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RANDY CUNNINGHAM V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

RANDY CUNNINGHAM, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. PENN 90-46-D
v.	MSHA Case No. PITT-CD-90-3
CONSOLIDATION COAL COMPANY, RESPONDENT	Dilworth Mine

DECISION

Appearances: Paul H. Girdany, Esq., Healey Whitehill, Pittsburgh, Pennsylvania, for the Complainant; David J. Laurent, Esq., Polito & Smock, P.C., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a complaint filed by Randy Cunningham, alleging a violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1) (the Act). Respondent filed an answer, and pursuant to notice, the case was heard in Pittsburgh, Pennsylvania, on March 7, 1990. At the hearing, Larry E. Swift, and Randy Cunningham, testified for Complainant, and Louis Barletta, Dan Jones and Richard J. Werth, testified for the Respondent. The parties filed briefs containing proposed findings of fact on April 30, 1990. On May 10, Respondent filed a reply brief; none was filed by Complainant.

Findings of Fact

1. At all relevant times Complainant, Randy Cunningham, a miner, worked as a roof bolter at Respondent's Dilworth Mine.

2. Complainant at all relevant times was an elected safety committeeman for Local Union 1980 of the United Mine Workers of America (hereinafter "UMWA") at Respondent's Dilworth Mine, having been elected to that position in May 1987.

3. Cunningham was the only safety committeeman at Respondent's Dilworth Mine who was working inside the mine.

4. Prior to August 3, 1989, safety committeemen were allowed to leave their work stations early before their scheduled quitting times to investigate safety problems, without seeking approval from Respondent's management.

5. Cunningham's production crew was again assigned to change at the face beginning in July, 1989, and within the first 2 weeks he left early four times on union business.

6. On August 3, 1989, Louis Barletta, Respondent's Superintendent, counselled Cunningham with regard to leaving work early on union business and told him that henceforth he would not be permitted to leave his work station before his scheduled quitting time on a safety issue unless someone else invoked their safety right.

7. On or about August 31, 1989 at a communications committee meeting between officials of the local union and the company, Barletta announced that henceforth no one was allowed to leave work before their scheduled quitting time for any reason except to exercise their individual safety rights. Barletta at that meeting stated that it would be his sole decision as to whether an employee/safety representative could leave work to pursue a safety problem. Complainant and Barletta argued at this meeting about the rights of safety committeemen to pursue safety issues on company time and Complainant again informed Barletta that, if necessary, he would pursue safety issues on company time. Barletta warned Complainant and others that failure to comply with this newly announced policy could lead to disciplinary action.

8. Around the beginning of the midnight shift, October 3, Russell Camilli asked Cunningham if pushing wagons along the haulage with one motor (locomotive) was allowed. Camilli told Cunningham that another employee, Russ Goodwin, was supposed to be working with him, and that foreman Greg Alexander had told them both to use only one motor. At approximately 1:10 a.m., Cunningham asked Jones if he had made such an assignment, and informed him that it is contrary to a safeguard to push wagons with a locomotive. According to Cunningham, Jones indicated that his supervisor had told him that such an activity is allowed. Jones explained that it was his understanding that it was permitted to push with a locomotive from switch to switch. (I accept Jones' version as it is not inconsistent with Cunningham's version. Also, Complainant did not offer any rebuttal by Cunningham to contradict Jones' version). Cunningham then indicated that he would seek the MSHA inspector, as a safeguard would be violated if the assignment were to be effectuated.

9. If a locomotive pushes a wagon, the vision of the miner operating the locomotive can be obstructed, causing hazards such as difficulty seeing trailing wires or persons on the tracks.

10. On October 3, 1989, at approximately 8:00 a.m., MSHA Inspector Koscho was present at Respondent's mine to perform a spot inspection. He generally handled safety hazards at Respondent's mine by gathering oral information, investigating, and writing citations or orders if appropriate, without basing his actions on written 103(g) complaints.

