

CCASE:  
(UMWA) v. AMERICAN COAL  
DDATE:  
19810602  
TTEXT:

~1428

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

UNITED MINE WORKERS OF AMERICA, ON BEHALF OF: NORMAN BEAVER,	COMPLAINANT	Complaint of Discharge, Discrimination, or Interference
v.		Docket No. LAKE 81-55-D
NORTH AMERICAN COAL CORPORATION,	RESPONDENT	Powhatan No. 1 Mine

DECISION

Appearances: Joyce A. Hanula, Legal Assistant, United Mine Workers of America, Washington, D.C., for the Complainant;  
Todd D. Peterson, Esq., Crowell & Moring, Washington, D.C., for the Respondent.

Before: Judge Cook

I. Procedural Background

On December 3, 1980, the United Mine Workers of America (UMWA) filed a discrimination complaint on behalf of Norman Beaver (Complainant) in the above-captioned proceeding alleging that North American Coal Corporation (Respondent) committed an act of discrimination in violation of section 105(c)(1) (FOOTNOTE.1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act). The complaint was timely

~1429

filed with the Federal Mine Safety and Health Review Commission (Commission) pursuant to section 105(c)(3) (FOOTNOTE.2) of the 1977 Mine Act following a determination by the Department of Labor's Mine Safety and Health Administration (MSHA) that no violation of section 105(c)(1) had occurred. (FOOTNOTE.3) The complaint alleged, inter alia, (1) that the Complainant was the walkaround representative of the miners on June 11, 13, 14, and 15, 1980; (2) that the Complainant, in his capacity as walkaround representative of the miners, accompanied a Federal mine inspector during the course of four regular inspections conducted on June 11, 13, 14, and 15, 1980; (3) that the Respondent failed to comply with the requirements of section 103(f) of the 1977 Mine Act by

~1430

refusing to pay the Complainant for the time spent accompanying the Federal mine inspector during the course of such regular inspections; (4) that such failure to pay the Complainant was an act of discrimination in violation of section 105(c)(1) of the 1977 Mine Act; and (5) that the Complainant suffered damages in the amount of \$306.08, representing 32 hours of lost wages.(FOOTNOTE.4) The prayer for relief requested (1) the issuance of an order requiring the Respondent to pay the Complainant the sum of \$306.08, with interest, and (2) such other relief as the Commission deems appropriate. The Respondent filed an answer on January 5, 1981, alleging, amongst other things, that the complaint fails to state a claim for which relief can be granted.

On January 13, 1981, a notice of hearing was issued scheduling the case for hearing on the merits on March 3, 1981, in Washington, Pennsylvania. On March 2, 1981, an order was issued granting a joint motion for continuance filed by the parties. The continuance was based on the parties' decision to waive an evidentiary hearing and to file stipulations and to submit briefs on the issue of whether an operator is required to pay a walkaround representative who accompanied a Federal mine inspector on regular inspections on days he was not scheduled to work.

The parties filed a joint stipulation of facts on March 4, 1981. Both parties filed briefs on April 10, 1981. The UMWA and the Respondent filed reply briefs on April 24, 1981, and April 27, 1981, respectively.

## II. Issue

The general question presented is whether the complaint states a claim for which relief can be granted. The specific question presented is whether a mine operator is required to pay an employee who is a walkaround representative of the miners for the time spent accompanying a Federal mine inspector on a regular inspection on days when such walkaround representative is not scheduled to work, when another miner-employee who was scheduled to work at such times could have accompanied the Federal mine inspector and would have suffered no loss of pay.

