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CHARLES BUNDY V. BENHAM COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CHARLES H. BUNDY,
COMPLAINANT

v.

BENHAM COAL, INC.,
RESPONDENT

Complaint of Discharge,
Discrimination, or Interference

Docket No. KENT 82-35-D

DECISION

Appearances: Joseph E. Wolfe, Esq., Wolfe, Farmer and Kern, Norton,
Virginia, for Complainant
Grover C. Potts, Jr., Esq., Wyatt, Tarrant and Combs,
Louisville, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued July 21, 1982, a hearing in the above-entitled proceeding was held on July 29, 1982, in Norton, Virginia, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3).

After the parties had completed their presentations of evidence and had made oral arguments in support of their respective positions, I rendered the bench decision which is reproduced below (Tr. 191-205):

This proceeding involves a complaint of discharge, discrimination or interference which was filed by Charles H. Bundy against Benham Coal Inc. in Docket No. KENT 82-35-D, on December 24, 1981, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

I shall make some findings of fact on which my decision will be based and the findings will be set forth in enumerated paragraphs.

1. Charles H. Bundy began working for Benham Coal Inc. on February 16, 1971, as an inside laborer. He worked at other positions until, in 1974, he received a letter from what was then MESA in the Department of the Interior advising him that he had indications of pneumoconiosis which gave him the right to transfer to a less dusty area under section 203(b) of the Federal Coal

Mine Health and Safety Act of 1969. (FOOTNOTE- 1 He made the election to transfer to a less dusty area and on July 8, 1974, was transferred to a position known as outside laborer.

2. He thereafter made a bid for the underground position of shuttle car operator on March 24, 1975, and subsequently became a roof bolter, thereby waiving his right of transfer to a less dusty area. He remained underground until March 3, 1976, when he again asked to be transferred to a less dusty area and on July 19, 1976, he was transferred to the coal preparation plant as an outside laborer. On April 10, 1978, he bid on the job of other machinery repairman. Then, on July 31, 1978, he exercised a job bid for the position of coal preparation plant electrician and mechanic and he held that position when Benham Coal Inc. had an extensive layoff of employees in June of 1980.

3. The company began to recall its employees in September 1980 on a seniority basis. When the 10-year seniority of Mr. Bundy, at that time, became applicable, he was told he could not be recalled at that time because the only position then open was one for a roof bolter and that was not a position in a less dusty area where a miner who had exercised his right to transfer under section 203(b) should be permitted to work. Mr. Bundy advised the company's manager of industrial relations, Mr. Charles Estep, that he would like to have the position of roof bolter despite the fact that it was not a position in a less dusty area in conformance with the right he had exercised to transfer under section 203(b). The company refused to allow him to go underground and he was unable to get a position until December 8, 1980, when the company did have an opening for the position of coal preparation plant electrician and mechanic, which was the position that he had held at the time he had been laid off.

4. Mr. Bundy's complaint in this case asks that he be paid the salary of a roof bolter for the period from September 24, 1980, to December 8, 1980, which he would have been paid if the company had allowed him to go back to work in a relatively dusty area underground at the time his seniority status would have qualified him to return to work as a roof bolter if it had not been for his previous election to take a position in a less dusty area of the mine.

5. At the time Mr. Bundy was not permitted to return underground to the position of roof bolter, Mr. Estep asked Mr. Bundy to procure a doctor's statement indicating that it was permissible for him to be sent underground. Mr. Bundy, at that time, went to see the company's physician, Dr. Weir, who first told Mr. Bundy that the company should take him back and, when Mr. Bundy checked back with him, Dr. Weir said that in the meantime he had talked to Mr. Estep and that he believed that Mr. Bundy should not be sent back underground because of his first stage condition of pneumoconiosis.

6. Mr. Bundy thereafter went to others doctors, one by the name of M. F. Saydjari, who provided Mr. Bundy with a statement that, in his opinion, Mr. Bundy was physically able to work in a coal mine. That statement has been made Exhibit B in this proceeding. Mr. Bundy also got a statement from Dr. W. E. Bowers, Jr., to the effect that Mr. Bundy could work in a coal mine, but he added that if Mr. Bundy developed breathing difficulties, he would suggest that blood gas and ventilation studies be made. That statement is Exhibit C in this proceeding.