11. At approximately 8:00 a.m., on October 3, Cunningham approached Koscho and asked him whether he had written a safeguard concerning pushing a wagon with a locomotive. Koscho indicated that he thought he had. Cunningham then told Koscho that he thought an incident occurred during the midnight shift. Cunningham asked Koscho if he wanted him to file a 103(g) complaint, but the latter indicated he'd rather have Cunningham find out if the incident occurred. Cunningham said that Robert Camilli was assigned to push a wagon with a locomotive. However, when Camilli was asked by Cunningham in the presence of Koscho, the former indicated he did not perform the task. Cunningham also indicated at that time that Russell Goodwin was also involved in the incident. However, Cunningham told Koscho that Goodwin does not shower in the mine but takes his coveralls and goes home. Koscho asked Cunningham to find out if Goodwin pushed the wagon with a locomotive. He also asked Richard Werth, Respondent's safety director, to talk to Jones and see if the incident occurred. Koscho indicated he would probably be back the next day.1

12. Cunningham did not attempt to contact Goodwin at any time subsequent to 8:00 a.m. October 3, until he spoke to him shortly after the start of the midnight shift on October 4. At that time, Goodwin informed Cunningham that he had performed the task of pushing a wagon with a locomotive.

13. On October 4, 1989, shortly after the start of the 12:01 a.m. shift, Cunningham told his immediate supervisor, Mel Robinson, that he would be leaving at the end of the regular shift (before the completion of scheduled mandatory overtime) to speak to an MSHA inspector about a safety violation. Cunningham also asked Robinson to get in touch with Dan Jones, the shift foreman, so that he could talk to Jones.

14. Shortly after 5:30 a.m., during the midnight shift of October 4, Cunningham reiterated to Jones that pushing one wagon with a locomotive is against the law. Jones indicated that his foreman Bob Burgh told him it was allowed. According to Cunningham, Jones said specifically that he did not agree with the safeguard, and indicated that he was not going to obey it. In essence, Cunningham told Jones that if the foreman had indicated that the safeguard did not have to be followed, then a violation could also occur on the day shift. He indicated that he therefore felt there was an ongoing safety problem, and wanted to leave his work station to see Swift and Koscho. According to Jones, he told Cunningham that the shift foreman, Mark Watkins, had explained to him, with regard to the safeguard, that it was permissible to go from switch to switch. Jones denied saying to Cunningham that he did not feel he had to follow the safeguard. He was asked whether he ever said he did not agree with the safeguard and answered as follows: "I said that I felt that what I had done that night was not in violation of the safeguard" (Tr. 284-285). I accept the version testified to by Jones as it is essentially consistent with what he had told Cunningham the previous night (See Finding 8, infra).

15. During the midnight shift, October 4, Jones told Cunningham that the incident in which a motor pushed a car occurred the previous night and ". . . that we weren't doing that type of action that night" (i.e. October 4), Tr. 288. He no longer had any intention of clearing tracks by pushing cars with a motor, but did not tell this to Cunningham.

16. During the conversation between Cunningham and Jones on October 4, 1989, at approximately 5:30 a.m., the former told Jones that he wanted to leave his work station at the end of the regular shift (before scheduled mandatory overtime) to speak to Swift and Koscho about the aforementioned violation of the safeguard. Jones indicated to Cunningham that Cunningham was not allowed to leave work, and a discussion took place in which Cunningham stated his rights, as a safety representative, to leave the mine. Jones threatened Cunningham with discipline and gave Cunningham a direct work order to stay at his worksite through mandatory overtime. Cunningham made it clear that despite the direct work order, he intended to exercise his rights as a safety representative, and that he would leave work before

the completion of mandatory overtime to talk to the federal inspector about the safeguard violation.

17. On October 4, 1989, at approximately 7:40 a.m., Jones came back to take Cunningham out of the mine and gave him another direct order to stay at his work station through mandatory overtime. Cunningham again explained his rights as a safety representative, and indicated he wanted to leave to speak to Swift and a federal safety inspector.

18. Upon exiting the mine on October 4, 1989, Cunningham went to the safety office and told MSHA Inspector Rantovich, who was conducting an investigation on another matter, that he wanted to speak to him about a safety problem. Later on, Cunningham informed him about the problem of pushing cars with only one motor, and related the previous day's conversation with Koscho. Rantovich stated that in order to investigate a safeguard violation he needed a written 103(g) complaint.

19. Barletta terminated Complainant from his employment for failure to follow the orders of shift foreman Jones, on the midnight shift of October 4, 1989, that he remain in the mine through mandatory overtime. Barletta was aware that the reason Cunningham wanted to leave his worksite was to talk to an MSHA inspector or Swift.

