

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 9, 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 97-88-D
On behalf of DANNY W. BROWN,	:	
Complainant	:	VINC CD 96-03
v.	:	
	:	Rend Lake
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 97-99-D
On behalf of DAVID R. GULLEY,	:	
Complainant	:	VINC CD 96-03
v.	:	
	:	Rend Lake
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Gay F. Chase, Esq., Christine Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Complainants;
David J. Hardy, Esq., Julia K. Shreve, Esq., Jackson & Kelly, Charleston, West Virginia for Respondent.

Before: Judge Barbour

These cases are before me upon complaints of discrimination brought by the Secretary of Labor (Secretary) on behalf of Danny W. Brown and David R. Gulley under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(c)(2)) (the Mine Act or Act). The complaints allege that Consolidation Coal Company (Consol) violated section 105(c) of the Act when it deprived Brown and Gulley of their section 103(f) (30 U.S.C. § 813 (f)) rights to accompany a federal coal mine inspector. Consol denied the allegations, and the complaints were consolidated for hearing and decision. Following a trial at Mt. Vernon, Illinois, counsels filed helpful briefs and statements of position.

STIPULATIONS

At the commencement of the hearing, the parties stipulated as follows:

1. The . . . Commission has jurisdiction over [the] proceeding.
2. The Rend Lake [M]ine is a bituminous coal mine located in or near Sesser, Illinois.
3. The Rend Lake [M]ine is owned and operate by [Consol].
4. [Consol] and its Rend Lake [M]ine are subject to the jurisdiction of the . . . [Act].
5. [Consol's] Rend Lake facility . . . is a facility that processes coal and which affects commerce within . . . [s]ections 3(b), 3(h) and 4 of the [Act].
6. The Rend Lake [M]ine produced in excess of three million tons of bituminous coal in 1966.
7. [Consol] produced in excess of ten million tons of bituminous coal at all of its mines in 1996.
8. At all times relevant, Joseph Wetzel was the superintendent of the . . . mine.
9. At all times relevant, Richard Harris was the assistant superintendent at the . . . mine.
10. At all times relevant, Mickey Samples was the general mine foreman at the . . . mine.
11. At all times relevant, Dean Parsons was the assistant mine foreman at the . . . mine.
12. At all times relevant, L.A. Smith was supervisor-safety at the . . . mine.
13. At all times relevant, Dennis Bacon was safety inspector at the . . . mine.

14. At all times relevant, Tim Martin was foreman at the . . . mine.

15. At all times relevant, Terry Crisp was shift foreman, C-turn, at the . . . mine.

16. The miners working at the . . . mine are represented by the United Mine Workers of America [AUMWA@].

17. The Nason [P]ortal of the . . . mine was open[ed] on July 6, 1996.

18. Danny Brown was employed by [Consol] as an underground mechanic assigned to the Sesser [P]ortal of the . . . mine on July 19, 1996, and is a Aminer@as defined by the Act.

19. Brown began his employment at the . . . mine on February 2, 1976.

20. On July 19, 1996, Mine Safety and Health [Administration] [AMSHA@] Inspector James Britton presented himself at the Nason Portal to conduct an inspection of the underground mine workings.

21. On or about July 30, 1996 . . . Brown filed a timely complaint of discrimination with MSHA.

22. David Gulley was employed by [Consol] as a shuttle car operator assigned to the Nason [P]ortal of the . . . mine on July 25, 1996, and is a miner as defined by the Act.

23. Gulley began his employment at the . . . mine on February 14, 1974.

24. On July 26, 1996, [MSHA] Inspector James Britton presented himself at the Nason [P]ortal to make an inspection of the underground mine workings.

25. On or about July 30, 1996 . . . Gulley filed a timely complaint of discrimination with MSHA.

26. Citation [No.] 30339498 was issued on October 1,

1996, for a violation of section 103(f) of the Act which occurred on July 25, 1996.¹

27. Citation [No.] 3039498 was not contested nor was a formal hearing requested and the assessed penalty was paid.

28. Exhibit C is a certified copy of R-33-Assessed Violation History Report - summarized by mine for the Rend Lake [M]ine for the period October 1, 1994 to September 30, 1996 (Tr. 12-15; see Joint Exh. 1).

SUMMARY OF THE RELEVANT FACTS

Each complaint arises out of incidents that occurred shortly after the opening of the Nason Portal, the second portal at the mine. Each complaint involves a situation where an MSHA inspector arrived at one portal and the representative of miners (the Awalkaround@) was at the other portal. As a result, the representative was required to travel from one portal to the other to join the inspector.

To understand the resulting controversies, it is helpful to understand the geographic layout of the mine. Also, it is helpful to understand the way in which miners=representatives were chosen at the mine.

