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

BALTAZAR MADRID, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. WEST 87-170-D
v.	DENV CD 87-2
KAISER COAL CORPORATION, RESPONDENT	Sunnyside No. 2 Mine

DECISION

Appearances: Dave Maggio and Don Huitt, East Carbon City, Utah, for Complainant;
Jathan Janove, Esq., and Diane Banks, Esq., Fabian and Clendenin, Salt Lake City, Utah, for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (1982) (herein the Act). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) under Section 105(c)(2) of the Act was dismissed.

Contentions of the Parties.

Complainant Madrid, in his complaint with MSHA (Ex. DÄ16) alleged:

> Since September of 1970 I have been employed at the Kaiser Coal Corp. mines (formerly known as Kaiser Steel Corp.) as a surface employee. On October 31, 1986 management illegally laid me off for lack of training. A summary of this discriminatory action follows:
>
> On October 22, 1986 the management of Kaiser Coal Corp. of Sunnyside had a reduction and realignment of the workforce. At this time I was informed that I would be realigned as an underground timberman. I expressed my concern about lack of training for underground work. Later I was informed that I would be given the 40 hours new miner training before going underground and in the meantime I was to be given a job as a tipple utilityman. (Footnote 1)

> Management on October 23, 1986 told me that I was scheduled to start my training on October 27, 1986 at the College of Eastern Utah in Price, Utah and until then was to work as a tipple utilityman.
>
> On October 24, 1986 management wrote me a letter informing me that I would not be going to the 40 hour training but would be left on the tipple.
>
> On October 31, 1986 Kaiser Coal Corp. of Sunnyside had yet another reduction and realignment of the workforce and at this time I was told that there was no available jobs on the surface and I didn't have the training to work underground so I was to be laid off.

Thus, Madrid, a lineman (a surface position), contends that on October 31, 1986, Kaiser illegally laid him off "for lack of (underground) training." In his post-hearing brief, this contention is expanded: "They openly discriminated by not providing Mr. Madrid his forty (40) hours training under Section 115 (Footnote 2) of the Act and by so doing, broke the law again under 105(c) of the Same Act." In terms of discriminatory motivation, Madrid contends that "Kaiser did not want to provide training to anyone including (himself)". Complainant Madrid referred to the decision in Secretary and UMWA v. Kitt Energy Corporation, 8 FMSHRC 1342, (September 1986; ALJ) at the hearing (T. 37, 155) as

supportive of his position. As will be discussed subsequently, this decision was recently reversed by the Federal Mine Safety and Health Review Commission (herein Commission).

Respondent Kaiser denies that the 40Ähour underground training requirement of the Act's Section 115(a) is a right guaranteed by 105(c) to miners who would otherwise be laid off (Footnote 3) and contends that even if it were, Madrid failed to establish a prima facie case of discrimination. Kaiser maintains that its decision to layoff Madrid resulted from its understanding that Madrid lacked the 45Äday underground working experience required by Article XVI of its Labor Agreement and had nothing to do with the 40Ähour training requirement of the Act. Kaiser also maintains inter alia that Madrid did not complain about or attempt to exercise a right under the Act until approximately 3 weeks after he was laid off; that the complaint that was made by Madrid was for the purpose of keeping himself in his surface job; that Madrid engaged in no "protected activity"; that it (Kaiser) had no hostility toward the 40Ähour training requirement; and that Madrid by choosing to remain on the surface opted for the more desirable surface work over the job security that would have resulted had he sought underground positions.

Findings

Complainant, Baltazar Madrid, age 49 at the time of hearing, was hired by Kaiser on September 9, 1970 (T. 46, 134Ä136), and until October, 1986, was so employed as a lineman ---as distinguished from electrician (T. 173Ä174, 183Ä185, 207, 209, 239, 243Ä245, 299). The lineman position is on the surface-- as distinguished from an underground position-- and Mr. Madrid normally worked the dayshift (T. 54, 105, 236, 246). Mr. Madrid, throughout his employment with Kaiser as well as a previous employer was a lineman and he did not attempt to obtain an underground classification even though this would have helped protect him against a layoff in a reduction-in-force (T. 105Ä107, 134Ä138, 269Ä270).

