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UNITED MINE V. PEABODY COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF JAMES ROWE, ET AL.,	DISCRIMINATION PROCEEDINGS Docket No. KENT 82-103-D MADI CD 81-23
JERRY D. MOORE,	Docket No. KENT 82-105-D MADI CD 82-05
LARRY D. KESSINGER, COMPLAINANTS	Docket No. KENT 82-106-D MADI CD 82-04
v.	Eastern Division Operations
PEABODY COAL COMPANY, RESPONDENTS	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF THOMAS L. WILLIAMS, COMPLAINANT	Docket No. LAKE 83-69-D VINC CD 83-04
v.	Eastern Division Operations
PEABODY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C. on behalf of Complainants James Rowe, et al., Jerry D. Moore and Larry D. Kessinger; Frederick W. Moncrief, Esq., Office of the Solicitor, Arlington, Virginia, on behalf of Complainant, Thomas L. Williams; Michael O. McKown, Esq., Peabody Coal Company, St. Louis, Missouri, for Respondent.

Before: Judge Merlin.

These cases are before me pursuant to the Commission's order dated June 18, 1984.

Introduction

These cases present the question whether under section 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter referred to as "the Act"), 30 U.S.C. 815(c), the operator discriminated against laid off miners by violating their statutory rights regarding training set forth in section 115 of the Act, 30 U.S.C. 825, and Part 48 of the Regulations, 30 C.F.R., Part 48.

The Act and the regulations set forth certain training which miners must receive. In determining which laid off miners to recall to work, the operator gave preference to miners who met the training requirements of the Act and regulations. The Complainants contend that under the Act, it was the operator's responsibility to provide the necessary training and that by not doing so with respect to laid off miners and then taking their lack of training into account in deciding who to put back to work, the operator discriminated by violating the statutory right to training.

LAKE 82-69-D is a complaint of discrimination brought by the Secretary of Labor under section 105(c)(2) on behalf of Thomas L. Williams, a laid off miner. KENT 82-105-D and KENT 82-106-D are complaints of discrimination brought by the United Mine Workers (hereinafter referred to as the "UMW") under section 105(c)(3) on behalf of Jerry D. Moore and Larry D. Kessinger, respectively, both of whom are laid off miners. KENT 82-103-D is a complaint of discrimination filed by the union as a class action on behalf of Peabody's Eastern Division laid off employees.

Statutory Provisions

Section 115 of the Act, supra, provides as follows:

> Sec. 115. (a) Each operator of a coal or other 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 not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that--
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> (1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives

under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;

(4) any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

(5) any training required by paragraphs (1), (2), or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.

(b) 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, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

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Part 48 of 30 C.F.R. sets forth the training requirements for underground mines (Subpart A) and surface mines (Subpart B).

Section 105(c) of the Act, supra, 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.
>
> (2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners

alleging such discrimination or interference and propose an order granting appropriate relief. 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, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of 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).

Factual and Procedural Background

On June 19, 1981, the operator sent a letter to all laid off employees in its Eastern division, advising them that Federal and state law required that they meet minimum standards prior to resuming work after having been laid off. Effective immediately, if laid off from any Peabody facility, it was their responsibility to keep their training current. If they failed to do so, they would be bypassed for recall in favor of panel members whose training was current.

The "panel" referred to in the operator's letter was established by Article XVII(d) of the National Bituminous Coal Wage Agreement of 1981 to which the operator was a party and which provides in pertinent part as follows:

> Employees who are idle because of a reduction in the working force shall be placed on a panel from which they shall be returned to employment on the basis of seniority as outlined in section (a). A panel member shall be considered for every job which he has listed on his layoff form as one to which he wishes to be recalled. Each panel member may revise his panel form once a year.

Article XVII(a) of the 1981 Agreement defines seniority as "length of service and ability to step into and perform the work of the job at the time the job is awarded."

Pursuant to its letter dated June 19, 1981, the operator bypassed a laid off miner, who would otherwise be recalled for a job under the 1981 Agreement, if the operator determined that such miner required training under 30 C.F.R. Part 48, before he could "step into and perform the work of the job."

In December 1982, Joseph Lamonica, MSHA's administrator for Coal Mine Safety and Health advised the Director of Training for Peabody that the operator's policy of requiring up-to-date training status under Part 45 was inconsistent

with the Act. In April 1983, MSHA revoked approval of the operator's training plans and issued appropriate citations. The operator then discontinued its policy and the citations were terminated.

