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November 18, 2015

SECRETARY OF LABOR, MSHA, On behalf of **THOMAS MCGARY** and **RON BOWERSOX**, Complainants,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-583-D MORG-CD 2014-15
v.	:	
THE MARSHALL COUNTY COAL CO., MCELROY COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	:	 Marshall County Mine Mine ID: 46-01437
SECRETARY OF LABOR, MSHA, On behalf of **RICK BAKER** and **RON BOWERSOX**, Complainants,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-584-D MORG-CD 2014-16
v.	:	
OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., AND MURRAY ENERGY CORPORATION, Respondent.	:	 Ohio County Mine Mine ID: 46-01436
SECRETARY OF LABOR, MSHA, On behalf of **ANN MARTIN** and **RON BOWERSOX**, Complainants,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-585-D MORG-CD 2014-17
v.	:	
HARRISON COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC.,	:	

AND	:	
MURRAY ENERGY CORPORATION,	:	Harrison County Mine
Respondent.	:	Mine ID: 46-01318
	:	
SECRETARY OF LABOR, MSHA,	:	INTERFERENCE PROCEEDING
On behalf of **RAYMOND COPELAND** and	:	
RON BOWERSOX,	:	
Complainants,	:	Docket No. WEVA 2015-586-D
	:	MORG-CD 2014-18
	:	
v.	:	
	:	
MONONGALIA COUNTY COAL CO.,	:	
CONSOLIDATION COAL COMPANY,	:	
MURRAY AMERICAN ENERGY, INC.,	:	
AND	:	
MURRAY ENERGY CORPORATION,	:	Monongalia County Mine
Respondent.	:	Mine ID: 46-01968
SECRETARY OF LABOR, MSHA,	:	INTERFERENCE PROCEEDING
On behalf of **MICHAEL PAYTON** and **RON**	:	
BOWERSOX,	:	
Complainants,	:	Docket No. WEVA 2015-587-D
	:	MORG-CD 2014-19
	:	
v.	:	
	:	
MARION COUNTY COAL CO.,	:	
CONSOLIDATION COAL COMPANY,	:	
MURRAY AMERICAN ENERGY, INC.,	:	
AND	:	
MURRAY ENERGY CORPORATION,	:	Marion County Mine
Respondent.	:	Mine ID: 46-01433

DECISION AND ORDER

Appearances: Charles Lord, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;

Laura Carr, UMWA, Washington, D.C., for the Complainants;

Thomas Smock and Philip Kontul, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pittsburgh, Pennsylvania, for the Respondents.

Before: Judge Miller

These cases are before me based upon complaints of interference brought by a number of employees at five mines owned and operated by Murray Energy Corporation. The cases were brought pursuant to the interference provisions of section 105(c) of the Federal Mine Safety and

Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Act"). At issue in each of the cases is a mandatory "awareness meeting" that was held at each of the mines in which the CEO of Murray Energy, Robert Murray, discussed complaints that had been made by miners to the Mine Safety and Health Administration ("MSHA"). The parties appeared at a hearing beginning on Tuesday, September 21, 2015, in Pittsburgh, Pennsylvania. The parties agreed that because, for the most part, the same presentation was given at each mine and the facts contained in the allegations are the same for each mine, a single hearing addressing the issues at all five mines was appropriate.

