CCASE:
MSHA & UMWA V. JIM WALTER RESOURCES
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SEP 30, 1985
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of

I. B. ACTON	Docket Nos.	SE 84-31-D
GRADY ADERHOLT		SE 84-32-D
FREEMAN BUTLER		SE 84=33-D
JAMES L. CAMPBELL		SE 84-34-D
J. D. ELLENBERG		SE 84-35-D
W. D. FRANKLIN		SE 84-36-D
BILLY R. GLOVER		SE 84-37-D
TERRY PEOPLES		SE 84-39-D
WILLIAM REID		SE 84-40-D
CHARLES W. RICKER		SE 84-41-D
TERRY SHUBERT		SE 84-42-D
THEODORE TAYLOR		SE 84-43-D
MARVIN WISE		SE 84-44-D
CHARLES BLACKWELL		SE 84-45-D
ROBERT BURLESON		SE 84-46-D
HOUSTON EVANS		SE 84-47-D
KENNETH RANDALL COF		SE 84-52-D

and
UNITED MINE WORKERS OF
AMERICA (UMWA)
v.
JIM WALTER RESOURCES, INC.

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners
DECISION
BY THE COMMISSION:
These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982). The primary issue presented is identical to the issue addressed in a decision issued this same date in United Mine Workers of America on behalf of James Rowe, et al. v. Peabody Coal Co., Docket No. KENT 82-103-D, etc., and Secretary of Labor on behalf of Thomas Williams v. Peabody Coal Co., Docket No. LAKE 83-69-D, 7 FMSHRC_____, Does an operator violate section 105(c) of the Mine Act, when

it bypasses for rehire a laid-off individual because the individual lacks health and safe&y training as specified in section 115 of the Act and 30 C.F.R. Part 48? 1/ A Commission administrative law judge found that

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1/ Section 115 states in part:

(a) Approved program; regulation

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;

(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;
(Footnote continued)
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Jim Walter Resources Inc. ("JWR") did not violate section 105(c) of the Act by requiring laid-off individuals to obtain training as a condition of recall. The judge held that "pre-employment training and experience criteria may be used by the mine operator, including the requirement that the prospective underground miners have completed their MSHA approved safety training, without running afoul of the Act 6 FMSHRC 2450, 2453 (October 1984)(ALJ). The judge also concluded, however, that JWR violated section 105(c)(1) of the Act by failing to compensate certain rehired complainants in these cases for training which the miners had obtained on their own, while relying or that same training to satisfy its statutory obligations as an operator under section 115 to provide training for "new miners." 2/ The judge's conclusions are consistent with our holdings in Peabody and, accordingly, are affirmed.

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Fn. 1/ end
(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) Training compensation
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.
* * *
30 U.S.C. $ 825.
30 C.F.R. Part 48 implements section 115 of the Mine Act. Part 48 was promulgated by the Secretary of Labor and it sets forth the training requirements for miners as well as the compensation requirements for miners' training and retraining.
2/ Section 105(c)(1) provides:
No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination 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,
(Footnote continued)
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The 17 complainants in these consolidated cases were employed by JWR in surface mining positions at JWR's Flat Top/Nebo and No. 7 mines. In January and .February of 1983, JWR conducted a reduction in force pursuant to which the complainants were laid off from their surface positions. The parties do not dispute that the layoffs were instituted for valid business reasons. Under Articles XVII(c) and (d) of the National Bituminous Coal Wage Agreement of 1981 ("the Agreement"), to which both the United Mine Workers of America ("UMWA") and JWR were parties at the time of the layoffs, each complainant was placed on a layoff panel and was required to list on his panel form the jobs that he was able to perform and to which he wished to be recalled. 3/

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Fn. 2/ end
representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] 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 has testified or is about to testify in any such proceeding, 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].
30 U.S.C. $ 815(c)(1).
3/ Article XVII states in part:
(c) Layoff Procedure
In all cases where the working force is to be reduced or realigned, management shall meet with the mine committee at least 24 hours in advance and review the available jobs and the individuals to be laid off, retained or realigned. Within five (5) days after an Employee is notified that he is to be laid.off. he must fill out a standardized form and submit it to mine management. On this form, the laid-off

