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MSHA (JOSEPH GABOSS) V. WESTERN FUELS-UTAH
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, DC
August 15, 1988

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
On Behalf of JOSEPH GABOSS

v. Docket No. WEST 86-24-D

WESTERN FUELS-UTAH INC.

Before: Ford, Chairman; Backley, Doyle Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

In this case Commission Administrative Law Judge John J. Morris held that Western Fuels-Utah, Inc. ("Western Fuels") did not violate the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), in discharging complainant Joseph Gabossi. 9 FMSHRC 1481 (August 1987) (ALJ). Gabossi had complained to Western Fuels and to the State of Colorado, Division of Mines, that the underground reporting structure at the Deserado Mine created unsafe working conditions, and that it violated Colorado state law. Judge Morris concluded that the firing was lawful because Western Fuels was motivated by Mr. Gabossi's clashes with mine management over the underground reporting structure in effect at Western Fuels' Deserado Mine and that his complaints did not fall within the protective umbrella of the anti-discrimination provisions of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). 1/ We disagree.

1/ Section 105(c)(1) provides:

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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or

Because Gabossi's conflict with Western Fuels regarding the Deserado Mine's underground reporting structure was safety related, a fact acknowledged by the judge, we conclude that Gabossi engaged in activity protected by the Mine Act. Accordingly, we reverse the decision of the judge and remand the matter for further proceedings consistent with this decision.

I.

Gabossi began working for Western Fuels on October 1, 1982. From that time until he was discharged on January 30, 1985, he served in a dual capacity of mine foreman and underground coal production superintendent at the Deserado Mine located in Rio Blanco County, Colorado. At the time Gabossi began working for Western Fuels John Bootle was the mine manager. Gabossi testified that, under Bootle, he coordinated the underground maintenance activities with the activities of his production crew. Tr. 16-17, 119. In June of 1983, Raja Upadhyay replaced Bootle as mine manager.

On June 29, 1983, Upadhyay issued an organizational memorandum setting forth the responsibilities of the Deserado Mine's four superintendents. Exh. R-1. Pursuant to that organizational memorandum, Gabossi was in charge of underground coal production while Gordon Burnett was in charge of underground maintenance. Although the record is unclear as to whether Gabossi still coordinated the activities of the maintenance and production departments following the issuance of this organizational memorandum, Gabossi testified that from that time until February of 1984 matters became "progressively worse" between himself and mine manager Upadhyay. Gabossi stated that on February 14, 1984, Upadhyay informed him that he "wasn't to interfere with maintenance in any way." Tr. 151-52.

In June of 1984, A.B. Beasley replaced Burnett as the maintenance superintendent. Beasley and Gabossi described their relationship as stormy. Tr. 20, 430. In that regard, Beasley had instructed

health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in

any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

maintenance foreman Art Cordova to stop reporting his underground instructions with Upadhyay and was told by the mine manager to follow them. Tr. 273. In September or October of 1984, Upadhyay gave Gabossi his own "breakdown" mechanic for each production shift but preventative underground maintenance remained under the control of maintenance superintendent Beasley. Tr. 23.

Gabossi's and Upadhyay's relationship continued to deteriorate. According to Upadhyay, in September, 1984, he and Gabossi had a heated discussion concerning disability payments to maintenance foreman Cordova. Tr. 468-69. Upadhyay testified that Gabossi "got real hot, upset, and left the office." Tr. 469. Upadhyay further testified that it was then that he decided to fire Gabossi. Id.

On October 1, 1984, Gabossi told Upadhyay that he no longer wanted to be in charge of the mine when Upadhyay was away. Tr. 493. Also, during the first week of October 1984, Upadhyay traveled to Washington, D.C. to meet with his supervisor Lloyd Ernst. Upadhyay delivered to Ernst a handwritten memorandum requesting Ernst's permission to fire Gabossi. Tr. 469-70. Although Upadhyay stated in the memorandum that Gabossi is a "good miner, [who] takes his work very seriously and gets 100% work out of his employees", Upadhyay also stated that Gabossi "can't work with others," that Gabossi is "very intimidating and tries to get his way in everything," that he "creates problem[s] with the union employees," and that his loyalty to Western Fuels is "nil or negative." Exh. R-5. Upadhyay testified that although he recommended that Gabossi be fired, Ernst chose Upadhyay's alternative suggestion that Gabossi be assigned more hours underground in the hope that he would become frustrated with his job and quit. This plan was set in motion upon Upadhyay's return to the Deserado Mine. Tr. 471, Exh. R-5.

