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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
MIKE E. AMMERMAN,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 89-25-D

MADI CD 88-19

Camp No. 2 Mine

v.

PEABODY COAL COMPANY,
RESPONDENT

DECISION

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by the Secretary on November 14, 1988, alleging that the Operator, Peabody Coal Company, discriminated against Mike E. Ammerman in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, (the Act), in that the Operator (Respondent) violated section 103(f) of the Act. An Amended Complaint was filed on December 15, 1988, seeking a Civil Penalty of \$600. An Answer was filed January 18, 1989.

The Parties engaged in prehearing discovery, and pursuant to notice, a hearing in this matter was scheduled for April 11, 1989, in Nashville, Tennessee. On March 30, 1989, the Secretary filed a Motion for Summary Judgment, and in a telephone conference call on April 11, 1989, between the undersigned and the attorneys for both Parties, the Parties agreed to waive oral argument, and to present this matter for disposition based on Motions for Summary Decision. The hearing set for April 11, 1989, was canceled, and Respondent filed its Motion for Summary Decision on April 10, 1989. The Secretary filed a Response to Respondent's Motion on May 17, 1989.

Findings of Fact

Peabody Coal Company's Camp No. 2 Mine is an underground facility located in Henderson, Union County, Kentucky. Camp No. 2 is a single mine with two entrances or portals designated as the East and West Portals.

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The United Mine Workers of America (UMWA) has represented the miners of Camp No. 2 since the mine opened in 1971. The members of the UMWA Safety Committee, elected by the local's rank and file members, are the miners' designated representatives for walk-around federal inspections at Camp No. 2. That is, by electing individual miners to the four-person Safety Committee, the miners at Camp No. 2 Mine designate such persons as their representatives to accompany Federal Inspectors on their inspections. In the latter part of March 1988, Respondent's management was advised by UMWA that only members of UMWA's Safety Committee would be allowed to accompany MSHA Inspectors.

If none of the four Safety Committeemen are present at the mine at the same shift as the inspection, or if there is more than one inspector, thus requiring more than one representative, each Safety Committeeman is empowered to designate another miner as a miners' representative. In such instances, the Safety Committeemen act on behalf of the miners in naming an alternative (or additional) representative. Designees, however, are never named just because a Safety Committeeman does not want to go on an inspection, or to avoid a situation where a Safety Committeeman would have to travel from one portal of the mine to the other.

At all relevant times, Douglas Rowans was the superintendent of the Camp No. 2 Mine, Matt Haaga was the assistant superintendent, and John Jost was the mine foreman on the West Portal.

In the Spring of 1988, the Safety Committee at Camp No. 2 Mine consisted of Terry Miller, Norman Pleasant, Mike E. Ammerman, and Roger Ennis. Miller, Pleasant, and Ammerman all work at the West Portal of the mine. Roger Ennis is an East Portal worker.

On April 7, 1988, Ammerman reported at his check-in point at the West Portal shortly before 8:00 a.m., and was told, via mine telephone, by East Portal worker Ricky Newcom, that the MSHA inspectors were at the East Portal. Ammerman was the only one of the four Safety Committeemen at the mine, at either portal, on that day. Ammerman designated Newcom as the other miners' representative to accompany MSHA Inspector Ronald Oglesby, and said he would come over to the East Portal to accompany MSHA Inspector Walter Leppen. The MSHA inspectors rode into the mine with the crew at the beginning of the shift at 8:00 a.m.

Ammerman told West Portal Mine Foreman John Jost that he was going to the East Portal, in his capacity as miners' representative in order to accompany an MSHA inspector. Jost told Ammerman that he would not be paid for his time spent traveling from the West Portal to the East Portal, and that he could not furnish

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Ammerman with transportation. Ammerman then went above ground and traveled to the East Portal elevator by car. This is approximately a 10-15 minute drive. Ammerman took a man trip from the East elevator to Unit 2, where the MSHA inspectors had already arrived. It was approximately 9:00 a.m. when Ammerman met up with them.

