FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

October 14, 1980

SECRETARY OF LABOR	:	
on behalf of DAVID PASULA	:	Docket Nos. PITT 78-458
	:	PITT 79-35
v.	:	PITT 79-36
	:	
CONSOLIDATION COAL COMPANY	:	

DECISION

This case raises several questions under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978)["the 1977 Mine Act"]. These questions include in what circumstances a miner may refuse to work in conditions that he believes are unsafe or unhealthful, and whether a violation should be found when adverse action taken against a miner is motivated by both unlawful and lawful reasons.

I.

The Secretary of Labor filed this complaint alleging that Consolidation Coal Company ("Consol") violated section 105(c)(1) of the 1977 Mine Act by firing David Pasula for engaging in the allegedly protected activity of refusing to work "in unsafe and unhealth[ful] conditions." Consol's answer "specifically denie[d] that Pasula was engaged in activity protected by section 105(c) of the 1977 Act...." Consol alleged that Pasula was fired "because he was insubordinate, because he interfered with the company's right to manage the mine and also because he caused an unnecessary interruption in production." The administrative law judge, after an extensive hearing, issued a decision in Pasula's favor, ordering that he be reinstated. Consol filed a petition for discretionary review, which we granted in part. Consol, the Secretary, and the United Mine Workers of America (the UMWA) submitted briefs and orally argued.

David Pasula was employed by Consol as a continuous mining machine operator in its underground coal mine. At the beginning of the midnight shift on June 1, 1978, Pasula was assigned to operate such a machine that had recently been damaged in a roof fall. Mechanics repairing the machine had replaced some gears, but the new gears failed to mesh smoothly with the old gears, and as a result, the machine was noisier than usual.

Pasula operated the machine for about an hour and a half, but stopped the machine because the noise gave him an "extreme headache", made his ears hurt, and made him nervous. 1/ Immediately upon shutting down the machine, Pasula told Consol about the noise and physical problems, and requested that a noise level reading be taken by Consol or by federal inspectors before he operated the machine any more. The judge found that Consol declined to take a noise level reading because it thought it was not obligated to do so and further refused Pasula the use of a mine phone to call in MSHA inspectors. Consol instead followed procedures established under its collective bargaining agreement with the UMWA, and called in a member of the Mine Health and Safety Committee to listen to the machine. The safety committeeman took no noise level reading but, after listening to the machine, agreed with Consol that the machine was not too loud to operate. He listened to the machine at an intersection, rather than at the face, with fewer than all its motors running, and in Pasula's absence. When Pasula returned and learned of the safety committeeman's views, he became very upset and harsh words were spoken. Consol management asked Pasula to return to work and operate the machine. Pasula refused, and again demanded that a noise level reading be taken.

Consol management personnel then turned to Pasula's helper, with whom Pasula had alternated in making cuts, and either asked him or was about to ask him to operate the machine. Pasula hit the machine and said, "nobody's going to run it." Consol then had Pasula clock out. The judge found that whether the helper was asked to run the machine or not before Pasula made his statement, the helper would not have operated the machine anyway, for "it is a general longstanding mine custom that when one miner will not operate a piece of equipment, another one will not." The mine section was then shut down by Consol.

Later that day, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) was at the mine and was asked by the UMWA to measure the noise level on the machine. He did so, but found no noise violation. He took noise level readings for about 15 minutes and found that with the pump motor running alone and with the machine not cutting coal, the noise level was 93 decibels; with the pump motor running, the conveyor running, and the machine mining coal, the level was 103 decibels. 2/

1/ Pasula was not equipped with a personal hearing protector.

2/ The noise standard applicable to underground coal mines, 30 CFR §70.510, does not, at least in the absence of hearing protectors, permit miners to be exposed to 90 dbA for more than an eight hour period, or to 102 dbA for more than one and one-half hours.

