CCASE:
BILLY WISE (UMWA) V. CONSOLIDATION COAL
DDATE:
19840627
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
JUNE 27, 1984

UNITED MINE WORKERS OF AMERICA
On behalf of BILLY DALE WISE

v. Docket No. WEVA 82-38-D

CONSOLIDATION COAL COMPANY

DECISION

This discrimination case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (1982), and involves an operator's alleged discriminatory suspension of a miner. After investigating the miner's complaint of discrimination the Department of Labor's Mine Safety and Health Administration (MSHA) determined that a violation of section 105(c) had not occurred. Thereafter, pursuant to section 105(c)(3) of the Mine Act, the United Mine Workers of America (UMWA) filed a discrimination complaint on behalf of the miner with this independent Commission. 30 U.S.C. 815(c)(3). A Commission administrative law judge found that a violation of section 105(c) had not occurred and dismissed the complaint. 4 FMSHRC 1307 (July 1982)(ALJ). The Commission granted the UMWA's petition for discretionary review of the judge's decision. For the reasons that follow, we affirm.

On Friday, July 10, 1981, Billy Dale Wise, Leo Conner and James Siburt were conducting an inspection of the One North Section of Consolidation Coal Company's (Consol) Ireland Mine. Wise and Conner were UMWA safety committeemen at this mine and Siburt was Consol's acting shift foreman. They were conducting the annual safety inspection made at this mine before miners returned to work after a vacation period. During this inspection, they discovered an overcast requiring additional roof support: roof bolts were loose; wire mesh was hanging down; and the overcast was loaded with stone. 1/ Foreman Siburt contacted Robert Omear, the mine superintendent, and explained

the situation to him.

_____

1/ An overcast is "an enclosed airway to permit one air current to pass over another one without interruption." A Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, at 780 (1968).

Omear came to the area and examined the overcast. He agreed that additional support was necessary. Omear and Siburt hung a "danger board" to prevent travel in the area until proper support could be provided. Wise, Conner and Siburt then continued with their inspection and Omear began preparations to correct the condition.

Later that day, Wise, Conner and Siburt returned to the overcast. In response to a request by Omear, Conner was carrying a saw needed by the miners repairing the overcast. A man-door had been erected in the overcast. Wise could see two miners working outby the door, but from his position outby the danger board he could not see the miners working behind the man-door. Wise and Conner proceeded beyond the danger board. Connor delivered the saw he was carrying and returned outby the danger board. Wise looked inside the man-door and asked the miners inby the door how the work was progressing. While inby the danger board, Wise and Omear had a brief exchange. The testimony of the witnesses to this conversation varies as to its particulars. The judge found that Wise was ordered to leave the area by Omear, Omear's instructions were ignored, and Wise remained in the area until he had completed, to his own satisfaction, his observations of the work being done. Substantial evidence supports these findings.

After Wise returned outby the danger board, Omear told him that he would investigate the matter and determine whether disciplinary action against Wise would be taken for his failure to respond to Omear's instructions. The following Monday, July 13, Wise and Omear discussed the matter again, but no decision regarding disciplinary action was made. On July 14, Wise was told by Omear that he was suspended for three days, effective July 15. Wise was given a suspension letter that stated that he had been insubordinate on July 10 by going past the danger board and refusing to leave the area when ordered, and that his conduct was in violation of state and federal laws and company policy. The disciplinary action was a collective decision made by Consol's management. 2/

Wise filed a grievance under the National Bituminous Coal Wage Agreement of 1981 (Wage Agreement) and the grievance was submitted to arbitration. The arbitrator affirmed Wise's grievance, finding that he

---

2/ Although disciplinary decisions are collective decisions by Consol's management, Omear was especially concerned about disciplining Wise. Within the two weeks immediately prior to the incident at issue here, Wise had filed three separate safety complaints with a state mine inspector. As a result of these complaints, Omear was concerned

that under state law he personally could be fined if it were determined that his suspension of Wise was a reprisal for the safety complaints. Omear voiced this concern to Consol's management. In his decision, the administrative law judge found that "'h,. Wise does not contend that the disciplinary action taken against him was out of reprisal for his filing safety complaints with the State of West Virginia mining authorities.... The UMWA does not advance an argument that Mr. Omear, or any other mine management official, suspended Mr. Wise because of these complaints." 4 FMSHRC at 1329-30. These findings have not been challenged on review.

