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MSHA, BENNETT, COX (UMWA) V. EMERY MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

EX REL. BENNETT, COX ET AL.

Docket No. WEST 80-489-D(A)

UNITED MINE WORKERS OF AMERICA,

Intervenor

v.

EMERY MINING CORPORATION

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1976 & Supp. V 1981), and involves the interpretation of sections 115 and 105(c) of the Act. An administrative law judge of this Commission determined that section 115(b) imposed an obligation on operators to provide and pay for new miner training and, as a corollary, granted miners a statutorily protected right to receive training. He concluded that Emery's policy of requiring job applicants to have 32 hours of miner training as a qualification for employment denied them their right to receive such training, and discriminated against them in violation of section 105(c) of the Act. 1/

For the reasons that follow, we affirm the judge's conclusion that Emery violated the Mine Act, but do not agree with his determination that Emery's hiring qualifications policy constituted a per se violation of the Act. Rather, we hold that Emery violated the Act by refusing to reimburse the complainants for wages for the

time spent in training and the cost of their training, while relying on that training, following their employment by Emery, to fulfill the requirements of section 115.

The facts in this case are uncontroverted. The twelve complainants are employed as underground miners by Emery Mining Corporation.

1/ The judge's decision is reported at 3 FMSHRC 2648 (November 1981) (ALJ). After the hearing before the judge, the Secretary was granted leave to amend his complaint to add 127 complainants. The judge then severed the amended complaint from the present case and assigned it docket number WEST 80-489-D(B). 3 FMSHRC at 2659-60. That case is now pending before the administrative law judge.

As a pre-condition for employment, Emery required completion of 32 hours of safety training for underground miners at an MSHA-approved miners' training course. 3 FMSHRC at 2650. 2/ Emery did not reimburse those hired either for the cost of the training or pay wages for the hours spent in training. Emery did, however, rely on the training that new hires had acquired, at their own expense to satisfy the training requirements of the Mine Act.

Emery's policy of accepting applications only from those who had completed a training course began January 1, 1980. Prior to that time, Emery sent newly hired miners to the College of Eastern Utah for training, and gave the requisite further training at Emery's facilities. 3 FMSHRC at 2653. The judge found, "The new policy was that no person would be hired unless he had completed a new miner orientation program through an MSHA approved institution (Tr. 82)." 3 FMSHRC at 2654. 3/ The judge further found, "The reason for Emery's change in personnel policy was to screen out those persons who weren't interested in a mining career and thereby reduce the turnover rate (Tr. 89, 96)." Id.

The complainants in this case successfully completed the training courses at their own expense. The record shows the costs to eight of the complainants for tuition as well as estimates of their transportation expenses to and from the courses. 3 FMSHRC at 2651-54. For two of the twelve complainants, the cost of motel rooms and meals is in the record, and another of the complainants testified to the cost of four lunches. 3 FMSHRC at 2652. Upon completion of training, Emery checked the complainants' references and, after physical examinations, they were hired. 3 FMSHRC at 2650. The starting wage for each complainant is in the record.

The judge first examined section 115 of the Mine Act and the legislative history relating to miner training in order to determine the statutory rights granted to miners by that section, and whether Emery's policy was in violation thereof. 4/ He concluded that section 115 places

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2/In addition to notifying applicants for employment who came directly to the mine of its policy, Emery also notified the State of Utah's Job Service which often referred job applicants to Emery. Of the complainants in this case, five went to Emery and were informed of its policy, and three went to Job Service and were told there that 32 hours of miner training was required. There is no information on this point concerning the four remaining complainants.

3/Emery had experienced a high turnover rate of 48% during 1979 among its inexperienced miners. Emery hired 450 miners and 190 terminated in the first 3 months. The judge found that the turnover rate was reduced to 25% after January 1980, but also found that the evidence did not reveal the exact cause of the reduction.

4/Section 115 states in part:

> (a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. . . . Each training program approved by the Secretary shall provide as a minimum that -

(Footnote continued)

the responsibility for, and the cost of, training miners on the operator. The section also requires that new miners be provided with 40 hours of training. The judge held that by requiring its prospective miners to obtain 32 hours of pre-employment training, Emery left itself responsible for only eight hours of training, and improperly shifted the burden of those 32 hours of training to the complainants. 3 FMSHRC at 2654-55. 2659. The judge further held that the requirements of section 115(b) were not satisfied by Emery because the complainants did not receive any compensation while they attended their training courses, and were not reimbursed for costs of attending the training. 3 FMSHRC at 2655. The judge found that the legislative history of the Mine Act supported his interpretation of section 115. He held that Emery's policy "clearly violate[d] section 115 of the Act." 3 FMSHRC at 2659.

