

CCASE:
SOL (MSHA) V. JIM WALTER RESOURCES
DDATE:
19931230
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 93-182-D
On Behalf of CARROLL JOHNSON,	:	BARB CD-92-20
Complainant	:	
and	:	No. 7 Mine
	:	
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	
v.	:	
	:	
JIM WALTER RESOURCES,	:	
INCORPORATED,	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 93-104
Petitioner	:	A. C. No. 01-01401-03938
and	:	
	:	No. 7 Mine
	:	
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Complainant and Petitioner; Barry Woodbrey, Esq., United Mine Workers of America (UMWA), for Intervenor; David M. Smith, Esq., and Mark Strength, Esq., Meynard, Cooper and Gale, Birmingham, Alabama, and R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Weisberger

Statement of the Case

The above captioned cases commenced by the Secretary, involve an alleged violation by Jim Walter Resources, Inc., (Respondent) of Section 103(f) of the Federal Mine Safety and Health Act of 1977 ("the Act"), and an alleged violation of Section 105(c)(1) of the Act. On March 19, 1993, the Secretary (Complainant) filed a motion for approval of settlement regarding both these cases. The United Mine Workers of America (UMWA), Intervenor, filed a response in opposition to the motion. Respondent filed a submission in support of the motion. On April 26, 1993, an order was issued denying the motion to approve settlement. Pursuant to notice, the cases were scheduled and heard in Birmingham, Alabama, on July 20 and 21, 1993. On September 23, 1993 the Secretary filed a brief. Respondent and Intervenor each filed their briefs on September 28, 1993. On October 1, 1993, the Secretary filed a reply brief. Respondent's response was received on October 12, 1993.

I.

Findings of Fact

1. Jim Walter Resources, Inc., Respondent, operates Mine No. 7, an underground coal mine.

2. At Mine No. 7, coal is mined on a continuous miner section and on two longwall sections.

3. In October 1991, Carroll Johnson, a miner, and chairman of the union safety committee at the subject mine, received safety complaints from miners regarding respirable dust on the longwall sections. In response, he requested a Section 103(g) inspection, on October 22, 1991, pursuant to the Section 103(g) inspection at the No. 1 Longwall Section. Citation No. 2805274 was issued to Respondent, alleging excessive respirable dust. The time to abate the violation was set for November 17, 1991 and subsequently extended to November 22, 1991.

4. On November 22, 1991, Respondent was issued a Section 104(b), Order (No. 3805276), alleging excessive respirable dust on the No. 1 Longwall Section.

5. On November 23, 1991, MSHA and Respondent agreed to 15 changes(Footnote 1) and adjustments to control dust on the No. 1 Longwall, including the placement of additional sprays, and fog-jet sprays. Also, one of the changes required a decrease in one of the diameters of the opening on the drum sprays, and the maintenance of "... a minimum of 70% operating." (Exh. G-4, par. N) (sic).

1 These changes were made to the original Dust Control Plan.

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6. The Section 104(b) Order, supra, was modified on November 23, 1991, to allow production to resume on the No. 1 Longwall Section "... to evaluate the changes and adjustments made to the approved ventilation methane and dust control plan and collect respirable dust samples." (Exh. G-3).

7. On November 23, 1991, MSHA Inspector Terry Gaither, and Milton Zimmerman an MSHA Supervisor Coal Mine Inspector, went to the No. 1 Longwall to evaluate the agreed upon changes and adjustments to the Dust Control Plan ("Plan"), and to determine if the Operator was in compliance with the respirable dust regulatory standards.

8. Johnson, as the representative authorized by miners, ("walkaround") accompanied the MSHA inspectors on November 23, 1991 on their inspection.

II.

