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

JOSEPH G. DELISIO,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. PENN 89-8-D
MSHA Case No. PITT CD 88-25

MATHIES COAL COMPANY,
RESPONDENT

Mathies Mine

DECISION

Appearances: Michael J. Healy, Esq., for the Complainant
Richard R. Riese, Esq., for the Respondent

Before: Judge Fauver

Complainant alleges a violation of 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The issue is whether Respondent violated 105(c) by refusing to compensate Complainant the difference between his regular daily wage of \$126.52 and his statutory witness fee of \$30 paid by MSHA for the day he appeared at a hearing. Complainant was subpoenaed by MSHA to testify against Respondent in a hearing before a Commission judge.

The parties have stipulated the facts and submitted the case for decision without an evidentiary hearing.

Respondent operates a coal mine where Complainant is a miner, the chairman of the local union safety committee, and a "representative of miners" within the meaning of the Act.

On July 21, 1988, in Mathies Coal Company, PENN 88-36-R, a hearing was held before a Commission judge to try a contest filed by Respondent concerning a citation issued at the mine, which charged a violation of a safety standard.

MSHA subpoenaed Complainant to appear at the hearing and paid him a statutory witness fee of \$30. The United Mine Workers of America paid Complainant the difference between his daily miner's pay and the statutory witness fee paid by MSHA.

The hearing was held in a courthouse, not at the mine. Complainant did not work at the mine on the day he testified.

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Respondent refused to pay Complainant the difference between the wages he would have earned at the mine that day, \$126.52, and the witness fee of \$30 paid by MSHA. However, Respondent called its own mine employee witnesses at the hearing on July 21, 1988, and compensated them at the pay rate they would have received had they worked at the mine that day. The witnesses called by Respondent were salaried employees, not hourly employees.

DISCUSSION

Section 105(c)(1) of the Act provides:

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, because such miner, representative of miners or applicant for employment is the subject of medical evaluation and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding, under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

The issue here -- whether 105(c) prohibits a mine operator from withholding wages from a miner witness who testifies against the operator at a Commission hearing while compensating other employee witnesses who testify on behalf of the operator -- appears to be one of first impression. However, this issue has been considered under other statutes.

In *Carpenter v. Miller*, 325 S.E. 2d 123 (WV 1984), the West Virginia Supreme Court of Appeals interpreted an anti-discrimination law similar to 105(c). The state law provided in part:

No person shall . . . in any . . . way discriminate against . . . any miner . . . by reason of the fact that he believes or knows that such miner . . . has testified or is about to testify in any

proceeding resulting from the administration or enforcement of the provisions of this law. [West Virginia Code 22-1-21(a) (3) (1981 Replacement Vol.).]

The UMWA and several miners brought a mandamus action against the West Virginia Department of Mines to prevent the practice of mine operators withholding compensation from miners who were subpoenaed to testify in hearings before the Department. The two operators named in the proceeding had paid the employee witnesses who testified on their behalf, but refused to pay their employees who testified against them. The court held that the withholding of compensation from the miners who testified against the operators constituted discrimination in violation of the state statute.

In *UMWA v. Miller*, 291 S.E. 2d 673 (WV 1982), the court held that withholding compensation from a miner who accompanied a state mine inspector during a mine safety inspection was discrimination in violation of the above state statute.

In *NLRB v. Western Clinical Laboratory, Inc.*, 571 F.2d 457 (9th Cir. 1978), the court upheld an NLRB ruling that the employer violated 8(a)(4) of the National Labor Relations Act (FOOTNOTE 1) by requiring an employee to use vacation time for his attendance under subpoena at an NLRB hearing despite the employee's desire to take leave without pay for those days.

In *Electronic Research Co. [I]*, 187 NLRB 733 (1971), the Board held that an employer's denial of a perfect attendance award to an employee because he was absent from work while testifying against the employer in a Board hearing violated 8(a)(4), where the employer granted such an award to employees who appeared at the same Board hearing at the employer's request. However, in *Electronic Research Co. [II]*, 190 NLRB 778 (1971), the Board held that the employer did not violate the NLRA when it refused to pay for time lost from work by three employees who had been subpoenaed by the union as witnesses at a Board hearing, even though it paid regular pay to employee witnesses called by the employer. The Board found that the hearing was an adversary hearing in which each side subpoenaed or called its own witnesses

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and compensated them for their time, and the union's witnesses were not monetarily disadvantaged since the union had paid union witness fees that exceeded their wages.

In a later case, *General Electric Company*, 230 NLRB 683 (1977), a majority opinion of the Board commented on the opposite results in the two *Electronic Research, Co.* cases, *supra*. It stated that the Board was "distinguishing between those situations where the employer's actions are directed at the employment relationship, as in the perfect attendance award . . . , and those where they were not, as in the witness fee situation" (emphasis supplied). The majority opinion thus concluded:

There is nothing unlawful in an employer using the wages of witnesses as the measure of his compensating them for witness fees while not also paying employees called by other parties . . . , since the employer's actions are not directed at the employment relationship. [Fn. omitted.] However, if an employer distinguishes between its employees on the basis of whether they were summoned as witnesses by it or by the opposition, it acts unlawfully.

Then-Chairman of the NLRB Fanning dissented on the ground that the employer's denial of wages to opposition employee witnesses "was disparate treatment based on whether the testimony was on behalf of or against Respondent's interest" - - and this was "discrimination within the meaning of Section 8(a)(4)."

The distinction relied upon by the majority opinion in *General Electric* -- between (1) discrimination as to a perfect attendance award or the use of vacation time and (2) discrimination as to wages -- appears to me to be artificial and in any event distinguishable from Mine Act cases. The broad protection of 105(c) of the Mine Act prohibits "any manner" of discrimination.

I conclude that Respondent violated 105(c) of the Act by refusing to pay Complainant the difference between his regular daily wages, \$126.52, and the witness fee of \$30 paid by MSHA. Because of Respondent's discriminatory treatment of witnesses in a Mine Act proceeding, i.e., refusing to pay wages to Complainant who was an opposition witness but paying the wages of the witnesses who appeared on its behalf, no further examination of discriminatory motive is necessary.

CONCLUSION OF LAW

1. The judge has jurisdiction over this proceeding.