Employee shall list: (1) his years of service at the mine; (2) his years of service with the Employer; (3) his previous mining experience with other Employers and the years of service with each; and (4) the jobs he is able to perform and for which he wishes to be recalled.
(Footnote continued)
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However, instead of recalling laid-off individuals strictly in accordance with the order in which their names appeared on the seniority list, JWR bypassed certain individuals and recalled others who had shorter terms of prior service but who had completed the health and safety training specified in section 115 for underground mining work. 4/ (The majority of jobs filled by recall were underground positions.) Seventeen of the laid-off individuals who were bypassed filed discrimination complaints with the Secretary of Labor. In turn, the Secretary filed complaints on their behalf with this independent Commission. 30 U.S.C. $ 815(c)(2).

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Fn. 3/ end
(d) Panels
Employees who are idle because of reduction in the working force shall be placed on a panel from which they shall be returned to employment on the basis of seniority as outlined in section (a).
Article XVII(a) defines "seniority" in part as follows:
Seniority at the mine shall be recognized in the industry on the following basis: length of service and the ability to step into and perform the work of the job at the time the job is awarded.
4/ Article XVII(h) of the Agreement states in part:
Recall of Persons on Layoff Status
When a job or training vacancy at a mine exists which is not filled by Employees within the active working force or from the mine panel, the panel custodians will review the list of Employees on the panel from other mines and the Employer shall recall to employment Employees on layoff status in the following order: (1) If there are no Employees on the mine panel with the ability to perform the work of the job, then, the Employer shall recall the senior Employee who has such ability from the Employer's other mines within the same UMWA district who has requested his name to be placed on the panel at that mine and has listed the job to be filled as one for which he wishes to be recalled.... (2) If there are no Employees on the mine panel or the District-Employer panel, who have the ability to perform the work of the job, then,

the Employer shall recall the senior Employee from the Employer's other mines outside the UMWA District where the mine is located who has such ability....

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For litigation purposes, the Secretary divided the 17 complainants into two groups. Group I consists of four complainants who, after being bypassed for recall because they lacked underground training, either did not obtain the training on their own or who obtained underground training but were not recalled. Group II consists of 13 complainants who were bypassed for recall, obtained underground training on their own, were, eventually rehired by JWR to work underground but were not compensated for.expenses incurred in securing the training.

In the discrimination complaints, the Secretary alleged that JWR refused to recall each of the complainants according to their seniority, as provided by the Agreement, for the sole reason that JWR otherwise would have been obligated to provide the training mandated by section 115 of the Mine Act and 30 C.F.R. Part 48. The Secretary asserted that this policy was a violation of section 105(c) of the Act and that the complainants were entitled to back pay for the time they were laid off because of the bypass, in addition to reimbursement with interest for the training that they had acquired on their own. 5/

In Secretary of Labor on behalf of Bennett, et al. v. Emery Mining Corporation, 5 FMSHRC 1391 (August 1983), pet. for review filed, No. 83-2017 (lOth Cir. August 17, 1983), the Commission held that section 115 does not restrict the prerogative of a mine operator to set pre-employment qualifications based upon training and that requiring applicants for emploYment to obtain the training specified in section 115 of the Act prior to hire does not violate the Act. We also held, however, that the operator in that case, having relied upon the newly hired miners: prehire training to satisfy its statutory training obligation towards "new miners," could not refuse to reimburse those miners for the expense of such training. 5 FMSHRC at 1396. In the present case, the judge held that it was "immaterial whether the affected applicants for employment are strangers to the industry and the employer, as in the Emery case, or are former employees awaiting ... recall...." 6 FMSHRC at 2453. He found that in either case the operator could require the completion of relevant safety training as a pre-condition to hire. Consistent with Emery, he also held that an operator must reimburse a new miner if the operator

