CCASE:
SOL (MSHA) V. PEABODY COAL
DDATE:
19901011
TTEXT:

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 ERNEST EUGENE WHITE, COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. WEVA 90-13-D OTC&I-CD-89-14 Sundial No. 10-B Mine
v.	
PEABODY COAL COMPANY, RESPONDENT	
PEABODY COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 90-31-R Citation No. 2723186; 11/8/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Sundial No. 10-B Mine Mine I.D. No. 46-04210
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 90-137 A.C. No. 46-04210-03678
v.	Sundial No. 10-B Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor;
Thomas L. Clarke, Esq., Charleston, West Virginia, for Peabody Coal Company.

Before: Judge Fauver

These three actions, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., turn on the issue

whether section 103(f) of the Act was violated when the operator refused to pay a walkaround representative designated to accompany a federal mine inspector. The inspection party included a federal inspector and a West Virginia mine inspector, and concerned a roof fall at Peabody's No. 10-B Mine. The operator paid the miner designated by the miners' representative as the walkaround to accompany the West Virginia mine inspector, but refused to pay the walkaround designated to accompany the federal mine inspector, contending that one paid walkaround was all that was required under section 103(f).

The parties have filed cross-motions for summary decision based upon a stipulated record.

DISCUSSION

It is stipulated that on May 16, 1989, the Mine Safety and Health Administration (MSHA) and the West Virginia Department of Energy (WVDOE) jointly conducted an investigation of a roof fall at Peabody Coal Company's No. 10-B Mine.

Ernest Eugene White, in his capacity as the Union Mine Safety Committee Chairman, designated Bob Holstine, President of UMWA, Local Union 2271, as the walkaround representative of miners to accompany the state inspector; he designated himself as the walkaround to accompany the federal inspector. The inspection party consisted of Jim Cline, an MSHA inspector, Danny Graham, A WVDOE mine inspector, Bob Holstine and Ernest Eugene White, representatives of the miners, and representatives of management.

After the investigation, the federal and state inspectors issued separate citations under their respective mine laws and regulations.

Peabody paid Bob Holstine for the time he spent on the inspection, but took the position that its payment of Mr. Holstine satisfied its obligation under federal law to provide walkaround pay to only one miners' representative per inspection. It therefore refused to pay Ernest Eugene White walkaround pay. The Secretary of Labor contends that Mr. White was entitled to participate in the investigation and to be paid as a walkaround in a federal inspection.

Section 103(f) of the Act provides in part:

> [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 . . . for the purpose of aiding such inspection and to participate in pre- and

> post-inspection conferences held at the mine. . . . Such representative of the miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection . . . . To the extent that the Secretary or the authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one representative of the miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of participation . . . .

Under this section, the miners are entitled to have at least one walkaround representative on each federal inspection of a coal mine. The section also gives the MSHA inspector the authority to determine the number of additional walkarounds that would aid in his inspection and the discretion to limit the number of walkarounds. Secretary of Labor on behalf of Wayne v. Consolidation Coal Company, 11 FMSHRC 483 (1989). An operator is required to give at least one miners' representative, and as many more as an inspector has determined would aid in his inspection, the opportunity to accompany the inspector. The miners have the right to determine who shall be given the opportunity to serve as their walkaround representatives. Secretary of Labor on behalf of Truex v. Consolidation Coal Company, 8 FMSHRC 1293, 4 MSHC 1130 (1986). However, section 103(f) requires that only one walkaround representative suffer no loss of pay for his or her time spent on an inspection. If an MSHA inspector chooses to permit more than one miners' representative to accompany an inspection party, as provided in section 103(f) of the Act, there is no federal law or regulation to guide an operator as to which of the miner's representatives must suffer no loss of pay.

In this case, the MSHA inspector permitted two representatives of the miners to take part in the May 16, 1989, inspection, even though he found that only one was necessary. Ernest Eugene White, as the Union Safety Committee Chairman, designated Bob Holstine, President of UMWA, Local Union 2271, as the miners' representative to accompany Mr. Graham, the West Virginia mine inspector; he then designated himself as the miners' representative to accompany the federal inspector. Peabody paid Mr. Holstine for the time he spent on the inspection, but refused to pay Ernest Eugene White, contending that it had complied with its obligation under section 103(f) to ensure that one of the walkarounds suffered no loss of pay.