The judge next considered whether the company's policy "constitute[d] a discriminatory practice under Section 105(c) of the Act." 3 FMSHRC at 2656. 5/ The judge held that the complainants were "applicants

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Fn. 4/ continued

> (1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground.
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> (b) Any health and safety training provided under subsection (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.

5/ Section 105(c)(1) provides in part:

> No person shall discharge or in any manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has

filed or made a complaint under or related to this Act, ... or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer ... or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

for employment" under section 105(c). 3 FMSHRC at 2656-57. He noted the broad scope of the discrimination section and its express inclusion of "applicants for employment" in its coverage. The judge held that the statutory right to safety training and compensation is therefore protected from interference by section 105(c) of the Act, and Emery discriminated against the complainants by requiring them to secure training on their time at their expense. 3 FMSHRC at 2657.

The judge awarded each miner compensation at his starting rate for the four days of training, the amount of tuition paid, and the expenses incurred in taking the training course plus 12.5% interest. A penalty of 1,000 for the violation of section 105(c) was assessed also. 6/

We granted Emery's petition for review, and allowed the United Mine Workers of America to intervene. Oral argument was heard before us on October 20, 1982. The questions on review are: What rights are granted to miners by section 115 of the Act; whether Emery interfered with those rights in violation of the Act; and, if interference is shown, what remedy is due the complainants. We turn to examination of the first two issues and will address the remedy separately.

Section 115 sets forth miner training requirements under the Mine Act. It neither dictates whom an operator should hire, nor refers to qualifications for hire. Indeed, the parties and the judge agree than an operator could hire only experienced miners and not run afoul of section 115. In this case, however, we are concerned specifically with section 115's requirements for training "new miners."

Section 115(a) requires operators to have an approved health and safety program that provides 40 hours of training to "new miners" who will work underground. It also mandates that an operator who hires new miners pay them at their "starting wage rate" while they are being trained, and compensate them for "additional costs" incurred in receiving training away from the mine. Section 115(b). Section 115 does not refer to a new miner's duty to obtain training but rather to an operator's responsibility to provide it. 7/ The legislative history of this section also demonstrates that the responsibility to ensure that new miners are trained unquestionably is imposed by statute upon the operator. See 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 638 (1978)("Legis. Hist"); S. Conf. Rep. 461, 95th Cong., 1st Sess., 61-63 (1977), reprinted in Legis. Hist. 1339-41. Further, this section imposes a

duty on the operator to see that new miners are trained before they begin their mining tasks. See National Indus. Sand Ass'n. v. Marshall, 601 F.2d 689, 710 (3d Cir. 1979).

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6/ No issues concerning the rate of interest assessed on the awards or the penalty are presented on review.

7/ Similarly, section 104(g) of the Mine Act protects from retaliation miners who are discovered working without the required training; it also requires an operator to pay a miner removed from the mine under 104(g) while that miner receives the necessary training.

We conclude that section 115 grants two separate, related rights to new miners: To receive 40 hours of safety training before working underground and to be compensated for the time and expenses of that training by the mine operator. The right to training is assured by section 115(a). The right to compensation for the time and expenses of training is specifically provided in section 115(b). As we discuss more fully below, failure to compensate miners for the time and costs of training relied upon by an operator to fulfill its statutory obligations interferes with the new miners' rights. Here the complainants had been hired by Emery and worked in Emery's mine. They were all inexperienced miners when they took the training course and Emery was their first employer after they received safety training. Thus, once hired, they became new miners under the Act entitled to the rights granted by section 115(a) and (b).

Section 105(c)(1) of the Mine Act prohibits interference with rights provided by the Act, including rights provided under section 115. The Senate Committee on Human Resources, which largely drafted the bill that became the Mine Act, specifically mentioned safety training in discussing the discrimination section of that bill:

> The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions of section 11[5] or the enforcement of those provisions under section 10[4][g].

Legis. Hist. 624. Further, as we noted in Moses v. Whitley Development, 4 FMSHRC 1475, 1478 (August 1982), Congress expressed in the same passage of legislative history its intention that section 105 protect miners "not only against the common forms of discrimination, such as discharge, suspension, demotion ..., but also against the more subtle forms of interference...." Id. Thus, section 105(c) prohibits denial of or interference with the right to receive safety training. We next consider the specific question of whether Emery interfered with these complainants' rights by requiring them to obtain training prior to applying for employment, and by relying on, and refusing to reimburse them for, their training after hiring them.

