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

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATIVE (MSHA) ON BEHALF OF MICHAEL J. DUNMIRE, AND JAMES R. ESTLE, COMPLAINANTS v.	APPLICATION FOR REVIEW OF DISCRIMINATION DOCKET NO. WEST 80-313-D Docket No. WEST 80-367-D (Consolidated) MINE: Rienau No. 2

NORTHERN COAL COMPANY,
RESPONDENT

DECISION

APPEARANCES:
Frederick W. Moncrief Esq. Office of the Solicitor,
United States Department of Labor,
Arlington, Virginia, For the Complainants

Charles W. Newcom Esq.
Sherman and Howard
Denver, Colorado, For the Respondent

Before: Judge John J. Morris

STATEMENT OF THE CASE

The Secretary of Labor of the United States, the individual charged with the statutory duty of enforcing the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), brings this action on behalf of complainants Michael J. Dunmire and James R. Estle. Complainants allege they were illegally discharged from their employment by Northern Coal Company (Northern) in violation of 105(c)(1) of the Act.

The statutory provision allegedly violated provides as follows:

> 105(c)(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.

After notice to the parties a hearing on the merits was held in Littleton, Colorado, on July 24 - 25, 1980. The parties filed extensive post trial briefs.

ISSUES

The issues are whether complainants were discharged as a result of engaging in a protected activity. Further, if the finding is affirmative, what relief, if any, should be granted.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. 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. Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, Pitt 78-458, 2 BNA MSHC 1001.

FINDINGS OF FACT

Portions of the evidence are conflicting. I find the following facts to be credible.

The swing shift working crew at Northern's Rienau Mine consisted of shift foreman Mike Morgan, Michael Dunmire, James Estle, two buggy drivers, and an extra man (Tr. 79, 83). On February 27, the crew worked on slope entry No. 1. Estle operated the continuous miner which mines the coal. Dunmire served as the miner's helper. His duties included setting timbers

and shovelling the ribs (Tr. 120).

Prior to February 27, 1980, Dunmire had complained to Northern supervisors Morgan, Daniels and Pobirk that he didn't want to be under the unsupported top shovelling the coal under the loose ribs while the continuous miner was operating (69-70). In the entire slopes area the top roof was bad and falling out (Tr. 65, 66, 82). Roof falls had occurred two to four times during the shifts while Estle was running the continuous miner (Tr. 66, 67). The entire slopes area had been in this same condition for two to three months (Tr. 134). On February 27, the roof and ribs were "blowing," that is, coal was flying out and the ribs were sloughing. There was "blowing out" behind the continuous miner (Tr. 83-84).

On February 27, the dust generated by the operation of the continuous miner reduced visibility to almost nothing. This condition caused Estle some concern about someone being injured. Estle complained about having to mine under the unsupported roof (Tr. 73). Estle told Morgan they should stop the mining operation, crossbar the roof, and find additional air. No one refused to work during the swing shift on February 27, 1980. (Tr. 83-87).

On February 28, Estle was told that the Mike Morgan crew was being broken up. Estle also learned that the plant superintendent approved the decision because foreman Morgan was spending too much time running the continuous miner. He was also told, as an additional reason for breaking up the crew, that Morgan was not keeping up with his supervisory duties including the roof control and rock dust plan (Tr 219-221, 238, 256).

Immediately before starting the swing shift on February 28, 1980, Estle talked to Rod Shaw, the continuous miner operator, from the previous shift. When asked about the top, Shaw said it was as bad as last night and "blowing out" (FOOTNOTE.1) (Tr. 93-94). Estle walked to the Stamler, where it was the custom to discuss mining conditions, and advised the crew the top was bad (Tr. 95).

Dunmire then said he'd run the tailpiece or the Stamler during the shift. Morgan, the foreman, stated that since he lacked experienced men Dunmire would have to serve as a miner's helper. Morgan also replied that if he (Dunmire) didn't want to do it he knew what he could do. At this juncture Estle interjected the remark that Dunmire could "get his bucket and go home" (Tr. 96, 141, 142). Estle's statement, given by him in a joking manner, was immediately ratified by Morgan. Dunmire left. Estle told the crew they should all go out with Dunmire. At this point foreman Morgan credits himself or crew member Petree as stating to Estle that if he went out, "you'll be cutting your own throat." No one left (Tr. 97, 261).

