CCASE:
RONNY BOSWELL v. NATIONAL CEMENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

RONNY BOSWELL, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. SE 90-112-DM
NATIONAL CEMENT COMPANY, RESPONDENT	SE MD 90-04
	Ragland Plant

DECISION

Appearances: Mr. Larry G. Myers, Union Representative, Independent Workers of North America, Birmingham, Alabama, for the Complainant;
Harry L. Hopkins, Esq., Lange, Simpson, Robinson & Somerville, Birmingham, Alabama, for the Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me based on a complaint filed by Ronny Boswell, alleging a violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (the Act). Respondent filed an answer, and pursuant to notice, the case was heard on September 5, 1990, in Birmingham, Alabama. At that hearing, Boswell himself, as well as Gerald W. Bowman, James E. Noah, and Gary R. Meads testified for the complainant. James Allen and Cedric Phillips testified for the respondent. Mr. Hopkins filed a post-trial brief on behalf of the respondent which I have considered in making this decision; none was filed by the complainant.

DISCUSSION

At all times relevant to the complaint, Ronny Boswell worked for respondent as a utility laborer, until the company disqualified him from being such on January 11, 1990. Boswell had held this position on three different occasions during his fourteen years of employment with National Cement. He had been a utility laborer this latest time since approximately 1982 and has been a utility laborer for approximately ten of the fourteen years of his tenure there.

Boswell became a payloader operator by some convoluted process unimportant to the merits of this case upon his disqualification as a utility laborer on January 11, 1990, and has remained so to this day.

Complainant seeks the difference in pay between what he would have received and what he did in fact receive as a result of and since the disqualification. Additionally, he seeks reinstatement to the position of utility laborer.

The respondent stated five specific grounds for the disqualification of Mr. Boswell from his position as a utility laborer. (Tr. 161, Resp. Ex. No. 1).

The Kiln Incident of August 8, 1989

The incident began with two other men already inside the kiln, tearing brick and coating down from overhead using fiberglass pry bars to pull it down, This was normal procedure for two men at a time to go inside and pull the brick down. When it gets too hot, they come out and two different men go in. There are always two men at a time pulling down the brick, which comes down in chunks weighing a hundred pounds and upwards. At the same time, there were eight men, including the complainant and Mr. Noah standing around out in front of the kiln.

At this particular point in time, one of the new French managers came upon this scene and inquired of their supervisor why more men were not working inside the kiln. The men had never before been asked to throw brick back up the kiln while people were still pulling brick and coating down from overhead. But, on this occasion, their supervisor, James Allen, prodded by the new manager, wanted three more men, including complainant, to go in there and throw brick that had already been pulled down back up the hill while two other men continued to pull brick and coating down around their heads.

The complainant refused and exercising his union contract rights, called for a safety review. However, he didn't get one. The union safety representative came when called, but the company man never showed up. The issue was resolved when the company just let it go. The supervisor simply continued the work with the usual procedure of having just the two men inside the kiln while the brick was being pulled down. Only after all the brick and coating was pulled down did they start cleaning it out, which is the next phase of the job.

Mr. Noah, who was on the scene at the time, concurred with and corroborated the testimony of the complainant. He testified that he informed Mr. Phillips, the Safety Director at the plant, that if Boswell hadn't called for a safety review, he would have, because it was unsafe to do what they were asked to do.

In any event, at the time, Boswell had an eye infection that had been "acting-up" for the previous two or three weeks, and he went home after four hours because his eye was hurting him and he didn't want to get dust in it. His supervisor, Mr. Allen, gave him permission to leave. Boswell also testified, unrebutted, that they had plenty of men to do the job; they didn't have to replace him.

Mr. Allen also testified about this incident. However, he misidentifies it as occurring on December 22, 1989 (Tr. 92) and states a widely differing version of the facts. For example, he states that only one man was working inside the kiln, not two and that they had already finished the pulling down phase of the work at the time he asked Boswell and a couple more men to throw loose brick up the kiln.

I make the necessary credibility finding in favor of the complainant. His testimony is corroborated by Mr. Noah and to some extent by Respondent's Exhibit No. 1. Mr. Allen apparently has some other incident in mind; perhaps the kiln incident of December 22, 1989.

Mr. Allen did go on to concede, however, that if the incident was as described by complainant and Noah, that would be "totally unsafe".

