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JIMMY MULLINS V. BETH-ELKHORN COAL
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FMSHRC-WDC

MAY 28, 1987

JIMMY R. MULLINS

v.

BETH-ELKHORN COAL CORPORATION, Docket No. KENT 83-268-D

LOCAL 1468, DISTRICT 30,
UNITED MINE WORKERS OF
AMERICA

and

INTERNATIONAL UNION, UNITED
MINE WORKERS OF AMERICA

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint filed by Jimmy R. Mullins pursuant to the Federal Mine Safety and Health Act of 1977. 30 U.S.C. $ 801 et seq. (1982)("Mine Act"). The complaint alleges that Mullins' removal from a dispatcher's job pursuant to an arbitration award resolving a seniority grievance violated section 105(c)(1) of the Mine Act by contravening his rights under 30 C.F.R. Part 90 ("Part 90"). 1/ Former Commission Administrative Law Judge Richard C. Steffey

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1/ In relevant part, section 105(c)(1) of the Mine Act 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, 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

found that the removal of Mullins from the dispatcher's job constituted unlawful discrimination, ordered that Mullins be reinstated to that position, and awarded back pay, expenses, and attorney's fees. 7 FMSHRC 1819 (November 1985)(ALJ). The Commission granted petitions for discretionary review filed by Beth-Elkhorn Corporation ("Beth-Elkhorn"), Local 1468, District 30, United Mine Workers of America ("UMWA"), and the International Union, UMWA. 2/ The Secretary of Labor ("Secretary") filed an amicus curiae brief in support of petitioners. Because we conclude that miners' Part 90 rights do not entitle miners to particular transfer positions, we reverse.

I.

The parties stipulated to the relevant facts. 7 FMSHRC at 1821-25. Mullins began working for Beth-Elkhorn at its No. 26 underground coal mine in 1970. At all times relevant to this proceeding, the UMWA represented miners at this mine for collective bargaining purposes. Until February 1981, Mullins worked as a repairman on a non.production maintenance shift. In May 1980, Mullins had a chest x ray that evidenced pneumoconiosis, and the Department of Labor's Mine Safety and Health Administration ("MSHA") informed Mullins and Beth-Elkhorn of Mullins' option under Part 90 to work in an area of the mine in which the average concentration of respirable dust in the atmosphere was continuously maintained at or below 1.0 mg/m3. See 30 C.F.R. $$ 90.1 & 90.3. Because the average concentration of respirable dust in the mine atmosphere in which Mullins was working was maintained at or below 1.0 mg/m3, Mullins continued to work in his repairman's position.

On February 3, 1981, through exercise of his seniority rights under the National Bituminous Coal Wage Agreement of 1981 ("the Agreement"), the collective bargaining agreement to which Beth-Elkhorn and the UMWA were parties, Mullins secured a job as an electrician on

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> [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].

30 U.S.C. $ 815(c)(1).

Under 30 C.F.R. Part 90, as relevant here, a miner determined by the Secretary of Health and Human Services to have evidence of the development of Black Lung disease (pneumoconiosis) is given the

opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m3"). 30 C.F.R. $ 90.3.

2/ For the sake of brevity, Local 1468, District 30, and the International Union of the UMWA are referred to herein as the "UMWA" or "the Union" unless the context requires a more specific reference.

the second shift, also a non-production shift. 3/ In September 1981 a sampling of the atmosphere in the area in which Mullins was working revealed that the average concentration of respirable dust exceeded 1.0 mg/m3. MSHA issued Beth-Elkhorn a citation alleging a violation of 30 C.F.R. $ 90.100 for failing to maintain the required low dust mine atmosphere where Mullins was working. Mullins became eligible again under Part 90 for transfer to a job in a less dusty area of the mine. Although Beth-Elkhorn offered to transfer Mullins to a less dusty area, he elected to waive his transfer option, pursuant to 30 C.F.R. $ 90.104(a), and to retain the electrician's job. 4/ By letter dated October 15, 1981, Beth-Elkhorn informed MSHA that it did not believe that the dust in Mullins' work area could be maintained at the appropriate level but that Mullins had elected to waive his Part 90 transfer rights and remain in the electrician's position. Based on Mullins' waiver, MSHA terminated the previously issued citation.