Estle waited a minute or so and then told Morgan that he was sick and that he was leaving. Estle did not raise any safety issues with Morgan before leaving the worksite. Morgan knew Estle had a back problem (Tr. 98, 107, 123, 124, 139). Estle repeated his explanation about being sick to plant superintendent Pobirk before he left the mine (Tr. 102). Estle stated he would have gone home "regardless" since he didn't feel good (Tr. 99). That afternoon Estle drove to Rifle, Colorado and he sought medical attention the following day (Tr. 99, 106).

After the incident at the Stamler, Dunmire and Estle were told by Northern supervisor Pobirk that since they had walked off the job they had quit (Tr. 164, 228). Dunmire argued with Pobirk. He told him he wanted to work but he didn't think the top was safe. Dunmire said he wanted the miner shut down while he set the timbers, established ventilation, and shovelled the ribs. Pobirk told Dunmire that he was terminated (Tr. 164-165).

Estle contended he did not quit, but left for medical reasons. According to him, a worker was permitted to go home if he was sick (Tr. 137). When Estle attempted to present his medical excuse to mine management they told him that they considered him to have quit (Tr. 103).

Estle returned to the Northern mine about three weeks later. Estle told Northern personnel that he would drop his discrimination charge if he was rehired with back pay and a lost week of vacation (Tr. 104). He was told he could not be rehired because then if anyone else wanted to walk out they could do it and get away with it (Tr. 104).

There is a wealth of evidence dealing with the operation of the continuous miner, with the crew's production of coal (generally excellent), with safety complaints involving electrical equipment, and with the mining process itself. Such evidence is not generally dispositive of the issues presented by the parties.

CONTENTIONS REGARDING MICHAEL J. DUNMIRE

Northern initially asserts that Dunmire quit or that Northern could take his action as a quit. I disagree. The credible evidence establishes that Dunmire refused to work as a miner's helper under a bad roof. He was forthwith discharged. Morgan does not dispute complainant's version of the facts at the Stamler. Immediately after the Stamler incident Pobirk told Dunmire that he considered him to have quit because he walked off the job. Dunmire argued with him and told him that he still wanted to work but didn't think the top was safe. He also wanted the miner shut down while he set the timbers, established ventilation, and shovelled the ribs. Pobirk then said Dunmire was terminated (Tr. 164-165).

Northern's further arguments focus on the alleged failure of Dunmire and Estle to articulate that an unsafe work condition

existed; further, that Dunmire and Estle failed to examine the work area; finally, that the work area was not, in fact, unsafe.

I find from the uncontroverted facts that Dunmire had previously complained to company supervisors Morgan, Daniels, and Pobirk that he did not want to shovel coal under the unsupported roof while the continuous miner was operating (Tr. 69-70). No such complaints were made by Dunmire on February 28 to Morgan. However, one must consider these prior complaints as evidence that Morgan and Pobrick knew Dunmire was concerned about the unsafe condition of the roof. The montage upon which is based the finding that Dunmire exhibited to Morgan that he was leaving for safety reasons and was consequently fired is: the crew is together at the Stamler; Estle advises them of the bad top; Dunmire at this juncture refuses to work as a miner's helper; he is forthwith terminated by the crew foreman, Morgan, and the termination is confirmed by the mine superintendent Pobirk.

Northern correctly states the law that before a miner can trigger the discrimination provisions of the Act there must be some claim that the conditions the employee is working in, or about to work in, are unsafe. Taylor Adkins et al v. Deskins Branch Coal Company, PIKE 76-66, 2 BNA MSHC 1023, I agree with Northern that Dunmire himself on February 28 made no safety related complaints to Morgan (Tr. 176). However, it is apparent from the above stated circumstances that Morgan, the foreman, knew Dunmire's refusal to work was based on what he considered to be the unsafe roof Cf Mine Workers Local 1110 v. Consolidation Coal Company, MORG 76 X 138 IBMA No. 77-43, 2 BNA MSHC 1022. Additionally, Dunmire expressed his concern about the unsafe roof conditions to Pobirk in his office after the incident at the Stamler. Pobirk responded by saying Dunmire was terminated (Tr. 164, 165, 281, 282).

In support of its view, Northern relies on Secretary of Labor and Charles W. Miller v. Old Ben Coal Company, Docket No. LAKE 79-282-D, 1 BNA MSHC 2333 Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir., 1974), and Secretary of Labor ex rel. Billy Gene Kilgore v. Pilot Coal Company, VA 79-144-D, 1 BNA MSHC 2363.

