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EMERY MINING V. MSHA & UMWA
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FMSHRC-WDC
March 29, 1988

EMERY MINING CORPORATION

v. Docket No. WEST 86-126-R

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

and

UNITED MINE WORKERS OF
AMERICA (UMWA)

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Backley and Lastowka, Commissioners 1/

This contest proceeding brought by Emery Mining Corporation ("Emery") under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) ("Mine Act" or "Act"), raises issues involving the extent of the walkaround rights granted miners'

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1/ A majority of the Commission joins in resolution of each issue presented by this case. The Chairman and all Commissioners join in section II.A. of this decision (affirming the judge's holding that a nonemployee may accompany an inspector as a miners' representative during a physical inspection of a mine). Commissioners Backley, Doyle, Lastowka and Nelson join in section II.B. (affirming the judge's holding that the failure of a nonemployee miners' representative to file the identifying information required by 30 C.F.R. Part 40 does not by itself permit the mine operator to deny that representative entry to its mine); Chairman Ford files a dissenting opinion as to that

issue. Chairman Ford and Commissioners Backley and Lastowka join in section II.C. (reversing the judge's holding that the mine operator could not require the nonemployee miners' representative to sign a waiver of liability as a condition of entry to its mines); Commissioners Doyle and Nelson file a dissenting opinion as to that issue.

representatives by section 103(f) of the Mine Act. 2/ Commission Administrative Law Judge John J. Morris held that: (1) under section 103(f) of the Act a nonemploYee representative of miners may accompany an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") during a physical inspection of the mine, i.e., participate in walkaround; (2) failure of a nonemployee miners' representative to have filed the identifying information required by 30 C.F.R. Part 40 ("Part 40") does not, by itself, permit the operator to refuse the representative entry to its mine for purposes of exercising section 103(f) walkaround rights; 3/ and (3) Emery could not require

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2/ The term "walkaround" is used for the sake of convenience in reference to the rights granted miners' representatives under section 103(f) of the Mine Act, which provides:

> [1] Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre or post-inspection conferences held at the mine.
> [2] Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine.
> [3] Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection.
> [4] To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives.
> [5] However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.
> [6] Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any

provision of this [Act].

30 U.S.C. $ 813(f)(sentence numbers added).

3/ 30 C.F.R. $$ 40.1-.3 provides in relevant part:

> $40.1 Definitions. As used in this Part 40: ...
> (b) "Representative of miners" means: (1) Any person or organization which represents two or more

miners at a coal or other mine for the purposes of the Act, and (2) "Representatives authorized by the miners", "miners or their representative", "authorized miner representative", and other similar terms as they appear in the Act.

$40.2 Requirements. (a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by $40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners. (b) Miners or their representative organization may appoint or designate different persons to represent them under various sections of the [A]ct relating to representatives of miners. (c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District Office and shall be made available for public inspection.

$ 40.3 Filing procedures.

(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current:

(1) The name, address, and telephone number of the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

(2) The name and address of the operator of the mine where the represented miners work and the name, address, and Mine Safety and Health Administration identification number, if known, of the mine.

(3) A copy of the document evidencing the designation of the representative of miners.

(4) A statement that the person or position named as the representative of miners is the representative for all purposes of the Act; or if the representative's authority is limited, a statement of the limitation.

(5) The names, addresses, and telephone numbers, of any representative to serve in his absence.

(6) A statement that copies of all information filed pursuant to this section have been delivered to the operator of the affected mine, prior to or concurrently with the filing of this statement.

(7) A statement certifying that all information

that a nonemployee miners' representative sign a waiver of liability as a precondition to entering mine property. 8 FMSHRC 1192 (August 1986) (ALJ).

For the reasons explained below, we affirm the judge's conclusion that walkaround rights under section 103(f) extend to nonemployee representatives of miners. Adhering to the Commission's decision in Consolidation Coal Co., 3 FMSHRC 617 (March 1981), we also affirm the judge's determination that an operator may not refuse a miner's representative access to a mine for walkaround purposes solely because the representative has not filed identifying information under Part 40. However, in reversal of the judge, we hold that an operator may require a nonemployee representative to sign a nondiscriminatory waiver of liability required by the operator of all nonemployee visitors to its mine. 4/

I.

Facts and Procedural History

The relevant events in this case occurred on April 15, 1986, at the Deer Creek Mine, an underground coal mine located in Utah. At the time, the mine was owned by Utah Power and Light Company ("UP&L") but was managed and operated by Emery. (Effective April 27, 1986, the operation of Deer Creek and all other UP&L mines managed by Emery transferred to UP&L.) The International Union, United Mine Workers of America ("UMWA"), represented miners at Deer Creek and at the other UP&L mines operated by Emery. On April 15, 1986, Emery and the UMWA were parties to a collective bargaining agreement applicable to the Deer Creek Mine, the Bituminous Coal Wage Agreement of 1984 ("the Wage Agreement").

On the morning of April 15, 1986, Vern Boston, an MSHA Inspector, arrived at the mine to conduct a regular quarterly inspection. 30 U.S.C. $ 813(a). At the mine gate the inspector was met by Thomas

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filed is true and correct followed by the signature of the representative of miners.

(b) The representative of miners shall be responsible for ensuring that the appropriate District Manager and operator have received all of the information required by this part and informing such District Manager and operator of any subsequent changes in the information.

4/ This case is one of four related matters. The other three cases

are all captioned as Utah Power & Light Company, substituted for Emery Mining Corp. v. Secretary of Labor, Mine Safety and Health Administration (MSHA), & UMWA (Docket Nos. WEST 86-131-R; 86-140-R; & 86-141-R). The parties agreed that the ruling in this proceeding would control the disposition of the remaining three cases. 8 FMSHRC 1210, 1212, 1214 (August 1987)(ALJ). Our consolidated summary opinion in those three cases, consistent with the present decision, is also issued this date.

