

CCASE:
RONNIE R. ROSS V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 11, 1981
RONNIE R. ROSS

and

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No.VINC 78-38

v.

MONTEREY COAL COMPANY,
McNALLY-PITTSBURGH CORP., AND
LOOKING GLASS CONSTRUCTION
COMPANY

DECISION

This case involves an application for review of allegedly discriminatory conduct in violation of section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq (1976)(amended 1977). Ronnie R. Ross alleges that his employer, McNally-Pittsburgh, by placing a letter in his employment file, illegally discriminated against him for engaging in protected activity; and that Monterey Coal Company also is liable for this violation because it caused the letter to be placed in his file, and because it was the owner of the job site. 1/ Following a full evidentiary hearing, the administrative law judge denied the application and dismissed the proceedings. For the reasons that follow, we affirm the judge.

In 1974, Monterey Coal Company began development of the Monterey No. 2 underground coal mine near Albers, Illinois. At the time of the violation alleged in this case, the underground portion of the mine development was completed and coal was being mined. Monterey had contracted with McNally-Pittsburgh, a construction firm, and with several other firms to construct surface facilities and accomplish other related activities at its mine. Ronnie Ross was employed by McNally from May 1975 until August 1978 at the Monterey site.

1/ Ross also alleged that Looking Glass Construction Company, another

independent contractor at the Monterey job site, discriminated against him. The administrative law judge's conclusion that Looking Glass did not violate the Act was not directed for review by the Commission.

~1172

From the fall of 1975 until May 1978 Ross was a United Mine Workers of America safety committeeman for McNally employees. In the spring of 1977, Ross became chairman of the UMWA Local 2015 safety committee, which consisted of the members of each of the Monterey site contractors' safety committees. While chairman, Ross continued to represent McNally's employees as one of their safety committeemen. He and the other McNally committeemen toured their job site monthly and reported safety violations to McNally's management. Toward the end of his employment, Ross's practice was to prepare requests for inspections by the Mining Enforcement and Safety Administration listing conditions which Ross or his committee believed violated the 1969 Coal Act. 2/ When Ross accompanied MESA inspectors on their inspections, he traveled throughout the entire Monterey project and did not restrict his travel to the McNally site. 3/

During the latter part of October 1977, an official of Monterey Coal Company advised Charles Bradley, McNally's superintendent for construction, that Ross had been observed in the slope area of Monterey's underground operations, an area where no McNally employees were working. Following this incident, Bradley instructed Bob Stearman, McNally's project superintendent, to limit the McNally Health and Safety Committee's inspections to McNally's work areas. Other reports of Ross's presence in non-McNally work areas were reported to McNally officials.

On November 4, 1977, Ross and his committee conducted a safety inspection and prepared a request for inspection under section 103(g). This request alleged, among others, safety violations by Looking Glass Construction Company. This request was given to federal inspectors on November 8 when they arrived to conduct an inspection at the Monterey mine site. Ross and another McNally safety committeeman accompanied the federal inspectors, as did management representatives from McNally and Monterey.

During the course of the inspection, an oral confrontation took place between Ross and the president of Looking Glass. McNally's construction superintendent Bradley was notified of the incident by one of the McNally supervisors on November 8, 1977, or soon thereafter. Bradley instructed project superintendent Stearman to write Ross a letter to document previous oral instructions limiting the McNally Health and Safety Committee's activities to McNally's work areas.

Subsequently, Ross was given a letter dated November 30, 1977, and signed by Stearman which stated:

2/ Section 103(g) of the Act gave a representative of the miners the right to file a written request for an inspection by MESA if he had a reasonable ground to believe that a violation of a mandatory standard existed. Upon the receipt of the written request, MESA was required to inspect as soon as possible.

3/ Section 103(h) of the Act permitted an authorized representative of the miners to accompany the representatives of the Secretary on their inspections.

~1173

This is to advise you that your duties as Project Union Health and Safety Committeeman are limited exclusively to McNally Operations at the Monterey Coal Mine No. 2.

In the event of your violating the above, you will be suspended--Subject to discharge.

This letter forms the basis for Ross's discrimination claim. Ross acknowledged, however, that even after the issuance of the letter, he continued to inspect McNally's and other sites and was not discharged, reprimanded or otherwise penalized. 4/

The administrative law judge found that the disciplinary letter was given to Ross for engaging in activities off his work site not authorized by his employer, and was not issued in retaliation for Ross's reporting of alleged dangers or violations to the Secretary. He therefore concluded that no violation of section 110(b)(1)(A) occurred and dismissed the proceedings.

After a careful review of the record, we are persuaded that the judge's conclusion is supported by the evidence and should not be disturbed. The record supports the finding that the letter was issued to protect a legitimate managerial interest in controlling the activities of its workforce. The judge did not draw the inference, argued for by Ross and the Secretary, that the letter was issued in retaliation for Ross's exercise of rights protected by the Act, e.g., notifying the Secretary of alleged hazards or violations or accompanying federal inspectors during their inspections. The record does not establish that Ross's exercise of his statutory rights in fact was in any way restricted; therefore, we cannot say that the judge erred. 5/ Compare Local Union No. 1110, United Mine Workers of America and Robert L. Carney v. Consolidation Coal Co., 1 FMSHRC 338 (1979).

Accordingly, the decision of the administrative law judge is affirmed. 6/

Richard V. Backley,
Chairman
Frank F. Jestrab,

Commissioner
A. E. Lawson,
Commissioner
Marian Pearlman
Nease, Commissioner

4/ We also note that the letter was removed from Ross's employment file prior to hearing, the McNally contract at Monterey is completed, and Ross is no longer employed by McNally.

5/ This decision should not be construed as affirming a policy of limiting safety committee inspections to the employer's area in all circumstances.

6/ In view of our disposition, we need not reach the issue of Monterey's liability as owner for the act of its contractor, McNally-Pittsburgh.

~1174

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