# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 15, 1995

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF RICHARD E. GLOVER AND LEON KEHRER, | : | DISCRIMINATION PROCEEDING |
| | : | Docket No. LAKE 95-78-D |
| | : | VINC CD 94-10 |
| Complainants | : | Rend Lake Mine 11-00601 |
| v. | : | |
| CONSOLIDATION COAL COMPANY, Respondent | : | |

## DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for the
Elizabeth Chamberlin, Esq., Pittsburgh,

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Richard E. Glover and Leon Kehrer pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, *et seq.*, the "Act". The Secretary alleges that the Consolidation Coal Company (Consol) transferred these complainants in violation of Section 105(c)(1) of the Act[1]

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[1] Section 105(c)(1) of the Act provides as follows:
No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of
the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or
because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for
Footnote 1 continued

because of their activities as miners' representatives. In particular, it is alleged that the Complainants were removed from their jobs as "scooter barn" mechanics on June 21, 1994, because their "walkaround" duties performed under Section 103(f) of the Act purportedly interfered with the efficiency of the scooter barn area.[2] Indeed it is undisputed that Consol removed the Complainants from their jobs as scooter barn mechanics because of their activities as miners' representatives in order to make the scooter barn area more efficient.

A preliminary issue is whether the Complainants were in fact "representatives of miners" within the meaning of the Act during relevant times and, in particular on June 21, 1994, when they were transferred. Pursuant to the directive in Section 103(f) of the Act the Secretary in his regulations at 30 C.F.R. ' 40.1(b) has defined representative of miners as "any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." Moreover, in *Utah Power and Light Company* v. *Secretary,* 897 F.2d 447, 455 (10th Cir. 1990) the circuit Court confirmed that any person or organization representing two or more miners is a miners' representative under Section 40.1(b).

In this case the Complainants both testified that prior to June 21, 1994, they were appointed as "safety committeemen" by an official of the local union in order to perform walkaround functions under the Act. Moreover, in each case, that appointment was confirmed by vote of the local union composed of miners at the Rend Lake Mine. It may reasonably be inferred from this undisputed evidence, therefore, that both Glover and Kehrer

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employment 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.

[2] Section 103(f) provides that "[s]ubject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine."

were, as of June 21, 1994, appropriately representing two or more miners at the Rend Lake Mine and were accordingly representatives of miners within the meaning of Section 103(f) of the Act.

**Factual Background**

Both Glover and Kehrer had worked as "scooter barn" mechanics at the Rend Lake Mine for many years prior to June 21, 1994. Glover had worked at the mine for 25 years and for 17 of those years had been a "scooter barn" mechanic. Kehrer had worked at the mine for 21 years. The scooter barn is located underground and on June 21, 1994, was situated about 150 feet from the bottom of the "B" shaft. It is a shop area 18 feet by 70 feet in size with rock walls, a beamed ceiling and a cement floor containing equipment including welders, drill presses, and grinders. One mechanic on each of the three shifts works out of the scooter barn and is ordinarily supervised only at the beginning of the shift. Glover worked primarily on rubber-tired equipment and occasionally worked outside the scooter barn on heavier equipment. Glover was then also a representative of miners serving as a "walkaround" with mine inspectors about two thirds of his work time. He later estimated that he and Kehrer (on the "C" shift) each spent four days out of five working as walkarounds.

According to Glover, at the end of his shift on Friday, June 21, 1994, he was told by his boss, Vernell Burton, that he would be taken out of the scooter barn because of his work as a walkaround. Burton also told him there was a possibility that if he would quit his walkaround activities he could stay at the scooter barn. When Glover returned to work on Monday, June 24, he was transferred to work as a mechanic on the 1-G Section. He again asked Burton if he would be permitted to stay at the scooter barn if he gave up his walkaround duties but Burton did not respond. At the end of his shift Glover and Complainant Leon Kehrer went to the mine superintendent's office. According to Glover, Superintendent Wetzel explained that the job transfer was made to increase productivity at the scooter barn. At this meeting, maintenance supervisor Wamsley offered the Complainants the option to quit their walkaround duties and remain in the scooter barn but Wetzel overruled him, stating that it was not an option. Glover acknowledged that Wetzel told him that he was doing a good job as a walkaround but they needed somebody full time in the scooter barn.

According to Glover, working on the section as an underground mechanic is significantly less desirable than working in the scooter barn and conditions on the section were more

hazardous. Because of this Glover subsequently bid on a motorman job taking a $1.00-an-hour pay cut.

Billy Ray Sanders, a former inspector for the Illinois Department of Mines and Minerals, was performing an inspection at the Rend Lake Mine on June 21, 1994. He happened to be outside the office of Maintenance Supervisor John Moore when he overheard Moore tell Kehrer that they had a meeting and decided to remove him from his job in the scooter barn because of his work as a "walkaround" for Federal and State Inspectors. Sanders heard Moore tell Kehrer that if he wanted to give up his walkaround duties he could remain as a scooter barn mechanic but otherwise he would be transferred to the section. Kehrer asked for Sanders' assistance to prevent his transfer but, upon checking with his legal department, Sanders found he could not help.