The next day, June 2, 1978, Consol gave a letter to Pasula stating he was "being suspended with intent to discharge" because Consol had "concluded that your insubordination (refusal to perform assigned duties), interference with management of the mines and causing an unnecessary interruption in production and your past disciplinary record cannot be tolerated by Consolidation Coal Company." (Emphasis added.) Pasula was later fired. Robert J. FlorJancic, the Consol official who signed the letters and fired Pasula, explained the reasons further during the hearing. He stated that the safety committeeman and Consol management personnel had resolved the matter about which Pasula had complained, and that, despite the contractual provision that required Pasula to return to work once it was so resolved, Pasula refused to do so. FlorJancic also stated that in addition to refusing to work, Pasula also "refused to let anybody else work, too", and that this also was a factor in his decision to fire Pasula.

To fully understand FlorJancic's reasons for firing Pasula, it is necessary to briefly summarize the provisions of the collective bargaining agreement between Consol and the UMWA. The National Bituminous Coal Wage Agreement of 1978 reserves to miners a limited right to refuse to work. Article III, section (i), entitled "Preservation of Individual Safety Rights", states that "No employee will be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." If the existence of such a condition is disputed by the operator, a safety committeeman "shall review such condition with mine management within four (4) hours to determine whether it exists. If there is agreement that the condition does not exist, the employee shall return to his regular job immediately." FlorJancic evidently believed that Pasula had violated this provision of the contract.

Pasula later challenged his discharge through the arbitration machinery established under the collective bargaining agreement. Arbitrator Beckman inquired into whether the condition described in article III, section (i)(1) of the contract existed, and found that it did not. He found that although the machine was making "an abnormal noise", the evidence "fails to support a conclusion that such noise was immediately dangerous and it also fails to support the conclusion that the noise could reasonably be expected to cause death or serious physical harm before abatement." He also found that Pasula "did not act in good faith." He therefore denied the grievance. The Arbitration Review Board denied discretionary review of Arbitrator Beckman's decision. This action was later filed before us under section 105(c) of the 1977 Mine Act.

II.

The Secretary's complaint alleges that Pasula was fired for refusing to work in unsafe and unhealthful conditions. The Secretary maintains that this refusal to work was, in these circumstances, protected by section 105(c)(1) of the 1977 Mine Act. Section 105(c)(1) reads in part as follows:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ..., or because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

The activity alleged by the Secretary is arguably not clearly protected by the plain language of this provision. The complaint did not allege that Pasula was fired for filing or making a safety complaint, for instituting proceedings or testifying, nor did the complaint identify a provision of the 1977 Mine Act that expressly permits miners to refuse work. This does not end the matter, however. We must look to the entire statute, being mindful that the 1977 Mine Act is remedial legislation, and is therefore to be liberally construed.

In determining whether section 105(c)(1) protects Pasula's refusal to work, we consider it important that the 1977 Mine Act was drafted to encourage miners to assist in and participate in its enforcement. Section 103(g)(1) accords to miners and their representatives having reasonable grounds to believe that a violation or imminent danger exists the right to obtain an inspection of the mine by giving notice to the Secretary. Section 103(f) permits miners to accompany MSHA inspectors on all inspections and accords a limited right to pay for their participation. 3/

Section 103(c) requires the Secretary to adopt regulations permitting miners to observe the monitoring or measuring of toxic materials and harmful physical agents, 4/ to have access to records of such monitoring

3/ See Magma Copper Corp., 1 FMSHRC 1948, 1 BNA MSHC 2227, 1979 CCH OSHD ¶23,075 (1979), pet. for rev. filed, No. 79-7535 (9th Cir., October 15, 1979); Helen Mining Co., 1 FMSHRC 1976, 1 BNA MSHC 2193, 1979 CCH OSHD ¶24,045 (1979), pets. for rev. filed, Nos. 79-2518, 79-2536 (D.C. Cir. December 19, 21, 1979); Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833, 1 BNA MSHC 2230, 1979 CCH OSHD ¶24,071 (1979), pets. for review filed, Nos. 79-2503, 79-2536 (D.C. Cir. December 17, 21, 1979).

