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SOL (MSHA) V. PEABODY COAL
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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), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. KENT 88-161 A.C. No. 15-02705-03645
v.	Camp No. 2 Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor for the Petitioner;
Eugene P. Schmittgens, Jr., Esq., Peabody Holding Company, Inc., St. Louis, Missouri for Respondent.

Before: Judge Melick

This case is before me upon cross motions for summary decision filed pursuant to Commission Rule 64, 29 C.F.R. 2700.64. The underlying petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charges Peabody Coal Company (Peabody) with one violation of the regulatory standard at 30 C.F.R. 48.10. The general issues before me are whether Peabody violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation before me, No. 2836947, issued pursuant to section 104(a) of the Act, charges that "in checking the training records for the annual retraining for 1988 held on March 14-15, the records indicate that personal [sic] at the mine were not being trained on their normal working shift as defined in 48.2(d)."

Section 115 of the Act provides that miners are to receive their statutorily mandated health and safety training during normal working hours. The regulation at 30 C.F.R. 48.10(a) also states that such training "shall be conducted

during normal working hours". "Normal working hours" is defined in the regulations at 30 C.F.R. 48.2(d) as follows:

> "normal working hours" means a period of time during which a miner is otherwise scheduled to work. This definition does not preclude scheduling training classes on the sixth or seventh working day if such a work schedule has been established for a sufficient period of time to be accepted as the operator's common practice.

The essential facts are not in dispute. The Camp No. 2 Mine is an underground facility located in Union County, Kentucky. It operates five days a week with three shifts on the following schedule:

> 1st shift (day shift) - 8:00 a.m. to 4:00 p.m.
> 2nd shift (night shift) 4:00 p.m. to 12:00 a.m.
> 3rd shift (midnight shift) 12:00 a.m. to 8:00 a.m.

On March 15 and 17, 1988, the Federal Mine Safety and Health Administration (MSHA) District Office in Madisonville, Kentucky was notified that Peabody was violating the training provisions at 30 C.F.R. 48.10(a) in that miners were being forced to attend annual refresher training courses during hours the miners were not normally scheduled to work. MSHA Inspector Ronald Oglesby, thereafter on March 17, 1988, visited the Camp No. 2 mine and found that several miners who ordinarily worked the second shift, (4:00 p.m. until 12:00 midnight) were required to attend annual refresher training on March 14 and 15, 1988, during the first shift hours from 8:00 a.m. until 4:00 p.m.

Upon his arrival at the mine Oglesby met with Peabody officials Jim Cartwright (Safety Manager) and Matt Haaga (Camp No. 2 Mine Foreman), and with Luis Seaton of the United Mine Workers of America. Haaga told Oglesby that Peabody did not honor the employees' normal shift assignments for purposes of training and acknowledged that two miners, Larry Menser and Anthony Edwards, both assigned to work the second shift from 4:00 p.m. until 12:00 midnight, were directed by him to attend the annual refresher training course on the day shift scheduled from 8:00 a.m. until 4:00 p.m. on Monday, March 14, 1988.

The two miners told Haaga that they were second shift employees and consequently should receive their training during their scheduled work hours from 4:00 p.m. until 12:00 midnight. The two miners maintained that they should not be forced to attend training during the day shift hours because

those were not the hours they were otherwise scheduled to work. Haaga responded at this point by giving a "direct order" to Menser and Edwards to attend the training as directed or "face discipline up to and including discharge."

The undisputed evidence shows that Menser reported to the Peabody Training Center as directed and attended training during the scheduled day shift hours on March 14, 1988. After attending this training session he requested to work the second shift on March 15, 1988. Peabody granted this request and Menser was paid at the overtime rate for that work. The evidence further shows that Edwards called in sick on March 14, 1988, and did not attend the training session as ordered. Edwards subsequently attended the training course on March 15, 1988, during the day shift hours from 8:00 a.m. until 4:00 p.m. but did not work the second shift on March 15, 1988.

The Secretary maintains that these miners who were ordinarily assigned to work the second shift were unlawfully required to attend training on the first shift on March 14 and 15, 1988--times other than their "normal working hours". Peabody maintains on the other hand that the evidence in this case demonstrates that cross-shifting between shifts was such a regular practice at the Camp No. 2 Mine as to have established it as a "common practice". Under this rationale the subject training could therefore be given to the noted miners on the day shift on March 14 and 15, 1988, as their "normal working hours."

Under certain circumstances the mine operator has the right to cross-shift miners for the purpose of providing the required training if cross-shifting is a common practice at the mine. See Consolidation Coal Co. v. Secretary of Labor, 4 FMSHRC 578 (1982) (ALJ); Secretary of Labor v. Peabody Coal Co., 7 FMSHRC 1039 (1985) (ALJ). In order for Peabody to prevail in this case then, it must establish that such a "common practice" existed at the Camp No. 2 Mine in March 1988. "Common practice" is defined in the latter decision as "that which is generally done, the prevailing practice."

In this case it is not disputed that there were approximately 291 miners employed at the Camp No. 2 Mine during the period January through March 1988, and of the approximately 180 shifts worked during that period there were more than 100 shift changes. In all but two cases during this period however the shift changes occurred at the request of the individual miners and not at the direction of Peabody. Thus if there was any "common practice" of cross-shifting it was limited to cross-shifting initiated by the miners. The

existence of only two involuntary "cross-shifts" during the period January through March 1988 over approximately 180 shifts does not support a finding that there was a "common practice" of involuntary cross-shifting at the mine. Under the circumstances requiring the miners at issue to attend annual refresher training on March 14, and 15, 1988, during the first shift was not during the "normal working hours" of those miners and accordingly was in violation of the cited regulation.

I find however that the operator is chargeable with but little negligence. The precise legal issue appears to be one of first impression and it cannot be said that Peabody's position was entirely frivolous. In assessing a penalty herein I have considered all of the criteria under section 110(i) of the Act. Under the circumstances I find that a civil penalty of $50 is appropriate.

ORDER

Peabody Coal Company is directed to pay a civil penalty of $50 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
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