¹Citation No. 3039498 states in part:

A violation of section 103(f) occurred on July 25, 1996, when a representative of the miners was denied the opportunity to accompany an MSHA inspector during the physical inspection of the mine. During this inspection, the representative of the miners, who had accompanied the inspector since the start of the shift, was directed by mine management to return to his normal duties. The inspector was not accompanied by a representative of the miners . . . while the designated miners=representative was traveling underground from the Sesser Portal to join the inspection party (Joint Exh. 1, Exh. A).

The Nason Portal is located on the east side of the mine, and the Sesser Portal is located on the west side (Tr. 76). The surface distance between the two portals is approximately thirteen miles. The underground distance is approximately four and one half miles. Travel time between the two portals is between 20 to 25 minutes, whether travel is undertaken on the surface or underground (Tr. 583-584, 602, 736).

For many years the mine had a single portal, and all miners, inspectors, and management personnel entered the mine at the Sesser Portal. After the Nason Portal opened, both portals were used to enter the mine (Tr. 46). During July 1996, there were three crews (or turns) working in the mine, the A, B, and C turns. Each turn worked a shift, and the work force for each turn was sometimes split. Some miners were assigned to enter the mine at Sesser and some were assigned to enter at Nason. Although most miners worked on the side of the mine they entered, there were miners whose work assignments required them to travel from one side of the mine to the other (Tr. 46-47).

At the mine, the miners selected union safety committeemen for each turn (Tr. 42). The committeemen for A, B, and C turns were respectively Melvin Filkins, Tommie Sweeten, and Danny Brown (Tr. 285; Gov. Exh. 5). In most instances it was the committeemen who acted as the walkarounds and accompanied the inspectors. However, there also were alternate representatives of miners (Tr. 284). The alternates usually were selected by the committeemen (Tr. 282, 373, 560-561). The alternates served as the walkarounds if the safety committeemen were not available to accompany the inspectors (Tr. 281-282). The alternates were named on a list that was posted at the mine. Mine management was aware of the list (Gov. Exh. 5; Tr. 284-285). There were eight or nine alternates for each turn (Tr. 373). The alternates were selected the same way before and after the Nason Portal opened (Tr. 374). There were times when the alternates could not accompany the inspectors, and at those times the committeemen might ask an unlisted miner to act as the walkaround.

INCIDENTS RELATED TO BROWN

Danny Brown, an underground miner and union member, worked as a mechanic at Sesser Portal (Tr. 39-40). Brown was appointed the safety committeeman for the C turn in 1995 (Tr. 42). As the safety committeeman for C turn, his duties included representing C turn miners on safety issues and accompanying inspectors during their inspections of the mine (Tr. 43). Shortly after his appointment, Brown was introduced as the C turn safety committeeman to the mine's then safety director and to several other management representatives, including Wetzel, the superintendent. (Tr. 42-43).

As the opening of the Nason Portal approached, the miners discussed what to do with regard to the walkarounds if the inspector came to a portal other than the one where the walkaround was working. Brown described how the miners decided to handle the problem:

[W]e . . . approached management before the opening of the portal. These were informal meetings between myself, Dennis Bacon [the company safety inspector], [and] L.A. Smith [management's safety supervisor]. . . . [There were] [s]everal meetings [and] we explained to . . . them . . . [i]f there w[ere] two inspectors, wherever the safety committeeman was assigned, he would stay at that portal. If there was only one inspector, no matter where he was at . . . the safety representative would accompany the inspector. We would travel from one portal to the other if there was only one inspector present (Tr. 50-51).

Brown maintained that the miners did not want to create a problem for the company[,]@ that the miners' representatives were not going to pick and choose where we want[ed] to go[,]@ but that the miners sought to make clear to the company that when there was one inspector at the mine, it was the safety committeeman who was the miners first choice to accompany the inspector (Tr. 51).

Melvin Filkins, who had been a union safety committeeman at the mine for fourteen or fifteen years, agreed that the primary walkaround representative for the miners@ was the safety committeeman, and that this was true both before and after the Nason Portal opened (Tr. 373-374). Filkins concurred with Brown that the miners discussed with management, including Smith, what would be done after the Nason Portal opened. He claimed that Smith was told if the inspector came to one portal and the walkaround was working at the other portal, the miners' representative would travel to join the inspector (Tr. 375-376, 379-380).

During the day shift of July 18, 1996, Brown was working at Sesser when he was advised an MSHA inspector was at Nason and was preparing to conduct an inspection. Brown asked Smith if he could use Smith's scooter to travel to Nason. According to Brown, Smith had no problem,@ but Smith advised Brown that before he left he had better check with another management person (Tr. 55).