The law of West Virginia gives an authorized representative of miners walkaround rights similar to the federal rights of walkarounds (West Virginia Code 22A-1A-12). The Supreme Court of West Virginia has held that withholding compensation from a

designated walkaround representative is prohibited by the state's anti-discrimination statute. UMWA v. Miller, 291 S.E. 2d 673 (1982). Similarly, it is a violation of the federal anti-discrimination law, section 105(c)(1) of the Act,1 to refuse to pay an authorized walkaround for his or her time spent in accompanying a federal mine inspector. Truex v. Consolidation Coal Co., 8 FMSHRC 1293, 1298, 1300 (198); and Stillian v. Quarto Mining Co., 12 FMSHRC 932, 936 (1990).

The Secretary contends that as Chairman of the Mine Safety Committee, Ernest Eugene White properly exercised his responsibility when, after being told by the MSHA inspector that only one miners' representative was necessary, he proceeded to go on "union business" in order to participate in the federal inspection. He later filed a section 105(c) complaint of discrimination under the Act. The Secretary contends that both sections 103(f) and 105(c) were violated by Peabody's failure to compensate White as a walkaround to accompany the federal inspector.

Peabody contends that since both the federal and state inspectors were investigating the same roof fall, it complied with the federal law by compensating only one miners' representative as a walkaround.

If Peabody had paid Mr. White, rather than Mr. Holstine, there would have been compliance with section 103(f) and no

violation of section 105(c), since Mr. White was the designated walkaround to accompany the federal inspector. In that situation, the miners would have had to pursue their claim for Mr. Holstine under state law.

If the state and federal inspectors had separately investigated the roof fall on different dates, there is no question that Peabody would be required to compensate a walkaround for each inspection under the respective federal and state laws. I hold that the fact that the inspectors appeared on the same day does not alter this responsibility.

Under federal and West Virginia laws, the miners are entitled to have their representatives participate in mine safety and health inspections conducted by the respective government agencies, whether or not a mine inspection is separately or "jointly" conducted. In any inspection, and particularly in an accident investigation, the miners are entitled to be confident that both federal and state agencies are fulfilling their obligations in determining what actually occurred and in reaching proper conclusions as to measures necessary to prevent future risks to miners. In the case of a roof fall, for instance, each agency's inspector will observe and analyze the facts through his own eyes and in his own way. While federal and state inspectors may discuss their observations with each other and with the other members of the inspection party, they must reach their own independent conclusions. A miners' walkaround should not have to try to monitor both a federal and a state inspector at the same time. Each inspector has a separate statute and set of regulations to enforce, and each has separate factual findings to make and separate laws, orders, citations, etc., to consider.

The federal and state rights of miners to participate in inspections should be read in harmony with each other, and not interpreted so as to favor one benefit to the exclusion of the other. Miners' representatives participating in a "jointly" conducted inspection should be able to concentrate on participating effectively in the separate federal and state inspections that are actually taking place.

Accordingly, I hold that Peabody violated sections 103(f) and 105(c)(1) by refusing to compensate Mr. White as a walkaround to accompany the federal inspector.2

~1943

Considering the criteria for a civil penalty in section 110(i) of the Act, I find that a penalty of $20 is appropriate for Peabody's violation of sections 103(f) and 105(c)(1) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 2723186 is AFFIRMED.

2. Peabody Coal Company shall pay a civil penalty of $20 for its violation of sections 103(f) and 105(c)(1) of the Act.

William Fauver
Administrative Law Judge

ÄÄ
FOOTNOTES START HERE

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

"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 Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, 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, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 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 Act 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 Act."

2. After Citation No. 2723186 was issued, Peabody abated the cited violation of section 103(f) by paying White compensation as a walkaround in a federal inspection. However, this was not an admission of a violation, and Peabody preserved its right to challenge the citation before the Commission.