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AMOS HICKS V. COBRA MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 1, 1991

AMOS HICKS

v.

COBRA MINING, INC., JERRY K. LESTER, and CARTER MESSER — Docket No. VA 89-72-D

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arises from a complaint of retaliatory discharge by Amos Hicks against Cobra Mining, Inc. and certain of its officers filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Mine Act"). Hicks alleges that he was discharged on May 11, 1989, in retaliation for numerous and various safety complaints made to his section foreman, Garnett Sutherland, at Cobra's No. 1 Mine located in Shortt Gap, Virginia. After investigation of Hicks' charges, the Secretary filed a complaint with the Commission under section 105(c)(2) of the Mine Act.1/

1/ Section 105(c)(2) provides as follows:

> Any miner or applicant for employment or representative of miners 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. Upon receipt of such complaint, the Secretary shall forward a

copy of the complaint to the respondent
and shall cause such investigation to be made
as he deems appropriate. Such investigation
shall commence within 15 days of the Secretary's
receipt of the complaint, and if the Secretary
finds that such complaint was not frivolously
brought, the Commission, on an expedited basis
upon application of the Secretary, shall order
the immediate reinstatement of the miner pending
final order on the complaint. If upon such
investigation, the Secretary determines that
the provisions of this subsection have been
violated, he shall immediately

After a hearing on the merits was held on January 3, 1990, Commission Administrative Law Judge Avram Weisberger issued a March 22, 1990 decision in which he found that Hicks had established a prima facie case of discrimination, but that Hicks had not overcome Cobra's affirmative defense that it would have discharged Hicks in any event for certain unprotected activity. Accordingly, the judge dismissed the complaint. The Secretary elected not to continue representing Hicks, and Hicks filed, pro se., a petition for discretionary review, which the Commission granted by order issued May 1, 1990. For the reasons that follow, we vacate and remand the judge's decision.

I. Factual and Procedural Background

Amos Hicks is a miner with 15 years experience in the coal industry. In July of 1987 he was hired by Cobra Mining Company when Cobra took over the lease of the No. 1 Mine from Far West Coal Company, Hicks' employer since 1981. Tr. 13, 17. While Hicks was employed by Cobra, it was owned by Jerry Lester, Carl Messer and Charles Davis. David Payne held the position of mine superintendent. Garnett Sutherland was section foreman on the number one section where Hicks worked as a shuttle car operator on the day shift. Tr. 132-143, 305.

It is undisputed, and the judge so found, that during the nearly two years during which Hicks worked for Cobra prior to his discharge in May of 1989, he made frequent safety complaints to both Superintendent Payne and Foreman Sutherland. 12 FMSHRC 564-565. Hicks' complaints centered on four

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(footnote 1, cont'd)

> file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing; (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation

> as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner-applicant, or representative of miner may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

30 U.S.C. 815(c)(2).

specific areas:

(1) That temporary roof support was not always installed in advance of roof bolting in the No. 1 Mine. In particular Hicks complained that when the bolting crew encountered higher than usual roof not within reach of the automated temporary roof support (ATRS) system, they often proceeded to bolt rather than sending out for timbers and other shoring materials to supplement the undersized temporary roof jacks. Tr. 20, 24, 194, 250.

(2) That there was inadequate and poorly-designed ventilation in the face area resulting in section crew members being exposed to excessive levels of dust. This condition was exacerbated during a brief period in early 1989, when two continuous mining machines were being operated within the same split of air. Dust from the first continuous miner was being blown across to the crew members working on and around the second miner. Tr. 39-40, 203, 250.

(3) That when the designated mantrip (a mine car outfitted with skids and pulled by a scoop car) was unavailable, miners were transported in and out of the mine in the bucket of the scoop. Because of overcrowding, there was a danger, in the event the scoop and bucket bounced up against the roof, of being bounced out of the bucket or being pinned against the roof. Tr. 11, 33, 35, 200, 255.

(4) That loose roof existed throughout the mine, particularly along travelways, and was allowed to remain uncorrected even after Hicks' complaints. Tr. 26-30, 140, 198, 252-253.

It was Hicks' contention, supported by other testimony, that Superintendent Payne was generally responsive to his complaints but that Foreman Sutherland was not so responsive, particularly with respect to loose roof conditions. Tr. 43, 103, 227-228, 232.