The parties have agreed that Murray Energy Corporation is a mine operator as defined by the Mine Act. Robert Murray is the President and CEO of Murray Energy Corporation ("Murray Energy"). Jt. Stips. ¶ 1. He is also President and CEO of Murray American Energy, Inc. ("MAEI"), Consolidation Coal Company, and McElroy Coal Company, which are all wholly owned by a subsidiary of Murray Energy, Ohio Valley Resources, Inc. Jt. Stips. ¶ 2. Murray is also President and CEO of the Marshall County Coal Company, the Ohio County Coal Company, the Harrison County Coal Company, the Monongalia County Coal Company, and the Marion County Coal Company, all local subsidiaries owned by MAEI. Jt. Stips. ¶¶ 3, 4. The local subsidiaries operate, respectively, the Marshall County Mine, the Ohio County Mine, the Harrison County Mine, the Monongalia County Mine, and the Marion County Mine. Jt. Stips. ¶¶ 7-11. All are underground coal mines located in West Virginia with hourly production and maintenance workers represented by a United Mine Workers Local Union. Jt. Stips. ¶¶ 6-11. At the time relevant to this case, five of the complainants, Thomas McGary, Ricky Baker, Ann Martin, Raymond Copeland, and Michael Payton, served as United Mine Workers ("UMW") representatives at the five mines, each at a different mine. Jt. Stips. ¶¶ 13-17. The sixth complainant, Ron Bowersox, is an International Safety Representative employed by the United Mine Workers. Jt. Stips. ¶ 12.

The issue before me is whether Murray Energy interfered with the Complainants' rights to make a complaint to MSHA pursuant to section 103(g) of the Act and therefore violated the interference provision of section 105(c)(1) of the Act. For the reasons set forth below, I find that Murray Energy and the five mines did violate section 105(c).

Facts.

The parties have stipulated to most of the relevant facts. At hearing, the parties presented a list of Joint Stipulations that included factual stipulations as well as twenty-eight exhibits that had been agreed upon. In addition, the Secretary introduced Exhibits 29, 30, and 31, which were accepted into the record. The Respondents declined to present additional documentary evidence. The parties also declined to present witness testimony at hearing. The following facts and decision are based upon the parties' stipulations, a careful review of all stipulated documents, a review of the audio tape, my review of the entire record, and consideration of all evidence and the post-hearing briefs.

In December 2013, ownership of the five mines named in this case was transferred from CONSOL Energy, Inc., to a subsidiary of Murray Energy. Jt. Stips. ¶ 6. Shortly thereafter, a number of 103(g) complaints were made to MSHA regarding alleged safety hazards and violations at the mines. From December 2013 through July 2014, MSHA conducted inspections to investigate the complaints and issued forty-two citations and orders as a result of these inspections. Jt. Stips. 30; Ex. 3. These included citations for accumulations of coal and other combustible materials, inadequate pre-shift examinations, obstructed travelways, a ventilation plan violation, and roof support violations. Ex. 3. In some cases, the inspector chose not to issue a citation after a review and discussions with the mine. Ex. 14, 15.

In response to these complaints, Robert Murray sent a letter to UMWA president Cecil Roberts on April 10, 2014. Jt. Stips. 18; Ex. 18. A copy of the letter was also sent to management employees of Respondents. Jt. Stips. 18. In the letter to Roberts, Murray complained about the "rash" of complaints being made by "disgruntled employees" and union officials who were "striking back" at the company. Ex. 18. He wrote that the complaints were not being made for safety reasons and that the misuse of the 103(g) process was wasting the inspection resources of MSHA and the mines. *Id.* Murray then requested that, while the company would "never interfere with a miner's right to file 103(g) complaints," management "be given the opportunity to *also* simultaneously be informed [of] safety issues in place of the 103(g) complaints, or afterwards." *Id.* A similar letter was sent to each of the Local Union Presidents, Safety Committee Officers, and Mine Committee Officers at the five mines. Jt. Stips. 19; Ex. 19. That letter also requested that miners inform the company of safety issues instead of or in conjunction with making a 103(g) complaint. Ex. 19. It emphasized that the company did not intend "to chill the exercise by concerned miners of their rights under Section 103(g)"; rather, the reporting policy was intended as "the most effective means to address and correct safety issues." *Id.*

On April 24, 2014, Robert Murray held the first in a series of "awareness meetings" at the Marshall County Mine. Jt. Stips. 20. The meetings were mandatory for all miners and were held at each shift. *Id.* They consisted of a speech by Murray along with a PowerPoint presentation. Jt. Stips. 21. The mine employed approximately 1004 workers at that time. Ex. 23. Both management and hourly workers were required to attend. Similar mandatory presentations were subsequently given to all shifts at the four other mines: in June 2014 at Marion County Mine, which employed 680 workers; on June 24 and 25, 2014, at Monongalia County Mine, which employed approximately 534 workers; on or around June 27, 2014, at the Harrison County Mine, which employed 589 workers; and on July 9, 2014, at the Ohio County Mine, which employed 712 workers. Jt. Stips. 22-29; Ex 23.

