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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF MICHAEL L. PRICE AND JOE JOHN VACHA, COMPLAINANTS v.	DISCRIMINATION PROCEEDING Docket No. SE 87-128-D No. 4 Mine
JIM WALTER RESOURCES, INC., RESPONDENT AND UNITED MINE WORKERS OF AMERICA (UMWA), INTERVENOR	

DECISION

Appearances: Frederick W. Moncrief, Esq., and Thomas A. Mascolino, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor and Complainants; Robert K. Spotswood, Esq., and John W. Hargrove, Esq., Bradley, Arant, Rose & White, Birmingham, Alabama, for Respondent; Robert H. Stropp, Esq., and Patrick Nakamura, Esq., Stropp & Nakamura, Birmingham, Alabama, for Intervenor, and Complainants.

Before: Judge Broderick

STATEMENT OF THE CASE

On May 14, 1987, the Secretary of Labor (Secretary) filed an application for an order requiring Respondent Jim Walter Resources, Inc. (JWR) to temporarily reinstate applicants Michael L. Price and Joe John Vacha to the positions from which they were discharged on March 2, 1987. At the request of JWR, I held a hearing on the application on June 29, 1987, following which I ordered JWR to reinstate Price and Vacha to the positions from which they were discharged and to pay back wages and other benefits retroactive to June 8, 1987. The order was based on my determination that the complaints of Price and Vacha to the Secretary were not frivolously brought. My order was affirmed by

the Commission, Secretary/Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305 (1987), and is presently on appeal to the United States Court of Appeals for the Eleventh Circuit.

The Secretary filed a Complaint of discrimination on behalf of Price and Vacha with the Commission on September 2, 1987. JWR filed its Answer on September 25, 1987. There has been substantial pretrial discovery, including depositions and interrogatories by all parties. The United Mine Workers of America (UMWA) intervened in the proceeding and took part in the discovery and the hearing, as it did in the hearing on the application for temporary reinstatement. Pursuant to notice, the case was heard on the merits on March 21 through March 24, 1988, in Birmingham, Alabama. The Secretary called Richard Brooks as an adverse witness and William Leow, Donald Pennington, Dan Green, William Glover, Kenneth Smith, Robert Galasso, Jerry Whitley, Earl Odum, Danny Joe Nelson, Barry Wood, Dwight Cagle, Herbert Jefferson, John Parrot, Jerry Grogan, Jeff Wilkes, John McVernon, Allen Robbins, Steve Anderson, and Pearlie Sue Gray as its witnesses. JWR called Christopher Frings, Michael Hall, Robert Hendricks, William Beemer, Dr. G.M. Shehi, Richard Brooks and Michael Johnson. Brooks Rouse was called as a witness by UMWA. The transcript of the Temporary Reinstatement hearing and the exhibits introduced at that hearing were admitted in this proceeding as Joint Exhibits. The transcript includes the testimony of Joe John Vacha, Michael L. Price, Thomas F. Wilson, Richard Brooks, Rayford Kelly, William Carr, Richard Donnelly and Wyatt Andrews. The exhibits include the opinion of arbitrator Samuel J. Nicholas dated January 29, 1987, on the class action grievance filed by UMWA concerning the drug testing program. They also include the transcript of the hearing before arbitrator Nicholas, March 18, 1987, on the grievance of Price and Vacha, as well as arbitrator Nicholas' opinion of April 13, 1987. All parties have filed post hearing briefs. The parties have agreed that should I find a violation of section 105(c) of the Federal Mine Safety and Health Act (the Act), they will attempt to agree on the appropriate monetary remedies. I have considered the entire record and the contentions of the parties, on the bases of which I make the following decision.

FINDINGS OF FACT

JWR MINING DIVISION

JWR operates five underground coal mines, a training facility and a central shop, all located in the State of Alabama. It employs over 2800 people, including 2200 hourly rated workers. The hourly employees are members of the UMWA; each mine has a local union, and all are affiliated with Distrct 20 UMWA. The

UMWA and JWR are signatories to a collective bargaining agreement (in effect through January 31, 1988), which governs labor relations in the JWR mines. It covers, among other things, the establishment and the rights and duties of a Mine Health and Safety Committee at each mine. It provides for discipline and discharge of employees for just cause.

