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GLENN MUNSEY V. SMITTY BAKER COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, DC
December 4, 1980

GLENN MUNSEY

v.

SMITTY BAKER COAL COMPANY, INC., P&P COAL COMPANY, AND RALPH BAKER — Docket No. NORT 71-96, IBMA 72-21

DECISION

The United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission to consider the following issues:

1) Whether Ralph Baker can be ordered to rehire Glenn Munsey at Mason Coal Company; 2) whether P&P Coal Company is a successor to the Smitty Baker Coal Company which may be ordered to reinstate Munsey: and 3) whether P&P Coal Company, even if not a successor, may be liable under section 110(b)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976)(amended 1977)("the 1969 Coal Act") for refusing to hire Munsey. Munsey v. FMSHRC, 595 F.2d 735, 745 D.C. Cir. 1978).

On appeal, the D.C. Circuit affirmed the administrative law judge's finding that Smitty Baker Coal Company and Ralph Baker violated section 110(b) of the 1969 Coal Act. The incidents leading to the finding of a violation of the Act's anti-discrimination provision occurred in 1971. Since that time this case has twice reached the Court of Appeals and has now come to the Commission to determine what remedy is due to Glenn Munsey and who must provide it. In the intervening time Smitty Baker Coal Company ceased mining operations; P&P Coal Company purchased a lease and equipment from Smitty Baker Coal Company and opened the former Smitty Baker No. 2 Mine; and Ralph Baker incorporated a new mining company, Mason Coal

Company, in a different location from that of the former Smitty Baker Coal Company operation.

For the reasons that follow, we hold that Ralph Baker can be ordered to reinstate Munsey at Mason Coal Company; that P&P Coal is a successor to Smitty Baker Coal Company; and that Ralph Baker, Smitty Baker Coal Company, and P&P Coal Company are jointly and severally liable for the illegal discrimination against Glenn Munsey. We further hold that P&P Coal cannot be held liable for an alleged independent act of discrimination arising out of its asserted failure to hire Munsey. Finally, we remand for additional findings on whether appropriate offers of reinstatement have already been made by Ralph Baker or P&P Coal, the amount of lost wages due to Munsey, and the costs and expenses to be awarded.

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I.

Ralph Baker was general manager of Smitty Baker Coal Company and was responsible for the day-to-day operations of that company. The Court of Appeals affirmed the administrative law judge's conclusion that Baker violated section 110(b) of the 1969 Coal Act by refusing to rehire Glenn Munsey on April 29, 1971.

The Smitty Baker Coal Company stopped mining operations in October, 1971, due to a strike and did not resume operations after the strike was settled in late 1971. As of 1975, the Smitty Baker Coal Company still had active accounts. Ralph Baker now owns all the stock of Mason Coal Company, which began operations in May or June, 1972, in a different location from that of the Smitty Baker Coal Company. His testimony indicates that his authority at Mason Coal Company encompasses the hiring of employees.

Section 110(b)(2) of the 1969 Coal Act requires a violator of section 110(b)(1) to "take such affirmative action to abate the violation as the [Commission] deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner ... to his former position with back pay." 30 U.S.C. $820(b)(2) (1976). Remedies in discrimination cases should be suited to the individual facts of each case and designed to eliminate the effects of illegal discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 364 (1977); Southern Tours, Inc. v. NLRB, 401 F.2d 6-9 (5th Cir. 1968). As the Court of Appeals found, Ralph Baker illegally discriminated against Munsey. Therefore, we must afford such affirmative relief as will best restore Munsey to the position in which he would have been but for the illegal discrimination. We hold that on the facts of the case reinstatement by Ralph Baker at Mason Coal Company, with such seniority and benefits as Munsey would have had if the illegal discrimination had not occurred, is an appropriate remedy in order to fully compensate Munsey for the effects of the illegal discrimination he suffered.

The record, however, raises a question as to whether Baker may have already made a suitable offer of reinstatement. Baker testified in December, 1975, that he offered Munsey employment at Mason Coal Company "maybe a year ago, maybe not that long." In his testimony, Munsey mentioned neither an offer of employment from Baker nor a request for a job at Mason Coal. No findings have been made on this issue. If a suitable offer was made and refused, then the need to offer reinstatement now is moot. Also, the making of a suitable offer would toll the accumulation of lost wages due to Munsey as the result

of the violation. Thus, we remand for further proceedings the question of whether Baker has made a suitable offer to Munsey of Employment at Mason Coal Company.