Further Findings of Fact and Discussion

A. Discrimination under Section 105(c)

An analysis of the specific events that transpired during the time period in question is to be made based upon the principles established by the Commission in *Secretary on behalf of Robinette v. United Castle Coal Company*, 3 FMSHRC 817 (1981). In *Robinette*, the Commission held that to establish a prima facie case of discrimination under Section 105(c) of the Act, a miner has the burden of proving that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated "in any part" by the protected activity. The operator may rebut the prima facie case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone.

1. Johnson's version

According to Johnson, on November 23, 1991, prior to the start of production at the subject site, air readings were taken, and the spray pressure was noted. Johnson said that once production was started, he followed the shearer to see if the sprays were working properly. Johnson related that some sprays appeared clogged, and he asked the shearer operator if they were

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clogged. According to Johnson, the latter's response was "yeah they're acting up a little again." (Tr. 138). Johnson stated that he mentioned to Thom Parrott, who was the longwall coordinator, that it "looked" to him "like the sprays may not be at seventy percent as required." (Tr. 138). Johnson said that in response Parrott "shrugged his shoulders," and did not say anything. (Tr. 139). Johnson said that he then told MSHA Inspector Terry Gaither, who in turn told Parrott that the sprays may have to be cleaned, and "you are getting quite a few stopping up." (Tr. 140) (sic)). According to Johnson, at that point Parrott agreed, and the sprays were shut down and cleaned.

According to Johnson, about 15 or 20 minutes after he had pointed out the clogged sprays to Parrott, Parrott asked to see him alone. Johnson said that Parrott then told him that he was not on his own inspection, was not an inspector, and was to "quit pointing things out." (Tr. 143) Further, according to Johnson, Parrott told him that he had not been staying in the immediate vicinity of the inspectors, and that he (Parrott) did not want to catch him away from them again. Johnson stated that his response was to say "Ah come on." (Tr. 144), but that he may have said that phrase harshly. He said he then walked away to the dinner hole. Contemporaneous notes taken by Johnson, in essence, corroborate the version he testified to at the hearing.

Johnson further testified, in essence, that at approximately 1:00 p.m., the inspectors stopped to talk to a miner. He said that when they stopped he was approximately 15 to 20 feet ahead of them, and he stopped and looked at the shearer. According to Johnson, while he was waiting for the inspectors, Parrott approached, and told him that he was being relieved of his duties. Johnson said that Parrott told him that he was relieving him of his duties because he was not staying in the immediate vicinity of the inspector. According to Johnson, after he was relieved of his duties, Parrott said that he wanted to talk to him "alone with Danny Watts." (Tr. 157)(sic) Parrott did not tell him why he wanted to talk to him. Johnson said that he did not go to talk to Parrott because he was afraid.

2. Parrott's version

According to Parrott, at approximately 9:43 a.m., on November 23, Johnson was observed looking at the shearer at the tailgate. Parrott said that the shearer was down at the time, and the inspectors were 250 and 300 feet away. Parrott indicated that this was the first time that he had seen a safety committeeman or a walkaround "go off on his own like that." (Tr. 458). Parrott called Richard Donnelly, who was the Deputy Mine Manager at the subject mine, and asked him if it was legal or within Respondent's work rules for Johnson to leave the general vicinity of the inspectors, and Donnelly said "no."

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(Tr. 458) Donnelly told Parrott to take Johnson aside, and not to confront him, but to tell him not to make his own inspection. According to Parrott, after he spoke to Donnelly, he found Johnson alone at the headgate drive. Parrott said he told Johnson that he was not to wander off and make his inspection, and that it was company policy for him to remain with the inspectors. Parrott said that Johnson's response was as follows: "Under the Act, I have full access to this mine, I can come and go as I damn well please and I will." (Tr. 461). According to Parrott, Johnson further said "If this is something personal, maybe you and I can step off the property after the shift and settle it." (Tr. 461) Parrott said that Johnson then "got angry" and went to the dinner hole. (Tr. 461).

