

CCASE:  
SOL (MSHA) v. KENTUCKY CARBON  
DDATE:  
19810318  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

Complaint of Discharge  
Discrimination, or Interference

Docket No. KENT 80-145-D

ON BEHALF OF:  
BOBBY GOOSLIN,

Calloway No. 1 Mine

COMPLAINANT

v.

KENTUCKY CARBON CORPORATION,  
RESPONDENT

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee, for  
the Secretary of Labor;  
Mary Lu Jordan, Esq., United Mine Workers of America,  
Washington D.C., and Bernard Pafunda, Esq., Pikeville,  
Kentucky, for Bobby Gooslin;  
C. Lynch Christian III, Esq., Jackson, Kelly, Holt and  
O'Farrell, Charleston, West Virginia; Timothy Biddle,  
Esq., Crowell and Moring, Washington, D.C.; and Timothy  
Pohl, Esq., Kentucky Carbon Corporation, Charleston,  
West Virginia, for Kentucky Carbon Corporation

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding commenced by the Secretary of Labor,  
Mine Safety and Health Administration (hereinafter MSHA) on  
behalf of Bobby Gooslin alleging that Bobby Gooslin was  
discharged from his employment at Kentucky Carbon Corporation  
(hereinafter Kentucky Carbon) on October 8, 1979, because of  
activities protected under section 105(c) of the Federal Mine  
Safety and Health Act of 1977, 30 U.S.C. 815(c) (hereinafter  
the Act). Bobby Gooslin filed a complaint with MSHA concerning  
his discharge. Following an investigation by MSHA, on January  
18, 1980, MSHA filed an application for temporary reinstatement  
of Bobby Gooslin. That application was granted by Chief  
Administrative Law Judge James A. Broderick on January 22, 1980.  
Thereafter,

~641

Kentucky Carbon requested a hearing on the application for temporary reinstatement. A hearing on the application was held in Pikeville, Kentucky, on January 30, 1980, before Chief Judge Broderick. Following the hearing, Chief Judge Broderick held that the order of temporary reinstatement should continue in force until further notice. On March 10, 1980, the Federal Mine Safety and Health Review Commission (hereinafter the Commission) granted Kentucky Carbon's petition for review of the order of temporary reinstatement and stated, "[t]he order of temporary reinstatement remains in effect pending Commission review." To date, the Commission has not ruled on that order.

On February 8, 1980, MSHA filed a complaint of discharge on behalf of Bobby Gooslin. Kentucky Carbon's motion to dismiss for failure to state a claim upon which relief could be granted was denied on May 5, 1980. Upon completion of prehearing requirements, a notice of hearing was issued on July 10, 1980, for a hearing on September 15, 1980. On August 18, 1980, Thomas M. Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, sole counsel for MSHA and Bobby Gooslin, sent me a letter which stated in pertinent part:

In preparation for the hearing scheduled September 15, 1980, I recently traveled to Pikeville, Kentucky to interview the complainant as well as other potential witnesses with knowledge of facts which will be in issue at hearing. As a result of that process, I have become firmly convinced that a conflict of interest would exist if this office continues to represent Mr. Gooslin in this matter.

\* \* \* \* \*

We do regret that this notification to you, and to the Respondent, has come at a time when we are only one month from hearing, however it was heretofore our belief that a conflict could be avoided. We have concluded, that such a conflict does exist, and does warrant the withdrawal of the Secretary of Labor from the above-styled matter. We therefore respectfully request that the presiding administrative law judge accept this notification as the Secretary's notice of withdrawal from the above-styled matter.

The August 18, 1980, letter from Mr. Piliero also stated that Bobby Gooslin would be represented in this matter by counsel from the United Mine Workers of America (hereinafter UMWA). On August 18, 1980, I conducted a telephone conference call with Mr. Piliero and C. Lynch Christian III, Esq., counsel for Kentucky Carbon. On August 18, 1980, I denied MSHA's motion to withdraw and ordered MSHA to show cause why its complaint of discharge should not be deemed to be withdrawn and why this matter should not be dismissed. MSHA and the UMWA opposed dismissal and Kentucky Carbon favored it. After considering all of the responses to the previous order, on September 8, 1980, I again denied MSHA's motion to withdraw. Additionally, I directed counsel

~642

for the UMWA to file Bobby Gooslin's consent to representation by the UMWA, directed Mr. Piliero to determine whether he could continue to represent MSHA in this matter in light of the alleged conflict of interest, and granted the UMWA's unopposed motion for a continuance of the hearing. On September 10, 1980, Bobby Gooslin consented to representation herein by the UMWA Legal Department. On September 16, 1980, Thomas A. Mascolino, Esq., Counsel, Office of the Solicitor, U.S. Department of Labor, stated that "despite your denial of our motion to withdraw we must respectfully advise you that we will not be representing Mr. Gooslin in this matter." Mr. Mascolino's letter went on to state that thereafter MSHA would be represented by William F. Taylor, Esq.

On September 23, 1980, Kentucky Carbon filed another motion to dismiss. MSHA and Bobby Gooslin opposed the motion. On October 15, 1980, I denied the motion to dismiss. On October 20, 1980, Kentucky Carbon moved for reconsideration of my order of October 15, 1980, denying its motion to dismiss. On November 5, 1980, I denied the motion for reconsideration. On December 4, 1980, Kentucky Carbon petitioned the Commission for interlocutory review of the order denying the last motion to dismiss and the motion for reconsideration of that order. On December 8, 1980, the Commission denied the petition for interlocutory review.

A hearing on the merits of the complaint of discharge was held in Pikeville, Kentucky, on December 8 through December 11, 1980. At the outset of the hearing, Kentucky Carbon objected to MSHA's right to propose a civil penalty herein without following the procedures set forth in 30 C.F.R. 100.5 and 100.6 and 29 C.F.R. 2700.25. I sustained Kentucky Carbon's objection, severed the civil penalty proposal from the complaint, and remanded the civil penalty proceeding to MSHA to begin the civil penalty assessment process. Counsel for Bobby Gooslin moved for an order requiring Kentucky Carbon to comply with the temporary reinstatement order by permitting Gooslin to return to work at the mine site rather than being permitted to merely receive wages. MSHA and Kentucky Carbon opposed the motion. I denied this motion for the following reasons: (1) since the Commission granted the petition for review of the order of temporary reinstatement and further stated that the order remained in effect pending Commission review, I did not have jurisdiction over the order of temporary reinstatement and (2) the motion was not timely.