Therefore, Brown went to the assistant mine superintendent, Rick Harris, and told him there was a federal inspector at the Nason Portal, and that he needed to travel to that portal. Harris asked Brown if someone else could take care of the situation. Brown stated that he, Brown, was the representative of miners, that this kind of a situation had been discussed previously with mine management, and that he should be the one to travel with the inspector. Brown claimed that Harris told him to go underground and find a ride (Tr. 55).

Brown went back to Smith and told Smith about the conversation with Harris. Brown also asked Smith to call Dennis Bacon, the company safety escort at Nason, and tell Bacon that he, Brown, was on his way to the portal. Smith gave Brown the keys to the scooter, and Brown drove to Nason (Tr. 56).

Once there, he went to the portal office where he met Bacon and Jane Hamby, a C turn miner who sometimes acted as an alternate walkaround if the primary representative could not go with the inspector (Tr. 56, 59). Brown felt Bacon was surprised to see him.² Brown felt Bacon was upset because he was there. Brown testified that several times Bacon said, "This is not right. This is not right. You should not be here" (Tr. 57). Brown replied, "[W]e've talked about this in the past. We told you how we were going to handle it. Why are you so upset?" (Id.). Brown testified that Bacon said to him "I just want you to know for every action there is a reaction" (Id.). After this discussion Hamby went underground to her regular job, and the inspector and Brown began the inspection (Tr. 60).

The following day, Brown again was working at Sesser when an inspector arrived at Nason. Brown asked Smith if he could use Smith's scooter to go to Nason. According to Brown, Smith replied he did not care but that Brown should talk to Wetzel, the mine superintendent, or to the assistant mine foreman, Dean Parsons, because there was "some sort of a problem" (Tr. 60). Parsons appeared and Brown asked him whether in fact there was a problem. Parsons responded he was not sure, but that he would ask Wetzel (Tr. 61).

Parsons left and spoke with Wetzel, who told him to tell Brown to go to his regular job assignment, because there was already a walkaround at Nason (Tr. 725-726, 729). When Parsons returned, he told Brown he could not go to Nason. Brown asked if Parsons was denying him the right to accompany an inspector, and Parsons replied "Somebody else will have to handle it" (Id.). (According to Scott Stella, an alternate walkaround, who was with Brown when Brown spoke with Parsons, Parsons also told Brown "You can't go" (Tr. 252).) Brown then went underground to work at his assigned job, a job that incidentally required him to travel to Nason (Tr. 62, 252).

Wetzel agreed that on July 19, Brown asked for transportation and permission to travel to Nason to accompany the inspector. However, as Wetzel recalled, he learned about Brown's request when Rick Harris telephoned him, and asked whether Brown was allowed to go. Harris told him that Jane Hamby, an alternate walkaround representative, was at Nason. According to Wetzel, he denied the request "Because there was already a designated walkaround at the Nason [P]ortal" and he "thought that the request was unreasonable" (Tr. 562). Wetzel stated he did not want "to do all the switching around [of personnel]" that would be necessary to accommodate Brown's request (Id.). Wetzel maintained that Hamby already had advised management that she was going to travel with the inspector (Tr. 563-564). Wetzel told Parsons to tell Brown to go to work (Tr. 563). Therefore, Hamby, not Brown, accompanied the inspector on July 19 (Tr. 564).

After telling Parsons to deny Brown's request, Wetzel spoke with Gerald Kowzan, Consol's supervisor for human resources. Wetzel asked Kowzan if his decision to deny Brown permission to travel to Nason was correct. Kowzan advised Wetzel to let Brown travel to Nason "because Brown was a safety committeeman" (Tr. 572). Kowzan's advice was based on a

²Later, Brown asked Bacon if Smith had called, and Bacon stated he had not (Tr. 56-57).

conversation he had with Elizabeth Chamberlin, a Consol attorney. Wetzel and Kowzan had telephoned Ms. Chamberlin to discuss the situation (Tr. 572). According to Kowzan, Chamberlin said there could not be two walkarounds, that management should find out who is actually declaring themselves [sic] to be the designated walk-around . . . and if one person steps forward and says . . . I am that person, then . . . to look into . . . is it reasonable for that person to travel (Tr. 807).

Shortly thereafter, Wetzel orally instructed management personnel that in the future Brown should be given transportation to go to the Nason to accompany the inspector (Tr. 573-575). However, Wetzel maintained that allowing Brown to travel to Nason contrasted with the practice at other two-portal mines operated by Consol. At those mines the walkaround came from the portal [where] the inspector showed up (Tr. 552).³

INCIDENTS RELATED TO GULLY

David Gulley is a shuttle car operator at the Rend Lake Mine. In July 1996, Gulley was assigned to the Nason Portal (Tr. 209-210). Gulley was not a union officer or a union committee member (Tr. 210). However, on several occasions prior to July 1996, he acted as an alternate representative of miners (Tr. 214).

