FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 3 1980

MARTIN COUNTY COAL CORPORATION, Contestant	:	Contest of Citation
v.	:	Docket No. KENT 80-212-R
	:	Citation No. 706431
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	March 5, 1980
	:	and
Respondent	:	
and	:	Contest of Order
	:	
COUNCIL OF THE SOUTHERN MOUNTAINS, INC.,	:	Docket No. KENT 80-213-R
	:	Order No. 706432
Respondent	:	March 18, 1980
	:	
	:	
COUNCIL OF THE SOUTHERN MOUNTAINS, INC.,	:	Complaint of Discharge, Discrimination, or Interference
Complainant	:	
v.	:	Docket No. KENT 80-222-D
	:	
MARTIN COUNTY COAL CORPORATION,	:	No. 1-S Mine
Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. KENT 80-264
Petitioner	:	Assessment Control
v.	:	No. 15-04194-03008
	:	
MARTIN COUNTY COAL CORPORATION,	:	No. 1-S Mine
Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. KENT 80-354
Petitioner	:	
v.	:	No. 1-S Mine
	:	
MARTIN COUNTY COAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Jack W. Burtch, Jr., Esq., and James F. Stutts, Esq., McSweeney, Stutts & Burtch, Richmond, Virginia, for Martin County Coal Corporation;
L. Thomas Galloway, Esq., and Richard L. Webb, Esq., Washington, D.C., for Council of the Southern Mountains, Inc.;
Edward H. Fitch IV, Esq., Office of the Solicitor, U.S. Department of Labor, for the Secretary of Labor and Mine Safety and Health Administration.

Before: Administrative Law Judge Steffey

Pursuant to an order issued May 30, 1980, as amended July 2, 1980, and August 12, 1980, a hearing in the above-entitled proceeding was held on August 21, 1980, in Pikeville, Kentucky, under sections 105(d) and 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 39-59):

> This proceeding involves two Notices of Contest, one Complaint of Discharge, Discrimination, or Interference, and one Petition for Assessment of Civil Penalty. The two Notices of Contest were filed on March 31, 1980, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, by Martin County Coal Corporation in Docket Nos. KENT 80-212-R and KENT 80-213-R challenging the validity of Citation No. 706431 and Order of Withdrawal No. 706432, respectively. Citation No. 706431 was issued under section 104(a) of the Act on March 5, 1980, alleging a violation of 30 C.F.R. § 48.3 by Martin County Coal Corporation and Order No. 706432 was issued under section 104(b) of the Act because of Martin County Coal Corporation's failure to abate the alleged violation of section 48.3 within the time provided for in Citation No. 706431.
>
> The Complaint of Discharge, Discrimination, or Interference was filed on April 10, 1980, in Docket No. KENT 80-222-D by the Council of the Southern Mountains, Inc., pursuant to section 105(c)(3) of the Act alleging that Martin County Coal Corporation violated section 105(c)(1) of the Act when the corporation denied access of the Council to the corporation's mine site on October 25, 1979, and March 18, 1980, so that the Council could monitor training classes being held at those times. The Council filed its Complaint under section 105(c)(3) of the Act because the Secretary of Labor had advised the Council by letter dated March 12, 1980, that the corporation's refusal to allow the Council to monitor training classes was not a violation of section 105(c)(1) of the Act.

The Petition for Assessment of Civil Penalty was filed on June 18, 1980, in Docket No. KENT 80-264 by the Secretary of Labor seeking to have a civil penalty assessed for the violation of 30 C.F.R. § 48.3 alleged in Citation No. 706431 whose validity is being challenged by the Notice of Contest filed in Docket No. KENT 80-212-R. Additionally, my order issued May 30, 1980, in this proceeding consolidated for hearing all civil penalty issues which may be raised when and if the Secretary of Labor should hereafter file a Petition for Assessment of Civil Penalty for the violation of section 105(c)(1) of the Act alleged by the Council's Complaint filed in Docket No. KENT 80-222-D. 1/

Although there are several exhibits in the record upon which I rely in my decision, the primary facts which are necessary to a decision in this case are set forth in a stipulation of facts the parties submitted to me on July 18, 1980. I shall make those stipulations at this point a part of my decision.

(1) The Council of the Southern Mountains, Inc. (Council), at least since October 24, 1979, has been an authorized representative of miners within the meaning of the Federal Mine Safety and Health Act of 1977 (Act), and 30 C.F.R. Part 40.

(2) The Council has never been decertified by the Mine Safety and Health Administration (MSHA), pursuant to 30 C.F.R. Part 40.

(3) On March 8, 1979, Martin County Coal Corporation (Martin County) denied non-employee Council representatives access to the mine site for purposes of monitoring training classes. The Council filed a discrimination complaint regarding this incident which, pursuant to a settlement agreement, subsequently was withdrawn.

1/ Counsel for the Secretary of Labor filed on September 12, 1980, in Docket No. KENT 80-354 a Petition for Assessment of Civil Penalty seeking assessment of a civil penalty for the violation of section 105(c)(1) which was found to have occurred in the bench decision which is issued in final form as a part of this decision. A copy of the Petition for Assessment of Civil Penalty in Docket No. KENT 80-354 was served by mail on September 10, 1980, on counsel for respondent Martin County Coal Corporation and respondent has a period of 30 days under 29 C.F.R. § 2700.28 from date of service within which to file an answer to the Petition. Since I promised the parties to this proceeding that I would issue my final decision by October 3, 1980, I shall defer assessing a civil penalty for the violation of section 105(c)(1) until the time for filing an answer has expired.