II.

In March, 1972, approximately five months after it had ceased operations, Smitty Baker Coal Company transferred some of its interests in coal leases to Clyde and Charlie James Poe. The transferred coal leases included Smitty Baker Coal Company's No. 2 mine, but did not include the No. 1 mine in which Munsey had worked. Rights to certain machines, some of which had been used in the No. 1 mine, were transferred. The Poes subsequently renegotiated the lease with Peabody Coal Company, the owner of the leases both before and after these transfers. The Poes incorporated under the name P&P Coal Company and began mining in March 1972. Glenn Munsey, alleging P&P Coal to be a successor company to Smitty Baker Coal Company, moved to add P&P Coal as a respondent in 1975. That motion was granted by the administrative law judge. The administrative law judge found, however, that P&P was not liable to Munsey as a successor. The Court of Appeals remanded this question to the Commission for consideration.

The legislative history on section 110(b) of the 1969 Coal Act supports the conclusion that the protection afforded miners is similar to that in existing provisions in other labor statutes. As Senator Kennedy stated:

> My proposed amendment, then, simply puts into the Coal Mine Health and Safety Act the same protection which we find in other legislation.

115 Cong. Rec. 27948 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 667 (1975). In certain circumstances, the protections of those other statutes have been construed to include the liability of bona fide purchasers and other successors for their predecessors' acts of discrimination. E.g., Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168 (1973); U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir.1968); International Technical Products, 249 NLRB No. 183, 104 LRRM 1294 (1980). We believe that in appropriate cases the successorship doctrine should also be applied under the 1969 Coal Act.

The United States Court of Appeals for the Sixth Circuit has enumerated several factors to be considered in determining whether under Title VII of the Civil Rights Act of 1964, 42 U.S.C. $2000(e) et seq. (1976), a new business entity is a successor employer:

1) [W]hether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or

> substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery.v, equipment and methods of production and 9) whether he produces the same product.

EEOC v. MacMillan Bloedel Containers, Inc. 503 F.2d 1086, 1094 (6th Cir. 1974). We find that these factors provide a useful framework for resolving the question of successorship in the present case.

The first factor to be weighed is whether the asserted successor, P&P Coal Company, had notice of the charge of discrimination and possible liability at the time of its acquisition of the predecessor's business operations. The administrative law judge found that the owners of P&P and representatives of Smitty Baker Coal Company did not discuss Munsey's discrimination complaint during the negotiations on the transfer of the lease. The administrative law judge also found that one of the owners, Charlie James Poe, knew generally that there was a dispute, but did not know that it involved an alleged discriminatory discharge. The judge concluded, "P&P Coal acquired its interest in this company with no knowledge that applicant [sic] was liable to applicant for a discriminatory discharge."

The administrative law judge erroneously relied on knowledge of liability, rather than notice of proceedings which could lead to liability, in reaching his conclusion that P&P Coal is not a successor to Smitty Baker Coal Company. See Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); U.S. Pipe and Foundry Co. v. NLRB, supra. P&P admitted in its answer to Munsey's motion to add it as a respondent "that it was aware of the litigation between the applicants and Smitty Baker Coal Company." Further, an administrative law judge had issued a decision on February 29, 1972, in which he found Smitty Baker Coal Company liable to Munsey for reinstatement, back pay, and costs including attorney's fees. P&P had sufficient notice to enable it to protect itself by either an indemnification clause or a lower purchase price in the takeover agreement. See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 185 (1973). P&P also presented evidence on the question of its successorship. P&P clearly had sufficient notice of the litigation between Munsey and Smitty Baker Coal Company to be held liable for back pay and reinstatement if other facts of this case show P&P to be a successor.

The ability of the predecessor to provide relief is the second factor to be considered. In his decision, issued in 1976, the administrative law judge found that Smitty Baker Coal Company's

accounts "remain active and there is still money in them." He did not make a finding regarding the amount of money in the accounts. Assuming that funds sufficient to cover the monetary award due to Munsey are in the accounts, the question of reinstatement for Munsey remains. Munsey will not be made whole unless he also is offered "reinstatement ... to his former position." 30 U.S.C. $820(b)(2). Smitty Baker Coal Company, the predecessor, no longer is active in mining operations and can not reinstate Munsey. Thus, in the present case the predecessor can not provide complete relief.