On the day of his discharge, May 11, 1989, 2/ Hicks and Douglas Lester were assigned to shuttle cars in the No. 1 section. At about 10:00 a.m., the continuous miner on the section broke down and Sutherland told Hicks and Lester to go to lunch while the machine was being repaired. The two miners travelled about 200 feet to the feeder area of the belt line to eat.

2/ The judge's decision indicates that the discharge occurred on May 10, 1989, 12 FMSHRC 567, but it appears that Thursday, May 11, 1989 was the correct date. Tr. 18, 258. The error apparently arose from Hicks' own confusion over days and dates during the week of May 7, 1989. Tr. 50, 79.

12 FMSHRC 567; Tr. 51, 258.

Testimony as to the ensuing sequence and timing of events is somewhat at odds. It is agreed, however, that once the continuous miner was repaired. Sutherland walked back to the feeder area and told Hicks and Lester that they should get back to work. Hicks complained that they had not had enough time to eat, that Sutherland should be "ashamed" of himself and that Hicks hoped Sutherland "would prosper [or profit] from this." Sutherland replied that he wouldn't prosper but the "company might." Tr. 52-53, 120-121, 259.

According to Sutherland, Hicks jumped up, threw out the remainder of his coffee and said, "well, kiss my ass." Tr. 260. Hicks admits that he made the statement but not until he had returned to his shuttle car and had started driving back to the face area. Tr. 53, 352. Hicks' version is corroborated by Douglas Lester. Tr. 229. In any event, Sutherland then told Hicks to "get [his] bucket and go to the outside" and arranged for Hicks' transportation out of the mine. Tr. 54, 260.

Hicks returned to the mine the following morning, Friday, May 12, 1989, and met with Payne and Sutherland. Payne asked Sutherland why he had fired Hicks and Sutherland replied that Hicks had "bad-mouthed" him. Payne indicated that it was Sutherland's decision whether to discharge Hicks or allow him back into the mine, and Sutherland stood by his decision of the previous day. 12 FMSHRC 567; Tr. 179. Sometime later co-owner Messer arrived and spoke briefly with Payne and Hicks. He asked Hicks what had happened and Hicks told him that he'd been fired. Messer stated that he would stand behind Sutherland's decision. Tr. 58, 308. On the following day, Saturday May 13, 1989, Payne and Sutherland met with co-owner Jerry Lester, who also decided to let Sutherland's decision stand. Tr. 154, 329, 331.

Payne visited Hicks at his home that evening and informed him of Jerry Lester's decision to uphold the discharge. Hicks and Payne then prepared a list of hazardous and/or violative conditions that they alleged to exist in the No. 1 Mine, and on Monday, May 15, 1989, Hicks visited the local MSHA office and filed his section 105(c) complaint. Tr. 50, 77-81, 181-182.

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Mine Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary o.b.o. 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 o.b.o. Robinette

v. United Castle Coal Company, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra: Robinette supra. See also, e.g., 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) (specifically approving the Commission's Pasula-Robinette test).

Applying the Pasula-Robinette test to the instant case, the judge determined that Hicks had engaged in protected activity by complaining directly to Sutherland (and to some extent Payne) about loose rock, improper ventilation, inadequate jack supports and riding in the bucket of the scoop. The judge further found that Hicks had obviously been adversely affected by being discharged by Sutherland on May 11, 1989. 12 FMSHRC at 565.

In order to determine whether a retaliatory motive existed between the protected activity and the discharge, the judge went on to make findings regarding the proximity in time between Hicks' various complaints and the date of his discharge. With respect to Hicks' complaint about inadequate jack supports, the judge credited Hicks' "uncontradicted direct testimony that a week before his discharge, he had complained to Sutherland about the failure to use safety jacks." 12 FMSHRC at 566.

As to the other complaints, however, the judge found that "[t]he weight of evidence fails to establish that the balance of Hicks' complaints were made within close proximity to his discharge." Id. Specifically, he determined that the complaint about loose rock appeared to have occurred a month before the discharge; that Hicks' testimony that he complained about ventilation a week before his discharge was not corroborated by his responses to interrogatories; and that Hicks' testimony that he complained about riding in the scoop bucket in April or May was not corroborated by his own witnesses and was contradicted by Sutherland, who testified that the complaint was made several months before the discharge.

