FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVE., N.W., Suite 9500
WASHINGTON, D.C. 20001

November 27, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, on behalf of	:	
DANIEL E. MCCLERNAN,	:	Docket No. LAKE 2001-58-DM
Complainant	:	NC MD 2000-40
v.	:	
	:	Hoyt Lakes Plant
LAKEHEAD CONSTRUCTORS, INC.,	:	Mine ID 21-00256 AQS
Respondent	:	

DECISION

Appearances: Barbara A. Goldberg, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Complainant,
Joseph J. Mihalek, Esq., Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota, for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by the Secretary of Labor on behalf of Daniel McClernan under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("the Act"). The Secretary alleges that Lakehead Constructors, Inc. ("Lakehead") discriminated against McClernan by refusing to pay him for time spent attending an MSHA training class and in retaliating against him for filing a complaint of discrimination with MSHA. A hearing was held in Duluth, Minnesota. Following receipt of the hearing transcript, the parties submitted briefs. For the reasons set forth below, I find that Lakehead discriminated against McClernan and award back pay and other equitable relief. I also impose civil penalties in the amount of $12,500.00 against Lakehead for its violations of the Act.

Findings of Fact

Lakehead is a heavy industrial contractor that performs construction and maintenance work for various companies, some of which operate mines. When Lakehead, an independent contractor, performs work at a mine site, it is an "operator" subject to the Act. 30 U.S.C. § 802(d). Many of Lakehead's jobs are of short duration, and it does not maintain a large permanent work force. It contracts with local unions to obtain tradesmen for its various projects. One such contract is with the International Union of Operating Engineers, Local No. 49 ("Union" or "Local 49"). Operating engineers are workers who operate heavy equipment, such as cranes

or fork-lift trucks, and are typically referred to as operators. McClernan was an operating engineer and a member of Local 49 at all relevant times.

Lakehead's process of staffing a new project typically took three to four weeks. The managers reviewed the scope of work and determined the number of men required from the various trades, identifying any special skills or qualifications needed. That information was passed on to Lakehead's human resources manager, Brian Johnson, who identified and hired union members who had the skills needed and were available to work on the project. Tr. 272-74. He typically consulted with the prospective job superintendent and/or shift foremen to ascertain whether they had particular workers they wanted for their crews, and generally attempted to hire those individuals. Tr. 87-88, 307. Lakehead was not required to request the referral of operating engineers from Local 49. It could simply call an operator directly if he had worked for Lakehead within the past 12 months. It could also call an operator directly if he had worked for Lakehead within the past five years, but had to notify the Union of the contact. Lakehead could also contact the Union, which would refer men from a list of out-of-work members. Tr. 174. Union members were not obligated to work for Lakehead and Lakehead could reject a referred worker for any non-discriminatory reason. Because of the direct contact option, many operators worked virtually continuously for Lakehead, without having to move up through the Union's hiring list. Tr. 273. Union members are paid by Lakehead only for hours worked. They are not paid for hours taken off for illness, personal or other reasons. Tr. 220.

Union members who work for Lakehead at a mine site are "miners."[1] Under the Act, 30 U.S.C. § 825, miners are required to have initial training and annual refresher training. An operator is required to provide required training to its miners. Such training must be given during normal working hours and miners are entitled to compensation at their normal rate of pay while attending the training. If the training is given at a location other than their normal place of work, miners are entitled to compensation for additional costs they may incur in attending the training. Operators are required to maintain, at the mine site, certificates for each miner, verifying that the miner has completed required training courses and has undergone refresher training within the past 12 months.

Prior to January 1999, Lakehead had provided MSHA training to tradesmen it hired to work on mine property 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 for which it had contracted to perform work. Beginning as early as 1997, some of those companies objected to paying for the cost of training. In response, Lakehead notified the unions and union members that, beginning in 1999, it would no longer provide MSHA training and that it would not pay union members for attending MSHA training courses. Rather, it would insist that tradesmen have all necessary MSHA training as a condition of eligibility for employment on mine properties. Lakehead also insisted that union members working for it on mine property, whose

---

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

training certificates were about to expire, obtain annual refresher training on their own. Tr. 222-25. Local 49 had been providing MSHA training to its non-working members. It then undertook to provide MSHA training to its members who were currently employed and needed annual refresher training to maintain their eligibility to work as miners. Tr. 255. Some other unions apparently negotiated increases in wage and benefit packages to compensate, at least in part, for the increased training expense. Some unions also provided a stipend to members attending training. Tr. 226-27. Some operators continued to compensate Union members for time spent in training. Tr. 171. Local 49 did not negotiate an increase in payments and did not provide a stipend to members who attend training.

McClernan was a member of Local 49 and a skilled operator of various types of heavy construction equipment. He was especially skilled in operation of a "pipe grapple," a multi-controlled hydraulic crane that is particularly useful in installing and removing large pipes in confined spaces. Tr. 40-41, 90, 171. McClernan first worked for Lakehead in 1974, but began working for it steadily in 1995, frequently at taconite plant "shutdowns." Like several other skilled operators, McClernan was typically hired through direct contact by Lakehead, rather than by Union referral. Tr. 28.