(4) On October 25, 1979, Martin County denied non-employee Council representatives access to the mine site for purposes of monitoring training classes.

(5) On March 18, 1980, Martin County denied non-employee Council representatives access to the mine site for purposes of monitoring training classes.

(6) On March 5, 1980, Martin County was duly served with Citation No. 706431 and on March 18, 1980, Martin County was duly served with Withdrawal Order No. 706432, both of which Martin County timely contested.

(7) MSHA has determined that Martin County's refusal to allow non-employee representatives of the Council access to the mine site for purposes of monitoring training classes on October 25, 1979, and March 18, 1980, did not violate section 105(c) of the Act.

(8) The information in the MSHA Proposed Civil Penalty Assessment dated May 30, 1980, regarding size of operator and history of previous violations is as set forth in Exhibits 1 and 4.

(9) Martin County has not abated the alleged violations which are the subject of this proceeding for the reasons stated by Martin County in the various pleadings of this proceeding.

(10) The assessment of a civil penalty under the Act will not adversely affect Martin County's ability to continue in business.

DOCKET NO. KENT 80-212-R

Contestant contends that Citation No. 706431 issued March 5, 1980, alleging a violation of 30 C.F.R. § 48.3 because of contestant's refusal to allow a non-employee representative of miners the right to attend on-site training sessions is invalid. Contestant supports that claim by arguing that the right for a non-employee representative to attend training classes is not to be found in the Act or any regulation promulgated under the Act. Moreover, contestant says that no such right can fairly be implied from the language used in the Act or regulations.

There is considerable merit in the arguments made by contestant in support of its claims that Citation No. 706431 is invalid for failure to cite a violation of a mandatory health or safety standard. The citation was issued under section

104(a) of the Act which requires the inspector to describe with particularity the nature of the violation and to cite the provisions of the Act, standard, rule, regulation, or order alleged to be violated. Citation No. 706431 flawlessly describes the violation by stating that "[o]n October 25, 1979, Raymond Bradbury, President of Martin County Coal Corporation, advised the representative of the miners, Dan Hendrickson of the Council of Southern Mountains, Inc., that he would not be permitted to observe the training class to be held that day. This refusal to permit observation of the training class constitutes a violation of 30 C.F.R. § 48.3."

The inspector's difficulty in finding a specific regulation to cite as having been violated is readily apparent when one turns to section 48.3 to find the language which requires an operator to allow a non-employee representative of miners to monitor or observe training classes. Section 48.3 is composed of subsections "(a)" through "(n)" and extends through three pages of regulations. The Secretary of Labor promulgated Part 48 in response to section 115 of the 1977 Act which requires each operator of a coal mine to have a health and safety training program approved by the Secretary. Section 48.3 specifically sets forth the steps to be followed by the operator for filing his training program and getting it approved by the Secretary.

Section 48.3 does not refer to the miners' representative until subparagraph (d) which requires the operator to furnish the miners' representative with a copy of the proposed training program 2 weeks before it is submitted to the Chief of MSHA's Training Center which approves or disapproves such plans on behalf of the Secretary. Subparagraph (d) gives the miners' representative the right to file comments with the operator or directly with the Chief of the Training Center. Any comments received by the operator from the miners' representative must be submitted to the Chief of the Training Center.

Subparagraph (e) does not refer to the miners' representative, but subparagraph (f) specifically requires the operator to make available at the mine site a copy of the MSHA approved plan for examination by the miners and their representatives.

The miners' representative is not mentioned in section 48.3 again until subparagraph (j) which requires the Chief of MSHA's Training Center to notify the miners' representative in writing within 60 days after the training plan is filed of the approval or status of approval of the training program. Subparagraph (j) also requires the Chief to give the miners'

representative a copy of any required revisions and affords the miners' representative the right to discuss the revisions or propose alternate revisions or changes, including the right to participate in a conference with the operator and the Chief of the Training Center before the training program is finally approved.

The next time section 48.3 refers to the miners' representative is in subparagraph (l) which requires the operator to notify the Chief of the Training Center and the miners' representative of any changes or modifications which the operator may wish to make in his training program. The operator must obtain the approval of the Chief of the Training Center for the proposed modifications.

Subparagraph (m) requires the Chief of the Training Center to notify the operator and the miners' representative of any disapproval of proposed modifications or of any changes which the Chief wishes to make in an operator's training plan.

Subparagraph (n) is the final part of section 48.3 and it requires the operator to post on the mine bulletin board and provide to the miners' representative a copy of all revisions and decisions made by the Chief of the Training Center with respect to an operator's training program.

My scrutiny of section 48.3 has left me empty-handed in being able to specify an exact subparagraph in that section which requires an operator to allow a non-employee representative of miners the right to observe or monitor actual training classes. MSHA's counsel takes the position in his pretrial brief that "a passive monitoring right is implied in the scope of the training regulations and that 30 C.F.R. § 48.3 is violated when an operator refuses to allow a representative of the miners to passively monitor a training session."