At the hearing, MSHA and Kentucky Carbon made opening statements. Thereafter, Bobby Gooslin moved for a summary decision on the basis of admissions contained in Kentucky Carbon's opening statement. The motion, considered to be the equivalent of a motion for directed verdict after the opening statement, was denied. MSHA presented no evidence at the hearing. Kentucky Carbon renewed its motion to dismiss and the motion was denied. The following witnesses testified on behalf of Bobby Gooslin: Bobby Gooslin, Tommy Coleman, Rodney Dale Isom, Jimmy R. Stiltner, Lloyd Johnson, Larry Keith Simpkins, and Ernie Justice. The following witnesses testified on behalf of

Kentucky Carbon: James R. Reynolds, Joe S. Dado, Troy Coleman,  
James Marshall Christian, Aaron H. Hall, Jr., William Meade,  
Delmar Cook, Fred C. Biliter, Billy Jack Fuller, and James C.  
Hager.

Upon completion of the testimony at the hearing, MSHA presented a closing argument and, thereafter, submitted its written response to questions I raised at the conclusion of its closing argument. Bobby Gooslin and Kentucky Carbon filed posthearing briefs.

#### ISSUES

1. Whether the complaint should be dismissed where MSHA requested permission to withdraw from this proceeding because of a conflict of interest between MSHA and Complainant Bobby Gooslin and where MSHA failed to present any evidence in support of the complaint at the hearing.

2. Whether Kentucky Carbon violated section 105(c) of the Act in discharging Complainant Bobby Gooslin and, if so, what relief shall be awarded to Complainant.

#### APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. 815(c), provides in pertinent part as follows:

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment 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, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation

to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

Section 103(g) of the Act, 30 U.S.C. 813(g), provides in pertinent part:

(1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If

the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

#### STIPULATIONS

The parties stipulated the following:

1. At all times relevant herein, Kentucky Carbon operated the Calloway No. 1 Mine in the production of coal and, accordingly, was an operator as defined in section 3(d) of the Act.

2. Kentucky Carbon's Calloway No. 1 Mine located near Phelps, Kentucky, is a "mine" as defined in section 3(h)(1) of the Act.

3. At all times relevant herein, the Complainant was employed by Kentucky Carbon as a "miner" as defined in section 3(g) of the Act. In addition, the Complainant was president of the UMWA local and safety committeeman at the Calloway No. 1 Mine.

4. On October 8, 1979, Complainant was discharged by Kentucky Carbon.

#### FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

##### Background

1. Kentucky Carbon is the operator of Calloway No. 1 (hereinafter the mine), an underground coal mine in Phelps, Kentucky.

2. Bobby Gooslin began his employment at Kentucky Carbon in 1972 and, at all times relevant herein, worked as a supply motorman. Prior to the time of this dispute, Kentucky Carbon considered Bobby Gooslin to be a good employee and no disciplinary action had been taken against him.

3. At all times relevant herein, Bobby Gooslin was president of UMWA Local 1416 and a member of the UMWA local safety committee at the mine. Although Bobby Gooslin was not chairman of the UMWA local safety committee, it was the practice of UMWA members and Kentucky Carbon management to deal with Bobby Gooslin regarding safety complaints.

4. On March 12, 1979, there was an unauthorized work stoppage or "wildcat" strike at the mine which lasted until March 14, 1979. On March 15, 1979, Billy R. Southerland, Division Manager of Kentucky Carbon, issued a memorandum to the President of Local Union 1416, members of the mine committee and all union employees of Kentucky Carbon stating that unauthorized work stoppages or "wildcat" strikes would not be tolerated and further stating as follows:



You are hereby placed on notice that, in the event an unauthorized work stoppage occurs in the future, company policy will be as follows: Management will selectively discipline, up to and including discharge, a significant number of employees who participate in future unauthorized work stoppages. Such discipline will be directed first to employees who can be identified as agitating or actively giving leadership or support to the stoppage. They may be determined on a basis as fundamental as those who first "hang up their lights" or those who first leave the work area or the parking lot. If such activists cannot be identified, participating employees whose record of work attendance or job performance is deemed poor will be selected for discipline. It is imperative that you realize you may be disciplined or discharged simply by participating in an unauthorized work stoppage.

The above memorandum was posted on the bulletin board at the mine and all miners were aware of it.

5. On May 7, 1979, Larry K. Simpkins, a shear operator on the longwall at Kentucky Carbon's Calloway No. 2 Mine, exercised his individual rights under the National Bituminous Coal Wage Agreement of 1978 (hereinafter the contract) and withdrew himself from a condition which he believed to be abnormally and immediately dangerous. He was assigned other duties on that date. On May 8, 1979, all five UMWA employees on his crew withdrew themselves for the same reason. Eight UMWA employees on another longwall section of the same mine withdrew themselves pursuant to the contract. All 13 of the UMWA employees involved in this matter were suspended with the intent to discharge them. An arbitrator reinstated all 13 employees but found that each of them should forfeit 4 days' pay because he found that they came out as a group rather than individually.

6. For a period of time prior to the events leading to the discharge of Bobby Gooslin, there was a continuing dispute between Kentucky Carbon and the UMWA concerning the propriety of hauling supplies on mantrips. During the week prior to the discharge of Bobby Gooslin, a group of miners visited the MSHA office to protest Kentucky Carbon's practice of hauling supplies on the mantrips. MSHA Coal Mine Inspector Supervisor Troy Coleman explained MSHA's interpretation of the regulations concerning mantrips and hauling supplies. The UMWA employees were unhappy with MSHA's interpretation of the law. The controversy surrounding the issue of hauling supplies on mantrips continued up to the time of Bobby Gooslin's discharge. Bobby Gooslin did not participate in the foregoing dispute. Subsequent to Gooslin's discharge and the occurrence of the work stoppage, MSHA conducted an inspection pursuant to section 103(g) of the Act concerning this complaint.