McClernan was working for Lakehead in July of 1999, at another job, when he was transferred to a job at the LTV Hoyte Lakes mine. He had undergone MSHA refresher training in December of 1998, and was certified as having completed all required training courses. That training class was provided by Lakehead at a local hotel meeting facility and he was paid his normal hourly rate for the time spent in attending it. He had received Lakehead's notice that it would no longer provide MSHA training and that it would no longer pay union members for attending training. In December of 1999, as his training certificate was about to expire, he notified Lakehead's human resources manager, Johnson, that he needed to attend MSHA refresher training. Johnson told him that Local 49 was going to give an MSHA refresher training course on December 28, 1999, and that he could or should attend it. Johnson also arranged for another operator to replace McClernan while he attended the training. Tr. 32-33, 291. McClernan worked as a miner at the LTV site on December 27, 1999. He attended training at the Union's hall on December 28, 1999, and returned to work as a miner at the LTV site on December 29, 1999, where he worked until February 17, 2000.

McClernan was not paid for the time he spent in training. There was no request for pay processed by the job superintendent, who kept the records of time worked by men on that job. Lakehead's records for December 29, 1999, show McClernan as being absent, and that the operator's work was performed by another union member brought in to replace him for that day. McClernan knew, from Lakehead's prior notices, that it would not pay him for time spent in MSHA training. For that reason, he initiated his request for compensation by filing his complaint of discrimination with MSHA on February 4, 2000. Tr. 36; ex. C-2.

About the same time, three other operators, Danny Butler, Alan Randall and Steve Karpik, also filed complaints alleging that Lakehead discriminated against them by failing to pay them for time spent in MSHA training. A week or two after filing the complaints each of them

was called by Johnson. McClernan, Butler, Randall and Karpik all testified that Johnson told them, in essence, that unless they withdrew their complaints they would not work for Lakehead on mine property again. Tr. 41-44, 81, 136, 142, 148-49. In the course of their conversations, Butler, Randall and Karpik advised Johnson that they would withdraw their complaints, which they subsequently did. McClernan did not initially decide to withdraw his complaint. However, when Johnson called him the following day to advise him that the other three operators had agreed to withdraw their complaints, he decided that he "didn't want to hang out there by [him]self," and told Johnson that he would withdraw his complaint, which he did on February 23, 2000. Tr. 79; ex. C-3. The withdrawal request form contains language indicating that the request is being made "voluntarily and without coercion from anyone." Ex. C-3. It also refers to a statement of reasons for the request, but no reason was stated by McClernan on the form. In a subsequent statement to an MSHA investigator, McClernan indicated that the reason he withdrew the complaint was because Johnson told him that Hallberg had said that if he ever wanted to work in the mines again he needed to drop his complaint. Ex. R-20. He explained that he did not feel threatened "physically," but did feel threatened financially. Tr. 79-83.

Johnson's calls were made at the instance of Dennis Hallberg, Lakehead's president and chief executive officer, who was on vacation at the time. Hallberg was notified of the complaints during a phone conversation with John Lohse, Lakehead's equipment manager. Lohse testified that Hallberg told him to have Johnson call each of the complainants and tell them that they could not work for Lakehead at a mine site without MSHA training, that Lakehead was not going to provide the training, and that Lakehead would not pay them for attending training. Hallberg, Lohse and Johnson testified, essentially consistently, that the message Hallberg directed to be conveyed was as stated above, that there were no threats made to any of the four operators, and that there was nothing said about withdrawing the complaints. Tr. 235, 281-85, 363-66.

Thomas Pariseau, Local 49's president, testified that when he learned of Johnson's calls, he phoned Johnson, who confirmed that he had told the four operators that they would not work for Lakehead on mine property again unless they dropped their complaints. Tr. 202-03. In the aftermath of the phone calls and the withdrawal of the complaints, McClernan received a letter from Hallberg, dated March 8, 2000, stating that he had a right to pursue discrimination complaints without fear of retaliation or reprisal. Ex. R-6. Hallberg did not recall the reason that the letter was sent, e.g., whether it resulted from MSHA's reaction to the incidents that prompted withdrawal of the complaints. Tr. 245.

On February 17, 2000, McClernan was told by the job superintendent that he was laid off, effective that day, from the LTV project. Tr. 39. Lakehead claims that there was no more operator work to be done. Tr. 277-78. McClernan testified that there was operator work remaining to be done at LTV, and that he observed that work being done by boilermakers in April. No other operator worked the LTV job after McClernan was laid off. The LTV project had originally been scheduled to last through May of 2000, but LTV obtained a waiver of a regulatory requirement that the project was designed, in part, to address, and it determined not to proceed with part of the job.

