CCASE:
RONNY BOSWELL V. NATIONAL CEMENT
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RONNY BOSWELL, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 90-112-DM
NATIONAL CEMENT COMPANY, Respondent	:	SE-MD-90-04
	:	Ragland Plant

DECISION UPON REMAND

Before: Judge Maurer

On February 26, 1992, the Commission remanded this matter to me, affirmed in part, vacated in part, and with special instructions on how to proceed with the remand.

Basically, on January 11, 1990, complainant was "disqualified" from his job as a utility laborer, a position which he had occupied for a sum total of approximately 10 years at respondent's cement plant in Ragland, Alabama.

National Cement "disqualified" Boswell from his position as a utility laborer pursuant to a "Disciplinary Action Report" (Respondent's Ex. No. 1) dated January 11, 1990. This report indicated five grounds for Boswell's disqualification: (1) a kiln incident on August 8, 1989; (2) a clay shredder incident on October 1 and 2, 1989; (3) a radio incident on October 22, 1989; (4) a kiln incident on December 22, 1989; and (5) a bobcat and wheelbarrow incident on January 1, 1990.

1/ Under the collective bargaining agreement at the plant, a miner has the right to call for a safety review if he believes that a situation is unsafe, and cannot be disciplined for refusing to perform an unsafe task. Under the safety review procedure, representatives of the union and company meet to review the situation. If the two sides cannot agree, they may request a review by the Department of Labor's Mine Safety and Health Administration.

In my original decision, reported at 13 FMSHRC 207 (February 1991) (ALJ), I found that the complainant had engaged in protected activity by refusing to perform work and asking for a "safety review"(Footnote 1) related to the kiln incident of August 8, 1989, and the bobcat and wheelbarrow incident of January 1, 1990. Furthermore, I found that the disqualification from his position as a utility laborer was motivated at least in major part by that protected activity. I therefore had concluded that Boswell was discriminated against in violation of section 105(c) of the Mine Act. That ultimate conclusion necessarily implicitly included antecedent determinations that National Cement had not success-fully rebutted the complainant's prima facie case nor had it met its burden of proof with regard to any affirmative defense.

It is the wheelbarrow portion of the January 1, 1990 incident that we are concerned with at this point on remand, as well as the respondent's putative affirmative defense that protected activity aside, it would have disciplined Boswell, in any event, for his unprotected activity alone.

Initially, Boswell was instructed by his foreman, James Allen, to use a bobcat to remove three bobcat buckets full of 3-inch diameter alloy steel mill grinding balls from the mill basement at the plant. 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. It is sort of a miniature bulldozer or front-end loader.

In any event, Boswell drove the bobcat to the mill and then called Allen to say he was afraid to run it up and down the ramp. The mill basement, where the grinding balls were located is accessed by a 20-30 degree inclined ramp, 12 feet wide and 30-40 feet long, which was strewn with loose clinkers (small marbles or rocks) at the time Boswell inspected it. Boswell did not believe he had been adequately trained to operate the bobcat in these conditions and did not feel he would be safe operating it up and down the inclined ramp.

When Boswell balked at using the bobcat, he was then instructed by Allen to use a wheelbarrow instead. Complainant testified that Allen told him to take a wheelbarrow and go down into the mill basement, load these steel balls into it and push it up the ramp. Boswell says you can't even walk up and down that ramp without holding onto the side, much less while pushing a wheelbarrow. He says "nobody can." That conclusion is seriously disputed by respondent. Mr. Allen, who claims to have done it himself at one time, was asked at Tr. 92:

Q. And do you deem it unsafe to put the balls in a wheelbarrow and take them up that ramp?

A. Not if you only -- you know, you only put so many

in there. Just what you can push up there. That's it.

When Boswell in turn claimed retrieving the balls from the mill basement was unsafe using the wheelbarrow, Allen attempted to change his mind and more or less cajole him into doing it. Allen testified that he told him he would get him some help. He told him to first sweep the inclined ramp free of clinkers in order to have better footing, and finally, he told him he could carry loads as little as ten pounds per trip. I find this last to be patently ridiculous since if that were the case, he could have just put a steel ball in each of his pants pockets and walked up the ramp, holding onto the side if he wished. The wheelbarrow would have been an unnecessary encumbrance. Itself would outweigh the 10 pounds of balls by a factor of 4 or 5 at the least.