4/ At least one standard applicable under the 1977 Mine Act identifies noise as a harmful physical agent. 30 CFR §57.5-50.

or measuring, and to have access to records of one's own exposure. The regulations must also require operators to promptly notify a miner that he has been excessively exposed, and of the corrective action being taken. See also section 103(d)(interested persons' access to accident reports), and, with respect to underground coal mines, sections 302(a) (miners' access to roof control plan), 303(d)(1), (f), (g), and (w) (interested persons' access to records of operator's safety and health examinations), 305(e)(miners' access to map of electrical system), 305(g)(miners' access to records of operator's electrical examinations), and 312(b) (miners' access to confidential mine map).

The 1977 Mine Act and the Commission's regulations also permit miners to initiate and participate in litigation before the Commission. For example, miners' representatives may challenge the Secretary's modification or termination of an imminent danger order of withdrawal (section 107(e)(1)), miners may challenge the modification or termination of all withdrawal orders issued under section 104, and may contest "the reasonableness of the length of time set for abatement by a citation or modification thereof." Section 105(d). The Commission's rules are also required to "provide affected miners ... an opportunity to participate as parties to hearings under this section [105]." Section 105(d). Our rules of procedure allow miners to intervene as of right before the start of hearings, and thereafter for good cause shown and upon just terms. In discrimination actions brought by the Secretary, the complaining miner may intervene and present evidence on his own behalf. 29 CFR §2700.4(b)(1) and (2). 5/

That Congress gave miners many valuable rights under the 1977 Mine Act clearly demonstrates the congressional view that their participation in the enforcement of the Act is essential to the achievement of safe and healthful mines. This is particularly true of the right to complain to the operator and to the Secretary of alleged dangers or violations. MSHA inspectors cannot be everywhere at once, nor can they be expected to be so familiar with every mine that they will become aware of every condition or practice in need of correction. The successful enforcement of the 1977 Mine Act is therefore particularly dependent upon the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction. The right to do so would be hollow indeed, however, if before the regular statutory enforcement mechanisms could at least be brought to bear, the condition complained of caused the very injury that the Act was intended to prevent. A holding that miners have some right to refuse work under the 1977 Mine Act therefore appears necessary to fully effectuate the congressional purpose.

5/ This description of miners' rights is not exhaustive.

Any doubts on the matter are resolved by the legislative history of the Act, which clearly indicates that Congress intended that section 105(c)(1) be construed to accord to miners a right to refuse work. 6/ The report of the Senate committee that largely drafted the 1977 Mine Act states:

> Protection of miners against discrimination
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> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. The Committee is also aware that mining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity.
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> Section 10[5](c) ... prohibits any discrimination against a miner for exercising any right under the Act. It should also be noted that the class protected is expanded from the current Coal Act. The prohibition against discrimination applies to miners, applicants for employment, and the miners' representatives. The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends to include not only the filing of complaints seeking inspection under section [103(g)] or the participation in mine inspections under Section [103(f)], but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.
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> * * *
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> The listing of protected rights contained in section 10[5](c)(1) is intended to be illustrative and not exclusive. The wording of section 10[5](c) is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety

6/ It is well-settled that we may refer to legislative history even if a statute appears clear on superficial examination. Train v. Colorado Public Interest Research Group, 426 U.S. 1, 9-10 (1976).

and health standard promulgated under the law. The Committee intends to insure the continuing vitality of the various judicial interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill's provisions; See, e.g. Phillips v. IBMA, 500 F.2d 772; Munsey v. Morton, 507 F.2d 1202. The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions ... or the enforcement of those provisions....

S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35 & 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 & 624 (1978)["Leg. Hist."]. The matter was also discussed on the floor of the Senate:

> MR. CHURCH. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 10[5](c), the discrimination clause.
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> It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act.
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> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?
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> MR. WILLIAMS. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.
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> The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.
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> MR. JAVITS. I think the chairman has succintly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings.
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> MR. CHURCH. I thank the floor managers for their clarification of this matter and for their outstanding work on this very necessary legislation.