JWR'S SUBSTANCE ABUSE AND REHABILITATION & CONTROL PROGRAM

JWR perceived that it had a substance and alcohol abuse problem among its employees because a number of hourly and salaried employees had been discharged or had resigned in lieu of discharge because of alcohol or drug abuse. In addition JWR had what it considered a relatively high accident rate and a high rate of absenteeism, both of which it attributed in part to a drug and alcohol problem among its employees. It further believed that it had high and escalating health care and workers' compensation costs, which it believed were related in part to substance and alcohol abuse.

In April 1986, Mike Gossett, President, District 20, UMWA, contacted Richard Brooks, Vice President of Industrial Relations, JWR, requesting a meeting to discuss the problem of employee drug use in the JWR mines. A meeting was held in which Brooks and Eddie Roberson, JWR Labor Relations Manager, represented JWR, and Gossett and Gene Hyche, UMWA District Representative, represented UMWA. All the participants agreed that a problem of drug and alcohol abuse existed at JWR mines. They also agreed that a joint union-management program would be preferable to a company imposed work rule. Brooks proposed that the program include employee testing, education and rehabilitation and that it include families of employees. He also emphasized the importance of it being confidential. Brooks prepared a draft of a proposed program and gave a copy to the union representatives in late July 1986. Some time later Brooks talked to Tommy Buchanan, International Executive Board Member for District 20 of the UMWA. Buchanan told him he had sent his copy of the program "to Washington." Later Buchanan told Brooks that the UMWA and MSHA were working on a joint program in Washington. Brooks concluded that the UMWA was not interested in agreeing on a substance abuse program at JWR. He thereupon modified the draft of the program and prepared it as a company work rule.

At a companywide communications meeting on September 24, 1986, attended by UMWA District representatives and all the local union presidents, copies of the JWR substance abuse program were distributed. None of the union representatives indicated any problem with the program. On October 16 and 17, 1986, JWR called a series of communications meetings at each mining location during which the program was explained, and the union

representatives were advised that it would take effect January 1, 1987. In late October or early November 1986, a notice with a copy of the plan was posted at each mine location, and each employee received a copy of the plan with his or her paycheck. In early January 1987, a special issue of the JWR magazine, "Workings" was entirely devoted to the drug abuse program.

The Program is entitled Substance Abuse Rehabilitation and Control Program. It covers five typewritten pages and is divided into four main topics: Employee Testing, Disciplinary Action, Rehabilitation, and Education. It applies to all hourly and salaried employees of JWR's mining division. The testing provision is directed first to employees demonstrating a reasonable cause for testing, including (a) anyone involved in two or more mine accidents within a 12 month period, or involved in one accident which injures another employee or causes property damage; (b) an "irregular worker"; (c) an employee who comes under an attendance control policy; (d) an employee on company property who appears to be under the influence of drugs or alcohol; (e) an employee who is indicted, arrested or convicted under state or federal drug laws. Any employee who enters rehabilitation and fails to cooperate, or tests positive during the rehabilitation program shall be removed from rehabilitation, and will be subject to random testing for one year. An employee may voluntarily come under the program. Laid off employees shall be tested as a part of the recall physical examination. Section II.E. of the program provides as follows:

> Any employee whose duties, whether by job title or by reason of elected office, involve safety, shall be subject to random testing for substance abuse up to four times per calendar year. Physicals for hoistmen shall also include testing for substance abuse. All provisions of the program shall apply to employees in this category.

Brooks intended that the phrase "employee[s] whose duties . . . by job title . . . involve safety" encompassed safety inspectors, dust and noise control supervisors, and section foremen. These are all salaried positions. The only hourly employees covered are union safety committeemen who come under the phrase "employee[s] whose duties . . . by reason of elected office . . . involve safety."