The above cases do not support Northern's arguments. In Charles W. Miller the dialogues between the miner and management were, at best, mere disagreements. As such they could not form the basis for a discrimination charge. In Phillips the miner did in fact complain to the foreman and the mine safety committee. Billy Gene Kilgore did not involve a safety hazard. The miner's refusal to drive the hauler truck was based on his fear of injury due to his lack of experience. No protected activity existed. In none of the cited cases is there a factual situation compatible with the facts here. It is apparent from the circumstances here that Dunmire refused to work under the unsupported roof and for this refusal he was discharged.

Northern further directs its argument to the failure of Dunmire and Estle to examine the area alleged to be unsafe. At the outset I agree with Northern that neither Dunmire nor Estle entered the mine immediately prior to starting the swing shift on February 28, 1980.

It is not necessary to make such an examination. The evidence is persuasive that Dunmire refused to work as a miner's helper because he thought the roof condition was unsafe. Dunmire's belief that the roof was unsafe is based on the following events: On February 27 the miners were in the no. 1 entry in the slopes. In the entire slopes area the top roof was bad and falling out (Tr. 65, 82, 66). Roof falls occurred two to four times during the prior swing shifts while Estle was running the continuous miner (Tr. 67). The roof and ribs were "blowing", that is, coal was flying out and the ribs were sloughing. There was "blowing out" in behind the continuous miner (Tr. 83-84). The entire slopes area had been in the same condition for two to three months (Tr. 134). Immediately before starting the swing shift on February 28 Estle talked to Shaw, the continuous miner operator from the prior shift. Shaw stated to Estle that "the top was bad" (Tr. 95). Estle related this statement to the entire crew including the foreman (Tr. 95). At this point Dunmire refused to work. The credible evidence establishes the bases of a reasonable belief on Dunmire's part that the roof was unsafe.

Northern states that its evidence supports the view that the work area was, in fact, safe. Particularly, Northern relies on its witnesses Daniels, Morgan, and Diaz. I do not find that Northern's evidence supports this proposition.

Daniels described the top as "fair" with the admonition that no coal mine has good top (Tr. 223). Morgan agreed the roof was "flaking" (Tr. 267). As Morgan sees it, the difference between flaking and falling is one of quantity. He describes a piece of coal as flaking if the size is one eighth of an inch up to a foot. A roof fall is four or five feet high and fifteen to twenty feet long. Diaz indicated the roof was flaking but not "too bad". He stated that this was normal for coal top. (Tr. 297). As indicated above, Northern's evidence concerning the condition of the roof does not directly conflict with the complainants' evidence.

Based on the foregoing facts and for the reasons stated, I conclude that Michael J. Dunmire's complaint of discrimination should be affirmed.

JAMES R. ESTLE

The facts concerning Estle have been established by the credible evidence as previously stated.

DISCUSSION

Northern's post trial arguments were directed in tandem at the Dunmire and Estle cases. The issues concerning the failure of the miners to examine the work area and whether the slope area was safe or unsafe have been resolved in the discussion of the Dunmire case. The same rulings are applicable in the Estle case.

Northern's additional arguments are that Estle failed to articulate a safety complaint, that he quit, and that he promoted an unauthorized strike. Additional arguments are directed to credibility issues.

The evidence shows that on February 28, at the Stamler, Estle advised the whole crew, including foreman Morgan, that they were "putting up with the same thing as last night and I talked to Rod and he said the top was bad" (Tr. 95). This constituted the articulation of a safety complaint on behalf of the entire crew. Estle encouraged the crew to walk out in support of Dunmire because he thought Dunmire was being fired for refusing to work in unsafe conditions (Tr. 97, 98). Estle was exercising on behalf of Dunmire and the crew a statutory right to complain about unsafe conditions and the right to refuse to work under such unsafe conditions, Pasula, supra. The Act protects a miner exercising ... "On behalf of himself or others ... any statutory right ..." 30 U.S.C. 815 (c)(1).

