FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 8 1981

GERALD D. BOONE,	:	Complaint of Discharge,
Complainant	:	Discrimination, or Interference
v.	:	
	:	Docket No. WEVA 80-532-D
REBEL COAL COMPANY,	:	
Respondent	:	Rebel Coal No. 2 Mine

DECISION

Appearances: Daniel F. Hedges, Esq., Appalachian Research and Defense Fund, Inc., Charleston, West Virginia, for Complainant; Frederick W. Adkins, Esq., Cline, McAfee and Adkins, Norton, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the complaint filed by Gerald D. Boone under the provisions of section 105(c)(3) of the Federal Mine Health and Safety Act of 1977, 30 U.S.C. § 801 et seq., the "Act" -alleging that Mr. Boone was discharged by the Rebel Coal Company (Rebel) in violation of section 105(c)(l) of the Act. 1/ More specifically, Mr. Boone alleges that he was unlawfully discharged because he refused to comply with an order to drive a haulage truck he claimed was in a hazardous condition. An evidentiary hearing was held on Boone's complaint in Abingdon, Virginia, commencing April 28, 1981.

Section 105(c)(l) of the Act provides in part as follows:

> No person shall discharge * * * or cause to be discharged * * * any miner * * * in any coal * * * mine subject to this Act * * * because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

1/ While the complaint herein alleges that it was filed pursuant to section 105(c)(2) of the Act, it was obviously intended to have been filed under the provisions of section 105(c)(3) of the Act in light of the fact that the Mine Safety and Health Administration (MSHA) had previously made a determination that no violation of section 105(c) had occurred. I find this oversight to be inconsequential.

Mr. Boone can establish a prima facie violation of this section of the Act if he proves by a preponderance of the evidence that he has engaged in a protected activity and that his discharge was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980). The refusal of a miner to perform work where he has a nood faith. reasonable belief that such work is hazardous is a protected activity within the purview of this section. Pasula, supra; Secretary ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Since there is no dispute in this case that Boone was discharged for refusing to drive the haulage truck, the principal question to be decided is whether that refusal was a protected activity under section 105(c)(l). In resolving that question, it will also be necessary to determine whether, at the time he refused to drive that truck, he entertained a good faith reasonable belief that it would have been hazardous to perform such work. Robinette, supra.

According to Boone, he had been working as a truck driver at the Rebel Coal No. 2 Strip Mine for about a year before his discharge. On May 28, 1980, he reported for work shortly before his 3 p.m. shift. During a routine pre-shift inspection of his assigned vehicle, the No. 5 Caterpillar haulage truck, he found that the seat shock absorber and tension springs were broken and that he was unable to adjust the seat tension. He complained about this to the second shift superintendent John Lockhart, but Lockhart told him to drive the truck anyway. Boone then did in fact drive one load about a quarter mile up a hill and return. On that part of the trip that was on a poorly maintained secondary road, Boone hit his head on the cab roof and hit his legs on the steering wheel as he bounced in the seat. When he returned, he again complained to Lockhart warning him that because of the defect he could not keep the truck under control. Lockhart again instructed Boone to drive it but agreed to have a mechanic also look at it. Later, around 3:30 p.m., mechanic Leo Browning inspected the seat. Fifteen minutes later, Browning called to the repair shop for a replacement shock. There was none in the shop so the original shock was rewelded in place. Boone later tested the seat but still refused to drive the truck claiming that the seat had not been fixed. He alleges that he then requested Lockhart to ask the mine safety committeeman,. Ron Chambers, to also check the seat.

Boone related the hazards he perceived in driving the truck with the seat in the condition described. The driver could lose control if his head hit the cab roof and could drive off the road. It is undisputed that there was no berm on one side of a steep section of that road where a 20-foot drop-off existed. On the other side of the road, the berm was only 2 or 3 feet high and the wheels of the truck were about 5 feet in diameter.

Mine Safety and Health Administration (MSHA) inspector Jefferson Adkins examined the subject truck on June 2, 1980, after receiving a section 103(g)(l) complaint. 2/ Adkins concluded that the seat shock absorber on

2/ Under section 103(g)(l) of the Act, MSHA is required to make an inspection pursuant to a complaint filed by a miner's representative.

the truck was indeed defective and that no adjustment could be made in the seat tension. He watched as truck driver Loss Godfrey drove the vehicle in a test. Godfrey bounced in the seat about a foot and had to drive with his legs spread apart. Godfrey showed Adkins the bruises on his upper thigh which he claimed had been caused by his legs being jammed into the steering wheel. Concluding that a dangerous condition existed which could result in the loss of vehicle control, Adkins "red tagged" the truck and issued an order withdrawing it from service until repairs could be made. The condition was abated after the shock was replaced and on June 4, the withdrawal order was removed.