The UMWA protested the unilateral implementation of the drug abuse program. It filed a class action grievance under the contract, and an unfair labor practice charge with the National Labor Relations Board (NLRB). Initially, the NLRB deferred to the arbitrator appointed under the collective bargaining contract. The arbitrator issued a decision on January 29, 1987, based on a

settlement reached by the parties: the program was recognized by the Union, but the Union disagreed with it; the Union reserved the right to file grievances on behalf of employees made subject to the program. Thereafter, however, the UMWA filed suit to set aside the January 29 award and subsequent individual awards (including an award denying the grievances of Price and Vacha) involving the program. The District Court granted summary judgment in favor of JWR, and the case is presently pending before the Court of Appeals. Apparently, the General Counsel of the NLRB has reconsidered her deferral to the arbitrator, and has instituted or contemplates instituting an unfair labor practice proceeding involving the substance abuse program.

IMPLEMENTATION OF THE PROGRAM

In late February 1987, Richard Brooks decided to randomly test the safety-related employees in all the JWR Mines under paragraph II.E. of the Program on March 2, 1987. He notified the industrial relations supervisors of the decision and "[swore] them to secrecy." The industrial relations supervisors were directed to test all employees covered by paragraph II.E. on that date. For various reasons, however, the urine samples were taken from the affected employees on March 2, 3, 6 and 9, and on April 8. Prior to March 2, there was considerable discussion and joking about the program among union employees and management officials. In the subject mine, much of the joking was directed at Price. In November 1986, Price told Wyatt Andrews, the mine safety inspector and Bob Hendricks, associate safety inspector that he had difficulty urinating in front of others. Hendricks laughed and made a vulgar remark to Price. In late November or early December a urine specimen bottle was exhibited on Wyatt Andrews' desk with a label on it reading "Mike Price UMWA." Andrews laughed when Price saw the bottle. It remained in the safety office for at least two days before Rayford Kelly directed that it be removed. Andrews and another safety inspector had on two other occasions jokingly thrust an empty CSE cannister and an empty coca cola can toward Price and Vacha telling them that they were practice piss cups. Later a styrofoam cup with Price's name and the notation "practice cup" written on it was displayed in the safety office. All these incidents took place prior to March March 2, 1987.

Price and Vacha worked on the day shift--7:00 a.m. to 3:00 p.m. At about 8:00 a.m. on March 2, Price was told that he would have to submit a urine sample. Vacha was informed at about 11:30 a.m. At the end of their shift, they went to the office of the Industrial Relations Supervisor of the No. 4 Mine, Rayford Kelly. Urine samples were taken at the No. 4 Mine from four management safety personnel and the owl shift safety committeeman. The

samples were taken under the supervision of Andrews and Hendricks, rather than Kelly. In the other mines, the samples were taken under the direct supervision of the industrial relations supervisors.

Price and Vacha signed the release form and submitted union prepared protest forms in Kelly's office. They asked whether they would be paid for the time spent in the office and were informed that they would not. Along with the other safety committeemen, they filed grievances for this, and were ultimately paid for one hour. Vacha then went to the bathroom with Andrews. He told Andrews that he was unable to urinate. He was taking a physician prescribed medication, lomotil, for a nervous stomach related to personal problems. One possible adverse reaction to this medication is urinary retention. Vacha tried on a number of subsequent occasions but was unable to provide a urinary specimen. He was clearly nervous and upset. Price also was unable to urinate. He offered to go into the bathroom naked if he could go alone, but this offer was refused. He tried a number of times to provide the sample but was unable to do so. Water, coffee and soft drinks were made available, but the requested urine samples were not forthcoming. At about 7:00 p.m. (4 hours after completion of their shift), Kelly told Price and Vacha that they would be given 30 minutes to provide a sample or be disciplined. Vacha replied that "you [or they] can't make me piss." Price asked whether they could return the next morning to give the samples, but this was refused. At approximately 7:20 p.m., they were given 5 minutes to produce a specimen or be discharged. At 7:30 p.m., they were each given formal five day suspensions with intent to discharge because of insubordinate conduct. The following morning, March 3, 1987, Price and Vacha had drug screen tests at the Emergicare Center (JWR's contract physicians) and at the Longview Hospital, respectively. The results, which were negative, were submitted to JWR.