Northern's reply brief contends that Estle admitted he did not claim there were unsafe working conditions immediately prior to leaving the mine. (Tr. 107, Line 8-20). The portion of the transcript cited by Northern must be considered in its context; namely, Estle admits he did not state an unsafe condition was his personal reason for leaving. As indicated above he had already complained that the roof was bad. Estle's reason for not raising the safety issue again with Morgan is best expressed by his testimony. (FOOTNOTE.2)

Justification for Estle telling Morgan he was leaving because of his back problem rather than restating the safety complaint is also found in the events that occurred just prior to his leaving. As Dunmire left the section Estle told the rest of the crew "we ought to go with him" (Tr. 261), Morgan (FOOTNOTE.3) then said "well, if you go out, you'll be cutting your throat" (Tr. 261).

Northern contends Estle quit, or it could consider his actions as an intention to quit. I disagree. He was entitled to fall back on a health reason for leaving since a worker could go home if he became sick (Tr. 137). Estle received medical attention the following day (Tr. 99, 106). When he returned to the mine to present his medical excuse he was told by management that they considered him to have quit because he had walked out of the mine. Estle denied he had quit (Tr. 102, 103).

Northern further asserts that if Estle was discharged any such action was justified since the uncontroverted evidence shows Estle promoted an unauthorized strike. In support of its position, Northern cites Secretary of Labor ex rel Alfred A. Santistevan v. C F & I Steel Corporation, WEST 80-85-D, 1 BNA MSHC 2525. Northern's argument lacks merit. The facts must generate the conclusion that Estle was fired because he promoted a strike. The burden of proving such an issue rests with respondent, and there was no evidence to support such a conclusion, cf David Pasula v. Consolidation Coal Company, supra.

Northern argues that complainants' testimony is not credible because they raised the safety issue the second time they saw management and after they had showered. I disagree. When Dunmire left the Stamler, supervisors Pobirk and Daniels were standing nearby on the surface. Dunmire asked each man if they wanted to talk to him. Both replied "No". Dunmire continued on his way, frustrated and mad. He thought it best to take a shower and cool off (Tr. 164). In short, I do not find that Dunmire and Estle made up their stories between the events at the Stamler and the conversations in Pobirk's office.

Northern urges that the evidence of an unsafe roof condition is unreliable. Northern says that roof conditions change rapidly and MSHA would claim foul if a defense were made that roof conditions on day one also existed on day two. A portion of this issue was resolved in the discussion of the reasonable bases for Dunmire's and Estle's belief that the roof was unsafe. In addition to the evidence previously discussed, I find the testimony of witness Gene Moore, a continuous miner operator, to be most persuasive concerning the condition of the mine on February 28th. I have credited Moore's testimony over that of the Northern supervisors because he was operating the continuous miner in the shift immediately preceding Estle's shift, and in the same area Estle was to mine. Moore was, as the expression goes, "in the trenches." His testimony establishes that the crew was finishing the break through in No. 1 entry and starting into No. 2 entry. Rod Shaw operated the continuous miner the first half of the shift. The roof and rib conditions in No. 2 entry were not very good. During the shift the miners lost about three quarters of the roof (Tr. 181-188). When Moore left that day the ribs in No. 2 entry were sloughing and blowing a bit (Tr. 189). Going out at the end of the shift Moore heard Rod Shaw tell Estle that they should watch the top as it was very bad (Tr. 181-190). Contrary to Northern's view and based on the foregoing testimony, I conclude the roof was unsafe on February 28th. Based on the foregoing facts and for the reasons stated I conclude that James R. Estle's complaint of discrimination should be affirmed.

TEMPORARY REINSTATEMENT ORDER
of MICHAEL DUNMIRE

The thrust of Northern's argument is that it was error to deny its request that a full hearing on the merits of the Dunmire case be held at the time of

the hearing on the temporary reinstatement order. The procedural rules (FOOTNOTE.4) of the Commission provide for a hearing on the temporary reinstatement order within five days after the operator requests such a hearing. The purpose of the hearing is to determine whether the Secretary's finding that the miner's complaint of discrimination was not frivolously brought was arbitrarily and capriciously made.

In the present case, Chief Judge James A. Broderick entered a reinstatement order as to Michael J. Dunmire on May 22, 1980. No reinstatement order was applied for on behalf of James Estle. On May 30, 1980, Northern requested a hearing on the order of temporary reinstatement. The parties agreed to have the hearing held on June 6, 1980. The order directed that the hearing be limited in scope by the terms of Commission Rule 44(a). On June 5, 1980, Northern moved for the consolidation of a hearing on the merits with the hearing on the temporary reinstatement order, or in the alternative, for the expedition of the hearing on the merits.