On November 6, 1984, Gabossi telephoned Boyd Emmons, District Coal Mine Inspector for the State of Colorado, Division of Mines. Tr. 27. Both Gabossi and Inspector Emmons testified that during their November 6 conversation, Gabossi expressed his concern about mine safety as a result of the underground reporting structure at the Deserado Mine. Gabossi also told Emmons that he was concerned about losing his state foreman certification should an accident occur underground because of the reporting system. Emmons' response was that as mine foreman Gabossi was responsible under section 34-24-101 of the Colorado Revised Statutes for all underground operations. Tr. 92. 2/ Although Gabossi did not

2/ Section 34-24-101(2) of the Colorado Revised Statutes provides:

The mine foreman shall have full charge of all inside workings and of all persons employed therein, in order that all the provisions of articles 20 to 30 of this title, insofar as they relate to his duties, shall be complied with, and so that the regulations prescribed for each class of workmen under his charge shall be carried out in the

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file a written safety complaint with the state Division of Mines, he did ask Inspector Emmons to send him a letter setting forth his responsibilities as mine foreman under Colorado state law. Tr. 27-29, 92-96.

The November 9th Incident

On Friday, November 9, 1984, Gabossi showed mine manager Upadhyay the letter that he had received from Inspector Emmons relating to his mine foreman duties under state law. Gabossi testified that he presented the letter to Upadhyay after Upadhyay had given him the additional responsibility of supervising an underground computer technician, as well as placing him in charge of surface belts running from the mine to the silos. Tr. 30. Gabossi stated that as soon as Upadhyay read Emmons' letter, Upadhyay "instantly got mad and told me that if I didn't like it, to quit...." Gabossi added that it was "quite a heated discussion." Tr. 31.

Upadhyay agreed with Gabossi that the November 9 incident was a "big blowup" but testified that he was not presented with Inspector Emmons' letter until after Gabossi had asked whether Western Fuels intended to keep its promise to buy his house were he to leave the company, and after Gabossi had called him the "worst mine manager" for whom he had ever worked and had told him that he belonged in a "caste system." Upadhyay added that, in any event, the letter from the Colorado Division of Mines merely recited the relevant Colorado state law that he and Gabossi had previously discussed. Tr. 472-74.

Gabossi's Probation and Discharge

Upadhyay testified that on Sunday, November 11, 1984, he called his supervisor, Lloyd Ernst, and again asked Ernst's permission to fire Gabossi. Ernst suggested that Gabossi be placed on probation. The next day, Upadhyay orally informed Gabossi that he was being placed on probation indefinitely. The primary reason given by Upadhyay for this action was Gabossi's inability to get along with other members of the management team. Tr. 475-76. While Gabossi admitted that Upadhyay told him that he was being placed on probation for not getting along with other senior staff members, Gabossi also stated that Upadhyay was "madder than hell" that he had contacted the Colorado Division of Mines. Tr. 32, 34. Gabossi received his letter of probation on November 16, 1984. The letter read, in pertinent part:

Your willingness to work harmoniously under the

organization structure put into effect by Western Fuels has been negative. You have repeatedly objected to the idea of Maintenance Superintendent being responsible for underground maintenance.

You have demonstrated your inability to work

strictest manner possible.

Exh. C-1.

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harmoniously with other division heads and employees at the Deserado Mine.

Exh. C-3.

Gabossi testified that from November 12 to January 21, 1985, Upadhyay was "very cool, but civil" to him. Tr. 42. On January 21 (just 9 days before he was fired) Gabossi reported to Upadhyay that one of maintenance superintendent Beasley's crew was falsifying permissibility inspection logs. Id. Gabossi further testified that he had little communication with Upadhyay from January 21 to January 30, 1985, when he was discharged. Tr. 42-43.