Rabbitt, a UMWA International Health and Safety Representative. The issues before us center around Rabbitt's attempt that day to accompany Inspector Boston on walkaround as an additional miners' representative. 5/

Rabbitt testified that approximately one week before his visit to the Deer Creek mine, Frank Fitzek, chairman of the UMWA's local three-person safety committee at Deer Creek, had asked him on behalf of the committee to look into allegations concerning "unwarrantable failure" citations and orders (30 U.S.C. $ 814(d)) being issued by MSHA during its quarterly inspection at Deer Creek. Rabbitt had indicated that he would visit the mine within a few weeks to assist in the inspection process. Rabbitt further testified that he telephoned Fitzek on the evening of April 14 to inform him that he would visit the mine the next day. (Tr. 87-89, 125-26, 147-48.)

Rabbitt arrived at the Deer Creek mine gate at approximately 7:00 a.m. on April 15. According to Rabbitt, Fitzek appeared and told Rabbitt that he had informed Mine Manager White that Rabbitt was going to be at the mine that day but had stated to White that he "didn't know exactly for what reason...." Tr. 89. Fitzek told Rabbitt that White was "quite disturbed" at the news of Rabbitt's visit. Id. Fitzek then left to begin his work at the mine. 6/

At approximately 7:45 a.m., Inspector Boston arrived at the mine gate, where Rabbitt was waiting. The inspector had not met Rabbitt before but was aware of his position with the UMWA. Mark Larsen, a Deer Creek employee and the third member of the local safety committee, was scheduled to accompany Boston that day on walkaround as the miners'

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5/ Rabbitt's duties during his seven and one.half years employment as an International Health and Safety Representative consisted chiefly of investigating mine accidents. Since June 1985 he had been working in Utah on the investigation of the disaster at Emery's nearby Wilberg mine. Rabbitt testified that on two occasions, in January and late February 1986, he had participated with Earl White, mine manager of Deer Creek, and with other Emery and UMWA representatives, in an underground investigation at Deer Creek in connection with a proposed petition for modification of a mandatory standard sought by Emery under section 101(c) of the Mine Act. 30 U.S.C. $ 811(c). However, prior to April 15, 1986, he had not participated in walkaround during an inspection at Deer Creek.

6/ Fitzek did not testify at the hearing. Mine Manager White,

Emery's witness, testified that on the morning of April 15, Fitzek informed him of Rabbitt's visit but denied to him that the local safety committee had "invited" Rabbitt. Tr. 175. Rabbitt testified that employees are "[q]uite often" reluctant to indicate to management that they have requested the presence of an International representative. Tr. 148. Whatever the details surrounding Rabbitt's visit to Deer Creek, the record makes clear that all three members of the local safety committee were aware of Rabbitt's visit on April 15 and there is no indication that they objected to his presence.

representative. Rabbitt asked Boston if he could accompany him as an additional miners' representative. Boston replied that he had no problem with Rabbitt's participation but would have to check with mine management concerning an additional management representative. (Under the fourth sentence of section 103(f) (n.2 supra), the Secretary's authorized representative may permit each party to have an equal number of additional representatives.)

Inspector Boston proceeded to the mine's safety office and spoke with Dixon Peacock, an Emery safety engineer and inspection representative. Peacock indicated that he had no objection to Rabbitt's participation in the inspection. Inspector Boston was then joined by safety committeeman Larsen, who had just been informed by Fitzek of Rabbitt's presence. Boston and Larsen returned to the gate and asked Rabbitt to join them. The three men then entered the mine premises together.

While Boston was changing his clothes, Larsen and Rabbitt met with Mine Manager White in his office. White questioned Rabbitt's authority to enter the mine pursuant to the Wage Agreement, asserting that Rabbitt had failed to provide mine management with the 24-hour advance notice of a visit required under the Wage Agreement. 7/ Rabbitt responded that he sought access to the mine not under the Wage Agreement, but pursuant to section 103(f) of the Mine Act. The three then went to the safety office where, joined by Peacock and Terry Jordan, another Emery safety engineer, White began reading section 103(f) of the Mine Act.

When Inspector Boston arrived in the room, a discussion ensued concerning the authority for Rabbitt's presence. Boston stated that Rabbitt had a right to participate in the inspection under section 103(f) of the Act because he was a UMWA International Representative. While agreeing that Rabbitt was an International Representative, White contended that under section 103(f) only a representative of miners who is also an employee of the operator is entitled to accompany the inspector. Tr. 32 33, 90.91, 180-82. At that point, and on that basis, White refused to permit Rabbitt to join in the inspection.

Inspector Boston then began writing a section 104(a) citation, 30 U.S.C. $ 814(a), alleging a violation of section 103(f) of the Act. Boston told White that he would give him ten minutes to reconsider and, if Emery persisted in its refusal to permit Rabbitt's participation, he would also issue Emery a section 104(b) order for failure to abate the cited violation. 30 U.S.C. $ 814(b); Tr. 33, 182. White went to another office and telephoned Dave Lauriski,

Emery's director of health and safety, informing him of his actions and of the issuance of the citation. Lauriski agreed with White's position but advised permitting Rabbitt to participate in the inspection rather than risk issuance of a section 104(b) withdrawal order. Tr. 183. White returned and told Boston that he would abate the alleged violation by allowing Rabbitt to accompany the inspection party, and Boston terminated the citation. Tr.

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7/ No issue concerning advance notice under the Wage Agreement is involved in this proceeding.

33, 39-40, 184.