Leg. Hist. at 1088-1089. Finally, Representative Perkins, the chief House conferee and chairman of the House committee that drafted a House bill, stated the following during the customary oral report to the House describing the bill agreed to by the conference committee:

> Mr. Speaker, this legislation also provides broader protection for miners who invoke their safety rights. If miners are to invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of the Interior have improperly denied the miner the rights Congress intended. For example, Baker v. North American Coal Co., 8 IBMA 164 (1977) held that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner had no "intent" to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur.

Leg. Hist. at 1356. 7/

III.

We do not in this early opinion definitively set all the contours of the right to refuse to work. This case does not require it. We also think it wiser to allow the Commission's judges, the Secretary, affected miners and their representatives, and mine operators to gain some practical experience with the implementation of this right, to reflect on how it should be shaped, and to communicate their considered views to us.

We hold that in this case the miner's refusal to work was protected under the 1977 Mine Act. Pasula refused to obey Consol's order to work because he believed the work conditions to be unhealthful. He contacted Consol management officials to obtain corrective action, but this was unavailing. He requested an MSHA inspection. His good faith belief was reasonable, and was directed to a hazard that we consider sufficiently severe whether or not the right to refuse work is limited to hazards of some severity. Pasula was not merely speculating that he might in the future suffer from the effects of loud noise, but he was already so suffering when he stopped the machine. He was not equipped with personal hearing protectors, he had already been or would have shortly been exposed to more noise than permitted by the applicable mine health standard, and he was also operating a machine that requires substantial attention to its operation. In view of his actual suffering, his view that he was exposed to unhealthful and excessive noise levels was reasonable and was supported by objective, ascertainable evidence. The duration of the work stoppage was permissible here because Pasula's work stoppage

7/ The significance of the 1977 Mine Act's legislative history was noted by the Supreme Court during its consideration of a similar question under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. (1976). Whirlpool Corp. v. Marshall, 63 L.Ed.2d 154, 164 n. 18 (1980).

ended when management sent him home, before the MSHA inspector determined in his opinion that there was no violation of the noise standard. Whether the duration of the right to refuse work continues only until an MSHA inspector has inspected a complained of condition, or whether it is dependent upon the inspector's decision to issue or not to issue a citation, or withdrawal order, we need not now decide.

Consol maintains that any right to refuse to work under the 1977 Mine Act should be fashioned in the light of, and to give effect to, the contractual method for resolving safety disputes agreed to by Consol and the UMWA. Consol argues, in particular, that once the union safety committeeman agreed with Consol that a hazard of sufficient gravity under the contract to justify a work stoppage did not exist, Pasula should be held to have had no right to refuse work under the 1977 Mine Act.

Pasula's contractual right to refuse work, however, is limited to a narrow class of hazards: those that are "abnormally and immediately dangerous ... beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." As the arbitrator's and the safety committeeman's views indicate, this language does not appear to encompass the condition here. In our view, the statutory right to refuse work under the 1977 Mine Act is broader and does apply to the condition here. The contractual language permits refusals to work in only what might be called an "abnormal imminent danger". We do not construe the 1977 Mine Act to limit a miner's refusal to work only to such conditions. 8/

Consol also argues that the administrative law judge did not attach any weight to the arbitrator's factual findings that a sufficiently severe hazard was not present and that Mr. Pasula "did not act in good faith." Consol cites Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), for the proposition that the judge erred in not attaching more weight to the arbitrator's findings.