Upadhyay testified that he had decided once again to seek permission from upper management to fire Gabossi after being informed on January 29, 1985, by maintenance superintendent Beasley that Beasley was leaving Western Fuels in part because of his inability to work with Gabossi. Tr. 485. Upadhyay additionally testified that inasmuch as he had lost maintenance superintendent Burnett and was about to lose Beasley because of Gabossi's poor attitude, he decided to seek Gabossi's termination to prevent his also losing the next maintenance superintendent. Tr. 486. Upadhyay then contacted senior management in Washington, D.C. and received permission from Ken Holum, the company's General Manager, to fire Gabossi. Id.

Gabossi and Upadhyay had another "heated argument" when Gabossi was given his termination notice on January 30, 1985. The termination notice reads in part:

Western Fuels-Utah, Inc. at the Deserado Mine needs to have employees who can act together as a team, especially now in view of our small workforce. Your efforts have not been directed towards that end. For this reason, your employment shall be terminated at Western Fuels-Utah, Inc. effective immediately.

Exh. C-2.

II.

Following Gabossi's discharged, the Secretary filed a discrimination complaint on his behalf with this independent Commission. The administrative law judge held in favor of Western Fuels and dismissed Gabossi's complaint. We granted the Secretary's petition for discretionary review of the judge's decision.

The judge below concluded that Gabossi had complained to Western Fuels management about the underground reporting structure because of his concerns over safety. 9 FMSHRC at 1504. The judge also concluded that Gabossi "was fired because of his continuing and extensive conflict with mine management over the company's failure to coordinate

underground mining activities." *Id.* Nevertheless, despite acknowledging that Gabossi's complaints concerning the company's underground reporting structure were "safety related," the judge held that those complaints were not protected under the Mine Act. 9 FMSHRC at 1505. The judge states that, "In short, [Gabossi's] unprotected activity, insofar as the federal Act is concerned, was his continual clash with management over the reporting structure." *Id.* The judge found that Gabossi's complaints were unprotected because neither the Mine Act nor the Department of Labor's Mine Safety and Health Administration's regulations contain a provision on a mine foreman's duties corresponding to section 32-24-101(2) of the Colorado Revised Statutes. 9 FMSHRC at 1505. See n. 2, *supra*. 3/

We hold that the judge erred in concluding that Gabossi's complaints to mine management regarding the Deserado Mine's underground reporting structure did not constitute activity protected under the Mine Act. In that regard, we note that the record amply supports the judge's determination that Gabossi's complaints to Western Fuels about the underground reporting structure were safety related. Gabossi testified that he had complained to Upadhyay about 10 to 15 times concerning the underground coordination problems between the production and the maintenance departments, but was told that maintenance was "none of his business." Tr. 22, 25-26, 143, 182. Gabossi was particularly concerned about ventilation changes made by the maintenance department which he believed could jeopardize the safety of the production crew. Tr. 21-22, 179-80.

Section 105(c)(1) of the Mine Act specifically prohibits discrimination against a miner who has "made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety and health violation." 30 U.S.C. § 815(c)(1) (emphasis added). The fact that Gabossi's safety concerns may have been related to the Colorado statute does not make his objections regarding the Deserado Mine's underground reporting structure any less a safety complaint under the Mine Act.

In light of our finding that Gabossi's complaints to mine management were protected under the Mine Act and in light of the judge's conclusion that Gabossi was fired because of his "continuing and extensive conflict with mine management over the company's failure to coordinate underground mining activities," the Secretary may have established a case of unlawful discrimination. Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (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

Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). It remains to be determined whether, on the basis of this record, Western Fuels successfully rebutted the Secretary's case or

3/ The judge, however, did find that Gabossi's contacting the Colorado Division of Mines and his presentation of State Inspector Emmons' letter to mine manager Upadhyay constituted activity protected under the Mine Act. 9 FMSHRC at 1505.

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affirmatively defended against it. *Pasula, supra*; *Robinette, supra*. See also, *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983). Accordingly, we remand this case for the judge to make additional findings of fact and to analyze those findings in accordance with applicable case law. Furthermore, to the extent appropriate for the disposition of this case, on remand the judge should consider the November 9, 1985 incident involving Gabossi and mine manager Upadhyay, Gabossi being placed on probation subsequently, and the events surrounding the discharge of Gabossi on January 30, 1985.

For the reasons set forth above, the judge's decision is reversed, the complaint of discrimination is reinstated, and the case is remanded for further proceedings consistent with this decision.