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CHADRICK CASEBOLT V. FALCON COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CHADRICK CASEBOLT, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 83-56-D
FALCON COAL COMPANY, INC., RESPONDENT	MSHA Case No. BARB CD 82-43 South Fork Surface

DECISION

Before: Judge Kennedy

Statement of the Case

This discrimination complaint is before me on the operator's motion to dismiss for failure to state a claim upon which relief may be granted. (FOOTNOTE 1) Since the motion relies upon matters outside the pleadings, the motion will be treated as a motion for summary decision. Under Rule 64, a motion for summary decision may be granted where the pleadings and matters considered outside the pleadings such as depositions, answers to interrogatories, admissions, and affidavits show (1) there is no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law. See also Rules 12(b), 56 of the Fed.R.Civ.P.

For the purposes of the motion, the operator concedes complainant can establish a prima facie case of unlawful discrimination. This notwithstanding the operator contends that the material facts not in dispute establish that entry of a remedial order is inappropriate because (1) complainant suffered no loss of pay since the job to which he was reassigned when he failed the Tech II qualification tests pays more than the jobs for which he was found unqualified, (2) a bona fide economic retrenchment subsequently eliminated the job of Tech II, surveyor, to which complainant seeks instatement, and (3) complainant's lack of technical qualifications for both the job of Tech II, surveyor, and Tech II, draftsman/mapper, bars complainant's assertion of entitlement to either of these positions solely by reason of his competitive seniority.

Complainant agrees that as a result of the discrimination alleged he suffered no loss of pay and that the job of Tech II, surveyor, to which he initially aspired was "abolished in October 1982 for bona fide economic reasons." (FOOTNOTE 2)

Nevertheless, complainant asserts that under the broad authority to fashion "make whole" remedies conferred by section 105(c) (3) the trial judge should (1) hold a hearing to determine whether there was a nexus at least in part between the protected activity alleged and the claimed discriminatory disqualification, and (2) upon a finding that such discrimination occurred issue (a) an order requiring the operator to create a vacancy for a Tech II, surveyor, job and override the competitive seniority or bidding rights of other miners to place complainant in that job or (b) override the seniority rights of incumbents in the remaining Tech II, surveyor, jobs in order to instate complainant or (c) if complainant's right to the surveyor and the draftsman/mapper jobs is barred, award complainant "front pay," i.e., monetary damages for his temporary (3 months) loss of opportunity and for the emotional, psychic and domestic distress brought on as a result of his reassignment to a higher paying but lower status job. (FOOTNOTE 3)

Casebolt's Employment Record

Chadrick Casebolt, a white, male miner and resident of Compton, Kentucky, was first employed by Falcon Coal Company, a subsidiary of Diamond Shamrock Corporation of Lexington, Kentucky on December 13, 1976. His job was that of tipple worker at the Breathitt County Tipples. Three months later his immediate superior recommended he be discharged for unsatisfactory work performance. After a grievance hearing it was found the recommendation stemmed from a personality conflict between Mr. Casebolt and his supervisor, Mr. Carpenter. (FOOTNOTE 5)

Arrangements were made to transfer Mr. Casebolt to the Engineering Department. Thus in March 1977, Casebolt found himself assigned as an Engineer Helper in Falcon's Engineering Department working under the supervision of the Chief Engineer, Chester Stevens.

Casebolt's run-in with Carpenter did not sit well with his new supervisor. Statements from several individuals who were in the Engineering Department at the time attest that Stevens let his dislike for Casebolt be widely known among his coworkers. Stevens told them he was forced to take Casebolt in the Engineering Department and that he did not want anyone to help Casebolt learn the job or show him how

things were done. Stevens also told employees in the Engineering Department that he did not care how they treated Casebolt.

For his part, Stevens said Casebolt "has himself overrated" because of his college degree. Stevens said Casebolt is "weak in mathematics" and that after three months in the Engineering Department he decided to assign him to the job of water sampler. Performance of this job did not require any of the skills needed to be a surveyor or draftsman/mapper which were the jobs to which others in the Engineering Department were assigned.(FOOTNOTE 6) Management animosity against Casebolt apparently goes back, as his coworkers said, a long way.