On July 24, 1996, Brown was notified by Gulley that Hamby would not be at the mine the next day. Gulley asked Brown who would accompany the inspector if one came to the Nason Portal on July 25. Brown responded if there was only one inspector, he, Brown, would be the walkaround. He would come to Nason and join the inspector as soon as he could, but Gulley should start out with the inspector. Gulley could return to his job after Brown arrived (Tr. 69).

Brown instructed Gulley to ask management if it was all right for Gulley to go on union business until Brown arrived (*Id.*).⁴ When a miner was on union business he or she was paid by the union, not by the company (Tr. 82-84). Therefore, the union would pay Gulley for his time and the company would not be out any money (Tr. 70). Brown testified he telephoned Otis Callis, a mine examiner and treasurer of the union local, and asked Callis to go with Gulley when Gulley talked to mine management (Tr. 69-70).

On the morning of July 25, Gulley reported for work at the Nason Portal (Tr. 211). Around 7:30 a.m., MSHA Inspector Britton arrived at the portal (Tr. 216). State mine inspector

³The practice was confirmed by MSHA Inspector Britton (Tr. 49, 500).

⁴Kenneth Dawes, the president of the union local, explained there was no set procedure for requesting permission to go on union business. At times, when there was ample time the request was made in writing. At other times, the request was made orally (Tr. 296, see also Tr. 298). Brown added there also were times when a union member simply told management what he or she is going to do and stated to that he or she would be on union business (Tr. 83).

Willard Dane also arrived around the same time. After finding Britton was there, Gulley went to meet with Bacon. Gulley told Bacon that he, Gulley, would travel with Britton and that another miner, James Key, would accompany the state inspector. (Tr. 218). Britton also spoke with Bacon. He told Bacon that he was at the mine to conduct an inspection (Tr. 476). Britton asked who would be the representative of miners, and Bacon told him it would be Gulley (Id.).

While this was going on, Dane went to the safety department office. At the office, Samples, the mine foreman, said he would accompany Dane (Tr. 613). Samples testified he went back to his office where he received a telephone call from assistant superintendent Rick Harris. Harris told him that Brown was coming to Nason from Sesser and that Gulley needed to go below and go to work (Tr. 614). There would not be two walkarounds for Britton.

Meanwhile, Gulley and Key met Filkins and Callis. They went to Samples's office (Tr. 443). Someone (Gulley could not recall who) asked Samples if it would be alright if Gulley went on union business to accompany Britton until Brown arrived from Sesser (Tr. 221). Gulley maintained Samples told him he could go. Gulley stated, "There is no doubt in my mind that I had permission to go" (Tr. 222). Gulley maintained he would not have gone without permission because had he done so he might have been fired (Id.).

As Filkins remember the visit with Samples, Filkins asked Samples if there was a problem with letting Gulley accompany the inspector. Filkins maintained Samples replied that Brown was on his way and the company was not going to pay for two people for the same inspector (Tr. 390-391, 394). Filkins testified he told Samples the union would pay for Gulley until Brown arrived and that Samples indicated this would be acceptable, just so the company did not have to pay two walkarounds (Id.).

Callis also testified the group assured Samples that the union would pay Gulley (Tr. 444). Callis stated Filkins asked Samples if Gulley could return to his job as a shuttle car operator once Brown arrived, and Samples stated he could (Tr. 443-444). Callis believed that everything had been resolved, that Gulley would be able to act as the walkaround until Brown reached the inspector, and that Gulley then would resume his normal duties (Tr. 444). Key also believed any disagreement had been resolved during the discussion and that Samples said it was "Okay" for Gulley to accompany the inspector (Tr. 846). Britton too understood that Gulley would be with him until Brown arrived (Tr. 481).

However, Samples testified he told Gulley and Key that one of them had to go to his regular work assignment because Brown was on the way. Although he stated, "Okay" when he was told Gulley was going on union business, "Okay" did not mean that Gulley was free to go with Britton (Tr. 615). Rather, he used the word simply to acknowledge he heard what was said. He had no authority to approve Gulley going on union business (Tr. 616-617).

Samples called Harris to tell him Gulley wanted to go on union business (Tr. 616). Harris called Wetzel, who called Kowzan (Tr. 743, 810). According to Kowzan, he and Wetzel

discussed Gulley's request, and Wetzel stated he thought it should not be granted. Kowzan agreed (Tr. 810). Wetzel did not believe it was a valid request because Brown had presented himself to go with . . . Britton . . . and [Brown] was on his way@ (Tr. 596). Moreover, the request to go on union business was not in writing, and it was unreasonable because it tied up two people, where one person would have suffice[d]@ (Tr. 579, 595-596). Wetzel believed management of the mine would be chaotic if miners could declare themselves to be on union business with no approval from the company (Tr. 598). Kowzan added it could have cost the company at least two hours or more of productivity to let Gulley go because there was no one to fill Gulley's position (Tr. 811-812). Subsequently, Kowzan and Wetzel called Harris and told him Gulley's union business was not approved and that Gulley should go to work (Tr. 743-744, 811, 813).