Kaiser underwent two separate layoffs (sometimes referred to as realignments, reductions-in-force, or RIFs) in October, 1986, the first on October 22 and the second on October 31 (T. 93Ä94, 99). On October 22, 58 employees were laid off and 40 were realigned to other jobs. On October 31, 46 more employees were laid off and 23 more realigned (Exs. DÄ1, DÄ2; T. 205). Kaiser's total hourly workforce was reduced from 262 to 158 employees by these 2 RIFs.

At the subject mine, surface jobs are generally considered more desirable than underground positions (T. 101, 132).

In the October 22 layoff, Madrid was not laid off but was assigned (realigned) to an underground position --timberman-- and he immediately (T. 190Ä191) filed a grievance alleging that Kaiser had no right to eliminate his surface position as lineman (T. 101, 131, 261Ä262). The record clearly indicates that Mr. Madrid was opposed to working underground (T. 53Ä54, 63, 104, 131, 137, 145, 191, 262) and complained that he had insufficient underground experience (T. 190Ä193; Ex. DÄ1, p. 4).

Mr. Madrid testified:

Q. If you can have your choice, you'll stay on the surface?

A. Sure.

Q. And at the time you filed a grievance saying that lineman job was improperly eliminated; right?

A. Right.

Q. And your goal at that time was to remain as a lineman on the surface?

A. Sure.

Q. Now, after you were realigned to tipple, okay, but before you were laid off, you didn't complain to anyone, did you, that you should have stayed as a timberman as opposed to a tipple utility man?

A. No, I didn't.

(T. 54).

After Madrid filed the grievance (after the October 22 layoff and before the October 31 layoff), Jack W. Roberts, Kaiser's Manager of Human Resources, reviewed Madrid's file and work experience and determined that a mistake had been made in assigning Madrid underground to the timberman position since such records indicated Madrid had not previously worked underground (T. 101, 102, 104Ä105, 112, 131Ä132, 136).

According to Roberts, who was the person responsible for realigning employees during the layoffs (T. 95Ä97, 138, 257), placing Madrid underground after the first-- October 22-- layoff contravened Article 16 (XVI) of the union contract since Madrid

did not, according to his records, have 45 days underground experience (T. 102Ä103, 112, 115, 134Ä136, 138Ä142). (Footnote 4)

After Mr. Roberts determined that Mr. Madrid's grievance had validity insofar as Mr. Madrid did not have suitable underground experience (T. 100, 140, 145) and should not have been assigned underground, Mr. Roberts allowed Madrid to bump to the position of tipple utilityman on the surface which had the effect of replacing an employee with less seniority who held such position--- one Willie Naranjo.5 Naranjo, who had underground experience (T. 106Ä107, 154), was moved to the timberman position which Madrid did not want (T. 101Ä109, 129Ä130, 133). Moving Madrid to Naranjo's surface position at this time was adverse to Naranjo (T. 106, 132).

At the hearing, Madrid in some contradiction to his original objection to being assigned underground, claimed that he had sufficient underground service (T. 286), although such account was extremely general (T. 50) and the amount of such time and the dates thereof are not subject to determination because of such vagueness.

