FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

May 18, 2001

COMPLAINANTS:	:	DISCRIMINATION PROCEEDINGS
	:	
JOHN SASSE,	:	Docket No. LAKE 2000-150-DM
	:	NC MD 00-07
ERNEST SHIMPA,	:	Docket No. LAKE 2000-151-DM
	:	NC MD 00-08
JOEL LAWRENCE,	:	Docket No. LAKE 2000-152-DM
	:	NC MD 00-09
KERRY GERSICH,	:	Docket No. LAKE 2000-153-DM
	:	NC MD 00-10
NOLAN POITRA,	:	Docket No. LAKE 2000-154-DM
	:	NC MD 00-11
ALAN POITRA,	:	Docket No. LAKE 2000-155-DM
	:	NC MD 00-12
DEAN BREKKE,	:	Docket No. LAKE 2000-156-DM
	:	NC MD 00-13
KEVIN FIDELDY,	:	Docket No. LAKE 2000-157-DM
	:	NC MD 00-14
DONALD RAGSTED,	:	Docket No. LAKE 2000-158-DM
	:	NC MD 00-15
PAUL HAFF,	:	Docket No. LAKE 2000-159-DM
	:	NC MD 00-17
JEFF GOVI,	:	Docket No. LAKE 2000-160-DM
	:	NC MD 00-18
RANDY HUSETH,	:	Docket No. LAKE 2000-161-DM
	:	NC MD 00-19
RANDY GREEN,	:	Docket No. LAKE 2000-162-DM
	:	NC MD 00-20
LANCE OMERSA,	:	Docket No. LAKE 2000-163-DM
	:	NC MD 00-21
JEFF GRAVES,	:	Docket No. LAKE 2000-164-DM
	:	NC MD 00-22
DOUG HOFFET,	:	Docket No. LAKE 2000-165-DM
	:	NC MD 00-27
SHAWN MORGAN,	:	Docket No. LAKE 2000-168-DM
	:	NC MD 00-30
FRED MILLER,	:	Docket No. LAKE 2000-169-DM
	:	NC MD 00-31

RHYS G. LAYTON,	:	Docket No. LAKE 2000-170-DM
	:	NC MD 00-39
v.	:	
	:	
LAKEHEAD CONSTRUCTORS,	:	Minntac Plant
Respondent	:	Mine ID 21-00820 AQF

DECISION

Appearances: Thomas F. Andrew, Esq., Brown, Andrew & Signorelli, P.A., Duluth, Minnesota, for Complainants,
Joseph J. Mihalek, Esq., Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota, for Respondent.

Before Judge Zielinski

These cases are before me on complaints of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(c). A hearing was held on March 15, 2001, in Duluth, Minnesota. Following receipt of the hearing transcript, the parties submitted briefs. For the reasons set forth below, I find that Lakehead did not discriminate against the Complainants and dismiss the complaints.

The Controversy

The Complainants were referred by their union, Plumbers & Pipefitters Local Union #589 (Local 589), to perform work for Lakehead Constructors. The job was at a mine site and was to begin on January 4, 2000. In order to satisfy the training requirements of the Act they attended a Mine Safety and Health Administration (MSHA) certified training course on January 3, 2000, which lasted four hours.[1] They contend that 30 U.S.C. § 825(b)[2] requires that they be paid by Lakehead at their regular hourly rate for attending the training.

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[1] Complainant Layton attended a three hour training session on February 25, 2000.

[2] 30 U.S.C. § 825(b) provides:

> Any health and safety training provided under subsection (a) of this section shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

Lakehead contends that Complainants were not "miners" as defined by the Act at the time of the training and, consequently, are not entitled to compensation. When Lakehead did not pay Complainants for attending the training, they filed complaints of discrimination with MSHA, pursuant to 30 U.S.C. § 815(c)(2). MSHA investigated the complaints, determined that Lakehead had not violated the Act and notified Complainants of their right to file an action on their own behalf before the Commission. These complaints followed.

