CCASE:
SOL (MSHA) V. U.S. STEEL MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of RICHARD E. GLOVER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 92-172-D
	:	HOPE CD 92-11
v.	:	Shawnee Mine
U.S. STEEL MINING COMPANY, INC. Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 93-13
	:	A. C. No. 46-05907-03657
v.	:	
	:	Shawnee Mine
U. S. STEEL MINING COMPANY, INC. Respondent	:	

DECISION

Appearances: Tina C. Mullins, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;
Billy M. Tennant, Esq., U.S. Steel Mining Company, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Secretary (Petitioner) on behalf of Richard Glover, filed a Complaint pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) ("the Act,"). The Complaint alleges that Glover was discriminated against by U.S. Steel (Respondent), who did not compensate him for newly employed experienced miner training it provided him. The Secretary also seeks a civil penalty, alleging a violation of 30 C.F.R. 48.10 which requires that miners attending such training shall be compensated. At issue in both cases is whether Glover was a miner.

Pursuant to notice, the cases were heard on April 27, 1993, in Charleston, West Virginia. At the hearing, Richard E. Glover, Fred A. Tucker, and James F. Bowman testified for Petitioner. Respondent did not call any witnesses to testify. The parties filed post-hearing briefs on June 18, 1993.

I. Findings of Fact

1. Richard E. Glover has been employed by the United Mine Workers of America ("UMWA") as an international representative assigned to health and safety since 1984.

2. An UMWA representative, Glover conducts safety inspections and investigates accidents at coal mines. He spends approximately 1/3 of his time in underground mines.

3. Glover worked for U.S. Steel Mining Company, Inc. ("USM") from 1972 until he was laid off in 1983 because USM's No. 36 Mine closed.

4. In October 1989, Glover placed his name on the recall panel at U.S. Steel's Shawnee Mine.

5. Glover intended to work only one day at USM's Shawnee Mine to obtain employee status there pursuant to the USM-UMWA collective bargaining agreement.

6. After working one day with USM to establish a seniority date for job protection under the USM-UMWA collective bargaining agreement, Glover intended to continue his employment with the UMWA.

7. On July 1, 1992, Respondent notified Glover of his opportunity to be recalled as a mechanic at its Shawnee Mine. On July 3, 1992, Glover advised Respondent that he accepted the mechanic's position.

8. In July 1992, Glover was recalled to USM's Shawnee Mine as a mechanic.

9. Glover accepted the recall, was tested for a job as a mechanic, took a physical examination, and was administratively processed for benefits purposes.

10. USM assigned an employee number to Glover on July 15, 1992.

11. USM did not pay Glover for his activities on July 15, 1992.

12. On July 20, 1992, USM provided Glover with eight hours of newly employed experienced miner training required under 30

C.F.R. Part 48. Respondent's agents told Glover when to take a break, when to go to lunch, and when to return from lunch.

13. On July 20, 1992, Glover did not go underground at Shawnee Mine, and he was not involved in the extraction or production of coal.

14. USM did not issue Glover safety equipment on July 20, 1992, and did not assign him any duties associated with the mechanic's job.

15. Glover was an employee of UMWA on July 20, 1992, and received his UMWA wages that day.

16. USM scheduled Glover to commence work on July 21, 1992.

17. Glover did not report for work as scheduled on July 21, 1992. Glover considered UMWA to be his employer on July 21, 1992, and chose not to be employed by USM on that day.

18. Fred Tucker, UMWA representative, spoke to Glover the night before he was to start work at the Shawnee Mine, and advised Glover that he would be required to attend to an union business the next day. Tucker explained that a union representative was needed to investigate a fatality that had occurred at Sharples Coal, and that a union representative also was needed to teach a training class at the Mine Academy. Glover advised Tucker that he would cover the training course because it was closer to his home, and would only take one day, and that Charlie Johnson, an international representative, would cover the investigation, which was closer to his home, and which would take three to four days.

19. On July 21, 1992, Glover remained on the payroll of the UMWA and was paid by the UMWA.

20. On the morning of July 21, 1992, Tucker spoke to U.S. Steel's Labor Relations Representative, David Cook, because Labor Relations Manager Les Morgan was not in. He advised Cook that Glover was requesting a leave of absence in order to perform his union duties, and he faxed a leave of absence request from UMWA President Richard Trumka to Respondent at approximately 2:30 that afternoon. Cook stated that he knew nothing about the details of Glover's situation, and that Tucker would have to speak to Morgan when he returned.

