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MSHA V. SUGARTREE, TERCO & RANDAL LAWSON
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FMSHRC-WDC
March 30, 1987

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JAMES CORBIN,
ROBERT CORBIN, and A.C. TAYLOR

v.

Docket No. KENT 84-255-D

SUGARTREE CORPORATION,
TERCO, INC., and RANDAL LAWSON

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

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). 1/ Terco, Inc. ("Terco"), seeks review of a decision by Commission Administrative Law Judge Gary Melick finding Terco, as successor to Sugartree Corporation ("Sugartree"), liable for back pay and other costs determined to be due as a result of Sugartree's

1/ Section 105(c)(1) of the Mine Act states in pertinent part:

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 health violation in a coal or other mine ..., 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).

discriminatory discharge of the complainants. 8 FMSHRC 206 (February 1986)(and appendices)(ALJ). For the reasons set forth below, we affirm.

Sugartree was owned by Randal Lawson, who was also its president. In July 1984, Sugartree operated the Sugartree No. 1 coal mine in Knox County, Kentucky. On the last workday prior to the July 4, 1984 holiday, and again on July 5, 1984, Sugartree miners James Corbin, Robert Corbin, and A.C. Taylor complained to their section foreman and to mine foreman Joe Watkins that malfunctioning watersprays on the continuous mining machine were creating a severe dust and ventilation hazard in the section where the miners were working. On July 5, 1984, after unsuccessful repair efforts, Watkins ordered the crew of seven or eight miners to continue working, but the entire crew left the mine rather than work under the existing dusty conditions. The crew returned to work the next day and, at the end of their shift, Watkins issued to the Corbins and Taylor lay-off slips that attributed dismissal "to the sharp decline in production during the last several weeks." No other miners were laid off. Lawson testified that he had picked these three miners for lay off because "they were the ones that [were] complaining...." Tr. 406. 2/

On July 12, 1984, the three miners filed complaints of discriminatory discharge with MSHA. 30 U.S.C. § 815(c)(2). Shortly thereafter, in July 1984, Sugartree ceased mining operations and Terco began mining at the same mine. On September 15, 1984, Terco, pursuant to 30 C.F.R. Part 41, submitted to MSHA a legal identity report for the "Terco No. 2 Mine" that bore the same mine I.D. number as the Sugartree No. 1 Mine. The report listed Randal Lawson as president of Terco.

On September 25, 1984, the Secretary of Labor filed with the Commission applications for the temporary reinstatement of the complainants. 30 U.S.C. § 815(c)(2); 29 C.F.R. § 2700.44 (1984). Two days later Commission Chief Administrative Law Judge Paul Merlin issued orders of temporary reinstatement directed to Sugartree. Shortly after receiving copies of Judge Merlin's order, the two Corbins went to the mine to be reinstated but were informed that they would have to apply to Terco for employment. On October 3, 1984, the Secretary moved to amend the reinstatement orders by including Randal Lawson and Terco as parties. However, no further action concerning temporary reinstatement was taken pending determination of Terco's liability. A subsequent legal identity report for Terco and the Terco No. 2 mine, submitted on February 2,

1985, listed Terry McCreary as president and Carol McCreary as secretary. Both McCrearys had served previously as officers of Sugartree, Terry McCreary as vice-president and Carol McCreary as secretary-treasurer.

2/ On July 10, 1984, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted a ventilation inspection at Sugartree No. 1 mine and issued to Sugartree two citations, one of which alleged that the water pressure in the continuous miner's spray system was lower than required by the mine's ventilation plan.

On December 27, 1984, the Secretary filed a discrimination complaint against Sugartree on behalf of the three complainants. 30 U.S.C. § 815(c)(2). In April 1985, following prehearing discovery, Judge Melick permitted the Secretary to amend the complaint to add Lawson and Terco as respondents.

