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Z.B. HOUSER V. NORTHWESTERN RESOURCES
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FMSHRC-WDC
JUN 20, 1986

Z.B. HOUSER

v. Docket No. WEST 83-101-D

NORTHWESTERN RESOURCES COMPANY

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by the Secretary of Labor on behalf of Zimmie B. Houser. The complaint alleges that Northwestern Resources Company ("Northwestern") violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1982), when it failed to recall Houser to work after he had been laid off due to a production shutdown of the mine. Northwestern contends that Houser was not recalled because of his unsatisfactory work performance. Following a hearing on the merits, a Commission administrative law judge concluded that Northwestern did not violate section 105(c) of the Mine Act, and the judge dismissed the discrimination complaint. 6 FMSHRC 1798 (July 1984)(ALJ). For the reasons stated below, we affirm this result.

On October 1, 1981, Northwestern hired Mr. Houser to work as a crusher operator at its Grass Creek Mine, a surface coal mine located at Grass Creek, Wyoming. The Grass Creek Mine was managed for Northwestern by Monte Steffans. Roger Sprague was employed as the working foreman.

Effective January 1, 1982, Houser was transferred from Grass Creek to Northwestern's small loadout facility at Kirby, Wyoming,

approximately 60 miles from Grass Creek. (Only one employee worked at the Kirby facility.) Coal from the mine was trucked to the load-out facility where it was dumped, stockpiled, and loaded into railroad cars. The facility was located about 400 yards from Houser's home. At Kirby, Houser was responsible for keeping the dump area clean so that trucks could unload. Houser was responsible also for loading the coal into waiting railroad cars for shipment to Northwestern's customers.

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In March 1982, Houser was transferred back to the Grass Creek Mine. He was replaced at Kirby by another miner from Grass Creek who needed the lighter work available at the load-out facility. Prior to the transfer, Sprague had received complaints about Houser's job performance at Kirby. Sprague testified that several truckers complained that they had to wait for Houser to come to the load-out site in order to unload their coal. Sprague also testified that Houser overloaded the railroad cars and did not maintain satisfactorily the front-end loader that he operated. When Houser returned to Grass Creek, he was assigned to the night shift. Approximately month later, the night shift was suspended and Houser was transferred to the day shift. With this transfer, the day shift consisted of Houser, four other miners, and the foreman, Sprague.

During the spring of 1982, Houser made various complaints to Sprague about the health and safety conditions at Grass Creek. Houser complained about the amount of dust in the pit, that the windows on the front-end loader that he operated were too small, and that coal dust was entering the cab through a broken windshield. Houser told Sprague that he was afraid of contracting pneumoconiosis or some other disease because of the amount of dust that he was inhaling. He testified that on some days there was as much dust inside the cab as there was outside the cab. Houser also complained to Sprague about the Safety of the steering mechanism on the front-end loader. Sprague agreed that the steering mechanism was defective and he had it repaired.

In May 1982, as a result of dust samples taken during the course of a regular inspection, Northwestern was issued a citation alleging that respirable dust in Houser's designated occupation exceeded the applicable limits.

During June 1982, as a result of losing one of its major customers, Northwestern laid-off miners at Grass Creek and Kirby. On June 11, 1982, Mine Manager Steffans announced that four miners, including Houser, would be laid off. In ranking the four miners who were laid off Steffans determined that Houser was third best. The four miners were given their final pay checks and termination notices signed by Steffans and Sprague. Houser's notice stated that his job knowledge exceeded requirements and that the quality and quantity of his work, and Houser's personal relationships on the job, met requirements. However, it also noted that Houser's initiative could show improvement. Finally, the notice stated that Houser was recommended for rehire.

Approximately two weeks after he was laid off, Houser met Steffans and during the course of their conversation, Steffans indicated that the Grass Creek mine would soon reopen. On July 19, 1982, the two miners whom Steffans has rated higher than Houser were recalled to work at Grass Creek. Near the end of July 1982, when Houser found out about their recall, he telephoned Steffans and asked why he had not been recalled. Steffans explained that he was not recalled because Sprague did not want him back.

During August 1982, the miner whom Steffans had rated below Houser was recalled. Houser contacted his union representative and complained that he had been by-passed. The representative's inquiry as to why Houser had not been recalled was referred to Steffans. In a memorandum dated August 23, 1982, Steffans stated that Houser was not recalled because during the course of his employment: (1) he did not maintain his equipment properly; (2) he was frequently absent from the job site at Kirby; (3) he did not keep the Kirby facility clean; and (4) he did not obey Sprague's orders concerning the manner in which he loaded coal.