Lakehead was scheduled to perform work at USX's Minntac plant during two

"shutdowns" that were to start in February and March of 2000. Taconite mines in the area must periodically replace pipes and conduct other heavy maintenance activities, which require shutting down part of their plant operations. To minimize the shutdown time, work proceeds around the clock, seven days a week. For shutdowns, Lakehead employs two crews, each working twelve-hour shifts. The pipe grapple was typically used on those projects because of the need to replace large pipes mounted overhead between support beams. Dan Tomassoni, who had been a foreman on five or six prior shutdowns, was assigned to be the second shift foreman on those jobs. Consistent with past practice, Dale Zifco, the job superintendent, asked him which particular tradesmen he wanted for his crew. Tomassoni requested that McClernan be hired as the operating engineer. Tomassoni's recommendations were generally honored, and Zifco responded affirmatively to the request and passed it on to Johnson. Tr. 87-88, 310. Tomassoni had requested McClernan on every shutdown on which he was a foreman, and Lakehead had agreed with his choice "wholeheartedly" in the past. Tr. 89. Tomassoni was comfortable with McClernan's skills and knew that he worked well with other members of the prospective crew. Tr. 87-91. A day or two after Tomassoni had requested that McClernan be hired, he inquired of Zifco whether he was going to get McClernan for his crew. Zifco replied that McClernan was not going to be on the crew and that he did not want to discuss the matter further. Tr. 98-100, 318.

McClernan, who had worked ten consecutive shutdowns at Minntac, expected to work the Minntac jobs, the first of which was expected to start on February 27 or 28, 2000. Tr. 39, 45. He testified that Johnson told him he would be working those jobs. Tr. 39-40. Johnson had no recollection of such a conversation. Tr. 292. McClernan was not hired for either of the Minntac shutdowns, the first of which started on February 28, 2000, and the second on March 26, 2000. Ex. C-6.

There were a total of 14 operators working on each shutdown, seven per shift. The operator hired to work on the second shift for the February shutdown was not experienced with the grapple and had some difficulty performing basic tasks with it. None of the other operators on that shift were skilled in use of the grapple. Tomassoni determined, for safety reasons, that his crew would not use the grapple, and Zifco agreed. Tr. 94-96, 103, 115, 319-22. They performed the work using hand rigging, a considerably more labor intense and time consuming process. Tr. 94-97. Tomassoni testified that he again inquired of Zifco why he couldn't get McClernan to operate the grapple and was told that the decision was made at "headquarters," i.e., Hallberg's office. Tr. 99-100. He also stated that a day or two after the project started, he overheard a conversation between Zifco and a boilermaker foreman in which Zifco stated that the reason that McClernan was not hired was "because of the MSHA deal."[2] Tr. 98-102. Zifco recalled a subsequent inquiry, but stated that, to the best of his recollection, McClernan was unavailable for the job. Tr. 318-19.

---

[2] Lakehead's counsel attempted to impeach Tomassoni with portions of his deposition, wherein Tomassoni did not mention that comment. However, the questions were not addressed to conversations that Tomassoni overheard. Tr. 119-125.

On March 1, 2000, after not being hired to work on the Minntac shutdown, despite having withdrawn his MSHA complaint, McClernan went to Lakehead's offices to discuss the matter with Johnson. He encountered Hallberg in a hallway outside of Johnson's office and a heated exchange took place. The parties' contentions regarding that exchange mirror those of the Johnson phone calls. McClernan testified that Hallberg repeated the threat that he would never work for Lakehead again and Hallberg testified that he repeated the message that McClernan needed MSHA training to work on mine sites and that Lakehead was not going to provide the training or pay him for attending it. Tr. 43-44, 238-39. McClernan also testified that, following the exchange and Hallberg's departure, Johnson remarked "Now you can see why I couldn't call you." Tr. 44. Johnson denied making that statement. Tr. 304.

While McClernan did not work the Minntac shutdowns, he did work for Lakehead on other occasions. On March 6, 2000, he worked one 16-hour shift at a paper mill. Lakehead had requested a referral from Local 49 and McClernan's name had risen to the top of the out-of-work list. Tr. 46, 370. In April of 2000, McClernan obtained a job with another employer for the remainder of the year. While he was working that job, he turned down offers of employment from Lakehead. On April 13, 2000, McClernan filed a second complaint with MSHA, reasserting his claim of discrimination for Lakehead's failure to pay him for attending the December 28, 1999, MSHA training course, and asserting a new claim that Lakehead retaliated against him for filing the original complaint. Ex. C-4. He later worked for Lakehead at two shutdowns at the Minntac plant in February of 2001. Thereafter, he got a job with a contractor on a multi-year highway project, and told Lakehead that he would be unavailable for work for the foreseeable future.

Conclusions of Law - Further Findings of Fact

Compensation for Time Spent in Training

The Act requires that each operator have a health and safety training program that provides new surface miners with 24 hours of training and all miners with eight hours of refresher training "no less frequently than once each 12 months." 30 U.S.C. § 825(a). Subsection (b) specifies that:

> Any health and safety training provided under [§825(a)] 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.

The Secretary maintains that McClernan was a miner with a right to training and compensation under the Act. Lakehead argues that McClernan was neither a miner nor its employee on the day of the training session, and that it had no obligation to provide training or

compensation for time spent in training.

