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SOL (MSHA) V. KITT ENERGY & UMWA
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF RONNIE D. BEAVERS, DONALD L. BROWNING, ROBERT L. CARPENTER, EVERETT D. CURTIS, LARRY L. EFAW, ROGER LEON ERWIN, CHARLES W. FOX, LESTER D. FREEMAN, LARRY F. HUFFMAN, HARRY EDWIN HURST, ROBERT HURST, GARY C. KNIGHT, LARRY LANTZ, DAVID R. MARTIN, MICHAEL L. MARRA, WILFORD MARSH, JR., DANNIE M. MAYLE, CHARLES W. McGEE, CHARLES F. MURRAY, WALTER F. MURRAY, LARRY NORRIS, CLARA Y. PHILLIPS, KENNETH D. SHOCKEY, RICHARD D. SNIDER, JESSE L. WARD, BEDFORD WILFONG, JR., COMPLAINANTS	DISCRIMINATION PROCEEDING Docket No. WEVA 85-73-D MORG CD 84-1 Kitt No. 1 Mine

v.

KITT ENERGY CORPORATION,
RESPONDENT

AND

UNITED MINE WORKERS OF
AMERICA,
INTERVENOR

DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
B.K. Taoras, Esq., Kitt Energy Corporation, Meadow Lands, Pennsylvania, for Respondent;
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Intervenor.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon stipulated facts for a ruling on Cross Motions for Summary Decision, filed pursuant to 29 C.F.R. 2700.64.

The issue presented is whether Kitt Energy Corporation (hereinafter referred to as "Kitt") violated section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act", 30 U.S.C. 815(c), when it laid-off the complainants, who were surface miners, notwithstanding their seniority and technical ability to perform the remaining underground jobs available, solely because they required additional training under 30 C.F.R. Part 48 before they could perform those underground jobs for which they were otherwise qualified and entitled to.

At the time of the layoffs herein, Kitt was a party to the National Bituminous Coal Wage Agreement of 1981 (the "Agreement"). The Agreement provides in relevant part that in the case of a reduction in work force, "[e]mployees with the greatest seniority at the mine shall be retained provided that they have the ability to perform available work." However, section 115 of the Act, 30 U.S.C. 825, and 30 C.F.R. Part 48 (the "Regulations") prescribe certain training which miners must receive before they can perform underground mining jobs.

Kitt took the position that although these complainants could have become qualified by receiving the appropriate training, the fact was that they did not have the qualifications to step in and perform the work at the time and, therefore, less senior employees who had the requisite training were given those positions. It is not disputed that had the terms of the Agreement been applied without regard to the federal training requirements, the complainants would not have been laid off.

The complainants contend that Kitt violated the Act when it discriminated among its employees on the basis of their need for statutorily mandated training. They contend that it was Kitt's responsibility to provide the training required by the Act and the Regulations and that by distinguishing between miners on the basis of their need to receive mandatory training thereby discriminated against those miners who were laid off solely as a result of the application of the training requirements.

STATUTORY AND REGULATORY PROVISIONS

Section 115(a) and (b) of the Act provide as follows:

> (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 program 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 -
>
> (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, 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.

Section 3(g) of the Act provides:

For the purpose of this Act, the term -

* * *

"miner" means any individual working in a coal or other mine . . . .

30 C.F.R. 48.2 provides in pertinent part:

48.2 Definitions

For the purposes of this Subpart A -

* * *

(b) "Experienced miner" means a person who is employed as an underground miner . . . on the effective date of these rules; or a person who has received training acceptable to MSHA from an appropriate State agency within the preceding 12

months; or a person who has had at least 12 months experience working in an underground mine during the preceding 3 years; or a person who has received the training for a new miner within the preceding 12 months as prescribed in 48.5 (Training of new miners) of this Sub part A.

(c) "New miner" means a miner who is not an experienced miner.

STIPULATIONS

I accept the following stipulations of the parties and find same as the facts upon which this decision is based.

1. Complainants were employed as surface or underground miners by Kitt Energy Corporation at the Kitt Mine until their layoffs on either August 29, 1983, or September 6, 1983, as indicated for each complainant in Exhibit "C".

2. Respondent, Kitt Energy Corporation, is the owner and operator of the Kitt Mine at Philippi, West Virginia, an underground coal mine having Federal Mine I.D. No. 46Ä04168.

