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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF RONNY BOSWELL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 93-48-DM
	:	MSHA Case No. SE MD-92-05
v.	:	
	:	Ragland Plant
NATIONAL CEMENT COMPANY, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esquire, Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Complainant; Thomas F. Campbell, Esquire, Lange, Simpson, Robinson and Somerville, Birmingham, Alabama, for Respondent

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Ronny Boswell pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," alleging that National Cement Company, Inc. (National Cement) issued Mr. Boswell a three day suspension in violation of Section 105(c)(1) of the Act.(Footnote 1)

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1 Section 105(c)(1) of the Act provides as follows:

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be

More particularly it is alleged that Mr. Boswell's suspension was the result of certain activities protected by the Act, namely:

* * *

> (a) During the course of the work shift on or about December 27, 1991, Complainant made a daily inspection of loader no. 950 and noted that the lights were 'faulty' and further noted under remarks: total disregard by the company to keep mobile equipment in proper working order may lead to damage to equipment are [sic] possible harm to employees.
>
> (b) On or before December 27, 1991, Complainant's supervisor questioned him regarding the information complainant had entered on the daily inspection report.
>
> (c) Complainant was then instructed to shut down the 950 loader for the rest of the night and to commence operating a different piece of equipment, a 540 loader.
>
> (d) Complainant did as he was instructed and operated the 540 loader until the odor of anti-freeze affected his ability to operate the loader.
>
> (e) Upon notifying his supervisor of the condition in the 540 loader, complainant was instructed to resume his work duties by operating the 950 loader which had previously been shut down by the supervisor.
>
> (f) Complainant informed his supervisor that it would be a violation of the company's safety procedures and requirements as well as federal regulations if the 950 loader was placed back in service without correcting the safety defects for which it had been shut down by management.

fn. 1 (continued)
instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

(g) A safety review was eventually requested by complainant.

(h) The safety director for the company was summoned to the area and the lighting defects ultimately corrected. Complainant then proceeded to operate the 950 loader for the remainder of the shift.

The Commission has long held that a miner seeking to establish a prima facia case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3rd Circuit 1981); Secretary of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981). The operator may rebut the prima facia case by showing either that no protected activity occurred or that the adverse action was in no part motivated by any protected activity. If an operator cannot rebut the prima facia case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 842 (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 tests under National Labor Relations Act.

Ronny Boswell has been an employee of National Cement for 18 years and has been a payloader operator since 1990. The Ragland Plant where he had been working operates 3 shifts, 24 hours a day and Boswell rotates on all three shifts. On December 27, 1991, Boswell was to work the night shift on the 950 Payloader. According to Boswell, following company safety procedures, before starting the equipment, the operator must complete a daily inspection report. This safety inspection report is then given to the foreman near the beginning of the shift.

On December 27, Boswell wrote on the daily inspection report for the 950 Payloader that the lights were "faulty" and noted in the remarks column "total disregard by the company to keep mobile equipment in proper working order may lead to damage to equipment are [sic] possible harm to employee" (Government Exhibit No. 1). Boswell had similarly

reported the lights as being "faulty" and noted a bent left lower headlight bracket on reports dated December 15, 16, 17, 19, 24 and 26, 1991 (Government Exhibit No. 2). Boswell explained that there are actually two pairs of lights on the front of the 950 Payloader, one factory installed pair 7 feet above ground and an additional pair on the upper cab 12 feet above ground and explained that his reports related only to the upper lights.

After filing his report on December 27, Boswell returned to the 950 loader and resumed working at the "clay house" where ample overhead lighting existed and obviated the need for any lights on the payloader. Around 12:00 or 12:30 that night substitute foreman Rudy Hall approached inquiring about the daily inspection report. Boswell acknowledges that he never refused to operate the 950 Payloader because of inadequate lighting and never told Hall that the loader was unsafe. Indeed, Boswell has always maintained that the loader was not unsafe to operate and presented no hazard. Following this discussion Hall nevertheless told Boswell "shut it down and get on the 540 loader -- turn the ignition off and let it sit where it [is]."

According to Boswell, the 540 Payloader was 7 years older than the 950 and after operating it for 20 to 25 minutes antifreeze fumes "got to me." He told Foreman Hall that he could not operate the 540 loader because he "couldn't breathe." Hall accommodated Boswell's difficulty with the 540 loader and told him to return to the 950 loader. Boswell then refused telling Hall that "it's in the company safety book that you can't start it up until the problem is fixed." Boswell maintains that he had the "company safety requirements" in his possession at the time and maintains that he was referring to paragraph (g) on page 4 of a document entitled "National Cement Company Safety Procedures and Requirements" (Government Exhibit No. 3). The cited provision states as follows:

> Report and, if possible, repair any defects found. Do not use machine with uncorrected safety defects which present a hazard. If the loader is unsafe and removed from service, tag it to prohibit further use until repairs are completed.