This is not the first challenge to Lakehead's policy of not paying for MSHA training. In *Sasse v. Lakehead Constructors, Inc.*, 23 FMSHRC 525 (May 2001) (ALJ), I held that members of a pipefitters union who attended MSHA training the day before reporting to Lakehead's mine job-site were not "miners" entitled to compensation, and that Lakehead had not discriminated against them by refusing to pay them for time spent attending training. The claimants in those consolidated cases were applicants for employment at the time they attended the training session, and were not yet employed by Lakehead or working at a mine site.

As noted in *Sasse*, judicial and Commission precedent frame the ultimate issue on this allegation as whether McClernan was a miner who had training rights under the Act. 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 been advised by a state employment agency 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 were not miners or employed by Emery at the time they obtained the training, Emery had no obligation under the Act to compensate them. The court observed that "[n]othing in the Act or the legislative history suggests that a new employee must be paid wages and expenses for the time spent in a course he voluntarily took prior to the time he was employed." *Id*. at 159.

The United States Court of Appeals for the District of Columbia Circuit interpreted the term "miner" in a related context in *Brock on behalf of Williams v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987). In *Brock*, the court affirmed decisions by the Commission denying claims by striking miners that they had been discriminated against when the operators passed them over and recalled strikers who had obtained MSHA training on their own initiative while on strike, thereby satisfying the Act's training requirements. The court stated: "We therefore join the Commission and the Tenth Circuit [in *Emery*] in holding that an individual is not a 'miner' who can claim a training right under [30 U.S.C. § 825(a)] unless he or she is *employed* in a mine." *Id.* at 1149 (emphasis in original). *See also Cyprus Empire Corp.*, 15 FMSHRC 10 (Jan. 1993) (miners who go on strike are not working in a mine, exposed to the hazards of mining, and are not included within the Act's definition of "miners" even though they retain their status as employees of the operator under the National Labor Relations Act).

In *Secretary of Labor on behalf of Aleshire v. 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 had 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 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

[followed] that decision." *Id*. at 964.

In contrast to the claimants in the above decisions, McClernan was employed by Lakehead, working in a mine, essentially continuously from August of 1999 to December 27, 1999, and was expected to continue in that job for several months. He was clearly a miner, within the meaning of the Act. As a miner, he possessed the right to annual refresher training provided by the operator, and the right not to be discharged or otherwise discriminated against for refusing to work without having received the training, or if ordered withdrawn from the mine site by the Secretary. *See Brock, supra,* 822 F.2d at 1147. He was also entitled to compensation for time spent in training, pursuant to 30 U.S.C. § 825(b).

Respondent argues that, regardless of the fact that McClernan worked as an employee for Lakehead at the LTV mine up to December 27 and on December 29, and thereafter, he did not work for Lakehead on mine property and was not a miner or its employee on December 28, 1999, when he attended MSHA training. This argument is based upon its position that because of the nature of the employment relationship, McClernan was a miner and its employee only during the hours that he actually worked at the mine site. In essence, he was discharged each day upon departing work and re-hired the next day when he reported to the job site. I reject Lakehead's proposed hour-to-hour determination of McClernan's status as a miner. He was not an applicant for employment, and did not lose his status as a miner by going on strike or being laid-off. He certainly did not lose his status as a miner, and his rights under the Act, when he departed the mine site at the end of his shift on December 27, 1999. Lakehead, as an operator, had a statutory obligation to provide training to its miners and to compensate them for attending it. It could not avoid those obligations by discharging – or as Lakehead might characterize it, not rehiring – McClernan when his training certificate expired.

Respondent's position on McClernan's status as an employee on the date he attended training finds questionable support in the record and, in any event, is not dispositive.[3] As noted above, McClernan was a miner and was entitled to training and compensation under the Act. His right to compensation was not affected by whether he was "considered" an employee on the day he attended training, or whether he was entitled to compensation under the union contract for days that he was absent from the work site. As the Commission reiterated in *Westmoreland*, "the Mine Act is a health and safety statute, not an employment statute." 11 FMSHRC at 964. 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*.

Similarly, McClernan did not lose his rights to training and compensation because the training session was given at a non-mine site. The Act, 30 U.S.C. § 825(b), provides that: "If

---

[3] Hallberg testified that union members were not "considered" to be employees of Lakehead, on days that they do not perform work for it. Tr. 220. McClernan, on the other hand, "considered" that he was Lakehead's employee on December 28, 1999, the day he attended the MSHA training. Tr. 34.

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." The Secretary's regulations also recognize that conference or educational facilities may often provide a more suitable training environment than a mine site. Under the regulations, an operator can fulfill its obligation to provide training by participating in "training programs conducted by MSHA, or may participate in MSHA approved training programs conducted by State or other Federal agencies, or associations of mine operators, miners' representatives, other mine operators, private associations, or educational institutions." 30 C.F.R. § 48.24. The training class at issue was provided in the Union's hall because Lakehead had "arranged" with the Union to provide the training. Previous classes conducted by Lakehead were held in hotel conference rooms. Under Lakehead's position, an operator could completely avoid the Act's compensation-for-training requirement by providing the training at a non-mine site, an outcome blatantly inconsistent with the letter and purpose of the Act and regulations.

