FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 30, 2015

SECRETARY OF LABOR, MSHA, on behalf of **ERIC GREATHOUSE**, Complainant,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-904-D MORG-CD 2015-07
v.	:	
MONONGALIA COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents.	:	Monongalia County Mine Mine ID: 46-01968
SECRETARY OF LABOR, MSHA, on behalf of **RICKY BAKER**, Complainant,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-905-D MORG-CD 2015-08
v.	:	
OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents.	:	Ohio County Mine Mine ID: 46-01436
SECRETARY OF LABOR, MSHA, on behalf of **LEVI ALLEN**, Complainant,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-906-D MORG-CD 2015-09
v.	:	
THE MARSHALL COUNTY COAL, CO., MCELROY COAL COMPANY, MURRAY AMERICAN ENERGY INC., and MURRAY ENERGY CORPORATION, Respondents.	:	Marshall County Mine Mine ID: 46-01437

SECRETARY OF LABOR, MSHA, on behalf of **MICHAEL PAYTON**, Complainant,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-907-D MORG-CD 2015-10
v.	:	
MARION COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY INC., and MURRAY ENERGY CORPORATION, Respondents.	:	Marion County Mine Mine ID: 46-01433
SECRETARY OF LABOR, MSHA, on behalf of **ANN MARTIN,** Complainant,	:	INTERFERENCE PROCEEDING Docket No. WEVA 2015-908-D MORG-CD 2015-11
v.	:	
HARRISON COUNTY COAL CO., CONSOLIDATION COAL CO. MURRAY AMERICAN ENERGY INC., and MURRAY ENERGY CORPORATION, Respondents.	:	Harrison County Mine Mine ID: 46-01318
SECRETARY OF LABOR, MSHA, on behalf of **MARK RICHEY,** Complainant,	:	INTERFERENCE PROCEEDING Docket No. LAKE 2015-616-D MORG-CD 2015-12
v.	:	
THE OHIO VALLEY COAL COMPANY and MURRAY ENERGY CORPORATION, Respondents.	:	Powhatan No. 6 Mine Mine ID: 33-01159

ORDER DENYING RESPONDENTS' MOTION TO DISMISS

These cases are before me upon a complaint of interference filed by the Secretary of Labor ("the Secretary") on behalf of six miners and miner representatives against the Respondents 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 Mine Act"). The Respondents have filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted under the Mine Act. For the reasons set forth below, the motion is denied.

I. The Secretary's Complaint

The complaint alleges that the Respondents violated section 105(c)(1) by implementing "Safety and Production Bonus Plans" at six different mines that interfere with the exercise of

rights protected under the Mine Act. The bonus plans, copies of which are attached to the complaint, provide that miners will receive graduated bonuses for each shift worked based on the amount of coal mined during the shift. A miner must be physically present for the entire shift in order to qualify for a bonus, however, and certain other occurrences will disqualify the entire crew from receiving a bonus for a given shift. Each mine's bonus plan contains the following limiting language:

> An S&S citation received on a section (inby the tailpiece) will disqualify all shifts worked on that section, that day, from earning a bonus. A lost time accident to a crew member that incapacitates the crew member during the shift will disqualify the entire crew for the bonus on that shift. Issuance of a "D Order" or "B Order" on a section (inby the tailpiece) attributable to the crews working on that section will disqualify all the crews on that section from the bonus for seven (7) consecutive days, including the day the Order occurred.

(Compl. Exs. A, C, E, G, I, K.)

The Secretary alleges that the bonus plans are coercive and interfere with the exercise of protected rights in that they create financial and social pressure for miners to refrain from engaging in protected activities that could impact their own or their coworkers' eligibility for bonuses or that could affect productivity in the short term. Specifically, the Secretary alleges that the bonus plans directly affect the following protected activities: refusing to work under hazardous conditions; reporting injuries and making safety complaints to management and miner representatives; requesting an MSHA inspection to address potential violations or imminent dangers; performing safety-related work such as workplace examinations or maintenance tasks that could have the effect of temporarily delaying production; and exercising the walkaround rights guaranteed to miner representatives. (Compl. ¶¶ 44-48.)

