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COUNCIL OF SO. MOUNTAINS V. MARTIN COUNTY COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 29, 1984
COUNCIL OF SOUTHERN
MOUNTAINS, INC.

v. Docket No. KENT 80-222-D

MARTIN COUNTY COAL
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). The issue presented is whether the Mine Act grants to non-employee representatives of miners the right to monitor training classes for miners on mine property. A Commission administrative law judge held that such a monitoring right was impliedly conferred by the Mine Act, and that the operator had interfered with its exercise in violation of section 105(c)(1) of the Act. 30 U.S.C. $ 815(c)(1). 1/ We disagree. Commission recognition of the asserted right would be tantamount to amendment of the Mine Act. Accordingly, we reverse.

I.

The essential facts are stipulated or undisputed. On October 25, 1979, Martin County Coal Corporation refused to permit persons from a non-employee representative of miners, the Council of Southern Mountains, Inc. (the "Council"), to enter the property of Martin County's No. 1-S coal mine to monitor Martin County's training classes for its miners. The Council's representatives were not accompanied by an inspector nor were they participating in an ongoing inspection. The classes were being conducted pursuant to section 115 of the Mine Act. 30 U.S.C. $ 825 (n. 4 infra). The Council was the authorized representative of miners, for purposes of the Mine Act, at Martin County's No. 1-S and 1-C

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1/ The judge's decisions are reported at 2 FMSHRC 2829 (October 1980) (ALJ)(decision on the merits), and 3 FMSHRC 526 (February 1981)(ALJ) (award of attorney's fees).

mines, and had complied with the Department of Labor's filing requirements for miners' representatives under 30 C.F.R. Part 40. 2/ In December, as a result of Martin County's refusal to permit monitoring on October 25, the Council filed a discrimination complaint

under section 105(c) of the Mine Act with the Department of Labor's Mine Safety and Health Administration ("MSHA"). MSHA investigated the complaint and on March 5, 1980, issued Martin County a citation alleging a violation of 30 C.F.R. $ 48.3, which is a training regulation implementing section 115 of the Mine Act. MSHA advised the Council by letter, however, of its determination that Martin County's refusal to allow the Council to monitor training classes was not a violation of section 105(c)(1) of the Act.

On March 18, 1980, the Council was again denied permission by Martin County to enter mine property to monitor miner training classes at the No. 1-S mine. Again, the Council's representatives were not asserting any right to accompany an inspector. On the same date, MSHA issued a withdrawal order for Martin County's failure to abate the alleged violation of section 48.3. Martin County filed a notice of contest of the citation and withdrawal order. The Council, in turn, filed a discrimination complaint with the Commission, which is the subject of this case, based on Martin County's October and March refusals to allow monitoring. The complaint was filed pursuant to section 105(c)(3) because of MSHA's prior determination that Martin County's refusal to permit monitoring did not violate section 105(c)(1). Finally, MSHA filed a civil penalty petition for the alleged violation of section 48.3. The Commission's administrative law judge subsequently consolidated the proceedings.

On October 3, 1980, the Commission's judge rendered his decision concluding that Martin County had violated section 105(c)(1). He awarded the Council attorney's fees and expenses but did not, at that point, specify the sums involved. Both Martin County and the Council filed petitions for discretionary review. On November 12, 1980, we returned the case to the judge for a determination of the amount of attorney's fees. 2 FMSHRC 3216 (November 1980). On February 23, 1981, the judge awarded the Council $14,730.51 in attorney's fees and expenses. Martin County then filed a petition for discretionary review, which we granted on April 3, 1981. The Secretary of Labor filed an amicus brief on review, and we heard oral argument in the case.

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2/ Earlier, in March 1979, Martin County had also denied Council representatives permission to monitor training classes. On March 12, 1979, the Council filed a section 105(c) discrimination complaint over this incident and other aspects of Martin County's refusal to recognize the Council's status as a representative of miners. On October 24, 1979--the day before Martin County again refused the Council permission to monitor classes--the Council voluntarily withdrew its complaint pursuant to a settlement with Martin County. The withdrawal letter stated that the Council and Martin County had