The Secretary of labor filed a discrimination complaint with the Commission on Houser's behalf. After an evidentiary hearing, the judge found that Houser's complaints regarding the coal dust in the pit and the steering mechanism on the front-end loader were protected by the Mine Act. 6 FMSHRC at 1806. The judge further concluded that Houser was not recalled to work in part because of his protected activities. *Id.* at 1809. Turning to Northwestern's argument that it did not recall Houser because of his overall poor job performance, the judge stated that when an operator produces evidence that a failure to rehire is based upon a legitimate business purpose, the burden is upon the complainant to establish that he would have been rehired "but for" his protected activity. 6 FMSHRC at 1809-10, quoting text from *Wayne Boich d.b.a. W.B. Coal Co. v. FMSHRC*, 704 F.2d 275, 284 (6th Cir. 1983). The judge found that Houser did not establish that he would have been rehired "but for" his protected activity because Houser's job performance was, in fact, unsatisfactory. 6 FMSHRC at 1810.

On review, Houser argues that the judge did not apply the proper legal test to determine whether he was the victim of unlawful discrimination. He also argues that the judge's findings of fact and the judge's conclusions are not supported by substantial evidence.

Upon reviewing the analytical framework of the judge's decision, we conclude that it is deficient in some respects. Nevertheless, we have reviewed the record as a whole carefully, and conclude that, with certain clarifications, the judge's ultimate determination that Northwestern's failure to recall Houser did not violate the Mine Act is supported by substantial evidence and consistent with properly applied precedent. See *Secretary of Labor on behalf of Sedgmer et al. v. Consolidation Coal Co.*, 8 FMSHRC 303, 306 (March 1986); *Gravelly v. Ranger Fuel Corp.*, 6 FMSHRC 799 (April 1984), *aff'd sub. nom. Gravel v. Ranger Fuel Corp. & FMSHRC*, 765 F.2d 138 (4th Cir. 1985).

To establish a prima facie case of discrimination a complaining

miner bears the burden of production and proof to show (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., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 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 not motivated in any part by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving (1) that it was also motivated by the miner's unprotected activity, and (2) that it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof with regard to this affirmative defense, *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1936-38 (November 1982.), but the ultimate burden of persuasion does not shift from the complainant. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984) and *Boich v. FMSHRC* 719 F.2d 194, 195-96 (6th Cir. 1983)(both cases specifically approving the Commission's Pasula-Robinette test).

With respect to the first element of the prima facie case, the judge's finding that during the spring of 1982 Houser made several complaints to Sprague about the dust at Grass Creek, the condition of the windows and the windshield of the cab of the front-end loader, and the steering mechanism of the front-end loader are supported by substantial evidence. We agree with the judge that these complaints constitute protected activity under the Mine Act. 6 FMSHRC at 1807.

The judge's finding that the second element of the prima facie case was established is also supported by substantial evidence. The record indicates that Houser was the most vocal of the miners concerning health and safety matters. Also, MSHA's citation of Northwestern for excessive respirable dust came at about the same time as Houser's complaints to mine management about the dust. Further, there is testimony that after failing to recall Houser, Sprague told one of the other miners that Houser was a "troublemaker." As the judge correctly noted, inferences of an operator's motivation may be drawn from such circumstantial evidence. 6 FMSHRC at 1809.

However, a crucial issue remains -- the adequacy of Northwestern's affirmative defense. In reciting the test to be applied for determining whether a violation of section 105(c) of the Mine Act occurs when an operator is motivated in any part by the exercise of protected activity, the judge stated the law incorrectly. The judge quoted and appeared to in part rely upon the Sixth Circuit's decision in *Wayne Boich d.b.a. W.B. Coal Co., v. FMSHRC* 704 F.2d 275 (6th Cir. 1983), in which the Court had declined to approve the Commission's test regarding the manner in which an operator may affirmatively defend against a prima facie case. The judge, however, apparently was unaware that on reconsideration, the Sixth Circuit

reversed itself and approved the Commission's test. *Boich*, 719 F.2d at 195-96. Thus, the correct inquiry is whether North-western would have refused to rehire Houser, in any event, for his unprotected activity alone. The judge's decision also provides his answer to this question. In his conclusion of law number 3 the judge stated: "Northwestern proved by a preponderance of the evidence that Houser was not rehired for reasons of unsatisfactory job performance." 6 FMSHRC at 1814. This finding is supported by substantial evidence as discussed below.