7. The company declined to accept either doctor's recommendation because Dr. Saydjari's statement was not enforced by any kind of X-ray. Although Dr. Bowers' statement was based on X-rays, they had been made in connection with Mr. Bundy's hospitalization for ailments other than pneumoconiosis. Therefore, the company suggested that Mr. Bundy have an additional X-ray made. One was made and was interpreted by Dr. Wells. Through Dr. Wells' interpretation, Dr. Weir again came up with a finding that Mr. Bundy had first stage pneumoconiosis and that the company preferred not to allow him to go back underground.

8. Mr. Bundy's first election to transfer to a less dusty area under section 203(b) of the Act was made after the government had sent him a statement that he did have preliminary indications of pneumoconiosis. In this proceeding, Mr. Bundy introduced as Exhibit 1, a statement from the Department of Health and Human Services based on an X-ray taken September 15, 1981, stating that the interpretation of the X-ray by a physician qualified under the Act indicates that there is no definite evidence of coal worker's pneumoconiosis. That most recent X-ray, of course, was not available either to Mr. Bundy or to the company on September 24, 1980, when Mr. Bundy elected to go back underground by waiving his right to transfer to a less dusty area.

Those are the primary findings of fact upon which my decision will be based.

Counsel for Mr. Bundy has argued that the company's refusal to allow Mr. Bundy to go back underground in September of 1980 was a violation of section 105(c)(1) of the Act.

In pertinent part, section 105(c)(1) reads as follows:

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 * * * is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 * * * 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.

Mr. Bundy's attorney recognizes that Mr. Bundy has elected to transfer out and then has waived his transfer rights and gone back in and worked in an area of the mine which is above one milligram per cubic meter of respirable dust and then has made a second election to transfer out. Mr. Bundy's counsel emphasizes that Mr. Bundy was allowed to make those changes because, in the first instance, Mr. Bundy went out because he had a letter saying he had the indications of pneumoconiosis and that he should go to a less dusty area. There is no provision in the Act authorizing Mr. Bundy to go back underground to take the position of roof bolter. That decision was based on Mr. Bundy's apparent belief that the roof-bolting position would pay more money than his position at the preparation plant.

After Mr. Bundy had done the work of a roof bolter for a while, he decided to transfer back to a less dusty area again and his reason for doing so the second time was that he was not aware that the roof-bolting position was as dusty as it apparently proved to be. During his testimony, Mr. Bundy indicated that he did not ask to go back into the mine until after the reduction in force in September 1980 because he was satisfied with the work he was doing outside the mine and had no reason to want to change his working position.

The company's attorney argues that I should look at the purpose and intent of the Act when I am trying to interpret or determine whether there was a violation of section 105(c)(1) here. He emphasizes a statement in section 2(a) of the 1969 Act which, of course, is still a part of the 1977 Act. Specifically, section 2(a) provides that "the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource--the miner."

The company's attorney thus emphasizes that, in this case, I'm confronted with a situation in which I'm being asked to use the Act as the basis for a miner to impair his health, or at least run the risk of further impairment of his health, by requiring the company to let him go back into the mine by taking a waiver of his right to transfer out of a dusty atmosphere. Counsel for the company points out that the election Mr. Bundy first took in 1974, and again elected to take in 1976, was based on section 203(b) of the 1969 Act which does not contain any provisions for waiver. There is no provision for waiver in Part 90 of the regulations which promulgated section 203(b) of the 1969 Act.

Counsel for the company also points out that Part 90 in the existing regulations became effective on March 31, 1981, after Mr. Bundy sought to be reemployed as a roof bolter in September 1980. While the provisions of the current Part 90 state that a miner may waive his rights to transfer, counsel for the company argues that once the miner has waived his right to transfer, he is not under the protection of the Act or the Regulations and that the contract between the miners and the company, which has been introduced as Exhibit A in this proceeding, then controls what occurs.

No one argues that when there has been a reduction in force, that the recall of miners should be governed by any principle other than seniority. Therefore neither Mr. Bundy nor the company argues that when the recall of miners occurred in 1980, Mr. Bundy was entitled to a job until such time as people with his number of years of employment had been reached.

But the company does argue that a provision of the contract, or Exhibit A in this proceeding, controls Mr. Bundy's right to bid for jobs underground. Specifically, Article 5, Section 12 of Exhibit A is relied upon by the company. Section 12 provides in pertinent part, "* * * [o]nce the employee has exercised the option to transfer to a 'less dusty area' he may not bid to an area of higher dust concentration."