Kehrer heard about his possible transfer from the scooter barn because of his duties as a "walkaround" from one of his bosses, Randy Price. Assistant Maintenance Superintendent John Moore also told Kehrer that he was to be transferred from the scooter barn because of his walkaround activities. Scott Wamsley confirmed to Kehrer that he either had to quit his walkaround duties or lose his job as a scooter barn mechanic. Kehrer then met with Wetzel who repeatedly stated that "my official statement [reason] is to make the scooter barn more productive."

Kehrer testified that he was then transferred to the 3-F Section and initially had no supervisor, no tools and no work assignments. According to Kehrer the section mechanics perform more difficult and heavier work and are subject to more dangerous conditions than scooter barn mechanics. They work with A.C. power, and are exposed to dust, methane and potentially dangerous roof and rib conditions.

Kehrer also noted that the scooter barn mechanic on the B-shift was not a representative of miners and was not transferred to the sections unlike he and Glover. Kehrer conceded that there was, indeed, a transportation problem at the mine because the bad road conditions in the mine damaged equipment. He also noted that there were not enough mantrips in the mine in any event.

On behalf of Consol, Lead Maintenance Foreman Vernell Barton testified that during June 1994, he was in charge of the service and maintenance of the transportation equipment. He had a good working relationship with both Complainants and was not involved in the transfer decision. Barton had been told that Glover was transferred because the time he was missing on day shift left

them short handed. They had to use a fill-in mechanic in the scooter barn in Glover's absence and initially the replacements were not as skilled. He was told several months before June 1994, that they needed to have someone at the scooter barn at all times because of the aging of the equipment and the increasing use of diesel equipment required increased maintenance.

John Robert Moore testified that he was an assistant to the master mechanic in June 1994, in charge of the transportation equipment. He too reported to Scott Wamsley. Moore was also involved in the decision to transfer the Complainants. He recalled a staff meeting on June 11 to discuss various problems at the mine including inadequate transportation of the hourly employees to their work stations. Nine of the people attending the meeting raised this issue and the apparently related problem of not always having a mechanic available in the scooter barn. They wanted a mechanic to be available at the scooter barn 24 hours a day. Moore testified that he was told by Wamsley that it would be necessary to move the Complainants out of the scooter barn to have somebody available all the time. According to Moore they also needed someone trained to work on their new diesel equipment available all the time.

Moore testified that in June 1994, although there were nine or ten mechanics working on each of the three shifts and that any one of these could have worked on the section as mechanics, only one or two per shift were capable of working in the scooter barn as substitutes. Moore acknowledged, however, that the transportation problems they had in June 1994, were the same problems they had since 1989. Moore maintains that they did not have the people to train to fill in. Moore acknowledged that he told Kehrer that if he would give up his walkaround duties he could stay in the scooter barn.

Mine Superintendent Joseph Wetzel testified that he scheduled the management meeting on June 11, 1994, to "define roles and solve problems". According to Wetzel the subsequent transfer of the Complainants was not as punishment but was the result of transportation problems. Wetzel testified that someone suggested offering the Complainants a choice to resign as representatives of miners but he wanted them to continue in that capacity and therefore did not give them a choice. Wetzel also testified that since their transfer the maintenance staff had been increased but not sufficiently to allow for fill-ins at the scooter barn.

When the above essentially undisputed facts are distilled, what emerges is in essence a policy by Consol that effectively

bars miners' representatives at the Rend Lake Mine from holding the position of scooter barn mechanic. It may also reasonably be inferred from the evidence that under this policy no one serving as a miners' representative could even be considered for the scooter barn job because of his activities as a miners' representative. Conversely, under the Consol policy no person presently holding the position of scooter barn mechanic could accept the duties as a miners' representative without fear of losing his scooter barn job and being transferred to less desirable and more hazardous work.

**Analysis**

Ordinarily it is essential in proving a case of discrimination under section 105(c)(1) of the Act that there be a determination of unlawful motive. The Act prohibits retaliatory conduct or discrimination that is motivated by a miner's exercising any protected right. Nevertheless, situations have arisen in which proof that adverse action was improperly motivated has not been required. The Supreme Court has permitted a showing of facial discrimination under section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. ' 158(s)(3): "Some conduct . . . is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967)(citations omitted). Moreover, the Commission held in *UMWA and Carney v. Consolidation Coal Co.*, 1 FMSHRC 338, 341 (1979), that an operator's business policy was facially discriminatory. There, the Commission found that, under section 110(b) of the Coal Act (30 U.S.C. ' 820(b)(1976) (amended 1977), the predecessor to section 105(c), a company policy requiring union safety committeemen to obtain permission from management before leaving work to perform safety duties was unlawful because it impeded a miner's ability to inform the Secretary of alleged safety violations. *See also Simpson v. FMSHRC*, 842 F.2d 453, 462-63 (D.C. Cir. 1988)(when mine conditions intolerable, operator motive need not be proven to establish constructive discharge). *Cf. Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1532-33 (1990)(held that operator's policy was not facially discriminatory.)