At these meetings, Murray gave a speech along with a PowerPoint presentation.[1] Jt. Stips. 20-29. Murray also sent a copy of the PowerPoint presentation to Cecil Roberts prior to the first meeting. Ex. 20. The presentation informs miners that the topic of the presentation will be "the circumstances at [the mine] surrounding your job and your family livelihood" as well as "what we must do to assure a future for our Mine, jobs and livelihoods." Ex. 4 at 4 (emphasis

[1] The PowerPoint presentations for each mine vary slightly, primarily in the discussion of production rates at each mine. The slides relevant to this case are identical in each presentation, however. *See* Exs. 5-8. For convenience, in this section and the discussion that follows, citations will be only to the presentation at the Marshall County Mine.

omitted). Murray asks the miners to "Take a Moment to Think About *Your Job* Being *Suddenly Gone*" and reminds them that "There Are *No Jobs* in This Area That *Pay Anywhere Close* to What Is Paid" at the mine. Ex. 4 at 14-16. The presentation informs them that the future of their jobs depends on the coal marketplace, and that the mine must produce the lowest cost coal to survive. Ex. 4 at 21-31. Murray goes on to address issues at the mine including production rates, drug and alcohol use, and employee absences. Ex. 4. at 37-60. He then discusses the issue of § 103(g) complaints. The presentation informs miners:

> You *Must* Report *Unsafe Situations* and *Compliance Issues* to Management so that they Can Be *Addressed* By Management
>
> *103(g) Complaints* Relative to the *Mine Safety and Health Administration ("MSHA") Are Your Right*
>
> Your *Company* Will *Never Interfere* With This *In Any Way*
>
> But, you Are Also *Required* To Make the *Same Report* to *Management*

Id. at 61-62. Murray states that there are "High Percentages of Negative Findings from MSHA on the 103(g) complaints" and that "This Indicates That This Right Is Being Used To Get Back At Management Regarding Something That You Disagree With That Has Nothing To Do With Safety." *Id.* at 63 (emphasis omitted). He claims that this "Dilutes Company and MSHA Resources[.] It Hurts your Company and Job Survival." *Id.* (emphasis omitted). Murray concludes by discussing the threat of competition from non-union mines.[2] *Id.* at 64-70.

At one of the meetings at the Marshall County Mine, a miner made a recording of Murray's speech, which the Secretary introduced into evidence. Ex. 29. Murray's speech closely tracks the PowerPoint presentation. In his discussion of 103(g) complaints, he states

> And I'll never interfere, and the company never will, and I won't, interfere with your right to file a 103(g) complaint with MSHA. That's not the way we go about it. I'll never interfere with your right to do it. But you also, and I'm telling you, are required to make that same report to management before, the same time, afterwards, you need to report it to management, that's a requirement.

Ex. 30 at 1-2. The speech also makes a connection between safety complaints and the tough market conditions for coal. In reference to 103(g) complaints that do not result in safety citations, Murray states

> Using these 103(g) complaints because you're unhappy with management is not something that will be accepted. . . . When

[2] The Marshall County Mine presentation also includes discussion of a recent conflict between management and the union over a temporary shutdown at the mine. Ex. 4 at 64-66.