When Casebolt started work in the Engineering Department he was assigned as a rod and chain man with one of the surveying crews. He completed his probationary period three months later. At that time (June 13, 1977), his performance was rated as "substandard but making progress." About a month after this evaluation, Stevens changed Casebolt's job from that of surveyor to that of water sampler. He continued, however, to be classified and paid as a Tech II, Engineer Helper. He worked under Stevens' direct supervision. The new assignment deprived Casebolt of the opportunity for any extensive on-the-job training as a surveyor or draftsman/mapper. Nevertheless, the pay was the same and, with the exception noted below, Casebolt remained in the job without complaint for the next five years.

During the period in question, March 1977 to November 1982, Falcon claims its Engineering Department consisted of a Chief Engineer who supervised the department and two divisions consisting of (1) the three field surveying crews and (2) the two miners assigned to drafting/mapping work. The water sampling job was first assigned as an additional duty to the members of the surveying crews. After Casebolt was assigned to it, however, it became his full-time job and the others did not participate. While Casebolt claims his understanding was that he was qualified to perform any Tech II position in the department because his classification for pay purposes was the same as the other Tech II's, it appears that he was already in a "dead end" job.

Casebolt first became concerned that his competitive seniority within the department was being adversely affected by his job as water sampler in January 1981. (FOOTNOTE 7) Mark Campbell, the new Chief Engineer, advised him that to bump into one of the other jobs in the department he would have to pass written tests of his ability to solve problems in algebra and trigonometry. Casebolt was reluctant to take these tests, fearing that if he did not pass they would be used against him. At the urging of Campbell, Casebolt finally took the written math exams for the jobs of surveyor and draftsman/mapper on October 15 and November 12, 1981. On the first test Casebolt scored 47.2% and on the second 51.6%. The arbitrator found a passing score of 70% was required to qualify for the Tech II surveying and draftsman/mapper jobs.(FOOTNOTE 8) Casebolt was afforded the opportunity to retake the tests in July 1982 at the time he tried to bump Mark Sheffel from a Tech II, surveying position but according to Jay Watts, the Chief Engineer, Casebolt declined to take the tests. It was Casebolt's position then, as now, that because he was already in the Engineering Department he could bump on the basis of his competitive seniority alone and that his competitive seniority was in no way qualified by a requirement to show a proficiency in mathematics.

Work As A Water Sampler

As a water sampler, Casebolt was responsible for collecting water samples from the silt ponds located at respondent's various surface mines. Because this required him to drive and work alone in remote mountainous terrain where dangerous conditions existed, he requested his 1978 pickup truck be furnished with a two-way radio. On several occasions during 1978 and 1979, Casebolt requested such communications equipment. It was not until some time in

1980, however, that Mr. Stevens provided Casebolt with a Citizens Band radio for the pickup truck. (FOOTNOTE 9)

Casebolt claimed that because of its limited range and power this radio did not provide him with a means of communication in the most remote areas. He continued to complain of his need for a two-way AM/FM radio that would allow him to remain in communication with his home office at all times. He was not furnished with this piece of equipment until June 15, 1982. Two weeks later he was bumped from his job as Tech II, water sampler by Jim Hutchinson a Tech II, surveyor with greater competitive seniority.

The Rif's

During 1982, two major series of seniority bumpings (Rif's) took place. The first of these occurred on June 7, 1982 in response to a reduction in force which Falcon began on May 21, 1982. The Rif first hit the Engineering Department when Zane Watts successfully bumped Woody Gabbard from a Tech II, surveyor job on Field Crew #1. The consequences of this series of seniority bumpings is shown on the attached diagram, Exhibit 1.

As Exhibit 1 shows, Woody Gabbard bumped Archie Combs who bumped Ben Johnson who bumped Jim Hutchinson who bumped Chad Casebolt. Casebolt then attempted to bump Mike Sheffel a Tech II, surveyor with less seniority. At this point, Falcon invoked the provisions of Section 9(c)(iii) of the collective bargaining agreement to require Casebolt demonstrate his qualifications for the position by taking a

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five-day field performance test and a written test of his proficiency in algebra and trigonometry. (FOOTNOTE 10)

Falcon asserted and the arbitrator agreed that the provision that requires senior bumping rights to be exercised in the same manner as bidding on a new job posting (Section 9(b)(iv)) required Casebolt to meet the job qualifications

for Engineering Tech II's as set forth in Exhibit "B" of the collective bargaining agreement. (FOOTNOTE 11) Section 9(b)(i).

