

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2' SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

JUN 15 1981

ARCH HOOVER, : Complaint of Discharge,  
                  **Complainant** :           Discrimination, or Interference  
                  :           :  
                  v. :           :  
                  :           Docket No. WEVA 80-580-D  
                  :           :  
ISLAND CREEK COAL COMPANY, : North Branch Mine  
                  Respondent :           :

DECISION

Appearances: Charles Jr. Moats, Montrose, West Virginia, for Complainant;  
Wayne Bussell, Esq., Lexington, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 23, 1981, a hearing in the above-entitled proceeding was held on April 7, 1981, in Elkins, West Virginia, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 150-162):

This proceeding involves a Complaint of Discharge, **Discrimination**, or Interference filed on July 30, 1980, pursuant to section **105(c)(3)** of the Federal Mine Safety and Health Act of 1977 by Arch Hoover against Island Creek Coal Company. The Complaint alleges that Island Creek discriminated against complainant by refusing to allow him to hold or obtain a mechanic's job at respondent's North Branch Mine.

The Complaint was filed **under section 105(c)(3)** of the Act because the Mine Safety and Health Administration declined to file a complaint on Mr. Hoover's behalf under section 105(c)(2) of the Act after finding, on the basis of **MSHA's** own investigation of the Complaint, that no violation of section 105(c)(1) of the Act had occurred.

I shall make some findings of fact which will be set forth in enumerated paragraphs.

1. Mr. Arch Hoover began working at Island Creek's North Branch Mine on January 17, 1968. During most of that time he has been a helper to the operator of a continuous-mining machine or **has done** other work operating equipment, but he has frequently done mechanical work. On December 8, 1978, mechanic's job No. 105 was open and Mr. Hoover applied for that job, but the job was not filled on the ground that no qualified bidder had applied for it.

That particular job required that the person who held it be a certified electrician. Mr. Hoover admittedly is not a certified electrician.

Mr. Hoover filed a grievance about not being awarded the mechanic's job, but the grievance seems to have been withdrawn with the understanding that **Mr.** Hoover would be sent to the next class offered after that occurrence for the purpose of enabling Mr. Hoover to become trained so as to be qualified to hold a certified electrician's card issued by the West Virginia Department of Mines.

2. Before Mr. Hoover could be sent to a school to become a certified electrician, he learned that he could attend the classes only if someone, in a position to know the facts, signed a statement to the effect that Mr. Hoover had had 3 years of electrical experience. Mr. Robert Severe, a UMWA committeeman, signed a statement to the effect that Mr. Hoover had had the required 36 months of experience, but when the statement was given to Mr. James Hamlin, superintendent of the North Branch Mine, he stated that he could not agree that Mr. Hoover had accumulated 36 months of experience under the direct supervision of a certified electrician. Mr. Hamlin's refusal to confirm that Mr. Hoover possessed the requisite experience resulted in Mr. Hoover's not being sent to the **classes** to become a certified electrician.

3. Three witnesses testified on behalf of Mr. Hoover to the effect that at various times Mr. Hoover had acted as the sole mechanic on their section when the regular mechanic was unavailable. **Those** witnesses stated that Mr. Hoover performed both mechanical and electrical work as well or better than other full-time mechanics who hold certified electrician cards. The evidence shows, however, that when Mr. Hoover performed the work of a mechanic, a section foreman with a certified electrician's card was on duty on the section.

4. Mr. Hamlin explained when he testified in this case that the class to which Mr. Hoover wanted to be admitted was a special **90-**hour class established with the approval of the West Virginia Department of Mines for the sole purpose of enabling some mechanics who had been working for Island Creek for a number of years in that position to become certified under the law in a way that would permit them to be considered as lawful, certified, electricians when, in fact, they would probably not have been able to pass the regular examination given to those who became certified electricians under the law as it is now administered.

Mr. Hamlin further stated that he checked with those company personnel who were in a supervisory position over electrical work and all of those individuals stated that they did not think Mr. Hoover had done the kind of electrical work which would be required for him

to have been considered to have accumulated 36 months of experience under the direct supervision of a certified electrician.

5. Mr. Hamlin and Mr. Riggleman, who is a maintenance electrical supervisor, additionally explained that the 90-hour class, which Mr. Hoover was not allowed to attend, was established for people who had held a regular mechanic's job prior to the passage of a new law pertaining to **certification** of electricians, but who could not have become certified under the new law except for attendance at the special 90-hour course. Therefore, even if Mr. Hoover, at the time the 90-hour course was offered, had actually had 36 months of experience, he would not have been qualified for that special course set up for the benefit of those particular people who had been working as mechanics prior to the passage of the West Virginia law requiring people to become certified electricians if they were also given the title of mechanic.