21. When Morgan returned to the office on Thursday, July 23, 1992, he advised Tucker that U.S. Steel was thinking of discharging Glover. He later called back and stated that Glover had refused his recall and was no longer on the panel at the Shawnee Mine. Subsequently, Glover called Morgan to apologize for the mix-up and to explain what had happened. Morgan refused

to pay for the training, because Glover had rendered no services to U.S. Steel.

22. On August 13, 1992, Glover filed a Section 105(c) discrimination complaint with MSHA, based on Respondent's failure to pay him for the newly employed experienced miner training. On August 18, 1992, MSHA Inspector James F. Bowman issued a 104(a) citation based on the Respondent's refusal to pay Glover for the training, which he alleged was required under 30 C.F.R. 48.10(a).

23. After MSHA issued a citation to USM for an alleged violation of 48.30(a) (later modified to 48.10(a)), USM abated the citation by paying Glover under protest for the day of training.

24. Payment was made by a check in the amount of $116.75, and dated August 24, 1992.

25. USM recalled Glover again, and he worked on February 11, 1993, relying on the training he had received in July, 1992.

26. Throughout 1992, Glover was never involved in the extraction or production of coal at USM's Shawnee Mine, nor was he regularly exposed to mine hazards there.

27. As an UMWA representative, Glover has never been involved in safety activities at Shawnee Mine; his involvement there has been limited to his attempts to establish a seniority date.

28. As an UMWA employee, Glover did not receive annual refresher training under Part 48, and could not work at Shawnee Mine until he received training required by Part 48.

II. Discussion

A. Docket No. WEVA 93-172-D (Violation of Section 105(c) of the Act)

In order for the Secretary to prevail in this case it must first be established that Glover is entitled to the protection of Section 105(c) of the Act. Section 105(c)(1) of the Act as pertinent, provides as follows:

> 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 . . . . (Emphasis added)

Whether Complainant was a Miner

Section (3)(g) of the Act defines "miner" as "...any individual working in a coal or other mine;". The word "working", is not defined in the Act. Webster's Third New International Dictionary, (1986 edition), defines "work", when used as an intransitive verb, as follows: "...(c): to perform work or fulfill duties regularly for wages or salary".

The record indicates, that on July 20, 1992, Glover took newly employed experience miner training, at the request of Respondent. The training was provided to Glover after he had already accepted a notice of recall, demonstrated his qualifications for a particular opening, and completed a pre-employment physical examination and all of the required paper work. On July 20, 1992, Glover did not perform any activities at the mine. Indeed, Glover could not legally perform any production or any extraction activities at the mine without first receiving newly employed experience miner training.

Hence, since Glover did not perform any work at the mine on July 20, he cannot be considered to have been "working" at the mine as that word is commonly used (See, Websters, supra).(Footnote 1)

The 10th Circuit, the D.C. Circuit, and the Commission, have previously examined the term "miner" in the context of training rights under section 115 of the Act, and have held, pursuant to the definition of the term "miner" in Section 3(g) supra of the Act that job applicants, and former miners on layoff did not qualify as "miners", under the Act, and hence were not entitled to training rights under Section 115 of the Act (Emery Mining Corp v. Secretary of Labor, 783 F.2d 155 (10th Circuit) (1986) (job applicants); Brock v. Peabody Coal Company, 822 F.2d 1134 (D.C. Cir. 1987) (individuals on layoff); and Westmoreland Coal

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1Although Glover underwent training on July 20, at the direction of Respondent, there was no agreement beforehand that he receive any salary or wages for fullfilling this obligation. It is significant to note that on day of the training although Respondent's agents told Glover when to take a break, when to go to lunch, and when to return from lunch, he was still an employee of the UMWA on that date, and was paid for that day by UMWA. Also, it is significant to note that when Glover responded to the recall for the Shawnee Mine, he intended to work only one day to preserve his seniority rights. Further, although Glover had been directed to report for work July 21, he did not report to work on that date, and did not advise Respondent at any time on July 20, or 21 that he was not going to report to work on July 21. Thus, his activities on July 20, undergoing training, do not fall within the scope of fulfilling "duties regularly for wages or salary" (Webster's, supra).

Company, 11 FMSHRC 960 (June 1989) (individuals on layoff).