In Gardner-Denver, the Supreme Court held that an employee may obtain a trial de novo in federal district court of a claim of racial discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1976), even though that employee had already unsuccessfully sought relief through the arbitration machinery of a collective bargaining agreement. The Court went on to hold, however, that while the federal district court should consider the employee's claim de novo, "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." 415 U.S. at 60. This textual statement was accompanied by the following footnote:

8/ Compare section 502 of the Labor-Management Relations Act, 29 U.S.C. §143, which may, unlike the 1977 Mine Act, limit refusals to work over safety, for purposes of that statute, to conditions of the gravity required by the collective bargaining agreement involved here. See Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974).

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

We adopt the Gardner-Denver approach to arbitral findings in discrimination proceedings under the Act. We believe that according weight to the findings of arbitrators may aid the Commission's judges in finding facts. A judge faced with a credibility problem may find the views of the arbitrator on labor practices in the mines, mine customs, or on the "common law of the shop" helpful.

This does not diminish the role of the Commission's judges. The hearing before the administrative law judge is still de novo and it is the responsibility of the judge to render a decision in accordance with his own view of the facts, not that of the arbitrator. Arbitral findings, even those addressing issues perfectly congruent with those before the judge, are not controlling upon the judge.

As Gardner-Denver indicates, there are several factors that must be considered in determining the weight to be accorded to arbitral findings: the congruence of the statutory and contractual provisions; the degree of procedural fairness in the arbitral forum; the adequacy of the record; and the special competence of the particular arbitrator. Arbitral findings may be entitled to great weight if the arbitrator gave full consideration to the employee's statutory rights; the issue before the judge is solely one of fact; the issue was specifically addressed by the parties when the case was before the arbitrator; and the issue was decided by the arbitrator on the basis of an adequate record.

In this case, we hold that the judge did not err in according little or no weight to the arbitral findings. The problem here is primarily the congruence of the statutory and contractual rights. The factual issues raised by the statutory and contractual rights to refuse to work are not congruent. The contractual right to refuse work, and the concomitant arbitral findings, turn upon different criteria than the statutory right. The gravity element in the contractual right is indeed far narrower than the gravity element in the 1977 Mine Act. With

respect to the arbitrator's finding that Pasula did not act in good faith, we note that the arbitrator's finding is unexplained. It appears, however, that the arbitrator's finding was made because the arbitrator thought that Pasula had no basis for believing that a hazard of the severity required by the contract to permit a refusal to work existed, because Pasula failed to follow the contractual procedure by failing to return to work once the safety committeeman agreed with management, because he announced that the machine was shut down and that nobody else could operate it, and because he failed to alternate operation of the machine with his helper. See Arb. Dec. at 13-14. If any of these reasons are a basis for the arbitral finding, then we believe that it is entitled to little or no weight. Any good faith finding necessary to uphold a work stoppage under section 105(c)(1) of the 1977 Mine Act would concern the good faith of the miner's belief that there existed a hazard of at least the severity present here. The miner's good faith is not "lost" by his subsequent misconduct, and it is obviously not defeated by his refusal, in this case, to follow contractual procedures requiring a return to work that are inconsistent with the statutory right to refuse work. In short, we find no prejudicial error in the judge's approach.

IV.

Although we find that Pasula's firing was motivated at least in part by his engaging in a protected activity, this is not necessarily the end of the matter. Consol argues that when Pasula "refused to permit anyone else to operate" the machine, "he stepped outside of any protection ... afforded to him under the Act", and that Pasula could not, upon engaging in protected activity, do as he pleased.

We will assume that Pasula was fired also in part for engaging in the presumably unprotected activity of, in Consol's words, refusing "to permit anyone else to operate" the machine. There is insufficient evidence to find that Pasula would have been fired for engaging only in the unprotected activity. 9/ The question is, therefore, whether Pasula is entitled to a remedy under these circumstances. We hold that he is.

