

CCASE:
(UMWA) V. BETHLEHEM MINES
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Federal Mine Safety And Health Review Commission
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA,
LOCAL UNION NO. 1197,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. PENN 83-234-D

v.

PITT CD 83-8

BETHLEHEM MINES CORPORATION
AND

No. 60 Mine

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

ORDER OF DISMISSAL

Before: Judge Broderick

On September 23, 1983, a complaint was filed under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (the "Act"), alleging that Respondent Bethlehem has discriminated against Complainant and the miners represented by Complainant by utilizing a longwall mining machine in the subject mine which produces more than the level of dust permitted under 30 U.S.C. 842, and that Respondent MSHA has discriminated against Complainant and the miners represented by Complainant by failing to enforce the dust standards in the statute and regulations against Bethlehem. The complaint further alleges that the use by Bethlehem of the machinery complained of, when it knew of MSHA's failure or refusal to enforce the Act concerning the machinery "prevents [Complainant] from exercising its statutory rights . . . in that if [Complainant] or its individual members were to refuse to work because of a hazardous condition created by the offending machinery, the employee asserting that right would be subject to discharge" As relief, Complainant seeks an order to withdraw the machine from the mine or an order limiting the time miners are exposed to the resulting respirable dust.

On October 20, 1983, Respondent Bethlehem filed a motion to Dismiss on the grounds that the complaint does not allege that Complainant (or its members) were engaged in activity protected by the Act and that adverse action was taken against them on account of such activity.

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On October 27, 1983, Respondent MSHA filed a motion to dismiss on the grounds that the complaint failed to state a cause of action under section 105(c) of the Act and that the Commission does not have authority to grant the relief sought.

On December 6, 1983, Complainant filed a Memorandum in Opposition to the Motions to Dismiss and affidavits from two members of Complainant Local Union who work at the subject mine and are members of the safety Committee.

ISSUES

1. Does the complaint state a cause of action under section 105(c) of the Act?

2. Is MSHA a "person" under section 105(c) and subject to its prohibition against discrimination?

3. Does the Commission have jurisdiction to grant the relief sought in the complaint?

THE STATUTE

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

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of 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.

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The provision prohibits adverse action ("discharge or in any manner discriminate against") against a miner or representative of miners because of activity protected under the Act. Such protected activity includes filing or making a complaint under the Act, instituting or testifying in a proceeding under the Act, requesting an inspection, accompanying an inspector as a miner's representative, receiving adequate training, and refusing to perform work in conditions reasonably believed to be unsafe or unhealthful.

The complaint herein alleges that Bethlehem utilizes a longwall mining machine which causes excessive concentrations of respirable dust and that MSHA has failed to enforce the dust standards in the Act and Regulations. Does this allege protected activity on the part of Complainant? The activity described in the complaint as protected is not the complaints made to Bethlehem or MSHA, but rather seems to be that Bethlehem continues to violate the dust standards and that MSHA refuses to enforce the standards against Bethlehem. However, illegal and reprehensible this alleged situation may be, by itself it can hardly be converted to the exercise by Complainant of rights protected by the Act. Complainant, as a representative of the miners, is given special responsibility under the Act. Certainly, it has the right and duty to report unsafe or unhealthy mine conditions to MSHA, and is protected under 105(c) in making such reports. See *UMWA Local 9800 v. Secretary and Dupree*, 3 FMSHRC 958 (1981) (ALJ). However, that is not the activity alleged in this case. I conclude that the complaint does not allege that Complainant was engaged in activity protected under the Act.

Further, the adverse action alleged is merely the speculation that the members of Complainant would be discharged if they refused to work because of hazardous conditions. This is not adverse action, but only the possibility of future adverse action. The complaint also seems to allege that being required to work in an unhealthy environment is adverse action. But Complainant and its members are not required to work in an environment reasonably believed to be unhealthy, and they would be protected if they refused to work under such conditions. I conclude that no past or present adverse action has been alleged here.

Therefore, I conclude that the complaint does not state a cause of action under section 105(c) of the Act.

IS MSHA SUBJECT TO 105(c)

Section 105(c) is directed to "any person." I have previously held that MSHA is a person under section 105(c) prohibited from discriminating against a miner or representative of miners and affirm that conclusion here. See *Local 9800 UMW v. Secretary and Dupree*, 2 FMSHRC 2600 (1980) (ALJ).

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COMMISSION JURISDICTION TO GRANT RELIEF

Section 103(g) of the Act gives the miners' representative the right to call for an immediate inspection by giving MSHA notice of an alleged safety or health violation or an imminent danger in a mine. If MSHA determines that a violation or danger does not exist it must so notify the representative in writing.

Under 30 C.F.R. 43.7, the representative of the miners may obtain an informal review by the MSHA District Manager or his agent who is required to furnish a written statement of the reasons for the final disposition of the matter.

The Act does not provide for Commission review of such disposition and MSHA argues that the Commission has no jurisdiction in such cases. In view of my holding that the complaint herein does not state a cause of action, it is unnecessary to rule on this issue, and I do not do so at this time.

ORDER

Therefore, IT IS ORDERED that this proceeding is DISMISSED for failure to state a cause of action under section 105(c) of the Act.

James A. Broderick
Administrative Law Judge