The parties have divided laid off miners involved in these suits into three categories. Category I consists of those individuals who, as a result of the operator's policy, obtained training on their own time and at their own expense, and were then recalled to work by the operator. The operator subsequently agreed to pay Category I individuals. On November 4, 1983, a Decision Approving Settlement was issued granting a monetary judgment for named miners in Category I and dismissing all suits regarding Category I with prejudice.

Category II is comprised of individuals who were bypassed on the recall panel because the operator determined they would need additional training under Part 48 to fill the job, and therefore were not considered experienced miners under the regulations. It is agreed that the named plaintiffs suing for themselves all fall within Category II, i.e., laid off miners who were "bypassed" as described above. In LAKE 83-69-D, the Complainant, Thomas L. Williams, was an experienced underground miner who, upon being laid off, was placed on a recall panel and indicated an interest in surface mine positions. Because Mr. Williams had not received the training for a surface miner required by section 115 and Part 48, the operator bypassed him in favor of a miner with fewer years of service. In KENT 83-105-D, the Complainant, Jerry D. Moore, also was a laid off underground miner who wanted a surface mine job but was bypassed by the operator because he did not satisfy the training requirements of section 115 and Part 48 of the regulations for surface mines. Similarly, the Complainant in KENT 83-106-D, Larry D. Kessinger, was a laid off underground miner who was bypassed for a surface job because the surface training he had was insufficient to meet the training requirements of the Act and regulations.

Category III is composed of individuals who, as a result of the operator's policy, obtained training on their own time and at their own expense, but whose names were not reached on the recall panel because of their relatively shorter length of service.

KENT 82-103-D is a suit by the union on behalf of all laid off Peabody employees in the Eastern Division. This includes Category II and Category III miners only since Category I was settled. It names James Rowe, a UMW official at the time KENT 82-103-D was filed, as a representative of all laid off miners in the operator's Eastern Division.

Summary Decision

All parties have moved for summary decision under Commission Rule 64, 29 C.F.R. 2700.64, which provides that a motion for summary decision shall be granted if the entire record shows that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision as a matter of law.

In the cases brought by the union, the union and the operator have entered into and submitted 68 stipulations. Although the stipulations contain material which does not belong in sets of factual stipulations, I conclude that the stipulations set forth agreed-upon facts sufficient to enable me properly to render summary decision. They also make clear that what is involved is a question of law. In the case brought by the Secretary, the operator responded to the Secretary's Request for Admission of Facts by admitting the relevant circumstances and showing that the issues of law involved are the same as those in the other cases. Accordingly, here too, I conclude that summary decision would be proper.

Class Action

In KENT 83-103-D, the United Mine Workers seeks to bring a class action on behalf of all laid off Peabody employees, Eastern Division. The procedural rules of the Commission do not specifically provide for class actions, but under 29 C.F.R. 2700.1(b), the Commission or Administrative Law Judge is to be guided so far as practicable by the Federal Rules of Civil Procedure as appropriate.

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

As set forth above, a settlement has been reached with respect to Category I. The union's attempt to bring a class action for Categories II and III remains.

The burden is on the party who seeks to utilize the class action to establish his right to do so. Zeidman v. McDermott, 651 F.2d 1030 (5th Cir.1981). After due consideration, I conclude that the union has failed to satisfy several important requirements of Rule 23.

The only named Complainant in KENT 82-103-D, which is brought by the union on behalf of all laid off Peabody employees, Eastern Division, is James Rowe. The union's motion in opposition to the operator's motion to strike admits Mr. Rowe is not a laid off miner (p. 7-8, UMW's Opposition to Motion to Dismiss). At the time suit was filed, Mr. Rowe was employed by the union but as of December 30, 1982, he had returned to his job at a Peabody surface mine. The union argued in its motion that since Mr. Rowe is a miner at a Peabody mine, he will be subjected to all Peabody policies, including the policy at issue in this case. Following the union's rationale, every active Peabody employee would be a party to this suit, although they do not fall within the class of laid off employees, as delineated by the union itself.