reached an understanding that the Council was the authorized representative of miners at the No. 1-S and 1-C mines. The letter did not mention the subject of monitoring training classes.
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In his decision on the merits, the judge vacated the citation and withdrawal order alleging a violation of section 48.3. He concluded that no provision in the regulation, expressly or by implication, granted non-employee miners' representatives a right to monitor an operator's training classes. He also determined that section 48.3 reserves to the Chief of MSHA's Training Center the exclusive right to evaluate the effectiveness of operators' training programs. Neither the Secretary of Labor nor the Council sought review of this aspect of the judge's decision.
With respect to the section 105(c) violation alleged by the Council, the judge determined that the Mine Act confers on non-employee miners' representatives an implied right to monitor classes being conducted on mine property. He therefore concluded that the refusal to let the Council monitor the classes violated section 105(c)(1), because it directly interfered with the exercise of a statutory right of a representative of miners. In holding that there was an implied monitoring right, the judge stated such an "implied right to monitor training classes must be found as a part of the purposes of the Act and its provisions in general." 2 FMSHRC at 2839.
The judge observed that section 2(e) of the Mine Act provides that operators "with the assistance of miners, have the primary responsibility to prevent the existence of unsafe and unhealthful conditions and practices in the mines." 30 U.S.C. $ 801(e). The judge reasoned that since miners are to assist operators in health and safety matters and may act through their representatives, section 2(e) supported representatives' active participation in operators' safety training classes. The focus of the judge's reasoning, however, was section 115 of the Mine Act.
The judge noted that section 115(a)(1) requires instruction on "the statutory rights of miners and their representatives." He stated that this provision constituted "a strong indication that the miner's representative should be present when that instruction is given." 2 FMSHRC at 2840. Additionally, the judge reasoned that section 115(b), which provides that training can be given at some place other than the mine site, was also "significant'. because an "operator would have difficulty in objecting to a miners' non-employee representative coming to that site to monitor the training classes." Id. The judge also relied on section 115(c), which requires that miners be given certificates of instruction after training and that the certificates be made available for inspection at the mine. He stated that this

section implied that miners' representatives, whether employees or not, would have the right to examine the certificates after training has been completed. We respectfully disagree with the judge's analysis of the statute.

II.

Neither the Mine Act nor its legislative history--nor, for that matter, the Secretary's extensive regulations implementing section 115

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of the Act--refers to a right of miners' representatives to monitor training classes. This legislative silence dictates cautious review of any argument that the Commission "recognize" such a statutory right.

We do not quarrel with the general proposition that statutory rights and duties may be judicially inferred. In our opinion, however, due respect for the limits of judicial power requires that any such inference be founded on a persuasive textual or legislative indication of the intended presence of the claimed right or duty. Legislative history, for example, may unquestionably show that statutory language embraces matters not expressly stated. Indeed, we found this to be the case with regard to the right to refuse work under the Mine Act. Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2789-93 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). Different provisions of a statute, when viewed together, may clearly yield a result that neither suggests alone.

Examples could be multiplied, but we conclude that there must be a persuasive nexus between that which is stated in a statute and that which is inferred from it. Ambitious inference all too easily becomes amendment. In view of some of the suggestions made in this case, it bears restating that the Commission is an independent adjudicatory agency that exists to provide administrative trial and appellate review. The Commission is in no way part of MSHA or the Department of Labor. Our statutory mandate does not include amendment of the Act or promulgation of legislative regulations implementing it.

The right we are asked to detect is sophisticated: Non-employee miners' representatives would be empowered to enter mine property and attend the operator's training classes; there, they would monitor the operator's teaching methods and its compliance with all applicable training requirements. We do not discern a persuasive nexus between the Mine Act and this asserted private avenue to enforce its training provisions. 3/

The Act's reference in section 2(e)(30 U.S.C. $ 801(e)) to "miner assistance" to operators in the prevention of unsafe and unhealthful conditions is a preambulary statement of general "findings and

purpose." As such, it does not definitively indicate whether this specific form of asserted "assistance" is implied by the Act. We cannot treat this general statement in the Act's preamble as a congressional carte blanche to engraft onto the Mine Act whatever judicial afterthought we might deem useful or expedient. As the Court of Appeals for the District of Columbia Circuit declared in a similar context:

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3/ Our decision in this case is not based on any distinction between the rights of employee and non-employee miners' representatives. Rather, we distinguish only between those who would regularly and properly be scheduled to attend an operator's training session and those who would not be present without an implied monitoring right or invitation. Obviously, nothing in our holding would bar permissive or contractual attendance by any miners' representative at training classes on mine property.

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> The ... argument based on the language in the preamble is based on an erroneous perception of the operation and significance of such language. A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.