During White's telephone conversation with Lauriski an additional subject arose concerning whether Rabbitt had signed Emery's waiver of liability form, a procedure that Emery required of nonemployee visitors to all of its mines, including Deer Creek. 8/ Before returning to the safety office, White telephoned the guard's shack at the mine entrance and learned that Rabbitt had not signed a waiver. After Boston terminated the initial citation, White stated that Rabbitt would have to sign a waiver before proceeding underground. Tr. 33, 39.41, 184-85. When a waiver form was produced, Rabbitt refused to sign it. Boston telephoned his supervisor for guidance, and was informed that Rabbitt could not be required to sign such a form. Following further discussion, White refused to allow Rabbitt to join the inspection party unless the form was signed. Boston then added a second alleged violation of section 103(f) to the original citation. White finally agreed to Rabbitt's participation and the citation was terminated. Emery's representatives raised no objection on that day to Rabbitt's participation based on the UMWA's failure to designate Rabbitt in its Part 40 filing that identified miners' representatives for the Deer Creek Mine.

The inspection party, consisting of the inspector, miners' representatives Larsen and Rabbitt, and Emery representatives Jordan and Peacock proceeded underground. During the inspection Rabbitt brought to Inspector Boston's attention a condition that resulted in the issuance of a citation for an alleged violation of Emery's roof control plan. Tr. 94.

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8/ On March 21, 1986, Emery instituted a waiver of liability policy requiring all nonemployee visitors to sign a waiver as a condition of entry to mine property. The Release and Waiver form, which includes a hazard check list, provides in pertinent part:

> The undersigned, in consideration of being allowed to come upon the mine property (insert name of mine), hereby forever releases, discharges and waives as to Emery Mining Corporation ("Emery"), any and all claims, rights or causes of action that the undersigned now has or may hereafter acquire against Emery on account of any damages sustained or injuries suffered, presently or hereafter, while present upon or within the mine property. The undersigned further agrees to hold Emery harmless on account of any and all liability which may attach to

Emery on account of damages sustained or injuries suffered by the undersigned while upon or within the mine property. All references to Emery shall include its officers directors, shareholders, employees and agents.

Emery Exh. 3.

On April 17, 1986, Emery filed a notice of contest pursuant to section 105(d) of the Mine Act, 30 U.S.C. $ 815(d), challenging the alleged violation of section 103(f). On April 24, 1986, Judge Morris granted the UMWA's motion to intervene, and the hearing was held on May 14, 1986.

During the hearing, a copy of the "Miners' Representation Notification" form submitted for the Deer Creek Mine to the MSHA District Manager, pursuant to Part 40, was received into evidence. Emery Exh. 7. Section A of the form lists Frank Fitzek, safety chairman, as the "Selected Representative of Miners," with his home address and telephone number. Section D lists thirteen miners with home addresses and telephone numbers as "Selected Multiple Representatives." Section E lists the UMWA as the "organization" with which the "Representative [Fitzek] is Associated." The form is signed by Fitzek, and a note identifies him as Safety Chairman of UMWA Local No. 1769. Neither Rabbitt nor any other official or health and safety representative of the UMWA International was listed on the form. Before the judge, Emery argued that the UMWA's failure to designate Rabbitt as a miners' representative on this Part 40 form also supported denial of access to Rabbitt on April 15, 1986.

Relying on the language of section 103(f) of the Act, its legislative history, and on the definition of "representative of miners" contained in 30 C.F.R. 40.1 (n.3 supra), Judge Morris, in his decision, concluded that nonemployees may be representatives of miners and participate in walkaround. 8 FMSHRC at 1202-05. He determined that both the UMWA and Rabbitt met the Secretary's definition of a miners' representative. 8 FMSHRC at 1205. Noting that Emery knew that Rabbitt was a UMWA International Representative, he concluded that Rabbitt was permitted to participate in the April 15 inspection as a matter of statutory right under section 103(f). Id. Addressing the question of Rabbitt's refusal to sign Emery's waiver, the judge found that Emery's legitimate right to condition entry to its mines by nonemployee members of the general public did not extend to miners' representatives seeking access pursuant to section 103(f) of the Mine Act. 8 FMSHRC at 1206-07. Last, citing the Commission's decision in Consolidation Coal Company, supra, the judge held that the UMWA's failure to designate Rabbitt on the Part 40 miners' representatives designation form for Deer Creek did not, by itself, justify Emery's attempt to deny Rabbitt access. 8 FMSHRC at 1208.

We granted Emery's petition for discretionary review and heard oral argument in this matter. We now affirm in part and reverse in

part.

II.

Disposition of Questions Presented

A. Nonemployee Representatives of Miners

We first address Emery's contention that the judge erred in holding that section 103(f) walkaround rights extend to nonemployee

representatives of miners. Emery does not dispute that nonemployees may serve as representatives of miners. E. Br. 12. Rather, Emery argues that nonemployee representatives may not accompany inspectors during physical inspections of mines as a matter of statutory right under section 103(f) of the Act but may participate in such inspections only through the consent of the operator or private contractual agreement.

The Commission has emphasized repeatedly that the opportunity to engage in walkaround is a vitally important statutory right granted to miners and their representatives by the Act. See, e.g., Secretary on behalf of Richard Truex v. Consolidation Coal Co., 8 FMSHRC 1293, 1298 (September 1986), and authorities cited. Although, as discussed below, this right is not unqualified, we find no authority for the broad participatory restriction based on employee status urged by Emery.

We find the language of section 103(f) dispositive of the question presented. While the term "miners' representative" is not defined in the Act, we have no difficulty concluding that Congress granted miners a broad right to designate representatives of their choosing for walk-around and other Mine Act-related purposes. The first sentence of section 103(f) (n.2. supra) confers the walkaround right upon miners and their representatives in unambiguous terms: "Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary['s] ... authorized representative during the physical inspection of any ... mine made pursuant to ... section [103(a) of the Act]...." (Emphasis added.) This sentence not only confers upon miners the basic right to choose their own representatives for purposes under the Mine Act including participation in walkaround (Truex, supra, 8 FMSHRC at 1298), but imposes no employee-status limitation as to whom they may choose.