Nevertheless, from his findings that Hicks had complained about the safety jacks within a week before the discharge and that Sutherland "got mad on occasion" in response to Hicks' complaints, the judge concluded that "there is some evidence to support a finding that the firing of Hicks by Sutherland was based, in some part, on the safety complaints that Hicks had made." 12 FMSHRC at 567.

The judge went on to hold, however, that Cobra had affirmatively defended against Hicks' prima facia case of discrimination by proving that Sutherland (and Cobra) were motivated by Hicks' insubordinate swearing and would have discharged him for that unprotected activity alone. In arriving at that conclusion the judge determined that Messer and Jerry Lester, the co-owners who endorsed Sutherland's firing of Hicks, were not aware of Hicks' safety complaints; that Superintendent Payne expressed no displeasure with

Hicks' complaints; that Hicks did not indicate that Sutherland manifested any displeasure in response to his complaints regarding loose rock in the travelway in the days preceding the discharge; 3/ that there was some evidence that Hicks had made "smart remarks" to Sutherland in the months prior to his discharge when he was asked to perform tasks; and that Hicks' discharge for swearing had a precedent in that Mary Lou Ray, a member of the bolting crew,

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3/ The record does not support this finding as will be discussed infra.

had been fired by Sutherland when she swore at him during an argument underground. 12 FMSHRC at 567-568.

Based on these determinations of fact, the judge then concluded that "due to the nature of the words spoken by Hicks to Sutherland, his foreman, and the manner in which they were spoken, I find that a valid business reason existed for the firing of Hicks," and that Sutherland found Hicks "deserving of being fired ... for the manner in which he [Hicks] talked to him [Sutherland], and that he would have fired him for this action in any event." 12 FMSHRC at 568. Having found that Cobra had established an affirmative defense with respect to Hicks' unprotected activity, the judge dismissed Hicks' complaint.

II. Disposition of Issues

A. Timing of Hicks' Complaints

On review, Hicks argues essentially that substantial evidence does not support certain findings of fact that were material to the judge's ultimate holding against him. Hicks first takes issue with the judge's conclusion that, except for the complaint regarding lack of safety jacks, none of the complaints was made in close proximity to the time of Hicks' discharge. For instance, the judge found that Hicks' witnesses did not corroborate Hicks' testimony that he had complained about loose roof in the travelway two days before his discharge, but Hicks notes that Mary Lou Ray testified that Hicks did complain about loose roof while travelling in and out of the mine and that such complaints occurred two or three times a week. Tr. 198. Hicks argues that, while Ray's testimony was not precisely corroborative, it is nonetheless supportive of his testimony.

Perhaps Hicks' most significant assignment of error relates to one of the judge's findings with respect to Cobra's affirmative defense. At 12 FMSHRC at 568 the judge states:

> I find that at least a week elapsed between Hicks' complaint about jacks and loose rock, and his being fired. It is significant that Hicks did not indicate that Sutherland manifested any displeasure or anger at the complaint he (Hicks) had made about loose rock on May 8, 2 days (sic) before he was fired. 4/

Hicks points out that he did indicate in his direct testimony that

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4/ The judge's decision contains apparent inconsistencies regarding the timing of Hicks' complaints about loose roof in the travelway. The judge

appears to reject Hicks' contention that he made the complaint two days before his discharge, apparently accepting Sutherland's contention that the complaint was made a month before the discharge. 12 FMSHRC at 566. However, in the passage quoted above, the judge finds that "at least a week elapsed between Hicks' complaint about jacks and loose rock, and his being fired" but then appears to credit Hicks' testimony that the complaint was made two days before the discharge.

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Sutherland manifested displeasure and anger in response to Hicks' complaint about loose rock:

By Mr. Loos:

Q. Do you remember any specific instances that you complained about loose roof to anyone from Cobra management?

A. Yes, sir. I believe it was on May 8.

Q. May 8?

Judge Weisberger: Of what year, sir?

The Witness: '89

By Mr. Loos:

Q. And to whom did you complain then?

A. Garnett Sutherland.

Q. And what happened?

A. He told me to get out, he stopped. He flagged the man trip off, told me to get out and pull it.

Q. And then what?

A. Then I got back in the car and went on to the section. But that had been about a month I had tried to get them to stop to pull that one specific piece of rock and he wouldn't. That morning he got mad and said. "well, go ahead and pull it."

