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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, ON BEHALF OF PHILLIP CAMERON, APPLICANT	Complaint of Discrimination Docket No. WEVA 82-190-D
v.	MSHA Case No. MORG CD 82-3
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, PA, for Applicant, Phillip Cameron; Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent, Consolidation Coal Company

Before: Judge Merlin

This case is a complaint filed under section 105(c)(1) of the Act by the Secretary of Labor on behalf of Phillip Cameron against Consolidation Coal Company alleging that the five-day suspension given Mr. Cameron by the company on November 6, 1981, was a discriminatory action in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1).

The complainant is a haulage motorman at the operator's Ireland Mine where he has worked since 1969 (Tr. 10-11, 59, 122).

On October 31, 1981, he was the motorman on a 27-ton lead locomotive which pulled a trip of 10 to 12 mine cars filled with coal from the belt to the dumping point (Tr. 10-12, 24). Until that day he had operated with a single lead locomotive and if cars became detached he used a safety switch on the line to derail them and so prevent a runaway (Tr. 12-13). He also had a helper, Mr. Aston, who rode with him on the locomotive (Tr. 14, 15). Among other duties, Mr. Aston helped gather the empties and gave the complainant the signal to take on empties (Tr. 14-15).

On October 31, 1981, the complainant and Mr. Aston were informed by Mr. Gibson, the section foreman, that the procedure regarding these trips was changed and that thereafter instead of the safety switch there would be a 10-ton trailing locomotive at the back of the trip to act as a brake if any of the cars should uncouple (Tr. 15, 18-19, 124, 336). The complainant and Mr. Aston told Mr. Gibson they did not think the 10-ton locomotive was sufficient to hold back the trip (Tr. 20, 126). Because that day was a Saturday and other sections were not working, a 50-ton locomotive was available (Tr. 27). Consequently, for that day Mr. Gibson let the complainant and Mr. Aston use a 50-ton locomotive on their trips (Tr. 27, 128-129). Mr. Gibson told the complainant and Mr. Aston that the use of a 50-ton locomotive was only for that day and that on the following Monday a 10-ton locomotive would have to be used (Tr. 76, 337).

On Saturday night the complainant telephoned Mr. Shreves, an official of the United Mine Workers (Tr. 29). According to the complainant, Mr. Shreves agreed with him that the 10-ton locomotive was inadequate and said that if anything came up the complainant should call the union safety committee (Tr. 29, 76-79, 80). On the morning of November 2 before beginning work, the complainant also spoke to Stacy Knox, a union safety committeeman for the Ireland Mine, who according to the complainant said that if the complainant were asked to do anything hazardous he should let Mr. Knox know and that Mr. Knox would be available if mine management called him (Tr. 30, 79).

Upon arriving at work Mr. Gibson informed the complainant and Mr. Aston that a 10-ton locomotive would be used as the trailing locomotive on their trips (Tr. 30, 130-131, 337). The complainant and Mr. Aston asked for the union safety committee (Tr. 31, 130-131). The complainant's testimony is inconsistent with respect to whether he refused to work. At times he stated he did not refuse to work (Tr. 70, 71, 73, 102, 106). At other times he admitted that he had refused to work (Tr. 78, 79, 101). The same inconsistency is present in Mr. Aston's testimony (Tr. 135, 162-163, 164, 167, 173, 174). The section foreman testified that both men refused to run trips with the 10-ton locomotive as their trailing locomotive (Tr. 337, 339). The section foreman stated that upon their refusal he sent them to Mr. Fleming, the River Portal shift foreman, and they were assigned to other work carrying cribs (Tr. 133, 134, 337-339). The complainant

testified that as the motorman on the lead locomotive he was himself in no immediate danger but that he feared for Mr. Aston's safety (Tr. 36, 99-100, 103). He also stated that a motorman with some seniority, Mr. Schubert, had been on sick leave for 2 years but that when Mr. Schubert returned he, the complainant, would then be on the trailing locomotive (Tr. 36, 38-39).