Mr. Bundy testified that, in his opinion, he was not bound by that provision so as to keep him from asking the company to reinstate him or rehire him in the position of roof bolter because he was not bidding for a job. He was, he contends, simply asking to be put back to work in the only available position to which he could have been recalled on September 24, 1980, when his seniority permitted him to be recalled. I do not purport to be an authority on interpreting the labor contract. Since it is unnecessary for me to interpret the contract in order for me to decide the discrimination issues in this

case, I shall not express any opinion in this final decision as to the merits of Mr. Bundy's or the company's arguments based on the contractual provisions of the Labor Agreement.

Another reason the company gives for refusing to let Mr. Bundy go underground is that it did not want to see him run the risk of having his health further impaired by working in a dusty area. Also the company argues that its exposure to having to pay black lung benefits would be greater if it allowed Mr. Bundy to go back underground where he might become subject to greater lung damage and, therefore, some day might file a black lung claim for pneumoconiosis which would not have been filed if Mr. Bundy had continued working as a Part 90 miner.

Mr. Bundy's attorney argues that the company's possible exposure to paying a black lung claim is such a speculative argument that I ought not to entertain it. I suspect that Mr. Bundy's attorney is correct in that contention because I do not believe that the company's possible exposure to paying a black lung claim is a valid basis for deciding the issues in this case.

On the other hand, I am greatly concerned about the company's other argument, which is that both the 1977 Act and 1969 Act were promulgated for the purpose of protecting miners' health and safety. Here, as the company points out, we have a situation in which the complainant is asking the Commission to use the Act for the purpose of forcing the company to allow him to work in a position which could have very definite adverse effects on his health if he continues to work underground where the concentration of respirable dust, according to Mr. Williams' and Mr. Estep's testimony, is never below one milligram per cubic meter of air, except perhaps for a single day for a short time, and where there is no concentration of respirable dust below one milligram at any time on an average basis.

In other words, the company's evidence shows beyond any doubt that the only place the company could place Mr. Bundy at the present time without exposing him to more than one milligram of dust would be on the outside of the mine or in a position that would require him to go only 50 feet in by the portal. The company has not monitored any positions which show that a miner could go more than 50 feet underground without violating the one milligram requirement in connection with a Part 90 miner.

The legislative history pertaining to section 105(c)(3) is contained in the Legislative History of Federal Mine Safety and Health Act of 1977 prepared for the Sub-committee on Labor on the Committee of Human

Resources, U. S. Senate, July, 1978. I would like to quote from page 623 of the Legislative History or page 35 of Senate Report No. 95-181, 95th Congress, First Session, May 16, 1977, as follows:

The legislation protects a miner from discrimination because he "is the subject of medical evaluation and potential transfer under a standard published pursuant to Section 10[1]". Under Section 10[1], standards promulgated by the Secretary must provide; as appropriate, that where it is determined as a result of a physical examination that a miner may suffer material impairment of health or functional capacity by reason of his exposure to a hazard covered by a standard, the miner shall be removed from such exposure and reassigned; and that the miner transferred shall continue to receive compensation for his work at no less than the regular rate of pay for miners in the classification the miner held prior to transfer. The Committee intends Section 10[5](c) to bar, as discriminatory, the termination or laying-off of a miner in such circumstances, or his transfer to another position with compensation at less than the regular rate of pay for the classification held by the miner prior to transfer. The relief provided under Section 10[5](c) is in addition to that provided under sections 10[4](a) and (b) and 10[5] for violations of standards.

The legislative history, in that same section, goes on to point out that the purpose of section 105(c)(1) is to bring about a safer work place for miners and a healthier work place for miners, and that discriminations must be rigorously prosecuted in order to protect the miner's rights to complain about health and safety matters in a mine.

The problem that I have with the complainant's claim in this case is that I am asked to interpret section 105(c)(1) to find that Mr. Bundy was discriminated against when the company refused to call him back to a position which was not in a less dusty area. The purpose of that section, and the legislative history shows the purpose of it is to enable Mr. Bundy to be able to find a position in a less dusty area for which he will not be compensated at a lower rate of pay than if he had continued to work in the dusty area.

It's true that Part 90, as it now reads, provides that a miner may waive his right to work in a healthier environment, but as counsel for the company has pointed out, once he waives that right to transfer to a less dusty area, then, he is outside the Act because the Act does not articulate what shall happen to him when he waives his right to transfer to a less dusty area.