Approximately one year later, in September 1982, the dispatcher's job on the second shift became permanently vacant and was advertised for bidding in the mine. By letter dated September 17, 1982, Mullins informed MSHA that he now wished to re-exercise his Part 90 rights to obtain that particular job. In his letter, Mullins stated, "If I cannot obtain this job as a dispatcher, then I do not wish to re-exercise my rights as a Part 90 miner." Exh. 9. In response, MSHA notified Beth-Elkhorn in November 1982 that Mullins had exercised his option "to work in a low dust area," and that "by the 21st calendar day after receipt of the notification .. [Mullins] must be working in an environment which meets the [1.0 mg/m] respirable dust standard." Exh. 11.

Mullins also bid on the dispatcher's job under the seniority provisions of the Agreement. Another bidder for the job, Norman Caudill, had greater mine seniority but was not a Part 90 miner. Beth-Elkhorn awarded the job to Mullins based on the "superseniority provision" of Article XVII(i)(10) of the Agreement, which gives a onetime job preference to Part 90 "production crew" members. 5/

3/ Article XVII(i) of the Agreement specifies that the filling of all permanently vacant jobs and new jobs created during the term of the contract shall be made on the basis of seniority. Article XVII(a) defines "seniority" as "Length of service and the ability to step into and perform the work of the job at the time it is awarded." Exh. 27, pp. 64-76.

4/ 30 C.F.R. $ 90.104(a) provides that miners, through notification or other actions, may waive their Part 90 rights. This section also

permits miners to re-exercise their Part 90 rights following a waiver. 30 C.F.R. $ 90.104(c).

5/ Article XVII(i)(10) states:

> If the job which is posted involves work in a "less dusty area" of the mine (dust concentrations of less than one milligram per cubic meter), the provisions of the Article shall not apply if one of

Under the Agreement's procedures, Caudill filed a grievance with respect to Beth-Elkhorn's decision to award Mullins the job. The UMWA's Local 1468, District 30 represented Caudill, and the grievance proceeded to arbitration. In an opinion issued on April 15, 1983, the arbitrator sustained Caudill's grievance. The arbitrator held that the superseniority provision of Article XVII(i)(10) applies only to Part 90 miners who are members of a "production crew," and that Mullins, as an electrician on a non-production maintenance shift, was not entitled to the onetime preference. Consequently, the arbitrator awarded the job to Caudill. Exh. 18.

Subsequent to the award, Beth-Elkhorn representatives met with Mullins and informed him that they would comply with the arbitrator's ruling by giving the dispatcher's job to Caudill. They also advised him that he could return to his former electrician's position or begin a new job as a repairman on the same non-production shift. The repairman's job carried the same hourly rate of pay and, in Beth-Elkhorn's opinion, was in a mine atmosphere that (unlike the electrician's position) complied with the 1.0 mg/m3 dust standard. After this meeting, Mullins chose to return to his job as an electrician.

In a letter dated May 2, 1983, Beth-Elkhorn informed MSHA of these developments and stated that, in its opinion, Mullins' choice constituted a waiver, pursuant to 30 C.F.R. $ 90.104, of his Part 90 transfer rights. At about the same time, Mullins filed a complaint with MSHA alleging, in essence, that his removal from the dispatcher's position discriminatorily denied him his Part 90 rights in violation of section 105(c)(1) of the Mine Act. Following an investigation of the complaint, MSHA determined that Mullins had not been subjected to illegal discrimination under the Act and declined to prosecute a complaint on Mullins' behalf. Mullins then instituted the present proceeding before this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. $ 815(c)(3).