Contestant argues in its pretrial brief, pages 11 through 12, that there is no provision in the Act or regulation which implies that a non-employee miners' representative has a right to monitor training classes. Contestant points out that only section 103(f) pertaining to walkaround rights of a miners' representative provides for a non-employee representative to have access to the mine site. I believe that contestant may have overlooked section 103(c) which would permit a non-employee miners' representative to enter a mine site to monitor the measuring of miners' exposure to toxic materials and to examine records made of such exposures.

Contestant also argues, at page 14 of its pretrial brief, that an operator has to comply with thousands of individual

regulations and is not free to read rights "in" or "out" of the regulations as it sees fit. Contestant further contends that such implied standards as are urged by the Council and MSHA would cause the regulations to lose their meaning.

The Council's pretrial brief, pages 15 and 16, contends, on the other hand, that failure to find an implied right for the miners' representative to monitor training classes would undercut the rights granted to the miners' representative in the regulations and would nullify the regulations. In support of that claim, the Council argues that the miners' representative cannot determine the substance of the training plans and intelligently evaluate the training without attending the training sessions. The Council claims that the miners' representative cannot evaluate the performance of an instructor, nor seek his decertification under section 48.3(i), nor evaluate the use of training aids, without attending the training classes. The Council further argues that a miners' representative cannot determine whether training plans are being implemented as written and approved without attending the classes. The Council emphasizes the seriousness of failure of an operator to provide proper training for new miners by reference to section 104(g) of the Act which provides for withdrawal of miners without proper training from the mine as a hazard to themselves and others. The Council contends that the miners' representative cannot recommend modification of a training plan unless he has access to the mine site to monitor classes because there is no way to determine whether modifications are needed unless the classes are monitored.

The difficulty with the Council's and MSHA's arguments about the implied right of a miners' representative to monitor training classes is that section 48.3 was written so as to reserve exclusively to the Chief of MSHA's Training Center the right to evaluate the effectiveness of the operator's instructors in teaching the substance of the operator's training program as set forth in subparagraph (e) of section 48.3; the Chief of the Training Center also has exclusive power to monitor the operator's instructors to determine whether the instructors should be approved by MSHA as set forth in subparagraph (h)(3); the Chief of the Training Center also has exclusive power to revoke MSHA's approval of instructors for good cause shown, as set forth in subparagraph (i). The miners' representative is not mentioned at all in any of the subparagraphs which have to do with the actual teaching or implementation of the training programs.

There must be some reason for the failure of section 48.3 to give the miners' representative any right of participation

in helping to assure that training programs are properly implemented in the classroom. A probable reason for that omission is referred to in footnote 2 on page 12 of contestant's pretrial brief where contestant states that employee miners' representatives, as distinguished from non-employee miners' representatives, have free access to the mine site by virtue of their being employees. One possible reason that section 48.3 does not specifically provide for the miners' representative to attend training classes or assist in evaluating instructors is that nearly everyone assumes that the miners' representative will be an employee as well as a miner's representative. In the 8 years that I have been holding hearings under the 1969 and 1977 Acts, this is the first dispute I've had where the miners' representative was other than someone affiliated with the United Mine Workers of America. In the cases involving the United Mine Workers of America, there was a safety committeeman who was both an employee and a miners' representative. In those cases, when a miner wanted to report a safety hazard, he generally reported it to the safety committeeman who would pass on the complaint to a non-employee miners' representative who was paid solely by UMWA.

When complaints about health and safety are relayed by the miners' representative to MSHA for the purpose of requesting a special investigation, section 103(g)(1) of the Act provides that the name of the miner who made the initial complaint shall not be revealed to the operator. Thus, the reason that section 48.3 contains no specific language providing for the miners' representative to monitor the training classes is that the Secretary, in my opinion, assumed when drafting section 48.3 that the miners' representative would monitor the classes as an employee miners' representative because each miner is given retraining each year and one or more employee miners' representatives will be in a position to evaluate the quality and substance of the training classes as well as the competence of the instructors who teach the classes, or new miners will pass on comments about the training classes and instructors to an employee miners' representative.

In this proceeding, there is no employee miners' representative. Even if the miners at contestant's mine report to their non-employee representative that they believe their training classes are inadequate, it is not possible for their representative to check on the accuracy of their complaints because, as a non-employee, contestant will not admit the miners' representative to the mine site to monitor the classes.

The evidence in this case shows that the miners' representative was denied the opportunity of accompanying MSHA's

training specialist in Pike County on a trip to monitor a training class held on October 25, 1979. Even though the Chief of MSHA's Training Center arranged for his training specialist to go to the mine and even though the Council hired an experienced mine foreman to be the miners' representative on that occasion, contestant's president advised the Chief of the Training Center and the miners' representative that the miners' representative would not be permitted access to the mine site for the purpose of monitoring the class. Since MSHA has authority under section 48.3(e) of the regulations to determine the effectiveness of the training program, the training specialist who had requested that the miners' representative accompany him, was entitled to have access to mine property to observe the training class, and the miners' representative would have had the right to do so under section 103(f) if the training specialist had asked the miners' representative to accompany him for the purpose of monitoring the class.