The arbitrator, in his decision rejecting Mr. Madrid's grievances (Ex. DÄ1), incisively explained why Madrid's claim of 45 working days underground should be rejected:

> The second reason advanced by the Union as to the non-applicability of Article XVI, Section (f) to the grievant was the claim that he actually had 45 working days prior underground mining experience over the course of his many years working as a surface Employee, and he would therefore not have to be classified as a Trainee if he worked underground. While the Maintenance Supervisor disputed many of the particular underground work assignments that the grievant claimed to have participated in, the weight of the evidence here was to the effect that, on a cumulative basis over the course of his 16 years at the mine, all of the individual hours on different days, when added together, would amount to 45 days sent underground. The question, however, is whether it is proper to consider that kind of work experience as meeting the requirements of Article XVI, Section (f). In my view, the contractual requirement of 45 working days prior underground mining experience is not met in such a casual manner. Crediting an hour or two here and there, along with some eight hour days which may be separated by weeks, months or even years, so as to add up to a total of 45 days, when there is not indication that there was ever any briefing on such things as the underground facilities, the procedures for entering and leaving the mine, the procedures regarding the transportation of Em-

ployees and materials, the escape and emergency evacuation plans, a review of the mine map and the location of abandoned and dangerous areas, instructions in the use, care and maintenance of the applicable self-rescue device, instructions in the detection of methane, or any of the hazards or dangers peculiar to the underground operations, seems to be so inconsistent with the recognition that the health and safety of the Employees are the highest priorities of the parties and with their expressed agreement that the establishment of effective training programs was essential to the safe and efficient production of coal that it would defeat the intent of the parties in establishing minimum standards for the training of Employees who are inexperienced when it comes to the peculiar hazards of underground mining. It is apparent that the grievant here did not consider himself an experienced underground Employee, even though he had gone underground on a number of occasions over the course of his many years at the mine. He was the one who first expressed his concern about his lack of training for underground work when he was realigned to a timberman position at the time of the first layoff and realignment on October 22, 1986, and the Company agreed with him that it was a mistake to have put him in an underground position.

> Such a casual and almost accidental or unintentional acquisition of the status of an experienced underground miner is so at odds with the intent and purpose of the safety and training provisions of the contract, provisions which were put into the contract at the Union's urging and for which the Union fought long and hard, that such a result could not have been intended. (emphasis added)

The arbitrator concluded:

> ... Working on the surface does not expose an Employee to the same dangers as working underground, and the surface Employee does not get the kind of first-hand knowledge that the parties wanted Employees assigned underground to have before they worked on their own.
>
> I have no doubt that the grievant here had the necessary skill and the physical ability to perform the job duties of a timberman, but at the same time I believe that he has to be considered a anew inexperienced Employee within the meaning of Article XVI, Section (f) of the contract. That necessarily means that he would have to be classified as a Trainee during the first 45 days he was assigned to work underground and could not be classified as a Timberman and assigned to perform all of the duties of a timberman. The contract itself precludes his being considered as having

> the present ability to step into and perform all of the duties of any underground job except that of Trainee. The Company's failure to recall him to the timberman job on December 15, 1986 therefore would not be considered a violation of his seniority rights, and his grievance claiming such a violation must consequently be denied.

Mr. Roberts described the decision-making process which led to Mr. Madrid's being laid off in the October 31 RIF as follows:

> A. Well, we went through the same procedure, and that was before he couldn't be considered for underground jobs because he hadn't worked underground. The job that he was put on, unfortunately, the tipple utility job, was being reduced. There were two jobs and they eliminated one. The other man was senior to Mr. Madrid, so, as a consequence, he was the one eliminated. Well, what we did, again, he was not able to take any of the underground jobs, so we started with the least senior person still working on the surface and went back up the line to see if we could find a job that he could do where he was senior to the person holding that job. And there was no such job. As a consequence, he was laid off.
>
> (T. 118Ä119).

According to Mr. Roberts and other Kaiser management witnesses, even if Mr. Madrid had, or had been given, the 40Ähours training required by the Act, he could not have been placed underground because of the 45Äday underground work requirement of Section XVI(f) of the Wage Agreement (T. 120, 139Ä140, 147, 151, 165, 267).

Members of Kaiser management, including Roberts and the operations manager, did not know that there was to be a second RIF on October 31, 1986, until several days after the October 22 RIF (T. 101Ä107, 132, 258).