The third factor, whether there has been a substantial continuity of business operations, has been termed the" successorship keystone". Saks and Co., 247 NLRB No. 128, 103 LRRM 1241 (1980). The Supreme Court relied heavily on this factor in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964), in which it held that the disappearance of a corporation by merger did not necessarily terminate the rights of employees under a collective bargaining agreement, and that a successor could be compelled to arbitrate. 1/ The Court stated:

> Although Wiley [the alleged successor] was substantially larger than Interscience [the predecessor], relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty.

376 U.S. at 551. This emphasis on the continuity of the workforce was reaffirmed in Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974). The Court, distinguishing its decision in John Wiley & Sons, sup ra, noted that Howard Johnson Co., whom the Court found not to be a successor, selected and hired its own work force and employed very few of its predecessor's workers. 417 U.S. at 259-260.

The administrative law judge found that "many" of the miners hired by P&P were not former Smitty Baker Coal Company employees; however, Charlie James Poe, president of P&P, testified that, needing experienced miners, he asked Ralph Baker if P&P could hire Baker's former employees. With Baker's agreement, P&P hired the Smitty Baker Coal Company employees according to the Baker seniority list without any screening. While the percentage of former Baker employees in the P&P workforce is unclear from Poe's testimony, it was at least 50 percent and possibly as high as 70 percent. 2/ P&P's testimony indicates that it would have hired Smitty Baker employees exclusively if they had been available. Thus, we find that the composition of the work force remained substantially the same.

1/ Analysis of cases determining the bargaining obligations of successor employers does not differ significantly from that of cases concerning the obligation to remedy the effects of the predecessor's illegal discrimination.

2/ Poe testified:

> Approximately how many employees did you have there during the first month of operation.
>
> A. I believe we finally wound up with twenty-four I believe the first month and ten.

Q. How about the second month?

A. That was probably it for a while. I'm afraid to say unless I went back to the records. I believe fifteen of those men were taken directly from Mr. Baker's seniority list and two of them were his bookkeeper and Fred Coburn were company men which I retained. That made seventeen in all you see. I believe that's right.

Transcript at 407-408. From this testimony, it is unclear whether Poe had 24 or 34 employees during the first month of operation.

In determining whether there has been substantial continuity of the employing industry, the NLRB has considered additional factors including the existence of a hiatus between the closing of the business and the reopening by an alleged successor. Mondavi Foods Corp., 235 NLRB 1080, 98 LRRM 1102 (1978); Radiant Fashions, Inc., 202 NLRB 938, 82 LRRM 1742 1973). In Radiant Fashions. the Board characterized a three month hiatus as "lengthy", and viewed it to be a "significant" though not "controlling" factor in determining whether there had been a substantial continuity of business operations. In the present case, there was about a five month hiatus between the cessation of the active Smitty Baker operation and the opening of P&P Coal. At least the first month of this gap is attributable to a mine strike, and should not necessarily be counted as an interruption of business operations.

The remaining factors discussed in MacMillan Bloedel concern the degree of identity between the former employer and the alleged successor. The first inquiry is whether the same plant is used. The specific mine in which Munsey worked was not operated by P&P. P&P reopened another mine operated by the Smitty Baker Coal Company, the No. 2 mine. P&P emphasizes that it did not work the mine where the controversy arose and that it leased approximately 3,500 acres from Peabody Coal Company whereas Smitty Baker Coal had only leased 300 acres. However, P&P first contracted to take over Smitty Baker Coal's leases and later renegotiated the lease with Peabody Coal. The proper inquiry is not whether P&P took over the actual locus of the dispute, but whether it substantially replaced the Smitty Baker Coal Company's operations. P&P took over Smitty Baker Coal Company's Peabody lease and reopened one of its mines. P&P used equipment that it had purchased from Smitty Baker and that Smitty Baker had used in its operation. We find that P&P Coal Company operated the substantial equivalent of the Smitty Baker Coal Company "plant." See Mondavi Foods Corp., supra.

Regarding the continuity of supervisory personnel, the record indicates that P&P hired a section foreman of Baker Coal who became P&P's mine superintendent. P&P also hired Smitty Baker's bookkeeper as its bookkeeper. Additional information as to the supervisory personnel of P&P is lacking in this record.