Association of American Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977)(footnote omitted).

Nor do we find indicia of the claimed right in section 115 itself. This section, set forth in the accompanying note, is a provision of considerable specificity. 4/ None of the language of section 115, however, hints at a monitoring right for non-employee miners' representatives on mine property.

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4/ Section 115 provides:

(a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum

that--
(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;
(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;
(footnote continued)
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The judge stated that the requirement in section 115(a)(1) and (2) for training on "the statutory rights of miners and their representatives"

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footnote 4 cont'd.
(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;
(4) any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;
(5) any training required by paragraphs (1), (2) or (4) shall include a period of training as closely related

as is practicable to the work in which the miner is to be engaged.
(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.
(c) Upon completion of each training program, each operator shall certify, on a form approved by the Secretary, that the miner has received the specified training in each subject area of the approved health and safety training plan. A certificate for each miner shall be maintained by the operator, and shall be available for inspection at the mine site, and a copy thereof shall be given to each miner at the completion of such training. When a miner leaves the operator's employ, he shall be entitled to a copy of his health and safety training certificates. False certification by an operator that training was given shall be punishable under section 110(a) and (f); and each health and safety training certificate shall indicate on its face, in bold letters, printed in a conspicuous manner the fact that such false certification is so punishable.
(d) The Secretary shall promulgate appropriate standards for safety and health training for coal or other mine construction workers.
(e) Within 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977, the Secretary shall publish proposed regulations which shall provide that mine rescue teams shall be available for rescue and recovery work to each underground coal or other mine in the event of an emergency. The cost of making advance arrangements for such teams shall be horne by the operator of each such mine. 30 U.S.C. $ 825.
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is a "strong indication that the miner's representative should be present when that instruction is given." 2 FMSHRC at 2840. We are not persuaded. The invoked language does not invite the creation of new statutory rights. On the contrary, it is simply a direction that operators instruct miners in the rights Congress has granted them in the Mine Act. This training must be provided by operators, but it

does not follow that non-employee miners' representatives are thereby discriminated against under section 105(c) when a mine operator refuses to allow them to monitor the instruction.

The judge's reliance on section 115(c) presents the same problem. Operators must provide training certificates upon the completion of the requisite instruction. The certificates shall be available for inspection in the mine. These requirements do not add up to a demonstration that non-employee miners' representatives should have overseen the instruction. In sum, we find no support for the monitoring right in the one portion of the statute where such support would be vital to judicial recognition.

As we have indicated, the legislative history affords no extrinsic evidence of a monitoring right. Congress expressed a deep concern over the problem of poorly trained miners. See, for example, S. Rep. No. 181, 95th Cong., 1st Sess. 49-51 (1977) ["S. Rep."], 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 637-39 (1978) ["Legis. Hist."]. Congress chose to act upon this concern by passage of section 115. Other legislative responses, including provision for monitoring, could have been made but were not. Moreover, the legislative history reflects a congressional intent that training be the "business" and responsibility of operators, not of the Secretary or, a fortiori, of miners' representatives:

> It is not the Committee's contemplation that the Secretary be in the business of training miners. This is clearly the responsibility of the operator, as long as such training meets the Act's minimum requirements.

S. Rep. 50, reprinted in Legis. Hist. 638. See Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Bennett, Cox, et al. v. Emery Mining Corp., 5 FMSHRC 1391, 1394-95 (August 1983), pet. for review filed, No. 83-2017, lOth Cir., August 17, 1983.

Recently we rejected a claim that we should recognize an implied statutory right of miners to initiate review of citations, issued by the Secretary of Labor, through the filing of a notice of contest. United Mine Workers of America v. Secretary of Labor, Mine Safety and Health Administration (MSHA), 5 FMSHRC 807 (May 1983), aff'd mem. sub nom. United Mine Workers of America v. Donovan, No. 83-1519, D.C. Cir., December 2, 1983. In the course of examining the structure of rights

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granted miners in the Act, we stated, "Where Congress intended for miners to have an affirmative right under the Mine Act, it clearly provided for such." 5 FMSHRC at 815. 5/ The same notation

applies in this case. Congress expressly granted miners and their representatives many valuable rights, in section 115 and in other provisions of the Act, but monitoring of mine site training classes by non-employee miners' representatives is not included among them. In the absence of any convincing implication of this asserted right in the Act and its history, we cannot presume a congressional intent that it be inferred and added to the statute.