I find that Lakehead's failure to compensate McClernan for time spent in MSHA refresher training on December 28, 1999, violated the Act.

The Retaliation Claims

A complainant alleging discrimination under the Act typically establishes a prima facie case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818, n. 20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

McClernan engaged in protected activity when he filed a complaint of discrimination with MSHA regarding Lakehead's failure to compensate him for time spent in training.[4] The Secretary claims that he suffered adverse action by being threatened with loss of employment opportunities if he failed to withdraw his complaint, being discharged from the LTV job one week early, and not being hired for the Minntac shutdowns in February and March of 2000.

---

[4] "No person shall . . . in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under . . . this chapter." 30 U.S.C. § 815(c)(1).

Lakehead disputes the claims of adverse action and unlawful motivation, denying that threats were made, and alleging that the timing of McClernan's departure from the LTV job was due solely to business considerations, and that he was not hired for the Minntac shutdowns because he was expected to be working on the LTV job when the crews for those jobs were assembled.

Threats of Adverse Action

I find that Respondent threatened McClernan with economic loss because he filed a complaint with MSHA seeking compensation for time spent in training. I credit the testimony of McClernan, Butler, Karpik and Randall, and find that they were called by Johnson and told to drop their complaints if they wanted to work for Lakehead on mine property again. This was a substantial threat because Lakehead was, by far, the largest contractor in the area and a substantial portion of the work for which it hired operators was on mine property. Approximately 90% of the work Butler did for Lakehead was on mine property. Tr. 136. Butler, Karpik and Randall told Johnson during the calls that they would withdraw their complaints and promptly did so. McClernan decided to do so the following day. The only reasonable explanation for those actions is that Johnson conveyed a clear message that their livelihoods were at stake if they continued to pursue their complaints. Butler, who had worked for Lakehead regularly, has only worked about 10 days for Lakehead since filing his complaint, and stated that he wished that he had pursued it. Tr. 137-38. Randall and Karpik had both worked steadily for Lakehead for several years and were working for Lakehead at the time they testified. They maintained that one of the reasons that they decided to withdraw their complaints was that they thought they were merely filing a union grievance, not a "federal class action lawsuit," as Johnson described the complaint to Karpik. Tr. 142, 148, 157. I find that those explanations were attempts at graceful retreats, rather than expressions of true motivation. It is significant that both Karpik and Randall confirmed the threatening nature of Johnson's calls. Moreover, I credit Pariseau's testimony that Johnson confirmed the nature of the calls in a conversation with him. Tr. 203.

In addition, Lakehead's characterization of the nature of the conversations and the motivation for the calls strikes me as being unlikely. According to Hallberg, Johnson was to call the four men and tell them that they needed MSHA training to work on mine property, and that Lakehead was not going to supply the training and was not going to pay them for attending it. There is no satisfactory explanation as to why Lakehead would call the complainants directly to convey this message. There certainly was no question that, under the Act, the operators needed MSHA training to work on mine property. There was also no question about Lakehead's stance on whether it would supply training and whether it would pay miners for attending it. Lakehead's position had been made abundantly clear for over a year in discussions with the various trade unions and Lakehead had provided personal and public notification of its position long before. McClernan and Karpik testified that they understood, at the time they attended training, that Lakehead would not voluntarily compensate them. Tr. 60, 158. There simply was little or no reason to call the complainants to convey that message. While Johnson explained that he wanted to find out how the complaints came about, it was Hallberg who decided that the calls should be made and it was not for that purpose. The same considerations lead me to find that

Hallberg also threatened McClernan during the March 1, 2000, encounter. I accept McClernan's testimony regarding that event, and also find that Johnson remarked "Now you can see why I couldn't call you" after Hallberg had departed.

There is ample evidence of adverse action in the form of threats of lost employment opportunities, motivated by McClernan's filing of his MSHA discrimination complaint. I find that Lakehead, through Hallberg and Johnson, threatened McClernan with loss of employment opportunities and that the threat was motivated entirely by McClernan's filing of the MSHA discrimination complaint. Lakehead's threats, motivated by McClernan's protected activity, violated the Act. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982).

The Other Retaliation Claims

McClernan has restricted his claims of retaliation based upon loss of employment, and his claim for back pay, to the period between February 17, 2000, when he was laid off from the LTV job, through the completion of the second Minntac shutdown. He claims that, were it not for Lakehead's retaliation, he would have worked one more week at the LTV job, and then would have worked both of the Minntac shutdowns. Lakehead contends that his layoff from the LTV job was due to the absence of operator work, and that he was not hired for the Minntac shutdowns because he was working the LTV job when the Minntac crews were put together and was expected to be working that job during the time of the shutdowns.