Use of the Smitty Baker Coal Company seniority list and retention of collective bargaining representatives indicate that the same jobs and working conditions probably continued. There is no evidence comparing production methods of the two companies. The same product, coal, was produced.

We recognize that the resolution of any question concerning successorship involves "striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee." Golden State Bottling Co. v. NLRB, 414 U.S. at 181. After careful consideration of all the circumstances of this case, we conclude that the purposes of section 110(b) of the 1969 Coal Act are

best served, and the balance appropriately struck in the present case, by a finding that P&P is a successor to the Smitty Baker Coal Company. As has been stated, "Where the harm to the discriminatee and to the national policy that would flow from a finding of no successorship is great, a substantial amount of harm to the new employer must and will be tolerated." Brown v. The Evening News Association, 473 F. Supp. 1242, 1246 (E.D. Mich. !979). See also Golden State Bottling Co., supra. Congress declared in section 2(a) of the 1969 Coal Act that the first priority and concern of all in the coal mining industry must be the health and safety of the miner. Section 110(b) was intended to support and enhance the protection of miners. We believe that the facts of this case and the need to afford Glenn Munsey a full remedy require holding P&P Coal, as a successor, jointly and severally liable for the illegal act of discrimination.

Before the administrative law judge, Charlie James Poe testified that Munsey had asked him for a job when he was first opening his mining operation, and that he had told Munsey that he would get to him if he was on the seniority list. Poe also testified that Munsey's name had remained on the seniority list. Poe further stated that Munsey had replied that he did not want a position at the P&P operation because he was employed elsewhere. Munsey's testimony contradicts Poe's. Munsey testified that he asked Poe for a job several times and was turned down on each occasion. The administrative law judge did not resolve this conflict; he made no findings on whether P&P Coal had offered appropriate employment to Munsey. As with the question regarding whether Ralph Baker offered Munsey suitable employment at Mason Coal Company, this question must be determined on remand.

III.

The Court of Appeals directed the Commission to consider whether P&P Coal Company, even if it is not a successor to Smitty Baker Coal Company, is liable for an independent act of discrimination against Munsey. The administrative law judge, apparently relying on the fact that Munsey was never employed by P&P and made no reports concerning safety conditions at P&P, found that P&P was not liable to Munsey.

We need not reach in this case the issue of the necessity of an employment relationship to trigger the protection against retaliation for making safety complaints. Section 110(b) states that a miner who believes himself to be discriminated against may file an application for review with the Secretary within thirty days of the alleged violation. Munsey did not file such an application against P&P. His

motion to add P&P as a respondent was granted in April, 1975, and only alleged that P&P was liable as a successor for the violation committed by Smitty Baker Coal Company. The theory of the possible independent liability of P&P apparently was suggested for the first time in the Court of Appeals in 1978. We hold that the separate allegation against P&P Coal for not hiring Munsey was not raised in a timely manner. We further hold that, whether or not the time for filing a claim of discrimination under

section 110(b) of the 1969 Coal Act can be extended in other circumstances, it is inappropriate to toll the statutory period for the number of years. involved in this case. We note that Munsey agrees that if P&P is found to be a successor, as we have concluded, the issue of P&P's further liability, based on an asserted separate act of discrimination, need not be reached because Munsey will have been afforded full relief for the wrong he has suffered.

IV.

We hold Ralph Baker, Smitty Baker Coal Company, and P&P Coal Company jointly and severally liable to Munsey for lost wages, and Ralph Baker and P&P Coal jointly responsible to reinstate Munsey with accrued benefits and seniority. We remand for further proceedings to determine whether Ralph Baker or P&P Coal has already made an appropriate offer of reinstatement.

The administrative law judge determined that $2,013.26 was due to Munsey for lost wages from April 29, 1971, until the close of the Smitty Baker Coal Company in October, 1971. We order Ralph Baker, Smitty Baker Coal Company, and P&P Coal Company, jointly and severally to immediately pay this amount, plus interest, to Munsey. We remand for such proceedings necessary to further determine the additional amount of lost wages and interest due to Munsey.

Further, we remand for assessment of attorney's fees and other costs incurred by Munsey in this litigation. We award these expenses jointly and severally against Ralph Baker, Smitty Baker Coal, and P&P Coal pursuant to section 110(b)(3) of the 1969 Coal Act.

Finally, in view of the protracted history of this litigation, we order that the proceedings on remand be expedited.

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