We also have concerns as to whether, if we infer a right to monitor compliance with the Mine Act's training provisions from generalized statutory language, the monitoring right could logically be confined to section 115. If there is a right to monitor the operator's provision of training and its conformity with all training requirements, we must ask why there is not an even larger implied right of access to the mine to monitor every aspect of the operator's compliance with the Act and implementing regulations. Nothing in the Act or its history reveals that Congress intended to go so far in the direction of granting the miners' representatives private inspection authority. Thus, we must conclude that the Act does not impliedly confer upon non-employee miners' representatives the right to monitor operators' training classes on mine property. It therefore follows that an operator does not interfere with the exercise of statutory rights and does not violate section 105(c) when it refuses entry to mine property for non-employee miners' representatives to monitor classes.

5/ See, for example, section 101(a)(7), 30 U.S.C. $ 811(a)(7) (transfer of miners overexposed to hazardous substance); section 103(c), 30 U.S.C. $ 813(c)(requiring the Secretary to adopt regulations permitting miners to observe the monitoring or measuring of toxic materials and harmful physical agents, and to have access to the records of one's own exposure); section 103(d), 30 U.S.C. $ 813(d)(interested persons' access to accident reports); section 103(f), 30 U.S.C. $ 813(f)(right to accompany MSHA inspector during inspection of mine, without loss of pay); section 103(g), 30 U.S.C. $ 813(g)(right to request a special inspection if there is a reason to believe that a violation or an imminent danger exists and right to obtain informal review if the inspector does not issue a citation or a withdrawal order); section 105(c)(3), 30 U.S.C. $ 815(c)(3)(right to bring an independent action for discrimination before the Commission in the event that the Secretary declines to do so); section 107(e)(1), 30 U.S.C. $817(e)(1)(right to seek Commission review of the Secretary's issuance, modification or termination of an imminent danger withdrawal order); section 111, 30 U.S.C. $ 821 (right to seek compensation if idled as a result of a withdrawal order issued under certain sections of the Act); section 302(a), 30 U.S.C.

$ 862(a)(miners' access to roof control plan); section 303(d)(1), (f), (g) and (w), 30 U.S.C. $ 863(d)(1) (f), (g), and (w) (interested persons' access to records of operator s safety and health examinations); and section 312(b), 30 U.S.C. $ 872(b) (miners' access to confidential mine map).
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III.
Other, more general, arguments have been pressed on review, but neither singly nor in combination do they warrant a different decisional outcome.
We are asked to read into the statute this asserted right as a matter of sound "policy." The Commission does have a policy-making role under section 113 of the Mine Act. 30 U.S.C. $ 823(d)(2)(A)(ii)(IV) and (B). This case does not require us to describe the outer boundaries of that jurisdiction. It must be exercised, however, within the parameters of the Act and implementing regulations, as they are written. We must be faithful to the higher policy of respecting the plain demarcations of legislative and judicial responsibility under the Act.
We are urged to weigh the crucial importance of training in the effectuation of the Act's goals. Important as training is, that consideration does not justify judicial amendment of the Act. We are told that where two interpretations of the Act are possible, the one promoting safety must be favored. There is a limit to this salutary principle of construction, reached here, where the interpretation claimed to promote safety lacks a basis in the statute.
We emphasize that our holding does not deprive miners and their representatives of protection from inadequate training. Section 115 of the Act and the Secretary of Labor's comprehensive training regulations, 30 C.F.R. Part 48, require operators to file detailed training plans with the Secretary for his approval. 30 C.F.R. $ 48.3(d) directs operators to furnish miners' representatives with copies of proposed training plans prior to approval by MSHA, and guarantees the representatives a right of comment on the plans. Section 48.3(k) requires that approved plans be posted at the mine for MSHA inspection and examination by miners and miners' representatives. As noted above, the Part 48 regulations do not expressly create any right of miners' representatives to monitor training classes. MSHA, however, may conduct inspections or investigations, upon a miner's complaint, of an operator's training program. 30 U.S.C. $ 813(g)(1). Citations and withdrawal orders issued by MSHA can remedy any lack of compliance. 30 U.S.C. $ 814. Thus, we are hard pressed to discover the glaring gap in protection and enforcement that the proponents of the claimed right allege.
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IV.

For the foregoing reasons, we reverse the judge's decision and dismiss the Council's discrimination complaint. The judge's supplemental award of attorney's fees to the Council as the prevailing party is accordingly reversed as well. 30 U.S.C. $ 815(c)(3).