Many union members were upset over the drug testing program, and a meeting took place prior to March 2, involving local union presidents, District 20 officials and safety committeemen from the No. 5 Mine. At this meeting it was decided that if urine specimens were requested, the committeemen should ask why, notify management that the specimens were given under protest, and provide the specimens if they could. There is no evidence that Price and Vacha were at this meeting. However, it is clear that they and most of the other safety committeemen objected to the implementation of the program, and believed that it was discriminatory. They were also aware that if they failed to furnish a specimen, they could be discharged.

Price and Vacha filed grievances over their discharge, and the grievances were taken to arbitration under the collective

bargaining contract. The arbitrator, Samuel J. Nicholas held a hearing on March 18, 1987. JWR called Rayford Kelly and Richard Brooks as witnesses. The Union called William Brooks, Dwight Cagle, Joseph O'Quinn, Dennis Gilbert, Edward Smith, Joseph Vacha, Michael Price and Dr. Daniel Doleys. On March 19, 1987, the arbitrator announced his decision denying the grievances on the ground that the company had justifiable cause under the contract for the discharges. He issued a written opinion on April 13, 1987. In his opinion he concluded that Price and Vacha could have given urine samples but "chose not to comply with management's request." He further concluded that there was no evidence of disparate treatment or discrimination against Price and Vacha. He relied on the fact that 43 other similarly situated employees "openly complied with management's request."

At the other JWR mines, some of the safety committeemen tested were allowed to produce urine specimens without an observer being present; in other cases, the observer was immediately outside the bathroom; some produced the specimen inside a closed toilet stall. In one mine, a committeeman who was unable to produce a specimen when requested was permitted to return at the end of his shift to do so. In another instance a miner being tested for cause (he had an accident), was permitted to return thefollowing day to give a urine sample. However, although the company had already notified the miner that it intended to discharge him, he was reinstated the next day and apparently was never actually tested.

SAFETY COMMITTEES

Article II, Section (d) of the Contract provides that each mine shall have a Mine Health and Safety Committee made up of miners "who are qualified by mining experience and training and selected by the local union." The committee is given the right to inspect any portion of the mine and report any dangerous conditions to management. If the committee believes that an imminent danger exists and recommends that the employer remove all employees from the involved area, the employer must comply with the recommendation.

Under the Act, the safety committeemen are considered representatives of the miners. They may request MSHA inspections under section 103(g), and normally accompany the MSHA inspector during his physical inspections of the mine.

At the JWR mines, the safety committeemen are elected. Committeemen choose their chairman, and select alternate safety committee members.

Price and Vacha and their safety committee had the reputation of being safety activists. In six years on the committee, Vacha has filed from 75 to 100 Section 103(g) complaints, and has participated in 50 to 75 safety grievances. Price has annually filed approximately 25 Section 103(g) complaints and handled approximately 70 safety grievances. Vacha estimated that he spent approximately 50 percent of his working time on safety committee duties; he was classified as a miner operator, but actually worked on self-contained rescuers, under Wyatt Andrews of the safety department. Price also devoted about 50 percent of his time to safety committee work. He was classified as a long wall helper. On one occasion while working on the mining section, Vacha was removed from his continuous miner operator job because he was thought to be shutting down his machine because of face methane. On another occasion in June 1986, Price was told by JWR's vice-president of operations, Buck Piper, that if he wanted to keep his job he "had better back off on safety." Price was discharged in June or July 1986 "for performing [his] job as a safety committeeman," but was reinstated after arbitration. He was reprimanded in 1983 and in 1986, also while performing his duties as a safety committeeman. JWR has blamed the safety committee for causing the mine to be closed on different occasions, and for filing a large number of 103(g) complaints and safety grievances. After the discharge of Price and Vacha on March 2, and a layoff affecting owl shift committeeman Ed Smith, there were as of June 29, 1987, no elected safety committeemen at the JWR No. 4 Mine.