7. At the time of this incident involving Bobby Gooslin, Kentucky Carbon contended that the UMWA was required to give 24-hours notice to the operator before making a safety run or spot inspection except in cases where the UMWA

~647

alleged the existence of an immediate or imminent danger. At all times relevant herein, the UMWA contended that it was not required to give 24-hours notice before making any safety run or spot inspection. Prior to this incident, there were instances when Kentucky Carbon had both allowed and denied the UMWA local safety committee the right to make spot safety inspections without the required 24-hours notice.

#### Events of September 29, 1979

8. After completing work on the 12:01 a.m. to 8 a.m. shift on September 29, 1979, UMWA members Tommy Coleman and Rodney Isom stopped at Bobby Gooslin's residence on their way home from the mine. Shortly thereafter, they were joined by UMWA safety committeeman J. R. Stiltner. The four miners who participated in this discussion contend that Coleman and Isom complained about bad roof along the main haulage track and an escapeway which was blocked by water. None of the miners suggested that this was an immediate or imminent danger. They asked Bobby Gooslin to make a UMWA safety committee run to check these conditions. All four of the miners who participated in this discussion deny that there was any discussion of the issue of hauling supplies on the mantrips.

9. At the conclusion of the meeting, Bobby Gooslin said he would call and make arrangements for the safety run.

10. Bobby Gooslin took no further action on this matter on September 29, 1979.

#### Events of September 30, 1979

11. During the afternoon, Bobby Gooslin called Lacy Ferrell, chairman of the local UMWA safety committee, to advise him that he wanted to schedule a safety committee spot run or inspection of the mine at the beginning of the 12:01 a.m. shift on October 1, 1979. Lacy Ferrell told Bobby Gooslin to set up the run but that Lacy Ferrell would not be present.

12. Between 3 and 4 p.m., Bobby Gooslin called William Meade, superintendent of the mine, to request postponement of a grievance meeting which had been scheduled for the next day. Bobby Gooslin did not mention any intention to make a safety run.

13. Between 3 and 4 p.m., Bobby Gooslin called Joe Dado, a Coal Mine Inspection Supervisor in MSHA's Phelps, Kentucky office. Bobby Gooslin claims that he requested that Joe Dado send an inspector to the mine at midnight and that Gooslin would have a written request pursuant to section 103(g) of the Act at that time. Joe Dado testified that Bobby Gooslin complained about the fact of hauling supplies on mantrips and other unspecified violations. Joe Dado claimed that Gooslin did not request an inspection pursuant to section 103(g) of the Act but merely wanted to know if MSHA would send an inspector.

~648

In any event, at this time, it was Dado's understanding that he was not permitted to agree to meet Gooslin at the mine at a specific time and that there was no requirement that he send an inspector to the mine until a written request for such an inspection had been received.

14. At approximately 5 p.m., Bobby Gooslin called James Boyd, a UMWA district safety inspector, and asked Boyd to meet him at the mine for a safety run prior to the 12:01 a.m. shift on October 1, 1979. Bobby Gooslin also told James Boyd that Gooslin was unable to get an MSHA inspector from the local MSHA office and that Boyd should arrange for an MSHA inspector at the time of the safety run.

15. Between 6 and 7 p.m., Doug Fleming, Acting District Manager of MSHA, called Joe Dado and Troy Coleman, coal mine inspection supervisors in the Phelps, Kentucky MSHA office. Acting District Manager Fleming advised the inspection supervisors that he had received a request from James Boyd, UMWA district safety inspector, for an inspection of the mine pursuant to section 103(g) of the Act. Joe Dado questioned whether MSHA could agree to such a request in view of the other provisions of the Act which prohibit advance notice of MSHA inspections. Joe Dado suggested that Doug Fleming call Troy Coleman because the mine was under Coleman's jurisdiction. Troy Coleman also discussed the question of advance notice with Doug Fleming and Coleman told Fleming that he was going on vacation the next day. No further action was taken by MSHA that day.

16. At approximately 8:45 p.m., Bobby Gooslin called Superintendent William Meade's home. He learned that Superintendent Meade had gone to the mine because of a roof fall. Thereafter, Bobby Gooslin called Superintendent Meade at the mine. Bobby Gooslin said that he had been unable to reach Superintendent Louis Simpkins and that Gooslin wanted to make a safety run at midnight. Gooslin and Meade also discussed the roof fall which measured 10 feet by 8 feet by 18 inches and was expected to take one shift to clean up. Superintendent Meade said he would contact Safety Director James Hager to make arrangements for the safety run.

17. At approximately 9:15 p.m., Superintendent Meade called Safety Director James Hager at home. Superintendent Meade reported the fact and dimensions of the recent roof fall and also reported Bobby Gooslin's request for a safety run at midnight. James Hager told Meade to call Gooslin back and tell him that he would not be permitted to make the safety run because he had not given 24-hours notice of this request.

18. At approximately 9:20 p.m., James Hager called MSHA Inspection Supervisor Joe Dado to report the roof fall.

19. At approximately 9:30 p.m., Superintendent Meade called Bobby Gooslin to inform him that James Hager had instructed Meade to notify Gooslin that he would not be permitted to make the safety run at midnight because he had failed to give Kentucky

Carbon 24-hours notice. Gooslin responded that

~649

he did not give a damn whether the company had someone to accompany him or not and that he was going to the mine anyway. Gooslin also advised Meade that James Boyd, UMWA District Safety Inspector, would be there with Gooslin.

20. Thereafter, Superintendent Meade called James Hager to report Gooslin's response in the above paragraph. Hager instructed Meade to call the shift foreman for the 12:01 a.m. shift and instruct him to deny Gooslin entry to the mine and tell Gooslin to return at 8 a.m. on October 1, 1979, to make the run.

21. At approximately 9:45 p.m., Hager called Fred Fletcher, Personnel Manager of the mine, and reported that Bobby Gooslin was going to go to the mine to make an inspection even though he had been notified that he would not be permitted to make the inspection. James Hager called Fred Fletcher because he thought the matter would develop into a personnel problem.