L. Clair Nelson, Commissioner

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Commissioner Lawson dissenting:

The majority's reversal of the decision below reflects a 'solution' to a nonexisting problem, contrary to the careful and legally circumspect analysis of the judge below. In this case, the authorized miners' representative 1/ seeks to monitor the mandatory health and safety training classes required to be given by the statute. Indeed, since the decision below was issued (in October 1980) these classes have been attended and observed by this non-employee miners' representative, without reported incident or disruption, and pursuant to agreement between the parties as to the limits and details of that monitoring (oral arg. 26-27, 38). No cost or prejudice to the operator has been demonstrated or will result. Even the operator is less absolutist on the right of access to these classes than is the majority, contending only for a "balancing" of rights, while acknowledging that "liberal construction" of the Act is appropriate (oral arg. 8, 54, 59). 2/

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1/ It is conceded that Council of Southern Mountains (Council) has at all relevant times been certified as the miners' representative. Oral arg. 4. (Stipulation No. 1).

2/ The operator in this case was characterized by the judge below as "extremely recalcitrant," having attempted to block Council's status as the miners' representative, and then, having capitulated, immediately denying this representative the earlier disputed monitoring rights (Dec. at 1, n. 2) (Dec. 21). The prior discrimination complaint was based on a series of events between December 1978 and March 1979, during which time the operator (1) refused to furnish the representative copies of two proposed training programs. prior to submission to MSHA, contrary to the requirements of 30 C.F.R. $ 48.3(d); (2) failed to note on modified programs, resubmitted to MSHA, that its miners were represented by a representative claiming instead "non-agreement," (3) responded to the representative!s request to attend classes by denying their representative status, (4) failed to respond to ten subsequent attempts by the representative to discuss the issue of attending classes, and finally, (5) failed to permit two representatives to pass through the main access road guard gate to monitor training sessions. The complaint was withdrawn when the operator agreed to recognize

Council as the miners' representative and to comply with training regulations. See Exh. A through G.

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There are no factual disputes in this case. No credible reason has been advanced by the majority for distinguishing between employee and non-employee miners' representatives. The majority's assertion that the mine operator may restrict attendance to "... those who would regularly and properly be scheduled to attend an operator's training session..." (slip op. at 4, n.3), but is empowered to refuse to permit non-employee representatives to attend these classes, effectively separates and distinguishes between miners' representatives. This is an obvious diminution of the participatory status of non-employee representatives, and a distinction that impermissibly lessens their statutorily authorized role. It is not disputed by the majority, and the operator concedes, that the statute which binds us makes no such distinction. Oral arg. 6. A miner's representative is a miner's representative, regardless of employee status. The Act does not limit the miners in their fundamental right to select a representative of their choice. 3/ As here, non-employees may be chosen, and those selected are granted no different or fewer rights than would be true if they were employees. See note 3, supra. Phrased differently, the majority's decision must thus bar employee miners' representatives from monitoring safety and health training classes. But if an employee miner who is an employee representative, e.g., a union official, is participating in the employer's training class, nothing prevents him or her from monitoring that class for content, effectiveness, or compliance with the training program (30 C.F.R. $ 48.3), and reporting those observations to fellow miners, the union or MSHA. Indeed, both in law and in fact, how could that monitoring be prohibited? It must therefore be concluded that the majority's decision is not in reality an exercise in judicial restraint, but merely an unacknowledged means of barring only non-employee miners' representatives from monitoring safety and health training instruction. This is, indeed, an impermissible amendment of the Act.

The remedial legislation we are called upon to interpret must be liberally construed, as the operator concedes, supra. Court and Commission precedent, as the judge below observed, holds that "should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety the first should be preferred." Old Ben Coal Co., 1 FMSHRC 1954, 1957-58 (1979), quoting, UMWA v. BMOA [Kleppe], 562 F.2d 1260, 1265 (D.C. Cir. 1977).

3/ Recognition that employees may designate their own representative has been long honored under the basic charter for employee democracy, section 7 of the National Labor Relations Act, 29 U.S.C. $ 157. See Minnesota Mining & Manufacturing Co. v. NLRB, 415 F.2d 174, 177, 178 (8th Cir. 1969); Standard Oil Co. v. NLRB, 322 F.2d 40 (6th Cir. 1963); NLRB v. Deena Artware, Inc., 198 F.2d 645 (6th Cir.). cert. denied; 345 U.S. 906 (1952); Native Textiles & Communication Workers, 246 NLRB No. 38, 102 LRRM 1456 (1979); see also Consolidated Coal Co. v. MSHA, 3 FMSHRC 617 (1981).

