CCASE:
MSHA V. PHELPS DODGE
DDATE:
1981113
TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 13, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

on behalf of JOHNNY N. CHACON,

v. Docket No. WEST 79-349-DM

PHELPS DODGE CORPORATION

DECISION

This case involves section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979), and raises questions concerning the burdens.of proof in discrimination cases previously enunciated in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds, No. 80 2600 (3d Cir. Oct. 30, 1981), and Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). 1/ For the reasons that follow, we hold that the judge erred in finding a violation and reverse his decision. 2/

I.

The Secretary filed a discrimination complaint on behalf of Johnny Chacon on August 20, 1979, and a hearing was held on April 16, 1980. At the time of the hearing, Chacon had been employed as a locomotive operator at Phelps Dodge's Morenci Branch open pit copper mine for approximately 10 years. Chacon became a union safety committeeman in 1977, and vice-chairman of the union in January 1979. His duties as vice-chairman included handling grievances. Chacon customarily presented safety complaints of union members to management and apparently was the first union representative to take complaints to MSHA. Chacon testified that he drafted a letter complaining of a problem with signals that was signed by the local union chairman and sent to MSHA in December 1978. In addition, on January 31, 1979, Chacon delivered to Phelps Dodge's management a grievance signed by him and approximately 71 other union members complaining of unsafe and improper maintenance of cabooses. Chacon participated in safety grievance meetings concerning this complaint on February 7-8, 1979. Chacon sent a letter concerning the cabooses to MSHA on about February 21, 1979, after the allegedly retaliatory acts in this case.

1/ The Court of Appeals did not discuss the underlying discrimination analysis and burdens of proof that we formulated in our Pasula decision, but rather, on evidentiary grounds, held that the miner had been discharged for engaging in unprotected activity. Because the Court neither approved nor disapproved our Pasula analytical tests, its decision does not affect our application of these tests in the present case.

2/ The judge's decision is reported at 2 FMSHRC 1271 (1980).

~2509

On February 5, 1979, Chacon derailed a train on a bench track 3/ and the next day received a written warning over the incident for "excessive speed" under a "slow order." The normal maximum speed for trains on bench track at the mine is 15 m.p.h.; a "slow order" is a notice written on a chalk board indicating that conditions require slower speeds. No maximum speed was set in the slow orders involved in this case. The February 6th warning, which was placed in Chacon's employment file, stated that any repetition would subject Chacon to a "more severe penalty." Six days later, on February 12th, Chacon again derailed a train and was suspended from work without pay for three days for "excessive speed on slow order track...." Chacon filed grievances with respect to both the warning and the suspension; management rejected his complaints.

The judge found that Phelps Dodge illegally retaliated against Chacon for protected activity by placing the written warning in his employment file and then suspending him for three days without pay. The judge ordered Phelps Dodge to expunge the warning and any references to the suspension from Chacon's file and to pay him three days' wages with interest. The judge also assessed a civil penalty of $2,500.

II.

We first analyze whether the judge properly found that the Secretary made out a prima facie case of a violation of section 105(c)(1). 4/ In Pasula, we held that a prima facie case is established:

> ... if a preponderance of the evidence proves (1) that [the miner] engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity.

2 FMSHRC at 2799.

3/ A bench is a ledge, or step, in the bank of an open pit mine. Along the Morenci pit benches, Phelps Dodge uses temporary, moveable track panel referred to as "bench track."

4/ The judge issued his decision before we decided Pasula. Adapting a discrimination test for the 1977 Mine Act from the D.C. Circuit's

description in Phillips v. IBMOA, 500 F.2d 772, 779 (1974), cert. denied, 420 U.S. 938, of a prima facie case under the 1969 Coal Act, the judge described the elements of proof that he believed the Secretary or miner must meet: The miner has engaged in protected activity; adverse action has occurred; and the adverse action "was motivated in at least significant part" by the protected activity. 2 FMSHRC at 1281. This formulation differs from our test in Pasula in that we determined that a prima facie case requires only a showing that the adverse action was motivated "in any part" by protected activity. Although this is an important distinction, the judge found that the Secretary had satisfied a stricter standard. Accordingly, the showing required by Pasula was, in effect, satisfied as well in the judge's mind. The judge also countenanced the presentation of an affirmative defense. He stated that the operator may present legitimate reasons, or "justification," for the punitive action alleged to be retaliatory. Id. at 1283 84. This comports generally with the defense available to operators pursuant to our decisions in Pasula and Robinette, 2 FMSHRC at 2799 2800; 3 FMSHRC at 818 n. 20. In sum, because the judge applied an analysis that is a functional analogue of our Pasula test, we believed that a remand for application of the latter test would be pointless.