II. The Motion to Dismiss

In their motion to dismiss, the Respondents contend that, as a matter of law, the complaint fails to state a violation of the Mine Act. Relying on *Swift v. Consolidation Coal Company*, 16 FMSHRC 201 (1994), and *Feagins v. Decker Coal Company*, 23 FMSHRC 47 (Jan. 2001) (ALJ), the Respondents argue that the bonus plans can be found to violate section 105(c) of the Mine Act only if (1) they overtly impose negative consequences for the exercise of protected rights, or (2) they were enacted with the intent to damage or deny such rights. The bonus plans do not, on their faces, impose negative consequences for the exercise of protected rights, and the Secretary has not pled that they were enacted with the intent to harm such rights or that they have actually caused any such harm. Therefore, the Respondents contend that the complaint should be dismissed for failure to state a claim upon which relief can be granted.

The Secretary argues that the Respondents' motion to dismiss should be denied because establishing unlawful interference does not require proof of discriminatory intent or proof that miners have actually been deterred from exercising protected rights. According to the Secretary, the test set forth in *Swift* and *Feagins* is inapposite because those cases involved claims of discrimination rather than interference, which is treated as a separate cause of action under

section 105(c). Relying on the plurality opinion authored by Commissioners Jordan and Nakamura in *UMWA on behalf of Franks v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014) [hereinafter "*Franks*"], *vacated and remanded on other grounds*, _ Fed. Appx. _, 2015 WL 4647997 (3d Cir. Aug. 6, 2015), the Secretary asserts that the appropriate test for interference is whether, under the totality of the circumstances and from the point of view of a reasonable miner, the Respondents' conduct in implementing the bonus plans could reasonably be viewed as tending to interfere with the exercise of protected rights. The Secretary argues that the complaint contains sufficient factual allegations to meet this test.

III. Legal Framework

A. Dismissal for Failure to State a Claim

The pleading requirements for complaints filed under section 105(c) of the Mine Act are found in Commission Procedural Rule 42, which states that a complaint must include "a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42. The Commission has characterized this pleading requirement as "minimal." *Ribble v. T&M Dev.*, 22 FMSHRC 593, 595 (May 2000); *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921 (Nov. 1996).

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a respondent to move for dismissal of a complaint due to failure to state a claim upon which relief can be granted. Although the Commission's procedural rules do not contain an analog, the Respondents' motion to dismiss is tantamount to a 12(b)(6) motion.[1] To survive such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This means the complaint must plead sufficient facts to allow the court to draw a reasonable inference that the named respondent is liable for the misconduct alleged. *Id.* (citing *Twombly*, 550 U.S. at 556-57). The Commission has stated that motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted. *Ribble*, 22 FMSHRC at 594-95; *Perry*, 18 FMSHRC at 1920.

B. Section 105(c) Interference

The prohibition against interference is established in section 105(c)(1) of the Mine Act, which provides in pertinent part:

> 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

[1] The Commission follows the guidance of the Federal Rules of Civil Procedure when its procedural rules do not otherwise apply. 29 C.F.R. § 2700.1(b).

> complaint under or related to this Act ... or ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 [relating to black lung] or ... 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.

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 Mine Act. *Id.* § 815(c)(2).

Most cases that come before the Commission pursuant to section 105(c) involve allegations of discrimination rather than interference. In such cases, the Commission evaluates the sufficiency of the complaint by applying the *Pasula-Robinette* framework, wherein a complainant makes out a prima facie case of discrimination by showing that he engaged in protected activity, suffered an adverse employment action, and the adverse action was motivated at least in part by the protected activity. *See Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

However, in the recent *Franks* case, a majority of the Commission recognized that interference claims should be analyzed under a separate framework. Two Commissioners expressly stated that section 105(c) "establishes a cause of action for unjustified interference ... which is separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework." 36 FMSHRC at 2103 n.22 (Young & Cohen, Comm'rs). They also noted that this separate cause of action has been implicitly recognized in at least two prior Commission decisions. *Id.* (citing *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), and *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 7-8 (Jan. 2005)).