In an eighty-page decision favoring Mullins, the judge found that Mullins had engaged in protected activity under section 105(c)(1) of the Mine Act when he re-exercised his Part 90 transfer rights and bid on the job of dispatcher. 7 FMSHRC at 1850-54. The judge concluded that

> the bidders is an Employee who is not working in a "less dusty area" and who has received a letter from the U.S. Department of Health and Human Services informing him that he has contracted

black lung disease and that he has the option to transfer to a less dusty area of the mine. In such event, the job in the less dusty area must be awarded to the letterholder on any production crew who has the greatest mine seniority. Having once exercised his option, the letterholder shall thereafter be subject to all provisions of this Article pertaining to seniority and job bidding. This section is not intended to limit in any way or infringe upon the transfer rights which letterholders may otherwise be entitled to under the Act.

Article XVII(i)(10) of the Agreement itself discriminated against and interfered with the rights of Part 90 miners by restricting them to a onetime only exercise of superseniority in bidding on vacant jobs and by giving preference in job placement only to Part 90 production crew members. 7 FMSHRC at 1844-45, 1854-61. The judge held that the UMWA discriminated against Mullins "when [it] brought a grievance to arbitration and succeeded in obtaining an interpretation of Article XVII(i)(10) of the [Agreement] which resulted in an award of a job performed in [a low dust area] to a miner who did not have any Part 90 rights at all." 7 FMSHRC at 1850. The judge further held that Beth-Elkhorn discriminated against Mullins by removing him from the dispatcher's job in compliance with the arbitrator's award. 7 FMSHRC at 1868-73. In reaching this conclusion, the judge opined that Beth-Elkhorn should have "re-examine[d] the [Agreement] ... to determine why it should not be revised in order to permit all Part 90 miners to bid on vacancies in positions performed in less than 1.0 milligrams of respirable dust." 7 FMSHRC at 1872. Finally, the judge concluded that the UMWA was an "operator" as defined in section 3(d) of the Mine Act, and consequently could be assessed a civil penalty for the violation of section 105(c)(1). 7 FMSHRC at 1841-44.

II.

The principal question presented.is whether the judge erred in concluding that Mullins enjoyed the right to obtain a particular Part 90 transfer position -- here, the dispatcher's job on the second shift --and that Beth-Elkhorn's award of that job to another miner pursuant to the arbitration decision violated section 105(c)(1) of the Mine Act. There is no dispute that a Part 90 miner, upon exercising his transfer option, has the right to be transferred to a position satisfying the requisite Part 90 criteria. We hold, however, that a Part 90 miner is not entitled to dictate to the operator or otherwise specify the particular position to which the transfer must be made. We find no statutory or regulatory basis for the judge's contrary views.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub.

nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 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 part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra: Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984):

Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test).

The first question is that of protected activity: Did Mullins enjoy the right under the Mine Act and Part 90 to transfer to a specific position? The Commission has established some broad guidelines relevant to that question. We have held that section 105(c) of the Act bars discrimination against or interference with miners who are "the subject of medical evaluations and potential transfer" under the Part 90 standards. Goff v. Youghiogheny & Ohio Coal Co., 7 FMSHRC 1776, 1780-81 (November 1985)("Goff I"). We have emphasized the importance of the rights and protections conferred by Part 90 and the related provisions of the Act, but have recognized that their extent is not unlimited. For example, neither the Act nor Part 90 entitles a qualifying miner to work in a mine environment totally free of respirable dust. Goff v. Youghiogheny & Ohio Coal Co., 8 FMSHRC 1860, 1865 (December 1986)("Goff II"). Claims of protected activity and discrimination in this context must be resolved upon the basis of a careful review of the structure of miners' rights and operators' obligations contained in the pertinent statutory and regulatory texts.

In general, key provisions of the Mine Act and related mandatory health standards require that the average concentrations of respirable dust and of respirable dust containing.quartz in the atmospheres of active workings in coal mines be maintained at or below specified low levels. 30 U.S.C. $$ 842 & 845; 30 C.F.R. $$ 70.100 et seq. & 71.100 et seq. Section 101(a)(7) of the Act further authorizes the Secretary to develop improved mandatory health or safety standards providing that miners whose health has been impaired by exposure to a designated hazard "shall be removed from such exposure and reassigned." 6/ As we stated in Goff I, "Part 90 implements this statutory mandate by providing for the transfer of miners who, as a result of exposure to the health hazard

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6/ In relevant part, section 101(a)(7) states:

> Where appropriate, [any mandatory health or safety standard promulgated under this subsection] shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to ... [a] hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall

> continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miners shall be based on the new work classification.