3. The parties hereto and the Kitt Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. The United Mine Workers of America (UMWA) is the collective bargaining representative for certain employees at the Kitt Mine and is a representative of miners for the complainants for purposes of the Federal Mine Safety and Health Act of 1977 and this proceeding.

5. At all times relevant to this proceeding, the UMWA and Kitt Energy Corporation were parties to the National Bituminous Coal Wage Agreement of 1981.

6. On or about August 25, 1983, Mr. Donald Jones of Kitt Energy Corporation contacted MSHA for information regarding when a miner is considered "experienced" under MSHA's training regulations, located at 30 C.F.R. 48.1 et seq. He was advised that the designation of "experienced underground miner" or "experienced surface miner" could be obtained by working at least 12 of the preceding 36 months in underground or surface positions respectively, or by receiving the appropriate training under 30 C.F.R. 48.1 et seq. The MSHA representative did not mention

nor was he asked specifically about the "grandfathering" provisions of the regulations. MSHA's definition of the term "experienced miner" for purposes of underground work, is found at 30 C.F.R. 48.2(b). MSHA's definition of "experienced miner" for purposes of surface work, is found at 30 C.F.R. 48.22(b).

7. On August 29, 1983, mine management invoked a reduction and realignment of the work force pursuant to Article XVII of the Wage Agreement. The work force was reduced from 565 to 210, resulting in the layoff of 355 persons. This caused a reduction in the number of surface positions from 91 to 59.

8. In determining which employees would be retained in the available jobs, mine management was bound by the Wage Agreement and the realignment procedure of Article XVII. A criterion applied by mine management to Article XVII to determine qualifications (ability to step in and perform the work of the job at the time) was that a miner have the appropriate experienced miner designation. For qualification purposes, only "experienced underground miners" were considered able to step in and perform the work of the underground positions at the time and only "experienced surface miners" were considered able to step in and perform the work of surface positions. The terms "experienced surface miners" and "experienced underground miners" were given the same meanings as defined in 30 C.F.R. 48.22(b) and 48.2(b), respectively.

9. Management's use of the appropriate "experienced miner" designation as mentioned in paragraph 5 to determine job qualification at Kitt Mine was held not in violation of the Wage Agreement by Arbitrator Roger C. Williams in a decision dated February 24, 1984.

10. The following complainants were among those who were laid off on August 29, 1983:

Jesse L. Ward	Harry Edwin Hurst
Robert Hurst	Larry Lantz
Larry Norris	Charles McGee

11. Prior to and at the time of the August 29 reduction and realignment of the work force, complainants, J. Ward, L. Lantz, and C. McGee, were working at surface positions at the Kitt Mine and were "experienced surface miners" as defined in 48.22(b). They were not "experienced underground miners" as that term is defined in 48.2(b).

12. Prior to and at the time of the August 29 reduction and realignment of the work force, complainants H. Hurst, R. Hurst, and L. Norris were working at surface positions at the Kitt Mine and were experienced surface miners within the meaning of 30 C.F.R. 48.22(b). They also happened to be experienced underground miners within the meaning of 30 C.F.R. 48.2(b) because of the grandfathering aspect of the provision. Nevertheless, they were laid off because of a lack of knowledge of the grandfathering provision in the training regulations.

13. On September 6, 1983, a second realignment occurred. The work force was reduced from 210 to 167 classified employees. Surface positions were reduced from 59 to 15 positions.

14. The same criteria to determine qualification for job placement were used as for the August 29 realignment, however, the "grandfathering" misunderstanding had been resolved and those who were "grandfathered" were treated as experienced miners.

15. On September 6, 1983, the following complainants, who had been working at surface positions at the Kitt Mine and who were "experienced surface miners" as defined in 48.22(b), were laid off because there was an insufficient number of job openings in surface occupations, and they did not have the ability to step in and perform underground work because they were not "experienced underground miners" within the meaning of 30 C.F.R. 48.2(b)

Huffman	Marra	Fox
Wilfong	Erwin	Beavers
Shockey	Curtiss	Freeman
Marsh	Carpenter	Browning
Martin	Mayle	Snider
W. Murray	Efaw	Phillips
G. Knight	C. Murray	

16. Had management, on August 29, 1983, and September 6, 1983, applied the terms of the collective bargaining agreement, without regard to the application of 30 C.F.R. 48, the complainants would not have been laid off and would have been placed in the remaining jobs according to Article XVII of the Wage Agreement.