Two Commissioners, who wrote separately in *Franks*, articulated a test for evaluating interference claims as a separate cause of action. *Id.* at 2108 (Jordan & Nakamura, Comm'rs). This test has been followed by several of the Commission's Administrative Law Judges[2] since *Franks* and is now advanced by the Secretary as the appropriate test for interference. Under this test, an interference violation occurs if:

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[2] *Sec'y of Labor on behalf of McGary v. Marshall County Coal Co.*, 37 FMSHRC _, Nos. WEVA 2015-583-D et al. (Nov. 18, 2015) (ALJ); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-65 (June 2015) (ALJ); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 309-11 (Feb. 2015) (ALJ). *See also Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 2352, 2356-57 (Aug. 2014) (ALJ) (pre-*Franks* ALJ decision applying similar interference test crafted from same precedent); *Sec'y of Labor on behalf of Clapp v. Cordero Mining, LLC*, 33 FMSHRC 3029, 3072 (Dec. 2011) (ALJ) (same).

(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. Thus, the test approaches interference from the perspective of those whose rights the Mine Act attempts to protect.

By contrast, the Respondents' proposed interference test would approach the issue from the mine operator's perspective by limiting unlawful interference to situations when the operator specifically intends to harm protected rights or takes an action that overtly imposes negative consequences for the exercise of protected rights. This test is inconsistent with the Commission's and other courts' expansive interpretations of what conduct is prohibited under section 105(c)[3] and with Congress's stated intent to "protect miners against not only the common forms of discrimination, such as discharge, suspension, [or] 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) (emphasis added). The Senate report relating to 105(c) also stresses that the provision should be "construed expansively to assure that miners will not be inhibited in any way" from exercising the rights afforded by the Mine Act. *Id.* The interference test advocated by the Secretary is consistent with this legislative directive because it addresses not only purposeful and overt attacks on protected rights but also any other actions that may inhibit miners' exercise of protected rights in any way.

The interference test advocated by the Secretary is also consistent with Commission precedent. It encompasses principles accepted by the Commission in contexts outside of 105(c) interference. For example, the Commission has recognized that evaluation of the impact of an employer's conduct on protected rights requires evaluating, from an objective standpoint, whether the conduct "reasonably tend[s] to discourage" protected activity. *Sec'y of Labor on behalf of Poddey v. Tanglewood Energy*, 18 FMSHRC 1315, 1321 (Aug. 1996); *Sec'y of Labor on behalf of Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 559 (Apr. 1996). As another

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[3] For example, in *Simpson v. FMSHRC*, the D.C. Circuit deemed a constructive discharge to be discriminatory despite the absence of evidence of specific intent, reversing a Commission decision that had required proof of a retaliatory motive. 842 F.2d 453, 461-63 (D.C. Cir. 1988), *rev'g Simpson v. Kenta Energy, Inc.*, 8 FMSHRC 1034 (1986). Characterizing the Commission's interpretation of section 105(c) as "severely restrictive," the D.C. Circuit noted that Congress had enacted 105(c) to replace a narrower discrimination provision and suggested that the protection conferred should be construed broadly so as to render coverage comparable to that afforded under other antidiscrimination statutes. 842 F.2d at 463. *See also Sec'y of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1537-38 (Sept. 1997) (rejecting argument that operator need only "reasonably accommodate" protected walkaround rights, as 105(c) provides expansive protection by assuring exercise of rights will not be inhibited "in any way").

example, in the context of determining whether an operator could receive a regular citation for interfering with a protected right, the Commission has previously recognized that this determination requires the court to balance the operator's business interests against miners' statutory rights. *Emery Mining Corp.*, 10 FMSHRC 276, 288-92 (Mar. 1988) (citing *Hudgens v. NLRB*, 424 U.S. 507, 521-22 (1976) and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Significantly, the interference test advanced by the Secretary is also consistent with the two prior decisions referenced above, *Moses v. Whitley Development* and *Secretary on behalf of Gray v. North Star Mining*, in which the full Commission implicitly recognized interference as a separate cause of action.