22. At approximately 10 p.m., Fred Fletcher came to James Hager's home to discuss the above events. Thereafter, Fred Fletcher called James R. Reynolds, Manager, Personnel Services, Carbon Fuel Company, the parent company of Kentucky Carbon. Fred Fletcher was concerned about the situation and wanted James Reynolds' reaction to these events.

23. At approximately 10 p.m., Bobby Gooslin called Larry Simpkins, a member of the UMWA local safety committee, and asked him to come to the mine for a safety run.

24. The following events occurred at the mine between 11 and 11:45 p.m. on September 30, 1979:

(a) At approximately 11 p.m., James Christian, shift foreman of the 12:01 a.m., shift, called Superintendent Meade and was informed that Bobby Gooslin would be at the mine with a UMWA safety inspector for an inspection. Christian was instructed to tell Gooslin that he was not allowed to make the inspection because he had not given enough notice and that he was to come back at 8 a.m.

(b) James Boyd and Bobby Gooslin arrived at the parking lot outside the mine office. Several other miners, who were scheduled to work the 12:01 a.m. shift, were already present in the parking lot.

(c) Shift Foreman Christian came out of his office and walked over to Gooslin and Boyd. Christian told them that he had orders from Superintendent Meade not to allow them underground. James Boyd asked Christian his name and then stated that Christian would end up in Federal court. Gooslin stated: "I'm going to show the damn Hagers they don't run this place." Bobby Gooslin then called Tommy Coleman and Rodney Isom over and had Christian repeat his statement denying Gooslin entry to the mine.

(d) Thereafter, Christian returned to the mine office where he called Superintendent Meade to report the preceding conversation. Christian

then remembered that he had neglected to tell Gooslin to return at 8 a.m. He again went out to the parking lot and told Gooslin to come back at 8 a.m. Christian again returned to his office.

(e) Thereafter, Gooslin told the miners who were gathered in the parking lot that he was "going off the mountain," Kentucky Carbon did not want him to make a safety run, and that they should "be very careful."

(f) Thereupon, Gooslin and Boyd left the parking lot in their vehicles.

(g) After Boyd and Gooslin left the parking lot, the miners who were to work the 12:01 a.m. shift assembled and discussed Kentucky Carbon's refusal to allow the safety committee to make a run, the occurrence of the roof fall earlier that night, and their complaints about bad roof and a blocked escapeway. After some discussion, the miners jointly decided not to work. None of the miners voiced a safety complaint to Kentucky Carbon management that night.

25. At some time between 11:45 p.m. and midnight, the miners who were to work the 12:01 a.m. shift at the mine got in their vehicles and left the mine with their headlights flashing and horns blowing. The miners who were about to start work at Calloway No. 2 Mine, on the other side of the valley, upon hearing and seeing these events, also left that mine.

#### Events Occurring After the Work Stoppage

26. The unauthorized work stoppage or "wildcat" strike which began on the 12:01 a.m. shift on October 1, 1979, continued until the 12:01 a.m. shift on October 8, 1979. During this time, approximately 350 miners were idled. Prior to resuming work on October 8, 1979, the UMWA local safety committee inspected the mine and cited more than 80 safety and health violations.

27. On October 1, 1979, Bobby Gooslin was served with a letter from Superintendent Meade notifying him that he was "suspended pending an investigation of your involvement preceding and culminating in an unauthorized work stoppage on October 1, 1979."

28. On October 2, 1979, Bobby Gooslin was served with a notice which stated as follows:

The Company has concluded that your actions on September 30, 1979 were the efficient cause of an unauthorized work stoppage and clearly establish you as a primary contributor in the instigation of a work stoppage in violation of the Agreement.

For this offense, you are hereby suspended with intent to discharge effective immediately.

The memorandum was unsigned and the author is not identified.



29. On October 8, 1979, Bobby Gooslin was discharged by Kentucky Carbon.

30. On November 1, 1979, arbitrator David T. Kennedy, heard testimony on behalf of Bobby Gooslin and Kentucky Carbon concerning Bobby Gooslin's grievance under the contract. On November 14, 1979, Arbitrator Kennedy denied Bobby Gooslin's grievance and found that his discharge was sustained. Arbitrator Kennedy stated in pertinent part:

The Union stressed the fact that no one who testified admitted hearing the Grievant order or suggest a work stoppage. It would be an unusual happening if anyone did. The initiation of a wildcat strike is not usually a public act. The proverbial "wink and nod" are sufficient. In this case, actions speak louder than words. Here, there were a number of men who came to the mine intending to work. After some of them spoke to Gooslin, the homeward movement started and spread throughout the operation with a domino effect. It may be that when the Grievant came to the mine on Sunday night, he did not intend to start a work stoppage, but there can be no question that his words or actions after his arrival did just that.

A number of witnesses testified that, although they came to the mine intending to work, upon arrival they were individually and separately seized with a sudden fear which prevented them from entering the mine, so they left. Although not one of them used the individual withdrawal provisions of the Contract, all professed knowledge of it. They would have us believe that their leaving the mine had nothing to do with the concerted homeward movement of the other Employees. I do not know what explanation the Employees of the other operations would give for not working, but it would be interesting to hear.

We are not required to believe the incredible. In my opinion, the evidence in this case leaves not one scintilla of doubt in my mind that this Grievant was the efficient catalyst of the work stoppage. Consider:

The Employees came to work intending to work; Gooslin arrives on the scene and speaks to a few men, everyone goes home. Strikes do not erupt spontaneously; they are caused. As I have said and attempted to demonstrate, it is not even necessary to consider the Company's evidence to sustain the discharge. The Grievant stands convicted by his own testimony and that of his fellow workers, and by the facts and circumstances. Beyond that, Gooslin was evasive and equivocal in his answers to questions propounded to him, and his testimony exhibited a hostility to his Employer which contradicted his protestations of innocence and his avowals of cooperation.

31. On January 14, 1980, the Arbitration Review Board denied review of Arbitrator Kennedy's award of November 14, 1979.

#### DISCUSSION

##### I. Whether the Complaint Should Be Dismissed For Want of Prosecution.

This action was initiated by MSHA upon completion of its investigation of Bobby Gooslin's complaint. Initially, MSHA was successful in obtaining an order of temporary reinstatement for Gooslin. Thereafter, the instant matter was filed to secure permanent relief. Less than a month before the scheduled hearing date for this matter, MSHA requested permission to withdraw from this proceeding due to an unspecified "conflict of interest." I denied MSHA's request. Thereafter, Kentucky Carbon presented numerous motions to dismiss this proceeding for want of prosecution. I denied those motions.