In Cyprus Empire Corporation, 15 FMSHRC 10 (1993), the Commission noted the holdings of Emery, supra, Peabody, supra, and Westmoreland supra, and held that striking employees were not miners for purposes of being entitled to have their previously designated walk-around representative accompany an MSHA inspector during an inspection. The Commission, after reviewing the definition of the term "miner" as set forth in Section 3(g) supra, concluded as follows: "Thus, a person's status as a miner is determined not by the fact that he is employed by an operator, but rather by whether, as the statute provides, he works in a mine." (Cyprus supra at 13). I conclude, that in general, this reasoning is applicable to the case at bar. Hence, considering all the above, I conclude that inasmuch as Glover on July 20, had not yet reported for work, and was not yet working in the mine, he was not a miner.(Footnote 2)

Accordingly, for all the above reasons, I conclude that Glover is not entitled to the protection of Section 105(c) of the Act. Hence, Complaint filed under Section 105 of the Act, is to

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2Petitioner also argues, in essence, that inasmuch as Glover was an International Representative of the UMWA, he qualifies as a "representative of miners", and he is entitled to the protection of Section 105(c)(1) supra. Also, Petitioner argues that since Glover was on Respondent's recall panel, applied for employment, accepted the notice of recall, and underwent the requisite procedures to qualify for a position as a mechanic, he should be considered an "applicant for employment" and thus entitled to the protection of Section 105(c)(1) supra, of the Act. However, under the terms of Section 105(c)(1), supra, an "applicant for employment" or "representative of miners" comes within the purview of that section only if there has been interference "...with the exercise of the statutory rights of any ... representative of miners or applicant for employment... ." According to Petitioner the statutory right that was allegedly interfered with herein was Glover's right to receive and to be compensated for newly employed experience miner training. Specifically, it is alleged that Respondent interfered with Glover's right to receive compensation for training pursuant to 30 C.F.R. 48.10 supra. Section 48.10 supra, provides, as pertinent, that "...miners attending such training shall receive the rate of pay as provided in Section 48.2(d)...". (emphasis added) Accordingly, pursuant to the terms of Section 48.10 supra, the right to receive compensation for training is limited to those persons who fall within the category of being a "miner". Although Glover may be construed to have been a representative of miners or an applicant for employment, in these capacities, Glover did not have a right to receive compensation for training.

be dismissed.(Footnote 3)

B. Docket No. WEVA 93-13 (Violation of 30 C.F.R. 48.10(a))

At issue herein is the validity of Citation No. 2736770 issued by MSHA inspector James F. Bowman, on August 18, 1992, alleging a violation by Respondent of 30 C.F.R. 48.10(a), which, as pertinent, provides that "miners", shall receive compensation for training. On July 20, 1992, Respondent required Glover to receive newly employed experienced miners training and he received such training on that date. The critical question is whether Glover qualifies as a "miner" as defined in 30 C.F.R. 48.2(a)(1). Section 48.2(a)(1), supra, defines a miner as "...any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods". Clearly, on July 20, 1992, Glover was not working in any underground mine, as explained above, II(A) infra, as he was not engaged in the extraction and production process. Glover had been employed as an underground miner on the effective date of the regulations, October 13, 1978, and, accordingly, was an "experienced miner", as opposed to a "new miner" (See, 30 C.F.R. 48.2(b) and (c)). However, on July 20, 1992 he was not engaged in the extraction or production process. Hence he was not a "miner" at that term is defined in Section 48.2(a)(1) supra.(Footnote 4) At best, he can be considered a "former miner", (See Cyprus Empire Corp, supra, at 13). As such, his status on July 20, 1992 was comparable to the experienced miner who was in a layoff status and who was found by the Commission in Westmoreland, supra, to have no right to be compensated for training that he took during the period of his

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3Additionally, I note that in order for Petitioner to prevail under Section 105(c) supra, it must first be established that Glover was involved in protected activity (Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Company v. Marshall 633 F.2d 1211 (3rd Cir. 1981)); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-818 (1981)). In this connection, in essence, it is Petitioner's argument that the protected activity herein was Glover's right to receive, and be compensated for newly employed experience miner training. There is no merit to this contention for the reasons set forth above, II(A). Hence, I conclude that the record fails to establish that Glover was engaged in any protected activity.

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4No argument was made by the Petitioner, that Glover was either a maintenance or service worker, or that he was "regularly" exposed to mine hazards.

layoff, as he was not considered a miner at that time.

I find therefore that since Glover was not a "miner", Respondent did not have any obligation, pursuant to Section 48.10 supra, to compensate him for the training it provided. As such, Respondent did not violate Section 48.10, supra, and the Citation at issue shall be DISMISSED.

ORDER

It is hereby ORDERED that, for all the above reasons, these cases be DISMISSED.

Avram Weisberger
Administrative Law Judge
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Distribution:

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