

CCASE:
CHARLES ROSE V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CHARLES F. ROSE,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

Docket No. WEVA 86-379-D

MORG CD 86-11

Pursglove No. 15 Mine

DECISION

Appearances: William R. Nalitz, Esq., Waynesburg, Pennsylvania,
for Complainant;
Michael R. Peelish, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me on the complaint of Charles F. Rose against Consolidation Coal Company filed on April 9, 1986 alleging discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq., hereinafter referred to as "Act"). On June 13, 1986, the Secretary advised Complainant that it had determined that a violation of Section 105(c) did not occur. Rose filed his complaint with the Commission on July 14, 1986. Pursuant to notice, the case was scheduled for October 23, 1986, in Washington, Pennsylvania. At the hearing, the Complainant, who was unrepresented, requested that the case to be adjourned so that he might obtain legal representation. This motion was granted and pursuant to notice the case was heard on November 3, 1986, in Washington, Pennsylvania. Paskel Lee Eddy and Charles F. Rose testified on behalf of Complainant, and James A. Simpson testified on behalf of Respondent.

Complainant and Respondent filed posthearing briefs on December 8 and December 5, respectively. Reply briefs were to have been exchanged ten days later but none were filed.

Findings of Fact

1. The Complainant, Charles F. Rose, is an employee of Respondent, Consolidation Coal Company, at the Respondent's Pursglove No. 15 Mine.

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2. Complainant's regular job classification is general inside labor.

3. Under the terms of the National Bituminous Coal Wage Agreement of 1984 Complainant is to work an 8 hour day including 30 minutes for lunch.

4. It has been the custom for many years at Respondent's mine that the lunch break has been taken between third and fifth hour of employment (11 a.m to 1 p.m).

5. It has been customary practice for at least 2 years, prior to March 1986, that the union representative (hereinafter called "walk-around") accompanying a Federal Mine Inspector on a inspection of Respondent's subsurface mine, have his half hour lunch at the conclusion of the inspection after the inspector leaves (Tr. 33, 38, 45-46, 65-66).

6. In March 1986, Respondent made a management decision, as a result of a reduction in work force, that the "walk-around" should eat his dinner between the 3rd and 5th hour, and that upon completion of the inspection the "walk-around" was to return to work.

7. On March 19, 1986, Complainant served as a "walk-around" accompanying a Federal Mine Inspector on his regular inspection of Respondent's Pursglove No. 15 Mine. He received pay for 8 hours.

8. At approximately 3:15 p.m. on March 19, 1986, after the Complainant completed his "walk-around" duties and the inspector left, Clyde Owens, Respondent's Safety Director, informed the Complainant that James A. Simpson, Superintendent, told him to tell the Complainant to go right to work without a break for lunch.

9. Simpson testified, in essence, that during an inspection underground there are delays waiting for certain activities to occur or waiting for transportation (Tr. 75, 79). This was confirmed by Complainant (Tr. 87). Simpson also said in essence that company personnel accompanying a federal mine inspection eat during a break in the inspection when they can sit down, or they grab a sandwich "on the run". However, Simpson also said that the delays are not predictable, and do not occur at regular intervals. Both Complainant and Eddy testified as to the difficulties a "walk-around" would encounter if one would start to eat during a transportation delay (Tr. 47, 87). Also Eddy testified that normally during an inspection one would not have a half hour to eat (Tr. 47). Complainant testified that normally, in essence, a delay due to switching or "whatever" was 5 to 10 minutes at the most and not a half hour (Tr. 87). Accordingly, inasmuch as Eddy and Complainant were actually involved as

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"walk-arounds" and thus had personal knowledge of the conditions during such inspection, I credit more weight to their testimony. Therefore, I find that it is not possible for a "walk-around" to have a continuous half hour lunch while engaged as a "walk-around" underground.

10. Simpson testified that after the inspector and the "walk-around" finish the inspection and return to the surface they may have a sandwich. However, he said that from the time they exit the mine until the time they start discussing the inspection from 15 minutes to a half hour elapses. During this time they also have to remove the clothes and equipment they wore in the mine. Accordingly, I find that there is not a continuous half hour period after the inspection for a "walk-around" to eat lunch prior to discussing the inspection.

Issues

The general issue in this case is whether Consolidation Coal Company discriminated against Rose in violation of Section 105(c) of the Act and, if so, what is the appropriate relief to be awarded Rose and what are the appropriate civil penalties to be assessed against Consolidation for such discrimination.