INDUSTRY DRUG ABUSE PROGRAMS

On September 15, 1986, the President of the United States issued an Executive Order, entitled DrugÄFree Federal Workplace, in which he stated that "[D]rug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year." The Senate Commerce Committee in Senate Report 100Ä43, 100th Cong. 1st Sess., to accompany S. 1041 filed April 10, 1987, found that "Drug and alcohol abuse has become an increasing problem in the workplace. Substance abuse leads to impaired memory, lethargy, reduced coordination, and a whole series of changes in heart, brain, and lung functions. These symptoms in workers have resulted in lost productivity for American businesses of as much as $100 billion a year, with significant increases in employee accident rates, health care costs, and absenteeism." A recent issue of the Duquesne Law Review has an exhaustive comment on compulsory drug screening in employment. 25 Duquesne Law Rev. 597 (1987). The problem is apparent; a solution which recognizes the union's interest and the rights to privacy and personal dignity of the employees is more difficult.

JWR and the UMWA officials involved with the JWR mines agreed that a significant problem of substance abuse existed among the employees in the JWR mines. They agreed that the problem should be addressed by a joint CompanyÄUnion program. They agreed that the program should include education, testing and rehabilitation. The UMWA believed that the program should be subject to collective bargaining. JWR, however, after some cursory discussions with different union officials, concluded that the UMWA was not interested in a joint program, and it unilaterally promulgated the plan involved in this proceeding. Prior to that time, the UMWA had not objected to, nor had it agreed to the provision which became Section II.E. in the program. Section II.E. (and much of the rest of the program) was drafted by Richard Brooks. Brooks' experience with safety committeemen was essentially limited to arbitration proceedings. He had little direct contact with the safety committees in the performance of their regular duties. There is no evidence that Section II.E. or any other part of the plan was motivated in any part by hostility to safety committee members. I accept Mr. Brook's testimony that he included safety committee members in Section II.E. because he believed that they had such a high degree of responsibility for safety in the mines.

Compulsory collection of urine for drug testing is "a highly invasive experience" (R571). This fact was recognized by the 5th Circuit Court of Appeals in the case of National Treasury Employees Union v. VonRaab, 816 F.2d 170, 175 (5th Cir.1987):

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom.

Collection of urine under the observation of co-workers or supervisors is especially uncomfortable for most people. The employees at JWR believed that compulsory drug testing was in some way accusatory, that being singled out for testing without cause was an invasion of privacy and degrading. One employee who was tested because she reported two back injuries within a year "felt humiliated and embarrassed about" being required to give a urine specimen. (R627) Recent news media stories have also created the fear in the minds of many JWR employees that the results of testing are not completely accurate, thus raising the specter that they might be falsely and unfairly branded as drug users. The evidence shows however that the drug screen testing used by JWR--an initial screen and a confirmatory screen--is better than 99 percent accurate. This, of course, presumes that

the collection procedures including chain of custody are strictly followed.

A substantial number of JWR employees, including most members of the safety committees, believe that singling out safety committee members for random testing is unfair. Some safety committee members have resigned because of the program. A number of others have considered resigning. Miners have refused to run for safety committee positions because they would be singled out for random testing four times per year. Steve Anderson who resigned from the safety committee testified:

> [The drug abuse program] is just too much room for harassment. You try to do your job and if you write a 103g or you file a complaint or the Federal, something like that if they don't like it, they got too much room for harassment just of the safety committee, that four times a year. (R.618)

The bashful bladder syndrome is a psychiatric illness--a social phobia--in which a person has a fear of urinating in public restrooms or in any place where the person is, or fears he/she is, in public view. Approximately one person in three hundred of the general population has this condition. However, stress, fear or anger can affect a person's ability to provide a urine specimen, even though he/she is not suffering from a clinical case of bashful bladder syndrome. From one to three percent of the population may experience individual episodes in which he or she has great difficulty in urinating because of some anxiety or pressure type situation.