After a hearing on the merits, the judge concluded that the complainants had been discharged from their jobs in violation of section 105(c)(1) of the Mine Act. In reaching this conclusion, the judge found that the complainants had made protected safety complaints regarding both the defective water spray on the continuous mining machine and the unhealthy dust conditions in the working section of the mine and had engaged in a protected work refusal. 8 FMSHRC at 209-12. He further determined that the complainants were laid off permanently, i.e., discharged "based solely on their protected safety complaints and/or their refusal to work in the face of clearly hazardous conditions." 8 FMSHRC at 211-12. The judge found that Randal Lawson, as an individual, and Sugartree, for which Lawson was an agent, were responsible for the unlawful discharges and, consequently, were liable for violating complainants' rights under the Mine Act. 8 FMSHRC at 212. The judge further determined that Terco was Sugartree's successor and, as such, was jointly and severally liable for remedying the illegal discrimination. 8 FMSHRC at 212-14. The judge assessed a \$1,000 civil penalty against Sugartree, Terco, and Lawson for the violation of section 105(c)(1), ordered them to pay approximately \$35,000 in back pay and interest to each of the complainants, and directed Terco to reinstate immediately the complainants either to the same positions held at the time of their illegal discharges or to comparable positions. 8 FMSHRC at 206-07, 214-15. 3/

3/ Terco thereafter reinstated the Corbins. Complainant Taylor waived reinstatement because he had obtained other employment. On July 23, 1986, the Secretary filed new discrimination complaints on behalf of the Corbins, alleging that they had again been discharged illegally by Terco. FMSHRC Docket Nos. KENT 86-131-D & 86-132-D. The cases were assigned to Judge Melick and ultimately became the subject of a settlement agreement between the Secretary and Terco, under the terms of which Terco agreed to pay the Corbins \$50,000 damages and the Corbins agreed to waive any right to reinstatement by Terco. The Secretary agreed to "forego any enforcement action on behalf of the Corbins" in the instant proceeding. However, the settlement agreement also stated that in this present proceeding the Secretary would "take all action necessary to enforce the award on behalf of A.C. Taylor," who was not a party to the agreement. Based

on the settlement, Judge Melick allowed the Secretary to withdraw the new discrimination complaints and dismissed those proceedings. 9 FMSHRC 24 (January 1987)(ALJ). The Secretary then moved the Commission to vacate that portion of the Commission's direction for review in the pending proceeding pertaining to liability and remedial issues affecting the Corbins. We granted the motion, but emphasized that all liability issues (including the question of successorship) and all personal remedy issues insofar as they affect ... A.C. Taylor, remain for decision." 9 FMSHRC 197, slip op. at 2 (February 10, 1987).

Terco was the sole respondent to seek review of the judge's final decision. Terco has raised no question on appeal regarding the validity of the judge's findings of unlawful discrimination or the responsibility of Lawson and Sugartree for the violation. The sole question before us concerns the derivative liability of Sugartree's alleged successor, Terco.

To determine whether Terco was liable for the damages stemming from Sugartree's discrimination, the judge applied the successorship doctrine enunciated by the Commission in *Glenn Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (December 1980), *aff'd* in relevant part, *rev'd* in part on other grounds *sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 851 (1983), and analyzed the case according to the nine factors set forth in *Munsey* (see 2 FMSHRC at 3465-66) for determining successorship status. 8 FMSHRC at 212-14. In particular, the judge found as follows: Terco had notice of the charges of discrimination; Sugartree could not provide remedial relief to the complainants; and a substantial continuity of business operations was maintained from Sugartree to Terco. 8 FMSHRC at 213-14. On the basis of these findings the judge concluded: "Terco was a successor business entity [to Sugartree] and accordingly is jointly and severally liable for [Sugartree's] illegal acts of discrimination in this case." 8 FMSHRC at 214.

In *Munsey*, this Commission noted that the statutory protection against discrimination afforded miners is similar to the statutory protection afforded workers under other labor statutes. The Commission stated: "In certain circumstances, the protections of those other statutes have been construed to include the liability of bona fide purchasers and other successors for their predecessors' act of discrimination ... and ... in appropriate cases the successorship doctrine should also be applied [by the Commission]...." 2 FMSHRC at 3465. Although *Munsey* was decided under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976)(amended 1977) ("Coal Act"), the predecessor to the Mine Act, the discrimination protections afforded miners under the Mine Act are even greater than those afforded miners under the Coal Act, and the successorship doctrine clearly applies under the Mine Act as well.