The specific issue is whether Respondent, by denying Complainant half hour for lunch upon completion of his "walk-around" activity beyond the usual time period for lunch, caused the Complainant to suffer a "loss of pay" during the period of his "walk-around".

Laws

Section 105(c)(1) of the Act provides, in essence, in part, that no person shall in any manner discriminate against, or cause discrimination against, or otherwise interfere with the exercise of the statutory rights of any miner or representative of miners because of the exercise by such miner of any statutory right afforded by the Act. In essence, Section 103(f) of the Act, provides that an authorized representative of miners, such as Rose, is entitled to accompany a MSHA inspector in the course of his inspection and that "such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." (Emphasis added.).

Discussion

Respondent in essence argues that the Complainant was not under the control of the mine management during the "walk-around", and thus the latter did not cause the Complainant to suffer a loss of lunch during the "walk-around". Respondent in this

connection presented testimony that it did not tell Complainant he could not eat lunch during a "walk-around". Also, Respondent argues that Complainant was paid his full wages for the day of the "walk-around", and thus suffered no "loss of pay".

Complainant argues that in essence deprivation by Respondent of a "walk-around's" right to eat lunch for a continuous period of half hour after a "walk-around" is violative of Section 103(b) of the Act. For reasons that follow I agree.

There is not any legislative history of the Act containing any discussion of the specific issue presented here. However, it appears that in general Congress intended a broad construction to be placed on the phrase "shall suffer no loss of pay" (Section 103(f), supra.) In this connection, it is noted that the Senate Report accompanying S. 717, (S. Rept No. 181, supra, at 28-29, Leg.Hist. at 616-617), provides with regard to the intent behind Section 103 that "to encourage such miner participation it is the Committees intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with purpose of the Act and would unfairly penalize the miner for assisting the inspector performing his duties". (Emphasis added).

Furthermore, similarly, the courts, based upon the legislative history, have placed a broad interpretation on the rights granted by Section 103(f), supra. Thus, in *United Mine Workers of America, etc. v. Federal Mine Safety and Health Commission*, 671 F.2d 615 (D.C.Cir.1982), the Court was faced with the issue as to whether under Section 103(f), supra, a miner has the right to pay when accompanying an inspector on a "spot" inspection. The court held that, pursuant to Section 103(f), supra, a miner shall not suffer any loss of pay while accompanying an inspector on a "spot" inspection as well as a regular inspection. In its decision, the Court reviewed the legislative history of Section 103(f), supra, and noted that it was the express intention of the Senate Committee on Human Resources, as contained in the Report on S.717 (S. Rept No. 181, 95th Cong. 1st Sess 28-29 (1977)), as reprinted in *Legislative History of the Federal Mine Safety and Health Act at 616-617* "that a Miner participating in a "walk-around" inspection receive "full compensation." (671 F.2d, supra at 625). The Court further opined that both miner participation and full compensation were considered by the committee to constitute important tools in the effort to increase miners' awareness of the hazards they face and the measures they can take to achieve a safe and healthy working environment. (671 F.2d, supra, at 625).

Further, the Court in *United Mine Workers*, supra, at 625 related that Senator Helms had introduced an amendment to S.717,

the Senate version of the Act, that would have stricken any reference to a miner being paid while accompanying an inspector on an inspection. (See Leg.Hist., supra). The Court, (671 F.2d, supra at 625), noted however that Senator Javits successfully opposed the amendment, giving, among others, the following reasons:

First, greater miner participation in health and safety matters, we believe is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner who is not in business for himself, should do this if his activities remain uncompensated.

* * * * *

But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.

In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper.

Essentially, the same legislative history was cited with approval in *Monterery Coal Company v. Federal Mine Safety and Health Review Commission* 743 F.2d 589 (7th Cir.1984), in which the court also held that Section 103(f) of the Act requires that a miner should be paid by an operator where the former participates in a "spot" inspection. (See also *Consolidated Coal Company v. Federal Mine Safety and Health Review Commission*, 740 F.2d 271 (3rd Cir.1984).