> we're fighting inside and we get shut down because of a 103(g) complaint because you're mad at somebody in management that just hurts you. . . . And if you want to fight inside let me tell you I'll go on to a better coal mine and we'll close this one. 'Cause the market's [unintel.] all the time anyway and every mine is fighting with every other mine. And I don't make any decisions about closing the mines, the marketplace does them, I make the decision about which mine [unintel.] and which mine doesn't [unintel.]. And right now you guys and the Monongalia County Coal Company are at the bottom of the list out of the five mines, the others have stepped up. Marshall is at the bottom of the list. The most radical workforce in the area . . . .

Ex. 30 at 2-3. Recordings were not made of the speeches given at the other mines.

On June 23, 2014, Ron Bowersox filed a complaint of discrimination with MSHA in relation to these meetings and letters pursuant to section 105(c) of the Mine Act. Jt. Stips. 12. On July 21, 2014, the five individual miners filed additional 105(c) complaints based upon the same allegations. Jt. Stips. 13-17. The complaints alleged that the mine management at the five mines was "trying to intimidate miners" and interfere with their statutory right to file anonymous 103(g) complaints with MSHA. The Secretary brought these actions on the basis of those complaints. The Secretary alleges that Murray Energy interfered with the exercise of statutory rights of miners. He argues that, in requiring that a miner who makes a 103(g) complaint make the same complaint to management, the mine violated the statutory protection against disclosure of the complaining miner's identity. The Secretary further argues that Murray Energy interfered with the rights of miners by threatening reprisal and closure of the mine if the miners continued to make 103(g) complaints to MSHA.

After the initiation of these cases, the parties conducted discovery. Respondent took the deposition of each of the complainants, Ron Bowersox, Rick Baker, Raymond Copeland, Ann Martin, Thomas McGary, and Michael Payton. Prior to hearing, and at the request of the Court, both parties filed a list of witnesses who would testify in the matter. The Secretary's list included Ron Bowersox, Michael Payton, and Ann Martin. On the Friday just prior to the scheduled hearing, a complaint was filed on behalf of several of the Respondents in the United States District Court for the Northern District of West Virginia against the UMWA and Ron Bowersox for activity at the five mines. The complaint alleges a breach of the collective bargaining agreement based upon the fact that miners have made 103(g) complaints to MSHA without taking those complaints first to the mine operator. The complaint names Bowersox as a defendant, and quotes from the depositions of Michael Payton and Ann Martin taken in this case. Over the weekend prior to the hearing, the Secretary filed a motion to cancel the hearing and submit the case for summary decision based on the intimidation of his named witnesses. The witnesses were not aware at the time the depositions were taken that their testimony would be used in a separate law suit filed against the union, and subsequently did not wish to testify further.

At hearing, the Secretary renewed the motion to submit the matter for summary decision, and thereby released the three witnesses from testifying. The Secretary did not call any witnesses, instead agreeing to the stipulated evidence and documents. The Secretary moved to admit into evidence the federal district court complaint naming his three witnesses, as well as an audio tape of Mr. Murray's presentation. The exhibits were received, despite an objection by Respondents that the tape was not authenticated. Respondent also declined to call any witnesses and presented no further documentary evidence. When questioned by the court, Respondents' attorneys stated that at the time the depositions were taken, they had no knowledge that another lawsuit was planned that would include copies of the depositions of the three witnesses.

The interference claim.

The prohibition against interference is established in section 105(c)(1) of the Mine Act, which provides that "[n]o person shall discharge or in any manner discriminate against . . . *or otherwise interfere with* the exercise of the statutory rights of any miner" because the miner has made a complaint under the Act. 30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(2) permits a miner or his representative to file a discrimination complaint with the Secretary if he believes "that he has been discharged, interfered with, or otherwise discriminated against" in violation of the Act. 30 U.S.C. § 815(c)(2). The Senate Report relating to 105(c) indicates that the provision is intended to "protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion ... but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal." S. Rep. No. 95-181, at 36 (1977).