On April 8, Ammerman again came in early and reported to his check-in point at the West Portal. This time at approximately 7:30 a.m. He went underground and called over to the East Portal. An East Portal miner told Ammerman that Oglesby was there to continue the inspection, and that he was the only inspector that day. Ammerman said he would be there as soon as he could. Ammerman again told Jost he was going to the East Portal. Jost again said he would not be paid for travel time, but did allow him the use of a man trip for transportation.

Ammerman took the man trip along the belt line, and met Matt Haaga somewhere along the way to the West Portal. Haaga told him that he would not be paid for travel time, and that in the future he would not be provided transportation. Ammerman arrived at the East Portal at approximately 8:45 a.m., and accompanied Oglesby. He returned to the West Portal at 4:45 p.m.

When Ammerman received his paycheck for the week of April 4 - 8, 1988, he had been docked 1 hour for April 7 (7 hours listed) and 15 minutes on April 8 (7.75 hours listed).

Issues

The general issue in this case is whether Peabody Coal Company discriminated against Mike E. Ammerman in violation of section 105(c) of the Act, and if so, what is the appropriate relief to be awarded Ammerman, and what are the appropriate civil penalties to be assessed against Respondent for such discrimination.

The specific issue is whether Respondent violated section 103(f) of the Act in denying Ammerman pay for the time to travel from his work site at the West Portal to the East Portal, where he was to serve as a miners' representative in accompanying an MSHA inspector.

Discussion

The affidavits accompanying the Motions for Summary Decision establish that on April 7 - 8, 1988, Mike E. Ammerman, a designated walk-around representative, was denied by Respondent, travel

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pay from his work site at the West Portal to the East Portal where he was to accompany an MSHA inspector on an inspection. In essence, it is the Secretary's position that Respondent has violated section 103(f), which, as pertinent, provides that the walk-around, Ammerman, ". . . shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." In essence, it is Respondent's position that section 103(f), supra, does not require it to pay Ammerman for the time spent traveling from portal to portal, as the travel time, preceded, and is not included in ". . . the period of his participation in the inspection" Respondent further argues that it is entitled to ". . . use East Portal workers as representatives," in reliance on previous history in which miners not on the Safety Committee accompanied MSHA inspectors. (Respondent's Memorandum P. 12.) For the reasons that follow, I do not find much merit in Respondent's arguments, and I accept the position of the Secretary.

In essence, according to the affidavits of Ammerman, Ricky Newcom, Terry Glenn Miller, and Norman Lee Pleasant, Sr., members of the UMWA Safety Committee are elected by the miners, and are the miners' designated representatives for mine inspections. According to the affidavits of Haaga and Douglas Rowans, management was informed by the Union on March 30, 1988, that only Safety Committee members would be allowed to accompany inspectors on their inspections. As such, it is clear that on April 7 - 8, 1988, Ammerman, as a member of the UMWA Safety Committee, was, within the purview of section 105, supra, the representative authorized by the miners to accompany the MSHA inspector on an inspection. Further, according to the affidavit of Ammerman, he was the only Safety Committeeman present at the mine at either portal on April 7, 1988. Therefore, he was the sole representative of the miners, and as such had to be accorded all the rights set forth in section 103(f) of the Act. Thus, in order for the miners to have their authorized representative (Ammerman) accompany the inspector, it was necessary for Ammerman to travel from his work site at the West Portal to the East Portal, the site of the inspection. Management clearly did not have option, as essentially argued by Respondent in its Brief, of utilizing miners already located at the East Portal, as Ammerman, being the sole member of the Safety Committee present, was the authorized representative. In this connection, it is noted that the miners, acting through their Union, and not the Operator, have the authority to designate a representative for the purpose of accompanying an inspector. (See, *Truex v. Consolidation Coal Company*, 8 FMSHRC 1293, 1298 (1986); See also, *Consolidation Coal Co.*, 6 FMSHRC 458).