30 U.S.C. $ 811(a)(7)(emphasis added).

of respirable dust, have developed pneumoconiosis." 7 FMSHRC at 1778 n. 3. The improved Part 90 standards supercede the interim mandatory health standards contained in section 203(b) of the Mine Act, 30 U.S.C. $ 843(b), which provided specifically for the transfer of miners with evidence of development of pneumoconiosis "to another position in any area of the mine." (Emphasis added.)

The Part 90 transfer option encompasses three basic rights: (1) to be assigned work in "an area of a mine" where the required Part 90 dust concentration levels are continuously maintained (30 C.F.R. $$ 90.3(a), 90.100 & 90.101); (2) in "an existing position" at the same mine on the same shift or shift rotation or, if the miner agrees in writing, in "a different coal mine, a newly.created position or a position on a different shift or shift rotation" (30 C.F.R. $ 90.102(a)); and (3) at no less than the regular rate of pay earned by the miner immediately before exercise of the transfer option (30 C.F.R. $ 90.103)(emphases added). It is the duty of operators to effectuate these rights as applicable with respect to their Part 90 miners.

Nothing in the quoted texts -- from superseded section 203(b) of the Mine Act (supra) to the present Part 90 standards -- requires that eligible miners be transferred to particular positions. On the contrary, placement in a position meeting the relevant dust concentration criteria is all that is required. As the Secretary points out in his amicus curiae brief, "Part 90 allows an operator to respond with flexibility to a miner's request to work in a less dusty area." S. Br. 8. Not only may the operator offer the Part 90 miner transfer to a range of qualifying positions within less dusty areas (30 C.F.R. $ 90.102), but also may elect to maintain or bring the miner's existing work area into compliance with the applicable Part 90 dust standards (30 C.F.R. $$ 90.100 & 90.101). 45 Fed. Reg. 80, 760-761 (December 5, 1980)(Secretary's official commentary on final Part 90 regulations).

The pertinent legislative and regulatory histories make clear that the fundamental purpose of these transfer provisions is the protection of miners' health -- not the distribution of specific jobs. Thus, in originally enacting as part of the 1969 Coal Act the provision that became section 203(b) of the Mine Act, a key House report states: "The committee considers this section ... equal in importance to the dust control section for decreasing the incidence and development of pneumoconiosis." H. Rep. No. 563, 91st Cong., 1st Sess. 20 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I

Legislative History of the Federal Coal Mine Health and SafetY Act of 1969, at 1050 (1975): see also Id. at 1071 72, 1199 & 1551. The legislative history of the Mine Act again reveals that the congressional emphasis is on decreasing the incidence of pneumoconiosis. S. Rep. No. 181, 95th Cong., 1st Sess. 22-23 (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 610-11 (1978); see also Id. at 1320.

Moreover, the Secretary's official comments concerning the final Part 90 standards adopted by him expressly indicate that while a Part 90 miner is entitled to an opportunity to remove himself from potentially

harmful concentrations of respirable dust a mine operator retains "a margin of latitude" and "some flexibility in the placement of a Part 90 miner, particularly in view of "unforeseen situations and unexpected mine and market conditions." 45 Fed. Reg. at 80,765-66. Thus, while an operator is required to provide a miner exercising his Part 90 option with a job that meets the applicable dust concentration limit, the operator retains an important measure of discretion to choose the specific job that is offered, provided the job meets the criteria specified in Part 90 regarding the mine involved, the shift or shift rotation, and the rate of pay. To the extent that the judge interpreted the Secretary's official comments as supporting a conclusion to the contrary (7 FMSHRC at 1838-39), the judge erred. 7/

We also note the explanatory construction of the Part 90 regulations provided us by the Secretary on review:

> The intent of Part 90 is that the specific job assignment of a Part 90 miner remains essentially a management decision made by the operator. ... In promulgating Part 90, the Secretary did not intend that an operator be required to give an eligible miner a specific job, but instead that the operator be obliged only to give him the opportunity to work in low dust concentrations. Any other interpretation of Part 90 destroys the flexibility the regulation is intended to provide. For example, it would be pointless for the standard to give an operator the option of bringing the dust level on the miner's present job into compliance with the standard if the miner nevertheless could require the operator to transfer him to a different specific job of his own choosing.

