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(UMWA9800) v. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA,  
LOCAL UNION 9800,  
COMPLAINANT

Complaint of Discharge,  
Discrimination, or Interference

v.

Docket No. KENT 80-216-D

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

Peabody Coal, Riverview Mine

OR

THOMAS DUPREE,

RESPONDENTS

DECISION

Appearances: J. Davitt McAteer, Esq., Center for Law and Social Policy,  
Washington, D.C., for Complainant Local Union No. 9800  
Thomas P. Piliero, Esq., Office of the Solicitor, U.S.  
Department of Labor, Arlington, Virginia, for Respondent  
Secretary of Labor;  
Stuart A. Kirsch, Esq., American Federation of Government  
Employees, Washington, D.C., for Respondent Thomas Dupree.

Before: Chief Administrative Law Judge James A. Broderick

STATEMENT OF THE CASE

The complaint filed in this case alleges that the Mine Safety and Health Administration (MSHA) or Thomas Dupree violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c), by threatening a lawsuit against Local Union 9800, United Mine Workers of America, in retaliation for the local notifying MSHA of alleged irregularities in inspections at Peabody Coal Company's Riverview Mine. Respondent MSHA filed a motion to dismiss and a motion for summary decision on the ground that it is not a person subject to section 105 of the Act. These contentions were rejected by an order denying the motions issued on September 25, 1980. 2 FMSHRC 2680.

Pursuant to notice, a hearing was held on January 13 and 14, 1981, in Evansville, Indiana.

Members of Local Union 9800 who testified for Complainant were Houston Elmore, George Christian, Richard Embry, Charles Wilkins, Richard Maddox, Neil Butterworth, and Randall Duncan. James Rowe and Thomas Gaston, officials of District 23, United Mine Workers of America, also testified for Complainant. Complainant called three additional witnesses who are officials in MSHA's District 10 Office, Charles Dukes, William Craft, and Bobby Hill. Thomas Dupree, an MSHA inspector and president of Local Union 3340 of the American Federation of Government Employees (AFGE), testified on his own behalf. Respondent MSHA called no witnesses.

The parties have filed briefs on the issues presented and, having considered them and the record as a whole, I make the following decision.

#### FINDINGS OF FACT

1. During the period in question, many Local Union 9800 members were employed at Peabody Coal Company's Riverview Mine in Western Kentucky.

2. In August of 1979, officials of Local Union 9800 discovered that there may have been irregularities in certain inspections at the Riverview Mine conducted in late July of 1979 by MSHA inspectors. They concluded that records indicating that coal-dust samples and environmental noise samples had been taken were falsified and those samples had not, in fact, been taken.

3. The president and other officials and members of Local Union 9800 discussed their allegations with officials of MSHA's District 10 Office. They were assured by those officials that the matter would be investigated and they would be advised of any disciplinary action taken as a result.

4. By early December, 1979, members of Local Union 9800 decided that the matter was not being handled to their satisfaction. Houston Elmore, president of the local, then wrote a letter, dated December 2, 1979, to Joseph Cook, MSHA's Administrator for Coal Mine Safety and Health. The letter expressed the local's concern over the thoroughness of the investigation and went on to state: "We now have reason to believe that the practice of falsifying federal records and reports may be a widespread practice in MSHA District #10 and accepted as a normal way of doing business." (Complainant's Exh. No. 1). The letter was not mailed until early or mid-January 1980.

5. Employees of MSHA District 10, including its inspectors, are represented by AFGE Local Union 3340, whose president is Thomas Dupree. A copy of Elmore's letter became available to personnel in District 10 and was widely discussed by the inspectors. Dupree informed the inspectors that he intended to call the United Mine Workers' District 23 Office to see if district officials supported the above-quoted statement by Elmore.

6. On January 31, 1980, Dupree called Thomas Gaston, president of United Mine Workers of America District 23 from the MSHA District 10 Office in Madisonville, Kentucky. Dupree identified himself as a District 10 MSHA inspector and as a representative of an employees' union at District 10. He

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told Gaston that he thought the above-quoted statement might be defamatory and intended to ask legal counsel whether, based on it, Elmore could be sued for libel. Gaston informed Dupree that he generally supported the sentiments expressed in the letter although he might not have phrased his criticism quite the same way. He stated that he did not think the letter was libelous.

7. After the call, Dupree sent Elmore's letter to his superiors in the AFGE with a note describing his constituency's distress over the quoted passage. No further action was taken by the AFGE, Dupree, or MSHA with respect to a lawsuit against Elmore or Local Union 9800, although Joseph Cook did respond to Elmore's letter.

#### ISSUES (FN.1)

1. Did the letter from Elmore to Cook dated December 2, 1979, constitute activity protected under section 105(c) of the Act?

2. Were Dupree's statements to Gaston during their phone conversation of January 31, 1980, imputable to MSHA?

3. Were Dupree's statements to Gaston during the same phone conversation unlawful under section 105(c) of the Act?

#### STATUTORY PROVISION

Section 105(c)(1) of the Act provides as follows:

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 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.

#### DISCUSSION WITH ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### A. The Letter from Elmore to Cook, December 2, 1979

Respondent Dupree argues that the letter from Elmore to Cook was not protected activity under the Act. Both Respondents argue that the letter written, signed, and mailed by Houston Elmore, president of Local Union 9800, was not the act of the local.