~2510

The first element of a prima facie case is a showing that protected activity occurred. The judge found that Chacon "as a representative of miners--not just [as] a miner-- ... filed and made complaints under the Act, including complaints notifying the operator of alleged dangers and safety and health problems and ..., as a union representative on behalf of other miners, made such reports both to the mine operator and the government agency charged with enforcing the Act." 2 FMSHRC at 1280. That Chacon was a safety committeeman and presented safety complaints to management is not disputed. Substantial evidence also supports the finding that he played an important role in making safety complaints to MSHA. There is no question that the complaints to MSHA were protected activity. Furthermore, Chacon's safety complaints to management were also protected activity. In relevant part, section 105(c)(1) broadly protects the "fil[ing] or ma[king] [of] a complaint under or related to [the] Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation" (emphasis added). Thus, we conclude that the first element was established.

The second element of a prima facie case is a showing that adverse action was motivated in any part by protected activity. Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. As the Eighth Circuit, for example, has analogously stated with regard to discrimination cases

arising under the National Labor Relations Act:

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965).

In the present case, the judge found discrimination on the basis of the following circumstantial indicia of discriminatory intent: knowledge of protected activities; hostility towards protected activity; coincidence in time between the protected activity and the adverse actions; and disparate treatment of Chacon. We examine each of these indicia below.

The operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case. Because subjective factors are involved, the operator's knowledge--like the overall question of motivation itself can be proved by circumstantial evidence and reasonable inferences. Cf. NLRB v. Long Island Airport Limousine Serv., 468 F.2d 292, 295 (2d Cir. 1972). We agree with the judge that there is substantial direct and indirect evidence of Phelps Dodge's knowledge of Chacon's protected activity. ~2511

As the judge found (2 FMSHRC at 1279, 1280), Chacon customarily presented safety complaints to management as the union safety committeeman and, on January 31, 1979 (shortly before his warning and suspension), delivered to Phelps Dodge a safety grievance signed by him and 71 other miners. This protected activity obviously supplied knowledge of his leading role in this area and Phelps Dodge does not contend otherwise.

We also agree with the judge that Phelps Dodge knew of Chacon's complaints to MSHA. As the judge found, superintendent Olson revealed his awareness of Chacon's activity at a grievance meeting in December 1978, shortly after safety complaints were sent to MSHA. 2 FMSHRC at 1279. At the beginning of that safety grievance meeting, which was attended by Chacon and another representative of the union, Olson angrily objected to the sending of safety complaints to MSHA. Tr. 58-59, 173. Although Olson denied knowing who contacted MSHA, he expressed his disapproval to Chacon and it is reasonable to infer from Olson's testimony that his comments were directed toward Chacon. Tr. 168-169.

Hostility towards protected activity -sometimes referred to as "animus"--is another circumstantial factor pointing to discriminatory motivation. Cf. NLRB v. Superior Sales, Inc., 366 F.2d 229, 233 (8th

Cir. 1966). The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries. We agree with the judge (2 FMSHRC at 1277, 1279, 1280) that Olson's angry remarks to Chacon about the MSHA complaints, discussed above, display a specific hostility towards Chacon's protected activity.

The judge also properly relied on coincidental timing as another indication of illegal motive. Cf. NLRB v. Long Island Airport Limousine Service, Corp., 468 F.2d at 295-296. Chacon received the warning on February 6th, within one and one-half month, after MSHA was contacted. The suspension on February 12th occurred only four days after Chacon participated in safety grievance meetings resulting from a complaint signed by 72 employees.

We hold that the substantial evidence of protected activity, knowledge, specific hostility, and coincidental timing present here make out a prima facie case that the adverse actions against Chacon were motivated, at least in part, by discriminatory reasons. The most persuasive aspect of th!s evidence is Chacon's leading role in the protected activity; as the judge found (2 FMSHRC at 1279), "Chacon had created a change in the force with which safety complaints were being handled by the local union." The warning and suspension occurred after the "change in force." Adverse action under circumstances of suspicious timing taken against the employee who is the leading figure in protected activity casts doubt on the legality of the employer's motive since such conduct is the classic method of undermining protected activity. Cf. NLRB v. Fremont Mfg. Co., Inc., 558 F.2d 889, 891 (8th Cir. 1977). This is not to say that the preceding factors will always make out a prima facie case, but here we find them present in a combination adequate to support a reasonable inference of partially unlawful motivation.

~2512

In addition to the evidence discussed above, in finding a prima facie case the judge relied heavily upon what he regarded as Phelps Dodge's "disparate treatment" of Chacon. 2 FMSHRC at 1273-76, 1282. While, in general, disparate or inconsistent treatment is an indirect factor often indicative of discrimination (Cf. NLRB v. Melrose Processing Co., 351 F.2d at 698), we find that there is not substantial evidence of disparate treatment on this record.