Q. Now, when you say Mr. Sutherland got mad when you complained, what do you mean? Could you describe his reaction?

A. He just got furious. I mean, I don't really .. I can't really describe it.

Q. How could you tell .. did he act a certain way or did he--say anything?

A. Yeah. He acted a certain way. I mean, he cussed and mumbled around there a little bit, but I don't know exactly what all he said.

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Tr. 27-30.

Hicks argues that the loose rock complaint and the ensuing tension between Hicks and Sutherland over its removal on May 8, 1989, were the principal motivating factors in Hicks' subsequent discharge, and that the swearing episode was invoked as a pretext for the retaliatory action taken on May 11, 1989.

Cobra argues that this case turns substantially on the judge's determinations of witness credibility, which determinations, absent clear error, should be sustained on review. Cobra cites a lack of evidence to show operator hostility toward Hicks for his safety complaints, a lack of coincidence in time between his complaints and the action taken against him, and a lack of evidence to show that Hicks was treated disparately with respect to his insubordinate swearing. In sum, Cobra argues that the judge's dismissal of the complaint is supported by the evidence and should not be reversed.

The Commission in previous rulings has acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect ... 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" Secretary o.b.o. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983 quoting NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965).

In Chacon, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC 2510. With respect to the first indicium, there is no dispute; Cobra and, in particular, Sutherland admit knowledge of Hicks' various safety complaints with respect to the four categories set forth above at pp. 2-3. With respect to the second indicium, the judge found that Sutherland "got mad on occasion, when presented with Hicks' complaints", 12 FMSHRC at 567. (As indicated above, however, the judge found, erroneously, that Hicks offered no testimony that Sutherland reacted with "displeasure or anger" to the specific complaint about loose rock that Hicks claimed he made on May 8, 1989 (12 FMSHRC at 568).

It is with respect to the third and fourth indicia that questions

arise in this case. The judge concluded that Hicks had satisfied the elements necessary to establish a prima facie case of discrimination, but only with respect to his complaints about the safety jacks. 12 FMSHRC at 567. The judge considered the other complaints too far removed in time to have motivated Sutherland's decision to discharge Hicks. As shown in note 4, supra, however, the judge's decision regarding Hicks' complaints of loose rock in the travelway is inconsistent. He discounts those complaints as a motivational factor in one instance (12 FMSHRC at 566) but later relies on them in conjunction with the safety jacks complaint.

The judge appears to have applied an overly narrow standard for recognizing proximity between the time of a complaint and the adverse action. In Chacon, for example, complaints ranging from four days to one and one-half months before the adverse action were deemed sufficiently coincidental in time to indicate illegal motive. 3 FMSHRC at 2511. In Stafford Construction, the D.C. Circuit Court of Appeals, noting that two weeks had elapsed between the alleged protected activity and the miner's dismissal, held that "[t]he fact that the Company's adverse action against [the miner] so closely followed the protected activity is itself evidence of an illicit motive." 732 F.2d at 960. See also Everett v. Industrial Garnet Extractives, 6 FMSHRC 1306, 1310 (June 1984)(ALJ Broderick), pet. for disc. rev. denied, June 23, 1984.

The Commission applies no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time. Nevertheless, we find that the judge erred in assessing Hicks' prima facie case by adhering to an overly restrictive time frame in deciding whether certain of Hicks' complaints were "within close proximity to his discharge." 12 FMSHRC 566-67.

Furthermore, it was error for the judge, in assessing retaliatory motives, to have considered each of the four areas of complaint (safety jacks, loose rock, ventilation and riding in the scoop bucket) in isolation, determining in each instance how proximate in time the complaint was to the May 11, 1989, discharge. Under the circumstances it would have been appropriate to consider the complaints as a whole in order to establish whether a pattern of protected conduct existed that might have provided sufficient motivation for the May 11, 1989, discharge.

Accordingly, we vacate the judge's determination that Hicks had established a prima facie case only with respect to his complaints about the safety jacks. On remand, the judge is directed to reconsider, in light of the principles expressed in Chacon and Stafford Construction, all areas of Hicks' complaints as motivating factors in Hicks' discharge. In the event that the judge continues to discount Hicks' complaints about poor ventilation, the judge is directed to explain the bases for that conclusion. The judge indicates that Hicks' hearing testimony regarding the timing of those complaints is not corroborated by his answers to interrogatories filed two and one-half months before the hearing. 12 FMSHRC at 566. Without further elaboration, however, it is unclear whether the judge was determining the weight to be given Hicks' hearing testimony or whether he was making a credibility finding adverse to Hicks.