Mr. Fitch has indicated in the argument that he made this morning that the Secretary of Labor does not want the miners' representative to be tied to visits by MSHA's inspectors for the purpose of monitoring training classes and he says that this proceeding could have been brought up under a factual situation under which the miners' representative would have been accompanying an inspector, but MSHA does not want section 103(f) used as a vehicle to assure that a miners' representative has a right to monitor training classes. Mr. Fitch's position on behalf of the Secretary is that the Act in general has an implied right for the miners' representative to monitor training classes and that, therefore, the Secretary did not, for the purpose of this hearing, set up a factual situation whereby this case would have arisen under an alleged violation of section 103(f) of the Act instead of an alleged violation of section 48.3 of the regulations.

I believe that the detailed provisions in section 48.3 providing for the miners' representative to participate at every stage of the operator's formulation of training plans, and all modifications of such plans, the fact that the operator is required to furnish the miners' representative with a copy of the plans before they are submitted to the Chief of MSHA's Training Center, and the fact that the plans must be made available for inspection at the mine site by the miners' representative even though the miners' representative must be furnished with all proposed plans and modifications to such plans, in addition to being given the right to discuss the plans with the operator and the Chief of the Training Center, provide a strong indication that section 48.3 was

intended to contain an implied right for the miners' representative to monitor the training classes. In fact, Mr. Fitch says that it was the assumption of the Secretary that the miners' representative was given that power, an implied power, of monitoring classes under those provisions that I have just mentioned.

The difficulty of finding a violation of section 48.3 is that the right to monitor training classes must be found, insofar as upholding Citation No. 706431 is concerned, within the provisions of section 48.3, but as I have previously pointed out, that section reserves to the Chief of MSHA's Training Center the right of determining the quality of training and the competence of instructors without any mention of the right of the miners' representative to participate in those activities. If, as Mr. Fitch says, the Secretary drafted section 48.3 so as to allow the miners' representative to have an implied right under that section to monitor training classes, the Secretary narrowed the scope of section 48.3 so much that I cannot find a violation of section 48.3 in contestant's refusal to allow the miners' representative to have access to the mine site for monitoring classes.

Initially, it was pointed out by contestant in its pretrial brief that it has to abide with thousands of specific regulations and that it cannot arbitrarily read into those regulations any generalized obligations which are not spelled out by the Secretary in the beginning when they are drafted. Additionally, if an implied right of monitoring is to be found in section 48.3, then I must find that the operator or contestant has violated that section; if I do that then I am required to assess a civil penalty based on an ambiguous argument that section 48.3 contains a specific provision allowing a non-employee miners' representative to monitor training classes. I don't think that I can in good conscience make that finding. Therefore, I find further that Citation No. 706431 failed to show a violation of section 48.3 and that the citation should be vacated and the Notice of Contest in Docket No. KENT 80-212-R should be granted.

DOCKET NO. KENT 80-213-R

The Notice of Contest in Docket No. KENT 80-213-R requests that Order No. 706432 be vacated. Order No. 706432 was issued on March 18, 1980, when contestant refused to allow the Council's non-employee miners' representative access to the mine site to monitor training classes. The order did not actually withdraw anyone from the mine, but it was issued because the inspector found that the time for compliance with the inspector's version of section 48.3 should not be extended.

Since I have found in dealing with the Notice of Contest in Docket No. KENT 80-212-R that a violation of section 48.3 did not occur, the order of withdrawal should be vacated and the Notice of Contest in Docket No. KENT 80-213-R should be granted because there is no need to extend the time for compliance with a regulation which has not been violated.

DOCKET NO. KENT 80-222-D

The Complaint in Docket No. KENT 80-222-D claims that Martin County Coal Corporation violated section 105(c)(1) of the Act by interfering with the implied right of the non-employee miners' representative to come on mine property for the purpose of monitoring the training classes. In its motion for consolidation filed on May 9, 1980, and which was granted by my order issued May 30, 1980, in this proceeding, the Council asked that its Complaint in Docket No. KENT 80-222-D be consolidated with the Notices of Contest in Docket Nos. KENT 80-212-R and KENT 80-213-R because the issue of Martin County Coal Corporation's refusal to allow monitoring is involved in the Complaint as well as in the Notices of Contest.

The Council's Complaint will have to be denied to the extent that it claims an implied right to monitor classes under section 48.3 because I have already found that no such implied right exists under that section of the regulations. The Complaint, however, is based on much broader allegations than implied rights under section 48.3. As shown in paragraph 9 on page 9 of the Complaint and in the prayer for relief on pages 9 and 10, the Complaint generally alleges illegal acts of interference.

The implied right to monitor training classes must be found as a part of the purposes of the Act and its provisions in general. One of the arguments made by the Council in this proceeding in contending that an implied right to monitor exists under the Act has been based on its reference to Franklin Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938, in which the court found that a miner may refuse to work in an area he thinks is unsafe until such time as the safety matter is resolved. The Council argues that the right not to work in an unsafe area is an implied right gleaned from the general provisions of the Act and is not a right which is specifically spelled out in the Act.

Many people rely on the general preamble to the 1969 Act, which, as far as I know, has not been rescinded by the 1977 amendments. In paragraph (e) of that preamble, the statement appears to the effect that the operators, with the

assistance of the miners, have the primary responsibility to prevent the existence of unsafe and unhealthful conditions and practices in the mines.