III. Opinion and Findings of Fact

A. Stipulation and Findings of Fact

The parties filed the following stipulation on March 4, 1981:

1. This proceeding is governed by the Federal Mine Safety and Health Act of 1977 ("the Act") and the standards and regulations promulgated for the implementation thereof.
2. The administrative Law Judge has jurisdiction over this proceeding.
3. Respondent is an "operator" as defined in Section 3(d) of the Act.
4. Norman Beaver was an employee and authorized UMWA walkaround representative at North American's Powhatan No. 1 mine on June 13, 14 and 15, 1979.
5. On June 13, 14 and 15, 1979, the Powhatan No. 1 mine was working on an idle day basis.
6. On June 13, 14 and 15, 1979, Norman Beaver was not scheduled to work, but accompanied a MSHA inspector on a regular inspection.
7. Prior to accompanying the inspector, Mr. Beaver was informed by North American that he would not be compensated for accompanying the inspector because he was not scheduled to work on those days.
8. Other UMWA members did work at the mine on June 13, 14, 15, 1979. These employees could have accompanied the MSHA inspector on his inspection.
9. North American did not compensate Norman Beaver for the time spent accompanying a MSHA inspector on June 13, 14 and 15, 1979. The amount of compensation due Norman Beaver, if a violation of 103(f) and 105(c) is found, is \$229.56.
10. Norman Beaver filed a complaint of discrimination under Section 105(c) of the Act on July 25, 1979.
11. On November 10, 1980, Mr. Beaver received a letter from Joseph A. Lamonica, Acting Administrator for Coal Mine Safety and Health. The letter informed Mr. Beaver that MSHA had conducted an investigation of his complaint and that the Secretary had determined that a violation of Section 105(c) had not occurred.

12. On December 3, 1980, the UMWA on behalf of Norman Beaver filed a Discrimination Complaint pursuant to Section 105(c)(2) of the Act. (FOOTNOTE.5)

13. On January 7, 1981, the UMWA received North American's Answer to the Discrimination Complaint on behalf of Norman Beaver.

#### B. Opinion

The Complainant was an employee and authorized UMWA walkaround representative at the Respondent's Powhatan No. 1 Mine on June 13, 14, and 15, 1979. The mine was working on an idle day basis on those days. The Complainant was not scheduled to work on those 3 days, but accompanied a Federal mine inspector on a regular inspection. Prior to accompanying the inspector, the Complainant was informed by the Respondent that he would not be compensated for accompanying the inspector because he was not scheduled to work on those days. Other UMWA members did work at the mine on those 3 days, and could have accompanied the Federal mine inspector on his inspection.

The Respondent did not compensate the Complainant for the time spent accompanying the Federal mine inspector on June 13, 14, and 15, 1979. The Complainant is due compensation in the amount of \$229.56, if a violation of sections 103(f) and 105(c)(1) of the 1977 Mine Act is found to have occurred.

The question presented in this case is whether a mine operator is required to pay a walkaround representative of the miners, who is also his employee, for the time spent accompanying a Federal mine inspector on a regular inspection on days when such walkaround representative is not scheduled to work, when another miner-employee who was scheduled to work at such time could have accompanied the Federal mine inspector and would have suffered no loss of pay. The UMWA maintains that the failure to pay the miners' walkaround representative in such a case is a violation of section 105(c)(1) of the 1977 Mine Act because it constitutes an interference with the statutory right to participate in mine inspections accorded the miners' walkaround representative under section 103(f) of the 1977 Mine Act. In support of its position, the UMWA maintains that the Commission's decisions in *Helen Mining Company*, 1 FMSHRC 1796, 1 BNA MSHC 2193, 1979 CCH OSHD par. 24,045 (1979), and *Kentland-Elkhorn Coal Corporation*, 1 FMSHRC 1833, 1 BNA MSHC 2230, 1979 CCH OSHD par. 24,071 (1979), stand for the proposition "that miners are entitled to compensation when they accompany a Federal inspector on regular inspections" (UMWA's Brief, p. 4). The UMWA points out that in *Magma Copper Company*, 1 FMSHRC 1948, 1 BNA MSHC 2227, 1979 CCH OSHD par. 24,075 (1979), the Commission stated that:

Walkaround pay was designed to improve the thoroughness of mine inspections and the level of miner safety consciousness. The first sentence of section 103(f) expressly states

that the purpose of the right to accompany inspectors is to aid the inspection. The Senate committee report on S. 717, 95th Cong., 1st Sess. (1977), the bill from which section 103(f) is derived, explained that the purpose of the right to accompany an inspector is to assist him in performing a "full" inspection, and "enable miners to understand the safety and health requirements of the Act and [thereby] enhance miner safety and health awareness." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-617 (1978) ["1977 Legis. Hist."]. The purpose of the right to walkaround pay granted by section 103(f) is also clear: to encourage miners to exercise their right to accompany inspectors.