The judge's disparate treatment finding rests on data concerning the frequency of derailments and of resulting discipline at Phelps Dodge. This data, provided in answers to interrogatories, shows that derailments were common occurrences: 1,082 derailments occurred in 1977; 1,164 in 1978; and 77 in the month of September 1979. In 1977, no warnings were given to engineers for derailments as a result of excessive speeds. In 1978, four warnings were given to engineers for

excessive speed; three of the warnings do not indicate either speed prior to, or the extent of damage from, the derailment. In the first 9 months of 1979, Phelps Dodge's records show three warnings for excessive speed issued after Chacon's. Two warnings specified speeds of 15 and 20 m.p.h., respectively, and indicated damage "to track and locomotive" and "tore up 7 or 8 panels"; the third warning did not show speed or damage. The judge also noted that during 1976, 1977, 1978, and 1979 only one employee other than Chacon was suspended for operating at excessive speeds, and the speed and damage were not recorded. In that 4-year period, 6 locomotive engineers, including Chacon (see n. 7 below), were suspended for reasons other than excessive speed, but relating to operation. On the basis of the foregoing evidence the judge concluded that Chacon was subjected to "disparate treatment.

Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter. The Secretary did not show either that other engineers similarly caused excessive speed derailments resulting in damage--Chacon's alleged misconduct--but escaped discipline, or that other engineers guilty of other equally or more grave offenses received less or no discipline. The fact that many derailments occurred does not by itself prove that they were caused by excessive speed or operational misconduct. We cannot accept the judge's implicit assumption (2 FMSHRC at 1282) based on the mere volume of derailments that significant numbers involving excessive speed or other operator error and serious damage occurred. On the contrary, the judge found elsewhere in his decision that:

Derailments are common occurrences at the Morenci Mine.... Locomotive engineers experience a derailment at the rate of approximately one per month. Derailments can occur at slow speed as well as high speed because of defects in the rails, the track generally, or the equipment. (Emphasis added).

2 FMSHRC at 1273 1274.

We emphasize that Phelps Dodge admitted at trial (Tr. 102-103, 185-187) that mere derailments with resultant damage, unless caused by operator error, would not ordinarily result in discipline. The raw data provided does not show how many derailments resulted from excessive speed or related factors; hence, from all that appears in the record,

~2513

derailments caused by operator error may well have been relatively rare occurrences. On the other hand, the record does show that in 1978 and the first nine months of 1979, seven other engineers received excessive speed warnings; between 1976 and 1979, one other engineer

was suspended for an excessive speed derailment, and five were suspended for operational infractions, such as running red lights. There is no evidence that engineers who had excessive speed derailments causing serious damage, or who were involved in similar incidents, escaped discipline. 5./

In the foregoing context, Chacon's discipline is not facially anomalous. Hence, we cannot conclude that the data shows or supports the inference that Chacon's treatment was inconsistent with company practice. On the contrary, we think that the data does show that Chacon's discipline was facially consistent with company practice, a conclusion which pertains to the adequacy of Phelps Dodge's affirmative defense. Given the rawness of the data, we do not find this derailment evidence particularly persuasive for either party's case. 6/ As discussed above, however, we conclude that the Secretary demonstrated a prima facie case of a violation without the data and without a showing of disparate treatment. 7/

5/ After Phelps Dodge presented its defense, the Secretary offered the testimony of Michael Cranford in rebuttal. Cranford described two derailments, one before and one after the incidents in this case, that resulted in a great deal of damage, but no discipline to the engineers. No evidence was presented concerning either operational misconduct or the speed at which the locomotives were traveling. We do not think this evidence suffices to show disparate treatment.

6/ The rawness of the data was underscored by the Phelps Dodge witness who gathered it. Richard Boland, the director of personnel services, testified, for example, that he obtained the information on the number of persons disciplined from grievance records. He stated that others may have been disciplined, but the data he supplied in answers to interrogatories would not show this if the engineers involved did not file grievances. Tr. 189-191. He cited "sheer volume" as the reason why additional records were not examined. Tr. 190. The Secretary did not seek additional information or records either prior to the hearing, or when Boland testified, or at the conclusion of the hearing. Thus, the available data on "comparative" discipline is at least incomplete, and probably somewhat "skewed" in the Secretary's favor.

7/ We also disagree with the judge's somewhat confusing discussion of burdens of proof regarding the numerical data presented. (2 FMSHRC at 1282). The judge appears to suggest that the burden of proof was Phelps Dodge's. On the contrary, the Secretary raised the possibility of disparate treatment in his prima facie case and, accordingly, he had to shoulder the burden of showing it.

We also do not agree with the judge regarding two other inferences that he drew. The judge found that a supervisor's reference to Chacon

as "your boy" on February 12th indicated "displeasure on the part of management with Chacon" and was evidence of discriminatory motive. 2 FMSHRC at 1281-1282. The description of the "your boy" incident came from superintendent Olson. He stated that shortly after the derailment, he encountered shift foreman Pounds who said, "Your boy done it again."