It now must be decided whether Respondent, by virtue of section 103(f), supra, had the obligation to pay Ammerman for the travel time from the West Portal to the East Portal. In this connection, section 103(f) provides that the miners' representative accompanying the inspector ". . . shall suffer no loss of pay during the period of his participation in the inspection " It appears that, in general, Congress intended a broad construction to be placed on this phrase. In this connection, it is noted that the Senate Report accompanying S. 717, (S. Rept No. 181, supra, at 28-29, 95th Cong. 1st Sess. 28-29 (1977)), as reprinted in Legislative History of the Federal Mine Safety and Health Act (Leg. Hist.) at 616-617), provides with regard to the intent behind Section 103, supra, that "To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties." (Emphasis added).

Thus, inasmuch as Ammerman's travel from the West to the East Portal was for the sole purpose of accompanying an MSHA inspector on an inspection, and inasmuch as the exercise of this right could not have been performed without traveling from his work site to the inspection site, it is clear that to deny him pay for the travel time would deprive him of the full compensation contemplated by section 103(f), supra. I find it unduly restrictive, to hold, as argued by Respondent, that Ammerman be denied pay for travel as it occurred prior to his "participation" in the inspection. To disallow pay for the travel time from portal to portal might have the effect of discouraging miners' participation in inspections, and as such would thwart the Congressional intent behind section 103(f) of the Act, of encouraging miner's participation in inspections.

Therefore, I conclude that Respondent, in not paying Ammerman for the travel on April 7 - 8, from his work site to the inspection site, caused him to suffer a loss of pay in violation of section 103(f), supra, and thereby discriminated against him in violation of section 105(c)(1) of the Act.

In assessing a penalty to be imposed against Respondent, I have considered the fact that although the refusal by Respondent to pay for Ammerman's portal to portal travel to accompany an inspector on April 7- 8, might tend to discourage miners' participation in inspections. However, there is no evidence before me that such actually occurred. Ammerman, in his affidavit, indicated that Mine Foreman John Jose (Jost) and Assistant Superintendent Matt Haaga, both informed him that he

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would not be paid for portal to portal travel to accompany the inspector. However, Ammerman in his affidavit did not indicate that either Jost or Haaga informed him of the reason for this decision. John Jost, Respondent's mine manager of the West Portal, indicated in his affidavit that he advised Ammerman that he would not be paid for the travel as a result of a directive received from management that such time was not compensable. Douglas Rowans, the superintendent of Respondent's Camp No. 2, indicated in his affidavit that he advised Safety Committee members on March 30, 1988, that they would not be paid for travel from portal to portal based on his opinion that the Act did not require payment as "a miner is not traveling with an inspector when he is traveling to meet an inspector." Further, paragraphs 7, 8, 9, and 10 of his affidavit set forth various business problems affecting Respondent's operation as a consequence of UMWA's policy of requiring the representative of the miners accompanying an inspector to be exclusively the Safety Committeeman.

Thus, I conclude that the act of discrimination against Ammerman, by denying him full pay for travel in violation of section 103(f), supra, was motivated solely by business reasons. Also, there is no evidence before me to conclude that there was any bad faith on Respondent's part in interpreting section 103(f) as not requiring pay for portal to portal travel. Taking these factors into account, I conclude that a penalty herein of \$100 is appropriate.

ORDER

It is hereby ORDERED that:

1. Respondent shall pay a penalty of \$100 within 30 days of this Decision.
2. Respondent shall, within 15 days of the date of this Decision, pay Mike E. Ammerman for the 1 hour he had been docked on April 7, 1988, and for the 15 minutes he had been docked on April 8, 1988, with interest at a rate to be calculated in accord with LOC. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1443 (November 1988), pet. for review filed, No. 88-1873 (DC Cir. December 16, 1988), and based on the formula set forth in Secretary on behalf of Bailey v. Arkansas - Carbona Co., 5 FMSHRC 2042, 2051-53 (December 1983).
3. The Respondent shall immediately cease and desist from further refusing to pay representatives of miners for travel time from their work site portal to the portal site of an MSHA inspection.

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4. The employment record of Mike E. Ammerman shall, immediately, be expunged of all references to the circumstances involved in this matter.

Avram Weisberger
Administrative Law Judge