The third sentence of section 103(f), authorizing the payment of compensation to some miners' representatives for their walkaround participation, is also instructive: "Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection...." (Emphasis added.) "Also" means "in addition ... as well ... besides, too" (Webster's Third New Int'l Dictionary (Unabridged) 62 (1971)), and its use in this provision evidences congressional awareness that some miners' representatives may be employees and others may not. The plain meaning of the third sentence is that only miners' representatives who are employees of

an operator shall be paid compensation for the period of walkaround. By equally plain implication, this language indicates that nonemployee representatives of an operator's employees share in the statutory right to engage in walkaround, but are not entitled to compensation from the operator. The fifth sentence of section 103(f) also contains a reference, with similar intent and effect, to "such representative who is an employee of the operator...."

Thus, read together, the first and third sentences of section 103(f) convince us that as a matter of statutory right a nonemployee may be chosen by the miners of a given mine as their representative and that such a representative may properly be afforded the opportunity to

participate in walkaround at that mine -- although without compensation from the operator. See also Conf. Rep. No. 461, 95th Cong., 1st Sess. 45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 1323 (1978)("Legis. Hist."): "[T]o encourage miner participation [the conference substitute bill] provide[s] that one such representative of miners, who is also an employee of the operator, be paid by the operator for his participation in the inspection...." 9/

Further, the first sentence of section 103(f) states that the exercise of the walkaround right is "[s]ubject to regulations issued by the Secretary," and the Secretary's Part 40 regulations are fully consistent with the conclusion that we reach today. Section 40.1 (n.3 supra) defines "representative of miners" as including "[a]ny person or organization which represents two or more miners at a ... mine for the purposes of the Act...." (Emphasis added.) As the Secretary has noted on review, this definition obviously includes nonemployees:

> This definition recognizes that there is no statutory limitation on the miners' right to choose their representatives. It is obvious that an "organization" cannot be an employee of the operator. This part of the definition was included in recognition of miners' frequent practice of designating either their union, or other specialized organization as their representatives.

S. Br. 9-10 (footnote omitted.) Congress specifically delegated to the Secretary the authority to issue implementing regulations under section 103(f) and we find that the Secretary's broad definition of representative is in accord with the underlying statutory text discussed above.

Finally, as we have stressed previously, section 103(f) and the Secretary's Part 40 regulations reserve to miners -- not mine operators -- the right to select their representatives for purposes under the Act, including the exercise of the walkaround right. Truex, supra, 8 FMSHRC at 1298. If adopted, Emery's position would impermissibly abridge that right of choice.

9/ Emery has cited certain other portions of the legislative history in support of its contrary argument. For example, during Senate debate over a proposed amendment that would have deleted the compensation guaranty under section 103(f) for employee miners'

representatives, Senators Javits and Helms used the words "workers," "employees" and "miners." Legis. Hist. at 812, 1053-56. Their debate, however, was concerned with the question of compensation for employee miner representatives. Contrary to Emery's arguments, the use of these words did not indicate a restrictive construction of "miners' representative," but rather related only to the question of whether such representatives who are emploYed by an operator should be compensated by that operator for participating in inspections at the operator's mine.

Accordingly, we affirm the judge's decision insofar as it held that nonemployee representatives are afforded a right under section 103(f) to accompany inspectors during physical inspections of mines. 10/

B. Part 40 Filing Requirements

We turn to the question of whether the failure to name Rabbitt as a miners' representative in the Part 40 filing submitted for the Deer Creek Mine entitled Emery to deny him entry to the mine for walkaround purposes. Relying on Consolidation Coal, supra, the judge held that, on the facts presented, the failure to list Rabbitt did not, by itself, defeat his walkaround rights. 8 FMSHRC at 1207-08. Emery argues that Consolidation Coal is factually distinguishable from the present case and is not controlling. Alternatively, Emery argues that the holding of Consolidation Coal should be reexamined and declared incorrect as a matter of law.

In Consolidation Coal the Commission held "that failure of a person to file as a representative of miners under Part 40 does not per se entitle an operator to deny that person walkaround participation under section 103(f)." 3 FMSHRC at 619. Like the present matter, that case involved an operator's objection to walkaround participation by UMWA International personnel whose names had not been listed in a Part 40 filing for the mine in question although the UMWA was the undisputed organizational representative of the miners at the mine. The Commission noted that "[n]either the statute nor the legislative history indicates that prior identification of miners' representatives is a prerequisite to engaging in the section 103(f) walkaround right...." 3 FMSHRC at 619. The Commission also observed that the Part 40 filing requirements were not promulgated merely to identify representatives for walkaround purposes but to facilitate secretarial cooperation with representatives and to further their inclusion in the range of representative functions contemplated by the Act. 3 FMSHRC at 619 n. 3.

In particular, the Commission emphasized that in promulgating the Part 40 regulations, the Secretary had noted that: "[M]iners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as a representative of miners under this part." 3 FMSHRC at 619, quoting 43 Fed. Reg. 29,508 (July 7, 1978) (Secretary's Part 40 Preamble). The Commission agreed with this position, but as a safeguard against abuse or fraud expressly recognized that "[i]n a

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10/ Emery's reliance on Council of So. Mtns. v. Martin County Coal Corp., 6 FMSHRC 206 (February 1984), aff'd sub nom. Council of So. Mtns. v. FMSHRC, 751 F. 2d 1418 (D:C. Cir 1985), is misplaced. In that proceeding, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the Commission's holding that the Mine Act does not grant nonemployee miners' representatives a general right of access to mine property for purposes of "monitoring" an operator's miner training program. However, both the Commission.and Court emphasized that the case did not involve participation in walkaround by an authorized miners' representative. 6 FMSHRC at 207; 751 F.2d at 1421 n.21 & 1423. Here, in contrast, we deal with that clearly conferred statutory right.

particular situation, absent filing, an operator may in good faith lack a reasonable basis for believing that a person is in fact an authorized representative of miners." 3 FMSHRC at 619. Thus, the Commission held that there may be "circumstances where an operator can legitimately refuse walkaround participation to a person who failed to comply with Part 40's filing requirements." Id.