Parrott stated, in essence, that the next time he saw Johnson, he was "around the corner ... out of sight of the inspectors" (Tr. 463). He indicated that Johnson was 30 or 40 feet from the inspectors. Parrott said that he gave Johnson a 464) Parrott stated that Johnson became "real argumentative." (Tr. 464) According to Parrott, Johnson said that "he did not give a damn what I said" (Tr. 464), and pointed out that the inspectors were only 15 feet away. Parrott said he then requested Johnson to step away, as he wanted to explain to him that if he would disobey an order, he would be suspended. Parrott said that Johnson refused the request and at that point he told Johnson that he was giving him a "direct order" to walk over to him (Parrott) (Tr. 465). According to Parrott, Johnson said "do you really want me to put some heat on your ass do you want me to come down here and inspect this longwall." (Tr. 467). Parrott said he then used the term "direct order" and asked Johnson if he understood what follows by disobeying a "direct order". Parrott said Johnson responded by saying he did not care. At that point, Parrott informed Johnson that he was being suspended with the intent to discharge for insubordination.

3. Discussion

a. Protected Activities

In essence, Respondent argues, inter alia, that the Secretary has failed to establish a prima facie case in that he has not proven that Johnson was engaged in any protected activities. Specifically, Respondent argues that there is no evidence that Johnson was out of the presence of the inspectors for the purpose of aiding the inspectors. Respondent also argues that there is not any evidence that Johnson left the inspection party at the request of the inspectors. For the reasons that follow, I find that the Secretary has established that Johnson was engaged in protected activities.

The Section 105(c) discrimination complaint filed by the Secretary is based upon an alleged discrimination against Johnson while he was exercising rights under Section 103(f) of the Act. Section 103(f) of the Act, as pertinent, provides that an authorized representative of miners shall be given an opportunity to accompany an inspector during an inspection" ... for the purpose of aiding such inspection" The Legislative History of Section 103(f) supra, indicates the importance of the right of miners' representatives to accompany an inspector. Congress concluded that participation of miners in inspections "will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." (Legislative History, at 616, supra). The language of Section 103(f) of the Act supra, indicates that the right of a representative to "accompany" an inspector is "for the purpose of aiding such inspection."

(1) Aiding the Inspection

Milton Zimmerman, a supervisory coal mine inspector, testified that, in general, a safety committeeman (representative of miners) assists in a dust inspection by checking sprays, talking with miners, and checking if the shields are being washed. Although neither Zimmerman, nor MSHA Inspector Terry Gaither, made any specific request of Johnson to do anything to aid them in the inspection, Zimmerman remarked as follows "... it didn't make any difference whether Mr. Johnson was with me or whether he was on a tailgate because he was assisting us on the inspection. And had he been on the tailgate or longwall which is 1000 feet away, he was assisting on the inspection." (Tr. 69). Based on this testimony, I find that Johnson's presence in the inspection party was aiding the inspection.

(2) Accompanying the Inspector

Webster's Third New International Dictionary (1986 edition) defines "accompany" as follows: "(1) to go with or attend as an associate or accompany; go along with." "With" is defined, inter alia as follows ... "4a ... used as a function word to indicate one that shares in an action, transaction, or arrangement." Applying the common meaning of the word "accompany," I find that there is no requirement in Section 103(f) for a representative of miners to be within a specific distance from the inspectors. It is sufficient if the representative "shares in an action." I find that Johnson, in the locations observed by Parrott, was part of the general action of the inspection. It would be unduly restrictive to find that a miner's representative is beyond the scope of Section 103(f) supra, unless he is at a location at the specific request of an inspector, or engaged in a specific action to aid the inspector at the latter's request. To the contrary,

as explained by Zimmerman, Johnson's presence in the general area was aiding the inspectors. Accordingly, broadly construing Section 103(f) supra, (Footnote 2) I find that given the framework of the specific inspection at issue, i.e., to evaluate the effectiveness of the changes to the Plan, Johnson's presence on the section other than within a few feet of the inspectors was within the scope of Section 103(f) rights. Hence, I conclude that Johnson was engaged in protected activities on November 23.