A. May MSHA withdraw from a complaint of discharge, which it initiated pursuant to section 105(c) of the Act, due to a "conflict of interest" with the complaining miner?

The parties are in agreement that there is no precedent for MSHA's request to withdraw from this proceeding. Section 105(c)(2) mandates that MSHA shall prosecute an action where it determines that an operator has discharged a miner in violation of section 105(c)(1) of the Act. At all times, MSHA asserted that Kentucky Carbon violated the above law in its discharge of Bobby Gooslin. The only authorities cited by MSHA in support of its request to withdraw from this proceeding were court decisions holding that an attorney may not represent a party where there is a conflict of interest. These cases do not support the proposition that a party - as distinguished from an attorney - may withdraw from the proceeding. This is especially true in the instant case where, by statute, MSHA is the only party which can institute proceedings pursuant to section 105(c)(2) of the Act.

I reaffirm my decision that in an action brought by MSHA pursuant to section 105(c)(2) of the Act, MSHA will not be permitted to withdraw from the proceeding due to a "conflict of interest" with the complaining miner. My reasons are as follows:

(1) Section 105(c)(2) clearly mandates MSHA to prosecute a discharge case where it determines that section 105(c)(1) of the Act has been violated; (2) Bobby Gooslin had no right to bring his own action for discharge pursuant to section 105(c)(3) of the Act because MSHA never determined that this section of the Act was not violated; and (3) the law applicable to a conflict of interest specifies instances where an attorney shall be precluded from representing a party but does not authorize the withdrawal of a necessary party from a proceeding.

B. Where MSHA declines to represent a complaining miner or present any evidence on his behalf at hearing, should the complaint be dismissed for want of prosecution?

Pursuant to MSHA's notice that it would not represent Bobby Gooslin and the subsequent representation of Gooslin by the UMWA, Kentucky Carbon moved to dismiss this action for want of prosecution. It also renewed this motion at the hearing after MSHA rested without presenting any evidence. Kentucky Carbon maintains that once MSHA rested without presenting any evidence, section 105(c)(2) of the Act does not permit the introduction of any "additional evidence" by the complaining miner. Section 105(c)(2) of the Act states that "the complaining miner ... may present additional evidence on his own behalf during any hearing held pursuant to this paragraph." Therefore, Kentucky Carbon asserts that in the absence of any primary evidence, there was nothing to trigger "additional evidence." Since the specific statutory language of section 105(c) of the Act does not resolve this matter, I examined the legislative history of this section of the Act. Its states:

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. (Emphasis supplied.)

LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess., at 623.

If Kentucky Carbon's renewed motion to dismiss is granted, it would place Bobby Gooslin's claim in limbo. While he could file his own discharge case with the Commission, Kentucky Carbon could then challenge it on the basis that his claim does not satisfy the statutory language of section 105(c)(3) of the Act which requires that MSHA determine that there was no violation of section 105(c)(1) of the Act. In any event, it would further delay a resolution of this conflict. Moreover, if the complaint of discharge is dismissed, there would be a serious question whether the order of temporary reinstatement should also be dismissed.

I have considered all these factors and conclude that section 105(c)(2) should be broadly construed to allow Bobby Gooslin's case to go forward even though MSHA declined to present any evidence in support of the complaint.

## II. Whether Kentucky Carbon Violated Section 105(c) of the Act.

### A. Setting

Prior to the occurrence of the incident herein, labor-management relations at the mine were hostile and

acrimonious. During the 7 months prior to this incident, there was a history of work stoppages, a written statement

~654

from management threatening to discharge or discipline any miner who was involved in an unauthorized work stoppage, the discharge and subsequent reinstatement of 13 miners who invoked their individual rights under the contract by refusing to work in an allegedly unsafe area, a continuing dispute as to whether the UMWA was required to give management 24-hours notice before making safety committee inspections of the mine, and a UMWA-Kentucky Carbon dispute, involving MSHA, dealing with the propriety of hauling supplies on mantrips.

None of the parties to this proceeding has covered itself with glory. MSHA presented no valid reason for its failure to honor a UMWA request for an inspection pursuant to section 103(g) of the Act. Bobby Gooslin presented no valid reason for only giving Kentucky Carbon 3 hours notice of his intent to make a safety run for a complaint not involving imminent or immediate danger. Kentucky Carbon presented no valid reason for its refusal to allow Bobby Gooslin and the safety committee to inspect the mine as requested as its refusal was based solely upon UMWA's failure to give 24-hours notice of the inspection.

The UMWA and Kentucky Carbon were on a collision course. To put it kindly, MSHA was merely negligent. While these events are not directly relevant to the issues at hand, they set the stage for the events of September 30, 1979, which culminated in the work stoppage and the discharge of Bobby Gooslin.

#### B. Weight to be Given Arbitrator's Decision.

As noted in paragraphs 30 and 31 of the Findings of Fact, supra, Bobby Gooslin filed a grievance under the contract and that matter was heard and decided by arbitrator David T. Kennedy. Arbitrator Kennedy ruled against Bobby Gooslin and in favor of Kentucky Carbon. The award, upholding Gooslin's discharge, became final when the Arbitration Review Board denied review. Kentucky Carbon asserts that substantial weight should be given to the arbitrator's decision because it "authoritatively resolve[d] the specific factual issue of the reason for Gooslin's discharge." On the other hand, Bobby Gooslin asserts that no weight should be given to the arbitrator's decision because "the issues are totally inapposite," the evidence was different in this proceeding, and the arbitrator failed to consider Bobby Gooslin's protected activity pursuant to section 105(c) of the Act.

Recently in Secretary of Labor o/b/o David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission considered the weight, if any, to be accorded the findings of arbitrators. The Commission discussed the decision of the Supreme Court in Alexander v. Gardner-Denver Co., 414 U.S. 36 (1974) and held as follows:

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.

Pasula at 2795.