6. There was introduced in evidence in this proceeding as Exhibit A a portion of the West Virginia statute which defines what a certified electrician is and that **section**, which is **22-1-1(d)(2)**, provides that a person either has to pass the examination given by the Department of Mines, or have 3 years of experience and complete a coal mine electrical training program approved by the Department of Mines. The program approved by the Department of Mines under that section is the **90-hour** course which Mr. Hoover was not permitted to attend because of **his failure** to qualify for that special purpose. The result is that he can no longer go to any existing or prospective class because the West Virginia Department of Mines has indicated that that type of method of becoming a certified electrician is no longer available.

7. Under the existing method of becoming certified, it is necessary for a miner to become an apprentice electrician. He has to take an 80-hour course and has to follow that up with training in the mine under the direct supervision of a certified electrician for a period of time and then, eventually, he has to **take** another 40 hours of instruction in the classroom and, finally, he has to pass an examination given by the West Virginia Department of Mines.

8. Mr. Hamlin has indicated in his testimony that Mr. Hoover was offered the possibility of enrolling in a course which would be given during the day shift at the North Branch Mine and that course might take, together with the apprentice training, up to 18 months before one can become a certified electrician under the present requirements; Mr. Hoover does not work on the day shift, and he has indicated that he does not find it possible to take advantage of the training program offered on the day shift because it would require him to drive by himself about 85 or **90 miles to** attend that type of training. Although Mr. Hoover now drives about 90 miles to work at the North Branch Mine on the 4:00 p.m.-to-12:00 midnight shift, he does so in the company of about ten other men who all ride in a van. The result is that they can pool their resources and afford

to drive that far as a group, but Mr. Hoover says he cannot afford **to do it alone** on the day shift **as a** single person. Consequently,, he finds that it is economically infeasible to take advantage of the present means of becoming a certified electrician.

I believe that those are the pertinent facts that have been developed here today in the testimony of quite a few witnesses. In order for Mr. Hoover to obtain relief under section **105(c)(1)** of the Federal Mine Safety and Health Act of 1977, he would have to show that respondent has violated that section. That section reads 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.

As **I** explained in the preliminary discussion that I had before the hearing started today, I had already studied **Mr. Hoover's** Complaint in this case and I tried my utmost to find some way to provide for the relief which he seeks, which is to become a certified electrician, but before **I** can order Island Creek to send him to a class to become a certified electrician, I would have to **find that** Island Creek violated section 105(c)(1) and **I** haven't been able to find anything in that section, or in the evidence introduced in this case, which would permit me to make such a finding.

As I explained before, it looked to me as if the primary way that **I might find** a violation would be if the evidence showed that Mr. Hoover was asked to do the work of a mechanic, which, of course, also means that he should be a certified electrician, and he were to refuse to do that on the ground that he was not a certified electrician, and the company were to tell him that if he didn't do it, he would be discharged. If the aforesaid things had occurred, I might then have been able to

find that there was a violation because he was objecting to doing something which is hazardous, that is, do a job for which he is not qualified by having the proper training. But, Mr. Hoover told me very clearly and without any equivocation, that nobody ever ordered him to do mechanical equipment work. He was asked to work on **mechanical** equipment on-occasion. On other occasions, he volunteered to do mechanical work, but I haven't been shown, and nobody has alleged, that Island Creek coerced him into doing mechanical work. So, I can't really find that the part of **the Complaint** which alleged that Mr. Hoover was required to do mechanical work is really supported by the evidence.

I think it was a mistake for Island Creek to have allowed Mr. Hoover to work as the only mechanic on a given section at times because there was testimony by several witnesses to the **effect** that there were times when Mr. Hoover was doing work which at least involved electrical connections and hooking up electrical wires, for example, in the installation of an electric motor. Mr. Hamlin pointed out, however, that as far as he was concerned, **that** was not the kind of electrical work that he feels is contemplated in the requirement that a person be a certified electrician.

It is a fact that when Mr. Hoover did mechanical work, there was a certified electrician present on the section. So, I can't really find that there **was a** violation of the Federal Mine Health and Safety Act, or the **regulations promulgated** under that Act, when Mr. Hoover worked as a mechanic on a section when the regular mechanic was unavailable.