It is clear that Sprague and others had numerous problems with Houser's work. Sprague testified that Houser was absent frequently from the Kirby load-out facility. He testified that in response to complaints from the truckers he had gone to Kirby on several occasions to check on Houser's attendance and that on some occasions he had to wait at least 45 minutes during normal work hours for Houser to arrive. Further, Houser was insubordinate from time to time. Sprague testified that during January 1982 the front-end loader that Houser usually operated at Kirby was not working and that a smaller substitute loader had to be used. Although Houser did not question the safety of using the smaller loader, he nonetheless refused to load the stockpiled coal into the waiting railroad cars. Because of his work refusal on that occasion, Houser was sent home and Sprague was forced to load the coal himself. Sprague testified that the next day he informed Steffans that Houser had refused to load the railroad cars and recommended that he be discharged. Sprague had received other complaints about Houser's work at Kirby. He testified that Houser frequently overloaded railroad cars and, as a result, the company was forced to expend funds to send two men 80 miles to the railroad yard to shovel excess coal out of the cars. After Houser was replaced at Kirby, Sprague testified that the railroad cars were seldom overloaded and that complaints about the work at Kirby were "almost nonexistent."

Two coal truck drivers who were familiar with Houser's work at Kirby also testified as to his poor job performance. Carl Bechtold testified that Houser did not keep the load-out facility clear so that coal could be dumped from his truck. Bechtold stated that frequently he had to wait for the area to be cleared; in fact, he said, this happened about twice a week during December 1982. He also complained that frequently Houser was not present at the load-out facility when he arrived to dump his coal. Bechtold testified that he brought Houser's absences to the attention of Sprague and Steffans. Thomas Anderson, whose trucks transported coal from Grass Creek to Kirby, estimated that he had contact with Houser on a daily basis. He testified that he and his men often had to wait for Houser to arrive at the facility in order to unload their trucks, even though Houser's home was only 400 yards away. Anderson also testified that Houser did not maintain properly the load-out facility. On some occasions the trucks could not be unloaded because the area was not levelled off and there was no room to dump the coal. Mr. Anderson testified further that he complained about Houser to Sprague and Steffans.

Moreover, Sprague testified that Houser did not properly

maintain the equipment that he operated. Sprague testified that Northwestern instructs each employee to monitor equipment constantly for missing or broken parts and that each employee is also responsible for the routine maintenance of equipment. Sprague testified that Houser was lax in replacing fittings and headlights and in maintaining pins on the front-end loader. Further, Sprague testified that the glass windows on the equipment that Houser operated had to be repeatedly replaced due to Houser's failure to latch the door.

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The judge found the foregoing testimony of Northwestern's witnesses with respect to the multiple instances of Houser's unsatisfactory job performance to be credible. 6 FMSHRC at 1812. The judge acknowledged that several of Houser's fellow employees testified that he was a good worker. The judge, however, found that the statements of these witnesses were general in nature, as opposed to the more detailed and specific testimony of Steffans and the truckers. Moreover, none of the miners who testified on Houser's behalf had immediate knowledge of Houser's job performance at Kirby. Given the particularized nature of the testimony of Northwestern's witnesses and the judge's first-hand observation of the witnesses at the hearing, we find no reason for overturning the judge's credibility determinations and his resolutions of conflicting testimony. See, e.g., *Ribel v. Eastern Associated Coal Corp.*, 7 FMSHRC 2015, 2021 (December 1985), petitions for review filed, Nos. 86-3832(L) & 86-3833 (4th Cir. March 31, 1986). 1/

Accordingly, we conclude that the record and the judge's findings establish that Northwestern would not have recalled Houser to work in any event due to his poor work performance. Thus, we hold that the discrimination complaint was properly dismissed and affirm the judge's decision on the bases discussed above. 2/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Houser's termination notice, which indicated that he was recommended for rehire, was accorded little weight by the judge and is contrary to the substantial evidence recited above concerning his job performance.

2/ Chairman Ford did not participate in the consideration or disposition of this case.

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