Samples went to the safety office to advise Gulley he had to go to work, but Gulley already had gone underground with Britton and Bacon (Tr. 617). Samples summoned Filkins and Callis to his office and told them Gulley's union business request was not approved (Tr. 617-618). After they left, Samples called Kowzan and advised him Gulley was underground. Kowzan said Samples should send someone to find Gulley and send Gulley to work. Around 8:30 a.m., Samples asked Terry Crisp, the C turn shift foreman, to locate Gulley, and Crisp went underground (Tr. 138, 234, 618).

Meanwhile, Gulley, Bacon, and Britton were proceeding with the inspection. As they approached the mouth of the 7E working section, Terry Crisp reached them. Crisp told Gulley he had to go to his assigned job. Gulley replied, *I'm on union business . . . I'm supposed to stay with this federal inspector until . . . Brown arrives from the other side@* (Tr. 225). When Crisp insisted Gulley go to his job, Gulley asked Crisp if he was ordering him to leave the inspector. Crisp stated he was, and Gulley went to his job (Tr. 136, 225-226). Gulley testified he left because he feared if he did not, he would be fired (Tr. 226).

Crisp drove Gulley to work (Tr. 138, 484-485). The union paid Gulley for the time he spent with the inspector. The decision to pay Gulley was in accordance with the union's understanding that if two persons were needed for walkaround purposes at the same time, the company only was required to pay one and that the union would *pick up the time@* for the other (See Tr. 172). The company paid Gulley for the time from when he left the inspector to the end of the shift (Tr. 228).

When Brown arrived for work at Sesser he learned that Britton was at Nason (Tr. 79). Brown went underground around 8:00 a.m. (*Id.*). Because there was no inspector at Sesser and Britton was at Nason, Brown wanted a ride to Nason. The company did not provide him with transportation, so he rode with another miner who was going to work at Nason (Tr. 81).⁵ When he reached Nason he went to the surface where he was met by two union members. They told

⁵The Secretary did not maintain the failure to provide Brown with transportation was a violation of the Act (Tr. 81-82).

Brown that Gulley had gone underground with the inspector and that management was going to remove Gulley from the inspection (Tr. 70-71). According to Brown, Samples, the general mine foreman, came out his office and Brown asked Samples about the situation. Samples replied AI had Terry Crisp remove . . . Gulley from the inspector@ (Tr. 71).

Brown then went underground with Samples and others and when the elevator reached the bottom, he asked Samples where the inspector was. Samples replied AI don't know@ (Tr. 72). A foreman offered Brown a ride, and Brown and the foreman want to find Britton (Tr. 75).

After Gulley left him, Britton, accompanied only by Bacon, continued toward the 7E section (Tr. 485-486). As he traveled, Britton inspected the roof . . . the travel roads . . . the cross-cuts, [and the] roof conditions@ (Tr. 485). Once in the section he traveled to the faces to check for methane and to observe the section's roof. He also checked to make sure that company mine examiners visited the areas. Finally, he took an air reading and began to inspect a continuous mining machine (Tr. 486). Brown reached Britton between 9:45 a.m. and 10:00 a.m. and remained with him for the rest of the inspection (Tr. 79, 486-488).

THE LAW

A miner seeking to establish a prima facie case of discrimination under section 105(c) of the Act bears the burden of proof that he or she 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., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 Fed 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Coal Co., 3 FMSHRC 803, 817-818 (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 protected activity. If the 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 Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 958-959 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test)).

RIGHTS, RESPONSIBILITIES, AND PRIORITIES UNDER SECTION 103(f)

An understanding of the rights, responsibilities, and priorities inherent in section 103(f) is key to resolving the issues of whether the company deprived Brown and Gulley of their statutorily protected walkaround rights. The rights and responsibilities are of fundamental importance in meeting the objectives of the Act. The legislative history makes clear Congress viewed the participation of the representative of miners as necessary to effectuate fully the inspection process. As the Senate Committee that drafted the Act stated, the representative who accompanies the

inspector assist[s] in conducting a full inspection (S. Rep. No. 181, 95th Cong., 1st Sess. 50 (1977), 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 616 (1978), (Legis. Hist.)). The overall goal of the walkaround right is to help miners understand the safety and health requirements of the Act and . . . enhance miner safety and health awareness (Id.). Exercise of the right is protected, and any attempt by an operator to restrict the right may run afoul of section 105(c) of the Act.