(footnote continued)

~2514

III.

As we stated in Pasula, Phelps Dodge may defend against the Secretary's prima facie case "by proving by a preponderance of all the evidence that, although part of [its] motive was unlawful, (1) [it] was also motivated by the miner's unprotected activities, and (2) that [it] would have taken adverse action against the miner in any event for the unprotected activities alone." 2 FMSHRC at 2799-2800; see Robinette, 3 FMSHRC at 818 n. 20. Phelps Dodge points to two factors in its defense.

First, Phelps Dodge asserts that its discipline of Chacon is consistent with company policy. As already discussed with regard to disparate treatment, there is evidence that other engineers were warned over excessive speeding incidents and others were suspended for serious operational misconduct. We also note that Chacon's discipline was not inconsistent with his past employment record. As detailed in the accompanying note, Chacon had some history of discipline both before and after he became a union safety committeeman. 8/ Hence, we cannot conclude that it was an unprecedented disciplining of a miner with an otherwise unblemished employment record.

Second, Phelps Dodge points to the seriousness of Chacon's two virtually consecutive derailments which it alleges were caused by excessive speed. A shift foreman indicated that damage and speed are considered when imposing discipline. Tr. 166. Track panels cost $1,500 each. 2 FMSHRC at 1274; Tr. 104, 185. Chacon, himself, testified that three to four "rails" (which the witnesses apparently treated as synonymous with "panels" in their testimony) were torn up in the first derailment, and three or four more during re railing. Tr. 66-67. Chacon testified that three or four rails were also "turned up" in the February 12th derailment. Tr. 75, 83. The shift foreman stated the

---

fn. 7/ cont.

Tr. 171, 177. Olson stated that he knew to whom Pounds referred because he had heard of the derailment on a mine radio in his office. Tr. 171. Pounds testified that he did not remember the conversation. Tr. 165. Both men indicated that anyone who did something wrong on the job might be referred to as "Olson's boy". Tr. 164, 177. In view

of this testimony, we do not believe that the comment reasonably supports an inference of discriminatory hostility toward Chacon. The judge also inferred that a disciplinary warning for excessive speed delivered to another engineer shortly after the initial warning to Chacon was "actual evidence of bad faith" and "smacks of action taken to bolster the disciplinary action taken against Chacon." 2 FMSHRC at 1282-1283. As Phelps Dodge points out, there was no evidence presented regarding that incident. Accordingly, this finding is speculative and we reject it.

8/ Chacon received a warning in December 1971, involving operation of his train; a warning on June 18, 1972, involving a failure to control his train and the derailing of a caboose; a disciplinary 3-day lay off on September 26, 1973. for running a light; a 7 day disciplinary lay off on December 22, 1973, involving an operating violation; a warning on October 14, 1975, for failing to control his train which resulted in a collision; a warning on March 14, 1977, for being AWOL; a warning on August 28, 1977, for not wearing a safety hat; a 3-day suspension on December 27, 1977, for AWOL; a warning on July 30, 1978, for an operating violation; a warning on January 8, 1979, for reading on the job; and another warning on January 8, 1979, for not wearing a safety hat and glasses.

damage in the second incident was "terrible" and approximately twelve panels were "completely demolished." Tr. 155. Another company witness described the track as "demolished", but did not indicate a number of rails or panels damaged. Tr. 108. In our opinion, the preponderance of the evidence shows severe damage. In short, there is no real dispute that Chacon's derailments caused several thousand dollars worth of damage, although no evidence was introduced concerning the total cost of his accidents or how it compared to damage caused in other accidents.

The more crucial question, however, is whether Chacon was traveling at "excessive" speeds under the slow orders and, therefore, was at fault when the incidents occurred. As we noted above, derailments with resultant damage are frequent occurrences and, unless operator misconduct were involved in some way, discipline would not ordinarily be imposed. Phelps Dodge bases its allegations of misconduct, i.e., "excessive" speed, on both the damage at the time of derailment and speed tapes taken from Chacon's locomotives just after derailment. Several company witnesses testified that they could determine from damage alone whether an engineer's speed was excessive. Tr. 103, 138, 155. Assistant shift foreman Lines testified that on February 5, the track was "pretty well tore up" (Tr. 135) and that he believed Chacon had been travelling too fast. Tr. 136, 138. General mine foreman Brooks stated that he believed Chacon's speed on February 12 was

greater than 11 or 12 m.p.h. "because the track was completely demolished." Tr. 108. Two witnesses testified that speeds above 10 m.p.h. are excessive under a slow order. Tr. 122 23, 162. A third stated that 5-10 m.p.h. is the proper speed under a slow order. Tr. 144. Phelps Dodge also uses a device to record on tape the locomotives' speedometer readings. The "speed tapes" are customarily checked after derailments and the supervisor initials the tape at the point where derailment occurred. 2 FMSHRC 1274; Tr. 135, 155. Copies of Chacon's speed tapes were introduced at the hearing and a company witness testified that they showed speeds of 16 m.p.h. on February 5, and 15 m.p.h. on February 12 just before the respective derailments. Tr. 121; Exh. R 4. Phelps Dodge's supervisory personnel consistently indicated at the hearing that they rely on these speed tape records and damage-based estimates of speed.