b. Motivation

(1) Johnson's version

In essence, according to Johnson, when he was at the headgate at the beginning of the shift, he told Parrott that it looked to him "that the sprays may not be at 70 percent as required." (Tr. 138). Johnson's contemporaneous notes also indicate that at 10:30 a.m., he pointed out as follows: "less than 70 percent sprays on H.G.". Johnson indicated that Parrott did not say anything, but that approximately 15 or 20 minutes later, Parrott told him that he was not to be on his own inspection, and to quit pointing things out. In contrast, Parrott stated that Johnson did not point out that 70 percent of the sprays were not operating. He also denied telling Johnson that he (Johnson) was pointing things out to the inspectors. Parrott also stated that he was not aware that Johnson was pointing things out to the inspectors on the longwall. In this connection, Respondent argues that no other witness corroborated Johnson's testimony that he had pointed things out, (Footnote 3) and no citation was issued on the basis of any alleged insufficient sprays. In this connection, Zimmerman indicated that Johnson did not tell him that anything was wrong with the sprays. However, the version testified by Johnson finds corroboration in the

2 In general, Congress manifested its intent that the scope of protected activities under Section 105(c) be broadly interpreted (S. Rep. No. 95-181, 95th Cong., 2d Sess., reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 ("Legislative History")). Given this intent, it might be reasoned that Congress similarly intended a broad interpretation to be accorded rights under Section 103(f) supra, where these are the basis of protected activities under Section 105(c) supra.

3 Johnson said that he told MSHA Inspector Terry Gaither that he thought that some of the sprays were "stopping" up (Tr. 140). Gaither did not testify to corroborate Johnson. Based on my observations of Johnson's demeanor, I find his testimony credible on this point.

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testimony of Richard Donnelly, who was the deputy mine manager. Donnelly indicated that when Parrott called him between 10 and 11:00 a.m., on November 22, to ask him if a safety committeeman is allowed to make his own inspection, Parrott told him that Johnson was pointing things out to the inspectors. Hence, for these reasons, and also based upon my observation of the witnesses' demeanor, I accept the version testified by Johnson, and find that he did point out problems with the sprays.

According to Johnson, at approximately 1:00 p.m., when he was about 15 or 20 feet ahead the inspectors, Parrott told him that he was relieved of his duties for not staying in the immediate vicinity of the inspectors.

(2) Parrott's version

According to Parrott, when he initially advised Johnson that it was the company's "position" (Tr. 460) that he remain with the inspectors, Johnson said "if this is something personal, maybe you and I can step off the property after the shift and settle it." (Tr. 461). Parrott testified at the second time when he spoke to Johnson and gave him a "direct order" to stay with the inspectors, Johnson stated as follows "do you really want me to put some heat on your ass, do you want me to come down here and inspect this longwall." (Tr. 467). On direct examination Parrott maintained that the fact that Johnson defied an order to stay with the inspectors did not have anything to do with the decision to suspend Johnson. He further said, in essence, that Johnson's position vis-a-vis the inspectors did not result in his discharge. Parrott said that Johnson's refusal to come over and discuss the situation with him was the main reason for the suspension in combination with threats that Johnson had made.

Parrott's contemporaneous notes corroborate his testimony that he had given Johnson "direct orders" to stay with the inspectors. However, the notes do not indicate that he gave Johnson a "direct order" to come to him and discuss the situation. On cross-examination Parrott indicated that he was not sure if he used the words "direct order" when he told Johnson to walk over to him. Parrott also indicated that he could not be sure if used the words "direct order", since he did not write it in his notes. In either event, it is critical to note that on cross-examination Parrott indicated that the fact that Johnson defied his "direct order" to stay with the inspectors "... was tied in" to the decision to suspended him. (Tr. 527).

