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SOL (MSHA) V. CANNELTON
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, ON BEHALF OF
JOHN W. BUSHNELL,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 85-273-D
HOPE CD 85-1

Pocahontas # 3 and #4 Mines

v.

CANNELTON INDUSTRIES, INC.,
RESPONDENT

DECISION

Appearances: Jonathan M. Kronheim, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington,
VA, for Complainant;
Larry W. Blalock, Esq., and Michael J. Bommarito,
Esq., Jackson, Kelly, Holt & O'Farrell, Charleston,
WV, for Respondent.

Before: Judge Fauver

This action was brought by the Secretary of Labor under 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et. seq., to recover lost pay alleged to be due John W. Bushnell for reduction of his pay rate after a transfer while he was a Part 90 employee. The Secretary also seeks a civil penalty for the alleged violation of that section.

On July 17, 1986, the parties' motion to submit this case on a stipulated record and briefs without a hearing was granted.

On September 23, 1986, after receipt of the parties' briefs, my secretary called the attorneys for the parties and asked the following question at my request:

Please see if you can stipulate whether or not Mr. John Bushnell, at any time after notice of his Part 90 status in 1972 and before September 17, 1984, was transferred as a result of exposure to respirable dust.

The attorneys' reply is a letter from counsel for Respondent dated September 29, 1986, in which counsel states that

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counsel for the Secretary stipulates to the facts stated in the letter. Accordingly, that letter is incorporated as a stipulation in the record.

FINDINGS OF FACT

The pertinent facts are set forth in stipulations submitted by the parties on July 15, 1986, and September 29, 1986. In brief, John W. Bushnell was an employee of the Respondent for approximately 17 years. Respondent was informed of Mr. Bushnell's Part 90 status in 1972. He transferred to a less dusty job in January 1980, by exercising his Part 90 rights. He remained a Part 90 miner at all times pertinent to this action. On September 16, 1984, Mr. Bushnell was employed as a dispatcher, earning \$113.28 for an eight hour shift. On September 17, 1984, Mr. Bushnell was transferred from his dispatcher position to that of general inside laborer, as a result of a realignment of the Respondent's work force due to economic conditions. Mr. Bushnell's occupation code was changed from code 365 to code 116 and his pay reduced to \$104.78 for an eight hour shift. Mr. Bushnell was laid off on October 1, 1984, for economic reasons. Mr. Bushnell suffered a loss of wages of \$161.14 as a result of the reduction of his pay rate in connection with his transfer from dispatcher to general inside laborer. The Secretary seeks to recover \$161.14 in lost pay plus interest thereon, and proposes a civil penalty in the range of \$100 to \$150 for Respondent's failure to maintain Mr. Bushnell's pay rate when he was transferred.

OPINION

The Secretary's regulations, at 30 CFR 90.103, provide in pertinent part that:

(b) Whenever a Part 90 miner is transferred, the operator shall compensate the miner at not less than the regular rate of pay received by that miner immediately before the transfer.

The regulations, at 30 CFR 90.2, define "transfer" as "any change in the occupation code of a Part 90 miner." Thus, whenever a Part 90 miner has a change in his occupation code, the regulation require that he be paid at not less than the regular rate of pay received prior to the change.

The preamble to 30 CFR 90.103, states that the Part 90 regulations were promulgated by the Secretary out of a concern that a large percentage of miners eligible for the Part 90 program were not participating. After receiving testimony and written comments, the Secretary attributed this lack of participation to significant economic sacrifices that

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miners were forced to make on entering the program. For this reason the Part 90 rules provided eligible miners with additional economic protection, including a guarantee against reduction in pay resulting from a transfer.(FOOTNOTE 1) The Secretary's reasoning demonstrates an intent to safeguard the health of Part 90 miners, consistent with their protection provided by the Act. The regulations are therefore reasonably related to the purposes of the Act and should be sustained as valid. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973); United Mine Workers v. Kleppe, 561 F2d 1258, 1263 (7th Cir.1977).

John Bushnell was an eligible Part 90 miner when his occupational code was changed without retention of the rate of pay he received prior to the change. Such action is contrary to the plain language of the regulation, which establishes a Part 90 miner's right to such pay retention, and constitutes interference with a protected right. It is therefore discriminatory pursuant to 105(c)(1) of the Act, in the same manner that failure to compensate a Part 90 miner at his previous rate after a transfer to a less dusty environment would be discriminatory.(FOOTNOTE 2)

I therefore hold that John W. Bushnell was unlawfully discriminated against by Respondent for engaging in the exercise of rights protected by 105(c)(1) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall pay to John W. Bushnell \$161.14 in lost wages resulting from the cut in pay that occurred because of his transfer. Interest shall be added to the back pay retroactively and shall accrue until the date of payment. The interest shall be computed in accordance with the Commission's rulings concerning interest. Payment shall be made within 30 days of this Order.

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2. Respondent is ASSESSED a civil penalty of \$25 for the violation found above, and shall pay such penalty within 30 days of the date of this Order.

William Fauver
Administrative Law Judge

1 See 30 CFR 90.12, 90.103 and 45 Fed.Reg. 80761, 80763, 80766 (1980).

2 The rights of Part 90 miners are specifically designated for protection under 105(c)(1) of the Act. "No person shall . . . interfere with the exercise of the statutory rights of a miner . . . because such miner . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101" 30 U.S.C. 815(c)(1).