McClernan testified that he was laid off of the LTV job, without notice, on February 17, 2000, one week after the Johnson calls.[5] Tr. 37, 72. There is a conflict in the evidence as to whether there was operator work remaining to be performed on the LTV job. McClernan testified that there were tasks remaining that would normally have been done by an operator and that he observed that work being done when he visited the site in April. Tr. 37-38. Lakehead introduced evidence that there was no more operator work to be done on that project and that there was no operator on the LTV job after McClernan was laid off. Tr. 277-78. I find McClernan's version more likely to be accurate. While there was evidence that the LTV job ended earlier than expected, because LTV obtained a waiver of a regulatory requirement, work continued well past February 17, 2000, the date of McClernan's departure. It seems likely that, if operator work was winding down, as Lakehead contends, there would have been some discussion with McClernan about his status and impending departure from the job a few days before his services would no longer have been needed. McClernan, however, testified that his employment was terminated without prior notice. Lakehead did not introduce any evidence to counter that assertion or to show that the shortening of the LTV job necessitated an abrupt curtailment of McClernan's work. I find that while there was no other operator employed on the LTV job after McClernan departed, there was work remaining that would have been done by McClernan from February 17, 2000, until the first Minntac shutdown started. I also find that the reason that

---

[5] McClernan's MSHA complaint was filed on February 4, 2000, and was subsequently sent to Lakehead. Johnson called McClernan on or about February 9 and 10, 2000. McClernan did not withdraw his complaint until February 23, 2000.

McClernan's work on the LTV job was terminated was because of the filing of his original MSHA complaint.

I also credit McClernan's testimony, and find that he was told by Johnson, in essence, that he would be working the Minntac shutdowns, the first beginning on February 28, 2000. He had worked ten prior shutdowns and was considered by Tomassoni to be part of that crew. He was one of the few operators who could competently operate the pipe grapple, a particularly useful piece of equipment on that type of job.[6] Since Lakehead terminated his employment on February 17, 2000, it knew that he was available for that job. I find that the work crews for the Minntac job were assembled during the week before the job was to start, when McClernan was available. Lakehead had performed numerous similar shutdowns at the Minntac plant and did not need extensive time to determine the size and makeup of its work crews. Tomassoni and Pariseau testified that the crew for the Minntac shutdown was being assembled during the week before the job started. Tr. 110, 176. Again, Lakehead introduced no compelling evidence to the contrary. Johnson did not specify when he assembled the crews for the Minntac shutdowns. He did testify that he did not find out that the LTV job was being reduced in scope until after the crews were put together. Tr. 275-77. However, he most likely didn't learn about the curtailment of the LTV job until March or April of 2000. The job was originally going to run through May and he didn't find out about the reduction in scope until a few days before what turned out to be the last phase of the project was wrapping up. *Id*. As noted above, McClernan observed the job in progress in April. Lohse testified that he kept a detailed log of contacts made to operators when it was his responsibility to secure their services later in the year 2000. While it is unknown whether Johnson kept such a log, he made no reference to a log or any other written record to clarify when the crews were put together.

I find that Lakehead discriminated against McClernan by not hiring him for the February Minntac shutdown because he filed a complaint with MSHA seeking compensation for time spent in training. That discriminatory action also extended to the March Minntac shutdown. As Johnson explained, the crews for the February and March shutdowns were the same, which was the normal practice. Tr. 277.

Lakehead argues that the fact that it continued to employ and/or subsequently employed McClernan, and the other operators who filed MSHA complaints indicates that the alleged threats were not made and the retaliation did not occur. The case of Karpik is illustrative. He was not working for Lakehead when he received the Johnson call. Tr. 149. When he withdrew his complaint a couple of days after the call, he had been hired by Lakehead and was working at the time. Tr. 155-56. However, he had told Johnson during the call that he would withdraw his complaint. Tr. 162. Consequently, while he was hired by Lakehead while his complaint was

---

[6] Zifco testified that about six operators were competent with the grapple, at least as of when he testified. Tr 312-13. Johnson stated that "quite a few" operators were competent to operate the grapple. Tr. 278. However, none of the seven operators hired for the second shift of the Minntac shutdown were skilled in operating the grapple and it wasn't used on that shift. Karpik testified that Butler or McClernan usually operated the grapple. Tr. 159.

pending, he had committed to withdrawing it. That he was hired and subsequently worked for Lakehead after agreeing promptly to withdraw his complaint, having explained that he hadn't intended to initiate a "federal class action lawsuit," does little to establish that the threat to McClernan was not made, or that the retaliation did not occur. The same is true for Randall. Butler, as noted previously, experienced a considerable reduction in the work he performed for Lakehead.

McClernan also stood on a somewhat different footing than the others. He did not initially agree to withdraw his complaint. He did so, only after being called a second time by Johnson, who told him that the other three had agreed to withdraw their complaints. He also may have been viewed by Lakehead as the instigator of the MSHA complaints. As Johnson explained, a lot of union members "grumbled" about Lakehead's training policy, but no one filed an MSHA complaint until McClernan did. Tr. 282. As noted above, McClernan's encounter with Hallberg on March 1, 2000, established that there was considerable hostility regarding the complaint, even after McClernan had withdrawn it. While Lakehead did employ McClernan for one shift on March 6, 2000, it did not call him directly for that job, even though it knew that he was no longer working for Lakehead. Lakehead typically phoned operators that had worked for it in the past five years directly, resorting to referrals from the Union only when it had exhausted that supply. It offered no explanation as to why it did not seek to contact McClernan for that job. Lakehead could refuse operators referred by the Union, but only for non-discriminatory reasons, and it is unclear how urgent Lakehead's need to fill that shift was. The subsequent offers of employment Lakehead made to McClernan may well have been attributable to a desire to reduce its exposure with respect to his re-asserted MSHA complaint and/or whatever prompted the March 8, 2000, letter advising McClernan that he had a right to pursue discrimination complaints without fear of retaliation or reprisal.