Donnelly testified that, in the second conversation he had with Parrott on November 23, the latter informed him that he had a "confrontation" with Johnson and had told Johnson "that he was again making his own inspection." (Tr. 350) (sic). According to Donnelly, Parrott then informed him that he had told Johnson "several times" to come and talk to him "about it" and Johnson

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refused. (Tr. 351). Donnelly further stated as follows: "And as a result of that, Thom (Parrott) informed me that he had given him five days with intent and relieved him of his job duties." (Tr. 351). Donnelly stated that he told Parrott that he wasn't sure if he agreed with him and he in turn contacted Willis Coates, the mine manager of No. 7 Mine, and J.T. Piper, the senior vice president of operations, to "discuss it." (Tr. 352). Neither Coates, nor Piper testified. Donnelly did not testify either as to specifically what he told Coates and Piper, or what he asked them. Neither did Donnelly testify to what Coates and Piper told him. Donnelly indicated that after speaking with Piper and Coates he informed Parrott to have Johnson "go to the end of the track." (Tr. 354). He stated that he also told John Looney, the mine foreman, who was Parrott's superior, that there was a personnel problem, and that he should go to the longwall and Parrott would explain it to him. (Tr. 354). Subsequently, at the beginning of Johnson's shift on November 25, 1991, Donnelly instructed Looney to administer to Johnson a five day suspension with intent to discharge. In the RECORD OF DISCIPLINARY ACTION served on Johnson, Donnelly had Looney state the following under the heading REASON FOR DISCIPLINARY ACTION:

Work Rule #7 Work Rule #1
Employee refused a direct order (Footnote 4)
Employee threatened supervisor & company. (Exh. G-19).

Donnelly indicated that the fact that Johnson had been given a "direct order" to stay with the inspectors and not to be making his own inspection was not the reason why he instructed Looney to give Johnson a five day suspension with intent to discharge. (Tr. 416). In the context of his directions to Looney, Donnelly was asked whether he considered the fact that Johnson had disobeyed an order to stay with the inspector, and had disobeyed an order not to be making his own inspection, and he answered as follows: "I'd answer that no." (Tr. 416). However, in earlier cross-examination he was asked whether it was true that one of the bases for the disciplinary action was that Johnson refused a "direct order" from Parrott not to be making his own inspection, and he answered as follows: "That is part of the circumstances that lead up to my feeling that he was insubordinate, yeah." (Tr. 415).

4 Donnelly said that the order that was referred to was the "direct order" given to Johnson to walk away from the miners who had gathered so that Parrott could discuss the matter with him.

(3) Conclusions

Given the above sequence of events, as set forth in the testimony of Johnson that I accept, and considering the testimony of Parrott and Donnelly on cross-examination, I conclude that the decision by Parrott to discipline Johnson, which was apparently affirmed by Donnelly, was motivated in part by Johnson's refusal to follow Parrott's order to stay with the inspectors. In this connection, I have concluded above, II(A)(3)(a) infra, that Johnson was engaged in protected activities, and was not outside the scope of these activities when he was not in the immediate vicinity of the inspectors. According to the testimony of Parrott on cross-examination, the fact that Johnson defied his order to stay with the inspectors was "tied in" to the decision to suspend him. Considering this testimony and the sequence of events, presented herein, I conclude that it has not been established that Respondent would have fired Johnson for his unprotected activities alone, i.e., the threats he allegedly made to Parrott, and his refusal to follow an order to walk over to Parrott and discuss the problems that had arisen that morning. (Footnote 5) Hence, I find that the Secretary has established a prima facie case which has not been rebutted by Respondent. Nor has Respondent established an affirmative defense.

c. Penalty

In essence, Intervenor argues for the imposition of a \$10,000 penalty based upon the history of violations, negligence, and the lack of good faith of Respondent in abating the violation.(Footnote 6)

5 As correctly argued by the Secretary, the fact that Johnson did not remain in the immediate vicinity of the inspectors, which was not outside the scope of protected activities, was the catalyst which triggered the subsequent orders given to him by Parrott to step over and talk to him. In other words, this order, and the prior direct order given by Parrott to Johnson to stay with the inspectors and not to conduct his own investigation were inseparable. The defiance of either of these orders alone cannot be isolated as a independent motive for the discharge.