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5/ Four of the Group II complainants also invoked the grievance procedures provided in Article XXIII of the Agreement to challenge JWR's recall policy. They alleged that JWR's practice of recalling less senior miners was a breach of the Agreement. An arbitrator

concluded that the grievant lacked the ability to perform the duties of the jobs to which the grievant claimed they were entitled because they did not have the requisite training. Therefore, the arbitrator held that the grievant did not possess the appropriate "seniority" in that they "lacked the ability to step in and perform the job at the time the job is awarded" and that their bypass did not breach the Agreement. In the matter of the Arbitration between Jim Walter Resources, Inc., Flat Top/Nebo Facilities and United Mine Workers of America, District 20, Local Union No. 6255, Arb. No. 2 JWR 81-20,83-142 (1983) (Clarke, Arb.).

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relies upon that individual's prehire training to satisfy its statutory training obligations. 6 FMSHRC at 2454. The judge found no need to resort to the Agreement to determine the validity of JWR's policy under the Act. 6 FMSHRC at 2453.

In Peabody Coal, supra, we examined fully the question of whether an operator violates section 105(c) of the Mine Act when it bypasses for hire laid-off individuals who lack relevant health and safety training. We answered the question in the negative. We held that under the Mine Act laid-off individuals are not "miners" or "new miners" entitled to section 115 training. For the reasons articulated in Peabody, we reach the same result here.

As explained in Peabody, we view any rights of recall from layoff, and the extent to which an operator may agree to condition those rights, as being the proper subjects of collective bargaining and arbitration, rather than of litigation under the Mine Act. In Peabody, we also re-affirmed the conclusion we reached in Emery that if an operator relies upon the training of those whom it subsequently hires, it must compensate them for the time and expense of their prehire training. 6/ JWR invites us to reconsider this latter conclusion. We decline to do so.

The judge awarded costs and damages, ordered the parties to calculate interest on the awards and to submit an agreement, along with a petition for attorney's fees, within 20 days. 6 FMSHRC at 2457. The parties failed to respond within the specified time and the judge made final his original award of costs and damages. 6 FMSHRC at 2650. Interest is ordinarily part of the "full measure of relief" to which complainants are entitled under section 105(c)(1) of the Mine Act. Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co. and Michael Walker, 5 FMSHRC 2042, 2049 (December 1983). There is an obligation, however, on the part of counsel representing such complainants to conduct the litigation through which miners secure the relief to which they are entitled in accordance with orders issued by the presiding judge. The order issued here directing the parties to submit interest computations was

entirely appropriate. knowledge that a judge has the authority to decline to make an award if a party's representative refuses to submit required information. Here, however, the judge's order imposed obligations on counsel for the operator

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6/ JWR argues further that the Secretary erred by not filing separate complaints of discrimination alleging JWR's failure to reimburse the complainants for training expenses and for compensable wages during the training period. Because the complainants are challenging JWR's policy that safety training is a proper pre-employment requirement for a laid-off miner, the allegation with regard to the failure to compensate is interrelated with the policy challenge. Under these circumstances, we will not require separate discrimination complaints.

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as well as counsel for the miners. Therefore, we will not penalize the miners in this case for the failure of counsel on both sides to see that the terms of the judge's order were met. We remand this matter for the calculation of attorney's fees and the interest due on the costs and damages awarded. 7/

On the foregoing bases, the judge's decision is affirmed. The case is remanded for the further remedial findings specified above. 8/

Richard V. Backley, Acting Chairman
James A. Lastowka, Commissioner
L. Clair Nelson, Commissioner

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7/ As an attachment to his brief on review, the Secretary filed with the Commission a document entitled, "MSHA Policy Memorandum No. 83-280, Mine Operators' Responsibilities for Safety Training Under Section 115 of the Federal Mine Safety and Health Act of 1977 and 30 C.F.R. Part 48." JWR has moved to strike the document. The motion is denied. The memorandum is a public document of MSHA and, as such, its existence and contents are subject to our judicial notice.

8/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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