Mr. Fleming telephoned Mr. Omear, the mine superintendent, and told him of the actions of the complainant and Mr. Aston (Tr. 279). Mr. Omear testified that he told Mr. Fleming again to order the complainant and Mr. Aston back to work (Tr. 280). Mr. Omear stated that he told Mr. Fleming to tell the complainant and Mr. Aston that no more than 10 cars would be used on each trip (Tr. 289). Mr. Aston then said he would work if the order were put in writing (Tr. 162-163, 174, 280-281). The order to work was not put in writing and according to Mr. Omear such orders customarily are not put in writing (Tr. 281). Mr. Aston admitted that putting the order in writing would not have affected the alleged lack of safety in using the 10-ton locomotive as a trailing locomotive (Tr. 175-177).

Mr. Omear also ordered Mr. Fleming to obtain a 10-ton locomotive so that a test could be run to demonstrate to the complainant and Mr. Aston that the procedure would be safe (Tr. 282). A locomotive was obtained but some of its sanders were not working so they were repaired (Tr. 288). In the meantime while the complainant and Mr. Aston were loading cribs, Mr. Bettinazzi, the operator's safety supervisor, spoke to them (Tr. 349). The complainant and Mr. Aston again expressed a view that the 10-ton locomotive was not safe but Mr. Bettinazzi questioned the position in which they were putting themselves because they had not tested a 10-ton locomotive as a trailing locomotive on any of their trips (Tr. 349, 352-353). Finally, a 10-ton locomotive was ready and tests were performed on two of the steepest available grades selected by the complainant (Tr. 49, 96-97, 98, 138, 139, 189, 241, 289-290, 357). First the trip was stopped and the brake of the lead locomotive was then released (Tr. 49, 138, 290). Next the trip was allowed to drift back about 10 feet before brakes were applied (Tr. 50, 139, 290-291). In both instances the 10-ton locomotive held (Tr. 50, 139, 290, 291, 356-357). The complainant, Mr. Aston, and the union safety committeeman, Mr. Wise testified that they were not satisfied with the tests results because the trip had no speed, an actual runaway situation was not created and the trolley pole on the trailing locomotive was

in the wrong position (Tr. 50, 52, 53, 108, 139-140, 189, 227-228). However, the operator's superintendent testified that during the test the 27-ton lead locomotive remained attached to the trip (Tr. 290). This was additional weight pressing against the trailing locomotive and would not be present in a true uncoupling because in an actual occurrence the lead locomotive would detach itself from the trip (Tr. 260-261). Despite their dissatisfaction with the test the complainant and Mr. Aston returned to work that day (Tr. 52-53, 141).

On November 5th a further test of the 10-ton locomotive was performed for state and MSHA inspectors on the same steep grade as the prior test (Tr. 97-98, 245-247). On this test the trip was allowed to coast 100 feet before the trailing locomotive was used to brake and stop the cars (Tr. 142, 189, 191, 257, 261, 268, 292, 358-359). The trip stopped within 150 or 200 feet (Tr. 142, 189, 239, 257, 268, 292, 359). Based upon this test the state and federal inspectors felt the 10-ton locomotive was safe (Tr. 189-190, 257, 292, 295, 359). Mr. Aston was still afraid and testified that in his opinion the only way to do a valid test would be to have an uncoupling without telling the motorman on the trailing locomotive (Tr. 143-146, 262). Mr. Wise, the safety committeeman testified that the test was not valid because it was controlled (Tr. 189). In particular, he objected to the fact that the trolley pole on the trailing locomotive had been turned (Tr. 190-192, 227-228). The operator's witnesses took the position that the test was even more adverse than actual circumstances because in an actual uncoupling the cars would come to a stop before they started to move back whereas in the second test the cars were allowed to move back 100 feet immediately prior to the trailing locomotive being used to brake them (Tr. 293-295, 324-325, 358-359). Moreover, the 27-ton lead locomotive remained attached to the trip and again was additional weight pressing against the trailing locomotive which would not be so in a actual uncoupling (Tr. 260-261, 264). The day after the test was performed for the inspectors the operator suspended the complainant for five days.

In Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds, Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981), the Commission held that the complainant establishes a prima facie case of a violation of section 105(c)(1) if he proves by a

preponderance of the evidence that (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. The Commission further decided that an operator may respond by either rebutting the prima facie case or if it cannot rebut by showing as a defense that even if part of its motive were unlawful, (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone.