The Commission has long recognized that "case law interpreting the [NLRA], upon which the Mine Act's antidiscrimination provisions are modeled, provides guidance on resolution of discrimination issues." *Sec'y of Labor on behalf of Johnson v. Jim Walter Res.*, 18 FMSHRC at 558 n.11; *see, e.g., Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite*, 23 FMSHRC 924, 934 n.8 (Sept. 2001); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-43 (Dec. 1990). To determine whether interference has occurred under section 8(a)(1) of the NLRA, the National Labor Relations Board asks "whether the employer engaged in conduct, regardless of intent, which reasonably tends to interfere with the free exercise of employee rights under the Act." *Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1223 (2004) (citing *American Freightways Co.*, 124 NLRB 146, 147 (1959)); 29 U.S.C. § 158(a)(1). If so, the burden shifts to the employer to demonstrate a legitimate and substantial business justification for its conduct. *Cal. Newspapers P'ship d/b/a ANG Newspapers*, 343 NLRB 564, 565 (2004); *Indep. Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 553 (5th Cir. 2013); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (discussing need to balance employees' protected NLRA rights and employers' property rights under 8(a)(1)).

The Respondents' proposed interference test focuses on the operator's motive in that it would impose liability only when the interference is intentional or when it is overt and therefore foreseeable to the operator. The Secretary's proposed interference test is more consistent than the Respondents' with Commission precedent and Congressional intent regarding section 105(c) and aligns more closely with analogous principles developed under the NLRA. I will therefore apply the Secretary's test in evaluating the sufficiency of the complaint.

IV. Analysis of Sufficiency of Complaint

To survive the motion to dismiss, the Secretary's complaint must contain a simple statement of facts that tend to demonstrate interference and must also contain a statement of relief requested. There is no dispute that the complaint contains a clear statement of the relief requested. Therefore, the review of the complaint focuses on whether or not it contains sufficient factual allegations, accepted as true, to permit a reasonable inference that miners and miner representatives would view the bonus plans as tending to interfere with the exercise of their protected rights.

The complaint explains that the bonus plan was put into effect on January 15, 2015, at six underground coal mines that are operated by Murray Energy. The complaint further discusses the bonus plan in detail and enumerates the rights with which the bonus plans are alleged to

interfere, referencing the statutory basis for each right. In addition, the complaint identifies which aspect or aspects of the bonus plans will interfere with each right; and briefly explains how such interference will occur. For example, the complaint alleges that the bonus plans will interfere with the right of an authorized representative of miners to accompany an MSHA inspector during the physical inspection of a mine. (Compl. ¶ 45.) This is referred to as the representative's "walkaround" right and is protected under section 103(f) of the Mine Act. *See* 30 U.S.C. § 813(f). The bonus plans disqualify an employee from receiving a bonus if he is not physically present on his assigned section during the entire shift, which could deter a representative from exercising his protected walkaround right when doing so would necessitate absenting himself from his section for part of the shift. (Compl. ¶ 45.)

Finally, the complaint sets forth the amount of bonus that each employee may receive and under what circumstances. The facts are detailed and contain more than enough information to understand the basis of the claims made by the Secretary. I find, therefore, that the facts alleged in the complaint, if accepted as true, are sufficient to make out a plausible claim that the bonus plans have a tendency to interfere with miners' and miner representatives' exercise of protected rights. The Complaint meets the requirements of the Commission for making an interference complaint and accordingly, the Respondents' Motion to Dismiss is **DENIED**.

Margaret A. Miller
Administrative Law Judge

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