

CCASE:
PARKS V. L & M COAL
DDATE: 19801027
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC

October 27, 1980

JACK W. PARKS

v. Docket No. NORT 75-377
IBMA No. 77-65

L & M COAL CORPORATION

DECISION

The question here is whether the L & M Coal Corporation discharged Jack W. Parks in violation of section 110(b)(1) of the Federal Coal Mine Health Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). 1/ The administrative law judge held that L & M had unlawfully discharged Parks for making a safety complaint to the Mining Enforcement and Safety Administration (MESA), and for refusing, in good faith, to work under mine roof that was unsafe, or believed by the miners to be unsafe. The judge ordered L & M to reinstate Parks. The judge also awarded Parks back pay, to be computed from the date of discharge to the date of reinstatement, 2/ together with interest at a rate of six per cent per year, and litigation expenses that included reasonably incurred attorneys' fees. L & M appealed the judge's finding of a violation of section 110(b)(1), as well as the order of reinstatement and awards of back pay and attorneys' fees. L & M did not appeal the judge's award of interest. 3/

1/ Section 110(b)(1) provided:

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 Act, or (C) has testified or is about to testify in any proceeding resulting from

the administration or enforcement of the provisions of this Act.

2/ The judge's order of relief allowed L & M to deduct from the back pay award all wages that Parks earned from other employment during the period covered by the order.

3/ The original decision in this case was appealed to the Interior Department's Board of Mine Operations Appeals in July, 1976. The Board did not decide the discriminatory discharge issue. Rather, it set aside the judge's decision on procedural grounds and remanded the case for reassignment and retrial. Subsequently, Administrative Law Judge Broderick decided this case on November 9, 1977. An appeal was filed with the Board and was pending on the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979)("the 1977 Mine Act"). It is before the Commission pursuant to section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §961 (Supp. III 1979). This case, however, presents no issue under the 1977 Mine Act.

~2816

Upon careful examination of the record, we affirm the judge's holding that Parks was unlawfully discharged. We also affirm the judge's order of relief. Our discussion of the case follows. 4/

Parks was hired by L & M as a timber setter in April of 1974. Shortly thereafter, he was elected to the union position of mine safety committeeman at the mine. As a mine safety committeeman, Parks was active in bringing the safety concerns of the miners to the attention of L & M management personnel. In February of 1975, a fatal accident involving a roof fall occurred at L & M's mine. Although Parks was out of work on sick leave at the time, he participated in part of the MESA roof fall investigation in his capacity as a mine safety committeeman. As a result of that investigation, MESA required L & M to adopt a stricter roof control plan. The new roof control plan called for full roof bolting in place of the spot roof bolting (i.e., the timber setting method) that was being employed by L & M when the accident occurred. The new roof control plan increased L & M's cost of producing coal considerably.

The mine remained closed from the time of the February 1975 roof fall to mid-March of that year. From mid-March to early May of 1975, only maintenance work was performed at the mine. On Friday, May 2, 1975, at about the time that L & M resumed coal production, L & M's mine superintendent left a message at Parks' home informing him to report back to work on the following Monday.

Later that evening, on Friday, May 2nd, a walkout occurred at the mine. Several miners walked off the job claiming that W. L. Lanningham, a co-owner of L & M, did not intend to fully roof bolt in accordance with the newly approved roof control plan. Following that walkout, some of the miners involved reported the incident to Parks. On Monday, May 5th, Parks called L & M and informed management that he would not report for work until the roof control plan was followed. In addition, Parks may have also told management that he would not be reporting for work because he was sick. Later that day, Monday, May 5th, Parks and the miners who had walked off the job on the previous Friday met with W. L. Lanningham at the mine. During that meeting, Lanningham told Parks and the other miners that L & M would not follow its approved roof control plan because it was too costly to fully roof bolt and still make a profit. In response, Parks informed Lanningham that he would contact MESA if L & M did not comply with its approved roof control plan.