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The legislative history of the 1977 Mine Act reveals congressional acknowledgement that lack of miner training had contributed in large measure to the great loss of life in the Sunshine and Blacksville mine disasters, events which stimulated passage of this legislation, Sen. Rep. No. 95-181 at 49, Legis. Hist. at 637 and that health and safety training is essential to achieving the Act s goals. Sen. Rep. at 50, Legis. Hist. at 638. In authorizing participation by miners' representatives in inspections and in pre- or post-inspection conferences, the legislators recognized the important role of representatives in the education of miners:

> It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness.

Sen. Rep. at 28, Legis. Hist. at 616.

The history also reflects an intent that miners and their representatives have maximum impact and involvement with the implementation and enforcement of the 1977 Act, including the inspection and safety training provisions, and that full participation by miners and their representatives be statutorily protected through the Act's anti-discrimination provisions:

> If our national mine safety and health program is to be truly effective, the miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation....
>
> Section 106(c) [105(c)] of the bill prohibits any discrimination against a miner for exercising any right under the Act. It should also be noted that the class protected is expanded from the current Coal Act. The prohibition against discrimination applies to miners, applicants for employment, and the miners' representatives. The Committee intends that the scope of

the protected activities be broadly interpreted by the Secretary,...

Sen. Rep. at 35, Legis. Hist. at 623. (Emphasis added.)

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Congress also made clear that the anti-discrimination protection applied to implementation of the safety training provisions:

> The listing of protected rights contained in section 106(c)(1) [105(c)(1)] is intended to be illustrative and not exclusive .... 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 115 or the enforcement of those provisions under Section 105(f) [104(g)].

Sen. Rep. at 36, Legis. Hist. at 624. (Emphasis added.)

An expansive role for miners and their representatives in implementation of the Act was initially recognized on April 19, 1978, in one of the first "Interpretive Bulletins" issued by the Secretary:

> The ... Act is a federal statute designed to achieve safer and more healthful conditions in the nation's mines. Effective implementation of the Act and achievement of its goals depends in large part upon the active but orderly participation of miners at every level of safety and health activity. Therefore, under the Act, miners and representatives of miners are afforded a wide range of substantive and procedural rights. [4/]

43 Fed. Reg. 17546 (April 25, 1978).

More directly, the Preamble to the Secretary's published regulations for implementation of section 115 of the Act states:

> Numerous references to the "representative of miners" throughout the Mine Act evidence the importance of involving the miner in all aspects of mine health and safety. Nowhere does the Mine Act either explicitly or implicitly limit the participation of the representatives of miners only to the enumerated situations in the Act.... Indeed, MSHA would be remiss in attempting to fulfill its statutory obligation to insure that the training plan submitted by the operator would afford adequate training to miners if it failed to include the representative of miners in the approval process.

43 Fed. Reg. 47454, 47456 (October 13, 1978).

4/ Nowhere in this or any other Secretarial bulletin or regulation is any distinction made between non-employee and employee miners' representatives.

Contrary to the majority's contention, the absence of an express monitoring right in the statute is not dispositive of the issue before us. Congress has indicated that its listing of rights is illustrative only, Sen. Rep. at 36, Legis. Hist. at 624, supra, and that the scope of protected activities is to be broadly interpreted.

> [I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislatures.

Barr v. United States, 324 U.S. 83, 90 (1945). See also Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980), and cases cited.