In Pasula, the Commission concluded "that the judge did not err in according little or no weight to the arbitral findings." Ibid.

I conclude that pursuant to the standard announced in Pasula, supra, the findings of the arbitrator are entitled to little or no weight for the following reasons:

1. The arbitrator never considered Bobby Gooslin's statutory rights and protected activity pursuant to section 105(c) of the Act.
2. The evidence before me in this proceeding is substantially different from the evidence presented at the arbitration proceeding in the following particulars: (a) the arbitrator was unaware of Gooslin's efforts to obtain an MSHA inspection of the mine at the same time he arrived to conduct the UMWA safety run. This evidence undermines the arbitrator's adverse finding concerning Gooslin's reasons for going to the mine. If Gooslin had been successful in obtaining the MSHA inspection, there would have been no challenge to the 24-hours notice policy because Kentucky Carbon would have been obligated to allow MSHA to inspect its mine without any advance notice and the UMWA would have been permitted to designate a representative to accompany the MSHA inspector; (b) the testimony of the miners who decided not to work at the time in question was significantly

different at the instant

hearing than their testimony at the arbitration hearing. The arbitrator found that their testimony, that each of them decided individually and without consultation with others not to work, was incredible. In the instant proceeding, these miners admitted that they discussed Kentucky Carbon's refusal to allow the safety committee inspection, the roof fall which occurred a few hours earlier, and the alleged problems of bad roof and a blocked escapeway. Thereafter, the miners jointly decided not to work; and (c) the arbitrator was unaware of the fact that less than 5 months before this incident, Kentucky Carbon had discharged 13 miners for exercising their individual rights under the contract. This evidence undermines the arbitrator's conclusion that: (1) the testimony of the miners who did not work on the shift in question was incredible; (2) that Bobby Gooslin "was the efficient catalyst of the work stoppage;" and (3) that "the contract gave the (safety) committee full authority to demand that no employee work in that area, as provided in Article III (d)(3)."

Although there are other differences in the records of the arbitration proceeding and the instant matter, suffice it to say that based upon the test adopted by the Commission in Pasula, I conclude that the findings of the arbitrator are entitled to little or no weight in the instant case.

#### C. Applicable Case Law and Definition of the Issue

In Pasula, the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. The Commission held as follows:

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 against 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.



Pasula at 2799-2800.

MSHA and Gooslin assert that Gooslin was discharged by Kentucky Carbon in violation of section 105(c) of the Act due to the protected activities in connection with a safety complaint. Kentucky Carbon asserts that Gooslin was discharged solely for unprotected activity in instigating an unauthorized work stoppage and, hence, there is no violation of section 105(c) of the Act.

In a nutshell, Kentucky Carbon contends that Gooslin instigated the unauthorized work stoppage by his presence at the mine and his actions and words at that time. While there has been much discussion, some of which was initiated by me, concerning the question of whether the instigation of an unauthorized work stoppage can ever be protected activity pursuant to section 105(c) of the Act, I conclude that there is no reason to reach that issue in this proceeding. Similarly, I agree with Kentucky Carbon's contention that "the issue whether Gooslin actually did instigate the strike (although relevant in the Wage Agreement arbitration to the question whether Gooslin was fired for good cause) is not relevant under section 105(c) which focuses simply upon Kentucky Carbon's motivation for the discharge." Posthearing Brief of Kentucky Carbon at 20. Kentucky Carbon's conclusion that Gooslin was discharged for instigating an unauthorized work stoppage must be analyzed by examining the specific, relevant activities of Bobby Gooslin on the night of September 30, 1979. Thereafter, a determination must be made whether such activity constitutes protected or unprotected activity under section 105(c) of the Act.

D. Did Bobby Gooslin Engage in Protected Activity?

Bobby Gooslin contends that he engaged in protected activities pursuant to section 105(c) of the Act on September 30, 1979, when he called Superintendent William Meade and notified him that he intended to make a safety inspection of the mine prior to the commencement of the midnight shift and, also, when he went to the mine after 11 p.m. for the purposes of conducting the safety inspection. Section 105(c)(1) of the Act sets forth certain types of protected activity including, inter alia, filing or making

a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner, representative of miners ... on behalf of himself or others of any statutory right afforded by this Act.

At all relevant time herein, Bobby Gooslin was acting in the dual capacities of a miner and a representative of miners. Neither the Act nor its legislative history specifies the manner in which complaints to the operator are to be made.

The first issue here is whether Gooslin's call to Superintendent Meade falls within the scope of protected activity. Gooslin's call to Meade notified him of the intent to make a safety run or inspection. Gooslin also notified Meade

that he would be accompanied by the UMWA District Safety Inspector.  
Kentucky Carbon emphasizes that at no time did Bobby Gooslin ever

~658

specify the nature of his complaint. While this is true, at no time did any of Kentucky Carbon's management personnel ever ask Gooslin about the nature of his complaint. I conclude that Gooslin's call to Superintendent Meade notified him of the UMWA's intent to conduct a safety run or inspection and that such call amounts to "a complaint notifying the operator ... of an alleged danger or safety or health violation." Hence, under section 105(c) of the Act, I conclude that Gooslin engaged in protected activity in connection with his telephone call to Superintendent Meade.

The next issue is whether Gooslin's presence at the mine on the night in question is also protected activity. Gooslin asserts that as a representative of miners (safety committeeman) he had the "right to enter the property to investigate the conditions complained of." Brief of UMWA at 18-19. Kentucky Carbon does not challenge Gooslin's right to be present on the mine property and concedes that "neither Hager nor Meade gave instructions that Gooslin be prohibited from entering the mine site ...." Reply Brief of Kentucky Carbon at 7. I find that Superintendent Meade's instruction to Gooslin not to come to the mine that night is irrelevant in determining the scope of protected activity. A mine operator cannot narrow the scope of section 105(c) of the Act by instructing the miner or representative of miners not to come to the mine. Gooslin arrived at the mine prior to the midnight shift to make a complaint to Kentucky Carbon about an alleged danger or safety violation. Kentucky Carbon does not contend that it was unaware of the fact that Gooslin's presence at the mine was related to his claim concerning a safety problem. Rather, Kentucky Carbon contends that the purported safety problem dealt with hauling supplies on mantrips, a complaint already resolved against the UMWA by MSHA, and that any such safety problem was merely a pretext on the part of the UMWA to challenge Kentucky Carbon's 24-hours notice policy. As to the first contention, it makes no difference, under section 105(c), whether Gooslin was concerned about the issue of hauling supplies on mantrips or bad roof conditions. Both areas are the subject of MSHA safety regulations and a complaint concerning either one is a protected activity under section 105(c) of the Act. Kentucky Carbon's contention that this purported safety committee inspection was merely a pretext to challenge its 24-hours notice policy is rejected. The preponderance of the evidence - in particular the concurrent request to MSHA for an inspection pursuant to section 103(g) of the Act - establishes that Gooslin was making a bona fide safety complaint.

