CCASE:
UNITED WORKERS V. PEABODY COAL
DDATE:
19820719
TTEXT:

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

UNITED MINE WORKERS OF AMERICA,	Complaint of Discharge, Discrimination, or Interference
ON BEHALF OF DELMAR SHEPHERD, COMPLAINANT	Docket No. KENT 81-186-D
v.	Camp Underground Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Mary Lu Jordan, Esq., Washington, D.C., for Complainant
Thomas R. Gallagher, Esq., and Michael O. McKown, Esq., St. Louis, Missouri, for Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant charges that Respondent's refusal to recall him to work at a job initially offered him constituted discrimination under the Act, because it was grounded on his need for additional training under State and Federal laws. The case was submitted for decision on a stipulated set of facts. Both parties have filed briefs.

FACTS

I accept the stipulations signed by counsel for both parties and filed in this case on March 10, 1982, together with the documents filed on July 13, 1982, pursuant to my request, as the facts on which this decision will be based.

Complainant Delmar Shepherd was employed by Respondent Peabody as a miner beginning in June 1981. He worked in an underground mine from June 23, 1971 to November 20, 1978. Thereafter, he worked in surface mines for Peabody.

From October 8, 1980 until he was laid off on November 18, 1980, he worked at Peabody's Alston Surface Mine. He was a member of the United Mine Workers of America which had a collective bargaining agreement with Peabody. The agreement provided that laid-off employees had the right to be recalled to work on the basis of seniority when jobs for which they were qualified became open at certain other Peabody Mines. Seniority is recognized as length of service and the ability to step into and perform the work of the job at the time the job is awarded.

On December 1, 1980, Respondent contacted Complainant and told him that on the basis of his seniority he was entitled to be recalled at one of 13 job openings available at the Camp Underground Mine. Complainant selected a job and was told that he would be notified when to report to work. Later the same day, Respondent called Complainant and informed him that none of the jobs would be made available to him because he would need additional training required for working in an underground mine by Federal and State law. He further stated that Respondent would not provide the training, but that Complainant would have to obtain it himself. Other miners with shorter lengths of service were recalled. Complainant lost wages and claims reimbursement therefor for the period from December 3, 1980 through January 20, 1981.

Respondent had an MSHA-approved training plan for training and retraining of underground miners effective at the time of the alleged discriminatory action. The plan provided a training program of from 6-1/2 to 11-3/4 hours for newly employed experienced miners. Part of the training was to be done at a company training center and part of it at the mine site. The Complainant, having worked in an underground mine from 1971 to November 20, 1978, was an experienced miner. (FOOTNOTE 1)

Complainant was returned to work in the subject underground mine on June 11, 1981. Presumably he received the required training. The record does not indicate whether it was provided by Respondent or whether Complainant was paid while being trained.

STATUTORY PROVISIONS

Section 104(c)(1) of the Mine Safety Act provides as follows:

> (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.

Section 115(a) of the Act provides in part: "Each operator of a . . . . mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs * * *."

Section 115(b) of the Act provide in part: "Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training * * *."

REGULATORY PROVISIONS

30 C.F.R. 48.2(b) provides in part:

> "Experienced miner" means a person who is employed as an underground miner, * * * on the effective date of these rules [November 12, 1978]; * * * or a person who has had at least 12 months experience working in an underground mine during the preceeding 3 years * * *.

30 C.F.R. 48.3(a) provides in part: "Each operator of an underground mine shall have an MSHA approved plan containing programs for training new miners, training newly-employed experienced miners * * *."

30 C.F.R. 58.6(a) provides: "A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties."

ISSUE

Whether Respondent's refusal or failure to recall Complainant because he required additional training under the regulations constituted discrimination under the Act? Putting the issue differently, whether Respondent was required under the Act to recall Complainant for a job opening and to provide him the training required for that job?

CONCLUSIONS OF LAW

It is the responsibility of the mine operator to provide the training required under the Mine Act. The Act specifically states (Section 2) that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in the mines." Section 115 requires that mine operators have an approved health and safety training program, that the training shall be provided during normal working hours and that the miners shall be paid at their normal rate of compensation while undergoing such training.

On the basis of these provisions, Judge Morris ruled in Secretary/Bennett et al v. Emery Mining Corporation, 3 FMSHRC 2648 (1981), that a requirement that a job applicant obtain miner training at his own expense as a precondition of employment constitutes discrimination under the Mine Act. In the Emery case the Complainants underwent the required training at their own expense and on their own time and were thereafter hired by Emery. Judge Morris ordered reimbursement for the cost and expenses of the training and payment of wages for the time spent in the training program. I agree with Judge Morris' reasoning and his conclusions. However, the facts in the case before me are different. If two miners apply for a position in an underground mine, one of whom requires training and the other of whom does not, the operator does not violate the Act if he hires the latter.

If Complainant had obtained training on his own time and at his own expense, and then was hired by Respondent, the facts would be analogous to those in Emery, and I would hold that a violation of 105(c) was shown, because this would be an obvious attempt to shift the responsibility and cost of training from the mine operator, on whom the Act places it, to the miner. On the other hand, the Act does not require that, on the basis of seniority or otherwise, miners who require training must be hired or rehired rather than miners who do not require training. I assume that the miners who filled the job sought by Complainant in the subject mine, which miners "had a shorter length of service than Mr. Shepherd," did not require training.

It is not the function of the Commission to interpret the collective bargaining contract between Respondent and the United Mine Workers of America, and I venture no opinion as to whether Respondent's failure to recall Complainant violated the contract. Nor have we been given the responsibility of overseeing Respondent's hiring practices except as they may conflict with the Mine Act. I find no such conflict in the facts submittted to me in this case.

ORDER

Therefore, IT IS ORDERED that the complaint is DISMISSED.

James A. Broderick
Administrative Law Judge

ÄÄ
~FOOTNOTE_ONE

1 Although the stipulations are not specific in this regard, I am assuming that it was Respondent's position that Complainant required training as a newly employed experienced miner per 30 C.F.R. 48.6 and not as a new miner per 30 C.F.R. 48.5. The regulations in Part 48 were published in the Federal Register October 13, 1978, 43 FR 47459. In the absence of a specified effective date, they became effective 30 days thereafter or November 12, 1978. 5 U.S.C. 553. According to the stipulations, Complainant was employed as an underground miner on that date and therefore was an "experienced miner." 30 C.F.R. 48.2(b).