Although Chacon testified that no one had ever specifically told him what a slow order meant, Phelps Dodge's supervisors also consistently testified that the meaning of slow order is well known by their engineers. Tr. 127, 138, 153 54. In partial agreement with the judge, we conclude that the speed tapes and da age-based estimates are probably only roughly accurate. Nonetheless, as we explain below, we do not agree with the judge's rejection of this evidence. In our opinion, the judge improperly substituted his business judgment for that of Phelps Dodge by his virtual exoneration of Chacon's conduct in the two derailment incidents and by his consequent rejection of Phelps Dodge's entire defense as pretextual.

The judge rejected Phelps Dodge's claim that Chacon's speed was excessive. He found that because the locomotive speedometers regularly "bounce" or fluctuate between 5-15 m.p.h., the speedometers and speed tapes were "unreliable as ... precise indicator[s] of speed," and that the operating engineer is generally the best judge of a locomotive's speed and of what a "safe and proper speed is." 2 FMSHRC at 1273. He

~2516

treated Chacon's speed tapes as unreliable and credited Chacon's own subjective estimates that he was travelling between 5-10 m.p.h. just before the first derailment, and about 10 m.p.h. before the second. Id. at 1277-78. The judge found that derailment damage is "not particularly probative of ... speed [because] other factors could [contribute to the damage done]--including the weather, the conditions, the wetness, the rain, and the like." Id. Finally, the judge criticized Phelps Dodge for what he regarded as its faulty system of posting slow orders, investigating derailments, and imposing discipline over any derailments:

... If the Respondent wishes a forum or tribunal or a court to recognize that there is some maximum speed

involved in the "slow order," then it should print or publish such a maximum speed. It should teach its engineers what it is. It should spell it out on the call board. It would then have the proof that it can come in and say, "Look this is what it is," but to come into a hearing and express an opinion, and there were different opinions even among Respondent's witnesses apparently as to what it meant, would seem to give it complete latitude to say anything it would want in a tribunal. If it wants to set a maximum, it should do it either by printing it or at least when a "slow order" is put up to specify what the maximum speed is. The reliability of the speed recorder would still be a problem from the standpoint of proof. So the affirmative defense that Respondent raised, in my opinion, was not established by probative evidence that I can recognize.

Id. at 1283.

We hold that the judge exceeded appropriate limits in examining Phelps Dodge's business practices. Of course, Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis and meets the first part of the Pasula affirmative defense test, then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's

~2517

or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf.

R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979)(articulating an analogous standard).

Contrary to the judge, we conclude that Phelps Dodge successfully defended by showing that it did have legitimate reason to regard Chacon's first derailment as a misstep warranting a warning, regardless of the ultimate truth of Chacon's and management's conflicting views on whether he was speeding. Such warnings had been issued before; there was credible reason, pursuant to Phelps Dodge's normal business practice, to infer excessive speed; and the damage caused was apparently serious. Once Chacon was warned over this first incident, the second derailment, within one week and causing apparently severe damage, represented the very occurrence warned against. With the second incident, there again was evidence of possible speeding, and, again, suspension was facially consistent with other discipline for operator misconduct. The fact that the first warning notified Chacon of the possibility of more severe discipline goes far, in our judgment, to show that Chacon would have been suspended if he had a second speeding derailment--much less one virtually on the heels of the first and causing severe damage. Most importantly, we believe that Phelps Dodge demonstrated that, in the exercise of its business and personnel judgment, it relies on speed tapes and supervisory opinions on damage and speed in determining whether to assess discipline. Even if this is "unjust" because the speed tapes and supervisor's evaluations are not always completely reliable, we cannot conclude that such reliance is, in effect, "impermissible" under the Mine Act. Thus, we conclude that Phelps Dodge established a legitimate statutory defense that it would have disciplined Chacon in any event for the unprotected activities alone. Treating the Secretary's allegations of disparate treatment as an attempt to refute this defense, we conclude, for the reasons already discussed, that the refutation fails. In short, we conclude that substantial evidence does not support the judge's rejection of Phelps Dodge's defense.

IV.