In this case it is unnecessary to determine whether Gooslin had the right to investigate the conditions underlying the safety complaint. I find that the language of section 105(c) authorized Gooslin to complain to Kentucky Carbon about any alleged danger or safety violation. To that end, Gooslin was authorized to go to the mine site. Thus, I find that his presence at the mine site on the night of September 30, 1979, also constituted protected activity pursuant to section 105(c) of the Act.

E. Was Gooslin's Discharge Motivated in Any Part by the Protected Activity?

In order to determine which evidence is relevant to this issue, it is appropriate to begin with the reasons given by Kentucky Carbon for Gooslin's

~659

discharge. James R. Reynolds, Manager, Personnel Services, for Carbon Fuel Co., Kentucky Carbon's parent company, testified that he made the decision to discharge Gooslin. Mr. Reynolds testified on direct examination as follows:

Q. As a result of Mr. Fletcher's report what did you do?

A. On the basis of the facts as they were presented to me, there was no question in my mind that Mr. Gooslin was the sole, the sole reason - his presence on the hill was the sole reason for the illegal work stoppage occurring.

Q. As a result of Mr. Fletcher's report what action was then taken?

A. I instructed Mr. Fletcher to prepare a suspension with intent to discharge slip ....

(R. 333).

On cross-examination Mr. Reynolds testified as follows:

Q. In your conclusion Mr. Gooslin's presence on the hill was the sole reason for the work stoppage?

A. That's right.

Q. In other words, there's no particular action that you are relying on by Mr. Gooslin to support your determination that he instigated a work stoppage?

A. No, I'm relying on the complete set of circumstances. That if we had a mine ready to go go work with no labor dispute or unrest Mr. Gooslin's appearance on the hill and whatever his actions and words were at that time resulted in the "wildcat" strike following Mr. Goosin off the hill.

Q. In other words, the mere fact that Mr. Gooslin appeared on the hill would have been sufficient?

A. I believe Mr. Gooslin's presence on the hill was the catalyst for the work stoppage, yes, without question.

(R. 360-361).

Kentucky Carbon's superintendent, William Meade, participated in the discussions which led to Gooslin's suspension and discharge. Although he stated that he did not make the decision to discharge Gooslin, he signed the initial suspension of Gooslin on October 1, 1979. Superintendent Meade testified on cross-examination as follows:

~660

Q. Mr. Meade, isn't the sole reason that Mr. Gooslin was terminated by Kentucky Carbon was because he came out to Calloway number 1 on the night of September 29, 1979 in an attempt to make a safety inspection?

A. That and I think his presence on the hill did instigate the unauthorized work stoppage.

(R. 526).

The above testimony by Kentucky Carbon management personnel establishes clearly that Kentucky Carbon believed that Gooslin's presence at the mine on the night in question caused the work stoppage and, thus, motivated Kentucky Carbon to discharge him.

Hence, it is clear that Kentucky Carbon's determination - that Gooslin instigated the unauthorized work stoppage - is based, at least in part, upon the fact of Gooslin's presence at the mine on the night in question. Since I conclude that Gooslin's presence at the mine on the night in question was protected activity pursuant to section 105(c) of the Act, it follows that Gooslin has established that his discharge, for instigating an unauthorized work stoppage, was motivated at least in part by his protected activity. Therefore, pursuant to the test set forth in Pasula, supra, I conclude that Gooslin has established a prima facie case of a violation of section 105(c)(1) of the Act.

F. Was Gooslin's Discharge Also Motivated By His Unprotected Activities?

James R. Reynolds, who made the decision to discharge Bobby Gooslin, stated that, in addition to Gooslin's presence at the mine on the night in question, he also based his decision on Gooslin's "actions and words at that time." (R. 361). Kentucky Carbon refers to only one statement made by Gooslin that night. After being informed by Shift Foreman James Christian that he would not be allowed to make a safety inspection of the mine, Gooslin said, "I'm going to show these damned Hagers that they don't run this place." (R. 415, 588). Although Gooslin denies making this statement, I find that the preponderance of the credible evidence establishes that he made the statement. Clearly, this statement does not amount to any form of protected activity and must be classified as unprotected activity.

Kentucky Carbon is unable to identify any specific actions of Gooslin, apart from the above statement, on the night in question. It refers, however, to "Gooslin's defiant, confrontation-oriented mood ...." Posthearing Brief of Kentucky Carbon at 21. Such an allegation is insufficient to establish any basis for discharge independent of the spoken words. Kentucky Carbon then asserts that "the circumstantial evidence in this case demonstrates that Gooslin instigated the wildcat strike." Posthearing Brief of Kentucky Carbon

~661

at 22. In support of this contention, Kentucky Carbon relies upon the arbitrator's findings. While the arbitrator seemed to infer that Gooslin somehow signaled the commencement of the work stoppage with a "wink and nod," the evidence before me does not support such an inference. It is just as plausible that the work stoppage occurred in the manner described by the miners who refused to work on the night in question. They testified that after Kentucky Carbon refused to allow the safety inspection, they met and discussed this fact, the roof fall earlier that night, complaints concerning bad roof generally, and a blocked escapeway. Thereupon, they jointly decided not to work. I conclude that the evidence of record fails to establish that Gooslin committed any act, apart from his spoken words as reviewed supra, which constitute unprotected activity motivating his discharge. In light of the hostile and accrimonious relations between the UMWA and Kentucky Carbon at this time, I conclude that Gooslin's spoken words as unprotected activity, also motivated Kentucky Carbon's decision to discharge him.