6 The Secretary seeks to bring to my attention Secretary of Labor on behalf of Donald B. Carson v. Jim Walter Resources, Inc. 15 FMSHRC 1992 (September 29, 1993 (Judge Maurer), and Secretary of Labor on behalf of James Johnson and UMWA v. Jim Walter Resources, Inc., 15 FMSHRC (Docket No. SE 93-127-D, November 18, 1993) (Judge Fauver). Neither of these cases involve the same violation as the case at bar, i.e., Section

(1) History of Previous Violations

Intervenor urges that cognizance be taken of adverse actions of Respondent against UMWA officials. In this connection, Intervenor refers to the testimony of Darrell Dewberry, District No. 20 union executive board member that when he was a member of the Union Safety Committee, he had been disciplined in 1981, for reporting adverse roof conditions. Dewberry filed a Section 105(c) complaint that subsequently was settled. Also, Dewberry testified that Union Safety Committeeman Don Nelson had been disciplined for reporting an unsafe condition. A Section 105(c) complaint was subsequently brought by the Secretary on behalf of Nelson. That case was subsequently settled, and a decision was issued by Commission Judge Melick approving the settlement which required Respondent to pay a penalty of \$2,000. Intervenor further cites the testimony of Larry Spencer that he was disciplined for filing a safety complaint in April, 1991. Spencer filed a Section 105(c) complaint which was subsequently withdrawn when a grievance filed by him was resolved. Also, Tommy Boyd, a member of the safety committee testified that he was disciplined in 1989 by Parrott because he asked that a methane monitor be calibrated. Boyd did not file a Section 105(c) complaint.

Among the factors required to be taken into account in assessing a penalty by a Commission Judge is an operator's "history of previous violations" (Section 110(i) of the Act)). In evaluating the congressional intent in enacting this phrase, I note the following language set forth in the report issued by the Senate Committee on Human Resources on the bill that became the Act: "In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard particularly within a matter of a few inspections, should result in a substantial increase in the amount of the penalty to be assessed." (S. Rep. No. 181 at 43, Legislative History, at 631). (emphasis added). In considering what evidence is to be taken into account in evaluating an operator's "history of previous violations," I initially note that in order for a record of an incident to be considered part of a "history of previous violations," this incident must result in a citation that has not been vacated, (Footnote 7)

103(g), nor the engagement in the same protected activities that were retaliated against. Accordingly, they were not accorded much weight in evaluating Respondent's history of previous violations or the gravity of the violations found herein.

7 See, Youghioghney and Ohio Coal Company, 7 FMSHRC 200, at 203 (1985).

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or at least there must be a "final determination" by the Secretary that a violation has occurred (See, Peggs Run Coal Company, Inc.,) 5 IBMA 144, 150 (September 22, 1975).

I find that the testimony relied on by Intervenor is insufficient to increase the appropriate penalty on the basis of Respondent's history of previous violations. In this connection, I note that Intervenor has not cited any "history of previous violations" similar to the one at issue, i.e., interference with the right of a walkaround who was not in the immediate vicinity of the inspectors.

(2) Negligence and Good Faith in Abatement

After Parrott ordered Johnson to go to the end of the track, Zimmerman was informed that Johnson had been relieved. Zimmerman informed Donnelly and Parrott that the inspection could not be continued without miner representation, and that the "b" (Footnote 8) order would be reinstated. In essence, Parrott asked Johnson and Zimmerman to name a replacement to serve as the walkaround, and they each refused. Zimmerman issued a citation alleging a violation of Section 103(f). Zimmerman informed Parrott and Donnelly that if miner representation was not allowed, he was going to reinstate the "b" order. (Footnote 9)

The following Monday, Johnson reported for work and was instructed to go to see the foreman. Based on Donnelly's instructions, Johnson was then given a notice of a five day suspension with intent to discharge. The following day, Willis Coates, the mine manager, called Darrell Dewberry, the UMWA District No. 20 executive board member, and requested him to tell Johnson to report work for his next shift. Dewberry was further told to inform Johnson that Respondent would compensate him for all lost wages. Johnson was in fact so compensated.