By agreement of the parties, a transcript of the testimony of Loss Godfrey taken from proceedings before the West Virginia Coal Mine Safety Board of Appeals was admitted into evidence in lieu of Mr. Godfrey's appearance. Godfrey there testified that on Tuesday the 27th (presumably of May 1980), he was driving the subject truck on the 7 to 3 day shift. According to Godfrey, the seat kept bouncing him, forcing his legs against the steering wheel. Eventually, he raised his left leg onto the dashboard for relief. On the following Wednesday or Thursday, the seat was even worse. It was not'working at all. He complained to his supervisor, Burt Wilson, that his back was hurting from the defective seat and that he was unable to drive with the steering wheel hitting his legs. Godfrey nevertheless continued to drive it. The following Friday morning, Godfrey heard that Boone had been fired for refusing to drive the truck. He claimed that upon hearing this he decided he would not refuse to drive for fear that he would be fired too. He testified that his bruised legs continued to hit the wheel and his head continued to hit the cab roof. There was only a 4- to 5-inch clearance from the top of his head to the cab ceiling and the seat was bouncing him about a foot. The truck had still not been repaired by the following Monday and Godfrey too finally refused to drive it.

John Lockhart, assistant mine superintendent, testified that on May 28 Boone did indeed complain about the seat. He assigned Boone to other work while a mechanic checked the seat. The shock absorber bracket was rewelded. He conceded that Bobne thereafter checked the seat by bouncing in it and refused to test drive the truck claiming that the seat had not been improved. Lockhart had Terry Phillips, the equipment superintendent, and Leo Browning, a mechanic, also check the seat. According to Lockhart, neither complained of any problems, although no one actually drove the truck. After consulting with Mine Superintendent McGaffey, Lockhart presented Boone with an ultimatum to drive the truck or be fired. Boone continued his refusal and Lockhart fired him.

Equipment superintendent Terry Phillips testified that he checked the seat after Browning had welded the bracket. The seat was "way out of adjustment," and although it had no "bounce," it was "okay" to Phillips. He also testified that he had overheard Browning call on the radio to the supply shop for a new shock absorber but was uncertain when this call was made.

Mine superintendent Terry McGaffey testified that he also checked the seaf after the bracket had been rewelded. He found it to be in an acceptable

condition. He also asked Boone to test drive the truck but Boone refused. He ordered Boone dismissed for that refusal.

Within the framework of this evidence, I find that Mr. Boone has indeed established by a preponderance of the evidence that he engaged in a protected activity'by refusing to drive the No. 5 Caterpillar haulage truck. In this regard, I accept Boone's credible and amply corroborated testimony regarding the nature of the hazard as it existed on May 28. I find that indeed there was then a defect in the shock absorber causing the seat to bounce the driver excessively. Under the circumstances, I find that the driver could strike his head on the cab roof or his feet could leave the control pedals and he could thereby lose control of the vehicle. If he should lose control, there was a clear and present danger of the vehicle driving off the roadway and overturning thereby resulting in fatal injuries. Boone's testimony in this regard is amply corroborated by the testimony of Loss Godfrey and of the two MSHA inspectors. While the MSHA inspection occurred 5 days after Boone's initial complaint and discharge on May 28, it is conceded that no alterations had been made to the seat during the interim. Both inspectors saw Loss Godfrey bouncing excessively in the seat as he drove the truck and considered the condition hazardous. Inspector Adkins accordingly "red tagged" the truck and ordered it removed from service until repairs could be made. Indeed, Boone's testimony is even corroborated by the operator's own witnesses. Equipment Superintendent Phillips admitted that the mechanic had requested a new shock absorber to replace the one Boone complained of. It is also undisputed that since a replacement was not available, the bracket had been rewelded. Finally, Phillips admitted that even after that rewelding, the seat was not normal. With Boone's testimony, credible in itself, so thoroughly corroborated, I can accord but little weight to the self-serving unsupported conclusions of Lockhart and McGaffey that they saw nothing wrong with the seat and that it posed no safety hazard whatsoever.

Rebel argues, alternatively, that even if, as a matter of fact, there was a hazard, Boone did not articulate to them the precise nature of any particular hazard and that such an articulation is a prerequisite under section 105(c)(l). I find no such requirement, however, in the language of the Act. In any event, I note that while Boone may not have articulated to mine management all of the safety hazards described at hearing, it is clear that he described the deficiency in the seat with sufficient clarity so that management was placed on notice of the potential safety hazards. Indeed, Mine Superintendent Lockhart conceded that Boone told him that he was bouncing in the seat to such an extent that his head was striking the cab ceiling. That he failed to recognize, or refused to recognize, the obvious safety hazard under the circumstances is immaterial.