Casebolt, as noted, refused to take the written math exam. Despite this, Falcon afforded him the opportunity to take the five-day field test. This was done under the supervision of Jay Watts, the Chief Engineer at the time. The test was administered on July 6, 7, 8, 9 and 12, 1982. Mr. Casebolt was asked to perform the same nine duties usually required of all Tech II, surveyors. These are run level, set tripods, rod for cross sections, roll up tape, use reducing arc, keep field notes, reduce field notes, plot cross-section notes and plot pit surveys. Watts's notes of Casebolt's performance during the five-day period showed he performed poorly on most of the subjects on which he was tested. Based on an evaluation of his performance by Watts, Larry Allen and Mark Campbell on July 12, and on the fact that Mike Sheffel had five years experience on the job with adequate performance ratings, Falcon declared Casebolt unqualified to bump Sheffel.

Approximately a week later, Casebolt attempted to bump into the Tech II drafting/mapping position held by Charles Booth. He was found disqualified for this position also but has not alleged that this disqualification resulted from any wrongful interference with his bumping rights.

While Casebolt was attempting to bump into the Tech II surveyor job held by Sheffel, Sheffel was attempting to bump into the drafting/mapping position held by Booth. Sheffel was also found disqualified for Booth's position.

During the week of August 2, 1982, Casebolt successfully bumped into his present position as a rock truck driver on the night shift. This marked the conclusion of the bumping that began in the Tech II area with Zane Watts on June 7, 1982.

The Arbitration

Casebolt took the question of his disqualification for both Tech II jobs to arbitration and on August 18, 1982, the arbitrator denied the grievance. At the arbitration hearing Casebolt did not contend that he was disqualified because of any activity protected under the Mine Act. What he did contend was that it was discriminatory for Falcon to require him to demonstrate proficiency in the duties of a Tech II when none of those holding such jobs had been required to demonstrate such proficiency. Casebolt's lawyer argued that since he and the others were classified as Tech II engineers at a time when there were no contractually specified qualifications for the position Falcon could not condition the exercise of his competitive seniority rights on a showing that he met the job qualifications set forth in Exhibit "B" to the collective bargaining agreement.

The arbitrator rejected this and held the company was not estopped to challenge Casebolt's qualifications for a Tech II surveying or mapping job because,

> The Company has the right to expect any employee who bumps into a position to have the requisite abilities at the time of the bump or at least be able to demonstrate adequate ability within the five (5) day qualification period established by the Agreement. It must be remembered that the Company not only owes the bumping employee an opportunity to show his ability in the new job, but also owes the employee who is being bumped the opportunity to retain his position if the bumper does not have the requisite abilities.
>
> In essence, then, it is my opinion that, under the circumstances before me in this case, merely because the Grievant was properly classified as an Engineering Technical II does not mean that he was properly qualified for a job on the mapping and survey crew. The duties and qualifications of a water sampler are so separate and distinct from those of the mapping and survey crew that I cannot conclude that the

> classification of Engineering Technician II automatically qualifies an employee to perform all duties now within that classification, when taking into consideration the fact that the Grievant's classification preceded the contractually established minimum required abilities. Dec. p. 7.

The arbitrator decided that while "no other Engineering Technician II has ever been required to take a written test or go through the five (5) day qualification period in order to bump into a job of another Engineering Technician II" the written and field testing were particularly appropriate for Casebolt because "no other Engineering Technician II has been almost exclusively assigned to water sampling duties, with only limited experience and other abilities required of that classification." Id., p. 9.

With respect to the claim of "premeditated, retaliatory, discrimination," the arbitrator found that while the evidence showed the Chief Engineer, Jay Watts, disliked Casebolt and may have pressured him in such a way as to prejudice Casebolt's performance during the five-day field test, a review of Watts's contemporaneous notes of Casebolt's field performance and the written math tests, which were unaffected by Watts's conduct, was persuasive of the fact that he did not possess the job qualifications prescribed by the collective bargaining agreement. Id. pp. 3, 6, 8, 9. Thus, the arbitrator held that, notwithstanding the discrimination alleged, the evidence was "sufficiently tangible and objective" to support the Company's decision to disqualify Casebolt from the positions of Tech II, surveying and mapping. Id. p. 9.