It was Congress' judgment that a failure to pay miners' representatives to accompany inspectors would discourage miners from exercising their walkaround rights, and that the resulting lessening of participation would detract from the thoroughness of the inspection and impair the safety and health consciousness of miners. [Footnote omitted.]

1 FMSHRC at 1951-1952. (UMWA's Brief, pp. 5-6.)

The UMWA fashions the following arguments from these dual propositions:

The representative of the miners plays an extremely important role in the statutory scheme of the Act. He or she is the conduit between the employees at the mine and the [Secretary of Labor's] authorized representative. Such person serves as the spearhead for the employees' concerns regarding their health and safety. In *Leslie Coal Mining Co. v. MSHA & UMWA*, 1 FMSHRC 2022 (1979), an operator denied an authorized representative of the miners, who was not scheduled to work, the right to accompany an inspector on a regular inspection. Judge Steffey found a violation of 103(f) and stated at page 6 "... I believe that the company cannot interfere with the person that the miners choose to accompany the inspectors. As long as he is still an employee ... and still one of the people who is intended to accompany the inspectors, I believe the company must let him do so ...." Judge Steffey was convinced of the need to maintain the integrity of the selection process for the miners' walkaround representative. The Judge also remarked on the importance of having a specific person to accompany inspectors. At page 8 of his decision, he stated:

But there does seem to be one aspect of having the inspectors -- or rather having a

specific person or persons designated to accompany the inspectors; because it appears to me that the inspectors feel that if they get the same person each time -- or a limited number of persons -- to accompany them, that a process of training can be instilled in these people who go around with the inspectors, and the result is there is gradually built up a certain amount of expertise in these representatives who accompany them.

The result is they can better field complaints from the miners in general and can coordinate the various inspections by adding knowledge to what has happened in the past. And this, I think, is helpful for both the company and the inspectors.

It is obviously advantageous to both [the Respondent] and the miners to have [the Complainant] accompany the inspector rather than pull an employee out of the mine who just happened to be scheduled to work that day. Such person may not possess the expertise or experience that [the Complainant] possesses. It would be unrealistic to expect that individual to perform an effective watchdog role to insure that MSHA conducts a thorough inspection. Since the person is not the one that has been selected in advance by the miners to walkaround on the particular inspection there is no assurance that the individual would have the confidence of his fellow employees. The lack of such confidence could seriously cut down on the complaints that are brought to the Secretary's attention.

[The Respondent] was in no way prejudiced by [the Complainant] accompanying the inspector. The alternative to not paying an off-duty miner representative is to pay an on-duty miner, withdrawing him from his scheduled work site. Since the idle day work force is limited to the number of workers needed to perform certain essential tasks it would appear that taking somebody from their work site could be very disruptive. There is no logic to this approach. Moreover, it permits the operator to play a role in the selection of the miners' representative. By limiting walkaround pay to employees who the operator has scheduled to perform idle day work, the operator effectively restricts the pool of available employee walkaround representatives. [The Complainant] was the person the miners had selected to accompany the MSHA inspector on this inspection. The miners should not be deprived of their right to have the most effective representative accompany the inspector merely because that representative is not scheduled to work on a particular idle day.

One of the surest ways to shatter confidence in the miners' representative is to allow the operator to play a role in the selection of who that representative will be. Allowing the operator to manipulate the right to walkaround pay may well result in undermining the effectiveness of the entire role of a miners' walkaround representative.

(UMWA's Brief, pp. 7-9).