Initially we note our divergence from the judge's conclusion that Emery's policy of requiring the training prior to employment violated the Mine Act. An employer has the right to choose its employees. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937). This principle has been stated succinctly as follows: "[A]n employer may exercise its right to refuse to hire for any reason

or no reason at all as long as statutory or constitutional provisions are not violated." Carter v. Seaboard Coast Line Railroad Co., 392 F. Supp. 494, 499 (S.D. Ga. 1974). Further, statutes that potentially limit an employer's right to select its employees, for example Title VII. are not violated when an employer refuses to hire an applicant protected by such an Act because the applicant lacks bona fide occupational qualifications. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424. 436 (1971). We believe that in

the Mine Act Congress did not restrict a mine operator's prerogative of setting pre-employment qualifications based on experience or training. Thus, Emery's policy of requiring inexperienced job applicants to obtain 32 hours of MSHA-approved training prior to hire does not violate the Mine Act.

Emery did, however, violate section 105(c) when, after hiring the complainants as new miners, it refused to compensate the miners for their 32 hours of training and yet relied on that training to satisfy its training obligations to them under section 115. Emery provided only eight of the forty hours of training required by section 115(a); the operator relied on the prehire 32 hours of training for which the complainants themselves had paid to comply with the full requirements of the Act. (Emery supplied the 8 hours of mine-specific training required by section 115(a)(5) and 30 C.F.R. 48.5.) Emery thus attempted to discharge its statutory obligations by obtaining the "benefit" of the new miners' prehire MSHA training without reimbursing them for the cost of that training. This action circumvented the statutory mandate that operators provide and pay for new miners' training, and thus interfered with the new miners' rights under section 115 in violation of section 105(c)(1). If Emery's approach to compliance with section 115 were adopted throughout the mining industry, section 115 would effectively be read out of the Act and the cost of training would be shifted from operators to miners. In short, if Emery wished to rely on the prehire training to satisfy its statutory obligation to provide training for new miners, it must compensate the new miners for that training.

We emphasize that our decision is limited to the facts of this case: Emery was the first operator for whom these new miners worked upon completing their 32 hours of training; they undertook the prehire training because of Emery's hiring policies; the complainants were not reimbursed for their training after hire; and Emery took advantage of that unreimbursed training to attempt to comply with section 115. Emery, in effect, "provided" that training under section 115. Therefore, under section 115(b), Emery must reimburse the complainants for the cost of their training, and the equivalent of wages for four days, at their starting pay rate, for the time spent in training.

We also emphasize that none of the Secretary's otherwise extensive training regulations at 30 C.F.R. Part 48 addresses the situation encountered in this case. Our decision therefore is based on the statute; there simply is no relevant training regulation bearing directly on the issue.

We now turn to the remedial aspects of the judge's decision. The judge awarded each miner the amount of tuition paid for the training course which that person attended and four day's wages at the starting wage rate. He also awarded some miners the expenses incurred in attending the courses, including an allowance for mileage for six miners, the cost of meals and a motel for two miners, and the cost of meals alone for one miner. Emery does not challenge the amount of tuition or back pay awarded, but rather argues in its petition for review and accompanying briefs that the judge erred in calculating the amount of other expenses to be

reimbursed to the complainants. Emery urges that, under section 115(b), the miners are entitled only to those expenses "above and beyond that which an individual would have incurred had he taken the training at the mine." Emery br. at 13.

At the hearing, counsel for the Secretary introduced evidence on the distance each miner traveled, the tuition fee paid, and incidental expenses. This was received into the record without objection and was before the judge when he made his findings. The issue now raised was not first presented to the judge below. The question of appropriate remedy, therefore, is not properly before us in this case. See section 113(d)(2)(A)(iii) of the Mine Act. Accordingly, we do not disturb the judge's award of damages, and leave for another day discussion of the correct measure of relief for similar violations of section 105(c) and/or 115 of the Mine Act.

On the bases explained above, we affirm the decision of the administrative law judge.

A. E. Lawson, Commissioner

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Distribution

Linda Leasure
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Timothy M. Biddle, Esq.
Crowell & Moring
1100 Connecticut Ave., N.W.
Washington, D.C. 20036

Mary Lu Jordan
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
333 West Colfax, Suite 400
Denver, Colorado 80204