In a recent case, two commissioners articulated a test for evaluating interference claims brought pursuant to section 105(c). *UMWA ex rel. Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Cmm'rs.), *vacated & remanded*, __ Fed. Appx. __, 2015 WL 4647997 (Aug. 2015). Under this test, an interference violation occurs if

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
>
> (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Id. This test is consistent with Commission precedent in cases alleging interference. *Id.*; *see Sec'y of Labor ex rel. Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 9 (Jan. 2005) (analyzing "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the exercise of [protected] rights"); *Moses v. Whitely Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982) (concluding that conduct that "could logically result in a fear of reprisal and a reluctance to exercise the right in the future" violated section 105(c)), *aff'd*, 770 F.2d 168 (6th Cir. 1985).

The Commission previously analyzed whether statements to a miner constituted interference in *Moses v. Whitely Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). That case involved a foreman who, after MSHA inspectors arrived to investigate an accident, asked an employee whether he had called MSHA, and repeatedly accused him of doing so in front of other employees. *Id.* at 1475-77. The Commission decided that this constituted interference. *Id.* It emphasized that coercive conversations and harassment were among the "more subtle forms of interference" prohibited by section 105(c). *Id.* at 1478. It explained that such actions could "instill in the minds of employees fear of reprisal or discrimination" and "chill the exercise of protected rights," which would undermine the "goal of encouraging miner participation in enforcement of the Mine Act." *Id.* at 1478-79.

Another Commission case, *Secretary of Labor ex rel. Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005), involved the issue of whether verbal threats made by a supervisor in a joking manner constituted interference. The Commission emphasized there that "Whether an operator's question or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act 'must be determined by what is said and done, and by the circumstances surrounding the words and actions.'" *Gray*, 27 FMSHRC at 8 (quoting *Moses*, 4 FMSHRC at 1479). The Commission noted that the judge should "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id.* at 10 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Circumstances that the Commission considered relevant to the interference analysis in *Gray* were the persistence with which the supervisor raised the subject of the protected activity; the accusatory manner with which the subject was raised; where the statements were made; the nature of the relationship between the supervisor and the complainant; the fact that the statements related to confidential grand jury testimony; and the fact that the supervisor attempted to speak to the complainant alone. *Id.* at 11-12.

The 103(g) provisions.

As discussed above, an interference claim requires proof that the operator's conduct interfered with "the exercise of protected rights." *Gray,* 27 FMSHRC at 8; *Moses*, 4 FMSHRC at 1478-79. Here, the right at issue is the right of miners and their representatives to make health and safety complaints directly to MSHA. Under section 103(g) of the Mine Act, a miner who has reasonable grounds to believe that a violation of the Act or a safety or health standard exists at the mine "shall have a right to obtain an immediate inspection" upon giving notice to the Secretary. 30 U.S.C. § 813(g)(1). The legislative history of the Act explains that this provision was included because of "the Committee's firm belief that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." S. Rep. No. 95-181, at 30 (1977).

The Act protects miners who make these complaints from having their identities disclosed to mine operators. The Act requires the Secretary to furnish the mine operator with a

copy of the 103(g) notice filed by the miner, but it provides that "The name of the person giving such notice and the names of individual miners referred to therein shall not appear" in copies given to the operator. 30 U.S.C. § 813(g)(1). The legislative history of this provision indicates that Congress intended to protect the confidentiality of miner complainants: "While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under Section [103(g)(1)] is absolutely essential." S. Rep. No. 95-181, at 30 (1977).

Indeed, confidentiality is crucial to the exercise of the 103(g) right. *See Franks*, 30 FMSHRC at 2109-11 (Jordan and Nakamura, Comm'rs.). The essential problem is outlined in a discussion by the Seventh Circuit of the common law informer's privilege:

> The underlying concern of the doctrine is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation . . . . With the threat of reprisal real and unprotected against, well-intentioned citizens may hesitate or decline to assist the government in tracking down wrongdoers . . . . The most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant's strategic position and also encouraging others similarly situated who have not yet offered their assistance.