In determining whether a successor should be required to remedy unlawful discrimination, consideration of a variety of relevant liability and economic factors is appropriate. In *Munsey*, the Commission approved for consideration nine such factors:

- (1) whether the successor company had notice of

the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the

same machinery, equipment and methods of production and (9) whether he produces the same products.

2 FMSHRC at 3465-66 (restating factors set forth in *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974)). These and similar factors have been applied under both the Civil Rights Act of 1964 (e.g., *MacMillan Bloedel*, supra) and the National Labor Relations Act (e.g., *NLRB v. Winco Petroleum Co.*, 668 F.2d 973, 976-78 (8th Cir. 1982)).

The first two factors considered by the judge were whether Terco had notice of the complainants' charges when it acquired Sugartree's business operations and whether Sugartree was able to provide relief to the complainants. Substantial evidence supports the judge's findings that Terco's Knowledge of complainants' charges may be inferred reasonably and that Sugartree was unable to provide relief. Legal identity forms submitted by Sugartree in July 1984 and by Terco in September 1984 listed Randal Lawson as president and Carol McCreary as secretary-treasurer of both companies. The complainants filed their complaint of discrimination with MSHA on July 12, 1984, and MSHA's investigation of the complaint followed. We agree with the judge that the existence of identical corporate officers during this period is evidence that Terco had notice of the complainants' charges, particularly where, as here, Lawson, by his own admission, discharged the complainants for an illegal reason. Terco cannot be heard to say that it lacked notice of potential liability arising from the illegal actions of its president at the time it succeeded to Sugartree's mining operation. As to the ability of Sugartree to provide relief, it is clear from the record that Sugartree ceased business activity and that its assets were sold to satisfy Lawson's personal debts. Tr. 432. Under these circumstances, complainants could not obtain reinstatement or monetary damages from Sugartree.

The seven other factors discussed in *Munsey* provide a framework for analyzing the crucial question of whether there was a continuity of business operations and work force between the successor and its predecessor. Here, the judge found that a substantial continuity in business operations was maintained from Sugartree to Terco, and the evidence substantiates this finding. A comparison of the payroll records of Sugartree and Terco indicates that of the fifteen employees hired by Terco in July 1984 for the Terco No. 2 mine (formerly the subject Sugartree mine), approximately thirteen were employed formerly by Sugartree. Ex. P-27; Tr. 488-491. Terco admits that approximately 50% of its total work force is composed of former Sugartree employees. T. Br. 3. Further, Terco continued to mine coal at the same mine and

Sugartree's mine superintendent and section foreman remained with Terco. Although Terco made some changes in its mining methods and equipment, these changes were dictated primarily by the requirements of mining engineering and not by any substantial change in its business operation. Moreover, no change in personnel was required to effect these changes. Under these circumstances, we conclude that the judge properly found that there was a substantial continuity in business operations between Sugartree and Terco.

Terco, citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), argues that only a successor who purchases the assets and stock of its predecessor with knowledge of the charges of discrimination may be held liable for remedy of the predecessor's illegal acts. Terco asserts that it did not make such a purchase but rather merely acquired Sugartree's coal leases. We reject this narrow reading of the principles of successorship law. *Golden State* does not hold that the purchase of the assets or stock of the predecessor by the successor is necessarily the determinative factor in establishing successorship. Rather, the Court merely emphasized that in cases like *Golden State*, which involve a bona fide purchaser, the successor may protect itself in the purchase arrangement against any potential liability. 414 U.S. 172-74. Purchase of the assets or stock of the predecessor undoubtedly should be weighed in the mix of successorship factors when it is present. However, its absence does not negate a finding of successorship liability. As the Court recognized, successorship transactions may assume many forms and liability may obtain in a number of business contexts. 414 U.S. at 182-83 n. 5. See also *Munsey*, 2 FMSHRC at 3465.

Accordingly, we affirm the judge's decision and, in particular, his finding that Terco is a successor business entity to Sugartree jointly and severally liable for remedying the illegal acts of discrimination committed by Sugartree and Lawson. In light of the settlement agreement discussed above and the Commission's prior order vacating that portion of the direction for review in this case pertaining to the Corbins (n. 3 supra), Sugartree, Terco and Lawson are directed to immediately comply with that portion of the judge's order directing payment of monetary damages to A.C. Taylor.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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