9/ See, e.g., Youngstown Osteopathic Hospital Assn., 224 NLRB 574, 575, 91 LRRM 1255 (1976)(in any part); Allen v. NLRB, 561 F.2d 976 (D.C. Cir. 1977)(same); Pelton Casteel, Inc. v. NLRB, 105 LRRM 2124, 2128 (7th Cir. 1980); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979)("but for" test burden on employer); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979)(age discrimination)("but for" test, burden on plaintiff); Colletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977)(same), following Mt. Healthy City School District Bd. of Education v. Doyle, 429 U.S. 274,285-286 (1977)(constitutionally protected conduct)("but for" burden on employer); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978)("but for" burden on plaintiff).

The question raised here is similar to difficult anti-retaliation issues arising under other federal statutes. Part of the reason this question has been so vexing is that courts and agencies often have great reluctance to order the reinstatement of an employee who may deserve to be fired in any event. Various approaches have been suggested, the most common being the "in any part" test and the "but for" test. The "in any part" test can be simply stated as follows: If any part of the motivation for an employer's adverse action against an employee has been that employee's protected activity, the adverse action is unlawful. It matters not that the employee's unprotected activities were outrageous, would have alone justified adverse action, and did in fact partially motivate the adverse action. The partial illegality of the employer's motive irretrievably taints the adverse action. The "but for" test can be simply stated as follows: it is not enough to support relief to find that the protected activity played a part, however great, in the adverse action; the evidence must also show that the employer would not have acted against the employee but for the protected activity, i.e., that in the absence of the protected activity, no adverse action would have been taken.

These tests represent different balancings of many considerations. The "in any part" test has been criticized on various grounds: that it is so easy to satisfy that almost any employer can be caught up in it, for it is a rare employer who cannot resist feeling some resentment over an employee's protected activities; 10/ that it protects employees who would have been fired anyway for their unprotected activities; 11/ that it puts such employees in a better position than they would have been in had they never engaged in the protected activity; 12/ and that it

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10/ See, e.g., Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 97 (2d Cir. 1978):

> If partial motivation were ... the [only factual issue], then its resolution would be simple. In all cases involving the discharge of a union activist, there is always sufficient evidence to pass such a test, and this case is no exception. It is unrealistic to expect management to ignore the fact that an employee is a union activist. When a union activist is discharged for cause, human nature is such that little employer disappointment can be expected. In such cases, more is required to support a finding of discrimination than an absence of remorse.

See also NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963)(concurring opinion).

11/ Waterbury Community Antenna, supra note 15, 587 F.2d at 97.

12/ Mt. Healthy City Bd. of Education v. Doyle, 429 U.S. 274, 285-286 (1977). The test has been particularly criticized on this ground under the LMRA because the "in any part" test is so tilted to employees that the neutral posture of the LMRA would be upset by its application. Waterbury Community Antenna, 587 F.2d at 99 & n.6. This criticism of the test is not apposite under the 1977 Mine Act, however, for as the legislative history of the Act makes clear, and Consol concedes, Congress wanted miners to exercise their rights.

encourages employees to think that they can "get away with" outrageous disruptive behavior. 13/ The test also has merit. It is the rare employee who can prove more than that the protected activity played a part in his firing; the test reflects better the congressional policy under the 1977 Act of encouraging the free engagement by employees in protected activities; and puts the burden of an adverse decision upon the party better able to bear it--the employer.

The "but for" test has the advantage of placing employer and employee in the position they would have occupied had the adverse action not been partially tainted, but it also has drawbacks. It may chill the willingness of other employees to engage in protected activity. Miners may be skeptical of a finding that their fellow miner would have been fired anyway; they would be even more discouraged if their statutory rights can be exercised only if they could prove that they would not have been fired anyway. And, as we have said, problems of proof may be almost insurmountable for the employee.

The language of the 1977 Mine Act considered alone does not provide a complete answer to this problem. Section 105(c)(1) proscribes adverse action "because" a miner engages in a protected activity. The comparable provision of the 1969 Coal Act used the term "by reason of the fact that". The legislative history of section 105(c)(1) of the 1977 Mine Act briefly but significantly touches upon a possible reason for this change. The report of the Senate committee that drafted section 105(c)(1) states that "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." S. Rep. at 36; Leg. Hist. at 624 (emphasis added).

