

CCASE:
ROGER L. STILLION V. QUARTO MINING
DDATE:
19890406
TTEXT:

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

ROGER L. STILLION,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. LAKE 88-91-D
MORG CD 88-3

QUARTO MINING COMPANY,
RESPONDENT

Powhattan No. 4 Mine

DECISION

Appearances: Thomas M. Myers, Esq., United Mine Workers of
America, Shadyside, OH, for Complainant;
Michael Peelish, Esq., Consolidation Coal
Company, Pittsburgh, PA for the Respondent

Before: Judge Fauver

Complainant brought this proceeding under 105(c) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et
seq, to recover compensation for his time spent as a "walkaround
representative" of miners during a federal mine inspection.

Having considered the hearing evidence and the record as a
whole, I find that a preponderance of the substantial, reliable,
and probative evidence establishes the following Findings of Fact
and additional findings in the discussion that follows.

FINDINGS OF FACT

1. Around August 1987, the Quarto Mining Company entered
into a contract with A&C Construction Company, for the hauling of
top soil and the removal of trees and brush at its Powhattan No.
4 Mine.

2. A&C Construction Company had about 12 to 15 employees
performing contract work, and Quarto Mining Company had about 12
of its employees working in and about the same area as the A&C
employees. Quarto employees were hauling rocks and stones from
stone bins to the top of the hill where A&C Construction
employees were working.

3. Shortly after A&C commenced its project on the Quarto
Mining property, rank-and-file Quarto employees began

~524

complaining to Ron Winkler, the outside safety committeeman, and to other union officials, with respect to the manner in which A&C employees were driving their trucks, and also with regard to a dust problem on the haul road and the lack of backup alarms on A&C equipment. Several Quarto employees raised similar complaints about A&C Construction employees and their equipment at the September, 1987, union meeting of Local Union 1785. Complainant, a union member, had also observed several of the complained-of conditions himself.

4. After the local union meeting at which the various complaints had been raised, safety committeeman Ted Hunt placed a Code-a-Phone call to MSHA, requesting that an inspection be conducted concerning A&C's equipment.

5. The haul road from the top of the hill, where the gob pile was located, to the bottom near Route 7 was a winding road and had areas cut out for the purpose of yielding the right-of-way. One of the complaints of Quarto employees was that A&C employees were not yielding the right-of-way. Quarto employees, as a part of their training, knew that the wide areas were designed to allow empty trucks going downhill to yield the way to loaded trucks which were going up the hill.

6. In response to the Code-a-Phone complaint by the union, MSHA Inspector Homko came to the Quarto property on October 2, 1987, and began an inspection of the A&C equipment. During that inspection, a walkaround representative for Local Union 1785, a Quarto employee, was paid for his participation as a walkaround, and was joined by Quarto safety representative Percy Hawkins.

7. During the inspection, one Quarto employee told the inspector that the A&C Construction employees were not yielding the right-of-way.

8. The inspection continued into the following week. In that week, Complainant Stillion was asked by mine safety committeeman Ted Hunt to accompany the federal inspector as a union walkaround on the remainder of the inspection of A&C's equipment. On October 6, Complainant met Inspector Gary Gaines to tell him that he was going to accompany Gaines as the walkaround for the remainder of the inspection, and Respondent's representative told Complainant that he would not be paid for his time spent with Inspector Gaines.

9. Quarto's refusal to pay Complainant reflected a change of policy. For about 16 years before this inspection, union representatives had accompanied federal inspectors on

~525

both regular general mine inspections and specific inspections which were aimed at the inspection of contractors' equipment only, and were compensated by Quarto in both cases.

10. On October 6, 7 and 8, 1987, Complainant Stillion traveled with Inspector Gaines but was not paid for any of his time spent on the inspection. As a result of the inspections conducted by Inspectors Homko and Gaines, several citations were issued to the A&C Construction Company.

11. The reason for the Code-a-Phone call to MSHA was the concern of safety committeeman Hunt for the safety of Quarto employees, based upon by the various complaints which Quarto employees had made concerning the safety of A&C equipment and the manner in which the equipment was being operated by A&C employees.

DISCUSSION WITH FURTHER FINDINGS

The basic issue is whether Complainant, a walkaround representative of Quarto's miners, was entitled to be paid under 103(f) of the Act for the time he participated in a federal inspection of A&C's equipment at Quarto's mine. The inspection was at the request of the Quarto employees through their miners' representative. The request was transmitted by Code-a-Phone to MSHA and, for the purpose of this Decision, is treated as an inspection request made under 103(g)(1) of the Act.

Section 103(g)(1) provides in part:

Whenever a representative of miners . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such . . . representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. * * *

Section 103(f) provides in part:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by the miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of

subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. * * *
Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. * * *

In *United Mine Workers of America v. FMSHRC*, 671 F. 2d 615 (D.C. Cir. 1982), cert. denied, 459 U.S. 927, the D.C. Circuit Court of Appeals examined 103(f) in depth to determine whether Congress intended to grant walkaround rights to miner representatives for spot or specific hazard inspections, in addition to "regular" inspections required by 103(a) of the Act. The court held that "spot" inspections are authorized by and made pursuant to 103(a) of the Act and are therefore covered by the walkaround compensation rights granted by 103(f). In reaching this holding, the court gave weight to the Secretary's Interpretative Bulletin of April 19, 1978 (43 Fed. Reg. 1754-47 (1978)), observing that the Secretary's interpretation is entitled to deference and that the Act, as safety legislation, is to be liberally construed to effectuate the Congressional purpose. The court stated further:

We agree with the Secretary that under Section 103(f) miner representatives are entitled to walkaround pay rights with respect to any physical inspection of a mine carried out under Department of Labor auspices for the purpose of determining "whether an imminent danger exists," or "whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter."

The Secretary's interpretative bulletin also interprets 103(f) as applying to inspections made at the request of a representative of the miners. Indeed, no significant distinction could be made in applying 103(f) to spot inspections as well as 103(g)(1) inspections because the authority for both kinds of inspections ultimately derives from 103(a) of the Act. Section 103(g) inspections are therefore subject to the walkaround pay requirements of 103(f).

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated 103(f) of the Act by refusing to pay Complainant his regular rate of pay for his time spent accompanying a federal mine inspector on October 6, 7, and 8, 1987.

ORDER

1. The parties are directed to confer within 15 days of this Decision in an effort to stipulate the amount of Complainant's back pay (with accrued interest computed according to the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1443 (1988), pet. for review Filed, No. 88-1873 (D.C. Cir. Dec. 16, 1988)) and Complainant's litigation expenses, including a reasonable attorney's fee.

2. Within 30 days of this Decision, Complainant shall file either a stipulated proposed order awarding monetary relief signed by both parties or, if there is no stipulation, Complainant's proposed order awarding monetary relief. If there is no stipulation, Respondent shall have 10 days after the proposed order is filed to file a response. If appropriate, an additional hearing will be scheduled to resolve any issues of fact as to monetary relief.

3. The above Decision will not become final until an order is entered awarding monetary relief and declaring the above Decision to be final. The judge will retain jurisdiction of this proceeding until such an order is entered.

William Fauver
Administrative Law Judge

AAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAA
FOOTNOTES START HERE

1. Respondent's stipulation of a proposed order awarding monetary relief will not limit its right to seek review of a final Decision and Order entered in this proceeding.