Casebolt has never contested the arbitrator's finding that he failed to demonstrate a lack of proficiency in mathematics. Complainant's contention before me as before the arbitrator is that he was not bound by the terms of the collective bargaining agreement to show a proficiency in algebra and trigonometry because (1) he was classified as a Tech II before the job qualifications were put in the contract, (2) he continued in the classification for some time after they were inserted, and (3) no other Tech II was required as a condition of exercise of his bumping rights

to show such proficiency. As we have seen, the arbitrator rejected each of these contentions holding that under the terms of the contract, as he construed it, the operator could require Casebolt to demonstrate his proficiency in the solution of routine engineering problems involving a knowledge of general mathematics and the fundamentals of algebra and trigonometry. (FOOTNOTE 12)

The results of the 1981 math tests, which Casebolt took voluntarily and which he has never claimed were tainted with Watts's alleged discriminatory conduct, were reliable, probative and substantial evidence of his lack of knowledge and skills for the job of surveyor or mapper. This evidence which came from his own hand at a time when he was trying to qualify for the jobs in question is, I believe, dispositive of any claim that but for his protected activity he would not have been disqualified. Consequently, whether or not Watts's motive was as malevolent as claimed, the smoking gun of disqualification came from Casebolt's own hand.

In arriving at this conclusion, I have given appropriate, but not controlling, deference to the arbitrator's "specialized competence" in interpreting the seniority provisions of the contract. (FOOTNOTE 13) I find this position to be in accord with both the doctrine of deference with respect to arbitral decisions that interpret the competitive seniority provisions of collective bargaining agreements and complainant's right

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to a de novo review of his claim by this trial tribunal. (FOOTNOTE14) In addition to the fact that Casebolt cites no authority for disregarding the contract to which he was a party as a member of the Falcon Coal Company Employees' Association, a close scrutiny of the contract shows no evidence of an intent to exclude Casebolt from the conditions attached to the exercise of seniority bumping rights by Section 9(c)(iii) and Exhibit "B". Further, I agree with the arbitrator that in view of Casebolt's failure to pass the written math exam less than a year previously and his limited experience on-the-job it was reasonable for Falcon to require Casebolt to demonstrate his qualifications for both jobs. I find particularly unappealing the argument that the alleged deficiencies of others in the engineering department excused Casebolt's lack of qualifications. In this connection, I note Casebolt has never claimed that the man he tried to bump, Mike Sheffel, was lacking in any of the essential qualifications required by the contract. Accordingly, whether I apply the doctrine of deference or my own de novo review of the contract I conclude Casebolt's competitive seniority rights were subject to the job qualification provisions of the contract. (FOOTNOTE 15)

The Complaint To MSHA

While the grievance was pending before the arbitrator, Casebolt filed a discrimination complaint with MSHA. This complaint alleged substantially the same acts of discrimination as were alleged under the grievance except that the MSHA complaint alleged the discriminatory treatment stemmed from a protected activity instead of a personality conflict (FOOTNOTE 16) and general animus against him on the part of his supervisors.

MSHA's investigation confirmed that several of Casebolt's co-workers witnessed acts of continuous harrassment by Watts during the five-day test period. One individual claimed he saw Watts "throw rocks at Casebolt when he was trying to set up a tripod." Mike Sheffel told the investigator that after he was bumped by Casebolt, but before Casebolt was found disqualified, Jay Watts told him he did not like Casebolt and "would make sure Casebolt did not qualify for the surveying job." Watts denies having ever said this. He also denied that Casebolt's requests for a two-way radio had anything to do with his disqualification. He said that Casebolt had worked with a surveying crew for about two months several years earlier but had no experience with new equipment introduced since then. Watts thought the C.B. radio which he claimed was furnished Casebolt in 1979 provided an adequate means of communication.

For the purposes of the motion, I do not resolve the conflicts in the statements of the witnesses or attempt to determine the "true" motive for Casebolt's disqualification. I am assuming for the purposes of the motion that Casebolt was disqualified at least in part for his claimed protected activity.

MSHA declined prosecution of Casebolt's complaint on the ground no violation of section 105(c)(1) occurred and on December 1, 1982, Casebolt filed a pro se complaint with the Commission under section 105(c)(3). After responding to the pretrial order, Casebolt employed his present counsel.