B. Cobra's Affirmative Defense

The Commission set forth the general principles for evaluating an operator's affirmative defense under the Pasula-Robinette test in Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1983):

> The operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate

> this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

4 FMSHRC at 993.

Resolution of any factual issues according to the above principles will also bear on issues surrounding disparate treatment, the fourth indicium of discriminatory intent set forth in Chacon, supra. In Secretary o.b.o. John Cooley v. Ottawa Silica Corp., 6 FMSHRC 516, 520-21, the general principles of Bradley (set forth above) were tailored specifically to situations involving the use of profanity. In Cooley the Commission held that profanity is "opprobrious conduct" and is not protected under the Mine Act. We further held that when an operator asserts such unprotected conduct in its affirmative defense, the proper course is to envision whether the adverse action would have been taken in the absence of any protected activity. The Commission then weighed certain factors for determining whether the opprobrious conduct, in and of itself, was grounds for dismissal: Had there been previous disputes with the miner involving profanity. Had anyone ever been discharged or otherwise disciplined for profanity. Was there a company policy prohibiting swearing, either generally or at a supervisor. Finding a negative answer to each question, the Commission, in Cooley, rejected the operator's affirmative defense.

In this case there is corroborated testimony that swearing was a common occurrence in Cobra's No. 1 Mine and that some of it was directed by hourly employees at supervisors. Tr. 66-67, 155, 205-206, 261, 273. The judge found that swearing was a common practice. He credited Sutherland's testimony, however, that there was a difference between swearing in a jocular manner and swearing in a serious manner. 12 FMSHRC at 567.

The judge further found that Hicks' discharge for swearing was not pretextual because Sutherland had previously fired Ray for swearing. The judge's reliance upon the Ray discharge needs to be explained further. First, the record discloses that Ray's discharge was quickly rescinded on the instructions of Payne. 5/ Second, the Ray incident could also be viewed as an aberration rather than as a precedent in support of the adverse action taken against Hicks. Given the context of widespread use of profanity in

the No. 1 Mine, the severe disciplinary action taken against both Ray and Hicks could be viewed as disparate treatment insofar as swearing was neither prohibited nor,

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5/ Sutherland testified that he rescinded the Ray firing because Payne threatened to fire Sutherland if he didn't. Tr. 264-265.

apparently, discouraged. 6

The judge does, in fact, place emphasis on the "manner" in which the fateful words were spoken ... seriously as opposed to jokingly ... but did not resolve the dispute over the context within which the exchange in question took place. Did Hicks make the statement while in the process of defying Sutherland's order to return to work, as Sutherland testified: or did Hicks make the statement after he had already boarded his shuttle car and had started back to the face, as Hicks and Douglas Lester testified? Sutherland testified that both the swearing and Hicks' refusal to comply with the order to return to work motivated the discharge. Tr. 273. The judge did not resolve the conflicting testimonies of Hicks, Douglas Lester, and Sutherland on this factual issue and should do so on remand.

As this Commission has often stated, it is bound by the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. 823(d)(2)(A)(ii)(I). This was succinctly stated in Donald F. Denu v. Amax Coal Co., 12 FMSHRC 602 (April 1980):

> "Substantial evidence means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. Consolidation Edison Co v. NLRB, 305 U.S. 197, 229 (1938). Nevertheless, 'substantiality of evidence must take into account whatever in the record fairly detracts from its weight.' Universal Camera v. NLRB, 340 U.S. 474, 488 (1951)." Id. at 610.

Until the judge resolves the factual issues discussed above, we are unable to determine, at this stage, whether substantial evidence supports the judge's conclusion that Hicks' statement warranted discharge in any event. This is particularly true in view of the testimony as to widespread use of profanity in Cobra's No. 1 mine, management's general tolerance of that profanity, and the lack of discipline meted out to Hicks for an earlier incident of profanity (see n.6, supra). The judge is therefore directed to re-evaluate Cobra's affirmative defense in terms of the criteria set forth in Bradley and Cooley, and in light of the discussion above.

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6/ Although the judge did not reference it, Sutherland testified to an earlier incident when Hicks directed an obscene comment to him. Rather than disciplining Hicks, Sutherland "shrugged it off." Tr. 271-72.

III. Conclusion

Accordingly, we vacate the Judge's decision and remand this matter for further proceedings consistent with this opinion.

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