The violation of Section 105(c), supra, initially occurred on November 23, when Parrott ordered Johnson to leave the work area. On Johnson's next regular shift on November 25, further

8 On November 22, 1991, Respondent was issued a Section 104(b), Order (No. 3805276), alleging excessive respirable dust on the No. 1 Longwall Section.

9 According to Parrott, Zimmerman informed him that he was going to issue a citation and then told them they had 15 minutes to obey it or "it becomes a "b" order." (Tr. 472). According to Parrott at that point he then called Donnelly who told him to reinstate Johnson.

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adverse action was taken against him when he was suspended for five days with intent to discharge. However, the following day, Johnson was reinstated and subsequently compensated for all lost wages. Hence, Johnson did not incur any damages as a consequence of the discriminatory action taken against him by Respondent.(Footnote 10)

Based on all the above, I conclude that a penalty of \$2,000 is appropriate for the Section 105(c) violation.

d. Relief

It is ordered as follows:

1. Respondent and its agents shall comply with Section 103(f), and shall cease and desist from seeking to intimidate Complainant and other members of the Health and Safety Committee from asserting rights under Section 103(f) supra.

2. Respondent shall post a notice on the mine bulletin board stating that it will not violate Section 105(c) supra, in the future.

3. Respondent shall expunge and destroy all reference, and copies of all documents, from any and all records of Respondent related to Complainant about the events and actions which took place from November 23 through November 26, 1991.

4. Respondent shall pay \$2,000 within 30 days of this decision, as a civil penalty for the violation of Section 105(c), supra.

B. Violation of Section 103(f)

In essence, Section 103(f) of the Act provides for a representative of miners to accompany inspectors to aid in their inspection. The legislative history of Section 103(f) manifests the importance that Congress placed on this right as it found that such participation "will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness." Legislative History, supra, at 616-617. As set forth above, II(A)(3)(a)(1) infra, Zimmerman indicated in general, how a walkaround aids an inspection. When

10 I note Intervenor's concern that does not counteract the chilling effect of his suspension on miners who might be reluctant to voice safety concerns reasoning that if a Union walkaround can be fired for engaging in protected activities, then the operator would not hesitate to fire them for similarly engaging in protected activities. I find this argument to be too speculative.

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617. As set forth above, II(A)(3)(a)(1) infra, Zimmerman indicated in general, how a walkaround aids an inspection. When Johnson was observed by Parrott he was not in the immediate vicinity of the inspectors. Parrott did not inquiry of him why he was not with the inspectors, or why he was located where he was. I found, above, II(A)(3)(a) infra, that Section 103(f) does not require a walkaround to be, at all times, in the immediate vicinity of the inspectors. I also found, above II(A)(3)(b) infra, that when Parrott relieved Johnson of his duties on November 23, he was motivated, in part, by Johnson's refusal to follow his order to stay with the inspectors. I thus, find Parrott's action interfered with Johnson right's as a walkaround under Section 103(f), and hence Section 103(f) was violated.

1. Penalty

I find that Johnson was reinstated as a walkaround after Zimmerman threatened Respondent with the issuance of a "b" order unless Johnson would be reinstated as a walkaround. This fact is important in assessing Respondent's good faith in abating the violation. Also considering Respondent's negligence as discussed above, II(A)(3)(c)(2) infra, I conclude that a penalty of \$1000 is appropriate.

2. Relief

It is ordered that Respondent pay, within 30 days of this Decision, \$1,000 as a civil penalty for the violation of Section 103(f), supra.

Avram Weisberger
Administrative Law Judge

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