I find that Lakehead retaliated against McClernan by discharging him from the LTV job one week early and by refusing to hire him for the two Minntac shutdowns because of the filing of his MSHA complaint.

Remedy

Back Pay

McClernan is entitled to back pay, plus interest, for the time he spent in training, the week that his employment at the LTV job was prematurely terminated, and the hours that he would have worked at the two Minntac shutdowns. Back pay calculations were performed by Pariseau, based upon his knowledge of the union contract, reported hours worked by operators on the Minntac shutdowns and other available information. Complainant's exhibit 6 reflects back pay calculations for those periods, using two alternative assumptions for the Minntac shutdowns. McClernan's gross hourly rate, as specified by the union contract, was $31.84 per hour, which consisted of $24.84 in wages and $7.00 in benefits. Tr. 36, 179-81. For regular overtime, the wage rate is multiplied by 1.5 and the benefit rate is added, yielding a gross hourly rate of $44.26. For Sundays, the hourly rate is doubled and the benefit rate is added, yielding a gross

hourly rate of $56.68. Tr. 179-82. For the eight hours he spent in training, McClernan is entitled to $254.72. For the week of February 17, 2000, when he would have worked at the LTV job, he is entitled to five days of pay for eight regular and two overtime hours per day, for a total of $1,716.20. Tr. 185-86; ex. C-6.

The Secretary offered two alternative calculations of back pay for the Minntac shutdowns. The first was based upon an assumption that McClernan would have been designated as the union steward on those jobs. Union stewards generally work more hours than other operators. Tr. 208. For the first calculation, it was assumed that McClernan would have worked the same number of hours that the actual union steward worked on those jobs. For the second, it was assumed that he would have worked the average number of hours worked on those jobs by all operators. Lakehead argues that it would be speculation to assume that McClernan would have worked more hours than the operator who worked the fewest number of hours. I find that the "union steward" assumption best establishes the amount of back pay to which McClernan is entitled. Pariseau's uncontradicted testimony was that he had the authority to designate the union steward on the Minntac shutdowns, and that he would have designated McClernan as the steward, had he been working. Tr. 187-88. Using the "union steward" model and the total number of hours worked by Karpik, the steward on those jobs, McClernan would have worked the equivalent of 19.5 consecutive days for the first shutdown, beginning on February 28, 2000, and 16 days for the second shutdown, beginning on March 26, 2000. The total gross pay he would have earned for the Minntac shutdowns would have been $16,718.52. From this must be deducted the gross pay he earned while working for Lakehead on March 6, 2000, i.e., one 16-hour shift, a total of $608.80. The total of back pay that McClernan is entitled to for the training, early discharge from the LTV job, and the Minntac shutdowns is $18,080.64, plus interest.

Civil Penalties

The Secretary has proposed a civil penalty in the amount of $6,000.00 for Lakehead's failure to compensate McClernan for time spent in training, and an additional $6,000.00 for its retaliation in the form of threats and denial of employment. Lakehead is the largest heavy construction contractor in the area and had 245,948 hours worked on mine property in calendar year 1999, making it a medium-sized operator. Its violation history, as set forth in exhibit C-7, is relatively unremarkable, and includes no violations of the Act's discrimination provisions. Lakehead does not argue that its ability to remain in business would be threatened by the imposition of penalties in the amounts proposed by the Secretary.

As to the compensation for training violation, the Secretary argues that Lakehead completely disregarded its training obligations under the Act, and its negligence should be regarded as high. She also argues that the gravity of the violation should be found to be serious, because it was likely to have a chilling effect on miners, discouraging them from getting required refresher training. The Secretary also contends that Lakehead exhibited bad faith by not attempting to achieve compliance, after being notified of the violation. Lakehead, aside from arguing that it did not violate the Act, contends that it was entitled to secure an interpretation of

the law on its training obligations, and that it has already been penalized by having to expend money on its defense to the Secretary's allegations.

