CCASE:
UMWA V. ROBERT L. CARNEY
DDATE:
19790508
TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION

WASHINGTON, D.C.
May 8, 1979

LOCAL UNION NO. 1110.
UNITED MINE WORKERS OF AMERICA (UMWA), Docket No. MORG 77-20

and

ROBERT L. CARNEY

v.

CONSOLIDATION COAL COMPANY

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969. 1/ The issue is whether the administrative law judge erred in finding that Consolidation Coal Company had violated section 110(b) of the Act. 2/ For the reasons discussed below, we affirm the judge's decision.

Consolidation Coal Company operates the Ireland Mine where Robert L. Carney was employed as a miner. Carney was a member of Local Union 1110, United Mine Workers of America, and was also a member of the Health and Safety Committee at the mine.

On January 28, 1977, during Carney's shift, the continuous mining machine shut down when an electrical component in the methane monitor burned out. 3/ The component was replaced but the gauge on the monitor continued to act erratically and it sporadically cut off power to the mining machine.

_____

1/ 30 U.S.C. $ 801 et seq. (1976) (amended 1977) ["the Act" or "the 1969 Act"]. This case presents no issue under the Federal

Mine Safety and Health Act of 1977, 30 U.S.C.A. $ 801 et seq. (1978).

2/ Section 110(b)(1) states:

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

3/ 30 CFR $ 75.313 reads in part as follows:

> Methane monitor. The Secretary...shall require...that a methane monitor...be installed...on any continuous miner. When installed on any such equipment, such monitor shall be kept operative and properly maintained and frequently tested as prescribed by the Secretary... Such monitor shall be set to deenergize automatically

(Footnote continued)

Carney requested the section foreman to test the monitor with a known, bottled mixture of methane gas. The foreman ordered the gas to be sent to the section and told the mining machine operator to resume production until the gas arrived to test the monitor. Carney objected to the resumption of production and asked that a federal inspector be called. 4/ The foreman replied that he could not call an inspector. Carney then left the mine in his capacity as a safety committeeman for the purpose of calling an inspector. Once outside the mine, Carney called the chairman of the Health and Safety Committee and asked him to call a federal inspector.

Two Mining Enforcement and Safety Administration (MESA) inspectors came to the mine about two hours later, met with management and the safety committee, and told them that a repaired methane monitor had to be tested with a known mixture of gas before production was resumed.

On January 31, when Carney stated that he would be off work on union business, the mine superintendent informed him, for the first time, that he would be required to obtain permission before undertaking union duties. Carney was given a reprimand letter stating:

> The only time you can leave your job during your shift to perform duties as a Mine Health and Safety Committeeman is upon request by mine management to review an individual safety rights dispute, or when permission is otherwise granted by management.

The letter further informed Carney that his action in leaving his job on January 28th without permission was an act of insubordination, and warned him that such acts would not be tolerated.

On February 1, Carney met with his lawyers to discuss the above incidents, and told Company officials by telephone that he would be off work that day on union business. When Carney reported to work on

---

footnote 3/ cont'd

> such equipment when such monitor is not operating properly and to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall not be more than 1.0 volume per centum of methane. An authorized representative of the Secretary shall require such monitor to deenergize automatically equipment on which it is installed when the concentration of methane reaches a maximum percentage

determined by such representative which shall not be more than 2.0 volume per centum of methane.

4/ Carney believed that it was a violation of the Ac to resume production, after an electrical component is replaced on a methane monitor, before running a gas test.

February 2, he was given a second letter of reprimand for failing to ask the Company's permission to be off work the previous two days. A heated argument ensued, and Carney left the mine on sick leave, claiming to be ill. He also took a personal day off on February 3, and did not report on February 4 because he attended a union meeting. When he returned on February 7, the next working day, he was given a third letter of reprimand for his "continuing insubordinate behavior on and since January 28, 1977," and was placed on probation for one year.