When the right was enacted Congress fully realized the right's exercise could cost the operator in production and in wages paid for time not worked (A To encourage . . . miner participation it is . . . [Congress's] intention that the miner who participates in such inspection . . . be fully compensated by the operator for time thus spent (Legist. Hist. at 616). Additionally, in granting the right Congress necessarily limited an operator's freedom to direct its work force in that a miner who is accompanying an inspector is not performing duties to which he or she otherwise would be assigned.

Finally, the question of who will accompany an inspector is for the miners to resolve. The Commission has stated that section 103(f) unambiguously provides that miners possess the right to choose their representatives for section 103(f) inspections (Secretary on behalf of Truex v. Consolidation Coal Co., 8 FMSHRC 1293, 1298 (September 1986)), and although the operator is not required to go through scheduling contortions to accommodate unreasonable assertions of the right, the miner's choice otherwise has priority.

DANNY BROWN AND THE INCIDENT OF JULY 19

I find the testimony established that before the Nason Portal opened it was the practice at the mine to proceed as follows with regard to the walkaround right: (1) to have the designated UMWA safety committeeman for each turn accompany the MSHA inspector; (2) to have an alternate UMWA safety committeeman for each turn accompany the inspector if the designated committeeman could not go; (3) to have the safety committeeman delegate someone else to go with the inspector, if the committeeman or an alternate could not go (Tr. 42, 282, 560-561). I conclude because Brown was the designated safety committeeman for the C turn, he was the miners' first choice as their walkaround representative. Further, I find mine management knew he was the first choice and therefore the primary walkaround (Tr. 42-43).

I also find that prior to the opening of the Nason Portal, the miners discussed with management the issue of who would represent the miners when an inspector was at one portal and the safety committeeman was at another (Tr. 50-51, 375-376, 379-380). I credit Brown's and Finkin's testimony about the informal talks between the union and management. Everyone knew the portal was going to open, and it is logical that the problem, which was foreseeable, would have been anticipated. The solution that the designated safety committeeman would travel to the inspector was consistent with past practice at the mine in that the designated safety committeeman remained the first choice of the miners as their representative. Equally, it was not

facially unreasonable, and it therefore was one the miners were entitled to make (Truex, 8 FMSHRC at 1827; (Tr. 50-51)) .⁶

I further find that any doubt in management's mind about who would be the primary representative when an inspector arrived at the Nason Portal, should have been clarified by the events of July 18, when Brown traveled from Sesser to Nason to accompany the inspector. Smith knew why Brown went to Nason, and management knew that in similar circumstances he would want to do so again. Hence, Wetzel's and Kowzan's conversation with Chamberlin.

On July 19, when the inspector again arrived at Nason, Wetzel denied Brown permission to travel to accompany the inspector. Wetzel justified his refusal by stating he believed Hamby, who was at Sesser, had declared herself to be the walkaround and that it was unreasonable to do all the switching around necessary to accommodate Brown's request (Tr. 562, 563). The reasons do not support denying Brown permission to join the inspector.

As I have found, it was or should have been clear to the company that Brown was the miners' first choice. As the designated safety committeeman, Brown's request had priority. If there was confusion over who was to act as the walkaround representative, the responsibility for clarifying the situation rested initially with the company, which totally controlled the communication and transportation systems at the mine. Wetzel, or another management representative, could have called Nason and had Brown speak with Hamby or with others to dispel any misunderstanding as to who was to be the walkaround. Initiation of the call would have been consistent with Chamberlin's advice that management should find out who is actually declaring themselves [sic] to be the designated walkaround (Tr. 807).

The switching around to which Wetzel objected might have been inconvenient for the operator, but it would have been an inconvenience the Act anticipates as sometimes necessary for full effectuation of the walkaround right. As I have noted, section 103(f) contemplates a diminution of the operator's right to direct its workforce and gives priority to the miner's choice. Here, that choice was Brown.

Therefore, I conclude the Secretary established a prima facie case of discrimination by proving that Brown engaged in protected activity on July 19 when he advised Consol management personnel he wanted to travel to Sesser to join the inspector. I also conclude that Wetzel's (and through him, Consol's) denial of permission was an adverse action that effectively blocked the exercise of Brown's section 103(f) right.

I reject Consol's argument that the Secretary failed to prove it was illegally motivated in

⁶In finding the solution was not facially unreasonable I note there were occasions when miners traveled from one portal to another for work purposes (Tr. 46-47, 81).

denying Brown permission to travel to Sesser. I believe the company either understood or should have understood that Brown was the primary choice of the miners to act as the walkaround, and even if there was confusion regarding who was designated, the company's control of the means of communication and transportation placed the responsibility on the company to make initial efforts to dispel the confusion, efforts it did not undertake.