Findings of Fact

Lakehead Constructors is a heavy industrial contractor that performs construction and maintenance work for various companies, some of which operate mines. When the work is performed at a mine site, Lakehead is an independent contractor subject to the Act. 30 U.S.C. § 802(d). Any of its employees working at a mine site are miners who must be trained, as required by the Act. Many of Lakehead's jobs are of short duration, e.g., two to three weeks, and it does not maintain a large permanent work force. In order to obtain tradesmen, it contracts with local unions, including Local 589.[3] The contracts contain exclusive hiring clauses that require Lakehead to contact the union for tradesmen that it will need for a particular job.[4] The union then identifies members who are available and meet the qualifications of workers needed and refers the applicants to Lakehead. Lakehead may reject a referred applicant for any non-discriminatory reason.[5]

Prior to January 2000, Lakehead had provided MSHA training to tradesmen when required and paid them at their regular hourly rate for the time spent in training sessions. It passed the cost of these payments through to the mining companies it had contracted to perform work for. By early 1999, however, some companies were beginning to object to paying for the cost of training. Specifically, U.S. Steel Group, a Unit of USX Corporation (USX), advised Lakehead, by letter dated March 18, 1999, that it expected "that all employees working at our plant site have previously received all necessary MSHA certification prior to entering our facility," the import being that USX would no longer pay for training costs. USX's position was based on cost containment considerations and its belief that unions were being compensated separately for training expenses through contributions to various fringe benefit funds. Lakehead advised USX that changes to the existing training compensation practice could not be implemented prior to expiration of its union contracts in June of 1999.

Lakehead's president and chief executive officer, Dennis Hallberg, informed the tradesmen unions of USX's position and warned them, prior to expiration of the contracts, that it

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[3] Lakehead is a party to a collective bargaining agreement entitled National Maintenance Agreement (NMA), which incorporates the provisions of Local 589's contract with the Iron Range Plumbing Contractors Association.

[4] Article V, Section 1 of the contract with Local 589, provides that the union "shall be the exclusive source of referrals of applicants for employment." Resp. Ex. 13, at p. 5.

[5] Article V, Section 6 of the contract provides, *inter alia*, that the "Employer retains the right to reject any job applicant referred by the Union." *Id.* at p. 6

would soon come to pass that Lakehead would no longer be reimbursed for payments made to tradesmen attending MSHA training and that it would not assume that cost. Rather, it would insist that tradesmen referred by the unions have all necessary MSHA training as a condition of eligibility for employment with Lakehead for any work on mine properties. Lakehead attempted to negotiate provisions in new contracts covering the post-June, 1999, period that addressed the issues raised by USX. It was successful in securing agreement with several local unions.[6] However, Lakehead was unable to reach an agreement with Local 589 on the training issue and the current contract provides only that the parties will attempt to negotiate a supplemental contractual provision regarding training. In many discussions between Hallberg and John Grahek, Local 589's business manager, Lakehead consistently took the position that it would insist that tradesmen referred by Local 589 for work at a mine site have current MSHA training certificates as a condition of employment and Local 589 insisted that miners be paid for time spent in training.

The present controversy had its origin on December 28, 1999, when Lakehead's director of human resources, Brian Johnson, called Grahek and informed him that union members were needed to perform work during a 2-3 week shutdown at USX's Minntac plant beginning on January 4, 2000. Because the plant was a mine site, he advised Grahek that the workers referred would have to have current MSHA training certificates. Grahek was unable to locate enough certified workers, so arrangements were made to conduct training sessions. Local 589 did not have a certified MSHA trainer. Lakehead agreed to provide one of its certified trainers to conduct the sessions. Grahek offered use of the Local 589 union hall, because it was more convenient for the prospective trainees. Local 589 handled all of the administrative tasks associated with the training. It determined who to invite to the training sessions and notified those members of the time and location. Lakehead did not know who had been invited to, or who would attend, the training sessions until they appeared for training. While Local 589 instructed the Complainants to attend the sessions in order to qualify to work at USX's mine site, they were not obligated to attend the training sessions. Likewise, those who attended were not obligated to work for Lakehead and could use their MSHA certification to work at any mine site.