I have considered the testimony before me of Dr. George Michael Shehi, and the record of the testimony of Dr. Daniel M. Doleys before the arbitrator. I have also considered the testimony of Price and Vacha. I find as facts that neither Price nor Vacha had a clinical case of bashful bladder syndrome. I further find that both Price and Vacha were anxious, fearful and angry over the requirement that they submit urine samples on March 2, 1987. I have very carefully and respectfully considered the opinion of arbitrator Nicholas that Price and Vacha "chose not to comply with Management's request" and that they "refused" to deliver urine samples. However, I have an independent responsibility under the Mine Safety Act, and have heard the testimony of Price and Vacha among other witnesses. I have observed their demeanor on the witness stand, and have weighed their obvious interest in the outcome of this proceeding. I am persuaded that they fully understood the nature of the oath they took to tell the truth. I disagree with the implied conclusion of the arbitrator that they perjured themselves. I find, as I previously found in my Temporary Reinstatement Order, that Price

and Vacha had physical or psychological difficulties in providing the required samples on March 2, 1987. I find that they did not refuse to submit the urine samples, but were unable to do so under the circumstances present on the evening of March 2 at the subject mine.

ISSUES

1. Is the JWR Substance Abuse Program on its face violative of section 105(c) of the Mine Act, irrespective of the motivation of JWR?

2. Was the JWR Substance Abuse Program as applied to claimants Price and Vacha in violation of their rights under section 105(c)?

3. What deference is owed to the findings and conclusions of the Arbitrator who upheld the discharges of Price and Vacha?

CONCLUSIONS OF LAW

JURISDICTION

JWR is subject to the provisions of the Mine Act in the operation of the subject underground coal mine. Michael Price and Joe John Vacha were, as of March 2, 1987, miners and representatives of miners as those terms are used in the Act.

FACIAL VALIDITY OF THE JWR SUBSTANCE ABUSE PROGRAM

The typical case of discrimination under section 105(c) of the Act involves adverse action taken against a miner for activity related to safety and therefore protected under the Act. In such a case, the motivation of the employer or other person respondent is important. In this case, the Secretary contends that the drug testing program (or section II.E. thereof) is per se discriminatory and therefore violative of the Act. The employer's motivation is, if not irrelevant, at least not so important. It is clear that a policy or program of a mine operator can itself be held to violate the Act. Local Union 1110, UMWA/Robert Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979). Enforcement of such a program by adverse action against a miner or miner's representative, it seems clear to me, can be prohibited regardless of the mine operator's motive.

Insofar as it requires random unannounced urine testing, JWR's substance abuse program applies only to elected safety committee members, among all hourly employees. The evidence establishes that the activities of many other hourly employees, including those who work at the coal face, and on-shift and

pre-shift examiners ("firebosses") are intimately related to safety, but they were not included in the random testing requirement. JWR's explanation for the distinction is that safety committee members have the greatest responsibility for safety of anyone in the mine. Brooks stated that it was for that reason that these employees were to be tested first. Brooks and William Carr, President of JWR's Mining Division, implied that they intended to test other hourly workers in the future. However that may be, it is clear that the current program is restricted to, and immediately impinges on one small group of hourly employees: the elected members of the mine safety committees.

The evidence establishes that the miners at JWR view mandatory drug testing with varying degrees of hostility: many consider it to be accusatory and believe that it casts suspicion of drug use on persons being tested. They look upon the testing procedures followed by JWR as an invasion of privacy and an affront to their dignity. Further, some of the miners have been exposed to news media reports which cast doubt on the accuracy of the testing procedures. Thus, they expressed fear that they might be erroneously branded as drug users. These suspicions and doubts seem to me to have resulted in part at least from an inadequate education effort on the part of JWR, and from the fact that the program was instituted unilaterally, without the participation of the unions.

The members and potential members of the mine safety committee reacted negatively and hostilely to the provisions of II.E. which they viewed as unfairly singling them out for random testing four times annually. As a result of this reaction, some committee members have resigned; others have considered resigning (only one test has been conducted to date because of the pending litigation), and further testing may cause further resignations. Still others have refused to accept safety committee positions or to run for election to them.