In light of Emery's arguments, we have carefully reexamined the reasoning and bases of Consolidation Coal. We find that decision to represent a sound interpretation of section 103(f) and to accurately reflect the Secretary's clearly expressed intent in promulgating his Part 40 regulations. We therefore reaffirm that decision and conclude that application of its principles to the present case dictates affirmance of the judge on this question.

Here, as noted above, Rabbit's name was not listed on the representatives' notification form submitted for the Deer Creek Mine pursuant to the filing requirements of 30 C.F.R. $$ 40.2 & 40.3 (n.3 supra). However, the UMWA was named on the form as the organization with which the local employee miners' representatives were affiliated. The record leaves no doubt that this affiliation and the UMWA's status as the organization representing miners at the Deer Creek Mine were well known to Emery. The record is devoid of any prior objection by Emery to the UMWA's representative status.

There is also no dispute that Rabbitt was a valid International Representative of the UMWA, and was recognized as such by Deer Creek's management. No one at the mine on April 15, 1986 -- miners, Emery management, or Inspector Boston -" doubted Rabbitt's credentials as a UMWA official. Indeed, the facts show that Rabbitt was well known in his official capacity by Mine Manager White and had previously visited the Deer Creek Mine in connection with the proposed modification of the application of certain mandatory standards.

Part 40 permits both organizations and individuals to serve as miners' representatives. In light of the evidence developed in this case, the judge properly determined that the UMWA as an organization and Rabbitt as an official of that organization were miners' representatives of the Deer Creek miners. That same evidence defeats any assertion that Emery entertained a good faith doubt on April 15, 1986, as to Rabbitt's status as a bona fide agent of the organization representing its miners. As was the case in Consolidation Coal, the operator "was aware of who [this] perso[n] [was] and why [he was] at its mine." 3 FMSHRC at 619.

Emery's attempts to distinguish Consolidation Coal are unpersuasive. First, Emery has argued in its brief (E. Br. 31-32) and at oral argument before us (Tr. Oral Arg't 70-71) that Rabbitt's presence at Deer Creek on April 15 had not been sought by the local safety committee. Our reading of the record shows that all three members of the Deer Creek safety committee were aware of Rabbitt's visit on April 15 and did not object to his presence. Sec n.6 supra. The only objection to Rabbitt's presence revealed in the record is that of Emery. Moreover, the judge found that the local members of that committee, including Fitzek, "wanted Rabbitt's expertise and

assistance." 9 FMSHRC at 1205. Rabbitt's previously described testimony concerning the safety committee's request that he visit the Deer Creek mine provides substantial evidence to support the judge's finding. Second, Emery asserts that the inspection in Consolidation Coal was conducted pursuant to a miner's request under section 103(g) of the Mine Act, 30 U.S.C. $ 813(g)(1), while the April 15 inspection at Deer Creek was a regular, quarterly inspection conducted pursuant to section 103(a) of the Act. This case does not require us to detail the interrelationship between sections 103(a) and (g). The concise answer to this argument is that section 103(f), by its express terms, links walkaround rights to inspections made pursuant to section 103(a).

In further challenging the rationale of Consolidation Coal, Emery relies on the principle that an agency must comply with its own regulations, which in this instance, require the filing of information identifying miners' representatives. First, we note that here it is a failure of the miners' representative to file under Part 40 that is at issue, not a failure of the government to follow its regulations. Second, it is settled that an agency possesses broad authority to delineate, explain, and interpret its regulations. See generally, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986)(Scalia, J.). With respect to the Part 40 regulations, the Secretary did so in his promulgation of the rules and indicated clearly that a failure to file under Part 40, by itself, does not vitiate walkaround rights.

For the above reasons, we agree with the judge that the failure to specifically name Rabbitt as a miners' representative in the Part 40 filing did not defeat his right to accompany the MSHA inspector. Nevertheless, we are constrained to observe that this type of issue has arisen several times before us on review. Thus, we are aware that a level of uncertainty is present in the mining community concerning the purpose of and the need for adherence to the Part 40 filing requirements. Clarity in the administration and enforcement of the Act is vital. In promulgating the Part 40 regulations, the Secretary expressly stated that he would monitor the experience of representation by organizations in order to address any problems encountered. 43 Fed. Reg. 29,508 (July 7, 1978). The interests of the mining community and the cause of cogent enforcement might be well served by instituting secretarial review of the Part 40 filing requirements with the object of clarifying the intent, implementation and need for compliance with filing requirements by miners' representatives.

C. Waiver of Liability Policy

We next turn to the issue of whether, in view of our conclusion that a nonemployee may be designated as a miners' representative authorized to accompany an MSHA inspector during an inspection, Emery could nonetheless require such nonemployee representative to sign a waiver of liability as a condition of entry into the mine. The administrative law judge concluded that Emery's insistence that Rabbitt sign a waiver before entering its mine was an impermissible interference with the exercise of the miners' walkaround rights under section

103(f). 11/ For the reasons that follow, we reverse.

The right given to miners to have a representative accompany an inspector is an important right. Congress concluded that miner participation in inspections "will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." S. Rep. No. 181, 95th Cong., 1st Sess. 28-29 (1977), reprinted in Legis. Hist. 616-617. Nevertheless, the right to accompany an inspector is not an unqualified right. Certain qualifications on the exercise of the right are stated in section 103(f) itself. Section 103(f) begins by providing that the exercise of the right is "[s]ubject to regulations issued by the Secretary." 12/ 30 U.S.C. $ 813(f). Also, rather than mandating that a miners' representative be present during any inspection, the section simply requires that a representative "be given an opportunity to accompany" the inspector and it is expressly provided that "compliance with [section 103(f)] shall not be a jurisdictional prerequisite to the enforcement of ... this Act." Id. Further, although more than one miners' representative may accompany the inspector if an inspector determines that such participation would aid the inspection, only one miners' representative employed.by the operator is entitled to compensation from the operator for the time spent on the inspection. Id.; see also Magma Copper Co. v. Secretary of Labor, 645 F.2d 694 (9th Cir. 1981). Thus, Congress provided miners' representatives a carefully delineated right that, although important, is far from an absolute, unconditional right of accompaniment. 13/

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11/ The judge also addressed whether Emery's waiver of liability policy violated the laws of the State of Utah. The proper concern in this proceeding, however, is whether Emery violated the Mine Act. We express no opinion, therefore, on any question concerning state law.