Assuming the union's description of Mr. Rowe's present status is correct, it does not provide a basis upon which he can serve as a representative of the specified class. Rule 23 requires that a class representative be a part of the class and possess the same interest and suffer the same injury as the class members. E. Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977). Mr. Rowe cannot qualify as a representative of the class merely because he worked in the Union Safety Division where his duties were concerned with improving the health and safety of union members. His job duties at the union, even if they had continued, would not put him in the situation of a laid off employee. Since Mr. Rowe was not a laid off miner, he could not have the same interest nor did he suffer the same injury as the putative class. Mr. Rowe must be stricken as a representative example of the class of laid off employees.

Moreover, the union itself cannot adequately and fairly represent either Category II or Category III complainants. In its motion to oppose the operator's motion to dismiss, the union asserts that because it "is an organization whose very purpose is to protect the interests of the miners it represents," it will fairly represent the interests of the class (pp. 7-8, UMW's Opposition to Motion to Dismiss). However, the dilemma of union's counsel in trying to decide what kind of relief to seek demonstrates the inability of the union to represent the diverse and conflicting interests of all members of the bypassed class. Union counsel could not decide whether to seek reinstatement of bypassed miners since such action could require "bumping" a union member with less seniority (Tr. 80-82, Hearing October 13, 1983). In Airline Stewards & Stewardesses Ass'n Local 550 TWU, AFL--CIO, v. American Airlines, 490 F.2d 636 (7th Cir.1973) the court held that a labor union, presumably largely under control of present employees, is not a proper representative

of all separated and present employees in an action charging discriminatory separation and seeking, inter alia, reinstatement, since there are obvious antagonistic interests among the class.

It is further clear from the "bumping" issue that not only is the union unable to represent the class but also that there are conflicting claims between the members of the class themselves. The Supreme Court has pointed out that to the extent that persons have dual and potentially conflicting interests, they cannot be regarded as in the same class. Hansberry v. Lee, 311 U.S. 32 (1940).

The union also has not met the requirements of Rule 23(a)(1) because it has failed to show that the members of Categories II and III are so numerous that joinder would be impracticable. As support for the class action, the union relied upon the affidavit dated August 9, 1981, of Mike Turner, a Peabody employee, which stated that since June 19, 1981, there had been 1000 layoffs and 380 recalls, but that it was impossible to identify instances of bypassed miners. With respect to Category II, therefore, the Turner affidavit expressly states there is no information. With respect to Category III, the figures in the affidavit are two years old and more importantly, it is not clear upon what they are based. Moreover, the information the union itself furnished strongly militates against allowance of a class action. Counsel for UMW has asserted that both Categories II and III have a finite number of members. This would appear to be so, especially since the operator has discontinued the challenged policy. At the hearings, union counsel stated that eight members of Category II and six members of Category III had been identified (Tr. 32, 56, Hearing, October 13, 1983; Tr. 6-9, Hearing, July 5, 1984). In proposed stipulations, she listed seven in Category II and six in Category III (UMW letter to Peabody counsel, dated October 3, 1983). Having fixed the class membership at such a small number of people who are readily identifiable, she has demonstrated the practicability of joinder and the lack of need for a class action.

Since Mr. Rowe must be stricken as a representative, and since the union itself does not qualify and finally because the purported class has not been shown to satisfy the requirements of Rule 23, the complaint in KENT 82-103-D must be dismissed. No class action is allowed. Because the case does not qualify as a class action and because the individuals mentioned by union counsel were never joined although it was possible to do so, they are not before me and cannot be granted relief. The claims of the individually named Category II complainants survive in the other docket numbers.

Discrimination and Right to Training in Lay Off Situation

Section 115 quoted supra, establishes the right of mine employees to receive basic safety training and the obligation of the operator to provide that training for them. Those classified as new miners are to receive 40 hours of training prior to underground assignment or 24 hours before surface assignment. The training is designed to cover the primary hazards of each and is to be as mine-related as possible. Operators are required to provide miners with at least 8 hours of refresher training once every 12 months and to provide miners with training in specific safety and health aspects of the work they are assigned.

The legislative history makes clear that the financial responsibility and economic burden of providing training are placed solely upon the operator and not upon the individual miner or the government. The Senate Report unequivocally states in this respect as follows:

> It is not the Committee's contemplation that the Secretary be in the business of training miners. This is clearly the responsibility of the operator, as long as such training meets the Act's minimum requirements. S.REP. NO. 95-181, 95th Cong., 1st Sess. 50 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2nd Sess., at 638 (1978) hereinafter referred to as "Leg.Hist.").