Dole v. Local 1492, Int'l Bhd. of Elec. Workers, 870 F.2d 368, 372 (7th Cir. 1989) (citations omitted); *see also Sec'y of Labor ex rel. Logan v. Bright Coal Co.*, 6 FMSHRC 2520, 2524-25 (Nov. 1984) (recognizing the informer's privilege in Mine Act proceedings). In the mine safety context, while miners have an interest in working in a safe environment, they also have an interest in maintaining good working relationships with fellow workers and mine management. If confidentiality is not guaranteed, a miner is forced to weigh these competing interests when deciding whether to report a dangerous condition to MSHA. For a miner to be truly free to exercise his statutory rights under section 103(g), then, confidentiality is essential.

The Totality of the Circumstances.

Having established that the miners had a protected right to make anonymous complaints to MSHA regarding health and safety violations, the question is whether Murray Energy and its CEO interfered with that right.

Commission precedent indicates that conduct that, viewed under the totality of circumstances, is "coercive" or "chills the exercise of protected rights" constitutes interference. *Gray*, 27 FMSRHC at 9-10; *Moses*, 4 FMSHRC at 1478-79. Cases decided under the interference provision of the National Labor Relations Act (NLRA), section 8(a)(1), are also instructive. The National Labor Relations Board (NLRB) evaluates work rules for whether they "would reasonably tend to chill employees in the exercise of their statutory rights": a rule violates the NLRA if it "explicitly restricts" protected activity or if "employees would

reasonably construe the language to prohibit" such activity. *Guardsmark, LLC v. NLRB,* 475 F.3d 369, 374 (D.C. Cir. 2007) (internal quotations omitted). In the context of employer speech, the NLRA protects the employer's right to express his views on organizing activity, but speech may nevertheless violate section 8(a)(1) if it contains a "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c); *Chamber of Commerce of U.S. v. Brown,* 554 U.S. 60, 67-68 (2008); *cf. Gissel Packing*, 395 U.S. at 619 ("[A]n employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control,' and not 'threats of economic reprisal to be taken solely on his own volition.'" (quoting *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967)).

In this case, miners were required to attend a meeting led by the CEO of the company in which he discussed the difficult economic climate for mining. Murray's tone as evidenced in the recording was serious and at times threatening. Throughout the two-hour presentation, miners were repeatedly reminded that their jobs, futures, and family livelihoods were at risk. Miners were informed that, while the company would "never interfere ... in any way" with their rights under section 103(g), they were "required to make the same report to management" if they decided to make a 103(g) complaint to MSHA. Ex. 4 at 62. Murray stated his belief that 103(g) complaints were "being used to get back at management regarding something that you disagree with that has nothing to do with safety," which "dilutes company and MSHA resources" and "hurts your company and job survival." Ex. 4 at 63. At the Marshall County Mine, Murray told miners, "When we're fighting inside and we get shut down because of a 103(g) complaint because you're mad at somebody in management that just hurts you. . . . And if you want to fight inside let me tell you I'll go on to a better coal mine and we'll close this one." Ex. 30 at 2-3.

A reasonable miner would have concluded from this presentation that management at the mine was hostile to the 103(g) complaint process, especially as it was currently being used at the mine. While Murray stated that he had no intention to interfere with miners' rights, the statement had little force when considered in the context of the rest of Murray's speech. A reasonable miner would additionally have understood that company policy now required him to make any safety complaint that he took to MSHA to management as well. As explained above, a miner who wishes to inform MSHA of a safety violation relies on the fact that he will remain anonymous. Murray's policy of requiring miners to also inform management of complaints removes this guarantee, which forces the miner to consider the impact of making a complaint on his relationships with management and his coworkers. While section 105(c)(1) of the Act prohibits discriminating against a miner who makes a safety complaint, a reasonable miner would fear that making a complaint would anger his managers and lead to negative consequences, even if they did not rise to the level of discrimination under the Act. This is especially true where management had already expressed its hostility to the complaint process being used at the mine. Thus, a reasonable miner could well be intimidated and discouraged from making a 103(g) complaint after attending one of Murray's awareness meetings.