My colleagues would also exclude from consideration the expression of congressional intent contained in the "Findings and Purpose" section of the Mine Act. Slip op. at 4. 5/ However, not only the Act but ample precedent makes clear the deficiencies in the majority's artificial separation of section 2(e) from the statute of which it is a part. It would appear superfluous to note that the "Findings and Purpose" section of the Act, under which 2(e) appears, represents an express statement of Congressional policy, see, e.g., Lehigh & New England Railway Co. v. I.C.C., 540 F.2d 71, 79 (3d Cir. 1976), cert. denied. 429 U.S. 1061 (1977), that is not severable from the statute. This expression of legislative policy has been described as a guide to the "public interest" that a statute addresses, McLean Trucking Co. v. United States, 321 U.S. 67, 82 (1944), 6/ and as a "mandate" in construing the reach of a statute, American Trucking Associations, Inc. v. Atchison, Topeka, & Sante Fe Railway, 387 U.S. 397, 412 (1967). If "[t]he purpose of Congress is the ultimate touchstone," Retail Clerks International Association v. Schermerhorn, 375 U.S. 96, 103 (1963), Congress' express statement of purpose in the 1977 Mine Act must be considered in determining the rights derived from the statute. See Whirlpool Corp. v. Marshall, 445 U.S. 1, 11-12 (1980), where the court expressly relied upon the statutory purpose and policy expressed in the preamble to the Occupational Safety and Health Act of 1970, 29 U.S.C. $$ 651-678, to determine whether a right to refuse work is embodied in the legislation. Indeed, the lead decision of this Commission interpreting section 105(c) was substantially based on the conclusion that the right to refuse work, on which this Act is silent, was "necessary to fully effectuate the Congressional purpose [of the Mine Act]." Pasula, supra, at 2790.

5/ It is manifest that if the relevant provisions of the Mine Act were so unambiguous as to preclude reliance on the statement of purpose contained in the statute, the majority's review of the legislative history (slip. op. at 3, 7) would be equally impermissible.

6/ See also Wiggins Bros, Inc. v. Department of Energy, 667 F.2d 77, 88 (Em. App. 1981), cert. denied, 456 U.S. 905 (1982).

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The interrelationship of the Act's various training sections, even without section 2(e), makes evident additional fallacies in the rationale of the majority. More specifically, section 2(g)(4) states that one of the major purposes of the Act is to "improve and expand ... training programs aimed at preventing ... accidents...." Further, section 104(g) of the Act provides for the mandatory immediate withdrawal from the mine of any untrained miners found therein. Sen. Rep. at 50, Legis. Hist. at 638. And section 115 of the Mine Act, "Mandatory Health and Safety Training" describes in detail the requirements for the safety training of miners.

Section 115(a) demands that "each operator of a coal or other mine shall have a health and safety training program...." (Emphasis added.) The majority's characterization of these classes as "the operator's," is thus misleading, since Martin County's duty to instruct is neither personal nor "private." In truth, both the classes, and any monitoring thereof, are for a statutory purpose, and charged with that legislatively expressed public concern.

Section 115(a) of the Mine Act also states that training classes "... shall include instruction in the statutory rights of miners and their representatives." (Emphasis added.) Notwithstanding, the majority would bar these admittedly statutorily indistinguishable miners' representatives (oral arg. 16), from observing instruction on the "statutory rights" of these very representatives. It would appear obvious that miners' representatives would, indeed must, be present when that instruction is given, if section 115 is to be meaningfully implemented.

Section 115(b), moreover, provides for training classes to be held at locations other than the mine site. Although the operator itself presented the classes in this case, the training required by the statute may be satisfied with instruction by non-operator personnel at, e.g., local public colleges or universities. 30 C.F.R. $ 48.4(a). Cf Bennett v. Emery Mining Co., 5 FMSHRC 1391 (1983), appeal filed, No. 83-2017 (lOth Cir. Aug. 17, 1983). The operator was unable to articulate any basis under the Act, or in law, which would permit it to bar miners' representatives from those classes held away from the mine site, admittedly non-hazardous locales. (Oral arg. 10-12). Indeed, the statute reveals none. One searches in vain to discover statutory--or other--support sanctioning restrictions by an operator on a public educational institution's admission policy.

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Section 115(c) requires that miners who have received the mandatory safety and health training not only be given certificates of

instruction after completion thereof, but that these certificates be made available for inspection at the mine site. If the training certificate is to be meaningful, the training given must be open to evaluation. Monitoring of the training process, designed to enable miners to work safely and survive in this most dangerous of industries, is crucial, indeed, indispensable, to the "business of training miners." Sen. Rep. at 50, Legis. Hist. at 638.

It would also be impossible for the miners' representative to exercise its undisputed right to propose revisions to safety and health training plans, undeniably granted by 30 C.F.R. $ 48.23, if it is unable to monitor and intelligently evaluate that training. Certainly miners' representatives can hardly be expected to receive, much less benefit from, this required instruction on their rights, if they are to be barred from these classes. Under the reasoning of the majority, newly hired miners, who have never seen the inside of a mine, would be required to determine on their own whether the training received satisfied the statutory criteria of section 115 and the training regulations contained in 30 C.F.R. Part 48. and then relay their observations to their representative. The miner is, after all, being trained, and if he or she were knowledgeable about the safety and health instruction being presented, there would obviously be no need for the training. Indeed, the asserted possibility of confusion, misinformation or disruption--admittedly totally without record support (oral arg. 57)--would be maximized, not minimized, by barring access to this safety and health training. This is surely contrary to both the language of section 115 and the goal of the safety and health instruction being presented.