In sum, we agree with the judge that the Secretary proved a prima facie case of a violation by showing protected activity and circumstantial evidence from which a reasonable inference of at least partially illegal motive could properly be drawn. We also hold, in contrast with the judge, that Phelps Dodge successfully defended against the prima facie case.

~2518

Accordingly, the decision is reversed, the complaint dismissed, and the penalty assessed against Phelps Dodge vacated.

~2519

Commissioner Lawson dissenting;

The judge below found and the majority herein have affirmed that a prima facie case has been established of a violation of section 105(c)(1) by Phelps Dodge. I concur, and the evidence in support of that determination is indeed substantial, well-documented, and undisputed. This case therefore stands in fortunate contrast to other discrimination claims, which have required for determination the weighing of the credibility of frequently sharply diverging testimony by parties with totally contradictory versions of the facts. As the majority states:

> We hold that the substantial evidence of protected activity, knowledge, specific hostility, and coincidental timing present here make out a prima facie case that the adverse actions were motivated at least in part, by discriminatory reasons.

Slip op. 4.

Inexplicably, the majority then holds that Respondent..."prov[ed] by a preponderance of all the evidence that, although part of [its] motive was unlawful, (1) [it] was also motivated by the miner's unprotected activities and, (2) that [it] would have taken adverse action against the miner in any event for the unprotected activities alone.", in claimed reliance on Pasula and Robinette, supra.

Slip op.2.

As to motive,l/ the unchallenged finding of the judge below is that "the primary management figure engaged in the decision to issue the written warning on February 6 and the three-day suspension on February 12, 1979, was Mr. Joseph Roche, General Mine Foreman." ..."it is clear that the decision to suspend Chacon was made by Mr. Roche." 2 FMSHRC at 1279 80.

Roche was not called as a witness in these proceedings, and his mental state or motivation, which is critical under the majority's rationale, is therefore not of record. Nor does any reason appear why this clearly vital witness, at the time of the hearing still an employee of Phelps Dodge, was not produced by the operator at the trial, whose burden it was to establish a permissible motive for the suspension meted out. The majority has therefore gone outside the record to speculate as to Roche's motive or motives, despite the lack of any evidence thereof.

As to whether Appellant would have taken adverse action against the miner for the unprotected activities alone, a review of the factual findings of the judge appears to be appropriate:

> During the years 1976, 1977, 1978, and 1979, only one of Respondent's employees, aside from Johnny Chacon, was suspended from employment without pay for operating a locomotive at an excessive speed causing a derailment. Respondent's records indicate that one M. F. Naccarati

was suspended for 3 days for violating the Code and
that there was no record of the speed or damage.
2 FMSHRC at 1276
1/ Motive is defined as "something within a person (as need, idea,
organic state, or emotion) that incites him to action...Webster's
Third New Int'l Dictionary (Unabridged).
~2520
It appears that Chacon was the first, or from Respondent's
standpoint, the second employee ever suspended for an excessive
speed derailment. I find that the statistical evidence which I
previously specified indicates that Chacon was treated in a
disparate manner. The general burden of establishing by a
preponderance of the evidence a case of discrimination is on
the Applicant. However, the burden of proof is on Respondent
as proponent of the rule that it urges in this case, that is
that Chacon was warned and suspended for operating a locomotive
at excessive speeds causing derailment. Thus, Respondent's
argument that the Government has failed to show that there were
other derailments where excessive damage was done and where the
locomotive engineer was not punished in retaliation for safety
reporting activities in my judgment has no merit if the
Government has established otherwise a prima facie case. I would
conclude that the burden would shift to Respondent to show that
there were excessive speed derailments and that the locomotive
engineer did receive a suspension. The Government has shown
that such was not the case clearly. The records furnished by
Respondent in answering the interrogatories show no such
suspension other than the Naccarati incident which is not
sufficiently documented, in my judgment, to count. So, I
conclude on the basis of the statistical information that the
Government has established that Chacon was treated disparately.
2 FMSHRC at 1282 (Emphasis added)
The majority avers that the Secretary raised the possibility of
disparate treatment in his prima facie case and accordingly, he had to
shoulder the burden of proving it. Slip op. 6. Pasula, however, upon
which the majority claims to rely, establishes no such test. Nor is
disparity the central issue, despite the majority's focus. The
determination to be made is whether this miner was discriminated
against. All agree that he was. A showing that the discipline
imposed was not disparate is perhaps some indication that the operator
was merciful, not just, but does not without more negate a finding of
discrimination. Since Respondent (Appellant) has contended that there
were other excessive speed derailments, and the engineer[s] there
involved were disciplined, the burden of going forward with or
presenting facts showing this to be the case is properly--as the judge