It must first be determined what the complainant did. As already noted, at times during his testimony the complainant alleged that he only asked for the union safety committee but did not refuse to work (Tr. 70, 71, 73, 102, 106). At other times he admitted he refused to work (Tr. 78, 79, 101). Mr. Aston testified about refusing to work in a similarly contradictory manner (Tr. 135, 162-163, 164, 167, 173, 174). Mr. Gibson, the section foreman, testified that the complainant had refused to work (Tr. 337-339). The testimony of the operator's other witnesses also was that the complainant had refused to work (Tr. 279, 280, 289, 348). Even the union safety committeeman, Mr. Wise, who testified for the complainant stated that under the circumstances he would say the complainant had refused to work (Tr. 226). I also note that the complainant and Mr. Aston were assigned to other work (Tr. 40, 133, 337-339). This assignment makes no sense unless they had in fact refused to work. If the complainant had merely asked for the safety committee, mine management would not on its own initiative had disrupted operations by voluntarily assigning him to other work. The haste and urgency with which the mine superintendent arranged to test the 10-ton locomotive is only explicable in light of a refusal to work by the complainant and Mr. Aston. The test was arranged in order to satisfy the complainant so that he would return to work.

The complaint (Para. 5), the Solicitor's prehearing statement, her oral statement at the close of the Secretary's case at the hearing, and her brief all allege a protected right to refuse to work under the circumstances of this case. The reason for the complainant's belated protestations at the hearing that he merely asked for the union safety committee obviously was his realization that under the collective bargaining agreement he could refuse to work only in conditions that were abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation

which could reasonably be expected to cause death or serious physical harm before abatement. (Optr.'s Exh. No. 1, pg. 2). At the hearing the complainant admitted the situation was not of this nature (Tr. 37, 75). The great weight of the evidence demonstrates that the complainant refused to work and I so conclude.

I further conclude that the operator suspended the complainant because of his refusal to work. The suspension letter states that the complainant did not exercise his individual safety rights in good faith under Article III section (i) of the National Bituminous Coal Wage Agreement of 1981 which as set forth in the immediately preceding paragraph gives the employee a right not to work in conditions abnormally and immediately dangerous to himself. (MSHA's Exh. No. 1). Even more importantly, the testimony of all the operator's witnesses and most particularly the superintendent makes clear that it was the complainant's refusal to work which so disturbed mine management. The superintendent stated that if the complainant had filed a safety grievance or had used the safety committee before refusing to work he would not have been disciplined (Tr. 318).

Under applicable Commission decisions a miner may refuse to work if he has a good faith, reasonable belief regarding the hazardous nature of the condition in question. Pasula, supra; Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981); Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982). Good faith simply means an honest belief that a hazard exists. Robinette, 3 FMSHRC at 810. A reasonable belief does not have to be supported by objective ascertainable evidence. Rather the miner's honest perception must be a reasonable one under the circumstances. Such reasonableness can be established at a minimum through the miner's own testimony as to the conditions responded to with the testimony evaluated for its detail, inherent logic and overall credibility. Corroborative physical testimonial or expert evidence also may be introduced and the operator may respond in kind. Robinette, 3 FMSHRC at 812. Unreasonable, irrational or completely unfounded work refusals are not within the purview of the statute. Robinette, 3 FMSHRC at 811. I conclude that the tests which were performed on the 10-ton locomotive on November 2 and November 5 demonstrated that it could be used safely as a trailing locomotive in the manner proposed by the operator. This circumstance however, does not preclude a reasonable, good faith belief on the part of the complainant regarding the existence of a hazard.

The Act's protection may be extended to those who possess the requisite belief even if the evidence ultimately shows the conditions were not as serious or hazardous as believed. Consolidation Coal Company, 663 F.2d at 1219; Dunmire, 4 FMSHRC at 131. The reasonableness of the belief must be judged as of the time it was held.