The Respondent maintains that the case presents a straightforward and relatively simple issue which is answered by the explicit language of section 103(f) which states, in part, that "[s]uch representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." Briefly stated, the Respondent's position is that since the Complainant was not scheduled to work on the days when the regular inspection was conducted, he suffered no loss of pay for the time spent accompanying the Federal mine inspector and therefore is not entitled to compensation under the walkaround pay provision of section 103(f) of the 1977 Mine Act. The Respondent's reasoning is set forth as follows:

[The language of the walkaround pay provision of section 103(f) of the 1977 Mine Act] indicates that Congress intended to permit employees who were regularly scheduled to work to participate in inspections without suffering any loss in pay. The section does not state that any miners' representative must be compensated for participating in an inspection. If Congress had intended that result, it could easily have granted that right by clear and explicit language. Instead, however, Congress chose to require only that a miners' representative must suffer no loss of pay; that is, if a miners' representative is already at the mine and scheduled to work, the operator may not deny his pay simply because he participated in an MSHA inspection.

By requiring only that a miners' representative suffer no loss of pay, Congress indicated its intent that the walkaround right not be utilized to place an additional employee on the operator's payroll. The language states Congress' intent not to add another salary, but only to ensure that an employee currently receiving his salary would not be penalized for his participation in the inspection. Thus, the meaning of Section 103(f) is simply that an employee must not lose pay to which he otherwise would have been entitled simply because he chooses to participate in an MSHA inspection.

When this statutory language is applied to [the Complainant's] complaint the result is readily evident. Since [the Complainant] was not scheduled to work during the week

when the inspection occurred, he suffered no loss of pay as a result of participating in the inspection. Therefore, [the Respondent's] action was fully consistent with the provisions of Section 103(f).

This conclusion is reinforced by the fact that other UMWA personnel were scheduled to work during the week of the inspection and were available to participate as the miners' representative. Since these UMWA employees were working at the mine, they would have continued to receive pay even if they had participated in the inspection as the miners' representative. Thus, there was no reason for [the Complainant] to be the miners' representative on the inspection. Other miners' representatives could have participated in the inspection without adding another individual to [the Respondent's] payroll. [Emphasis in original.]

(Respondent's Brief, pp. 4-5).

The UMWA's reply brief states, in part, that:

On its face the requirements [of the walkaround pay provision of section 103(f) of the 1977 Mine Act] are quite clear. If the representative of the miners is an employee, then the operator cannot refuse to pay him at his normal rate for the time spent participating in a regular inspection].

In the instant case, [the Complainant] walked around during what would have been his usual shift had the mine been in regular production. He was an employee of the operator and the person the miners selected to accompany the MSHA inspector on his inspection.

[The Respondent's] interference with the exercise of [the Complainant's] right to pay during a regular inspection is a violation of [sections] 105(c)(1) and 103(f) of the Act.

The Respondent sets forth the following arguments in its reply brief:

In its initial brief the UMWA ignores the explicit language of the Act, and instead focuses on imaginary problems that are not raised by the facts of this case.

1. This case does not involve the issue whether [the Respondent] may dictate who will participate as a miners' representative on MSHA inspections. [The Respondent] made no effort to dictate to the miners who could act as their representative. The miners were completely free to select whomever they wished to act as their representative during

the inspections, and [the Respondent] recognized that no such representative could suffer a loss of pay. In fact, [the Respondent] specifically permitted [the Complainant] to participate in the inspection himself. [This fact distinguishes the instant case from Leslie Coal Mining Company, 1 FMSHRC 2022 (1979), upon which the UMWA relies]. [The Respondent] simply decided that since [the Complainant] suffered no loss of pay, that it would not pay him extra compensation for participating in the inspection. This decision, which is completely consistent with the language of the Act, in no way infringed upon the miners' right to select their own representative.