12/ The Secretary has not promulgated a regulation addressing the relationship between 103(f) rights of nonemployee representatives and waiver of liability policies. Rather, this theory of violation was enunciated by the Secretary for the first time in the enforcement proceeding presently before us.

13/ The Secretary of Labor's Interpretative Bulletin addressing section 103(f) walkaround rights also recognizes that the exercise of walkaround rights of miners' representatives is subject to appropriate qualifications:

> Considerable discretion must be vested in inspectors in dealing with the different situations that can occur

during an inspection. While every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed, and orderly inspection. The inspector cannot allow inordinate

In this case the operator asserts that its requirement that a waiver of liability be executed was a good faith, reasonable condition of entry applicable to all nonemployee visitors, and that Rabbitt's refusal to sign the waiver justified Emery's denial of entry into its mine. In essence, Emery argues that its policy requiring waivers of liability as a condition of entry into its mine is proper because it protects a legitimate private property right of the operator without impermissibly interfering with the exercise of the statutory walkaround right granted to miners under section 103(f).

The Supreme Court has recognized that in appropriate circumstances conflicts between statutory rights of employees and private property rights of employers must be resolved by seeking a proper and balanced accommodation between the two. See, e.g., Hudgens v. NLRB, 424 U.S. 507, 521-22 (1976). Such accommodation between employees' statutory rights and employers' property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956). In striking these balances, the Court has approved restrictions upon organizational activity under the National Labor Relations Act 29 U.S.C. $ 151 et seq. (1982) carried on by nonemployees on employers property (e.g., Babcock & Wilcox, supra, 351 U.S. at 112-14), and limitations of access to employers' business records by nonemployee bargaining representatives (Detroit Edison Co. v. NLRB, 440 U.S. 301, 318-19 (1979)). See also Marshall v. Barlow's, Inc., 436 U.S. 307, 314-17 (1978)(in part applying the Babcock & Wilcox principles to strike down warrantless inspections under the Occupational Safety and Health Act of 1970, 29 U.S.C. $ 651 et seq. (1982) ("OSHAct")); Council of So. Mtns., supra, (nonemployee miners' representative not entitled to monitor training classes on mine property.) The Court has emphasized that in fixing "the locus of accommodation," the difference between activities carried on by employees and by nonemployees may be, in a given context, "one of substance." Hudgens, supra, 424 U.S. at 521-22 & n.10. With these general principles in mind, we turn to a balancing of the competing interests at issue here.

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delays in commencing or conducting an inspection because of the unavailability of or confusion surrounding the identification or selection of a representative of miners. Where necessary in order to assure a proper inspection, the inspector may limit the number of representatives of the operator and miners participating in an inspection. The inspector can also require individuals

> asserting conflicting claims regarding their status as representatives of miners to reconcile their differences among themselves and to select a representative. If there is inordinate delay, or if the parties cannot resolve conflicting claims, the inspector is not required to resolve the conflict for the miners and may proceed with the inspection without the presence of a representative.

43 Fed. Reg. 17546 (1978).

Emery's evidence concerning the adoption of its waiver of liability policy established that following the disaster at Emery's Wilberg Mine in December 1984 in which 27 miners died, large portions of Emery's liability insurance coverage were canceled and Emery was unable to replace the canceled coverage. As a result, Emery decided to attempt to limit its liability exposure. Accordingly, the challenged policy requiring nonemployees to sign the waiver of liability was implemented. 8 FMSHRC at 1195-96. (State and federal mine inspectors were not asked to sign the waiver forms. 8 FMSHRC at 1196). The judge rejected Rabbitt's suggestion that the waiver policy was adopted to restrict his activities at Emery's mines. 8 FMSHRC at 1206. Instead, the judge found the reasons set forth by Emery concerning its adoption of the policy to be credible. Id. In sum, it is clear from the record that the policy requiring nonemployee visitors to Emery's mines to execute liability waivers was adopted in response to Emery's serious difficulties in obtaining a satisfactory level of liability insurance coverage and was not targeted at nonemployee miners' representatives in an attempt to hinder the exercise of their representational rights. Thus, the record demonstrates that Emery's interest in obtaining liability waivers from nonemployees entering its mines was legitimate and substantial.

The interests of the miners and of their nonemployee representative in having such representative accompany an MSHA inspector into Emery's mines without executing a waiver of liability must also be considered. On a basic level, their interest in being able to do so appears obvious. Most, if not all, individuals would prefer to participate in any undertaking or activity without having to sign a waiver of liability prior to such participation. Such personal desires alone, however, are insufficient to override legitimate private property interests of the party requesting a waiver. Of more importance is the effect that execution of such a waiver would have on the miners' right to have a nonemployee accompany an MSHA inspector as the miners' representative during an inspection. On this question, we find that the record is devoid of convincing evidence supporting the claim of interference or chilling effect raised by the Secretary and the UMWA.