G. Would Kentucky Carbon Have Discharged Gooslin For the Unprotected Activity Alone?

The dispute here is analogous to the dispute in Pasula, where the Commission found "that the miner's refusal to work was protected under the 1977 Mine Act." Pasula at 2793. The Commission went on to state, "we will assume that Pasula was fired also in part for engaging in the presumably unprotected activity of ... 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." Id. at 2796. The Commission concluded that

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." Indeed, part of the misconduct that Consol claims would have caused Pasula to be fired in any event ... is conduct that we have concluded is protected by the 1977 Mine Act - Pasula's refusal to work." Id. at 2801.

In the instant case, I conclude that Gooslin's presence at the mine on the night in question was protected under section 105(c) of the Act. I also conclude that Gooslin was fired because of his protected activity and, in part, for his unprotected activity in stating that "I'm going to show these damned Hagers that they don't run this place." Kentucky Carbon contends that Gooslin was discharged for instigating an unauthorized work stoppage. However, the previously quoted testimony of James R. Reynolds and Superintendent Meade clearly establishes that Kentucky Carbon concluded that the unauthorized work stoppage was instigated by Gooslin's presence at the mine which was protected activity under section 105(c)(1) of the Act. Kentucky Carbon has failed to establish that Gooslin would have been discharged for his unprotected activity alone. Kentucky Carbon has failed to meet its burden of persuasion on this



affirmative defense. Bobby Gooslin has sustained his complaint of discharge in violation of section 105(c) of the Act.

H. Award to Complainant.

Section 105(c)(2) of the Act provides in pertinent part as follows:

The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

Accordingly, based upon my conclusion that Bobby Gooslin was discharged in violation of section 105(c) of the Act, Kentucky Carbon is ordered to rehire and reinstate him to his former position with full seniority rights. It should be noted that Kentucky Carbon was previously ordered to reinstate him on January 22, 1980. While the complaint herein requested an award of back pay and other monetary employment benefits, no evidence was presented on this matter and, hence, I find that Bobby Gooslin has abandoned this claim.

Pursuant to the legislative history of the Act, Kentucky Carbon also shall expunge all references to Gooslin's discharge from his employment records, post a copy of this decision and order on all bulletin boards at the mine for a consecutive period of 60 days, and shall cease and desist from discriminating against or interfering with Bobby Gooslin because of activities protected under section 105(c) of the Act.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant Bobby Gooslin and Kentucky Carbon were subject to the provisions of the Act.

2. This administrative law judge has jurisdiction over the parties and subject matter of this proceeding.

3. Where MSHA initiates an action on behalf of a miner or representative of a miners pursuant to section 105(c)(2) of the Act, MSHA may not withdraw from such action because of a "conflict of interest" with the miner or representative of miners.

4. Where, in an action initiated by MSHA on behalf of a miner or representative of miners pursuant to section 105(c)(2) of the Act, MSHA fails to present any evidence at hearing but the miner or representative of miners stands ready to present evidence, the action will not be dismissed for want of prosecution.

5. On September 30, 1979, Complainant Bobby Gooslin engaged in the following activities which are protected under section 105(c) of the Act:

~663

(a) Telephone call to Superintendent William Meade notifying him that Gooslin, in his capacity as UMWA safety committeeman, intended to make a safety committee inspection of the mine at midnight; and

b) Gooslin's presence at the mine for the purpose of making a safety committee inspection.

6. Complainant Bobby Gooslin has established that he was discharged by Kentucky Carbon on October 8, 1979, because of his protected activities, supra, and he would not have been discharged but for such protected activity.

7. On September 30, 1979, Complainant Bobby Gooslin engaged in the following activity which does not constitute protected activity under section 105(c) of the Act: After being refused the right to enter and inspect the mine by Shift Foreman James Christian, Gooslin said, "I'm going to show these damned Hagers that they don't run this place."

8. Kentucky Carbon has established that its determination to discharge Complainant Bobby Gooslin was also motivated by Complainant's unprotected activity as set forth in the preceding conclusion of law, but has failed to establish any other unprotected activity of Complainant Bobby Gooslin which motivated its determination to discharge him.

9. Kentucky Carbon has failed to establish that it would have taken adverse action against Complainant Bobby Gooslin for the unprotected activity alone.

10. Complainant Bobby Gooslin was discharged by Kentucky Carbon in violation of section 105(c) of the Act.

11. Complainant Bobby Gooslin shall be rehired and reinstated to his former position at Kentucky Carbon with full seniority rights.

12. Complainant Bobby Gooslin has failed to establish any claim for back pay, interest, or other monetary employment benefits.

13. Complainant Bobby Gooslin has established his claims requiring that this incident be expunged from his employment records, requiring a copy of this decision and order be posted on Kentucky Carbon's bulletin boards at the mine, and entitling him to an order that Kentucky Carbon cease and desist from discriminating against or interfering with him because of activities protected under section 105(c) of the Act.

14. MSHA failed to follow the procedure concerning proposed assessment of a civil penalty as set forth in Commission Rule of Procedure 25, 29 C.F.R. 2700.25 and, therefore, the proposed assessment of a civil penalty is severed from this proceeding and remanded to MSHA for further proceedings.

ORDER

WHEREFORE, IT IS ORDERED that Kentucky Carbon's motion to dismiss for want of prosecution is DENIED.

IT IS FURTHER ORDERED that Complainant's complaint of discharge is SUSTAINED and Complainant shall be rehired and reinstated to his prior position at Kentucky Carbon with full seniority rights.

IT IS FURTHER ORDERED that Kentucky Carbon shall:

1. Expunge all references to Complainant's discharge from his employment records;

2. Post a copy of this decision and order on all bulletin boards at the mine where notices to miners are normally placed and shall keep it posted there, unobstructed, for a consecutive period of 60 days;

3. Cease and desist from discriminating against or interfering with Complainant because of activities protected under section 105(c) of the Act.

IT IS FURTHER ORDERED that the proposal for assessment of a civil penalty is SEVERED from this proceeding and REMANDED to MSHA for further administrative proceedings.

James A. Laurenson Judge