Finally, to the extent Consol is arguing that letting Brown join Britton unreasonably dislocated its work priorities, I conclude Consol did not prove the assertion. As a general rule it was not unreasonable for the miners' representative to travel from one portal to another. Although in specific instances such travel might have been an unwarranted burden, it was incumbent upon Consol to prove it. At the very least, the company should have established the critical nature of the walkaround's duties and the lack of any other personnel to fulfill those duties. Ordinary inconvenience is not enough. Here, Consol did not establish that Brown's normally assigned duties on July 19 were critical to the functioning of the C turn and that others were not available to fill in for Brown.

DAVID GULLEY AND THE INCIDENT OF JULY 25

I have found that it was a practice at the mine for a committeeman to delegate his or her walkaround responsibilities to an alternate or to another miner if the committeeman or alternate could not accompany the inspector. I also have found the company fully understood this was the practice. It is clear from the testimony that Brown was aware Hamby (the usual alternate) would not be at the Nason Portal on July 25, and that Brown asked Gulley to act as the walkaround either for the entire inspection or until he, Brown, arrived (Tr. 69, 213, 218). In addition, it is clear Brown instructed Gulley to tell management that Gulley would be on union business until Brown arrived so the company would not have to pay two walkaround representatives for one inspection (Tr. 69-70). Additionally, it is certain that Gully told management's safety escort, Dennis Bacon, that he, Gulley, would be the walkaround with Britton (476, 676).

I recognize there is a dispute about whether or not Samples was told that Gulley was going on union business in order to accompany Britton. Gulley maintained he, and others, met with Samples and that Samples understood Gulley would be accompanying the inspector while on union business (Tr. 221-222). Samples maintained he was only told that Gulley was going on union business, that Gulley did not state he was accompanying Britton. Thus, when Samples responded "Okay," he was acknowledging he heard the statement that Gulley was going on union business. He was not authorizing Gulley to go with Britton or to be away from his job and be paid by the union. (Tr. 615-616).

It is difficult for me to believe that Bacon, the company representative, understood Gulley was going to act as the walkaround and that Samples did not. Moreover, given the context of Gulley/Filkins/Calis conversation with Samples, I find that Samples used the word "Okay" as it is used normally — that is, as a term of approval or authorization. It is highly unlikely Samples would have approved something without knowing its purpose. I infer from all of this that

Samples gave Gulley permission to go underground and that Samples fully understood that Gulley was going to accompany Britton and would be paid by the union while doing so (Tr. 480-481).

When he allowed Gulley to go with Britton, Samples knew Brown was on his way (Tr. 614). Consol's miners had a right to have someone accompany the inspector from the moment the inspection began. "Accompany" is defined as "To go with or attend as an associate or companion" (Webster's Third New International Dictionary (1986) at 12). Brown had not reached Nason when Britton was ready to leave. Britton was not required to wait for him. Gulley, as the designated walkaround, had a right "to go with" Britton until Brown arrived. It follows that Gulley was exercising his section 103(f) right when he went underground with Britton. Section 103(f) was not satisfied when Brown left Nason to join Britton. The walkaround must accompany the inspector, not be on the way to do so.

Therefore, I conclude that Gulley was engaging in protected activity when the inspection was interrupted and Crisp ordered Gulley to go to work (Tr. 136-138, 225, 618). Although Britton continued the inspection after Gulley left, he did so for approximately an hour without the aid of a miners' representative (Tr. 484-488).

By ordering Gulley to leave Inspector Britton before Brown arrived, Consol unlawfully discriminated against Gulley. Wetzel objected to having "two people [tied up], that is to having one employee traveling to join an inspector while another employee was filling in," but as I have stated, section 103(f) impinges upon an operator's authority to direct its work force, and the right to accompany prevails when it is not unreasonably exercised. Given the configuration of the mine, the fact that Brown was the miners primary choice, and the fact that Britton was not required to wait for Brown, I conclude it was reasonable to have Gulley exercise the right until Brown reached Britton, and I reject Consol's argument to the contrary (Consol Br. 8). Gulley was the representative of miners until Brown got there. Either Gulley went with Britton or there would have been no walkaround with the inspector. The miners' right to be represented trumped any employee dislocation and loss of production that might have resulted.⁷ While Kowzan

⁷I also reject Consol's argument that "[a]ny right" of the union to require that only certain of the designated walkarounds act in a given situation is contractual in nature and beyond the jurisdiction of the . . . Commission and . . . [the] judge" (Consol Br. 7). The argument is contrary to a fundamental precept of section 103(f), that miners are entitled to select whomever they wish

testified Gulley's absence from work could have cost the company two hours or more of productivity (Tr. 811-812), this was not an unreasonable price to pay given the priority of the miner's choice.