I am not persuaded by Respondents' argument that no rule was created by Murray's statements because the mine's collective bargaining agreement requires that any new rules be submitted to UMWA representatives in writing for discussion before they are implemented. Resp. Br. 8-10. The relevant perspective on the issue is that of a reasonable miner, and I find that a reasonable miner would have thought that a statement made by the CEO of the company at

an all-staff mandatory meeting constituted binding company policy. *Cf. Cent. States Se. & Sw. Areas, Health & Welfare & Pension Funds*, 362 NLRB No. 155 (2015) (holding that a work rule was established by a statement by a manager to a single employee in the presence of several others). Respondent's argument that the policy was merely a "request" and not a mandatory rule is similarly unconvincing given the tone and language of Murray's presentation. Resp. Br. at 15-16; *see* Ex. 4 at 61-62 ("But, you Are Also *Required* To Make the *Same Report* to *Management*.") I find, therefore, that the communications made to miners at Murray's awareness meetings interfered with the miners' exercise of their statutory rights.

Respondents' legitimate and substantial reason

Under the interference test outlined in *Franks*, an operator may defend against an otherwise valid interference claim if it offers a "legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." *Franks*, 36 FMSHRC at 2108, 2116.

The mine's proffered legitimate and substantial reason here is that it had a right to be informed of unsafe conditions at the mine. Respondents cite the Commission decision *Pack*, in which the Commission determined that a mine operator could lawfully discharge an employee for failing to report a dangerous safety condition to management, even though he had reported the condition to MSHA. *Sec'y of Labor ex rel. Pack v. Maynard Branch Dredging Co.*, 11 FMSHRC 168, 170-73 (1989), *aff'd*, 896 F.2d 599 (D.C. Cir. 1990). In that case, the mine operator had a policy requiring employees to report dangerous conditions to management, which the Commission held to be permissible. *Id.* at 172. It explained,

> It is beyond dispute that a mine operator has the right to hire individuals whose job duties include the reporting of dangerous conditions. The Mine Act itself recognizes the importance of such an arrangement. While section 2(e) of the Mine Act provides that mine operators have the primary responsibility to prevent unsafe conditions in mines, that section adds that miners are to provide assistance to operators in meeting that responsibility. It would make little sense to assert that an operator may not receive such assistance because a miner elects instead to report such a condition only to MSHA.

Id. at 173. The Commission was especially concerned with the situation in which a miner's decision to report a condition to MSHA instead of management would expose other miners to danger. *Id.* It held that an operator had a right to discipline an employee in such a situation. *Id.*

I find that Murray's policy can be distinguished from the policy sanctioned in *Pack*. The Commission in *Pack* emphasized that

> Maynard Branch did not have a policy that prohibited miners from reporting dangerous conditions to MSHA, a policy that would clearly be prohibited by the Mine Act. Nor did Maynard Branch

> have a policy that required miners to notify the company prior to contacting MSHA. The company policy only required employees to report dangerous conditions to the company, and contained no instructions or prohibitions as to employees' actions vis-a-vis MSHA.

Pack, 11 FMSHRC at 172-73. In contrast, the policy at the Murray mines directly related to MSHA complaints: while miners were directed to report all unsafe conditions to management, Murray placed special emphasis on the conditions that miners chose to report to MSHA. Ex. 4 at 61-63. In *Pack*, the mine's policy could credibly be understood as an attempt to promote safety at the mine. But in this case, given the context in which the policy was announced, the same cannot be said. The reporting requirement was announced in a presentation in which the CEO of the company expressed his dissatisfaction with the current use of the MSHA complaint process and repeatedly discussed the possibility of closing the mine and of miners losing their jobs. These actions went beyond what was necessary to establish a safe environment at the mine. Rather, they were calculated to discourage miners from using the MSHA complaint process. I find that the operator's interests do not outweigh the harm to miners' protected rights in this case.