The Second Rif

In the meantime, on October 15, 1982, a second company-wide reduction in force necessitated by the loss of additional TVA contracts resulted in the elimination of one Tech I and two Tech II jobs in Field Survey Crew #3. See Exhibit 2 attached. Archie Combs who was a Tech I in Field Crew #3 bumped Jim Hutchinson, who had earlier bumped Casebolt, from the water sampling job and Hutchinson became a rock truck driver on the night shift with Casebolt. Ben Johnson, who earlier had been bumped from the Tech I job by Archie Combs into a Tech II job bumped Eugene Turner from a Tech II job on Field Crew #2. Turner tried, unsuccessfully, to bump into the Tech II job held by Charles Booth in the mapping/drafting division and then successfully bumped into a job as a rock truck driver with Casebolt on the night shift. Finally, with the elimination of Field Crew #3 Mike Sheffel, whom Casebolt had been unsuccessful in bumping back in July, had to bump into a position as a rock truck driver on the night shift with Casebolt.

Thus, by November 15, 1982, when these realignments had taken place all the Tech I and II jobs in the surveying division were held by men senior in service to Casebolt and two men with greater seniority and experience as either Tech I or II's (Turner and Hutchinson) were driving rock trucks on the night shift with Casebolt. Further, Mike Sheffel who held the job Casebolt tried to bump into was also driving a rock truck on the night shift. For these reasons, the operator contends that even if Casebolt was disqualified as the result of some unlawful discrimination in July 1982 he would still have ended up driving a rock truck on the night shift with his junior Mike Sheffel and his seniors Hutchinson and Turner in October 1982. (FOOTNOTE 17) I find the material facts not in dispute show (1) that Casebolt was technically unqualified for a Tech II job and (2) that as the result of a bona fide economic retrenchment there is no Tech II job to which Casebolt can be instated without violating the competitive seniority rights of other miners under the collective bargaining agreement.

Jurisdiction to order instatement depends on my finding not only that Casebolt was deprived of a Tech II position because of unlawful discrimination but that no bona fide business or economic justification exists for its subsequent elimination. Here, however, the undisputed facts show, and Casebolt concedes, that he would have lost any Tech II surveying job he might have occupied in October 1982 when, for bona fide economic reasons, the job (then held by Mike Sheffel) was abolished. (FOOTNOTE 18)

As respondent points out, if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198, n. 7 (1941). Furthermore, back pay does not accrue to a discriminatee for any period after the date he would have lost his position because of lack of competitive seniority or the unavilability of work. NLRB v. Columbia Tribune Pub. Co., 495 F.2d 1384, 1393 (8th Cir.1974). By a parity of reasoning, the courts have held that

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the unavilability of a position due to a bona fide economic retrenchment or reduction in force bars reinstatement of a discriminatee. M.S.P. Industries, Inc. v. NLRB, 568 F.2d 166, 179-180 (10th Cir.1977); Union Drawn Steel v. NLRB, 109 F.2d 587, 592 (3d Cir.1940); 48A Am.Jur.2d 1580.

In Union Drawn Steel and MSP Industries, the courts held the NLRB could not order reinstatement without a finding that there was work for the discriminatees to do. Again in NLRB v. Federal Bearings Co., Inc., 109 F.2d 945 (2d Cir.1940), the court held that where depressed business conditions required a reduction in force an employer was not in contempt by failing to reinstate. In the same vein, was the Third Circuit's holding that a company cannot be required to reinstate employees for whom there is no work as a result of curtailment of operations for bona fide economic reasons. NLRB v. Wilson Line, 122 F.2d 809 (3d 1941). And in NLRB v. Southeastern Pipeline, 210 F.2d 643 (5th Cir.1954), the Fifth Circuit held that where the employee did not have the knowledge required for a new position created by combining two former jobs and had been given a transfer to another location at the same pay, reinstatement should not be ordered.

The defense of unavailability of work to a claim for reinstatement was also upheld in NLRB v. Sterling Furniture Co., 227 F.2d 521, 522 (9th Cir.1955). There the court held that under the National Labor Relations Act, the remedial model for section 105(c), it is well settled that an employer may refrain from reinstating a discriminatee during a period when employment is not available for non-discriminatory reasons. Compare NLRB v. United Contractors, Inc., 614 F.2d 134, 137-138 (7th Cir.1980).