17. The complainants had the technical ability to perform the jobs that were available at the Kitt Mine after the reduction and realignment of the work force that occurred on August 29 and September 6, 1983.

18. But for the complainants not being "experienced underground miners" as defined in 48.2(b), they would not have been laid off on either August 29 or September 6, 1983.

19. Although the complainants were not considered "experienced underground miners" under MSHA's regulations, each complainant except Efaw had worked underground at the Kitt Mine prior to taking a surface job. Mr. Efaw had no underground employment with Kitt Energy prior to October 1983, but had underground experience elsewhere.

20. Exhibit "C" contains information pertinent to each complainant: name; employee number; seniority date and number; date laid off and the number of days of work missed; job title prior to layoff; recall date; job title upon recall and classification rate; amount of training received and experienced miner designation.

21. All the complainants would have been retained in jobs had they been experienced underground miners within the meaning of 30 C.F.R. 48.2(b).

22. On or about September 7, 1983, MSHA advised Kitt that the layoff procedure conflicted with MSHA's training requirements and those employees who were laid off because of training would have to be recalled even if it meant "bumping" less senior employees who had been retained. No citations were issued. Mine management disagreed with MSHA's position; however, management did as MSHA requested in order to limit the exposure to potential penalties and damages.

23. On September 13, 1983, complainant, R. Beavers, was recalled to an outside position. He started work that day without any further training.

24. On September 14, 1983, Kitt recalled the complainants and gave them the training required to satisfy the "experienced" designation within the meaning of 30 C.F.R. 48.2(b).

25. All training was provided by Kitt. All employees were paid for time spent in training at the rate for the job to which recalled.

DISCUSSION AND FINDINGS

The facts in this case are not in dispute. The law in this area, however, is just now evolving. Three cases, in particular, are important to an analysis of the issue herein.

The first of these is Secretary of Labor, on behalf of Bennett, et al. v. Emery Mining Corp., 5 FMSHRC 1391 (1983), enforcement denied sub nom. Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155 (10th Cir.1986). This case arose as a result of a change in the hiring policy at the Emery Mining Corporation. Under the new policy, effective January 1, 1980, Emery required completion of 32 of the 40 hours of safety training for underground miners mandated by section 115(a) of the Act as a pre-condition of employment.(FOOTNOTE 1) Furthermore, Emery did not reimburse those individuals who were eventually hired as miners either for the cost of the training or pay wages for the hours spent in obtaining it.

As a result, the Secretary filed a complaint of discrimination with the Commission against Emery on behalf of twelve Emery employees, each of whom had been hired after January 1, 1980, and each of whom had personally paid for their own training prior to being employed by Emery as a miner. The Commission administrative law judge found that Emery's policy of requiring job applicants to obtain the 32 hours of miner training at their own expense as a pre-condition for employment interferred with their right to receive such training because the Act places the responsibility for miner's training on the operator, and therefore discriminated against them in violation of section 105(c) of the Act. The Commission affirmed the judge's finding that Emery violated the Act by refusing to reimburse the complainants after they were hired for wages for the time spent in training and the cost of their training. However, the Commission disagreed with the judge's conclusion that Emery's policy of requiring the training as a pre-condition of employment violated the Act. In so holding, the Commission stated that although once hired, these complainants became new miners under the Act and entitled to the rights contained in sections 115(a) and (b), nothing in that section dictates whom an operator should hire. An employer has the right to choose its own employees.

On appeal from the order of the Commission, Emery contended that the Act requires compensation only for those individuals who receive training while they are miners and not those who receive that training prior to becoming miners. The United States Court of Appeals for the Tenth Circuit denied enforcement of the Commission's order holding that "because the complainants were not miners as defined by the Act, they are not entitled to compensation for the 32 hours of training they voluntarily undertook, "lost wages,' and other expenses incurred in completing the training program." Emery, 783 F.2d at 158.

The court also held that "the Commission properly found that Emery's pre-employment policy of requiring 32 hours of training did not violate the Act." Emery, 783 F.2d at 159.