The hearing on the temporary reinstatement order took place as scheduled. At the hearing Northern renewed its motion to consolidate (Tr. 8-9, June 6, 1980).

The undersigned denied Northern's motion for an immediate hearing on the merits on the grounds that the issues had not yet been framed inasmuch as a Complaint had not been filed. The motion for an expedited hearing was granted and the hearing on the merits was set for July 24, 1980.

DISCUSSION

Commission Rule 29 C.F.R. 2700.44(a) defines the scope of the hearing on the temporary reinstatement order. Accordingly, the Commission rule takes precedence over Rule 65(a)(2) of the Federal Rules of Civil Procedure relied on by Northern to support its position that the hearing on the merits should have been consolidated with the hearing on the reinstatement order. Cf. Commission Rule 29 C.F.R. 2700.1.

Northern argues that the temporary reinstatement of a miner without an opportunity for the mine operator to counter the allegation of discrimination violates due process principles. Northern states that it should not be compelled to employ someone who was rightfully discharged. I agree that it is possible that the enforcement of the Act may result in the temporary reinstatement of a miner who at the conclusion of all proceedings under the Act will be found to have been properly terminated. However, Congress believed that the operator was in a better position than the miner to sustain any financial loss caused by the delays necessary for the investigation and adjudication of the complaint. The legislative history is clear on this issue:

> Upon determining that the complaint appears to have merit, the Secretary shall seek an order of the Commission temporarily reinstating the complaining miner pending final outcome of the investigation and complaint. The committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint. U.S. Senate Report, Report No. 95-181, 95th Cong., 1st. Sess. at 36-37 (1977).

It would be incongruous with the intent of Congress to require the Secretary to complete the investigation and prepare for a trial on the merits before applying for the temporary reinstatement of the miner. Accordingly, the scope of the hearing on the application for reinstatement is limited to the issue of whether the Secretary acted arbitrarily and capriciously in finding that the complaint was not frivolously brought. At this hearing, the operator has the opportunity to examine the facts upon which the Secretary's finding was based and the procedures he employed to arrive at his determination. The judge must decide whether the Secretary's determination was based on a consideration of the relevant factors, namely; that the miner allegedly engaged in protected activity and as a consequence thereof was discharged or otherwise discriminated against by the mine operator. The judge must decide whether there has been a clear error of judgment. However, the judge cannot substitute its judgment for that of the Secretary. The judge must also determine if the Secretary followed the necessary procedural requirements. Citizens to Preserve Overton Park v. Volpe 401 U.S. 402 (1971).

Commission Rule 29 C.F.R. 2700.44 complies with Congressional intent and is not violative of due process. This was the ruling in a similar case decided by the district court in Zeigler Coal Co., v. Marshall 502 F. Supp. 1326 (S.D., Ill., 1980). The court there followed the precept that "Congress has broad latitude to readjust the economic burdens of the private sector in futherance of a public purpose. Only if Congress legistates to achieve its purpose in an arbitrary and irrational way is due process violated," citing Nachman Corp. v. Pension Benefit Guarantee Corp., 592 F.2d 947 (7th Cir. 1979), citing

Usery v. Turner Elkhorn Mining Co., 429 U.S. 1, 15 (1976). In Ziegler the court specifically ruled that the governmental interest in encouraging miners to report unsafe conditions was a legitimate goal and the means chosen to accomplish it were rational.

Southern Ohio Coal Company v. F. Ray Marshall, 464 Fed. Supp. 450 S.D. Ohio, 1978, cited by Northern, does not support a different conclusion. In Southern Ohio the mine operator was not afforded any opportunity for a hearing. Under Commission Rule 29 C.F.R. 2700.44(a) an operator may receive a hearing within five days of filing its request. This provision provides due process under the circumstances here where the Congress, under certain conditions authorized "immediate reinstatement of the miner pending a final order on the complaint." 30 U.S.C. 815(c)(2).

Northern, at the hearing on the temporary reinstatement order, did not seek any evidence of the factual bases relied on by the Secretary to apply for the reinstatement of Dunmire. Contrary to the statement in Northern's brief, I ruled that such evidence was relevant (Tr. 21-22). Northern has not successfully overcome Commission Rule 29 C.F.R. 2700.44(a). The temporary reinstatement of Dunmire was proper.