As Mr. **Bussell** pointed out in his argument, before I could order Island Creek to do something that it hasn't already done, such as set up a special class for the benefit of Mr. Hoover, I would have to find that Mr. Hoover has been engaged in some protected activity or that Island Creek refused to let him go to one of those classes because of his having been engaged in a protected activity. I haven't been able to find any protected activity that he has **been engaged** in.

There have been some cases before the Commission in which the Commission has ordered a company to give an individual-certain types of relief. For example, in Local Union No. 1110, UMWA, and Robert L. Carney vs. Consolidation Coal Company, 1 FMSHRC 338 (1979), Carney was given three letters of reprimand and placed on probation for 1 year because of his union activities. He had left the continuous-mining machine and had gone to complain to other union officers and MSHA because he was asked to operate the continuous-mining machine pending receipt of a **known** mixture of methane for checking the methane monitor. Carney was told he could only make such complaints and leave the section when management approved it. Carney continued doing union work without getting permission and that resulted in another letter of reprimand.

The Commission in that case affirmed an administrative law judge's holding that this restrictive policy was a violation of Carney's rights. The health and safety of miners made it necessary for a union committee-man to do his work even though it might interfere with Consolidation's ability to control production as it would prefer on a given occasion. The Commission held that Consolidation's policy would impede a miner's ability to contact the Secretary of Labor when safety violations or dangers arise.

I refer to the Carney case primarily to illustrate the fact that if Mr. Hoover had been engaged in some activity which showed that the company was about to do something that was hazardous or endangered someone's life or health, then he would be entitled to relief because he would have been engaged in a protected activity. The mere fact that he agreed to do mechanic's work is not a protected activity, as I understand it, which would enable me to find that a violation of section 105(c)(1) occurred.

Mr. Moats explained to me--Mr. Moats being the person who represented Mr. Hoover in this case--what the present West Virginia law is on becoming a certified electrician and; as he understood that portion of the West Virginia law, Mr. Hoover, when he worked solely as a mechanic on a section when the regular mechanic was absent, would have to be an apprentice electrician and should have a card so stating from the West Virginia Department of Mines. Mr. Moats suggested that the failure of Mr. Hoover to be given that classification while he was acting as the sole mechanic on a section may well be illegal under West Virginia law.

I am not certain that Mr. Hoover is precluded from doing mechanical work so long as a certified electrician is present, even under the present West Virginia law. As I understand that law, it simply requires that a person be an apprentice electrician under that statute if he wants to become a certified electrician. Since Mr. Hamlin has indicated that the present program is apparently going to be designed for the day shift only, it wouldn't appear that Mr. Hoover would be able to qualify for it in view of his economic problem of being unable to drive back and forth to work on the day shift. I don't know that any good will come out of this hearing; but I would hope that Island Creek would endeavor to offer the program for an apprentice electrician on its 4:00-to-12:00 shift so that Mr. Hoover could get into the program and could eventually become a certified electrician.

There was a lot of testimony in this case by Mr. Hoover's friends and I think he must be a very fine person. In order for these miners to take off a day from work to come and testify in his behalf and I would hope that their efforts are not in vain and that Mr. Hoover will be given an opportunity to become a certified electrician. Everyone who has testified here today has said that Mr. Hoover is an excellent worker, that he is conscientious, that he has initiative, and I think a man like that should be allowed to become as well-trained and educated as possible and I hope the company will make a concerted effort to try

to see that Mr. Hoover gets the proper recognition and opportunity to achieve the requirements for the position that he would like to hold.

But, as I have stated, I simply cannot find any way to find that a violation of section 105(c)(1) occurred.

WHEREFORE, it is ordered:

The Complaint filed in Docket No. **WEVA** 80-580-D is denied for failure to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

*Richard C. Steffey*  
Richard C. Steffey  
Administrative Law Judge  
(Phone: 703-756-6225)

Distribution:

Charles Jr. Moats, Representative for Arch Hoover, Route #1, Box 102A,  
Montrose, WV 26283 (Certified Mail)

Wayne **Bussell**, Esq., Attorney for Island Creek Coal Company, P.O. Box  
11430, Lexington, KY 40575 (Certified Mail)

MSHA, Special Investigations, U.S. Department of Labor, 4015 **Wilson**  
Boulevard, Arlington, VA 22203

Assistant Solicitor, U.S. Department of Labor, 4015 **Wilson** Boulevard,  
Arlington, VA 22203