20. Swift filed a Section 103(g) complaint over the October 3, 1989 incident on October 5, 1989, and a citation was eventually issued on October 12, 1989.

Discussion

A. Protected Activity

In order to prevail herein, Complainant must establish first of all, that he was engaged in a protected activity i.e., that he was exercising "any statutory right" afforded by the Act.

Essentially, it is Respondent's position that Cunningham's leaving his work station during mandatory overtime, and contrary to a direct work order, is not a protected activity. In support of this position, Respondent argues that on October 4, there was no hazard present, and that "Swift and MSHA already knew about the alleged violation and there is no reason why Cunningham had to come out of the mine early on October 4, since he could not provide any additional information that could not have been

obtained through other means, ... " (Respondent's Posthearing Brief, pg. 23).2

It is true that a violative action had occurred on October 3, and was brought to the attention of Koscho at that time. However, it would be unduly restrictive to conclude that, from Cunningham's point of view, there was no hazard on October 4 as argued by Respondent. Jones had clearly communicated to Cunningham his interpretation of the safeguard, as told to him by his foreman and supervisor, that pushing with a locomotive from switch to switch was not prohibited. Thus, Cunningham could reasonably have concluded on October 4, as he did, that another incident could occur on the day shift, of a similar use of a locomotive, which might be in violation of the safeguard. Further, as explained by Swift, if a locomotive is used to push wagons, presumably even from switch to switch, the vision of the miner operating the locomotive is obstructed, creating a hazard of hitting a trailing wire or a miner walking on the track. Further, Cunningham was asked by Koscho to find out if Goodwin in fact pushed a locomotive with a wagon. Koscho also told him he probably would return to the mine on October 4.

Furthermore, Respondent has not cited any Commission decisions which directly and specifically hold that, under the circumstances herein, Complainant was not engaged in the exercise of a statutory right, when he left his worksite to seek out Swift and/or Koscho.3

In resolving the issues herein presented, I am guided in my decision by the Legislative History of the Act which embodies Congress' intent in enacting the Act. The Senate Report, on the Senate version of the bill that became the Act, (S. Rep. No. 95-181, 95th Cong. 2d Sess. 1977, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 ("Legislative History")), contains the following language relating to the protection of miners against discrimination:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. * * *

Further instructive with regard to the construction to be accorded the scope of activities protected under Section 105(c), supra, is the following language from the Senate Report, supra, (Legislative History at 623).

> The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection under Section 104(f) or the participation in mine inspections under Section 104(e), but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

The Senate Report, supra, (Legislative History at 624) explicitly indicates that Section 105(c), supra,4 was intended by the Committee:

> [T]o be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

The Sixth Circuit Court of Appeals in Boich v. Federal Mine Safety and Health Review Commission, 704 F.2d 275, 283 (6th Cir. 1983), recognized the principle of broad construction to be accorded the Act in general, and referred to the Legislative History as follows:

> The Act is remedial in nature and should be broadly construed. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974); see Marshall v. Whirlpool Corp., 593 F.2d 715, 721-22 (6th Cir. 1979), aff'd, 445 U.S. 1,100 S.Ct. 883, 63 L.Ed.2d 154 (1980). The Senate Report specifically provides that the section should be "broadly interpreted by the Secretary . . . . "

I can not disregard the expression of legislative intent as referred to above. Based on these statements, I conclude that it would be violative of legislative intent to deny that, in the circumstances presented herein, Cunningham had a right on October 4 to seek out the inspector and/or the safety committee chairman. To do so would tend to discourage active participation in safety matters, and inhibit the exercise of the right to complain about safety matters, which would contravene the explicit, expressed, Congressional intent stated in the Senate Report, supra. For these reasons, I find that Complainant was engaged in protected activity on October 4, 1989, when he left his work station to seek out Swift and/or Koscho.

B. Motivation

Adverse action was taken against Cunningham by Barletta when he terminated the former's employment. Respondent maintains that, assuming Cunningham engaged in protected activity, he would have been discharged in any event, because he disobeyed a direct work order without cause. Inasmuch as I have found that the record here establishes that Cunningham had a protected statutory right to leave his work station, Respondent therefore had a duty to let him go, and thus did not have a right to order him to remain at his work station and continue working. Thus, in actuality, the action taken against Cunningham resulted solely from his exercising a statutory right which of necessity required him to violate a work order. Hence, he was terminated based on the exercise of a statutory right. As such, his rights under Section 105(c), supra, were violated.