The Act gives unique responsibilities to miners and their representatives in carrying out its provisions. Miner-representatives have the right to accompany MSHA inspectors "for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." Miners or their representatives have the right to an immediate inspection if they notify the Secretary of an alleged health or safety violation or an imminent danger. They may be entitled to an informal review by the Secretary for any refusal to issue a citation with respect to any such alleged violation or danger. I have found in this case that the alleged irregularities in the MSHA inspection records were discovered by officials of Local Union 9800. I have found that the president of the local and other officials discussed the irregularities with MSHA officials. Clearly, these were activities related to safety in the mine and therefore were protected under the Act.

The letter in question was written because the local felt that MSHA was not properly handling the case. There is no evidence and no suggestion except in the arguments of counsel that Elmore wrote the letter because of a matter personal to himself. It grew out of the union concern over safety in the mine. Whether it was formally authorized by a membership meeting is irrelevant. Elmore was the local president and is presumed to be authorized to speak for the union in matters of union concern. I conclude that the letter was the act of Complainant and that it was activity protected under the Act.

##### B. MSHA's Liability for Dupree's Conduct

Based upon the testimony of Dupree and Gaston, the parties to the conversation, Dupree did not state that he was speaking for MSHA. There is no evidence that he was authorized, expressly or impliedly, to respond to the letter on behalf of MSHA. The fact that he was an MSHA inspector and used MSHA facilities hardly creates apparent authority, but even if it did, it was

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expressly negated when he identified himself as "a representative of some union that represented [MSHA inspectors]" (Tr. 398, 424). It is not clear, furthermore, whether the doctrine of respondeat superior can be applied in a case such as this. See *Monell v. Department of Social Services*, 436 U.S. 658, 692-694 (1978). But even if the doctrine applied, Dupree's conduct involved herein cannot be attributed to MSHA. I find that Respondent MSHA cannot be held liable as a principal for the statements of Dupree in the telephone conversation in question.

C. Did Dupree's Remarks Constitute A Violation of Section 105(c)?

My finding as to the content of the telephone call is contained in Finding of Fact No. 6. I reject Complainant's contention that Dupree threatened Elmore or Local Union 9800. In deciding whether Dupree's statements violated section 105(c), the focus must be on the reaction of the ordinary listener in Gaston's circumstances. The way other United Mine Workers of America members understood the conversation as reported to them, is largely irrelevant. That they may have believed MSHA threatened to sue Local Union 9800 in retaliation for complaining about inspection irregularities is unimportant if no such threat was made.

Thomas Gaston was and remains the president of United Mine Workers of America District 23. He supervises the union's affairs in Western Kentucky and is familiar with legal matters, having helped to negotiate and administer collective bargaining agreements and having participated in litigation in which the union was involved.

According to Gaston, Dupree called him to see if District 23 supported the statements in Elmore's letter of December 2, 1979. Dupree supposedly stated further that he felt the letter was libelous and that he had talked to an attorney who agreed. In view of the short period of time which had elapsed since Dupree received Elmore's letter and in view of Dupree's subsequent action, I find that Dupree actually stated that he intended to consult an attorney on the matter. I find that Dupree did not threaten a lawsuit in so many words. The purpose of the phone call was to see if Elmore's letter was supported by District 23. This was the understanding of both Dupree and Gaston. I cannot conclude that the statements of Dupree constituted interference "with the exercise of the statutory rights of any miner, representative of miners \* \* \*." Dupree was acting in good faith and was motivated by a concern for the members of his union.

Grave questions involving the first amendment protection of the right of free speech would be presented if I concluded that the Mine Safety Act authorized the Commission to punish (Complainant seeks disciplinary action against Dupree) speech of the kind shown in this record. "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1975). The communication involved here was not physically or

economically coercive, nor did it threaten such coercion.  
Therefore, it is "communication" and not "action" and is



entitled to rigorous first amendment protection. See EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 423-425 (1970). See also TRIBE, AMERICAN CONSTITUTIONAL LAW (1978), 582:

[G]overnment regulation \* \* \* aimed at the [communication] \* \* \* is unconstitutional unless government shows that the message being suppressed poses a "clear and present danger" constitutes defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny.

To construe the Mine Safety Act in such a way that it would direct punishing the speech found herein to have taken place, even if possible under norms of statutory construction, would bring it in conflict with a most basic constitutional right. I cannot so construe it.

ORDER

Based upon the above findings of fact and conclusions of law, I find that Respondents did not violate section 105(c) of the Act as charged in the complaint, and the case is DISMISSED.

James A. Broderick  
Chief Administrative Law Judge

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~FOOTNOTES\_ONE

1 The complaint does not charge that the alleged falsification of records and MSHA's response thereto are unlawful, and I do not consider this an issue in this case. MSHA and Dupree both assert that Local Union 9800 did not formally authorize or initiate these proceedings. I know of no rule of law requiring such formal authorization. Officers and members of the local participated in the case. Counsel has appeared for the local, and there is a strong presumption that he is authorized to do so. Bethlehem Steel Corporation v. Deever, 389 F.2d 44 (1968).