While there are some minor disagreements over the language used during the discussions about the training sessions, the lines of this controversy were clearly drawn prior to the January 3, 2000, session. As Grahek acknowledged on cross-examination, prior to the training session, he knew that Lakehead was not going to pay the union members for attending the training session. He informed union members attending that if Lakehead did not pay them, that a grievance would be filed. Lakehead, conversely, knew that Local 589 would file a grievance and

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[6] Under the typical agreement, the unions would establish MSHA training programs and provide training to their members and Lakehead would make payments based upon the number of hours union members worked for it. For the first year of the five year contracts Lakehead would contribute $0.05 per hour worked by a union member to a union training fund. The payments would increase by $0.05 per hour each year, reaching $0.25 per hour worked in the fifth year of the contract. The payments could be used at the union's discretion to cover training costs and/or compensate members for time spent in training.

take every step it could to secure payment of its members.[7]

Union members who responded affirmatively to Local 589's solicitation of workers for the Lakehead/USX job, reported to the union hall prior to the 7:00 am start of the January 3, 2000 training session. There they received from Grahek a referral slip for the Lakehead job and turned it over to a union steward for that job. Steven Jones, Lakehead's safety manger, who conducted the training session distributed certain forms required of prospective Lakehead employees.[8] Complainants filled out and executed the forms and returned them to Jones.[9] He was the only representative of Lakehead at the training session and was not authorized to hire Lakehead employees. At the end of the session, Jones issued training certificates to Complainants. The following morning they reported to USX's Minntac plant and began working on Lakehead's project.

Conclusions of Law

Judicial and Commission precedent frame the ultimate issue in these cases as being whether Complainants were miners at the time they attended the MSHA training sessions. In *Emery Mining Corp. v. Secretary of Labor*, 783 F.2d 155 (10th Cir. 1986), the court reversed a Commission decision requiring payment of persons who voluntarily obtained MSHA training prior to becoming employed as miners by Emery Mining Corporation. The claimants in that case had contacted Emery directly or a job placement service and had been advised to secure MSHA training to enhance their chances of employment. They obtained the training at their own expense, were subsequently hired by Emery and sought compensation for time spent in training and other expenses. The court held that the clear wording of the Act restricted entitlement to compensation to "miners" and, since it was undisputed that the complainants there

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[7] Complainants filed a grievance under the NMA that eventually resulted in a decision that they were entitled to be paid for the hours spent in MSHA training. Lakehead has not sought judicial review of the decision and Complainants have not taken any steps to enforce it. Lakehead later unilaterally decided to give each of the complainants two hours of pay. As a result of those payments the present claims are reduced to two hours' pay (one hour for Complainant Layton). Lakehead had asserted in its answer to the petition that the payments were in settlement of the NMA grievances and these claims. However, its president and chief executive officer testified that the decision to make the payment was voluntary and was not part of an agreement to settle any claims.

[8] The forms were a Dept. of the Treasury Form W-4, a U.S. Dept. of Justice Immigration and Naturalization Service Employment Eligibility Verification, Lakehead's New Employee Registration form, Lakehead's Alcohol/Drug Testing Program Acknowledgment Form, and, Lakehead's Disciplinary Policy & Procedure Acknowledgment Form.

[9] Section 3 provided that required forms were to be completed "prior to being hired." Resp. Ex. 13, at p 5.

were not "miners"[10] or employed by Emery at the time they obtained the training, Emery had no obligation under the Act to compensate them.

Subsequently, in *Westmoreland Coal Co.*, 11 FMSHRC 960 (June 1989), the Commission held that individuals who had been laid off by Westmoreland Coal Company and who Westmoreland advised would enhance their chances of being recalled if they obtained MSHA training were not entitled to compensation for time spent in training prior to being recalled. The Commission concluded that its prior precedent to the effect that individuals were entitled to such compensation if the operator relied upon the training they had obtained to hire or recall them had been overruled by *Emery*. It rejected the Secretary's argument in that case that the complainants' "established relationship with the operator", i.e., their prior employment and their recall rights under a union contract, distinguished their case from *Emery*. Rather, the Commission found "no persuasive basis upon which to distinguish this case from the Tenth Circuit's decision in *Emery* and in the absence of contrary judicial precedent we will follow that decision." *Id*. At 964.

