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MSHA (ALESHIRE, ETC.) V. WESTMORELAND COAL AND UMWA
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FMSHRC-FCV
MAY 10, 1988

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
JERRY D. ALESHIRE,
ROY E. CHAMBERS,
CLYDE W. COLIN,
DENIS R. GILLIAM,
RICKY RAY ROE,
WILEY R. KENT,
JOHN E. NEWMAN,
Complainants
v.

WESTMORELAND COAL COMPANY,
Respondent
and
UNITED MINE WORKERS OF
AMERICA (UMWA),
Intervenor

DISCRIMINATION PROCEEDING

Docket No. WEVA 84-344-D

HOPE CD 84-6

Farrell No. 17 Mine

DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Complainants; F. Thomas Rubenstein, Esq., Big Stone Gap, Virginia, and Thomas C. Means, Esq., Crowell & Moring, Washington, D.C. for Respondent; Mary Lu Jordan, Esq., Washington, D.C., for Intervenor, United Mine Workers of America.

Before: Judge Broderick

STATEMENT OF THE CASE

On August 2, 1984, the Secretary of Labor (Secretary) brought this complaint under section 105(c) of the Federal Mine Safety and Health Act (Act) on behalf of seven 1/ miners who

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1/ The Secretary filed a motion on October 2, 1984, to remove the name Robert L. Harmon and add the name Ricky Ray Roe to the list of Complainants. The motion apparently has not been acted upon. I hereby grant the motion.

worked as surface miners in the subject mine until they were laid off on December 17, 1982. The matter was stayed after the answer was filed, pending decisions in the case of Emery Mining Co. v. Secretary of Labor in the 10th Circuit Court of Appeals, and in the case of Rowe v. Peabody Coal Company, before the Review Commission. The case was assigned to me on October 3, 1986. After the decisions in the Emery case and the Rowe v. Peabody case, this proceeding was further continued because the parties were attempting to stipulate as to the facts. On December 23, 1987, the parties filed Stipulations of Fact and submitted the case for decision as to the question of liability on the basis of the stipulations. The parties have agreed that if the issue of liability is decided in Complainants' favor, they would endeavor to stipulate on "the appropriate damages award."

The Secretary filed a Motion for Summary Decision and a Memorandum in Support of the Motion on February 29, 1988. Respondent filed a Cross-Motion for Summary Decision and a Memorandum in Support thereof on April 12, 1988.

FINDINGS OF FACT

I accept the stipulations as the facts in this case. I note that the briefs filed disagree as to the cause of the layoff in December 1982: the Secretary asserts that it resulted from a disaster at the mine necessitating indefinite cessation of mining. Respondent states that the layoff was the result of weak market conditions which caused the mine to be idled in December 1982, and that the disaster had occurred in November 1980. I do not consider that a resolution of this dispute is necessary for my decision in this case. Both of the parties state in their memoranda that Complainant Newman had been employed as an experienced underground miner on October 13, 1978, when 30 C.F.R. Part 48 became effective and was therefore "grandfathered" and did not need the training which he received to be eligible for recall to an underground position. These facts are not included in the stipulation, but I accept them as facts in the case.

Each of the Complainants was employed at the subject mine in surface positions for three or more years prior to December 17, 1982. Each had underground mining experience prior to working on the surface, but only Complainant Newman was working as an experienced underground miner on October 17, 1978. On December 17, 1982, Complainants were laid off from their surface mining positions. After the lay off, Respondent advised miners at a union meeting, attended by one or more of the Complainants, that they would require new miner underground training before they could work underground. Respondent suggested that to improve their chances for recall, "they would

be well-advised" to obtain such training on their own time and at their own expense.

In May and June 1983, Complainants obtained new miner underground training at the Boone County Career and Technical Center. The training was paid for by the County Board of Education except as to Newman and Gilliam, "each of whom claim they paid $20."