REMEDIES

as their representative (Truex, 8 FMSHRC at 1298), subject to certain qualifications set forth by the Secretary and which are not applicable here (Emery Mining Corp., 10 FMSHRC 276, 280 (March 1988); Secretary on behalf of Wayne v. Consolidation Coal Co., 11 FMSHRC 483, 487 (April 1989). To hold otherwise would be to place potential restrictions on the miners' freedom of choice.

The Secretary requests I find Consol's actions to have a chilling effect on the miners' exercise of their statutorily protected rights and that I order Consol to post . . . a notice stating it recognizes the right of its miners to file complaints of discrimination and to not interfere in any manner with such rights (Sec. Br. 52). Although I share the Secretary's concern that Consol's actions may make miners reluctant to serve as walkarounds in the future, I decline to order Consol to post the notice requested by the Secretary.⁸ I am not convinced posting an open-ended statement that recognizes existing rights and requirements serves much of a purpose. I believe the Act itself provides a better remedy in that under section 109 (30 U.S.C. § 819) Consol may be required to post this decision on the mine bulletin board where it will be a specific and public reminder of the company's duties under section 103(f) and of the statutory protections the Act affords miners who exercise their rights under these particular circumstances. In addition, I am persuaded the civil penalties assessed below will serve as an incentive to Consol for future compliance.

CIVIL PENALTIES

In assessing civil penalties for the two violations of section 105(c), section 110(i) of the Act (30 U.S.C. § 820(i)) requires consideration of the following six criteria:

PREVIOUS VIOLATIONS

The Secretary asserts, and the company does not dispute, that during the relevant time period prior to the violations, 1,126 violations were cited at the mine, including 15 violations of section 105(c) (Sec. Br. 49; Joint Exh. 1 (Exh. C)). This is a large history of previous violations.

SIZE

As the stipulations make clear, the mine is large in size and Consol is a large operator (Joint Exh. 1, Stips. 6 & 7).

NEGLIGENCE

The company was negligent in discriminating against Brown. The company knew or should have known Brown was the first choice of the miners, and if there was confusion in management's mind as to who was to travel with the inspector, it was the company's responsibility under the circumstances of this case to initiate action to resolve the question. The company, not the miners, controlled the means of communication and transportation. In denying

⁸I note Gulley's credible testimony that he felt he was having to put [his] job on the line to accompany a federal inspector and that he has refused to act as a walkaround since the July 25 incident (Tr. 230).

Brown the right to travel with the inspector, the company failed to exhibit the care required of it.

The same is true of the Company's treatment of Gulley. Samples knew Gulley was going to act as the walkaround until Brown arrived. He knew Brown was on the way. He either knew or should have known that in accompanying the inspector, Gulley was exercising a protected right, since Brown, the miners first choice, was not yet there. By having Gulley removed from the inspection party before Brown arrived, Samples and through Samples mine management, failed to exhibit the care require of it.

I also find, however, that the company's negligence was mitigated by the fact these two incidents involving section 103(f) rights were among the first to confront the company following the opening to the Nason Portal. That the company was uncertain of its responsibilities under the new configuration existing at the mine, is shown by Wetzel's and Kowzan's conversation with Chamberlin (Tr. 572, 807). It may be that the company was misled by the manner in which walkarounds were designated at its other two-portal mines (Tr. 49, 500), but whatever the cause, I conclude the company's responses were more misguided than purposeful.

ABILITY TO CONTINUE IN BUSINESS

No evidence was offered by Consol that the size of any penalties assessed will affect adversely its ability to continue in business, and I conclude that they will not.

GRAVITY

Both violations were serious. I have noted the fundamental importance of section 103(f) in meeting the objectives of the Act. Denying Brown and Gulley their rights interferes with the inspection process, a process that is key to enforcement of the Act.

GOOD FAITH ABATEMENT

The Secretary does not contend otherwise, and I find that Consol exhibited good faith in abating the violations.

The Secretary proposes a civil penalty of \$5,000 for each violation of Section 105(c). After considering all of the criteria and given the mitigated negligence of the company, I conclude penalties of half that amount are appropriate.

ORDER

In view of the foregoing, it is ORDERED that:

1. Consol post a copy of this decision on the mine bulletin board or other location readily available or accessible to miners and that the decision remain posted for thirty days or until it becomes final.

2. Consol pay the Secretary's Mine Safety and Health Administration a civil penalty of \$2,500 for each violation of section 105(c) of the Act (\$5,000 in total), and payment be made within thirty days of the date of this decision.

David Barbour
Administrative Law Judge

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