Mr. Fitch impressed me with his argument today that once a miners' representative is chosen, he has a right to act for the miners whether he's an employee or non-employee and that miners are doing their part to enforce the safety and health provisions of the Act by electing representatives to help them see that improvements in safety and health conditions in mines are made. One way for the miners to enhance safety is to have their representatives attend training classes to assure that the operators' training program is being carried out in the classrooms.

Mr. Galloway on behalf of the Council also impressed me with an argument this morning in which he said that if it's conceded, as I think I must concede, that the Secretary could have drafted section 48.3 so as to permit a miners' representative to participate in monitoring training classes, then it must also be conceded that the Act contains within its purview an implied right for a miners' representative to monitor training classes. If the Act does contain an implied right to monitor training classes, then, of course, that is all that's required to sustain the Council's argument that it does have such an implied right under the Act.

Section 115 of the Act deals with training programs and has been codified in the Federal Regulations under Part 43. The first part of section 115, that is, subparagraph (a)(1), is noteworthy in this proceeding because, under that subparagraph, the training plan which the operator must submit to MSHA for approval shall include instruction in the statutory rights of miners and their representatives. The provision that instruction be given as to the statutory rights of the miners' representative is a strong indication that the miners' representative should be present when that instruction is given. I believe that subparagraph (a)(1) provides strong support for finding that miners' representatives are intended to be given the right to see what's being taught under the training program. Another provision that I think is significant in considering this implied right is in section 115(b), which indicates that training might be given in some location other than the mine site. I would assume that if training is given at some place other than the mine site, that the operator would have difficulty in objecting to a non-employee miners' representative coming to that site to monitor the training classes.

Additionally, section 115(c) refers to the fact that miners will be given certificates to show that they have

completed certain kinds of instructions and those certificates are supposed to be available for inspection at the mine site. There again, I would think that the miners' representatives, if employees or otherwise, should have the right to examine those certificates of instruction upon completion of instruction.

The Commission itself has taken a liberal view about interpreting the Act and the regulations. For example, in Old Ben Coal Co., 1 FMSHRC 1954 (1979), the Commission interpreted section 75.400 to require the prevention of accumulation of combustible materials, as opposed to the former Board's interpretation that section 75.400 only required that accumulation of combustible materials be cleaned up within a reasonable time after they had accumulated. In that case, the Commission quoted UMWA v. Kleppe, 562 F.2d 1260 (D.C. Cir. 1977), at page 1265, where the court stated that "[s]hould a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety, the first should be preferred."

In Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974), the court upheld the former Board's opinion that existence of 7,200 feet of coal dust constituted an imminent danger. The court noted that the 1969 Act, which has been strengthened by the 1977 Act, is a remedial statute which should be liberally construed. That language was cited with approval by the court in Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), in which the court ruled that a mine whose coal was sold only in intrastate commerce for domestic consumption was subject to the 1977 Act because of its effect on interstate commerce.

My discussion above leads me to find that non-employee miners' representatives do have an implied right under the Act to monitor training classes.

As to the alleged violation of section 105(c)(1), the pertinent part of that section provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because * * * of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory rights afforded by this Act.

One of the cases which I think supports a finding of a violation of section 105(c)(1) in this proceeding is a case entitled Local Union No. 1110, UMWA, and Robert L. Carney v. Consolidation Coal Co., 1 FMSHRC 338 (1979). In that case, Carney was given three letters of reprimand and placed on probation for 1 year because of his union activities. He had left his continuous-mining machine and had gone to complain to other union officers and MSHA because he was asked to operate a continuous-mining machine pending receipt of a known mixture of methane for checking the methane monitor on the continuous-mining machine. Carney was told that he could only make such complaints and leave the section when management approved. Carney continued doing union work, because he was a safety committeeman, without getting permission to do so and that resulted in other letters of reprimand.

The Commission in that case affirmed an administrative law judge's holding that this restrictive policy was a violation of Carney's rights. The Commission stated that health and safety of miners made it necessary for the union committeeman to do his work even though it might interfere with Consolidation's ability to control production as it might prefer on a given occasion. The Commission said that Consolidation's policy would impede a miner's ability to contact the Secretary when safety violations or dangers arise.

In this case, I think it is clear that when Martin County Coal Corporation prevented the non-employee miners' representative from coming on the premises to monitor the training classes, it was doing exactly what the Commission said couldn't be done in the Carney case because Carney was trying to report violations to the proper authorities at various times when it didn't suit management for him to do so. The Commission said that the importance of maintaining health and safety in the mines requires that the operator not interfere with the miners' representative when he is trying to accomplish something which will enhance safety. In this case, as I have already indicated in the first part of my decision, when the Council's representative tries to go on the premises to monitor the classes and make sure that the training program is being conducted properly so as really to teach the miners the things that are required, he is simply trying to carry out his obligations as the miners' representative in seeing that the training program is competent and is accomplishing its purposes.

I am aware of Martin County's argument in this case to the effect that there must be an additional effort to bring the alleged violation of section 105(c)(1) within the purview

of a violation, but I think that when a miners' representative seeks to exercise even an implied statutory right that he is automatically brought within the purview of section 105(c)(1) when the company takes an action which specifically interferes with the miners' representative in his effort to do an act that he should be allowed to do in order to make sure that health and safety in the mines are going to be carried out in fact as well as placed in a training program. For the reasons I have indicated, I find that a violation of section 105(c)(1) did occur and that the Council is entitled to the relief sought under section 105(c)(3) of the Act.