On October 21, 1983, Complainants were recalled to Respondents Hampton No. 3 Mine in underground positions. Under the governing labor contract, miners are entitled to be recalled in accordance with seniority, but seniority presumes the ability to perform the work of the awarded job, which includes having all necessary training. As of October 21, 1983, Complainants would have been eligible for recall to surface positions without additional training. Except for Newman, they would not have been eligible for recall to underground training as of October 21, 1983, had they not taken the underground training referred to above.

On December 21, 1983, Complainants filed a complaint with the Secretary alleging that Respondent discriminated against them by not providing or paying them for the underground training referred to above. They seek an order requiring Respondent to pay them for the 40 hours which they spent taking the underground training course.

ISSUES

1. Whether miners laid off from surface mining jobs who obtained training while on layoff at the mine operator's suggestion, which training is required for reemployment in underground jobs, are entitled to compensation from the mine operator for the time and expenses of such training after being recalled to underground jobs?

2. Whether a miner laid off from a surface mining job who obtained training at the mine operator's suggestion, which training he did not require for reemployment in an underground job, is entitled to compensation from the mine operator for the time and expenses of such training after being recalled to an underground job?

3. Whether the failure by a mine operator to reimburse miners for required safety training under section 115 of the Act is a violation of section 105(c) of the Act?

CONCLUSIONS OF LAW

STATUTORY OBLIGATION

Under section 115 of the Act, mine operators are required to have an approved health and safety training program, which, among other things, must provide that new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Section 115 requires also that such training shall be provided during normal working hours, and miners shall be paid at their normal rate of compensation while they take such training. New miners must be paid at their starting wage rate.

PART 48 REGULATIONS

Pursuant to the mandate of section 115, the Secretary promulgated training and retraining regulations effective October 13, 1978. 30 C.F.R. Part 48. Subpart A is concerned with underground miners. It defines a new miner as one not employed as an underground miner on the effective date of the rules, and who has not received training acceptable to MSHA from an appropriate State Agency, or in accordance with the requirements of $ 48.5, within the preceding 12 months, and who has not had at least 12 months experience working in an underground mine during the preceding three years.

Section 48.10 repeats the requirements of $ 115 of the Act that training be provided during normal working hours and that miners attending such training be paid at their normal rate of compensation, which is defined as the rate of pay they would have received had they been performing their normal work tasks. If the training is given at a location other than the normal place of work, miners shall be compensated for the additional costs, such as mileage, meals, and lodging incurred in attending the training sessions.

The term "miner" for the purposes of $$ 48.3 through 48.10 is defined as "any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods." The regulations do not refer to laid-off miners or to applicants for underground mine employment.

EMERY

In the case of Emery Mining Corporation, 5 FMSHRC 1391 (1983), the Review Commission held (1) the policy of requiring job applicants to have training as a qualification for employment

is not a per se violation of the Act; and (2) the refusal of the mine operator to reimburse newly hired miners for the time spent in training and costs of training, while relying on the training to fulfill the operator's obligations under section 115, is a violation of the Act. The 10th Circuit Court of Appeals reversed the Commission in the case of Emery Mining Corporation v. Secretary of Labor, 783 F.2d 155 (10th Cir. 1986). The Court held that because the applicants for employment were not miners as defined in the Act, they were not entitled to compensation for the time spent or the costs incurred in the training they received before being employed.