I therefore find that complainant did engage in protected activity by refusing to perform work and asking for a "safety review" related to the kiln incident of August 8, 1989. I also find that the adverse action taken by the company (i.e., disqualification) was predicated at least in part on this protected activity.

The Clay Shredder Incident of October 1, 1989

Mr. Boswell was charged with refusing to operate the clay shredder on October 1, 1989. He says because he had no knowledge of how it worked nor had he ever had any training to operate it.

Initially, that strikes me as being a fairly reasonable proposition. But, it turns out he didn't really refuse to operate it, he refused to be responsible for it. When James Allen asked him to operate it, he replied he didn't know how. Allen offered to show him. They then got into some repartee back and forth about who would be responsible if anything untoward happened, etc. The upshot of the whole thing was Allen decided it didn't need to be run after all and simply assigned Boswell to do something else.

The next night, the same issue arose again. This time Allen started the machine up for Boswell and he agreed to simply watch

it while it ran. This he did and Allen seemed satisfied with that, at least at the time.

The complainant feels the clay shredder is a dangerous piece of equipment for which adequate training is essential to operate it. Besides, he believes that operation of the clay shredder was not a part of his job.

Basically, with regard to the entire clay shredder incident, I don't find much in it for either side. Boswell performed, albeit reluctantly, the task assigned by Allen to Allen's satisfaction. Accordingly, I do not find any protected activity herein related to this incident. Nor do I find any unprotected justification for Boswell's disqualification.

The Radio Incident of October 22, 1989

This is another non-issue. Everybody at this point agrees nothing happened on this date. Boswell was off work on this particular date. Furthermore, Boswell testified that nothing like this ever happened.

On the other hand, Supervisor Allen testified that whatever date it was, it happened. When he tried to call Boswell on the radio, he got no answer and so he went looking for him. When he found him, he asked if he heard him calling on the radio. Boswell said "no". Mr. Allen thereupon checked the radio and it seemed to be working fine. The intimation being I suppose that Boswell was "goofing off" and didn't want to answer the radio to get assigned to some work detail.

Once again, I don't think this issue is going to do the company any good. The only possible purpose its proof might serve is to establish a legitimate cause for Boswell's disqualification. However, the closest Mr. Allen was able to pin this date down was "sometime in 1989" and then he didn't report it to the company until January 11, 1990, when the company was gathering ammunition to take action against Boswell. Therefore, I find the proof that the incident happened at all to be extremely weak.

The Kiln Incident of December 22, 1989

On the day in question, Mr. Boswell had arrived on the job four hours early and worked outside in the cold for the entire time, including four hours of his regular shift, for a total of eight hours. He testified it was very cold that particular day and he had been having ear problems for a month or longer. His ears had been bleeding. After eight hours outside, his ears were hurting worse. He told Supervisor Allen that and was excused for the day. That was the sum and substance of the entire episode

and I find this also to be a neutral situation. It neither helps nor hinders either side of the case.

The Bobcat and Wheelbarrow Incident of January 1, 1990

Supervisor Allen needed to get about three Bobcat (FOOTNOTE 1) buckets full of 3-inch diameter alloy steel mill grinding balls out of the mill basement, which area was accessed by a 20-30 degree inclined ramp, strewn with loose clinker.

He first went out to talk to the first shift Bobcat operator who was getting ready to leave. Allen asked him if he could stay over and finish cleaning the balls up as he (Allen) stated he needed it finished by morning. The man couldn't stay for personal reasons and so Allen next turned to Boswell. He wanted Boswell to operate the Bobcat and finish cleaning up the balls. Boswell objected-said he was afraid to and also stated that it was unsafe for him to attempt to do so as he had no training on the machine. He claims to have only operated this Bobcat about 8 hours total time during his fourteen years with the company and never up and down this ramp. Boswell acknowledges that other people do run the Bobcat down there to clean-up the balls, but he states that they are trained and qualified and they do it every day.

Next, Allen told him that if he wouldn't run the Bobcat, then take a wheelbarrow and go down there in the bottom of the mill room and load these balls in it and push it up the inclined ramp. Boswell states you can't even walk up and down that ramp without holding onto the side, much the less push a wheelbarrow up it. In any event, he refused to do it and instead, for the second time in five months, called for a safety review. Once again, he got no safety review. Supervisor Allen said "no, let it go." He told Boswell to go get the bulldozer and push rock and so he did for the balance of that shift.