REINSTATEMENT

After the hearing the parties agreed that Michael J. Dunmire voluntarily left the employ of Northern Coal Company on August 22, 1980. (Statement filed September 29, 1980). The parties further agreed that if Michael J. Dunmire prevailed in his claim of discriminatory discharge then reinstatement would not be an appropriate remedy.

Inasmuch as James R. Estle's complaint of discrimination is affirmed he should be reinstated.

CIVIL PENALTIES

In each case the Secretary seeks a civil penalty of $8,000 against Northern for the violation of Section 105(c) of the Act. Northern asserts that the proposed penalty is unwarranted. I do not agree with Northern that the Secretary did not present any evidence in support of his proposed penalty. The credible evidence has been reviewed and the complaints of discrimination have been affirmed. The Act provides that any violation of the discrimination section shall "be subject to the provisions of section 108(FOOTNOTE.5) and 110(a)."(FOOTNOTE.6) The statute authorizes the imposition of a penalty in an amount not to exceed $10,000. 30 U.S.C. 820(a). In assessing civil monetary penalties the Commission is to be guided by section 110(i)(FOOTNOTE.7) of the Act. However, in construing a similar statute (FOOTNOTE.8) setting forth factors to be considered in assessing penalties the United States Court of Appeals for the 8th Circuit stated that "[t]he

assessment of penalties is not a finding but an exercise of a discretionary grant or power." Brennan v. OSHRC and Interstate Glass Company 487 F. 2d 438. (8th Cir., 1973).

Considering the pertinent statutes and in view of the facts, I deem a penalty of $3,000.00 to be an appropriate civil penalty in each case.

MONETARY AWARDS

After the conclusion of the hearing and the filing of briefs the undersigned entered an order directing the parties to stipulate to the potential back pay of complainants; in the event the parties could not agree, an evidentiary hearing would have been held. The stipulation was filed, together with supplemental briefs. Several secondary issues were presented in connection with the monetary awards. These are (1) whether complainants are entitled to the inclusion of vacation pay in the back pay award; (2) whether complainants are entitled to reimbursement for their expenses in connection with their attendance at the hearing; and (3) whether Estle's appropriate back pay period is from the day he was discharged to the day he resumed full employment status with another employer on April 14, 1980 or should back pay continue to accrue after April 13, 1980, less any interim earnings.

The initial issue concerns vacation pay. Dunmire and Estle had accrued a right to take one week's vacation. Northern takes the position that the workers have no such entitlement since the amount agreed to for regular earnings, shift differential, and overtime was full pay for each and every day they could have worked during the back pay period. Northern states that its policy regarding vacation pay requires that employees take time off. They cannot elect to receive vacation pay in lieu of such time off.

The thrust of Northern's argument is directed at "double dipping", that is, an employee cannot, at the same time, draw vacation pay and regular pay. Although company policy requires an employee to take time off and prohibits an election to receive vacation pay in lieu of time off, such vacation pay, as a part of the employment contract, accrues and has a monetary value. The award of vacation pay should accordingly be granted as a portion of back pay.

The second issue concerns reimbursement of expenses in connection with attending the hearings. Under Section 105(c)(2), in a discrimination proceeding brought by the Secretary, the Commission may direct "other appropriate relief," including an order incorporating affirmative action to abate and "back pay and interest." A 105(c)(2) case brought by the Secretary does not directly authorize costs and expenses.

On the other hand, in a proceedings brought by a miner on his own behalf under Section 105(c)(3), in addition to back pay and interest, the Commission shall award a sum for "all costs and

expenses." The apparent

conflict, as outlined above, is resolved by a review of the legislative history:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

S.Rep. No. 95-181, 95th Cong. 1st Sess. 37, reprinted in (1977) U.S. Code Cong. & Ad News 3400, 3437.

Application of the statutory standard has resulted in the reimbursement of lost equity in a truck (Secretary on behalf of E. Bruce Noland v. Luck Quarries, Inc., 2 FMSHRC 954), an employment agency fee (Secretary on behalf of William Johnson v. Borden, Inc., SE 80-46- DM April 13, 1981), transcript, court costs, and attorneys fees (Frederick G. Bradley v. Belva Coal Company, supra. Here, the expenses incurred in participation in the hearings are special damages necessarily resulting from complainants' prosecution of their claims. The statute intended these expenses to be borne by the individual whose conduct occasioned them.