As the judge found, Rabbitt himself had signed a similar "Visitor Release" in visits to Emery's mines, including the Deer Creek Mine. 8 FMSHRC at 1189 & n. 9. This release stated that the visitor "will not hold Emery ... liable should [he or she] suffer injury or death while ... in the mines." Emery Exh. 4. Further, at oral argument, counsel for the UMWA expressed

uncertainty that requiring nonemployee miner representatives to sign such waivers would actually hinder their entry into the mines in their capacity as representatives of miners. Tr. Oral Arg't 65-67. (The same representatives participate in inspections and investigations under the applicable collective bargaining agreement and in this capacity are required to sign waivers. Tr. 268; 8 FMSHRC at 1197.) In sum, no specific evidence of an identifiable impairment of a nonemployee representative's entry into Emery's mines was presented. Nor has any other material impairment of rights granted to miners under section 103(f) been established in connection with the inspection at issue. Here, Rabbitt was serving as an additional miners'representative, the miners also being represented on the inspection by

Mark Larsen, an employee of Emery and member of the UMWA safety committee at the Deer Creek Mine. Although there is evidence that during the inspection Rabbitt pointed out a roof control violation to the inspector, there is no suggestion that the miners would not have had effective walkaround representation if Rabbitt had not appeared to participate in the regular inspection taking place that morning.

Balancing the competing interests at stake here, and based on the record before us, we conclude that Emery's requirement that Rabbitt, a nonemployee, as part of Emery's general policy directed at nonemployees entering its mines, sign a waiver of liability as a condition of entry did not violate the Mine Act. Rather, we view this condition of entry as good faith, nondiscriminatory attempt to protect a legitimate and substantial private property interest. Cf. Hercules, Inc. v. NLRB, 833 F.2d 426, 429 (2d Cir. 1987)(nonemployee industrial hygienist granted access to plant upon condition that agreement not to divulge trade secrets was signed). Although the Mine Act grants nonemployees access to operators' mines when serving as miners' representatives, it does not address the economic question of who bears the cost of injuries that they might suffer while they are on the mine site in their representative capacity. Accordingly, based on the record before us, we find that the balance of legitimate competing interests tips in favor of Emery on the question of whether Emery's requirement that a nonemployee miners' representative sign a waiver of liability as a condition of entry into its mine violates the Mine Act. The judge's contrary conclusion is therefore reversed.

III.

Conclusion

We have concluded that Emery's denial of entry to Rabbitt based on his status as a nonemployee cannot stand. The record shows that this was the initial objection raised by Emery on April 15, 1986. The evidence also demonstrates that even had Rabbitt agreed to sign the waiver, Emery would have interposed its nonemployee objection. Under these circumstances, we conclude that insofar as Emery denied Rabbitt access for walkaround purposes based on its nonemployee objection, its conduct violated the Act. The fact that Emery's insistence that Rabbitt sign the waiver did not violate the Mine Act will be taken into account in determining the appropriate civil penalty to be assessed, an issue not presented by this proceeding.

Accordingly, for the foregoing reasons, the judge's decision is affirmed insofar as it held that a nonemployee may serve as a miners' representative under section 103(f) and that the failure to specifically name Rabbitt in a Part 40 filing did not defeat his right to accompany the inspector. We reverse the decision insofar as it found that Emery's waiver of liability policy violates the Mine Act.

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

Chairman Ford, concurring in part and dissenting in part:

Subject to the caveats discussed below, I agree with my colleagues in the majority that section 103(f) of the Mine Act, 30 U.S.C. 813(f), allows for walkaround participation in MSHA inspections by nonemployees. I further agree that walkaround participation in such circumstances can be made subject to reasonable nondiscriminatory preconditions such as signing the liability waiver at issue in this case. I part company with my colleagues, however, on their holding that walkaround participation by a nonemployee purporting to be a miner representative can not be made contingent upon his compliance with the filing requirements of 30 C.F.R. Part 40. Accordingly, I would hold that a mine operator does not violate the Mine Act by refusing access to a nonemployee who has not complied with Part 40.

To begin with, walkaround rights are textually and effectually conditioned by the introductory language of section 103(f) itself: "Subject to regulations issued by the Secretary ... a representative authorized by [the] miners shall be given an opportunity to accompany the Secretary or [her] authorized representative during the physical inspection of any coal or other mine..." The "regulations" referred to in section 103(f) are obviously those set forth in Part 40. Thus, the "opportunity to accompany", i.e., the "walkaround right", is contingent upon the miner representative's compliance with the requirements of Part 40. 1/

The requirements of Part 40 are not burdensome. Briefly stated, the representative of miners "shall file" with the appropriate MSHA District Manager the following: (1) his or her name, address and telephone number, or in the case of an organization such as the UMWA, the "official or position" who is to serve as representative; (2) the name, address and identification number of the subject mine; (3) a copy of the document evidencing the designation of the representative; (4) a statement of those statutory functions the representative is authorized to perform; (5) names, addresses and telephone numbers of alternate representatives; (6) a statement that all information filed has been delivered to the affected mine operator; and (7) a signed certification that the information provided is true and correct. 30 C.F.R. 40.3.

Of particular importance to this case are requirements (1), (3), (4) and (6). They not only establish the representative's bona fides,

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1/ The Secretary is correct in asserting that Part 40 is meant to

identify miner representatives for other purposes in the Act as well. Indeed, the authority headnote to Part 40 appears to cite every instance in the Mine Act where "representative of miners" or a variant thereof is used. I find it compelling, however, that section 103(f) is the only instance that directs the Secretary to issue regulations addressing the activities of miner representatives and the only instance where the term "authorized miner representative" is used. [Emphasis added].

they also put the affected mine operator on notice as to the identity, authority, and scope of responsibilities of the nonemployee representative when he presents himself at the mine and asserts his right of access for walkaround purposes. In such circumstances, the mine operator is in no position to question the representative's authority since section 30 C.F.R. 40.4 requires the operator to post the information provided by the representative, pursuant to item (6) above, on the mine bulletin board.