below held--that of Appellant.
The majority would require the Secretary to shoulder the burden of proving a negative, that is, that other derailments claimed to be due to excessive speed resulted in less or no discipline. Although the best, indeed the only quantifiable, evidence presented does just that, the information the majority demands is here, and will always be, in the control of the operator, not the Secretary, and any explanation, exculpatory evidence or justification for the clearly facially disparate discipline imposed on Chacon should have been offered by the operator. It was not, and what the majority terms the operator's "affirmative defense" consequently fails. Slip op. 6.
~2521
That evidence, and the record herein, reflects a railroad compared to which the fabled Penn Central appears to be a model of operational efficiency. In 1977, 1,082 derailments took place; in 1978, 1,164; and in 1979 (up until September), 786 (for an annual rate of 1,148). Of these extra-rail excursions, no warnings were given to Phelps-Dodge's engineers for any which took place in 1977, four warnings were given to engineers for "excessive" speed in 1978, 2/ in 1979 no warning for excessive speed was given for any derailment prior to the one here involved.3/
In summary, of 3,032 derailments recorded prior to Mr. Chacon's, in only seven instances were engineers warned for "excessive" speed, and only Chacon was penalized by imposition of a suspension for the claimed violation of this operator's so-called slow order. And, as is undisputed, mere derailments, even with resulting damage, would not ordinarily result in discipline, unless caused by the engineer's error. Nevertheless, it is asserted that "There is no evidence that engineers who had excessive speed derailments causing serious damage, or who were involved in similar incidents, escaped discipline." Slip op. 6. This begs the question of the nature of the discipline imposed, which is so clearly disparate as to need no embellishment. In summary, the evidence established over 3,000 derailments with only one suspension for excessive speed, that of Chacon in this case. It is difficult to envision a stronger case of disparate or discriminatory treatment. In short, the discipline here imposed was clearly not facially consistent, it was rather facially inconsistent. Moreover, no documentary evidence was presented, nor, it is undisputed, does such exist, defining either a "slow order", nor what is "excessive speed". There has never been any posting or written expression or publication by this operator defining these terms. The sole operator attempt to inform its engineers concerning regulating locomotive speed reflected in this record was the chalking of "slow order in effect" on the mine blackboard in this case, despite the--again unchallenged--fact that, as the judge below found, "slow orders"

do sometimes specify maximum speeds. 2 FMSHRC at 1274. Indeed, this so called "slow order" hardly rises to the dignity of an admonition, much less an "order". An employer of this size and sophistication would not appear to lack the capacity to credibly define a slow order, and what constitutes a violation thereof. Nowhere in this record is there any evidence that Chacon had been advised on the day in question as to what, indeed, was a slow order, or what was a permissible speed for the train he was operating.

2/ Three of these indicate neither the speed prior to, nor the extent of damage caused, by the derailment.

3/ Of these 1979 warnings issued after the instant derailment. two specified speeds of 15-20 m.p.h., respectively, and indicated damage "to tracks and locomotives" and "tore up seven or eight panels": the third showed neither speed nor damage.

~2522

Nevertheless, despite the absence of any written or published definition of "slow order", if there existed even an unwritten understanding thereof, the majority's rationale for finding a violation of that order would be supportable. But, as the judge below also found:

Under the Code of Safe Practice for Railroad Train Operations applicable to the Morenci Mine, Exhibit R-2, unless a so-called "slow order" is posted on a call board, located for purposes of this proceeding in a lineup shack, the maximum permissible speed on good track which is to be observed by locomotive engineers is 15 miles per hour for "bench tracks." I note that the Code also provides that "track conditions may dictate speeds slower than those listed above," which also is evidence that in the final analysis the subjective judgment of the locomotive engineer must determine what a safe and proper speed is....

There is no written instruction or provision in operators' manuals or in courses taught by either the Government or the operator or elsewhere or otherwise which express what a maximum speed is under a "slow order"....

Turning now to the incidents which resulted in the issuance of the warning and the suspension I find that on February 5, 1979, Chacon was operating his locomotive on the bench proceeding towards the dump when his train was derailed. Chacon was in the caboose which contained no speedometer. Chacon had not been told by management either in writing or orally what the maximum permissible speed was that he should do. There was, however, a "slow order" in effect and (I find) that Chacon was going no more than 10 miles per hour. I make this finding on the basis of the following reasons: Various

witnesses for the Respondent have indicated that they can tell or should be able to tell how fast a locomotive is going within 2 or 3 miles per hour; that is, a locomotive engineer should be able to make such a judgment. On the other hand, Mr. Starr testified that he could estimate his speed above 5 to 7 miles per hour and that it is difficult at speeds above 5 miles per hour to determine exact speed. Mr. Chacon testified that he was going between 5 and 10 miles per hour and that he could tell he was not going 15 miles an hour based upon his experience. I conclude that Mr. Chacon, being the operator of the locomotive at the time, is in the best position to determine his speed....