When Madrid was first realigned to the underground timberman position in the October 22 reduction, management intended to give him the 40Ähour training required by the Act (T. 197, 259Ä261).

After Madrid was laid off on October 31, 1986, he did not, for 3 weeks, list the timberman position on the "panel form" required under the Wage Agreement which would have entitled him to consideration for assignment to that position in the event of recall (T. 109Ä110, 156Ä157, 263). Under Article XVII(c) of the Wage Agreement, a laid-off employee is required to fill out a standard form within 5 days after being laid off, and among other things, indicate the "jobs he is able to perform and for which he wishes to be recalled." From such information, the Employer prepares a "panel" form. Thus Art. XVII(d) provides:

> Employees who are idle because of a reduction in the working force shall be placed on a panel from which they shall be returned to employment on the basis of seniority as outlined in section (a). A panel member shall be considered for every job which he has listed on his layoff form as one to which he wishes to be recalled. Each panel member may revise his panel form once a year.

Management officials held a meeting prior to each of the 2 layoffs to implement such (T. 257Ä258). In the second meeting for the October 31 layoff, which was held (1) after Madrid had filed his grievance, (2) protested going underground in the timberman's position, and (3) had been reassigned to the tipple utilityman position on the surface, the application of the 45Äday underground working experience requirement of the Wage Agreement came up. This process was described by Kaiser's Operations Manager, Ronald O. Huges as follows:

> A. It was brought up that as we went through the people had been displaced, there was a tipple utility position that was reduced; therefore, Balt had to be realigned once again. When we came to Balt's position in the seniority roster, the only position that was available was underground timberman's position, and it came up then that Balt was not, by contract, a trained miner; therefore, he went to the layoff.
>
> Q. Now, in this meeting or any other time prior to the layoff, was the point made that he did have 45 days working experience, as required by Article 16?
>
> A. That he did have?
>
> Q. That he did have.
>
> A. No.
>
> Q. Throughout the period of time up to his layoff, what was your understanding as to whether he did or did not have experience?
>
> A. I'd understood that he did not have the underground experience.
>
> (T. 264)

The record indicates and it is found that Madrid did not have the 45 days of underground experience contemplated and required by the Wage Agreement and this was Kaiser's basis and business justification for laying him off in the October 31 RIF and for not realigning him to an underground position at that time ahead of others having such experience.

Discussion

In order to establish a prima facie case of prohibited discrimination under Section 105(c) of the Act, a complainant bears the burden of proving (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797Ä2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817Ä18 (April 1981). See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir.1987), Donovan v. Stafford Constr. Co., 732 F.2d 954, 958Ä59 (D.C.Cir.1984); Boich v. FMSHRC, 719 F.2d 194, 195Ä96 (6th Cir.1983) (specifically approving Commission's PasulaÄRobinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397Ä413 (1983) (approving nearly identical test under National Labor Relations Act.)

If the complainant does not establish that he engaged in a protected activity, the discrimination complaint must fail. The insistence of a complainant on the right to be provided training is activity protected by the Act. Thus, the question arises whether under the Mine Act Complainant Madrid had a protected right to the training at issue here.

In Peabody Coal Co., 7 FMSHRC 1357, 1363 (September 1985), and Jim Walter Resources, 7 FMSHRC 1348 (September 1985), aff'd sub nom. Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C.Cir.1987), the Commission concluded that mine operator policies to bypass for rehire laid-off individuals because those individuals lacked current safety and health training required by the Mine Act did not constituted discrimination under the Mine Act. The Commission determined that Section 115 of the Act grants training rights to "new miners" and that laid-off individuals do not become entitled to the training rights of Section 115 until they are rehired as miners. Thus, since there is no statutory right to operator--provided training for those on lay off status, an operator's refusal to rehire a laid-off individual due to lack of required training does not violate the Mine Act.

