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

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF  
PHILLIP CAMERON,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 82-190-D  
MORG CD 82-3

Ireland Mine

v.

CONSOLIDATION COAL COMPANY,  
RESPONDENT

DECISION  
ORDER OF RELIEF

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

Before: Judge Merlin

This case is now before me pursuant to the Commission's decision of remand dated March 28, 1985 (7 FMSHRC 319). The operator appealed the Commission's decision, but the Court of Appeals dismissed the appeal on July 17, 1985. Thereafter, the parties advised me that they did not believe a further evidentiary hearing was required and on August 13, 1985, I ordered them to file additional briefs on or before October 1, 1985 setting forth their positions in light of the Commission's decision. The operator and the Solicitor have filed briefs but the union has not.

The facts of this case are fully set forth in both my original decision dated December 13, 1982 (4 FMSHRC 2205) and the Commission's remand. Briefly, the complainant was a haulage motorman on a lead locomotive pulling 10 to 12 mine cars of coal. Until the time in question he used a safety switch to derail detached cars and prevent a runaway. The operator changed this procedure so that 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. The complainant refused to run the lead locomotive because he believed this procedure would be dangerous to his co-worker on the trailing locomotive. 4 FMSHRC at 2209-2210.

In my original decision I concluded that the complainant's belief was in good faith and reasonable, stating as follows:

\* \* \* 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. 4 FMSHRC at 2211.

After again reviewing the record I adhere to conclusions expressed above. I also note and accept the complainant's statement that he would worry about anyone on the trailing locomotive under the operator's new procedures (Tr. 118). The complainant's fears were undoubtedly heightened in the case of Mr. Aston because Aston was not experienced, but I conclude that the complainant's reasonable, good faith belief concerned the procedure itself with respect to anyone who would be assisting him by riding on the trailing locomotive.

In its decision the Commission ruled that under certain circumstances a miner's refusal to work can be protected under the Act where he himself is not in danger but another miner is, holding in this respect as follows:

\* \* \* Therefore, we hold that a miner who refuses to perform an assigned task because he believes that to do so will endanger another miner is protected under section 105(c) of the Mine Act, if, under all the circumstances, his belief concerning the danger posed to the other miner is reasonable and held in good faith. *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1418 (June 1984), citing Secretary on behalf of *Robinette v. United Castle Co.*, 3 FMSHRC at 807-12. We emphasize, however, the need for a direct nexus between performance of the refusing miner's work assignment and the feared resulting injury to another miner. In other words, a miner has the right to refuse to perform his work if such refusal is necessary to prevent his personal participation in the creation of a danger to others. Of course, as with other work refusals, it is necessary that the miner, if possible, "communicate, or at least attempt to communicate, to some

representative of the operator his belief in the . . . hazard at issue," Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397-98 (June 1984) (emphasis added), quoting Secretary on behalf of Dunmire and Estle v. Northern Coal Co., supra, 4 FMSHRC at 133, and that the refusal not be based on "a difference of opinion--not pertaining to safety considerations--over the proper way to perform the task at hand." Sammons, 6 FMSHRC at 1398.

7 FMSHRC at 324.

As already set forth, I have concluded that the complainant's belief was reasonable and held in good faith. I further conclude that there was a direct nexus between the complainant's operation of the lead locomotive which he refused to run and the danger which he feared would result to his co-worker on the trailing locomotive. Evidence of record indicating that there were areas of bad track and steep grades is accepted (Tr. 23, 24). As the operator of the lead locomotive the complainant might misjudge grades and/or speeds, thereby causing or contributing to an uncoupling which would place the man on trailing locomotive in danger (Tr. 119, 153). Also, in the event of an uncoupling on a grade, the complainant, as operator of the lead locomotive could cut his motor off from the rest of the trip, saving himself but again jeopardizing the man on the trailing locomotive (Tr. 93-95). Thus, the complainant's expressed fear that he could cause injury or death to the man on the trailing locomotive is well founded (Tr. 103, 120). In other words, the complainant would personally participate in the creation of the danger to the other motorman. Finally, as my first decision sets forth in detail, the complainant communicated his belief in the hazard to all levels of mine management including the section foreman, shift foreman, safety supervisor and mine superintendent. 4 FMSHRC at 2206-2207.

In light of the foregoing, I determine that all the requirements of the Commission's decision have been satisfied and that this complaint should be granted.

Accordingly, it is Ordered that:

- (1) the operator vacate the suspension and remove it from the complainant's employment record;
- (2) the operator pay the complainant for the days he was suspended together with interest computed thereon in accordance with applicable Commission decisions and any expenses reasonably incurred by complainant in connection with the institution and prosecution of this case. These amounts should be readily ascertainable by the Solicitor and operator's counsel without difficulty.

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(3) the operator post a copy of this decision on a bulletin board at the subject mine which is available to all employees, where it shall remain for a period of at least 60 days.

Paul Merlin  
Chief Administrative Law Judge