Most closely in point, perhaps, is United Steelworkers of America v. Overly Mfg. Co., 438 F.Supp. 922 (W.D.Pa.1977). There the court refused to find an employer in civil contempt of a prior order of the court that directed reinstatement of a discriminatee to his job of draftsman with full seniority. The court upheld the defense of impossibility of reinstatement upon a showing that the position no longer existed as well as a change of circumstances that would have rendered enforcement of the reinstatement decree inequitable. The facts showed that during the pendency of litigation to enforce the arbitral award and the appeals that followed the employer had transferred the discriminatee's job of journeyman draftsman from its Greenberg,

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Pennsylvania plant to its plant in Glendale, California. Thereafter, the only drafting work available in Greenberg had to be performed by professional engineers who were college graduates because the design work involved the use of higher mathematics. Discriminatee had only a high school education and no formal education in drafting. Discriminatee refused the offer of a job in California and insisted he be paid as a draftsman at the Greenberg plant even if there was no work for him to do.

The court found that while resolution of discriminatee's right to reinstatement was not simple, the absurdity of ordering literal compliance with the order of reinstatement in the light of changed circumstances dictated denial of the Union's petition. 438 F.Supp. 927.

I am cognizant of the fact that the "make whole" remedy to which complainant is presumptively entitled embraces the use of constructive or preferential seniority. But this is true only where complainant's plight is the result of wrongful discrimination. It does not justify catapulting Casebolt into a better position than he would have enjoyed absent the discrimination.

Only if Casebolt could show, as he cannot, that he is driving a rock truck because of the discrimination that occurred in July 1982 would this trial tribunal have jurisdiction and power to abrogate Falcon's seniority system by slotting Casebolt into the system ahead of Turner and Hutchinson or displacing an incumbent. Ford Motor Co. v. EEOC, --- U.S. ----, 76 L.Ed2d 721, 733-734, n. 22 (1982); Franks v. Bowman Transportation Co., 424 U.S. 747, 746, 770, 778 (1976); W.R. Grace & Co., --- U.S. ----, 76 L.Ed2d 298, 310 (1983). Unlike the EEOC this Commission is vested with power and jurisdiction to adjudicate discrimination claims and to impose sanctions that are enforceable by the courts of appeals. But in the absence of a finding that Casebolt lost seniority as a Tech II as a result of the discrimination assumed it would be inequitable and a violation of the rights of innocent third parties to slot him ahead of them under the collective bargaining agreement's seniority provisions. Casebolt is now, as he was then, ahead of Sheffel on Falcon's company-wide seniority list and is now, as he was then, below Turner and Hutchinson. If a vacancy in a Tech II job occurs he can bid on it ahead of Sheffel and behind his two seniors. That is the agreement he bargained for. It was not affected by what transpired in July 1982.

Since no Tech II job vacancy exists, it is unnecessary to consider whether a lateral transfer under section 9(h) of the contract is an available remedy. Under the circumstances that have prevailed since October 1982, this provision cannot be used to nullify Turner's and Hutchinson's seniority rights. Further, an order compelling reinstatement either directly or laterally to a job that does not exist would result in an egregious form of featherbedding and an abuse of the equitable remedial powers conferred by the Act.

Finally, if no relief is available by means of reinstatement, back pay, or retroactive, constructive, or preferential seniority, it is suggested I award Casebolt "front pay." This term refers to the substitution of monetary relief in lieu of injunctive relief for identifiable victims of discrimination. It has been most widely used in cases where discriminatees were wrongfully denied promotions because of discriminatory hiring or promotion policies. Schlei and Grossman, Employment Discrimination Law, (2d ed. 1983), at 1434-1436. In Franks v. Bowman Transportation Co., supra, 777, N. 38, 780-781, the Supreme Court declined Justice Burger's suggestion to use front money as a substitute for constructive seniority but found that under Title VII it was available as a remedy. Casebolt urges that in view of this I fashion a monetary remedy in lieu of reinstatement and thereby avoid infringing the seniority rights of other miners. The difficulty is that Casebolt lost no opportunity, promotion or otherwise. At least not one that can be quantified. Front pay for a lost opportunity must be calculated on the basis of the present discounted value of earnings that are reasonably likely to occur between the date of the lost opportunity and the date of its realization, i.e., promotion, reinstatement, etc. See, Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.1975), cert. denied, 429 U.S. 920 (1976).

Because Casebolt lost no earnings or opportunity for promotion there is no basis for making a present discounted value calculation of his claimed injury.