Based on this review of the evidence, I conclude that one effect of the drug abuse program has been to severely limit the independence and therefore the effectiveness of the committees. This is true without regard to the motivation of JWR in instituting the plan. The importance of preserving the independence of safety committee personnel was underscored in the case of Local Union 1110, UMWA/Robert Carney v. Consolidation Coal Company, supra, a case under the 1969 Coal Act. The safety committeeman is the representative of the miners under the Act. He or she is the usual conduit for miners' safety complaints to management or to MSHA. Although miners and mine management are both clearly interested in safety, a safety committeeman brings a different perspective, a different attitude to safety matters,

the perspective and attitude of the miner. He may be less concerned about production and more concerned about the lives and limbs of the workers. In some instances at least, his concerns and opinions may clash with those of management. It is therefore important that his independence be maintained. Congress strengthened the antiretaliatory provisions in the Coal Act when it enacted the 1977 Mine Act. The legislative history of the Mine Act makes this clear:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. . . .
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> The wording of section [105(c)] is broader than the counterpart language of section 110 of the Coal Act and the Committee intends section [105(c)] to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.

S.Rep. 95Ä181, 95th Cong., 1st Sess. 35Ä36 (1977), contained in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. (1978) 623Ä624.

I have previously found that the program was not intended to diminish the rights and responsibilities of the miners' representatives, but its effect has clearly been to do so. I conclude that a retaliatory motive need not be shown to make out a claim of discrimination under the Mine Act in the circumstances of this case. Cf. Simpson v. FMSHRC, 842 F.2d 453 (D.C.Cir.1988). Therefore, I conclude that section II.E. of the JWR Drug Abuse and Rehabilitation and Control Program is facially in violation of section 105(c) of the Act. The discharge of Price and Vacha on the ground that they refused to participate in the program was therefore also in violation of section 105(c).

IMPLEMENTATION OF THE PLANÄDISCHARGE OF PRICE AND VACHA

The Secretary and the Intervenor both contend that even if the drug testing plan is not discriminatory on its face, it was discriminatorily applied to Price and Vacha because of their safety committee activities. Specifically, they argue that Price and Vacha were harassed and were subjected to disparate treatment

because they were safety activists. Finally, they contend that they were discharged because of their activity as safety committeemen. To establish a prima facie case of discrimination under this theory of the case, complainants have the burden of establishing that they engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 633 F.2d 1211 (3rd Cir.1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 817 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. The operator may also defend affirmatively by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra.

The safety committee activities of Price and Vacha were clearly protected by the Act. Safety inspections, safety complaints to mine management and MSHA, relaying miner complaints to mine management and MSHA: these are prototypically activities protected under the Mine Act. Refusal (as JWR claims) or failure because of inability (as Price and Vacha claim) to produce urine specimens for drug tests would not on the surface seem to be protected. But the specimens were sought only because Price and Vacha were safety committeemen and therefore representatives of the miners. Complainants contend that the pre-testing harassment and the refusal to accommodate the difficulties complainants experienced in providing the specimens are evidence of a discriminatory motive.

Rayford Kelly, the Industrial Relations supervisor at the No. 4 Mine, who discharged Price and Vacha, was not directly involved with the safety committee activities of Price and Vacha but was clearly aware of them. He knew they were safety activists, that they were "notorious" for filing safety complaints. The supervision of the urine collection at the No. 4 Mine was delegated to Andrews and Hendricks, company safety inspectors, rather than remaining in the Industrial Relations Department, as in the other mines. In some of the mines, those supervising the collection did not go into the bathroom with those giving the samples. No accommodation was offered Price and Vacha when they claimed inability to produce urine specimens, though some accommodation was given others involved in the drug screening program. I have found as a fact that Price and Vacha did not refuse to give specimens, but were in fact physically or psychologically unable to produce the specimens prior to being discharged on March 2, 1987. On the basis of this evidence, and reasonable inferences from the evidence, I conclude that the