Kebel also argues that Boone failed to request the mine safety committeeman to examine the alleged defect in accordance with the collective bargaining agreement and that that failure is fatal to his complaint. The parties disagree as to whether Boone actually did make such a request. In any event, the Commission has made it clear in the Pasula decision, that such provisions in

the collective bargaining agreement have no binding effect in a complaint under section 105(c)(l) of the Act. Thus, even assuming, arguendo, that Boone did not request the safety chairman to look at the alleged hazardous condition, that does not, in itself, bar relief under section 105(c)(l). This contention does, however, raise a question as to whether Boone then entertained a good faith reasonable belief of the hazardous nature of the condition. In addition to Boone's own credible testimony, the reasonableness of his belief is supported by the evidence that after his initial complaint about the seat condition, the operator's mechanic, Leo Browning, had requested a new shock absorber and, after finding that none was available, had merely rewelded the old shock bracket. This evidence is further buttressed by the testimony of truck driver Godfrey and of the MSHA inspectors who found the seat condition so hazardous that they ordered the truck withdrawn from service.

Rebel also suggests that Boone may have been acting vindictively and in bad faith because he had earlier that morning received a warning about a previous unexcused absence. Both parties admit, however, that although Boone could have then been properly discharged because of his unexcused absences, he was not. Under these circumstances, I find it more reasonable to conclude that Boone would, if anything, have been grateful to the operator for having retained him and not vindictive for having merely been warned about his unexcused absence. Within this framework, I conclude that Boone did indeed entertain a good faith reasonable belief of the hazardous nature of the condition. Robinette, supra. I find it therefore unnecessary to determine whether or not he actually requested that the safety chairman examine that condition.

Rebel next contends that the decision of the West Virginia Coal Mine Safety Board of Appeals denying Boone's discrimination complaint filed under West Virginia law and the decision of an arbitrator denying Boone's grievance under the collective bargaining agreement should be given great, if not controlling, weight herein. Under Pasula, the weight to be given arbitral findings is to be controlled by several factors including the congruence of the statutory or contractual provisions governing those proceedings and the provisions of the Federal law, the degree of procedural fairness in the other forums, the adequacy of the record of those proceedings, and the special competence of the particular decision maker. I find these criteria to be also relevant in determining the weight to be accorded the decision of the West Virginia Coal Mine Safety Board of Appeals' decision. Bradley v. Belva Coal Company, 3 FMSHRC 921, petition for review granted May 1981. Applying these criteria to the Board decision, I find that I cannot give it any weight. I have before me only the final summary decision of the Board itself. The reasoning of the Board in support of its decision and the transcript of those proceedings have not been made available. Moreover, Rebel has failed to cite even the statutory authority or criteria under which that decision was made. 3/ Finally, even assuming that

3/ Presumably, the State proceedings were brought under section 22-1-21 of the West Virginia Code. The provisions of that section, set forth below in

the Pasula criteria had been met, since the Board decision has not yet become final but is currently under appellate review, I could not in any event fairly give any weight to that decision.

For similar reasons, I can give no weight to the arbitrator's decision. It is clear that his decision hinged upon a finding that Boone had failed to follow procedures outlined in the collective bargaining agreement to first contact the safety committeeman before refusing to perform the claimed hazardous work. There is no such requirement in the Act and proceedings under the Act are not controlled by any collective bargaining agreement. Pasula, supra. Thus, while the arbitrator's decision may very well have been correct under that agreement, it is of no import to the case before me. The arbitrator's decision in Pasula was rejected by the Commission under essentially the same factual setting. See Pasula at p. 2796.

Under all the circumstances, I conclude that Boone was indeed engaging in an activity protected under section 105(c)(l) in refusing to operate the No. 5 Caterpillar truck on May 28, 1980. Since Boone was admittedly discharged solely for his refusal to operate the truck, it follows that his discharge was solely motivated by his protected activity. I therefore find that Boone was discharged in violation of section 105(c)(l) of the Act.

ORDER

The parties are directed to consult and seek to stipulate as to the specific damages resulting from the discharge of Gerald D. Boone found unlawful in these proceedings and to report to me in writing on or before July 30, 1981, the results of such consultations.

Gary Melick
Administrative Law Judge

fn. 3 (continued)
relevsnt part, are not congruent with those of section 105(c), particularly as the Federal law has been interpreted in Pasula. Since the criteria for finding unlawful discrimination under the State law is much more limited in scope, and the statute does not on its face cover the factual situation presented in this case, the decision of the State Board denying Boone's claim of discrimination under that law should be entitled to no weight in this case.

"(a) 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 he believes or knows that such miner or representative (1) has notified the Director [of the West Virginia Department of Mines]; his authorized representative, or an operator, directly or indirectly, of any alleged violation or danger, (2) has filed, instituted or caused to be filed or instituted any proceeding under this law, or (3) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this law. No miner or representative shall be discharged or in any other way discriminated against or caused to be discriminated against because a miner or representative has done (1), (2) or (3) above."

Distribution:

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