The next day, the union and Carney filed an application for review of acts of discrimination. 5/ Administrative Law Judge James A. Broderick issued his decision on September 15, 1977. Judge Broderick held that the Company discriminated against Carney because he engaged in activities protected by section 110(b) of the Act. He ordered the three disciplinary letters removed from Company records. The Judge also concluded that the Company's permission policy violated section 110(b) because it severely and unnecessarily inhibits the ability of miners, particularly safety committee members to whom miners often forward safety complaints, to bring safety complaints to the Secretary. 6/ He accordingly ordered the Company to "cease and desist from enforcing a policy requiring [the Company's] permission before a member of the Mine Health and Safety Committee can leave his assigned duties to bring safety complaints to the Secretary."

On appeal, the Company argues that its permission policy does not violate section 110(b), and that the judge had no authority to order the Company to stop enforcing the policy. The Company also argues that Carney's activities were not protected by section 110(b), that Carney did not notify the Secretary of a safety violation or danger, that no violation of a mine safety standard occurred, that the judge erred in finding that Carney acted in good faith, and that it did not "discriminate" against Carney. We reject these arguments.

5/ MESA appeared as amicus curiae.

6/ The Judge held that section 110(b)

> "includes in its protection the right of employees in a mine to bring safety complaints through the normally established channels to the Secretary without unnecessary interference on the part of the employer. I regard the policy under discussion here as applied to the local union and its Safety Committeemen to be such an unnecessary interference. It severely limits the ability of the miners to complain of hazards and violations during a working shift, by permitting only such complaints as

mine management deems acceptable. A contrary rule of course restricts management's ability to control production. However, the value restricted by the first rule (the health and safety of miners) clearly outweighs the latter."

First, we concur in the judge's holding that the enforcement of the Company's "permission policy" violates section 110(b). The purpose of section 110(b) is to encourage communication between the miners, their representatives and the Secretary concerning possible dangers or violations. 7/ The Company's policy effectively impedes a miner's ability to contact the Secretary when alleged safety violations or dangers arise, a time when free access to the Secretary is most important. We therefore reject the Company's objections to the judge's order that the Company cease and desist from enforcing its policy. 8/

Second, we agree with Judge Broderick that issuance of the three letters of reprimand to Carney violated section 110(b) of the act. After voicing a safety complaint to his foreman, Carney left the mine section to contact MESA officials, through the chairman of the mine's Health and Safety Committee, to bring the safety dispute to MESA's attention and to obtain its view on the legality of the Company's safety practice. We concur in the view expressed in Phillips v. IBMOA, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975), that such activities constitute notice to the Secretary and were protected by section 110(b). Because Carney's activity was protected, and because the Company could not lawfully require him to obtain its permission before engaging in such activity, the first letter of reprimand was an act of discrimination. Further, the second and third letters were, as Judge Broderick found, "certainly related to the first letter and [were] issued in part at least because of the activity protected by section 110(b)." 9/

7/ 115 Cong. Rec. 27948 (October 1, 1969 (remarks of Senator Kennedy), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I, at 666-667 (1975).

8/ The judge had the authority to enter the order. Section 110(b)(2) provides in part that:

> If [the Secretary] finds that such violation did occur, he shall issue a decision, incorporating an order therein requiring the person committing such violation to take such affirmative action to abate the violation as the Secretary deems appropriate.... [Emphasis added.]

9/ The Company's argument that a safety violation did not exist is inapposite. The statute protects notification to the Secretary of an "alleged violation or danger" (emphasis added). See Baker v. IBMOA, No. 77-1973 (D.C. Cir., November 29, 1978). We also reject the Company's attack upon the judge's finding that Carney was acting

in good faith. The judge found that "the record clearly supports the finding that applicant Carney left his work on January 28, 1977, because of a good-faith belief that resumption of production without a gas mixture test of the repaired methane monitor was dangerous." The judge's finding is supported by the record and we find no reason to disturb it. We thus have no need to pass upon the question of whether under the 1969 Act a showing of good faith must support a complaint of discrimination. Compare Munsey v. FMSHRC No. 77-1619 (D.C. Cir., November 29, 1978). Finally, the Company argues at length that it did not discriminate against Carney because it would have treated any other miner in the same manner. The argument is unconvincing. The question here is whether the Company took adverse action against Carney in retaliation for activity protected by section 110(b). It makes no difference that the Company would have taken the same action against other miners.

~342
Accordingly, the judge's decision is affirmed.