In *Swift et al. v. Consolidation Coal Company,* 16 FMSHRC 201, 206 (1994), the Commission held that in order to establish that a business policy is discriminatory on its face, a

complainant must show that the explicit terms of the policy, apart from motivation or any particular application, plainly interferes with rights under the Act or discriminates against a protected class. The Commission further noted that once a policy is found to be discriminatory on its face, an operator may not raise as a defense the lack of discriminatory motivation or valid business purpose in instituting the policy.

When reviewing a claim of facial discrimination, the Commission has also stated:

"The Commission does not sit as a super grievance board to judge th
appropriate to analysis under section 105(c) of the Mine Act." Our limited purpose is to
focus simply on whether the [program] or enforcement of some component thereof conflicts with rights protected by the Mine Act

*Price and Vacha* 12 FMSHRC at 1532 (citation omitted).

Within this framework of law it is clear that Consol's policy herein is, indeed, facially discriminatory. By effectively barring miners' representatives from holding the desirable job of scooter barn mechanic, by discouraging persons who might wish to work as scooter barn mechanics from becoming miners' representatives and by removing persons from such a position upon the assumption of activities as a miners' representative, Consol's policy unlawfully discriminates against the protected class of miners' representatives and those who would otherwise be willing to serve in that capacity. It is significant to note that this policy also effectively restricts miners' rights to select whom they wish to have represent them under Section 103(f) of the Act. See *Kerr-McGee Coal Corp. v. FMSHRC,* 40 F.3d 1257 (D.C. Cir. 1994), *petition for cert. filed,* 63 U.S.L.W. 3805 (U.S. Apr. 14, 1995) (No. 94-1685). Under the circumstances Consol's policy which led to the transfer of the complainants herein is facially discriminatory and in violation of the Act.

The policy at issue and the specific action by Consol in transferring the Complainants in this case for their activities as miners' representatives is also discriminatory under the customary analysis applied to discrimination cases. The Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The

operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by any protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413(1983) (approving nearly identical test under National Labor Relations Act).

There is no dispute in this case that both Complainants, as miners' representatives, were members of a protected class and had engaged in protected activity prior to their transfer. It is also clear that the adverse action complained of (the transfer of the Complainants from their job as scooter barn mechanics to section mechanics) was motivated solely by their protected activity as miners' representatives (because of their time-consuming work in that capacity). Since this case does not therefore involve a "mixed-motive", discrimination under the Act is established and no further analysis under *Pasula* is necessary.

Consol cannot under the circumstances prevail with an affirmative defense that it based its transfer of Glover and Kehrer on unprotected activity alone since it admits that their transfer was based upon their activities as miners' representatives. Indeed, it cannot be disputed that the adverse action was solely motivated by the fact that the Complainants were performing their duties as representatives of miners. They were admittedly transferred because their walkaround duties detracted from the time devoted to their duties as scooter barn mechanics. The Secretary has in this manner, therefore, also proven discrimination under the *Pasula* analysis.

Even assuming, *arguendo,* that this case involves a "mixed motive" in the sense that Consol was also motivated in transferring Glover and Kehrer by business related concerns that their activities as miners' representatives was affecting mine productivity and efficiency, those concerns cannot prevail over the express Congressional intent to construe Section 105(c) "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act]."
S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35 & 36 (1977)

["S. Rep."], *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 & 624 (1978) ["Leg. Hist."].

That Senate Committee also stated in that report as follows:

"If our national mine safety and health program is to be truly ef encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation".

Moreover, in creating a protected class of miners' representatives under Section 103(f) of the Act, Congress expressly recognized that there would be related economic costs to the industry. Thus, while it may be true that Consol could operate more productively and efficiently by prohibiting miners' representatives from holding certain jobs, Congress has clearly determined that such business reasons cannot be used to justify discrimination against them as Consol suggests herein.

Considering the serious impact Consol's actions herein would have on the willingness of persons to serve as miners' representatives and the intentional and obvious discriminatory nature of its actions in conjunction with other criteria under Section 110(i) of the Act, I find that a civil penalty of $10,000 is appropriate.

## ORDER

In accordance with the damages requested by the Secretary, Consolidation Coal Company is hereby directed to (1) immediately restore the Complainants to their positions as scooter barn mechanics at the appropriate rate of pay for the position, and (2) post for a period of not less than 60 days a notice at Rend Lake Mine in a prominent place frequented by miners, which states its recognition of miners' statutory rights to file complaints of discrimination and to participate as miners' representatives with the Mine Safety and Health Administration; and its commitment to honor these rights, and not to interfere in any manner with the exercise of these rights. Consolidation Coal Company is further directed to pay civil penalties of $10,000 for the violations in this case.

Gary Melick
Administrative Law Judge
(703) 756-6262

Distribution:

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