The complainant said he did not believe the 10-ton locomotive was big enough to stop the trip of mine cars (Tr. 20). The complainant had been a motorman for several years and had used a 10-ton locomotive to pull trips of supply cars carrying materials such as roof bolts and gravel (Tr. 20-21). The complainant maintained that the trips of supply cars he had pulled were composed of fewer and smaller cars so that they did not weigh as much as a trip of mine cars (Tr. 21-23). The operator's witnesses pointed out that more power was needed from a lead locomotive which pulls a trip than from a trailing locomotive whose function is to stop uncoupled cars (Tr. 314-315, 352, 360). But the operator's superintendent could not remember whether the operator ever had used a 27-ton motor as a lead locomotive and a 10-ton motor as a trailing locomotive on main haulage (Tr. 311). In determining the honesty and reasonableness of the complainant's belief, I find relevant the fact that the procedure for using a 10-ton trailing locomotive on a trip of mine cars such as the complainant drove was new and had not been done previously in this mine. Despite his experience as a motorman the complainant therefore, had never been confronted with this precise situation. Moreover, there were some grades over which the mine trip had to travel which reasonably could be expected to add to his concern (Tr. 23-24). The MSHA inspector testified that until the test was performed, he did not know whether the trip would hold (Tr. 266). After weighing all the evidence I determine that the record supports the complainant's position that his belief about the safety hazard was in good faith and was reasonable.

This brings us to the most significant issue presented by this case. May a miner refuse to work when he himself is in no danger but the risk is to someone else? The complainant admitted that use of a 10-ton trailing locomotive on the day in question posed no danger to him (Tr. 36, 99, 100). The risk was only to Mr. Aston who would be riding the trailing locomotive (Tr. 36, 99). As set forth above, the collective bargaining agreement specifically provides that an employee will not be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself. Because any danger that might have been present was not to the complainant himself the

arbitrator upheld the disciplinary suspension under the collective bargaining agreement (Optr's. Exh. No. 1). I do not believe the arbitrator's decision is binding here nor do I believe it has any collateral estoppel effect under criteria set forth by the Commission regarding the issues presented here. Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982). The Mine Act does not contain language the same as or similar to that in the collective bargaining agreement regarding individual danger. In addition, under the collective bargaining agreement the test of the hazard is much stricter than that under the Mine Act and according to the arbitrator's decision objective evidence must support the miner's belief.

The Mine Act does not contain any provision expressly granting a miner the right to refuse to work. Relying upon legislative history and statutory purposes the Commission in Pasula interpreted the Act to afford a right to refuse to work in unsafe or unhealthful conditions. 2 FMSHRC at 2790-2793. However, Pasula presented an individual whose own health and safety were being jeopardized at the time he refused to work. The Commission made this very clear in its decision as follows:

> Pasula was not merely speculating that he might in the future suffer from the effects of loud noise, but he was already so suffering when he stopped the machine. He was not equipped with personal hearing protectors, he had already been or would have shortly been exposed to more noise than permitted by the applicable mine health standard, and he was also operating a machine that requires substantial attention to its operation. In view of his actual suffering, his view that he was exposed to unhealthful and excessive noise levels was reasonable and was supported by objective, ascertainable evidence.

2 FMSHRC at 2793.

Upon review, the Third Circuit in Consolidation Coal Company held that the statutory scheme in conjunction with the legislative history supported a right to refuse to work in the event the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health, stating in this respect as follows:

> Under the circumstances of this case, neither party in their briefs took a position contrary to the existence of a right to walk off the job. Thus, although we need not address the extent of such a right, the statutory scheme, in conjunction with the legislative history of the 1977 Mine Act, supports a right to refuse to work in the event that the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health. 663 F.2d at 1217 n.6. (Emphasis supplied).

Thus in upholding the right to refuse to work the Third Circuit referred to the individual's belief of a threat to his own health or safety. Although the Court stated it was not defining the perimeters of the right to refuse to work, its holding that the miner did not have the right to shut down a continuous mining machine, thereby preventing others from working, indicates that the right to refuse to work has rather strict limits and that it does not extend beyond the endangered individual himself. (FOOTNOTE 1)

Although the legislative history, as explained in Pasula, supports an interpretation of the Act which affords a protected refusal to work, it does not support giving this right to miners who are not in danger. The relevant committee report refers to a refusal to work in conditions believed to be unsafe or unhealthful. S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35-36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623-624 (1978) ["Leg. Hist."]. The discussions on the floor of the Senate and House make clear Congress was concerned about individuals who face a threat to their own health or safety. Discussion on the Senate floor in this respect was as follows:

> Mr. Church. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 106(c), the discrimination clause.