Northern also argues that no expenses should be awarded Dunmire for the hearing on the temporary reinstatement order because the Secretary asserted that no testimony could be taken regarding the merits of the case. This point has been thoroughly discussed (supra, pages 8 - 11). In addition, there is no doubt that the presence of Dunmire was necessary in the prosecution of his claim.

The third issue concerns the calculation of Estle's back pay. Estle resumed full employment with another employer on April 14, 1980. The issue is whether the appropriate back pay period should be from February 28, 1980 through April 13, 1980 or should back pay continue to accrue after April 13, 1980 less any interim earnings.

The back pay provisions of 105(c) of the Act are patterned after the provisions of Title VII of the Civil Rights Act. These provisions are modeled after the National Labor Relations Act, 29 U.S.C. 160(c) Cf Albemarle Paper Co. v. Moody 422 U.S. 405 (1975). NLRB precedent indicates that as a general rule back pay is the difference between what the employee would have earned but for the wrongful discharge less his actual interim earnings. OCAW v. NLRB, 547 F. 2d 598 (D.C. Cir., 1976). Basically this would be gross pay less net interim earnings. The employer is also responsible for complying with applicable state and federal

laws on the

withholding of taxes, etc. Cf Social Security Board v. Nieratko, 327 U.S. 358 (1946), Bradley v. Belva Coal Company WEVA 80-708-D. (April 1981).

Based on the case law stated above the back pay should continue to accrue less any interim earnings. OCAW v. NLRB, supra. However, Northern argues that Estle's award of back pay is limited by his pleadings which sought back pay only through the time when he "resumed full employment status with another employer."

According to the stipulation the back pay through his reemployment date on April 13, 1980 is $2,485.78 (plus vacation pay). On the other hand, according to the stipulation, Estle's back pay through March 6, 1981 less interim earnings, would be $5,442.41.

Northern indicates there is no case authority dealing with this issue. Its argument is that under the doctrine of equitable estoppel the Secretary should be precluded from seeking a larger award of back pay because Norther relied on the initial claim in the pleadings during the settlement negotiations. Northern says it would be inappropriate and inequitable to change the rules one year later. Northern also contends the doctrine of mitigation of damages is applicable. In support of its position Northern cites State Farm Mutual Automobile Ins. Co. v. Petsch, 261 F. 2d 331, (10th Cir, 1958); Phelps Dodge v. N.L.R.B., 313 U.S. 177, 61 S. Ct. 845 (1941), and U.S. v. Lee Way Freight, Inc. 625 F. 2d 918, (10 Cir. 1979). I do not find these cases controlling.

Concerning the issue of equitable estoppel, it is well settled that the United States government is not in a position identical to that of a private litigant when it is involved in the enforcement of laws enacted by Congress. U.S. v. Hibi 414 U.S. 5 (1973). State Farm is inapplicable since it was a suit brought by an insured against the insurer. The Supreme Court has held that as a general rule neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest. Hibi citing Utah Power & Light Co. v. U..S. 243 U.S. 389. As explained above, Estle has a statutory right to the accrual of back pay after April 13, 1980 less any interim earnings. The government cannot be estopped from enforcing this right.

Further, the relief awarded in a judgment is not limited to that demanded in the pleadings. Federal Rule of Civil Procedure 54(c).

Northern's additional argument concerns the legal requirement that all persons must mitigate their damages. Northern's argument focuses on the proposition that Estle did not seek temporary reinstatement. Therefore, the argument goes, given the limited request for relief, Estle failed to mitigate his damages in that he chose to retain a lower paying job rather than to seek a return to Northern pending resolution of his complaint.

I disagree. The facts do not support such a "choice" by Estle nor is the Act subject to the construction Northern now urges. Estle returned to Northern and was advised he could not be rehired. He then mitigated his damages by obtaining other employment. The order herein based on the

stipulation, assesses back pay through March 6, 1981. However, back pay will continue to accrue until Estle is reinstated or until he waives such right.

