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ADKINS AND HUNT
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
October 23, 1980

TAYLOR ADKINS AND FRED HUNT,
Applicants

v. Docket No. PIKE 76-66

DESKINS BRANCH COAL COMPANY IBMA No. 77-13
Respondent

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969.^{1/} The issue is whether two miners, Taylor Adkins and Fred Hunt, were discharged by their employer, Deskins Branch Coal Company, in violation of section 110(b)(1) of the Act.^{2/}

Adkins and Hunt were discharged on September 26, 1975. They filed an application for review of the discharges under section 110(b) of the Act. A hearing was held before an administrative law judge. Conflicting testimony concerning the circumstances of the discharge was presented. The judge resolved the conflicting testimony, concluded that the discharges did not occur because the miners had made a safety complaint, and denied the application for review. Adkins and Hunt appealed.^{3/} Oral argument was heard on July 16, 1980. We have carefully reviewed the record and the judge's decision and affirm his dismissal of the application for review.

We conclude that, if Adkins and Hunt had made a safety complaint to their foreman, this would have constituted notice to the Secretary for the purposes of section 110(b) of the Act. In a non-union mine without established procedures for reporting complaints, as was the situation here, a miner's notification to any mine official brings the miner within the protection of section 110(b).^{4/} However, the record does

1/ 30 U.S.C. §801 et seq. (1976 and Supp. I 1977). This case presents no issue under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978).

2/ Section 110(b) provides in part:

(b)(1) 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...."

3/ The appeal was filed with the Interior Department's Board of Mine Operations Appeals. It is before the Commission pursuant to section 301 of the 1977 Act, 30 U.S.C. §901 (Supp. II 1978).

4/ *Phillips v. IBMOA*, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975); *Local Union No. 1110. UMWA and Carney v. Consolidation Coal Company*, 1 FMSHRC 33S (1979).

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not establish that Adkins and Hunt made a safety complaint to their foreman. Adkins and Hunt did testify that they were troubled by the condition of the roof in the No. 3 heading as well as the hazards that exist when two pinning machines operate in the same heading. Both the foreman and the foreman's supervisor testified that neither Adkins nor Hunt made a safety complaint to them or otherwise indicated that their refusal to work in the No. 3 heading was based on their fear of unsafe conditions.

We interpret the judge's decision as making credibility findings, at least implicitly, that no complaint concerning unsafe conditions was made to the foreman and that the employees' refusal to perform their assigned tasks was not safety related. Based on our review of the record, we conclude that these findings are supported by the evidence and must be affirmed. ^{5/} Thus, Adkins and Hunt failed to invoke the protections of section 110(b) of the Act.

For these reasons, the decision of the administrative law judge denying the application for review is affirmed. ^{6/}

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

^{5/} During the oral argument before the Commission both parties agreed that a new hearing would not be fruitful because of the passage of time since the occurrence of the events at issue and the retirement of the judge who presided at the hearing.

^{6/} We further find, for the reasons stated by the judge, that no prejudicial error was committed by admitting the Company's exhibit 7 into evidence.

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