2. There is no reason to stretch the language of the Act to award extra compensation to [the Complainant]. The UMWA claims, without any supporting evidence whatsoever, that it was essential for [the Complainant] to act as the miners' representative and that it was therefore necessary to provide him extra compensation in order to encourage his participation. The UMWA brief is replete with unsupported assertions that [the Complainant] is the only one who could have acted effectively as the miners' representative. These assertions are completely inconsistent with the facts as stipulated by the parties, which indicate that other qualified UMWA members were working at the mine and were available to act as miners' representatives.

In fact, it is an extraordinarily rare situation where one person acts as the miners' representative for all MSHA inspections. UMWA mine safety committees generally comprise at least three people, and frequently many UMWA members at a particular mine will participate in inspections as miners' representatives. In this case, there is no evidence that [the Complainant] was the only qualified miners' representative or that he participated in every inspection. There is no evidence that it was necessary for [the Complainant] to participate in this particular inspection. In fact, the stipulation indicates precisely the contrary: that other UMWA members were scheduled for work who could have participated as miners' representatives.

Moreover, the participation of different UMWA members as miners' representatives enhances rather than detracts from the goals of the walkaround provision and the Act. As the UMWA itself admits, one of the principal purposes of the provision is to enhance all of the miners' consciousness of the various safety and health provisions of the Act. If only one miner participated as a miners' representative, then the benefits of miner participation would be limited to that one

miner. Thus, in many instances it is both necessary and in complete accordance with the policies of the Act to have more than one person act as the miners' representative.

The choice of whom to select is of course up to the miners at a particular mine, and in this case [the Respondent] permitted the miners that choice. The only restriction is that which is contained in the Act itself, which states not that any miners' representative is entitled to be compensated for participating, but only that the representative shall suffer no loss of pay as a result of participating in the inspection.

3. The legislative history fully supports the conclusion that Congress intended merely to ensure that miners suffered no loss of pay for participating in an inspection and not that anyone who acted as a miners' representative would receive compensation. \* \* \*

For example, the Senate Report states that the reason for requiring that a miner suffer no loss of pay was to avoid a requirement that "would unfairly penalize the miner for assisting the inspector in performing his duties." Subcommittee on Labor of the Senate Committee on Human Resources, Committee Print, Legislative History of the Federal Mine Safety and Health Act of 1977, 616-17 (1978). Thus, the Senate Report indicates that Congress was simply seeking to avoid penalizing a miner by making him lose pay that he otherwise would have received simply because he participated in an inspection during a time when he was scheduled to work. Nothing in the legislative history or in the language of the Act itself indicates that Congress intended that a person who was not working at the mine be compensated for participation in an inspection.

4. The UMWA suggests that [the Respondent] would suffer no harm if it were required to compensate miners' representatives even if they were not otherwise scheduled to work. The UMWA clearly misses the point, since requiring compensation for any miners' representative would in effect require [the Respondent] to add another employee to its payroll. It is [the Respondent's] prerogative to determine how many people it wishes to employ. Although [the Respondent] recognizes that it may not refuse to pay a member of its active work force who participates in an MSHA inspection, it is not required to put on its payroll someone who would not otherwise be receiving any pay. Congress specifically recognized this right by limiting the walkaround pay right to those who would otherwise have suffered a loss of pay, that is, those who were otherwise scheduled for work. [Footnote 2 omitted.]

For the reasons set forth below, I conclude that the Respondent's refusal to pay the Complainant for the time spent accompanying the Federal mine inspector on the June 13, 14, and 15, 1979, regular inspection was not an interference with the exercise of statutory rights accorded the Complainant under section 103(f) of the 1977 Mine Act. Accordingly, no violation of section 105(c)(1) of the 1977 Mine Act occurred as a result of such refusal. In reaching this conclusion, all arguments advanced by the parties have been considered fully, and, except to the extent that they are expressly or impliedly adopted herein, they are rejected as contrary to the facts as stipulated, contrary to the law, or immaterial to the decision in this case.