Similarly, in *Magma Copper Company v. Secretary of Labor* (645 F.2d 694 (9th Cir.1981, cert. denied 454 U.S. 94), the Court held that where several inspectors are present, it is within purview of Section 103(f), supra that one representative of the miners may accompany each inspector without loss of pay. In reaching this conclusion, the Court, at 698, cited with approval the legislative history of the Act, as set forth, in the Senate Report 95-81, (reprinted in Legislative History at 623,) to the effect that if the Mine Safety and Health Program is to be truly effective miners will have to play an active part in the enforcement of the Act.

Also, the Commission's Judges, have, on occasion, provided a broad interpretation to Section 103(f), supra, so as not to discourage participation in "walk-around" inspections which would be contrary to the clear intent of Congress. Thus, in Secretary of Labor, Mine Safety and Health Administration, on behalf of Timothy P. Scott v. Consolidation Coal Company, 2 FMSHRC 1056, the miner was paid on the basis of a grade three rate scraper operator for the time spent in "walk-around" activities. On the day of the inspection, the miner was told that he was to perform removal work, at higher level of pay, (grade five). However the miner began his "walk-around" prior to the actual commencement of such work. Judge Melick found that the miner must be compensated in a amount equivalent to grade five rate pay so as not to be unfairly penalized in performing his "walk-around" duties as a representative of miners. In Secretary of Labor, Mine Safety and Health Administration v. Virginia Pocahontas, 3 FMSHRC 1493 (1981), former Commission Judge Steffey, held, in essence that the language of Section 103(f) supra requires that a miner, who accompanies an inspector on a shift other than his own regular shift, must be provided with work on that shift after the inspection is completed.

Thus from all the above it can be seen that Congress, in enacting Section 103(f), supra, clearly intended it to encourage "walk-arounds" and prohibit acts that would tend to discourage miners from participating in "walk-arounds". It is thus manifest that the broad intent behind Section 103(f), supra, would be thwarted by allowing any act which might have a tendency to discourage miners' participation in "walk-arounds". As such, it is concluded that Respondent's action herein violates Section 103(f), supra.

At the hearing and in a posthearing brief Complainant has requested that relief be extended to all occasions subject to March 19, 1986, when Complainant served as a "walk-around" and was denied by Respondent the opportunity to have lunch upon conclusion of the inspection. This relief has been opposed by Respondent. Inasmuch as Complainant has established that Respondent violated Section 103(f), supra on March 19, 1986, in the interest of justice, Complainant shall be allowed to establish if additional similar actions by Respondent have subsequently occurred. This will achieve the purpose of granting Complainant's full relief, (see Section 105(c)(3) of the Act). This should not unduly burden Respondent, as at the hearing on November 3, 1986, Respondent had the opportunity and did present its case, i.e., that its actions in not providing Complainant a lunch after a "walk-around" did not violate Section 103(f), supra. It would appear that the facts adduced by Respondent at the hearing would apply equally to all subsequent similar actions.

Conclusions of Law

Complainant and Respondent are subject to Section 105 of the Act, the latter as miner and the former as mine operator. I have jurisdiction to hear and decide this case. Respondent has violated Section 103(f) of the Act by not providing the Complainant with a continuous half hour for lunch upon the completion of his duties as a "walk-around."

Relief

It is ORDERED that:

(1) Respondent pay Complainant \$10.32 within 10 days of this decision.

(2) Respondent shall desist from not providing Complainant a continuous half hour for lunch upon completion of his "walk-around" duties.

(3) Respondent shall pay costs and expenses including attorneys fees reasonably incurred by Complainant in connection with the institution and prosecution of this proceeding.

(4) For each instance subject to March 19, 1986 until the date of this decision, Respondent shall pay Complainant, his usual rate of pay for each half hour of lunch time Respondent failed to provide Complainant upon completion of his duties as "walk-around".

(5) Counsel are directed to confer and attempt to agree on the amounts due under paragraphs 3 and 4 above, and if they can agree to submit a statement to me within 20 days of this decision. If they can not agree, Complainant shall within 30 days of this decision file a detailed statement of the amount claimed, and Respondent shall submit a reply thereto within 30 days thereafter. If there are significant and substantial issues of fact raised in these statements, a supplemental hearing might be held.

This decision shall not be final until I have issued a supplemental decision on the amounts due under paragraphs 3 and 4.

(6) Respondent shall post a copy of this decision on a bulletin board at the surface mine which is available to all employees and it shall remain there for a period of at least 60 days.

Avram Weisberger
Administrative Law Judge