had acted Properly under the Wae Agreement in his role as a UMWA safety committeeman. The arbitrator ordered Consol to reimburse Wise for lost wages and expunge the suspension from Wise's personnel records. Wise also filed a discrimination complaint with the Coal Mine Safety Board of Appeals for the State of West Virginia alleging that his suspension violated West Virginia law. The State Board of Appeals dismissed the complaint stating that through the contractual arbitration Wise had been granted all of the relief that the Board could grant. The instant complaint alleging discrimination under the Mine Act was filed with the Commission after MSHA determined that discrimination under section 105(c) had not occurred. After a hearing, the Commission's administrative law judge concluded that Wise had not engaged in activity protected under the Mine Act by walking past the danger board and refusing orders to leave the area.

The administrative law judge found that Wise believed he had the right, as a safety committeeman, to enter any area of the mine, including dangered-off areas, for the purpose of insuring compliance with mine safety laws as well as to insure the safety of miners engaging in work connected with the correction of hazardous conditions brought to the attention of mine management. 4 FMSHRC at 1320. The judge also found that Consol conceded that Wise had certain prerogatives as a safety committeeman including access to most areas of the mine to conduct inspections. Conaol took the position, however, that Wise's access to areas that are dangered-off is limited by state and federal law to individuals specifically authorized to be there. Id. In arguing whether Wise had a right under the Mine Act to go inby the danger board at issue in this case, the parties relied on sections 303(d)(1) and 104(c)(3) of the Mine Act. 3/

_____

3/ Section 303 (30 U.S.C. 863) provides in part:

Ventilation

* * * * *

(d)(1) Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings.... If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "DANGER" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of

the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted....

(footnote continued)

The judge rejected Consol's argument that Wise himself violated the Mine Act. The judge found that Consol's reliance on 303(d)(1) of the Mine Act was misplaced because there was no evidence that the posting of the danger board resulted from a firebossing examination by a certified mine examiner conducted pursuant to that section. 4 FMSHRC at 1334. The UMWA took the position that under the 1981 Coal Wage Agreement Wise was "qualified" to make mine examinations under section 104(c)(3) and that he was not required to be removed from an area covered by an MSHA withdrawal order. 4 FMSHRC at 1334-35. Consol argued that Wise did not fall within that section of the statute. The judge concluded that being chosen a safety committeeman pursuant to the Wage Agreement did not "necessarily" transform Wise into a certified mine examiner for the purposes of section 104(c)(3) of the Act. He noted that acceptance of the UMWA's theory inevitably would lead to the conclusion that all safety committeemen would be "qualified" or "certified" under that section of the Act.

Thus the judge concluded that the Mine Act granted Wise no right to be in the area beyond the operator-posted danger board and that his refusal to leave the dangered-off area when ordered was not protected activity under the Act. The judge stated: ',Since mine management has the primary obligation under the law to insure compliance and to preclude any of its personnel being injured or killed by walking into these areas, I see nothing unreasonable in mine management's requiring that they be allowed to monitor and control these areas." Id. at 1337. Because Wise's action was not protected activity, the judge found no discrimination by Consol and dismissed the case.

_____

footnote 3 cont'd.

Section 104 (30 U.S.C. 814) provides in part:

Citations and Orders

(c) The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

(1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;

(2) any public offices whose official duties require him

to enter such area;

(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order.

(4) any consultant to any of the foregoing.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. SecretarY on behalf of Pasula v. Consolidation Coal Co. v. Marshall, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall. 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal C., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. Id. See Boich v. FMSHRC 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Constr. Co., No. 83-1566, D.C. Cir. (April 20, 1984)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., U.S. , 76 L.Ed. 2d 667 (1983).

In this case there is no dispute that Wise was disciplined for refusing to leave the dangered-off area when ordered to do so by management. Thus, the only issue presented is whether Wise had an express or implied right, protected by the Mine Act, to be in the area beyond the danger board contrary to the operator's orders. If Wise had such a right, then Consol violated section 105(c)(1) by suspending him for exercising this right. If Wise did not have this right, then the judge properly dismissed the discrimination complaint.

The Mine Act does not address expressly the question of whether a safety committeeman, as a representative of miners, may proceed inby a danger board posted by the operator upon discovery of a hazardous condition during an "inspection" conducted by the operator and miners' representatives, rather than by MSHA. The parties suggest on review, as they did before the judge, that sections 104 and 303(d)(1) of the Mine Act are pertinent to this question. We disagree.