Section 105(c)(1) of the 1977 Mine Act provides, in part, that no person shall in any manner discriminate against, or cause discrimination against, or otherwise interfere with the exercise of the statutory rights of any miner or representative of miners because of the exercise by such miner or representative of miners of any statutory right afforded by the 1977 Mine Act. (FOOTNOTE.6) It is my opinion that a mine operator's refusal to provide the miners' walkaround representative, who is also an employee of such mine operator, with the pay to which he is entitled under the walkaround pay provision of section 103(f) of the 1977 Mine Act, is an act of interference in the exercise of statutory rights accorded such representative by section 103(f), and therefore actionable under section 105(c)(1). As noted in the statute's legislative history: "The Committee intends that the scope of the [activities protected by section 105(c)(1)] be broadly interpreted by the Secretary, and intends it to include \* \* \* the participation in mine inspections under [section 103(f)]." S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 623 (1978).

The question presented is whether the walkaround pay provision of section 103(f) requires the mine operator to provide the miners' walkaround representative, who is also an employee of such mine operator, with pay for the time spent accompanying Federal mine inspectors on regular inspections which are conducted on days when such walkaround representative is not scheduled to work, when another miner-employee who was scheduled to work at such times could have accompanied the Federal mine inspector and would have suffered no loss of pay. None of the Commission's decisions on the subject of walkaround pay address this issue.

The Commission has held that the right to walkaround pay accorded a miners' representative under section 103(f) of the 1977 Mine Act is limited to the time spent accompanying a Federal mine inspector during a "regular" inspection conducted pursuant to section 103(a) of the 1977 Mine Act. Helen Mining Company, 1 FMSHRC 1796, 1 BNA MSHC 2193, 1979 CCH OSHD par. 24,045 (1979); Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833, 1 BNA MSHC 2230, 1979 CCH OSHD par. 24,071 (1979). The Commission has also held that when

~1440

an inspection of "the entire mine" conducted pursuant to section 103(a) is divided into two or more inspection parties to simultaneously inspect different parts of the mine, one miners' representative, who is also an employee of the mine operator, in each inspection party is entitled to walkaround pay under section 103(f) for the time spent accompanying a Federal mine inspector who is engaged in such inspection. Magma Copper Company, 1 FMSHRC 1948, 1 BNA MSHC 2227, 1979 CCH OSHD par. 24,075 (1979). In each of these three cases decided by the Commission, the miners' walkaround representative was scheduled to work on the days when the inspections were conducted.

Similarly, no decision by an Administrative Law Judge of this Commission has been discovered which poses the question presented herein. See, e.g., Jewell Ridge Coal Corporation, 2 FMSHRC 2578 (1980) (Steffey, J.); Secretary of Labor ex rel. Scott v. Consolidation Coal Company, 2 FMSHRC 1056 (1980) (Melick, J.); Alabama By-Products Corporation, 2 FMSHRC 467 (1980) (Laurenson, J.); Leslie Coal Mining Company, 1 FMSHRC 2022 (1979) (Steffey, J.).

The walkaround pay provision of section 103(f) requires only that the walkaround representative of the miners "who is also an employee of the operator shall suffer no loss in pay during the period of his participation in the inspection \* \* \*." (Emphasis added.) The UMWA interprets this language as requiring the mine operator to provide compensation to its employee who is a walkaround representative of the miners whenever such representative accompanies a Federal mine inspector on an inspection of the entire mine conducted pursuant to section 103(a), regardless of whether or not such representative at that time would otherwise be performing work for the mine operator which would entitle him to a wage payment. In the UMWA's view, the only germane considerations are (1) that the individual is the person selected by the miners to act as their representative during inspections conducted pursuant to section 103(a), and (2) that the individual is an employee of the mine operator. This interpretation distorts the plain meaning of the carefully drafted language used by Congress. Congress intended only that a representative suffer no loss in pay when his activities as walkaround representative of the miners during inspections of the entire mine conducted pursuant to section 103(a) require him to be absent from those duties which he would otherwise perform for the mine operator, his employer. The plain language of the walkaround pay provision disavows any intent to create a right to compensation for a walkaround representative who is not otherwise scheduled to work. The walkaround pay provision is designed to encourage miner participation in inspections by providing an assurance that their designated representative will suffer no loss in pay as a result of participating in such inspections, i.e., that his participation in an inspection will place him in the same position with respect to his pay that he would have occupied had he not participated in the inspection. It was not intended to create a right to compensation where none otherwise existed.