DOCKET NO. KENT 80-264

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-264 seeks to have a civil penalty assessed for the violation of section 48.3 alleged in Citation No. 706431. Since I have already found in this decision that no violation of section 48.3 occurred, the order accompanying this decision will dismiss the Petition for Assessment of Civil Penalty in Docket No. KENT 80-264.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed on March 31, 1980, by Martin County Coal Corporation in Docket No. KENT 80-212-R is granted and Citation No. 706431 dated March 5, 1980, is vacated for failure to show that a violation of 30 C.F.R. § 48.3 occurred.

(B) The Notice of Contest filed on March 31, 1980, by Martin County Coal Corporation in Docket No. KENT 80-213-R is granted and Order of Withdrawal No. 706432 dated March 18, 1980, is vacated because no question as to the reasonableness of time to be given for compliance existed in this instance in view of the fact that underlying Citation No. 706431 failed to show a violation of a mandatory health or safety standard.

(C) The Complaint of Discharge, Discrimination, or Interference filed on April 10, 1980, in Docket No. KENT 80-222-D by the Council of the Southern Mountains, Inc., is granted because a violation of section 105(c)(1) of the Act existed. Therefore, Martin County Coal Corporation is ordered:

(1) To cease and desist from further acts of discrimination and intereference with the Council in its efforts to represent the miners at the Corporation's mines, including, but not limited to, interference with the Council's sending representatives to monitor training classes given at the Corporation's mine site or elsewhere.

(2) To notify the Council, at least 2 days in advance, when actual training classes are to be given, including providing the Council

with the time and place where the classes will be held and specifying the length of time which the classes are expected to last.

(3) To reimburse the Council for all attorneys' fees and other expenses incurred in connection with the filing and prosecution of the Complaint in Docket No. KENT 80-222-D or otherwise incurred as a direct result of Martin County Coal Corporation's refusal to allow the Council's representative to monitor training classes.

(D) The Petition for Assessment of Civil Penalty filed June 18, 1980, in Docket No. KENT 80-264 by the Secretary of Labor seeking assessment of a civil penalty for an alleged violation of 30 C.F.R. § 48.3, is dismissed because no violation of section 48.3 has been proven.

(E) The civil penalty issues raised by the Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-354, seeking assessment of a civil penalty for the violation of section 105(c)(1) by Martin County Coal Corporation, are severed from this consolidated proceeding and a decision regarding those issues is deferred until such time as Martin County has filed an answer to the Petition pursuant to 29 C.F.R. § 2700.28.

(F) In order to evaluate the criterion of whether respondent demonstrates a good faith effort to achieve rapid compliance with respect to the civil penalty issues referred to in paragraph (E) above, counsel for Martin County is requested to provide me with a statement by October 10, 1980, as to whether Martin County allowed the Council's representative access to the mine site for the purpose of monitoring the training classes which are scheduled to begin on October 5, 1980.

SUPPLEMENTAL DECISION

Foreword. In some preliminary discussions with counsel for the parties in this proceeding, I stated that I expected to render a bench decision at the conclusion of the presentation of evidence. Counsel thereupon requested that they be permitted to file prehearing briefs. Such briefs were filed by the parties on August 15, 1980.

After I had indicated at the hearing that my bench decision, supra, would rule in the Council's favor with respect to the complaint filed in Docket No. KENT 80-222-D, counsel for Martin County Coal Corporation asked that he be permitted to file a posthearing brief between the time that I received the transcript of the hearing containing my bench decision and the time of issuance of the bench decision in final written form. I granted that request at the hearing (Tr. 29) and provided that such posthearing briefs should be submitted to me by September 25, 1980. Posthearing briefs were timely filed by the Council and Martin County Coal Corporation. Counsel for MSHA did not file a posthearing brief.

It should be noted that I agreed to issue my decision by October 3, 1980, because new training classes are scheduled to be held by Martin County

beginning with the first shift which reports for work at midnight on Sunday, October 5, 1980, and the Council wanted a ruling by me as to whether the Council's representative would be entitled under my decision to send a representative to monitor the training classes which are scheduled to commence on October 5, 1980.

Consideration of Arguments in Council's Posthearing Brief

The Council's brief states that it still believes that section 48.3 contains an implied right for the Council's representative to monitor classes on behalf of the miners, but its brief is devoted primarily to supporting the aspects of my bench decision which found that the Council has a right under the Act to monitor training classes. Inasmuch as the Council's brief primarily supports the holdings which are contained in my decision, it is unnecessary for me to consider the arguments contained in the Council's posthearing brief except for one issue which is discussed below.

Award of Damages under Section 105(c)(3) of the Act. At page 10 of the Council's brief, it is correctly stated that I said at the hearing that I would not order Martin County Coal Corporation to pay any damages to the Council unless the Council could cite some legal support for its request for damages (Tr. 59). After reading the Council's arguments in support of its request for damages, it is obvious that I misunderstood what the Council meant in its complaint when it asked for damages. I understood the prayer for damages to be a request that I order Martin County to pay punitive damages because, in other cases, I have had miners in discrimination cases to ask for up to $1,000,000 in damages because of an alleged unlawful discharge. The Council's brief shows that the Council meant by damages that it wants to be reimbursed for approximately $500 in expenses (phone calls, travel, etc.,) which the Council incurred as a direct result of Martin County's refusal to allow its representative access to the mine site for the purpose of monitoring training classes.