S. Br. 8-9.

In sum, we find nothing in the language, purpose or history of the Mine Act or of Part 90 that grants Part 90 miners the right to secure specific jobs that they desire. Here, Mullins attempted to exercise his Part 90 transfer option by seeking only the specific job of dispatcher. (As noted, Mullins' transfer request to Beth-Elkhorn stated: "If I cannot obtain this job as a dispatcher, then I do not wish to re-exercise my rights as a Part 90 miner.") Mullins, of course, had the

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7/ In his Federal Register comments the Secretary rejected a recommendation that Part 90 miners be assigned only to vacant

existing job to avoid "bumping" non-Part 90 miners from their jobs. 45 Fed. Reg. at 80,766. We read the Secretary's statement that "there will be occasions where an operator will assign a Part 90 miner to a position currently held by a non-Part 90 miner" not as an indication that a Part 90 miner is entitled to a particular job over a miner with more seniority, but rather as recognition that in the exercise of the operator's prerogative of offering Part 90 miners qualifying jobs, such "bumps" may be inevitable.

general right to re-exercise his Part 90 transfer option. To the extent that he sought Part 90 transfer to a particular position, however, his goal was outside the rights afforded by the Mine Act.

From the standpoint of Beth-Elkhorn's Part 90 obligations, it follows that the operator did not violate the Mine Act by failing to retain Mullins in the dispatcher's job. Beth-Elkhorn's only duty was to offer Mullins a position that satisfied the Part 90 criteria. The operator fulfilled its responsibilities by offering him the repairman's job -- a position at the same mine, on the same shift, at no loss in pay, and in a low dust area of the mine. 30 C.F.R. $$ 90.100 & 90.102.

Nor is there any evidence in the record that Beth-Elkhorn's actions otherwise were tainted in any part by an intent to discriminate against Mullins or interfere with his exercise of any legitimate protected activity. Prior to the dispute over the dispatcher's job, Beth-Elkhorn and Mullins had reached a mutually acceptable accommodation concerning Mullins' work as an electrician. Beth-Elkhorn initially awarded the dispatcher's job to Mullins pursuant to the superseniority provision of Article XVII(i)(10) of the Agreement. The UMWA sought Mullins' removal from that position pursuant to the grievance and arbitration procedures of the Agreement. We cannot conclude that either the UMWA, in pursuing a grievance over Mullins' initial placement in the dispatcher's position, or Beth-Elkhorn, in removing Mullins from the job pursuant to the arbitration award, violated the Mine Act.

As independent grounds for declaring Mullins' removal unlawful, however, the judge determined that Article XVII(i)(10) of the Agreement and the grievance arbitration proceedings taken in this matter amounted to invalid restrictions upon Mullins' Part 90 and Mine Act rights. We hold that the judge erred and exceeded the limits of his authority in so ruling.

The Mine Act is not an employment statute; the Commission does not sit as a super grievance or arbitration board. When required to do so for purposes of resolving issues arising under the Mine Act, we must interpret the meaning and application of parties' bargaining agreements with appropriate restraint. As the Commission has stated: "It is true that we do not decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights; nor do we unnecessarily thrust ourselves into resolution of labor or collective bargaining disputes." Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp., 3 FMSHRC

1175, 1179 (May 1981). See also United Mine Workers of America on behalf of James Rowe, et al. v. Peabody Coal Co., 7 FMSHRC 1357, 1364 (September 1985), pet. for review filed, No. 85-1717 (D.C. Cir. October 30, 1985).