The next cases concerning a similar issue to be decided by the Commission were both handed down on September 30, 1985, while their decision in Emery, supra, was still pending in the Tenth Circuit. United Mine Workers of America on behalf of Rowe, et al. v. Peabody Coal Co., 7 FMSHRC 1357 (1985), appeal docketed sub nom. UMWA on behalf of Rowe, et al. v. FMSHRC, Nos. 85Ä1714, et al. (D.C.Cir. Oct. 1985); and Secretary of Labor on behalf of Acton, et al. v. Jim Walter Resources, Inc., 7 FMSHRC 1348 (1985), appeal docketed sub nom. Secretary of Labor on behalf of Acton, et al. v. Jim Walter Resources, Inc. and FMSHRC, No. 86Ä1002 (D.C.Cir. Jan. 1986). In both of these cases, the issue presented for decision was whether an operator violated section 105(c) of the Act when it bypassed for rehire a laid-off individual because that person lacked the health and safety training specified in section 115 of the Act and 30 C.F.R. Part 48.

In the Peabody case, the Commission's chief administrative law judge found that laid-off miners were "miners" within the meaning of the Act and that therefore it was Peabody's responsibility to provide the training required by section 115 and Part 48 after rehire and that by denying recall because they were not trained, Peabody violated section 105(c)(1) of the Act. Because the Act does not specifically address the issue of the laid-off miner, the judge looked to the parties' collective bargaining agreement and concluded:

> [T]he 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 section 115 and 105(c) of the Act.

6 FMSHRC at 1648.

The Commission disagreed and reversed. Consistent with their holding in Emery, they stated that section 115 does not dictate to operators whom they must recall any more than it dictates whom they must hire. That it is upon being rehired that laid-off miners once again become "miners" within the meaning of the Act and at that point again become entitled to the rights granted by section 115. Therefore, since there was no statutory right to training

for those persons in a layoff status, Peabody's policy requiring them to obtain training prior to rehire does not violate section 105(c) of the Act.

In reaching this conclusion, the Commission went on to add that:

> [T]he Mine Act is not an employment statute. The Act's concerns are the health and the safety of the nation's miners. Those individuals employed at a mine are to be trained before they begin work so that once they begin work accidents are less likely to occur.

7 FMSHRC at 1364.

The facts of the Jim Walter case are very similar to Peabody, i.e., the alleged discrimination occurred when the operator recalled laid-off miners who had terms of company service shorter than the complainants, but who, unlike the complainants, had completed the underground safety training required by section 115 of the Act. The administrative law judge in Jim Walter held that the operator did not violate section 105(c) of the Act by requiring laid-off individuals to obtain the training as a condition of recall, holding that it was "immaterial whether the affected applicants for employment are strangers to the industry and the employer, as in the Emery case, or are former employees awaiting . . . recall . . . . " 6 FMSHRC at 2453.

The Commission, consistent with their decisions in Peabody and Emery, affirmed.

Turning now to apply the facts of the instant case, as stipulated herein, to the existing law, it seems to me that several issues are now well settled by the decisions and do not require further analysis. Among these are that section 115 of the Act and Part 48 of the Regulations set forth certain mandatory training requirements for "miners", and it is the operator's responsibility to provide and pay for that training. Furthermore, section 105(c) prohibits denial of, or interference with, these training rights granted to "miners" by section 115.

The complainants herein were "miners" who were laid-off from surface mining positions as a result of the operator reducing and realigning its work force. At the time of the layoffs, the Agreement provided that more senior employees whose positions were eliminated could bump less senior employees, if the more senior employee had the ability to step in and perform the work of that job at the

time. These complainants had a greater length of service with the company than some of the employees who were retained, but although they had each spent some time previously as underground miners, they had spent the last few years in surface mining positions. The remaining available jobs and those that are at issue in this case, however, were all underground jobs and thus these individuals would have had to be provided with the mandated safety and health training before they could perform those jobs, or have otherwise been designated "experienced underground miners" by the grandfathering provision of the Regulations.

The operator maintains that "the ability to step in and perform the job at the time" means that the miners in question in this case must have been "experienced underground miners" as defined in 30 C.F.R. 48.2(b). As a practical matter, these complainants could have become qualified by receiving the appropriate training and therefore their layoff resulted solely from the fact that they lacked this training. In fact, three of the complainants herein, Harry Hurst, Robert Hurst, and Larry Norris, did not even require the new miner training as they were "experienced underground miners" by virtue of the grandfathering provision contained in 30 C.F.R. 48.2(b), but were laid-off anyway because the operator mistakenly believed they did.