2 FMSHRC at 1273, 1274, 1277

The majority's sua sponte adoption of the operator's defense that the extent of the damage incurred, despite the establishment of a prima facie case of discrimination, somehow rebuts the finding of a violation despite the operator's own disclaimer that it would not impose discipline on that basis, is also unsupported by the record. As the judge found:

~2523

I further find for similar reasons that gauging damage--and surveying damage done--is not particularly probative of the speed that a train is traveling in a given instance. There is testimony in this record with respect to factors which could change that--including the weather, the conditions, the wetness, the rain, and the like. The opinions given, likewise, are suspect for the reason that gauging speed on the basis of damage is not particularly susceptible to persuasive proof by the rendering of a mere general opinion. There was really little corroboration beyond the expression of such general opinions in this case. Certainly, these were not sufficient evidence to overwhelm the testimony of the person in the best position to gauge the speed, which in this case is the operator himself. I also find no reason to discredit the testimony of Mr. Chacon on this subject and on other subjects contained in his testimony. The occurrence of derailments is very frequent and can occur from many, many causes. To attribute the derailments to excessive speed in this instance would require a higher quality of proof than that presented by Respondent. 2 FMSHRC at 1277-78.

The majority's opinion, which concedes the fallibility of speed tapes (Slip op. 10) fails to define what constitutes a proper speed under a "slow order." Since the necessary predicate for the violation of a rule is obviously the existence thereof, and the undisputed record is as set forth I fail to perceive how Chacon can be

legitimately disciplined for violating such. The operator's rule claimed to have been violated lacks both specificity and definition, so as to qualify as a restraint of whose existence an employee could have fair notice.

Again, the judge's opinion details the infirmity of the actual measurement of the speed:

I find that the needle of the speedometer fluctuates or "bounces" regularly between 5 and 15 miles per hour based upon the testimony of the locomotive operators who operate the same who testified in this hearing. I find that the speedometer and the speed recorder which records the speeds shown on the speedometer are unreliable as a precise indicator of the speed of the locomotive based upon the credible evidence in this proceeding. All witnesses who testified on the subject conceded that to some extent there was or there could be a variance between the speed shown on the speedometer and the actual speed being traveled.4/

2 FMSHRC at 1273

The tape mechanism, in my judgment, is not sufficiently credible based upon the testimony in this hearing for me to rely on it. Were the speed-recording tape reliable. I would consider it to be the best evidence and to have overwhelmed the opinions and subjective judgment of the individuals. The testimony in this case with respect to speed has been all over the lot. I do not find it sufficiently accurate from the standpoint of Respondent to credit it.

2 FMSHRC at 1277

4/In addition, following the February 12th derailment, repairs were made to the speedometer of that locomotive. 2 FMSHRC at 1279.

~2524

The majority, however, would hold that the judge has somehow exceeded "appropriate limits in examining Phelps Dodge's business practices." That excursion to me bears no relationship to the issues before us on this appeal. Much more to the point is the existence of employer hostility or animus toward an employee, necessarily strong evidence in determining discriminatory motivation. Here the majority agrees with the judge that the operator displayed a "specific hostility toward Chacon's protected activity." Slip op. 4.

This affirmation of the judge's findings of "obvious animosity" (2 FMSHRC 1284) was not disturbed by the majority. The logic of the majority's opinion would compel a holding that the "substantial evidence of protected activity knowledge, specific hostility, and coincidental timing present here.... , found to make out "a prima facie case that the adverse actions against Chacon were motivated, at least in part, by discriminatory reasons,", (Slip op. 4) are to be

readily discarded if the discipline imposed can be in some way found not to be disparate.

Henceforth, it would appear that the Secretary must examine all disciplinary actions taken by the operator and submit these to the judge who must then evaluate such for disparity of discipline. It would be impossible for a single miner to prove disparate treatment, if no basis for comparison is available. For the majority to have concluded that the suspension here was proper, it must have determined that only Chacon's derailment, of over 3,000 enumerated, resulted from improper train operation. That is manifestly impossible on this record. Animus is to me still the touchstone in determining motivation, and its existence here is unchallenged. The majority's approach would appear, however, to border on indeed requiring impermissible examination of an operator's business practices."

In short, an operator is now apparently granted broad license to discipline an employee, motive notwithstanding. The moral of the story would appear to be that penalizing more than one miner is permissible under the Act, even discriminatorily, but a similar exercise of discipline against only one miner would apparently be impermissible. This makes no sense as a matter of law or logic.

I therefore dissent.

~2525

Distribution

Ann S. Rosenthal, Esq.
Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Stephen W. Pogson, Esq.
Evans, Kitchel & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003

Administrative Law Judge Michael Lasher
FMSHRC
5203 Leesburg Pike, 1Oth Floor
Falls Church, Virginia 22041