Windfalls are not part of the "make whole" relief to which a discriminatee is entitled. To award Casebolt monetary damages on some unspecified, unquantified basis would not just make him whole it would put him in a better position than other miners who were bumped to the rock trucks for non-discriminatory reasons.

As for the claim that Casebolt is entitled to something for his emotional and psychic distress and loss of consortium by reason of the fact that he had to work nights, all I can say is that life is unfair but that I find no warrant in the statute or precedent for an award of damages for pain and suffering. At least not in this case.

Accordingly, it is ORDERED that the motion for summary disposition be, and hereby is, GRANTED and the captioned complaint DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

1 The complaint charges a wrongful interference with complainant's bidding (bumping) rights under Falcon's collective bargaining agreement.

~FOOTNOTE_TWO
2 In May and October 1982, there were two company-wide reductions in force necessitated by the loss of contracts to supply coal to the TVA.

~FOOTNOTE_THREE
3 Complainant states that as a result of the operator's discriminatory action:

I have been taken away from a job that I cared about, one that promises a good future. It also deprived me a lot of times with my family by having to work nights. It placed me in a dangerous situation of which I was not prepared for. It has deprived me of my rights within the contract and the MSHA laws, and also I had a psychological trauma which has brought hardship on my family life. It has been very hard for me to accept that the company would permit something like this to occur.

~FOOTNOTE_FOUR
4 I wish to emphasize that my findings with respect to the facts and background of the discrimination alleged are made solely for the purpose of determining the motion. Because I have not heard the witnesses, I cannot finally resolve the conflicts in witness statements or the questions of credibility presented. As the story unfolds, the reader will understand why resolution of these conflicts is irrelevant to my ultimate disposition.

~FOOTNOTE_FIVE
5 The record shows that Mr. Casebolt holds a BA degree (Class of '71) from Morehead State University with a major in Physical Education and minors in Biology and Sociology. At the time of his employment by Falcon in 1976 he was 29 years old, married with a family. He may have been over qualified in terms

of education for the job of general laborer at a mine preparation plant. His employment application shows he did not seek employment in a job involving mechanical or engineering skills but something that would enable him to employ his clerical skills.

~FOOTNOTE_SIX
6 The operator claims that the knowledge and skill required of a water sampler are comparable to those of "high school aged lifeguards [who perform] similar water sampling duties at swimming pools in the summer."

~FOOTNOTE_SEVEN
7 Casebolt's concern over his job security may have been stimulated by the cancellation of a large coal supply agreement with TVA. As a result of this contract cancellation, Falcon began to reduce its work force on January 7, 1980.

~FOOTNOTE_EIGHT
8 There is no claim that Casebolt failed these tests because of any protected activity.

~FOOTNOTE_NINE
9 Falcon's failure and refusal to furnish Casebolt with this equipment until almost two years after it was requested may have constituted a violation of 30 C.F.R. 77.1700. This provides:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

~FOOTNOTE_TEN
10 The collective bargaining agreement between Falcon and the company union, Falcon Coal Company Employees' Association, is dated July 13, 1981. The provisions invoked provided as follows:

> 9. SENIORITY, LAYOFF AND JOB POSTING. (a) Seniority shall be determined on the basis of the length of continuous full-time employment with Falcon
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> (c) If a reduction in the work force is made, layoffs of Association Members shall be based upon company-wide seniority and shall be accomplished as follows:
>
> (iii) Subject to the provisions of subsection (iv) below an Association Member with sufficient seniority to remain in the Company after such layoff, but who has been displaced in the provisions of this section, shall exercise his seniority rights within five (5) days and displace any Association Member with less seniority. An Association Member so exercising his seniority shall have five (5) working days in which to prove his ability to perform the job, just as if he had obtained the new job through the bid system provided for herein. In the event that such an Association Member is unable to perform such new job, he shall again exercise his seniority rights until he finds a job he can perform.

~FOOTNOTE_ELEVEN

11 While Falcon admits that "Passing the written exam is not required if the employee's performance during the five-day qualification period or previous work experience demonstrates that the employee has the requisite mathematical proficiency," it claimed Casebolt's work experience and previous demonstrated math deficiency did not justify waiving the written math test in his case. The arbitrator agreed.