Penalty and Remedies.

The Secretary asks the court to order the mine to cease and desist from violating section 105(c), rescind its rule requiring notice to management about 103(g) complaints, and reverse any disciplinary actions issued as a result of the rule. The Secretary further asks the court to order a Murray Energy corporate officer to read a notice to all miners regarding 105(c) violations, and to order Murray Energy to mail such notice to all miners and post it at the mine for one year.

Section 105(c)(2) authorizes the Commission to require a person who has committed a violation of section 105(c)(1) "to take such affirmative action to abate the violation as the Commission deems appropriate." 30 U.S.C. § 815(c)(2). In cases involving statutory rights under the NLRA, courts have found that it is appropriate to order a management official to read a remedial notice to employees when there is a "particularized need." *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929-30 (D.C. Cir. 2005). An illustrative case is *Conair Corp. v. NLRB*, in which the president of the company held captive audience meetings where he made threats to employees about closing a plant if it were unionized and expressed his personal animus against unions. 721 F.2d 1355, 1385-87 (D.C. Cir. 1983); *see also Federated Logistics*, 400 F.3d at 930 (upholding notice-reading order where many of the NLRA violations were committed by high-level managers). A reading of a statement by a high-level official has the function of communicating clearly to employees that that official is bound by the statutory requirements. *Federated Logistics*, 400 F.3d at 930.

Accordingly, Respondents are **ORDERED TO CEASE AND DESIST** from violating section 105(c)(1) as described in this decision. Respondents are further **ORDERED** to rescind the rule announced at the awareness meetings requiring miners to give notice to management of 103(g) complaints. In the event that any miner has been disciplined or received any adverse action as a result of that rule, that action is **ORDERED** to be rescinded immediately. Robert

Murray is **ORDERED** to hold a meeting at each mine in which he shall read a prepared and approved statement notifying miners that they are not required to contact management when making a complaint to MSHA. Respondent is further **ORDERED** to post for one year on a document that is at least 8 1/2 by 11 inches in a public and conspicuous place at each mine a notice to all miners detailing the miners' rights pursuant to section 103(g) of the Act and stating that there is no requirement or expectation that miners will make the same complaint to management.

The Secretary has proposed a penalty in the amount of $20,000.00 for each of the five mines and an additional penalty of $20,000.00 at Marshall County Coal Mine for the threat of reprisal. I find that the claim alleging interference and threats of reprisal at the Marshall County Mine found in Count Two of the Secretary's First Amended Complaint involves the same facts and analysis as Count One of that complaint, and therefore merges into that count. Count Two of the Secretary's First Amended Complaint is therefore dismissed.

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria: the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence. The mines have no history of interference violations. The mines and the Murray entities are large operators. The parties have stipulated that the penalties as proposed will not affect Respondents' ability to continue in business. Jt. Stips. ¶¶ 34, 35. I find that Respondents did not demonstrate good faith in abating any violation. Instead, they exacerbated the situation by filing a complaint in federal court that named the three individuals the Secretary had named as witnesses in this case. The timing of the filing of the complaint, along with the fact that the deposition testimony taken in this case was attached, tends to indicate that the mine attempted to intimidate the witnesses. The filing of a legal action is an extension of the intimidation at Murray's awareness meetings and shows that Respondents did not wish to make any good faith effort to eliminate the interference. I find interference with the right to make anonymous complaints to be a very serious matter that undermines the safety of the mine. The negligence is high.

Therefore, I find that a high penalty is appropriate and I assess a penalty of $30,000.00 for each of the five violations. Each of the five mines is hereby **ORDERED** to pay the sum of $30,000.00 to the Secretary of Labor within 40 days of the date of this order.

Margaret A. Miller
Administrative Law Judge

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