I said, “We’re at the crossroads here. We’ve got to have change today.” I said, “It can’t go on like this.” I said, “We have to have something change today.” I said, “We can’t have your attitude like this no more. You’re going to have to commit to me you’re going to change.”

(TrII. 110.)

Harvey’s response was, “Are you firing me?” (TrII. 110.) Runyon then asked Harvey if he wanted to resign and when he said he would not, told him that he was fired. Harvey got up and said, “Fine. You’ll hear from my lawyer,” and left. (TrII. 110-11.)

Johnston and Griffith corroborated Runyon’s testimony. They agreed that Harvey never acknowledged that he had an attitude problem or agreed to make any changes. Harvey’s testimony does not differ in any major respects from the company’s testimony on this meeting. (TrI. 118-20.) Nevertheless, if it did, I would credit the testimony of Runyon, Johnston and Griffith.

The Company has established that about three years before his termination, Harvey began displaying what can only be characterized as a bad attitude. He refused to serve as a foreman on equipment moves, not because he thought they were unsafe, but because he felt he should be paid extra for doing them. When his request to trade shifts with another electrician was turned down, he even went so far as to go to the personnel office and request that the additional pay that he was receiving for acting as a foreman on equipment moves be stopped since he was no longer going to

perform that function. When questioned by management about this, he responded: “You scratch my back, I’ll scratch yours.” (Comp. Ex. 8, Resp. Ex. 18 at 1.)

Supervisors frequently had to check up on Harvey to find out what was taking him so long to do a job or to make sure he had completed a job. On at least one occasion, he refused to go back to the surface to find out what additional work needed to be done, after completing an assigned task, and when the electrician he was working with insisted on doing so, he called the electrician “a big suck.” (TrII. 14.) By the time he was fired, he had trouble with every supervisor he had worked for and even his fellow electricians told their foremen that they would rather work alone than work with him.

The company’s evidence in this case that Harvey was fired for his bad attitude and not because of any protected activity he may have engaged in is both considerable and credible. Perhaps the best indication of the veracity of Mingo Logan’s evidence is that the tapes which Harvey secretly made of three conversations with company management personnel all corroborate the testimony of the company witnesses, rather than Harvey.

Conclusion

Harvey has failed to show either that he engaged in protected activity or that he was discharged for engaging in that activity. Harvey’s being accidentally rock dusted, while unfortunate, was not engaging in protected activity. His concern with equipment moves was primarily monetary, but even if he also really had safety concerns, those concerns were either not conveyed to management or were adequately responded to by management. His problem with blasting seems to have arisen after his discharge, and to be based mainly on hearsay and supposition. Nonetheless, if he really did have such concerns, there is no evidence that they were ever communicated to anyone in management. In addition, there is no concurrence in time between any of this activity, most of which occurred several years earlier, and the discharge. In contrast, the Respondent has amply demonstrated that Harvey was fired because of his longstanding bad attitude and not because of any protected activity in which he may have engaged.

Order

Accordingly, since the Complainant has not established that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the complaint of Nathan B. Harvey against Mingo Logan Coal Company is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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