PEABODY AND JIM WALTER

Before the 10th Circuit decision in Emery, the Commission issued its decisions in the Peabody Coal Co. case, 7 FMSHRC 1357 (1985) and the Jim Walter Resources case, 7 FMSHRC 1348 (1985). In the former case, it held that Peabody's policy requiring laid-off miners to obtain necessary training prior to rehire did not violate section 115 of the Act. This was grounded on the theory that laid-off individuals are not miners protected under section 115 until they are rehired. The Commission declined to treat laid-off miners differently for this purpose from applicants for employment, or to interpret the requirements of section 115 in the light of the collective bargaining contract between the mine operator and the union. The Commission further concluded that section 115 requires an operator to reimburse rehired miners for the expenses of their training "if it relies upon the prehire training of those whom it rehires to satisfy its statutory training obligations with respect to 'new miners'." Peabody, at 1364. Peabody had fulfilled this obligation. In Jim Walter (JWR), the Commission addressed the same issues. It repeated its determination that the operator did not violate the Act in by-passing for hire laid-off individuals who lack required training. It also affirmed the ALJ's decision which required JWR to reimburse the rehired miners who had obtained such prehire training for the time and expense of the training. The Secretary appealed the Commission decisions that Peabody and JWR did not violate the Act in refusing to recall laid off miners because they lacked the required training. JWR did not appeal the Commission decision that JWR violated the Act by refusing to compensate recalled miners for the time and expense of training taken while on layoff. The Court affirmed the Commission decisions. Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987). The Court stated that "the success of the Secretary's argument depends almost entirely on whether the individuals passed over qualified as 'miners' under section 115 while on layoff." Id., at 1140. The Court affirmed the Commission holding that laid off employees were not "miners" even though they might be "contractually entitled to employment," i.e.,

employees on layoff entitled to recall without reference to training status.

In the case of Secretary/Beavers v. Kitt Energy Corporation, 8 FMSHRC 1342 (1986), Commission Judge Maurer held that a mine operator who laid off surface miners, with seniority and the technical ability to perform available underground jobs, solely because they lacked the additional training required under Part 48, was in violation of the Act. On March 17, 1988, the Commission in an open meeting voted to reverse this decision. See 9 Mine Safety and Health Reporter, Current Report at p. 627 (March 18, 1988). The Commission decision has not been issued as of this date.

The statute and the case law make clear (1) a mine operator who hires an untrained 2/ miner must provide training; (2) a mine operator may hire a miner (newly hired, not on lay-off) who has received training on his own without compensating him for the time and expense of training; (3) "work assignments" made by an operator based on a miner's training status are permissible, i.e., a miner may be laid off if he lacks training required for available positions; (4) a mine operator is not required by the Act to provide safety training for a laid off miner who requires such training for recall. The remaining question is whether a mine operator is required to compensate recalled miners for necessary safety training taken during layoff. More narrowly, are miners covered by a labor agreement who are on layoff entitled to different treatment under section 115 than new applicants for employment? In the Peabody case, the Commission declined to look to the collective bargaining agreement to determine miners' entitlement under section 115. I find nothing in the Act, the regulations or the case law which would permit me to treat differently under section 115, miners laid off with contractual recall rights and new applicants for employment. In Peabody the Commission held that "nothing mandates that we go beyond the Act and the legislative history to determine whether laid off individuals are entitled to section 115 safety training." 7 FMSHRC at 1364. Similarly, nothing mandates going beyond the Act and legislative history to determine whether individuals recalled from layoff are entitled to compensation for section 115 training. Neither miners on layoff nor applicants for mine employment are "miners" for whom the mine operator is required to provide health and safety training, or to reimburse for the time and expense of training taken on their own. To the extent that this interpretation "would result in the effective elimination of

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2/ In using the words training here, I am referring to the health and safety training mandated by section 115.

section 115 and the total frustration of the intent of Congress" (Secretary's brief, p. 8), the remedy, as the Court of Appeals said in Brock v. Peabody, supra, lies with Congress.

Therefore, I conclude that miners laid off from surface mining jobs who obtained training while on layoff at Respondent's suggestion, which training was required for reemployment in underground jobs, are not entitled to compensation from the mine operator for the time and expenses of such training after being recalled to underground jobs.

Because of this conclusion, it is not necessary to decide issues 2 and 3, i.e., whether miner Newman who did not need the training is entitled to compensation because he was misled by Respondent into thinking he did require it, and whether a violation of section 115 by refusing to pay compensation for training constitutes adverse action against the miners which can be remedied under section 105(c).

ORDER

Based on the above findings of fact and conclusions of law IT IS ORDERED:

(1) The Secretary of Labor's Motion for Summary Decision is DENIED;

(2) Respondent's Motion for Summary Decision is GRANTED;

(3) This proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

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