discharge of Price and Vacha was motivated in part because of protected activity, i.e., because of their activities as safety committeemen. The evidence also establishes that JWR made known that refusal or failure to submit urine samples when required under the program would be ground for discharge. This was based on its conclusion that such refusal would be violative of a work order and thus insubordination. It is not my function to determine whether such a policy was a good one or was in compliance with the contract. (It involved a "work order" which involved activity "off the clock"). Price and Vacha were discharged for insubordination--violating a work order. Would they have been discharged "in any event" for such insubordination--that is, if they were not notorious for filing safety complaints? Since none of the other employees tested in March and April 1987 failed to produce urine specimens, answering this question is not easy. JWR told those being tested that failure to give a urine specimen would result in discharge. I believe that any safety committeeman who failed to produce a specimen when asked would have been discharged. Therefore, I believe that Price and Vacha would have been discharged for failure to produce the specimens if they were not safety watchdogs but harmless safety pussycats. I conclude therefore that JWR would have discharged Price and Vacha for violating a work order (not protected activity) in any event, and that the drug testing program was not discriminatorily applied to Price and Vacha. This conclusion does not affect my previous conclusion that the program was discriminatory on its face.

DEFERENCE TO ARBITRATOR

In a "Summary Opinion" dated April 13, 1987, Arbitrator Samuel J. Nicholas, Jr., restated his award of March 19, 1987, denying the grievances filed by the UMWA on behalf of Price and Vacha. The arbitrator determined that JWR had the right to direct Price and Vacha to deliver urine specimens and that Price and Vacha had the duty to provide them. He held that the discharge of Price and Vacha was not "colored by discrimination and/or disparate treatment," that the discipline meted out was appropriate "given the . . . circumstances surrounding the [employees] refusal to deliver the . . . urine samples." The transcript of the arbitration proceeding and the arbitrator's opinion were before me when I issued my Temporary Reinstatement order. I held that arbitrator's findings are not binding on the Commission, citing Pasula v. Consolidation Coal Co., supra. It is beyond argument that the Commission may not abdicate its responsibility to decide whether a miner was discriminated against under section 105(c) of the Act, because an arbitrator has decided that the miner was or was not discharged for just cause under the collective bargaining agreement. JWR argues, however, that I should defer to the arbitrator's conclusion that

Price and Vacha refused to provide the requested urine specimens. I have considered this conclusion and have reviewed the testimony on which it was based. I have also considered the testimony before me and have elsewhere in this opinion given my reasons for disagreeing with the arbitrator. I believe I have given his findings great weight. But they are not compelling. Further, my disagreement with the arbitrator's finding is of little importance since, despite my finding that Price and Vacha did not refuse to provide urine specimens, I concluded that they did not establish (assuming the facial validity of the program) that they were discharged in violation of section 105(c). The arbitrator's findings and conclusions are not entitled to deference or to great weight in determining the legal issue whether Section II.E. of the drug testing program was on its face violative of Section 105(c).

ORDER

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

1. Respondent JWR shall permanently reinstate Michael L. Price and Joe John Vacha to the positions from which they were discharged on March 2, 1987.

2. Respondent shall pay wages and other benefits to Price and Vacha from March 3, 1987, until the date of their reinstatement with interest thereon in accordance with the Commission decision in Secretary/Bailey v. Arkansas Carbona Co., 5 FMSHRC 2024 (1984).

3. The attorneys for the intervenor contributed substantially to the successful litigation of the claim. However, under the rule enunciated in Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639 (4th Cir.1987), and Maggard v. Chaney Creek Coal Co., 9 FMSHRC 1314 (1987), complainants are not entitled to reimbursement for private attorney's fees.

4. Respondent shall expunge from its personnel records, all references to the discharges of Price and Vacha on March 2, 1987.

5. Respondent shall cease and desist from enforcing the provisions of paragraph IIE of its Substance Abuse Rehabilitation and Control Program against safety committee personnel in all its mines.

6. Counsel for the parties shall confer and attempt to agree upon the amounts due Complainants under No. 2 above. They shall report to me the results of their attempt on or before

August 12, 1988. This decision shall not be final until a supplemental decision and order has been issued concerning the amounts due under No. 2 above.

James A. Broderick
Administrative Law Judge