The discussion surrounding S. 717 (the Senate version of the 1977 Act) further demonstrates that the operators were expected to assume the costs associated with the training requirements.

> MR. WILLIAMS. There are certain aspects of the cost that will arise from this legislation that we feel can be quite precisely estimated. There is, at long last, a clear precise demand for training of new employees coming to work in the mines. This has been one of the great failures, as I see it, in the preparation of workers for their jobs in a very hazardous industry, preparation that will contribute to a safer work place. We do have a clear demand for training--as a matter of fact, 40 hours for new underground miners, 24 hours for surface miners, and 8 hours of annual retraining for experienced miners. This is one of the large figures that went into the total estimate of new cost to industry.

> We estimated it this way: With training at $75 a day, for the annual retraining of 478,000 miners for 1 day, that multiplies out to $35,875,000.
>
> I mentioned the new surface miners. There is a demand that they be trained. The training of 15,000 new surface miners at 3 days will total $3.375 million.
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> Training 10,000 new underground miners--this is the 40-hour training provision. That is 5 days. It comes to $3.750 million. The total for this training will be $43 million.

123 CONG.REC.S. 10219 (daily ed. June 20, 1977).

The legislative history of section 105(c) shows that the anti-discrimination provisions apply to the training provisions. The Senate Report states in this respect:

> The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions of section * * * [115] or the enforcement of those provisions under section * * * [104(g)]. Leg.Hist. at 624.

The Act and the legislative history do not specifically address the situation of the laid off miner. The operator's position is, therefore, plain and simple. Its responsibility for training under the policy in effect at the pertinent time ran only to those individuals who were actually performing work for it. The operator asserts that it had the right to hire (or rehire) individuals who had the requisite training over those who did not. The union and the Secretary argue, however, that based upon certain rights accorded laid off miners under the National Bituminous Coal Wage Agreement of 1981, those who would have been recalled but were instead bypassed because they did not have the training required by the Act and regulations, fall within the scope of sections 115 and 105(c).

As set forth above, Article XVII(d) of the Agreement establishes recall panels for laid off miners from which they are to be returned to employment on the basis of seniority. "Seniority" is defined in section (a) of Article XVII as length of service and the ability to step into and perform the work of the job at the time the job is awarded. In addition, section (f) of Article XVII provides that employees on layoff status continue to accrue seniority while

they are on the recall panel. Section (c) of Article XIV includes periods of layoff as part of one's continuous employment with a particular employer.

I adhere to the view that it is not the principal province of the Administrative Law Judges of this Commission to interpret provisions of the collective bargaining agreement. However, I also believe that the status and rights of individuals under the Mine Safety Act must not be viewed in a vacuum when to do so would stand the Act on its head by perversely transforming its protections into unforeseen and crippling liabilities.

The three named complainants in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D were reached on recall panels for jobs to which they were entitled and which they would have been given but for the training requirements of the Act and regulations. As appears from the legislative history quoted supra, because of the hazardous nature of mining which over the years had caused a series of appalling disasters, Congress enacted the training provisions of section 115 to protect miners by making sure that operators adequately trained them. However, under Peabody's policy which is at issue here, the effect of the training requirements on laid off miners would not be to help and protect but rather to hurt and harm.

The record in the instant cases contains several decisions rendered by arbitrators in grievance proceedings brought under the 1981 Agreement by laid off miners who had been denied jobs because they lacked the required Federal training. The arbitrators denied the grievances, reasoning that the complaining miners did not have the ability to step in and perform the jobs as required by the 1981 Agreement because they were not adequately trained in accordance with the Mine Act. In response to the miners' assertion that under the Act the operator should have provided the training, the arbitrators held that it was not up to them to interpret the Federal law. Thus, the very training provisions designed to protect miners became the reason for their continued unemployment under the collective bargaining agreement. If in interpreting the Mine Act, I now were to ignore the status and rights given laid off miners under the collective bargaining agreement, they would end up in a legal "no-man's-land" between the two. I will not adopt such an unfair and unrealistic approach.