I find that Lakehead's negligence was no more than moderate. In response to mine owners' objections to paying for MSHA training, it determined that it would no longer provide such training and would not compensate individuals for attending it. While it ceased holding its own training courses, it did secure a concession from the Union to provide refresher training to miners working for it. Its position as to union members not yet hired was sustained in *Sasse*, *supra*. I also find, as to gravity, that the violation was not as serious as the Secretary maintains. There is no evidence that Lakehead's decision to cease compensating individuals for time spent in training had any chilling effect, either on McClernan or any other miner. On the contrary, Union members were well aware that they needed to keep current on their MSHA training in order to be qualified to work on mine property, and made sure to get required training, which was provided free of charge by the Union. The only evidence of individuals foregoing training, and actual or potential employment opportunities, was to the effect that union members who had traveled from other jurisdictions where there was little or no mine work, might forgo refresher training and further employment if they had only a day or two left on the job. Tr. 259. I also agree with Lakehead that its litigation of this case is not evidence of bad faith. While it did not establish good faith by agreeing to pay McClernan for time spent in training after being notified of the Secretary's determination that it had violated the Act, it should not be penalized for seeking a ruling on its position. The Secretary has not pointed to another avenue through which Lakehead could have obtained a ruling from the Commission.

Upon consideration of the common penalty factors addressed above and the negligence, gravity and good faith considerations, as discussed in the preceding paragraph, I find that a civil penalty in the amount of $2,500.00 would be appropriate for this violation. Whatever expense Lakehead has incurred in litigating this claim has not been considered in determining this penalty.

As to the retaliation claims, I find that the threat of loss of employment conveyed to McClernan after the filing of his original MSHA complaint, his early and precipitous termination from the LTV job and the failure to hire him for the Minntac shutdowns, were blatantly discriminatory and evidence a reckless disregard for miners' rights under the Act. This was a violation of serious gravity, likely to have a chilling effect on other miners. Under the existing hiring system, Lakehead was free to choose among any Union members who had worked for it within the past 5 years, and it was by far the largest such employer in the area. The open hostility that it exhibited toward McClernan, in response to his exercise of his rights under the Act, no doubt had a chilling effect on any person who depended upon Lakehead's offers of employment for his livelihood. The effects of Lakehead's violations may have been reduced somewhat by its subsequent offers of employment to McClernan and its actual hiring of McClernan after April of 2000. However, the impact of its treatment of McClernan is likely to have a chilling effect on other miners' exercise of their rights for years to come. As with the training violation, Lakehead cannot be penalized for litigating this aspect of the case. However, I find that it failed to exhibit good faith in attempting to achieve compliance, after being notified

of the Secretary's determination that it had violated the Act.

Upon consideration of the common factors discussed above, and the negligence, gravity and good faith factors, I find that a penalty in an amount greater than that proposed by the Secretary should be imposed. I find that a civil penalty in the amount of $10,000.00 would be appropriate for the retaliation violation. The cost of Lakehead's defense of this action has not been considered in determining the amount of the penalty.

ORDER

Based upon the foregoing, I find that Lakehead discriminated against McClernan, in violation of the Act, by refusing to compensate him for time spent in annual refresher training, and in retaliating against him by threatening him with loss of employment opportunities if he did not withdraw his discrimination complaint, by terminating him from the LTV job, and by failing to hire him for the Minntac shutdowns that started in February and March of 2000. Accordingly, it is **ORDERED** that:

Back Pay

Respondent shall pay McClernan $18,080.64 representing back pay for 8 hours spent in training on December 28, 1999, back pay for the week of February 17, 2000, that he would have received for working on the LTV job and back pay that he would have received for working on the two Minntac shutdowns. To this amount interest shall be added to the date of payment under the formula established in *Secretary on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-05 (Nov. 1988).[7] Payment shall be made within 30 days of the issuance of this decision.

Posting of Notice

Respondent shall post in a prominent place at any mine site where it performs work, in a location where all its miners can read it, a notice stating that:

1. Individuals working for it on mine property are "miners," as defined in the Mine Safety and Health Act of 1977, and that as miners, they have a right to refresher training required by the Act, that Lakehead is obligated to provide that training to any miner working for it, and is also obligated to pay such miners at their normal hourly rate for time spent in training.

2. Lakehead was found to have discriminated against McClernan, in violation of

[7] Deductions from gross pay may be made for withholdings required by law. In addition, the benefits portion of the back pay award, plus appropriate interest, may be paid directly to the Union, if consistent with the collective bargaining agreement.

the Act, by refusing to compensate him for time spent in annual refresher training on December 28, 1999, in threatening him with loss of employment opportunities if he did not withdraw the discrimination complaint he filed with MSHA, in retaliating against him for filing the complaint by terminating him one week early from a job at LTV, and by failing to hire him for shutdowns at the Minntac plant that started in February and March of 2000.

3. Lakehead, its officers and agents will not discriminate against any miner who exercises rights under the Act.

The notice shall be posted within 30 days on any mine property on which Lakehead is performing work, or on which it performs work within the twelve-month period following issuance of this decision. It shall remain posted for a period of 30 days, or until the end of the job, whichever is shorter.

Civil Penalties

Respondent shall pay civil penalties in the total amount of $12,500.00, within 30 days.

Michael E. Zielinski
Administrative Law Judge

Distribution:

Barbara A. Goldberg, Esq., Office of the Solicitor, U.S. Department of Labor,
230 S. Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Joseph Mihalek, Esq., Fryberg, Buchanan, Smith & Frederick, 302 W. Superior, Suite 700,
Duluth, MN 55802 (Certified Mail)

\mh