I have always considered that a complainant in a discrimination or interference case has a right to be compensated for all direct costs associated with the act of discrimination or interference. For example, in my decision in Bernard Lyle Cline v. Itmann Coal Co., Docket No. HOPE 76-364, issued December 21, 1977, I ordered the company to reimburse Cline for expenses such as phone calls, preparation of employment applications, etc., in addition to reimbursement for back pay and legal fees. With respect to the relief to be provided under section 105(c), Senate Report No. 95-181, 95th Cong., 1st Sess., May 16, 1977, stated as follows (p. 37):

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The

specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

Paragraph (C)(3), page 16, supra, of the order accompanying my bench decision is intended to grant recovery of the type of expenses for which the Council seeks reimbursement in its references to "damages" on pages 10 through 12 of its posthearing brief.

Consideration of Arguments in Martin County's Posthearing Brief

None of the arguments in Martin County's posthearing brief persuades me that I ought to change my findings or rulings made in the bench decision which has been reproduced on pages 2 to 16, supra. My reasons for rejecting Martin County's supplemental arguments are set forth below.

The Right of a Non-Employee Miners' Representative To Monitor Training Classes. Pages 5 to 13 of Martin County's posthearing brief are devoted to arguing that the Act contains no specific provision that a non-employee miners' representative has the right to monitor training classes and that such a right cannot be fairly implied.

The first contention under the above argument is that the Act provides for miners' representatives to have three categories of rights. Those rights are said to be given in sections 101(c), 103(f), and 111 of the Act which provide, in general, (1) that the miners' representative may inform the appropriate authorities about conditions affecting health and safety of the miners, (2) that the miners' representative has a right to health and safety information, such as mine maps and records, which are deemed necessary for enforcement purposes and prevention of work-related accidents, and (3) that the miners' representative is entitled to accompany a Federal inspector when he is conducting an inspection. Martin County follows up the foregoing recitation of the rights given to the miners' representative by the Act with the claim that under the doctrine of ejusdem generis only those rights of the same kind, class, or nature as those specifically within a statute's coverage are to be implicitly included. Martin County then concludes that the right of a miners' representative to attend training classes cannot be considered to be of the same nature as access to records and descriptions of mines.

I cannot agree with Martin County's conclusion that the right of a miners' representative to attend training classes is of a different category or type of right from the ones which Martin County has described as being inherent in sections 101, 103, and 111 of the Act. Determining whether a company's training classes are teaching the contents of the training program is specifically related to assuring that the miners are trained properly in the health and safety precautions which they should follow in the course of their employment.

There is almost no difference between a miners' representative being allowed to observe a training class and requiring that he be allowed to accompany an inspector who is conducting a health and safety inspection. The primary difference between accompanying an inspector under the provisions of section 103(f) and attending a training class is that a miners' representative is more likely to be able to compare the adequacy of a company's instructors to carry out the provisons of a training program than a miners' representative may be competent to obtain rock dust samples or take air measurements or determine whether a ground wire complies with the mandatory safety standards. Since I believe that the right of a non-employee miners' representative to monitor training classes is of the same category as other rights specifically granted by the Act, I find that there is no merit to Martin County's first contention to the effect that the Act does not give the miners' representative the right to monitor training classes.

The second argument made by Martin County's posthearing brief is a claim that the finding in my bench decision that the miners' representative has an implied right to monitor classes is invalid because I made a rule of general applicability by the adjudicative process rather than through the rulemaking provisions of the Act. Martin County's brief (p. 9) concedes that the Supreme Court held in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), that the Administrative Procedure Act does not preclude enunciation and enforcement of a retroactive standard by an adjudicative rather than a rulemaking proceeding, but argues that the Supreme Court's holding in the Aerospace case that the NLRB could do so was based on that Board's historic reliance on adjudicative proceedings to establish new principles. Also Martin County observes that the Supreme Court said that there might be situations where the NLRB's reliance on adjudication would be an abuse of discretion or a violation of the Act there involved (Brief, p. 10). Martin County completes its rulemaking argument by pointing out that the rulemaking provisions of the 1977 Act are very rigorous and require preliminary procedures which are much more demanding than those prescribed by the Administrative Procedure Act, citing a long passage from Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 402-403 (D.C. Cir. 1976), which describes the procedures which the Secretary of Labor is required to follow in rulemaking proceedings.

Martin County's arguments based on the rulemaking provisions of the Act are misapplied. Those rulemaking provisons apply to the Secretary of Labor rather than to the Federal Mine Safety and Health Review Commission. The Commission pointed out in Old Ben Coal Co., 1 FMSHRC 1480 (1979), that its powers in proceedings under the Act are broad in scope and that the Commission has an obligation to set a policy for enforcement of the Act. Therefore, Martin County's argument that the NLRB can proceed by adjudication, whereas the Commission cannot, is incorrect and must be rejected.

Another argument raised by Martin County's brief (pp. 13-16) in support of its claim that the Act contains no language from which it can be implied that a non-employee miners' representative can come on Martin County's mine property to monitor training classes is an involved claim that Martin

County's property is so sacred that a non-employee can come on the property only if the reason for his coming on the property can be satisfied by no other means. Martin County argues that the non-employee miner's representative can find out fom talking to Martin County's employees whether the training classes are faithfully carrying out the provisions of the training program. The representative, it is said, can make complaints to MSHA on the reports received from the miners who attend the classes.