The Commission noted that the undersigned failed to address Allen's testimony in this regard in my original decision. I had presumed that the incredulity of this scenario was so obvious that no comment was necessary. We have to remember that Allen needed to get three full bobcat bucket loads of 3-inch diameter steel balls out of the mill basement. This is a lot of balls. It would have been of very little practical help to him to have Boswell carry them up out of there in a wheelbarrow or otherwise, two or three balls at a time. This alternative makes no sense, unless perhaps we view it as an attempt to embarrass or pressure Boswell into taking a chance with his personal safety in order to get the job done. What Allen really wanted Boswell to do was use the bobcat and get it over with. Accomplish the mission. Get the balls out of the basement. He finally got another miner named Echols to run the bobcat up and down the ramp. He took out the three bobcat bucket loads of balls that night.

To be very clear about this, it is my considered opinion that nobody believes, least of all Allen and Boswell, that he was merely being asked to bring up ten pounds, i.e., two or three balls at a time in his wheelbarrow or pockets or however he could carry them.

As an objective matter, I did not initially and do not now find that the wheelbarrow alternative Boswell was presented with, and by that I mean bringing up a substantial load of steel balls out of the basement, was unsafe. Perhaps it could have been done safely, without incident or injury. But I do find that Boswell thought it was unsafe and in accordance with established procedures at the cement plant, he could and did ask for a "safety review," as was his right to do. This was not a simple matter of refusing to perform a task. Boswell called the union safety man at home and determined that he could come to the plant right away to settle the matter. But his supervisor, Allen, would not allow him the "safety review" he sought. Allen instead told him to "let it go" and reassigned him to get on a bulldozer and push rock. Boswell did as he was told and went to push rock.

Therefore, I do not view this strictly as a reasonable or unreasonable refusal to work. Rather, I view it as a reasonable exercise of Boswell's right to ask for a "safety review" of the task. Up to that point I believe he was well within the protection of the Mine Act. When the company foreman decided not to pursue the "safety review" and simply reassigned him to another task, they could not thereafter be heard to complain that he had refused to work.

After all, we don't know what would have happened if the company would have conducted the requested "safety review." Perhaps the union safety man would have seen it the company's way and advised Boswell to perform the requested task. In any event, it is apparently undisputed that Boswell's request for a "safety review" regarding the bobcat and wheelbarrow incident was protected activity. Protected activity that formed part of the basis for his subsequent "disqualification." The admittedly protected activity of seeking a "safety review" is inextricably tied up with the work refusal itself. In my opinion, it is impossible to separate the two. There would have been no request for a "safety review" absent a dispute about the alleged unsafeness of the requested task.

The "safety review" is a right without a remedy if the company never in fact provides one when requested. Not only that, but if a worker asks for too many of them (in this case, two in five months), he could be subject to disciplinary action. Seemingly, that is the "lesson" to be learned by the worker caught in this type of dilemma.

I am mindful that for our purposes, the miner must have a good faith, reasonable if only a subjective belief that the requested work is unsafe for him to perform. I am of the opinion that Boswell held such a belief and that the operator did nothing to address his concerns. Purportedly, that is the function of a "safety review" at this plant.

I am also mindful that such a "safety review" procedure could become a source of misuse and abuse by a worker, but there is no evidence of that in this case.

Accordingly, I conclude that Boswell's belief that it was unsafe for him to push a loaded wheelbarrow up a 20 degree inclined ramp was at least subjectively reasonable and entitled him to preliminarily seek a "safety review" of the job which request was refused or ignored by the respondent. Therefore, I find that Boswell engaged in protected activity on January 1, 1990, in connection with his refusal to use the wheelbarrow, and adverse action motivated in part by that protected activity occurred shortly thereafter.

If an operator cannot, as here, show either that no protected activity occurred or that the adverse action taken was in no part motivated by protected activity, it may nevertheless affirmatively defend by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Basically, I believed and still believe Boswell was "disqualified" for the reasons the respondent stated they disqualified him in their "Disciplinary Action Report" of January 11, 1990 (Respondent's Ex. No. l). Most particularly, for calling the "safety review" in August 1989 and the last straw, again on January 1, 1990. Ten days after that he was reprimanded and disqualified as a utility laborer. Both of these incidents are clearly protected activity under the Mine Act.

The other three instances cited in the Disciplinary Action Report were essentially nonissues, i.e., throw-ins. None of these incidents taken separately or together provides any credible unprotected justification for the adverse action taken against Boswell. See the earlier ALJ decision at 13 FMSHRC 207 for my rationale concerning these incidents.