We conclude that many of the drawbacks of the "in any part" and "but for" tests are presented not so much by the tests themselves, but in the allocation of burdens of persuasion and going forward that have accompanied their application. In Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), the Supreme Court dealt with the multiple motivation issue with respect to constitutionally protected speech. The Court held that a school teacher not rehired in part because of his protected activity met his burden of persuasion by showing that his protected conduct was a "motivating factor" in the decision not to rehire him. The Court also held that the school board that refused to re-employ the teacher may prove by a preponderance of the evidence "that it would have reached the same decision as to [Doyle's] re-employment even in the absence of the protected conduct." Id. at 274. The Court explained:

13/ NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963)(concurring opinion): NLRB v. Billen Shoe Co., 397 F.2d 801 (1st Cir. 1968); Colletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1294 (1st Cir. 1977). See also Liberty Mutual Ins. Co. v. NLRB 592 F.2d 595, 606 (1st Cir. 1979) (concurring opinion).

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

* * *

[Other constitutional law cases] suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

Id. at 285-287. See also Givhan v. Western Line Consolidated School District, 439 U.S. 410, 416-417 (1979); and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270 n.21 (1977). Although Mt. Healthy dealt with constitutionally protected rights, and not with statutory rights granted by Congress, we find that Mt. Healthy is nevertheless instructive, particularly with respect to the need for flexibility in the allocation of burdens of persuasion, and is consistent with the 1977 Mine Act.

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by

a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action againt the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.

By adopting this approach, we have adopted both the "in any part" and "but for" tests, but we have allocated differing burdens of persuasion to each party. The adoption of the "in any part" element is consistent with the congressional intent underlying the anti-retaliation provisions of the 1977 Mine Act, prevents the imposition upon the complainant of what may be an impossible burden to shoulder, and does not chill the exercise of miners' rights that may occur if the burden of persuasion were any heavier. On the other hand, the Commission recognizes that it would hardly further the statutory purpose to order the reinstatement of a miner who would have been discharged for lawful reasons alone. It would put a miner who has engaged in both protected and unprotected activities in a better position than he would have occupied had he done nothing. It would require reinstatement even though the record shows that the employer would have lawfully assessed the miner as unfit for further employment. We have placed the ultimate burden of persuasion upon the employer 14/ because it is the employer who is in the best position to prove what he would have done. 15/

14/ As to the allocation of the ultimate burden of persuasion upon the employer, see, in addition to Mt. Healthy, E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 81 (1956):

> Just as the courts have come to recognize that there is no a priori formula for fixing the burden of persuasion, so they should recognize that if there is a good reason for putting on one party or the other the burden of going forward with evidence ... it ought to be enough to control a finding when the mind of the trier is in equilibrium.

15/ While this opinion was in preparation, the National Labor Relations Board issued its decision in Wright Line, 251 NLRB No. 150 (1980), in which the Board adopted a test substantially the same as we adopt here and for many of the same reasons.

The employer has admitted, and the record in any event establishes, that at least part of the motive for Pasula's discharge was activity that was protected. Under our test, the issues are whether the employer has proven that (1) unprotected activities also partially motivated the discharge, and (2) Pasula would have been fired in any event for the unprotected activities alone.

The record fails to support Consol's claim that the evidence shows that Pasula's "misdeeds are so obvious that the employee would have in any event been disciplined." 16/ Indeed, part of the misconduct that Consol claims would have caused Pasula to be fired in any event (Consol Br. at 32, 34) is conduct that we have concluded is protected by the 1977 Mine Act--Pasula's refusal to work.

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

16/ Consol argues at length that the administrative law judge erred in his approach to evidence of past instances of misconduct by Pasula. Even if we were to agree with Consol's argument, the outcome here would be unaffected. As we note above, the record fails to show that Pasula would have been fired in any event for his past and present misconduct alone.

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