The UMWA concedes that the danger board was not posted pursuant to section 104 during an inspection conducted by a federal inspector. Thus, this case does not pose the question of whether Wise could have accompanied a federal inspector inby this or any other danger board. The UMWA's fear that a decision upholding the judge in the present case could be interpreted as prohibiting safety committeemen from accompanying federal inspectors during inspections and investigations is unfounded. The UMWA also alleges that the judge erred in ruling that safety representatives do not fall within the exception provided in section 104(c)(3) of the Act, and that he erred by applying the definition of a "qualified person" in 30 C.F.R. 75.2 to section

104(c)(3). Because of our conclusion that this case does not involve the interpretation or application of section 104, the judge's analysis concerning that section, and whether safety committeemen in general or Wise in particular fall within the exception in 104(c)(3), is dicta. For this same reason, we need not reach the question of whether the judge erred by applying the definition of a qualified person in 30 C.F.R. 75.2 to section 104(c)(3) of the Act. We concur with the judge's rejection of Consol's argument that

the inspection conducted by Wise was comparable to a pre-shift examination under section 303(d)(1). The circumstances at issue did not arise from a pre-shift examination conducted by a certified person under section 303(d)(1) of the and that section is not applicable to the present case.

Thus, we conclude that neither section 104(c)(3) nor section 303(d)(1) is pertinent in the present situation. We further conclude that the Mine Act does not grant a right to Wise as a union safety committeeman to proceed, contrary to orders of management, inby operator-posted danger boards in these circumstances. The well-recognized purpose of a danger board is to restrict or eliminate access to a hazardous area. Although the inspection team (of which Wise was a part) performed a vital mine safety function in discovering the hazardous overcast, under the Mine Act the statutory responsibility for accomplishing abatement of a hazardous condition is placed on mine operators. In this case, immediately upon discovery of the hazard the operator began abatement work. Where an operator has posted a danger board, and such posting has not occurred as a result of a withdrawal order issued by the Secretary, an operator may restrict access to dangerous areas to such employees as it deems necessary to accomplish effective correction of the hazard. Cf. Ronnie R. Ross v. Monterey Coal Co., 3 FMSHRC 1171 (May 1981). If a safety committeeman, or any miner, has reasonable grounds to believe that abatement work is being performed in a manner contrary to the statute or mandatory standards, and that a danger or hazard is thereby presented, such miner has available the normal statutory procedures for securing an MSHA inspection and, if appropriate, the issuance of any necessary citations and orders. 30 U.S.C. 813(g). Se Local Union 1110. UMWA and Robert L. Carey v. Consolidation Coal Co., 1 FMSHRC 338 (May 1979). 4/

---

4/ We reject the UMWA's assertion that the judge's decision authorizes an operator to interfere with the exercise of statutorily protected safety activities of a miners' representative, contrary to the holding in Carney. The Commission held in Carney that the operator violated section 110(b) of the Coal Act by disciplining safety committeeman Carney for leaving his assigned work area to contact a federal mine inspector concerning a perceived safety hazard, contrary to the operator's policy that permission by management was necessary before he could leave. The Commission stated that "[t]he Company's policy effectively impedes a miner's ability to contact the Secretary when alleged safety violations or dangers arise. 1 FMSHRC at 341. Unlike the circumstances presented in this case, Carney involved the statutorily protected right to notify the Secretary of any alleged

violation or danger.  In this case, that right is not at issue.

We agree with the judge's conclusion that, in proceeding into and refusing orders to leave an area dangered-off by the operator, Wise was not engaged in activity protected by the Mine Act. Accordingly, the judge's dismissal of the discrimination complaint for failure to establish a prima facie case is affirmed. 5/

_____

5/ The UMWA also argues that because the judge found that Wise's actions did not violate the Mine Act, the judge should not have proceeded to find that Wise's discipline was "reasonable and proper in the circumstances." This statement by the judge is contrary to the arbitrator's finding that disciplinary action under the applicable 1981 Wage Agreement was not warranted. We agree that having concluded that Wise did not engage in activity protected by the Mine Act, the judge's comment concerning the appropriateness of the discipline constitutes dicta on an issue not before him. Further, in light of our conclusion that a prima facie case of discrimination was not established, the various substantial evidence arguments raised by the UMWA are immaterial and we need not and do not reach them.