Accordingly, I conclude that in interpreting the Act in these cases, account must be taken of the provisions of the collective bargaining agreement insofar as they affect the

status of laid off miners. As set forth above, the collective bargaining agreement gives the laid off miner several very important rights, including placement on a recall panel, the right to opt for certain jobs, and the right to invoke the grievance procedure. Also, accrual of seniority continues as does continuous employment with one employer. I have considered arbitration decisions which are in conflict over whether the employment relationship continues or is severed in the lay off situation. I do not find them particularly useful or instructive and in any event, I believe that the instant cases should be decided in light of the purposes and goals of the Mine Act. I conclude that the laid off miner is certainly in a position far different and more advantageous than just anyone seeking employment in the mines. Moreover, some of the laid off miners' rights such as accrual of seniority and computation of continuous employment with one employer go beyond giving preference in applying for a job. The laid off miner clearly is more than just a preferred job applicant. I conclude that the rights accorded a laid off miner under the collective bargaining agreement contain indicia of an ongoing employment relationship sufficient for him to be considered a miner within the purview of sections 115 and 105(c) of the Act. I have not overlooked the definition of "miner" in section 3(g) of the Act. In view of the pertinent provisions of the collective bargaining agreement and the overriding purposes of the training provisions of the Act, I conclude that for present purposes, the laid off miner must be considered an individual working in a coal mine. That is where he would be if not for an interruption caused through no fault of his own.

I have, of course, considered the decision of the Commission in Secretary of Labor v. Emery Mining Corporation, 5 FMSHRC 1391 (1983) which has been discussed and analyzed at length by the parties. That decision which the Commission itself confined to the facts presented, is distinguishable from these cases because it involved miners who were "strangers" in that they had no previous relationship with the industry or the employer.

To the extent that the conclusions expressed herein may be inconsistent with the Judge's decision in United Mine Workers of America, etc. v. Peabody Coal Company, 4 FMSHRC 1338 (1982), I decline to follow it.

Accordingly, I conclude that the operator discriminated against the named Complainants in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D, by violating their statutory rights regarding training. These Complainants must now be given the jobs they originally would have been given (or comparable jobs) and must be awarded appropriate damages.

In LAKE 82-69-D, the Secretary declined to file a motion for temporary reinstatement on behalf of Mr. Williams. In light of the finding for Mr. Williams on the merits, this issue now becomes moot; but as the analysis already set forth makes clear, the Secretary should have sought temporary reinstatement and erred in not doing so.

As set forth above in the discussion regarding class actions, no valid complaint has been made out with respect to Category III Complainants. However, in order that this matter be as comprehensively handled as possible for the benefit of the Commission, I deem it appropriate to express my views on the merits regarding Category III. Category III like Category II is composed of laid off individuals. There is, however, a difference which is crucial for present purposes. The Category II people have been reached on the recall panel and the Category III people have not. The rights given under the collective bargaining agreement and the Act regarding rehiring and training actually exist with respect to Category II, but are merely inchoate for Category III. As set forth herein, the right to a job cannot be denied for a lack of training, but the right to a job itself is predicated upon being reached on the recall panel. If there is no right to a job, there is no right to training. Whether an individual will be reached on a recall panel depends upon a multiplicity of unpredictable factors, including the state of the coal industry and the well-being of the entire economy. Indeed, an individual may never be reached. Under the circumstances, the right to training which depends on being recalled is too speculative to be allowed for Category III individuals. Finally, since, as held herein, Category II persons are entitled to training, those in Category III are not in any way jeopardized since they will be entitled to the jobs and any necessary training when they are reached on the recall panel.

ORDER

It is Ordered that the complaint in KENT 82-103-D be Dismissed.

It is further Ordered that the complaints of discrimination in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D be Allowed.

It is further Ordered that the operator place the named Complainants in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D in the jobs they would have been given if they had not been bypassed, or in comparable jobs, together with all necessary training.

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It is further Ordered that on or before July 23, 1984, the parties submit a statement setting forth the amounts of agreed upon monetary relief for each of the named Complainants.

It is further Ordered that if agreement is not reached on monetary relief, the parties appear before me at 10:00 a.m., July 24, 1984, at 1730 K Street, N.W., Washington, DC 20006.

Finally, it is Ordered that on or before July 23, 1984, the Solicitor file petitions for the assessment of civil penalties in KENT 82-105-D, KENT 82-106-D, and LAKE 83-69-D.

Paul Merlin
Chief Administrative Law Judge