

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 26, 2003

ROBERT G. JUNGERS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-532-DM
	:	WE MD 02-13
v.	:	
	:	Mine I.D. 04-05363
U.S. BORAX, INC.,	:	Boron Operations
Respondent	:	

PREHEARING ORDER

This proceeding was brought by Robert G. Jungers against U. S. Borax, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (“Mine Act”) and 29 C.F.R. § 2700.40 *et seq.* Mr. Jungers alleges, in part, that the actions of Joe Ellison in taking down “illustrated clean-up areas designated to each crew” that was taped on a window put him “in a potentially hostile work place, heaped on dysfunctional stress, and was tort.” Jungers states that Ellison took this action because Jungers had spend time with OSHA compliance officers. In its answer, U.S. Borax denies Mr. Jungers allegations and maintains that he has not stated a claim that can be remedied under section 105(c)(3) of the Mine Act.

It is important for Mr. Jungers and U.S. Borax to understand the limits of my jurisdiction. I do not have authority to determine whether any actions taken against Mr. Jungers by U.S. Borax were unfair and unreasonable unless such actions violated the anti-discrimination provisions of the Mine Act at 30 U.S.C. § 815(c). Under that provision, a mine operator is prohibited from discriminating against a miner because he complained about safety or health conditions at the mine or refused to perform a task that he reasonably and in good faith believed presented a hazard to his safety or health. A miner’s safety complaints or actions are known as “protected activity.” A mine operator may not take adverse action against a miner for such protected activity.

If the parties are unable to settle the case and if the case is not otherwise dismissed, a formal hearing will be held. The issues at the hearing will include whether U.S. Borax discriminated against Mr. Jungers. At a hearing, Mr. Jungers will be required to present evidence that he engaged in protected activity and that U.S. Borax’s adverse actions were motivated at least in part by that protected activity. U.S. Borax may attempt to rebut Mr. Jungers’ case at the hearing by presenting evidence that either no protected activity occurred, no adverse actions were taken, or that the actions taken with respect to Mr. Jungers were in no part motivated by the protected activity. If U.S. Borax is unable to present such evidence, it may present evidence that the actions it took with respect to Jungers were also motivated by unprotected activities and that it would have taken these actions for the unprotected activity alone.

The Federal Mine Safety and Health Review Commission is not part of the Department of Labor's Mine Safety and Health Administration (MSHA). Section 105(c)(3) of the Mine Act authorized Mr. Jungers to file this case on his own behalf. This provision provides him with an opportunity to try to establish that he was discriminated against. Consequently, this case is not an appeal of MSHA's decision not to file a discrimination complaint on behalf of Mr. Jungers, but it is a new, independent proceeding brought by Mr. Jungers on his own behalf. I do not have the authority to review MSHA's investigation to determine whether it was competent or to determine whether MSHA's decision to not bring a case was defensible. I do not have a copy of MSHA's investigation file in this matter. Neither MSHA nor the Secretary of Labor is a party in this proceeding. If Mr. Jungers and U.S. Borax are not able to settle this case and it is not dismissed, Mr. Jungers will be required to present evidence at a hearing to establish that U.S. Borax discriminated against him in violation of section 105(c) of the Mine Act, as described above.

1. In order to encourage the parties to settle this case, counsel for U.S. Borax shall contact Mr. Jungers to discuss settlement. The parties shall confer as often as necessary to negotiate a settlement. If the parties are unable to settle the case, they shall attempt to narrow the issues, enter into stipulations, and discuss proposed hearing dates.

2. On or before **March 27, 2003**, the parties shall initiate a conference call with me to discuss the status of the case, potential hearing dates, and other matters that they wish to discuss.

Richard W. Manning
Administrative Law Judge

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