Boswell also maintains, although it is not clear he raised this contention with Hall at the time, that he understood from Federal regulations in his possession that he was also prohibited by those regulations from resuming operation of the 950 loader. In particular, he cited the provisions of 30 C.F.R. 57.14100(c) which provide as follows:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.(Footnote 2)

According to Boswell, Hall became "very upset" when he continued to refuse to start the 950. Boswell states that Hall then asked him what he was to do and Boswell responded "I'm not going to start the 950 loader back up to get your ass out of a crack." Hall made further inquiry as to what it would take to resolve the impasse and Boswell made it clear that he was not refusing to operate the loader because it had been shut down for safety reasons but only that it could not be restarted without violating Federal regulations and company rules.

Boswell then asked for a "safety review" -- apparently a procedure wherein union representatives review an employee safety complaint for possible further action. According to Boswell, Hall would not call the union safety representative but subsequently Cedrick Phillips, the company safety director, reported to the plant, examined the loader and had the brackets straightened. The light was replaced by Boswell himself. Boswell then restarted the 950 Payloader and operated it for the remainder of his shift. The above recitation of facts taken from the testimony of Boswell is uncontradicted. Rudy Hall was present at trial but was never called as a witness.

On January 13, 1992, Boswell attended a meeting at which he was given a disciplinary action report and was notified of his three-day suspension (Government Exhibit No. 6). Boswell acknowledges that although a number of reasons for his suspension were cited in the "disciplinary action report" (and mine manager Remy Demont later testified that he also considered prior oral and written warnings in Boswell's personnel file) he conceded and understood that the disciplinary action related only to events that occurred on December 27.

Within this framework of undisputed evidence it is clear that Boswell has established a prima facia case that he engaged in protected activities by (1) reporting in the daily equipment

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2 On cross examination Boswell acknowledged that the 950 loader had never in fact been "tagged out" nor "taken out of service and placed in a designated area posted for that purpose."

inspection report for the 950 Payloader on December 27, 1991, and on at least nine other prior occasions, that its lights were "faulty" and (2) in complaining about and refusing to operate the 540 loader on the evening of December 27, 1991, because of the complaints regarding antifreeze leakage and fumes causing difficulty in breathing. I further find that the disciplinary action taken against Boswell was motivated at least in part by the latter protected activity. Plant Manager Remy Demont, who made the decision to suspend Boswell, in fact testified that the suspension was based in part upon Boswell's refusal to operate the 540 Payloader.

It may also reasonably be inferred because of its close relationship to his later refusal to operate the 950 loader on the evening of December 27, 1991, that Demont also was motivated at least in part in suspending Boswell based on his complaints in the daily inspection reports noted above. Under the circumstances the Secretary has established a prima facia case of discrimination under Section 105(c) of the Act in proving that indeed, Boswell engaged in protected activities and his suspension was motivated in part by those activities. Pasula, supra; Robinette, supra.

I find, however, that National Cement has affirmatively defended against that prima facia case by proving that it would have taken the adverse action in any event on the basis of Boswell's unprotected activity alone, i.e., his subsequent insubordination in refusing to operate the 950 Payloader for reasons not related to any safety or health hazard. Pasula, supra; Robinette, supra. In this regard I find credible the testimony of Plant Manager Demont that the triggering event for Boswell's discharge was in fact this insubordination in refusing to operate the 950 Payloader. Demont further explained that Boswell's demand for a "safety committee review" while admitting there was no safety hazard on the 950 loader was the specific causative grounds for his suspension. The critical issue to be determined then is whether Boswell's refusal to operate the 950 Payloader on the evening of December 27, 1991, was a protected work refusal.

A miner has the right under Section 105(c) of the Act to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition. Pasula, 663 F.2d at 1216 n. 6, 1219; Miller v. Consolidation Coal Co., 687 F.2d 194, 195 (7th Cir. 1982). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993. A good faith belief "simply means a honest belief that a hazard exists." Robinette, at 810. The purpose of this requirement is to "remove from the Act's protection work refusals involving frauds or other forms of deception." Id.

Since Boswell acknowledges that he did not refuse to operate the 950 loader because of any hazard, this work refusal is clearly not protected. The Secretary nevertheless argues that a miner has a right to refuse to work if the miner has a good faith, reasonable belief that he would, by continuing to work, violate a mandatory safety standard. In this regard, the Secretary maintains that to operate the 950 loader once it had been removed from service pursuant to 30 C.F.R. 57.14100(c) would constitute a violation of that standard.

Even assuming, arguendo, that the Secretary's legal theory is correct in this regard, the credible evidence in this case does not demonstrate that the 950 Payloader had ever been removed from service pursuant to that mandatory standard. It was admittedly never "tagged out" nor "taken out of service and placed in a designated area posted for that purpose" as would be required under the standard and there is no evidence that it was ever cited by the Secretary. Moreover, Boswell himself at all times insists that the lighting problems on the 950 Payloader did not create any hazard. Under the circumstances the Secretary is disingenuous in claiming on behalf of Boswell that the 950 Payloader was in a hazardous condition and was taken out of service under the cited standard. In summary, I cannot find that Boswell has met his burden of proving that he entertained a good faith and reasonable belief that to operate the 950 loader would have been hazardous or that it would have violated the cited mandatory standard. Thus, in any event, his complaint herein must fail.

ORDER

Discrimination Proceeding Docket No. SE 93-48-DM is DISMISSED.

Gary Melick
Administrative Law Judge
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