The job qualifications set forth in Exhibit "B" to the collective barbaining agreement are as follows:

5. ENGINEERING-TECHNICIAN II-Knowledge of general mathematics and fundamentals of Algebra and Trigonometry for use in the solution of routine engineering oriented technical problems. Proficient in engineering, lettering and drafting. Knowledge of proper rod and chain techniques.

~FOOTNOTE_TWELVE

12 The arbitrator stated that "I have personally reviewed both tests taken by the Grievant and find them to be fair, appropriate and reasonable." Casebolt has never challenged the fairness of the math tests.

~FOOTNOTE_THIRTEEN

13 While no transcript was made of Casebolt's arbitration hearing, a complete and authentic copy of the collective bargaining agreement in question has been furnished in support of the operator's motion. The arbitrator's decision contains a recitation of the evidence submitted by the parties. This closely parallels that in the MSHA investigation file which is also in the record.

~FOOTNOTE_FOURTEEN

14 See W.R. Grace & Co. v. Local 759, --- U.S. ----, 76 LEd2d 298, 306 (1983). See also the NLRB's deferral policy in Morris, The Developing Labor Law, Ch. 20, Accommodation to Arbitration, (2d ed. BNA, 1983) and Olin Corporation, 268 NLRB No. 86 (1984). No Commission decision has previously touched on the question of the extent to which a trial judge should defer to arbitral decisions involving the interaction of job qualifications with the exercise of competitive seniority rights. Prior decisions of the Commission have focused on the standards governing the weight to be accorded to credibility and disputed factual findings by arbitrators with respect to activity involved in section 105(c) retaliation (discrimination) cases. See, David Hollis v. Consolidation Coal Company, --- FMSHRC ----, decided January 9, 1984. Compare, Alexander v. Gardner-denver, 415 U.S. 36, 59-60, n. 21 (1974). In Gardner-Denver, the Supreme Court recognized the "specialized competence of arbitrators" in interpreting collective bargaining agreements. Id. at 53, 57.

~FOOTNOTE_FIFTEEN

15 Since my de novo determination is congruent with that of the arbitration, I find it unnecessary to deal with Casebolt's claim that the arbitrator was not technically authorized to hear

and determine his grievance.

~FOOTNOTE_SIXTEEN
16 For example in the grievance proceeding the Union, on behalf of Casebolt, offered evidence which showed that Watts told Sheffel, the miner Casebolt was trying to bump, that Sheffel need not worry because Watts did not like Casebolt and would make sure Casebolt didn't qualify for the surveying job. At the arbitration hearing this was cited as showing a premeditated intent to discriminate against Casebolt. The arbitrator found the Union's evidence established a "long-standing personality conflict" between Watts and Casebolt which put Casebolt under pressure during his five-day field test. But, the arbitrator concluded, even if the field test was unfair, the math tests were not and that Casebolt's refusal to retake them was tantamount to an admission that he lacked the knowledge and skills necessary to perform the job.

~FOOTNOTE_SEVENTEEN
17 In April 1983, the Tech II water sampling job was abolished and its responsibilities transferred to the Reclamation Department. I assume, therefore, that Archie Combs may also be driving a rock truck.

~FOOTNOTE_EIGHTEEN
18 Because the undisputed facts show Casebolt was not technically qualified for a draftsman/mapping job and because I do not read his complaint or response to the pretrial order as alleging his disqualification for this job was tainted by any unlawful intent or motive to discriminate, I decline to entertain any suggestion that Casebolt is entitled to further protract these proceedings by being allowed to amend his complaint. Complainant's case has been gossamer thin from the beginning. I believe Mr. Casebolt has had his day in court, and then some, and that any further protraction of this matter would be unfair and vexatious to the respondent. Because miners often have no professional guidance in the institution of pro se discrimination cases, it would be unjust to apply to them the sanctions ordinarily available to deter the filing of frivolous, unreasonable or groundless claims. If, however, a miner were to insist on pursuing a claim after it clearly appears to be frivolous, unreasonable or groundless the common law sanction for pursuing or continuing vexatious claims, i.e., claims pursued in bad faith may be invoked to deter abuse of the adjudicatory process. See Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980).

~504
ATTACHMENT

EXHIBIT 1 (Bumping caused by Zane Watts, 6/7/82-8/9/82)
TABLE

~505
EXHIBIT 2 (Bumping caused by elimination of Field Crew #3, 10/15/82-11/15/82)
TABLE