As for Boswell's allegedly poor work history going back to 1980, and his inability to get along with his foreman, Mr. Allen, forming the basis for a viable affirmative defense in this case, I am not persuaded. I think they are bound by their own Disciplinary Action Report, i.e., they took the action against Boswell for the reasons they say they did, on January 11, 1990.

At the hearing, on September 5, 1990, I specifically asked Mr. Cedric Phillips, the personnel director for the respondent, if the allegations contained in that report were the only grounds the company relied on to disqualify Boswell from his utility laborer position. He replied: "Yes sir. Those are the ones that were used." (Tr. 161). He then went on to state that "Ronny [Boswell] and James [Allen] wasn't getting along together" and therefore, "Ronny needed to be removed from his job and from his shift." (Tr. 162). Thats it. That is the sum total of the evidence that anything other then the grounds stated in

Respondent's Exhibit No. 1 were used to disqualify Boswell. On the other hand, Boswell's unrebutted testimony was that he worked for James Allen for the last 8 years and had no more problems with supervision and supervisors than anyone else did.

Lastly, I will turn to the seven earlier incidents concerning Boswell's work which were not even mentioned in the January 11, 1990 report, but which are included in the hearing record as respondent's exhibits.

Respondent's Exhibit No. 5 dated May 27, 1980, Respondent's Exhibit No. 6 dated April 27, 1981, Respondent's Exhibit No. 7 dated December 10, 1981, Respondent's Exhibit No. 8 dated December 14, 1981, and Respondent's Exhibit No. 9 dated April 16, 1982, I deem too remote in time to have any bearing whatsoever on his 1990 "disqualification."

There were two further incidents written up during 1988. One on May 24, 1988 (Respondent's Exhibit No. 10) is on a piece of scratchpad on which is written a Mr. Harvey Hyde's note that Boswell had refused to follow a supervisor's orders concerning signing the change sheets for cement silos. There is no further elucidation in the record of what this is all about, nor is there any mention of it in connection with the 1990 "disqualification." Respondent's Exhibit No. 11 is also signed by one Harvey Hyde and appears to be more serious. It is on a "Disciplinary Action Report" form and again has to do with following procedures or failing to follow procedures about changing cement from one silo to another. Again, it has been dumped into the record cold and has no readily discernible connection with the adverse action the respondent took against Boswell on January 11, 1990.

As noted by the Commission in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982), it is not our function to pass on the wisdom or fairness of such purported justifications, but only to determine whether they are credible and whether they would have motivated the operator as claimed. Assuming all these earlier incidents happened, and taking them at face value within the four corners of the documents presented, I conclude that respondent has failed to prove that it would have disqualified Boswell over any of these incidents separately or together. The elapsed time alone between these incidents and the complained of adverse action casts substantial doubt on that claim.

Accordingly, considering the entire record of proceedings made in this case yet again and in particular the Commission's Decision and remand instructions to me of February 26, 1992, I conclude and find that:

1. The wheelbarrow incident did constitute a protected work refusal; and

2. National Cement Company failed to prove that it would have disqualified Boswell in any event for his unprotected activities alone, and this is so whether these activities are considered separately, in any combination thereof or in toto.

With regard to the adverse action in this case, complainant was unrepresented by counsel at the hearing and was unable in my opinion to sustain his burden of proving his entitlement to back pay. However, the Commission has concluded that Boswell suffered an adverse action in this respect as well. "[T]he evidence shows that Boswell earned more because he worked more, but that he nevertheless suffered a loss in his base pay rate." Slip Op. at 8.

Therefore, in addition to the remedies previously ordered in my original decision of reinstatement to his former position and expungement of his personnel record, I am herein ordering back pay paid to the complainant in the amount of $1.08 per hour for every hour he has worked between the date of disqualification and the date of reinstatement to the position of utility laborer, plus interest.

ORDER

It is ORDERED that:

1. The respondent shall pay to complainant Ronny Boswell back wages in the amount of $1.08 per hour for every hour he has worked from January 11, 1990 until the date of reinstatement to the utility laborer position, with interest thereon computed in accordance with the Commission's Decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd, 895 F.2d 773 (D.C. Cir. 1990). The parties shall confer within 15 days of the date of this decision, in an effort to stipulate the amount due complainant under this order. If they are unable to so stipulate, complainant shall submit within 20 days of the date of this decision, its statement of the amount due. Respondent may respond within 10 days thereafter.

2. The terms of my earlier Order dated February 7, 1991, are reiterated here.

3. This decision upon remand will not become final until a subsequent order is issued awarding back pay and declaring the decision to be final.

Roy J. Maurer
Administrative Law Judge

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