In Peabody and in Jim Walter the Commission stressed that the Mine Act is a health and safety statute, not an employment statute. The Commission noted that in enacting Section 115 Congress was concerned with preventing "the presence of miners ... in a dangerous mine environment who have not had ... training in self-preservation and safety practices." S.Rep. No. 181, 95th Cong., 1st Sess. 50 (1977), reprinted in Senate Subcommittee

on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637Ä38 (1978). The Commission determined that the rights of particular laid-off individuals to recall, including the extent to which an operator can favor for recall fully trained persons over persons with greater length of service, properly are within the sphere of collective bargaining and arbitration. 7 FMSHRC at 1364; 7 FMSHRC at 1354.

As noted hereinabove, contrary to the position asserted by Complainant Madrid that he enjoyed a statutory or legal right to the 40Ähour underground training referred to in Section 115 of the Act which purportedly would have entitled him to realignment to an underground position after the October 31, 1986 layoff, the Commission's recent decision in Kitt Energy, supra, emphasizes that a mine operator in implementing a reduction-in-force is not in violation of the discrimination provisions of the Act by not placing surface miners in underground positions where they failed to meet the underground experience requirements of Section 115, and by placing in such underground positions persons who by training or experience fully met Section 115 requirements. Thus, in pertinent part the Commission held:

> We recognize that the complainants in the instant case, unlike the complainants in Peabody, were "miners" at the time the alleged act of discrimination occurred. This distinction, however, does not require a different result because in the crucial and controlling respect, this case and Peabody are the same. In both cases, the operator chose for placement in underground mining positions persons who by training or experience fully met the training requirement of Section 115 of the Act and the Secretary's implementing regulations. In placing trained miners underground the operator did not violate the language of the Mine Act or the safety and health objectives of the training requirements. To the contrary, the Act's purpose was fulfilled. In addition, no miner was discharged or otherwise discriminated against either because of a refusal to work without having the required training or because of a withdrawal from the mine pursuant to an order issued by the Secretary under Section 104(g) of the Act due to a lack of training. See 822 F.2d at 1147. In sum, the Secretary's argument that Section 115 of the Mine Act mandates that "training neutral" employment decisions be made by mine operators is just as wide of the mark in the present situation as it was in Peabody, and must be rejected here for the same reasons.
>
> In order to reach the result argued for by the Secretary and the UMWA, we would be required to go beyond the Act and examine the Wage Agreement. It is not the Commission's

> province, however, to interpret the rights and obligations mandated by the Act through an interpretation of a private contractual agreement unless required to do so by the Act itself. Peabody, supra, 7 FMSHRC at 1364. In holding that the complainants as "miners" had the right to whatever training was required to continue their employment, the judge misperceived the proper focus of Section 115. To require an operator to train miners for underground work so that they, rather than other miners, would have the opportunity for continued employment would transform Section 115 from a health and safety provision to an employment provision. This type of employment issue is appropriately resolved through the collective bargaining and grievance and arbitration process. Indeed, the issue of the validity of Kitt's experienced miner policy was pursued through the contractual grievance process and Kitt's position was upheld.

Kaiser's witnesses, including Roberts who was the member of management primarily responsible for realignment and layoff decisions in the RIFs, convincingly established that the motivation for not placing Madrid in an underground position after the October 31 layoff was because of the application of the 45Äday underground experience requirement of the Wage Agreement--not the Mine Act's 40Ähour training requirement. (Footnote 6) Mr. Madrid was actually assigned underground after the first RIF on October 22, at which time his objective to remain as a lineman on the surface became clear. He immediately filed a grievance and raised the question as to his qualifications in terms of underground experience to work underground. At this time, at his own instance, he was placed in the tipple utilityman position on the surface--bumping another miner from such position. When this transaction took place the record is clear that management had no knowledge or indication that a second RIF was coming on October 31. Complainant failed to establish by the preponderance of the reliable and substantive evidence of record that Kaiser was

motivated in its actions vis a vis Madrid from either hostility to the Act's training requirements or other discriminatory frame of mind. (Footnote 7)

It is concluded that Complainant did not establish a violation under Section 105(c) of the Act and that the Complaint herein is without merit.

ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, his complaint is DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

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Footnote starts here:-

~Footnote_one

1 Although this allegation implies that the assignment to the tipple utilityman job was temporary, the evidence of record indicates that Madrid did not want to be assigned underground and that the tipple assignment was, as of October 24, permanent (Ex. DÄ11, T. 110, 132Ä136, 137, 145, 154, 157).

~Footnote_two

2 Section 115, relating to "Mandatory Health and Safety Training", in pertinent part provides:

> (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 programs 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, and 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.

~Footnote_three

3 Subsequent to filing of briefs the Commission's decision on review in Kitt Energy, 10 FMSHRC _____ (July 15, 1988) issued which sustained this view.

~Footnote_four

4 Thus, Article XVI, Section (f) of the National Bituminous Coal Wage Agreement of 1984 (Ex. PÄ12) governing the labor relationship between Kaiser and UMWA at all times material herein, provided:

> New Inexperienced Employees at Underground Mines
>
> No new inexperienced Employee in an underground mine hired after the date of this Agreement with less than forty-five (45) working days prior underground mining experience shall operate any mining machines at the face, or work on or operate any transportation equipment, mobile equipment or medium or high voltage electricity. All such new Employees shall always work in sight and sound of another Employee for a period of forty-five (45) days. During this period the new Employee shall be classified as a Trainee in order to permit him to gain maximum familiarity with the work of the mine as a whole, but to minimize exposure to hazards until more extensive experience in underground mining is achieved. At the end of the forty-five (45) working day period, he shall be eligible to bid on any vacancy that arises. Nothing in this section shall authorize any practice more permissive than that established by any applicable law or prior custom and practice.

~Footnote_five

5 Thus, following Madrid's objection and Robert's re-evaluation of his underground experience, the following letter (Ex. DÄ11) to Madrid from Kaiser's General Manager, C.W. McGlothlin, Jr., dated October 24, 1986, was hand delivered to Madrid on the same date:

> Dear Balt:
>
> It has been determined that you did not have the ability to step into and perform the work of available jobs at the time of the 10Ä22Ä86 layoff. Therefore, in accordance with Article XVII, Section (c) you are realigned to the job of Tipple Utilityman. Please report to Jim Eaquinto on Monday, October 27, 1986, for day shift.

Madrid never actually worked in the timberman position underground, and he worked on the surface for the 2Äday interim period between the "mistaken" timberman assignment and his bumping into Naranjo's utilityman position (T. 106, 112, 133, 145, 191, 228Ä230).

~Footnote_six

6 There is no persuasive or probative evidence in the record that Kaiser attempted to avoid the training requirements of Section 115. Contrary to Complainant's contention in this regard, i.e., that Kaiser removed Madrid from the timberman position to avoid such 40Ähour training, when Kaiser realigned him to

timberman after the October 22 RIF, it clearly planned to arrange for Madrid to receive such training (T. 48Ä49, 56, 104, 116, 190Ä192, 197, 229Ä231, 259Ä261). There is no evidence of Kaiser management being antagonistic to the Mine Act's training requirement or that management personnel or other employees were advised to avoid or ignore such requirements (Ex. DÄ4, T. 57, 172Ä173, 196Ä197, 230, 233Ä234, 260).

~Footnote_seven

7 Although at the hearing Madrid raised the question that one member of management, Pete Palacios, an outside Surface Superintendent, may have seen the layoffs as a means of retaliating against Madrid, there was no nexus established between any such purported animosity on Palacios' part and any safety activity on Madrid's part or connection to the Act's training requirements. Again, the record is clear that Palacios played no part in the personnel decisions (layoffs and realignments) made during the subject October RIFs.