The UMWA argues that denying the Complainant walkaround pay for his activities on June 13, 14, and 15, 1979, permits the mine operator to play a role in the selection of the miners' walkaround representative, and also

~1441

deprives the miners of their right to have the most effective representative accompany the Federal mine inspector merely because that representative is not scheduled to work on the day of the inspection. According to the UMWA, allowing the mine operator to play a role in the selection process will surely shatter the miners' confidence in their representative, and allowing the mine operator to manipulate the right to walkaround pay may well result in undermining the effectiveness of the miners' walkaround representative.

It is unnecessary to address these issues because they are well beyond the facts of this case. There is no indication in the record, as stipulated, that the Complainant's idle day status permitted the Respondent to directly or indirectly participate in any manner in the process of selecting a walkaround representative. Additionally, there is no indication that the Respondent manipulated the Complainant into an idle day status to discourage his participation in the inspection. The UMWA's arguments must be reserved for a case in which the facts properly raise such issues.

The facts of the instant case reveal that the Complainant was permitted to participate in the June 13, 14, and 15, 1979, inspection notwithstanding his idle day status, and that some other miner who was working at the mine could have acted as the miners' walkaround representative on those 3 days and received his full pay under section 103(f). In order to create the kind of result which the UMWA prays for in this proceeding, it would be necessary to amend section 103(f) of the 1977 Mine Act to so provide.

In view of the foregoing, I conclude that the Complainant was not entitled to walkaround pay under section 103(f) of the 1977 Mine Act for his participation as walkaround representative of the miners during the June 13, 14, and 15, 1979, regular inspection of the Respondent's Powhatan No. 1 Mine. The Respondent's refusal to pay the Complainant for the time so spent was not an interference with the exercise of rights accorded the Complainant under section 103(f) of the 1977 Mine Act, and, accordingly, is not actionable under section 105(c)(1) of the 1977 Mine Act. The discrimination complaint will be dismissed.

#### IV. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over this proceeding.

2. The Respondent is an "operator" as defined in section 3(d) of the 1977 Mine Act.

3. The Department of Labor's Mine Safety and Health Administration conducted an investigation of the dispute which is the subject matter of this proceeding and concluded that a violation of section 105(c)(1) of the 1977 Mine Act had not occurred.

4. The Complainant received a written notification from the Department of Labor's Mine Safety and Health Administration on December 10, 1980,



his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). 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, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a)."

~FOOTNOTE\_THREE

On its face, the discrimination complaint states that it was filed pursuant to section 105(c)(2) of the 1977 Mine Act. The parties' March 4, 1981, filing contains a stipulation which states that the complaint was filed pursuant to section 105(c)(2) of the 1977 Mine Act.

A comparison of sections 105(c)(2) and 105(c)(3) of the 1977 Mine Act reveals that the UMWA could properly file this action before the Commission only pursuant to section 105(c)(3). Section 105(c)(2) filings are made by the Secretary of Labor.

The Respondent has not challenged this filing defect, and the tenor of the stipulations indicates agreement between the parties that the case is properly before the Commission. Accordingly, the defect is viewed as technical, and the complaint is deemed one properly filed under section 105(c)(3).

~FOOTNOTE\_FOUR

The complaint alleges that the walkaround activities occurred in June of 1980. Thereafter, the parties stipulated that such activities occurred in June of 1979. This discrepancy is considered immaterial, and is noted solely to point out that the discrepancy exists.

~FOOTNOTE\_FIVE

See n. 3, supra.

~FOOTNOTE\_SIX

The full text of section 105(c)(1) is set forth in n. 1,  
supra.