The wisdom or fairness of Article XVII(i)(10) is not the Commission's concern. Nor does the Commission's role include assessing whether the arbitrator's construction of that provision represents sound or unsound collective bargaining law. Also, there being no Part 90 right to secure particular positions, the superseniority effect of the Article in question may, in fact, operate to grant some Part 90 miners

more rights than conferred by Part 90 and the Mine Act. The Mine Act does not bar operators and unions from agreeing to give Part 90 miners placement rights more generous than those provided by statute and regulation. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 778-79 (1976); Moteles v. Univ. of Penn., 730 F.2d 913, 921 (3d Cir.), cert. denied. 469 U.S. 855 (1984); Tangren v. Wackenhut Services, Inc., 658 F.2d 705, 707 (9th Cir. 1981), cert. denied, 456 U.S. 916 (1982). Further, the complained-of distinction in Article XVII(i)(10) between production and non-production Part 90 miners is a seniority matter negotiated between the contracting parties and was drawn in a context of providing an elevated level of rights to Part 90 miners. Such contractual distinctions, above the statutory/regulatory "floor," do not violate the Mine Act or Part 90. In short, Mullins had no Part 90 claim to the dispatcher's job; his initial award of the job, pursuant to the superseniority provisions of the Agreement, went beyond any entitlement under Part 90; and his removal from that job pursuant to the same Agreement and proposed transfer to another Part 90.qualifying position did not violate any of his Part 90 rights.

Accordingly, we conclude that Mullins did not engage in protected activity in seeking the dispatcher's job, and neither the Union nor Beth-Elkhorn violated section 105(c) of the Mine Act in connection with his removal from that position. 8/

III.

Finally, we briefly address the judge's holding that for purposes of this proceeding the UMWA is an "operator" under the Mine Act subject to a civil penalty for the violation of section 105(c)(1). 9/ Section 3(d) of the Act, 30 U.S.C. $ 802(d), defines "operator" as any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." The judge noted that Article lA of the Agreement provides that Beth-Elkhorn may not contract out certain types of mine construction or extraction jobs "unless all [UMWA] employees with necessary skills to perform the work are working no less than 5 days per week." 7 FMSHRC at 1843. The judge concluded that "by restricting [Beth-Elkhorn's] right to contract out construction and other work at the mine, [the UMWA] makes itself an 'independent contractor performing services at the mine' and makes [itself] an 'operator' within the meaning of section 3(d) of the Act." 7 FMSHRC at 1843. We disagree.

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8/ During the course of this proceeding, the Union sought and the judge denied his disqualification or refusal. 7 FMSHRC at 1897. The UMWA sought review of the judge's ruling but at oral argument advised the Commission that it had abandoned the refusal issue. Tr. Oral Arg. 13-14. We therefore do not address that issue.

9/ Section 110(a) of the Act states that "[t]he operator of a ... mine" in which a violation of the Act occurs shall be subject to a civil penalty. 30 U.S.C. $ 820(a).

Without deciding whether a union may ever be an "operator" under the Mine Act, we conclude that on the facts presented here the UMWA is not an "independent contractor performing services or construction." The Union did not itself "contract to perform services or construction at [the] mine." See 30 C.F.R. $ 45.2(c). Of equal importance, under the Agreement the power of the UMWA to restrict Beth-Elkhorn's right to contract out construction and other work at the mine is far removed from the kind of participation in the running of the contracted activity or service that could support a finding under the Mine Act of independent contractor status. See, e.g., Old Dominion Power Company v. Donovan, 772 F.2d 91, 96 (4th Cir. 1985); National Industrial Sand Ass'n. v. Marshall, 601 F.2d 689, 701 (3d. Cir. 1979). We vacate the judge's finding that the UMWA is an "operator" under the Mine Act.

IV.

For the foregoing reasons, the judge's decision is reversed and Mullins' complaint of discrimination is dismissed. 10/

Richard v. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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10/ Chairman Ford did not participate in the consideration or disposition of this case.

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