The Council's pretrial brief provided excellent reasons, as set forth in my bench decision at page 7, supra, for the need for the non-employee miners' representative to come on Martin County's property to monitor the training classes. Moreover, as I pointed out on page 8 of my bench decision, supra, the non-employee miners' representative should be allowed on the mine property to check the reports of the miners so that any reports given to the representative by the miners can be verified by the representative before complaints are made to MSHA. Verification of miners' complaints before reporting them to MSHA is beneficial to Martin County because idle, false, or incorrect reports would be eliminated.

The Award to the Council of Attorney's Fees. Martin County's post-hearing brief (pp. 16-19) argues that neither courts nor administrative agencies are free to require losing litigants to pay the attorney's fees of successful litigants in the absence of express statutory authorization. Martin County cites authorities in support of the foregoing argument and then faces up to the fact that my statement at the hearing that my order in this case would award attorney's fees to the Council is based on a statute which does authorize the Commission and its judges to award attorney's fees to persons who have proved their cases under section 105(c)(3) of the Act. Martin County then states that even though section 105(c)(3) does provide for an award of attorney's fees, that special circumstances may exist which would make an award of attorney's fees unjust. Martin County contends that such special circumstances are present in this case because this is a case of first impression where Martin County proceeded under a course of action which was based on a reasonable interpretation of the Act. Martin County says that my finding that a non-employee miners' representative has a right to monitor training classes is concededly based on an implied right under the Act. Martin County argues that it was reasonably led by the Secretary's Interpretative Bulletin, 43 Fed. Reg. 17546, published April 25, 1978, to believe that its conduct was consistent with the Act and the regulations. Martin County completes its argument on the above point as follows (Brief, p. 19):

> Normally where an award of attorney's fees is assessed by statute, the party against whom it is assessed has violated some objective, concrete provision of which he has notice of the consequences of violation. Here, the Company's reliance on the Department's own published statements and the apparent language of the statute itself was reasonable. In these circumstances to assess an award of attorney's fees against the Company would be to impose an unjust penalty where no penalty at all is warranted.

There are a number of exhibits in this proceeding which show that Martin County has been extremely recalcitrant in complying with any of the provisions of the Act or the regulations insofar as they pertain to allowing the miners' representative to participate in the formulation of training plans. Exhibit B shows that Martin County did not send a copy of its training program to the miners' representatve in compliance with section 48.3. Exhibit C shows that the Council tried to use the regulations as an excuse to ignore the miners' representative altogether and Exhibit D shows that Martin County failed to read the preamble to the training regulations which clearly showed that MSHA had not refused to continue recognizing the Council as the miners' representative at Martin County's mine. Exhibit E contains a painstaking recitation of the uncooperative series of acts on the part of Martin County's managerial staff in its obstinate and continual refusal to allow the Council to perform the duties which were clearly within its right as the miners' representative at Martin County's mine.

Martin County's brief deals with my finding of an implied right of a non-employee miners' representative to monitor training classes as if it were a finding of a tremendously burdensome and demanding requirement which it could not possibly have thought could happen. The right to monitor training classes has no adverse impact on Martin County because it has to do almost nothing in response to the right. Martin County already had the obligation under section 48.3 to prepare and file with MSHA a training program for MSHA's approval. Under section 48.3, a copy of the proposed training program has to be filed with the Council which is the miners' non-employee representative. The Council had a right to participate in discussions regarding the training program under section 48.3. The Council is entitled under section 48.3 to be notified if the training program is modified by either Martin County or MSHA. Martin County is required to teach the material which is described in its training program. Martin County must provide a room in which the classes can be taught and must ventilate and provide illumination in such room. The instructors must be competent and must be approved by MSHA. The requirement that Martin County allow a non-employee miners' representative to monitor the class requires Martin County to do nothing which it was not already obligated to do by section 48.3 other than to send the Council notification of the time and place where the classes will be held.

While it may cost Martin County 15 cents in postage to notify the Council when training classes are to be held, Martin County, in exchange for honoring that right, will be able to discontinue the practice of posting a guard at its mine in order to prevent the Council's representative from having access to mine property for the purpose of monitoring the classes. Moreover, Martin County will no longer have to be plagued with numerous phone calls from the Council's representative and the Chief of MSHA's Training Center as they try to persuade Martin County's officials to allow the non-employee miners' representative access to mine property to monitor training classes.

In view of the facts recited above, I find that there is no merit to Martin County's claim that it reasonably refused to allow the miners' representative to monitor its training classes. The Act was written to improve health

and safety in the mines. The likelihood that the Act would be interpreted so as to deny a non-employee miners' representative the right to monitor training classes was remote and Martin County's officials deliberately and knowingly took a calculated risk that they would be found to have violated section 105(c)(1) when they continually and defiantly refused to allow the Council's representative to monitor the training classes. Therefore, Martin County should be required to reimburse the Council for all attorney's fees and all other expenses incurred by the Council with respect to its efforts to be given access to mine property for the purpose of monitoring training classes.

The ordering paragraphs at the end of my bench decision, commencing on page 15, supra, are affirmed.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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