Complainants herein contend that their layoff violated section 105(c) of the Act because it interfered with their statutory right, under section 115, to be provided whatever safety and health training they needed at operator expense. They claim that the operator discriminated against them by distinguishing between its employees ("miners") on the basis of their need to receive mandatory training under the Act.

The operator relies on the Tenth Circuit decision in Emery and the Commission decisions in Peabody and Jim Walter for support for its interpretation of sections 115 and 105 of the Act. However, those cases involved applicants for employment, "strangers" to the industry and the employer (Emery), or laid-off employees (Peabody and Jim Walter). In my opinion the instant case is distinguishable from those because this case involves "miners" who were on "active duty" so to speak at the time the conduct complained of occurred. The complainants in the aforementioned cases were unemployed, at least initially, for reasons totally unrelated to the training requirements of the Act, albeit those requirements were the reason the operators did not hire or rehire them. Whereas, herein the lack of the required training was the precipitating cause of the complainants' unemployment.

The fact that all the employees of Kitt who were considered for the layoff were "miners" within the meaning of the Act at the time the operator picked and chose among them based on the federal training requirements is a critical distinction and is decisive in this case. As "miners", the complainants herein were entitled to be provided whatever training was required under section 115. By laying off these complainants rather than providing the required training, the operator interfered with their statutory right to training under section 115. The insistence of the complainants on their right to be provided this training by the operator of the mine where they work is activity protected by the Act. Therefore, I find that the operator discriminated against the complainants by violating their statutory rights regarding training, as alleged.

Kitt is apparently attempting to use the Agreement's definition of seniority (FOOTNOTE 2) to justify its actions against these complainants. While it is plainly not the function of this Commission to interpret that Agreement, I note that even if their interpretation of the contract is correct, if it conflicts with the statutory requirements of the Mine Safety Act, it is the Act that must prevail. The complainants possess rights which are accorded under section 115 of the Mine Act and which are protected under section 105(c) of that Act, irrespective and independently of any rights they may or may not have under the terms of their labor contract. The Agreement is only significant in this case to the extent that it is undisputed that by its terms, the complainants herein would not have been laid-off, but for their lack of health and safety training.

Finally with regard to the three miners, Harry Hurst, Robert Hurst, and Larry Norris, who were mistakenly treated as inexperienced miners and laid off, the operator urges that they have no claim at all under the Act. I disagree. Although unlike the other complainants herein, they did not in fact require new miner training, the operator laid them off based solely on the mistaken belief that they did. Therefore, I conclude that the operator discriminated against them on the basis of their perceived lack of federally mandated training and I find that likewise impermissible and a violation of section 105(c) of the Act. The fact that the operator was mistaken did not change the

consequences suffered by the three miners. As the Commission has stated in an earlier discrimination case "[a]n equally important consideration is that an affected miner suffers as much by mistake as he would if he were discriminated against because he had actually engaged in protected activity. We conclude that discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)". Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1480 (1982).

Having considered the arguments of all the parties herein on the stipulated facts, I conclude that an order should be entered in favor of all the complainants granting the relief they seek.

ORDER

It is ORDERED that the complaint of discrimination be ALLOWED.

It is FURTHER ORDERED that the parties, by counsel, communicate for the purpose of stipulating the amounts of monetary relief due each of the named complainants, as well as attorney fees that may be awarded to counsel for Intervenor and file such stipulation with me on or before October 20, 1986.

It is FURTHER ORDERED that if agreement cannot be reached on monetary relief or attorney fees, the parties notify me of the same on or before October 20, 1986.

Finally, I note that the Act provides that any violation of the discrimination section shall be subject to the provisions of section 108 and 110(a). Therefore, it is FURTHER ORDERED that on or before October 20, 1986, the respondent pay a civil penalty of $1,000 for violating section 105(c) of the Act.

Roy J. Maurer
Administrative Law Judge

1 Emery supplied the 8 hours of mine-specific training required by section 115(a)(5) and 30 C.F.R. 48.5.

2 The collective bargaining agreement defines the term seniority as "length of time in service" and "the ability to step into and perform the work of the job at the time the job is awarded."