Based on the stipulation and for the foregoing reasons I conclude the following monetary awards should be made:

MICHAEL J. DUNMIRE

Back pay	$6,208.10
Vacation pay	454.00
Expenses in attending hearing:	
June 6, 1980	162.04
July 24-25, 1980	236.58
	$7,060.72

JAMES R. ESTLE

Back pay through March 6, 1981	$5,442.41
Vacation pay	492.00
Hearing expenses	253.78
	$6,188.19

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

Case No. WEST 80-313-D
Michael J. Dunmire

1. Complainant Michael J. Dunmire was unlawfully discriminated against and discharged by respondent for engaging in an activity protected under Section 105(c) of the Act, and said complainant's charge of discrimination is sustained.

2. Respondent is ordered to pay Michael J. Dunmire the sum of $7,060.72 consisting of the following:

Back pay		$6,208.10
Vacation pay		454.00
Incidental expenses for attending hearing:		
	June 6, 1980	162.04
	July 24-25, 1980	236.58
		$7,060.72

Further, respondent is to pay interest on said back pay, including vacation pay, from February 28, 1980 at the rate of 12 1/2% per annum. (FOOTNOTE.9)

3. The employment record of Michael J. Dunmire is to be completely expunged of all comments and references to the circumstances involved in his discharge.

4. A civil penalty in the amount of $3,000.00 is assessed against respondent for violating Section 105(c) of the Act.

Case No. WEST 80-367-D
James R. Estle

1. Complainant James R. Estle was unlawfully discriminated against and discharged by respondent for engaging in an activity protected under Section 105(c) of the Act, and said complainant's charge of discrimination is sustained.

2. Respondent is ordered to reinstate James R. Estle to the position from which he was discharged, at the present rate of pay of said position, and with the same or equivalent duties as assigned prior to his discharge, without the loss of seniority or other benefits.

3. Respondent is ordered to pay James R. Estle the sum of $6,188.19 consisting of the following:

Back pay through March 6, 1981	$5,442.41
Vacation pay	492.00
Hearing expenses	253.78
	6,188.19

Further, respondent is ordered to pay interest on said back pay and vacation pay from February 28, 1980, at the rate of 12 1/2% per annum.

4. The employment record of James R. Estle is to be completely expunged of all comments and references to the circumstances involved in his discharge.

5. A civil penalty in the amount of $3,000.00 is assessed against respondent for violating Section 105(c) of the Act.

John J. Morris
Administrative Law Judge

ÄÄ
~FOOTNOTE_ONE
The testimony of witness Gene Moore corrobrates Shaw's testimony and it appears in the discussion, infra. The writer finds Moore's testimony credible but it is not included at this point because Moore did not advise the Dunmire/Estle crew, of the conditions.

~FOOTNOTE_TWO

Q. If you thought there was something unsafe, why didn't you raise that with Mr. Morgan?

A. I think the main reason is after you argue so long about things like that, you finally just say, "What the hell," you just do the best you can and take as few chances as you can and try to make your pay and get money to live on and I was tired of arguing about it.

~FOOTNOTE_THREE

Morgan attributes the statement to himself and then to Roy Petree. I attribute the statement to Morgan as he initially testified (Tr. 261).

~FOOTNOTE_FOUR

2700.44 Temporary reinstatement proceedings.

(a) Contents of application procedure: hearing. An application for reinstatement shall state the Secretary's finding that the complaint of discrimination, discharge or interference was not frivolously brought and the basis for his finding. The application shall be immediately examined, and, unless it is determined from the face of the application that the Secretary's finding was arbitrarily or capriciously made, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon issuance. If the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the request is filed, hold a hearing to determine whether the Secretary's finding was arbitrarily or capriciously made. The Judge may then dissolve, modify or continue the order.

(b) Dissolution of order. If, following an order of reinstatement, the Secretary determines that the provisions of section 105(c)(1) have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement. If the Secretary fails to file a complaint within 90 days, the Judge may issue an order to show cause why the order of reinstatement should not be dissolved. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act and 2700.40 of these rules.

~FOOTNOTE_FIVE

30 U.S.C. 818

~FOOTNOTE_SIX

30 U.S.C. 820(a)

~FOOTNOTE_SEVEN

30 U.S.C. 110(i)

~FOOTNOTE_EIGHT

30 U.S.C. 666(j) which provides:

(j) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

~FOOTNOTE_NINE

Interest rate used by Internal Revenue Service for underpayments and overpayments of tax, Rev Ruling 79-366. Cf Florida Steel Corporation, 231 N.L.R.B. No. 117, 1977-78, CCH, N.L.R.B. Para 18,484; Bradley v. Belva Coal Company, supra.