> It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protesting [sic] them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act.
>
> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?
>
> Mr. Williams. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs. The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.
> Mr. Javits. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings.

Leg. Hist. at 1088-1089 (Emphasis supplied).

Similarly in the House of Representatives, Congressman Perkins in discussing the bill as agreed to by the Conference Committee stated:

> Mr. Speaker, this legislation also provides broader protection for miners who invoke their safety rights. If miners are to invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of the Interior have improperly denied the miner the rights Congress intended. For example, Baker v. North American Coal Co., 8 IBMA 164 (1977) held

> that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner had no "intent" to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur.

Leg. Hist. at 1356 (Emphasis supplied).

The complainant also relies upon the fact that at the time in issue Mr. Schubert, who was the senior motorman for a lead locomotive, had been on sick leave for 2 years due to an accident but that when he returned, the complainant as the junior motorman might then be on the trailing locomotive. I conclude that what might or might not have happened when Mr. Schubert returned to work was too remote and speculative on November 2, 1981 to provide a basis for the complainant to allege he was in any danger. At that time Mr. Schubert might never have returned or if he did, the complainant might have been working somewhere else. (FOOTNOTE 2)

The complainant has referred to the "buddy" system and the principle that in the mines, a miner is responsible for the safety of his co-workers and especially for one with whom he is working as a team (Tr. 40). I recognize and acknowledge these factors and I am, of course, cognizant of the safety purposes which this statute was enacted to advance and pursuant to which it must be liberally construed. Nevertheless, I conclude that the right to refuse to work which is after all, only implied and not express cannot be so greatly expanded in these proceedings. As set forth above, such action would be contrary to judicial precedent and unsupported by legislative history. Moreover, the extension of the right of refusal to individuals such as the complainant would have great practical impact in the mines by creating the possibility of continual disruption in operations through work stoppages caused by challenges to management decisions from miners whose health and safety are not in danger. The wide ramifications of such situations are demonstrated by the record in this case. The mine superintendent testified that if the complainant had been willing to run the lead locomotive when Mr. Aston had been afraid to be on the trailing locomotive, it would have been

up to mine management to find someone else to go on the trailing locomotive or some other means (Tr. 323-324). Upon questioning from the bench, the complainant testified that he did not know what he would have done if mine management had found someone else to go on the trailing locomotive and he indicated that in that event a relevant inquiry would be whether or not such other individual was experienced (Tr. 117-120). It was clear to me at the time I listened to complainant and later when I read the transcript that he intended to reserve to himself the right to decide whether he would accept any other individual assigned by the operator to be his trailing motorman.

It is therefore only a short step from challenging management's decisions to usurping its right to make them at all. In light of these factors, I find pertinent and persuasive the following statement of the Court of Appeals for the Seventh Circuit in Miller v. FMSHRC, 687 F.2d 194, 196 (1982): "We are unwilling to impress on a statute that does not explicitly entitle miners to stop work a construction that would make it impossible to maintain discipline in the mines."

The Solicitor and operator's counsel filed detailed briefs which have been most helpful in analyzing the record, defining the issues and deciding the case. I have reviewed and considered these excellent briefs. To the extent they are inconsistent with this decision however, they are rejected.

In light of the foregoing, I conclude that the complainant had no right under the Act to refuse to work and that therefore he did not engage in protected activity. Accordingly, he must be denied relief and his complaint dismissed.

ORDER

It is Ordered that the complaint be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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~FOOTNOTE_ONE

1 One individual can, of course, communicate to the operator on behalf of other endangered persons who also have decided for themselves not to work. Dunmire, 4 FMSHRC at 134.

~FOOTNOTE_TWO

2 Mr. Schubert did return a few months thereafter but the record does not indicate what job he performed upon his return or what job the complainant had then (Tr. 39).