The instructors of these mandatory safety and health classes may also have their approval as instructors revoked by MSHA for "good cause." 30 C.F.R. $ 48.3(i). It would appear beyond argument that the miners' representative, if permitted access to these classes, would be in the best position to demonstrate "good cause," if any revocation were to be sought of an instructor's teaching approval certificate.

It is thus essential, as the Secretary agrees, that representatives be able to monitor the training being given, in order to effectuate these several statutory rights. (Oral arg. 39-42.) Absent miner monitoring, it strains credibility to believe, for example, that an operator will enthusiastically instruct its employees on the right to refuse work. As Phillips v. Board of Mine Operations Appeals, 500 F.2d 772, 778 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975), instructs us: "The miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws."

The majority contends that the miners' representative is asserting a "private avenue" or is acting as a "private attorney general" to enforce the training provisions of the Act. Slip op. at 4, 8. It is scarcely necessary to observe that no recompense is claimed by, nor will any accrue to this miners' representative if it were to monitor these mandated safety and health classes. Moreover, in contrast to the active intrusion legislatively [and judicially--UMWA v. FMSHRC, 671 F.2d 615 (D.C. Cir.), cert. denied sub nom. Helen Mining Co. v. Donovan, 51 U.S.L.W. 3288 (U.S. Oct. 12, 1982), corrected, 51 U.S.L.W. 3300 (U.S. Oct. 19, 1982)(No. 82-33)--] granted to miners who not only accompany federal mine inspectors to assist in searching out safety and health hazards but are paid by the mine operator for their time, the passive "intrusion here is truly de minimis. 7/

The right of access to training classes for miners and their chosen representatives, whoever they may be, is thus amply implied, if not explicitly required by, the Act. The Act is also silent as to the right of a miner to refuse work in unsafe conditions. Nonetheless, that most fundamental right has, as the majority concedes, been determined to be implicit in section 105(c) of the 1977 Mine Act, Pasula, supra, as well as under section 110(b) of the 1969 Act, 30 U.S.C.A. 820, under language significantly narrower than that of the 1977 Act: 8/

> Nothing in the 1969 Mine Safety Act or mine procedure suggests that the company has a right to fire a miner for refusing to work in a particular area of a mine when he fears a chronic, long-term threat to his health or safety there due to safety violations.

7/ The majority, although never directly. apparently approves this operator's shopworn contention that its property rights outweighs the duty of the operator to provide accessible safety and health training. This Commission has previously held that non-employee miners' representatives have access to mine property for walkaround inspection purposes. See Consolidation Coal Co. v. MSHA, supra, note 3. It would also appear beyond serious question that a non-employee miners' representative could have monitored any of these classes under section 103(f) of the Act if an MSHA inspector had asked the representative to accompany him. Dec. at 9.

8/ Section 110(b)(1) states:

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the

Secretary or his authorized representative of any alleged violation or danger, (B) has filed instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

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Phillips, 500 F.2d at 780. Congress thereafter explicitly confirmed that right under the 1977 Mine Act, specifically approving Phillips. Sen. Rep. at 36, Legis. Hist. at 624. The final and definitive ruling on that implicit right, under comparable statutory language, was set forth by the Supreme Court in Whirlpool Corp. v. Marshall, supra. Finally, although given their disposition of this case the majority does not reach this issue, it is clear that if the right exists to monitor these classes, this operator has interfered with the exercise of that right, and that interference is prohibited by section 105 of the Act. Sen. Rep. at 35-6, Legis. Hist. at 623-24. 9/ The essence of the discrimination here is this operator's treatment of this non-employee miners' representative in a manner that it would not, and indeed could not, for the reasons stated, impose on an employee miners' representative. See Consolidation Coal Co. v. MSHA, supra, note 3.

I therefore dissent, and would affirm the judge below.

A. E. Lawson, Commissioner

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9/ As Pasula makes clear, it is not necessary that discriminatory action be premised on a violation of a specific statutory right or administrative requirement.

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