DISCUSSION AND CONCLUSIONS

Respondent is of the view that Boswell did not have a reasonable, good faith belief that using the wheelbarrow in this instance was unsafe. At the heart of the inquiry then is whether this work refusal and request for a "safety review" rose to the status of "protected activity" as that term is used in this context.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511, (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983; and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Generally, refusal to work cases turn on the miner's belief that a hazard exists, so long as that belief is held in good faith and is a reasonable one. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (1983); Miller v. FMSHRC, 687 F.2d 1984 (7th Cir. 1982).

In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co. 5 FMSHRC 1529, 1533-34 (September 1983); Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. The Commission has also explained that "[g]ood faith belief simply means honest belief that a hazard exists." Robinette, supra at 810.

Thus, the principal question for decision here is did Boswell reasonably and in good faith believe that he was going to

be required to operate a piece of equipment or perform some job which was deleterious to his personal safety.

With regard to the kiln incident of August 8, 1989, there can be no doubt that Boswell's refusal to work as directed and his request for a "safety review" were both made in good faith and eminently reasonable. The work he was requested to perform was patently unsafe.

The Bobcat and wheelbarrow incident is a closer call, but I find his refusal to work in this instance and his request for a safety review to be protected activity also. He had very limited experience operating the Bobcat and none operating it on a twenty degree slope. He therefore felt it would be unsafe for him to do so in this instance and I cannot fault him for that. It would seem to me that if the company needs trained and experienced Bobcat operators on each shift that it would be more prudent to train sufficient personnel to meet their needs rather then attempt to press untrained and inexperienced operators into service as a stop-gap measure. As for the wheelbarrow alternative Boswell was presented with, although respondent claims it is possible, and in fact Mr. Allen claims to have personally run a wheelbarrow up and down that particular incline, Boswell didn't think it could be done safely and he called for a safety review. We don't know what would have happened had a safety review been accomplished because, as is the usual practice, the supervisor simply sent the requestor off somewhere else to perform some other task. This Boswell apparently did to the operator's satisfaction.

Mr. Boswell was not made aware that any of these incidents involving he and James Allen were going to result in disciplinary action until January 11, 1990, when they told him they were disqualifying him off his job for going home sick twice, calling the two safety reviews and not answering the radio once (as it turns out on a day he wasn't even at work).

Accordingly, I conclude that the complainant engaged in protected activity on August 8, 1989, and again on January 1, 1990. Furthermore, the disqualification from his position as a utility laborer was motivated at least in major part by that protected activity. Therefore, I find and conclude that Boswell was discriminated against in violation of section 105(c) of the Mine Act.

In resolving the issues herein presented I was also guided in part by the Legislative History of the Act which embodies Congress' intent in enacting the Mine 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.

I also found instructive 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), 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.

REMEDIES

Turning now to the complainant's remedies, I find that for 1990 as of August 29, 1990, complainant was financially better off in the job he was sent into on January 11 then he would have been had he remained in the job he was disqualified from. Boswell, as of August 29, 1990, has earned $28,640.26 for 1552 hours worked as a payloader operator. The man who took over his job as a utility laborer, Meads, earned $27,720.72 for 1496 hours during the same time period. In other words, Boswell earned $919.54 more as a payloader operator then he would have earned as a utility laborer for 56 more hours of work. Therefore, I find

that Mr. Boswell is not due and owing any back pay from respondent as a result of his discriminatory disqualification from his utility laborer position.

He is, however, entitled to be reinstated to the position of utility laborer and to have his personnel file purged of any derogatory information pertaining to that disqualification. It will be so ordered.

ORDER

WHEREFORE IT IS ORDERED THAT:

1. Respondent shall, within 30 days of this decision, reinstate Complainant to the same position, pay, assignment, and with all other conditions and benefits of employment that he would have had if he had not been disqualified from his previous position as a utility laborer on January 11, 1990, with no break in service concerning any employment benefit or purpose.
2. The personnel records maintained in Mr. Boswell's file shall be completely expunged of all information relating to the January 11, 1990 disqualification.

Roy J. Maurer
Administrative Law Judge

FOOTNOTE:

1. A Bobcat is a relatively small machine with a scoop bucket on the front that allows you to pick up material. It doesn't have a steering wheel, but rather is steered with foot and hand controls. It requires good coordination and some getting used to in order to properly operate it.