The next morning, Tuesday, May 6th, Parks called L & M and stated that he would not be reporting for work until L & M complied with its

roof control plan by fully roof bolting. After Parks' call, at approximately 8:20 a.m. that morning, MESA and Virginia state mine inspectors arrived at the mine to conduct an inspection of the mine roof. The

4/ The facts recited were found by the judge. Our review of the record convinces us that his findings are supported by substantial evidence of record and should not be disturbed.

~2817

inspectors informed L & M management personnel that they were conducting the inspection in response to a phone call by a "representative of the miners" who alleged that L & M was not following its approved roof control plan. Although the inspectors found that L & M was at that time in compliance with its roof control plan, they issued several citations for unrelated violations. A copy of the MESA inspection report, dated May 8, 1975, was mailed to Parks and was received by him on May 12th.

In the meantime, on Wednesday, May 7th, two days after the meeting between W. L. Lanningham, Parks and the miners involved in the May 2nd walkout in which Lanningham informed the miners that L & M would not fully roof bolt, and one day after the MESA and Virginia state inspection of the mine roof, W. L. Lanningham drew up and signed Parks' notice of suspension. The notice of suspension read:

Due to your refusal to perform your duties as a faceman ... and help in correcting any hazardous conditions which may occur but at the present time does not exist and due to your call on May 6, 1975, 7:30 a.m. informing the load operator that you would not work ... until the hazardous conditions were corrected but at the time of your call no hazardous conditions had been observed by federal and state inspection. [5/]

Due to these facts a five day suspension is in effect and you may be subject to discharge pending an investigation of these facts.

On Friday, May 9th, Parks was given the notice of suspension and a layoff slip. As of that date, Parks had still not reported for work. Parks was discharged by L & M on May 19, 1975.

Parks instituted this proceeding claiming that his suspension and subsequent discharge were motivated by protected safety activity and, therefore, violated section 110(b)(1) of the Federal Coal Mine Health and Safety Act of 1969. After an extensive evidentiary hearing, the judge found that "Parks' call to MESA and the inspection the following day are established as a motive for [L & M's] suspension and discharge of [Parks]", that Parks "had cause to believe, in good faith, that [L & M] did not intend to bolt every 12 feet in accordance with the plan" and that "these facts constituted sufficient justification for

[Parks'] refusal to work during the week of May 5." The judge concluded that L & M's retaliatory action in suspending and eventually discharging Parks violated section 110(a). We agree. In light of the facts set

5/ Parks notified L & M that he would not be reporting for work before the inspectors conducted their inspection of the mine roof, not afterwards as the notice of suspension indicates.

~2818

out in this opinion, we hold that L & M violated section 110(b)(1) in suspending and discharging Parks. We further hold that reinstatement, back pay and attorneys' fees are proper remedies under section 110(b)(2) of the 1969 Coal Act, and that the judge's remedial order is appropriate in view of the facts of this case. 6/ Accordingly, the judge's decision is affirmed. 7/

6/ Section 110(b)(2) in part provided:

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, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay. [Emphasis added.]

7/ We also affirm the judge's holdings with respect to two procedural matters. First, the judge properly denied L & M's motion to dismiss the Secretary of the Interior's amicus curiae brief. L & M had alleged that a decision by another Commission judge that was attached to the brief and that involved a civil penalty proceeding stemming from the February 1975 roof fall at L & M's mine constituted extra-record evidence. In denying L & M's motion to dismiss, the judge here stated that with respect to the Secretary's brief, he was "not considering such matters as evidence." Furthermore, the facts established in this case clearly support the judge's finding of a discriminatory discharge. With respect to the second alleged procedural error, for the reasons stated by the judge, we hold that he did not err in refusing to receive into evidence certain portions of a transcript of an arbitration hearing.

~2819

Distribution

Eugene E. Lohman, Esq.
2672 Lee Highway
Bristol, Virginia 24201

Peter Mitchell, Esq.
United Mine Workers of America
900 15th Street, N.W.
Washington, D.C. 20005

Thomas A. Mascolino, Esq.
Cynthia L. Attwood, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Chief Administrative Law Judge
James A. Broderick
FMSHRC
1730 K Street, N.W.
Washington, D.C. 20006