Complainants attempt to distinguish their cases from *Emery* and *Westmoreland* by arguing that they had been hired by Lakehead prior to commencement of the training sessions. Complainant Haff testified that he felt that he was hired by Lakehead when Grahek gave him a referral slip. Complainant Fideldy testified that he felt that he was hired by Lakehead when he gave his introduction slip to his union steward. Complainants' attempt to distinguish themselves from the complainants in *Emery* and *Westmoreland* fails, both factually and legally.

As noted above, Local 589's contract clearly gives it the exclusive right to refer "*applicants* for employment," not the right to determine who will be employed by Lakehead, which retained the contractual "right to reject any job applicant referred by the Union." Neither Haff, nor Fideldy, had spoken to anyone associated with Lakehead up to the time they claim to have been hired. At that time, Lakehead knew nothing about them and did not know that they had been referred as applicants for employment. Lakehead's only representative at the training sessions had no hiring authority.[11] While complainants filled out employment forms, the forms are required prior to commencement of employment with Lakehead and Local 589's contract clearly states that required forms must be completed "prior to being hired." Complainants were applicants for employment at the time they attended the training sessions and were fulfilling a qualification for employment with Lakehead to work at USX's mine site. Like the applicants in *Emery*, they were not miners at the time and are not entitled to compensation for the time spent

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[10] The Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).

[11] Complainants argue that Jones should be found to have had hiring authority because the training process was virtually the same as it was prior to January 2000 and union members had been paid for attending training in the past. That history, however, does not evidence that Jones had hiring authority at any time. The unrebutted testimony of Lakehead's president and chief executive officer, its director of human resources and Jones himself, established that he had no authority to hire Lakehead employees.

in training.

Even if they had become employees of Lakehead at the beginning of the training sessions, that would not bring them within the definition of miners. Lakehead is not a mining company. It is an independent contractor subject to the Act only when it performs work at a mine site. There is no evidence that Lakehead was performing any work at a mine site on January 3, 2000, the date of the first training session. As the Commission reiterated in *Westmoreland*, "the Mine Act is a health and safety statute, not an employment statute." 11 FMSHRC at 964 (*citing, Peabody Coal Co.*, 7 FMSHRC 1357 (Sept. 1985) and *Jim Walter Resources*, 7 FMSHRC 1348 (Sept. 1985), *aff'd sub nom, Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C.Cir. 1987)). Rights bestowed and obligations mandated by the Act are not to be determined through interpretation of private contractual agreements, such as employment or collective bargaining contracts. *Id*.[12] As in *Peabody,* the question of whether complainants have a claim for wages based upon their claimed status as employees, is essentially "of a private, contractual nature . . . [and is] appropriately resolved by the grievance-arbitration process." *Peabody,* 7 FMSHRC at 1364. The instant dispute was, indeed, resolved *in complainants' favor* through the grievance process under the National Maintenance Agreement. See n. 7, *supra*.

I find no reason to distinguish the claims here from those in *Emery* and *Westmoreland* and, in the continued absence of contrary judicial opinions and the failure by Congress or the Secretary to address the issue, hold that the Complainants were not "miners" at the time they attended the training and are not entitled to compensation under the Act.

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[12] *See also*, *Brock v. Peabody Coal Co.*, 822 F.2d at 1149, n. 54 ("We have no reason to disagree with the statement by the court in *National Indus. Sand Ass'n* [*v. Marshall*, 601 F.2d 689 (3rd Cir. 1979)] that 'the statute looks to whether one *works* in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction operations.' 601 F.2d at 704 (emphasis in original).").

Order

Based upon the foregoing, Complainants' claims of discrimination are dismissed.[13]

Michael E. Zielinski
Administrative Law Judge

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[13] Resp. Ex. 3 purports to be a copy of a letter, dated November 22, 1999, from an attorney to an official of another local union, Painters Local 106. It discusses Lakehead's position of requiring current MSHA certifications for workers referred for employment. Complainants objected to introduction of the letter on grounds of relevance and attorney-client privilege. Respondent claims the letter is relevant and that the privilege has not been properly asserted and/or has been waived. There is no need to resolve the privilege issues because the letter is not probative of any factual issue in these cases. While it discusses the ultimate issue presented here, there is no evidence connecting it to any party in these cases. It has not been considered in reaching this decision.