I thus conclude that Cunningham was discriminated against in violation of Section 105(c), supra.

ORDER

It is hereby ORDERED that:

1. Respondent shall, within 15 days of the date of this Decision, post a copy of this Decision at its Dilworth Mine where notices to miners are normally placed, and shall keep it posted there for a period of 60 days.

2. Complainants shall file a statement, within 20 days of this Decision, indicating the specific relief requested. The statement shall be served on Respondent, who shall have 20 days from the date service is attempted, to reply thereto.

3. This Decision is not final until a further Order is issued with respect to Complainants' relief and the amount of Complainants' entitlement to back pay if any.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. I reject the argument set forth by Respondent in its brief (pg. 6-8), that it was unlikely that Koscho planned to return the next day. In evaluating whether Cunningham's activities are protected, the key issue is not Koscho's subjective intention, but rather what he told Cunningham. I accept the testimony of Cunningham that Koscho told him he probably would return the next day, as it was essentially corroborated by Swift. The narrative statement by Cunningham on cross-examination, that he was sure Koscho was going to be there, does not negate his previous testimony on direct examination, that Koscho either said he would or probably would return the next day. Also, Werth, who also was present, did not rebut or contradict the testimony of Swift and Cunningham that Koscho said he would return. In this regard, Werth's statement that he did not know when Koscho would return, is inadequate to contradict the specific testimony of Cunningham as to what Koscho said.

2. Respondent also asserts, at page 23 of its brief, supra, that Cunningham was most likely acting in bad faith i.e., seeking to avoid mandatory overtime or challenging Respondent's authority "rather than vindicating a legitimate safety interest which could not be adequately addressed at the end of his shift or by Swift, ... " However, Respondent does not advance any facts to support this latter assertion, and it is rejected as being unduly speculative.

3. I find the following cases cited by Respondent not to be relevant to the case at bar. In Howard v. Martin Marietta Corp., 3 FMSHRC 1599 (1981), Judge Broderick held that a miner who left his work site to call MSHA to complain about a front-end loader being unsafe, was protected by Section 105(c) of the Act. In Howard, supra, at 1603. Judge Broderick concluded that a miner has an absolute right to leave the premises to call for an inspection when he believes that there exists a situation ". . . requiring an immediate safety and health inspection." This conclusion fits the facts presented in Howard, supra, but clearly does not attempt to limit the right to leave the premises to only those situations requiring an immediate inspection. Such an interpretation goes beyond the law of the case in Howard, supra.

In UMWA on behalf of Wise v. Consolidation Coal Co., (6 FMSHRC 1447 (1984)), a safety committeeman ignored a safety board, placed by the operator, in order to observe work being performed to correct a hazardous condition. The Commission held that the miner did not have a right, protected by the Mine Act, to go beyond a dangered-off area contrary to the operators orders. The Commission reasoned that an operator may restrict

access to hazardous areas to effectuate correction of a hazard. The Commission commented in Wise, supra, at 1432, that if a safety committeeman believes that abatement work presents a hazard, then the normal statutory procedures are available. These comments do not per se require a conclusion that the Complainant herein did not have a right to seek an inspector, Koscho, or Swift, the safety committee chairman.

In Ross v. Monterey Coal Co, 3 FMSHRC 1117 (1981), a miner, acting as a union safety committeeman, inspected areas other than the work area of his employer. The Commission found that the disciplinary letter given him by his employer was nondiscriminatory, and was issued to protect a legitimate interest in controlling the work force. The mere recognition of a legitimate managerial interest in the circumstances presented in Ross, supra, does not compel a finding of a legitimate managerial interest herein, which would have the effect of destroying Complainant's right to seek out an inspector.

I do not accord any weight to a decision denying Cunningham unemployment compensation, as that decision did not adjudicate any rights of Complainant under Section 105(c), supra, of the Act, which is the exclusive jurisdiction of the Commission to adjudicate.

4. The Senate Report, supra, on the Senate version of the Act, (S. 717), refers to Section 106(c), which, essentially, contains the same language as section 105(c) of the Act.