Had Mr. Rabbitt or his employer, the UMWA, complied with Part 40 -particularly after having been denied access to another of Emery's mines on an earlier occasion - Emery's refusal to allow him to participate in the inspection would have been a violation of section 103(f). On the basis of the record here, however, Emery cannot be said to have denied access to an "authorized miner representative" as that term is used in section 103(f). Indeed, even absent the written filing and operator notice requirements of Part 40, the evidence that Mr. Rabbitt was specifically designated as a walkaround representative by two or more miners in the Deer Creek Mine is insufficient at worst, equivocal at best. 2/

It is well-established that an agency is bound by its own regulations. See e g., United States v. Nixon 418 U.S. 683 (1974); Vitareli v. Seaton, 359 U.S. 535 (1959); and Accardi v. Shaughnessy, 347 U.S. 260 (1954). Here the Secretary requires certain filings pursuant to Part 40 that would establish the credentials of a non employee as an authorized miner representative but then proceeds to ignore the lack of compliance. To be sure, the Secretary does not "authorize" miner representatives; the miners do. Her MSHA district offices, however, are meant to serve as repositories of all information documenting that individuals who purport to be miner representatives have indeed been authorized by the miners for purposes of walkaround participation under section 103(f). Had the Secretary insisted on compliance with Part 40 by both her own representatives and Mr. Rabbitt, the citation at issue would have had some credibility.

Much has been made of a sentence in the preamble to Part 40 (not, incidentally, printed in the Code of Federal Regulations) which states, "[I]t should be noted that miners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as a representative of miners under this part." 43 F.R. 29508 (July 7, 1978). See also Consolidation Coal Co. v. Secretary and UMWA, 3 FMSHRC 617 (1981). Read together with the mandatorily - styled provisions of Part 40, the Secretary

appears to be saying, "This is what you must do in order to be considered an 'authorized miner representative' under section 103(f), but if

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2/ I am not persuaded as my colleagues appear to be, that a lack of the safety committeemen s objections to Mr. Rabbitt's presence at the mine somehow translates to authorization for him to have served as the designated walkaround representative on April 15, 1986. (Majority Slip Opinion at pp. 5 and 12). Furthermore, only one of those committeemen was called to testify.

you don't comply you may, nevertheless, be considered an 'authorized miner representative' under section 103(f)." I find that construction of Part 40 to be illogical and absurd particularly when the walkaround right in section 103(f) was intended by Congress to be "subject to" the very regulations that appear to be honored more in the breach than in the observance. 3/ The gloss placed on Part 40 by the Secretary's preamble directly contradicts the regulations themselves and therefore, the Commission need not give it any weight. See Udall v. Tallman 380 U.S. 1 (1965)(an agency's interpretation of an administrative regulation may not be set aside unless it is plainly erroneous or inconsistent with the regulation). Furthermore, the Secretary's position here with respect to the authority of a contemporaneous interpretative statement issued with a regulation is contrary to the Secretary's position taken in Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986).

At oral argument it was suggested that the Commission ought to recognize a presumption that a representative of a collective bargaining agent is also a representative of the miners for purposes of section 103(f). (Statements of UMWA Counsel, Oral Argument, July 30, 1987, at pp. 57-61). Such a presumption, it was argued, would eliminate the need to file under Part 40. That argument, while appealing to the majority (Slip opinion at p. 12), is unpersuasive on several counts.

First, Part 40 delineates "representative of miners" to include "organizations", presumably labor organizations. As such, they too are subject to the filing requirements of Part 40. Second, absent the information required by a filing, neither the Secretary nor the operator is placed on notice as to what statutory functions the collective bargaining agent's representative is authorized to perform, including the walkaround function. 30 C.F.R. 40.3(a)(4). Third, and most importantly, as this Commission has often held, "the Mine Act is not an employment statute." United Mine Workers of America on behalf of James Rowe et al. v. Peabody Coal Co., 7 FMSHRC 1357, 1364 (1985) Aff'd 822 F.2d 1134 (D.C. Cir. 1987).

In affirming the Commission's holding in the above case, the D.C. Circuit explicitly rejected the Secretary's argument that "miner", as used in the Act, could be expanded to include persons on layoff status "contractually entitled to employment" by reason of the collective bargaining agreement's seniority provisions. We certainly cannot infer from the Act that Congress intended privately-bargained contracts to determine who is or is not a miner entitled to receive the section 115 safety training," Id at 1148.

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3/ As to any loss of statutory rights in this case, I note that Mr. Larsen, an employee of the Deer Creek mine, a mine safety committeeman, and an authorized miner representative who filed pursuant to Part 40, was a member of the inspection party and was not challenged by Emery. Furthermore, section 103(f) explicitly provides that where there is no authorized representative, the inspector is to consult with a reasonable number of miners on matters of safety and health as he moves through the mine.

Here, likewise, the status and authority of a purported "authorized miner representative" should be established by the labor contract-neutral indicia of Part 40 in determining who is entitled to accompany MSHA inspectors under section 103(f).

In summary, I join with my colleagues in criticism of the Secretary's lackadaisical attitude toward Part 40 compliance, but fundamental fairness dictates that the citation be vacated since Emery cannot be found to have denied access to an "authorized miner representative" when it denied access to a nonemployee who did not comply with Part 40. 4/

Mine operators, of course, have the option of granting access to anyone they choose including nonemployee "Walkarounds" who have not complied with Part 40. My views address only those situations where the operator challenges the credentials of, and denies access to a nonemployee who purports to be an authorized miner representative for purposes of section 103(f), but who has not complied with the Secretary's filing requirements.

Accordingly, I would reverse the judge's decision.

Ford B. Ford, Chairman

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4/ It is of little consequence that Emery did not question the lack of Part 40 compliance on the day Mr. Rabbitt sought access to the mine (April 15, 1986), since the issue was fully presented to the judge below as an alternative defense to the citation.

Commissioners Doyle and Nelson, concurring in part and dissenting in part:

We join in the majority's decision to the extent that it affirms the administrative law judge's conclusions that walkaround rights under section 103(f) of the Mine Act extend to nonemployee representatives of miners and that an operator may not deny such walkaround rights solely because the representative has not filed identifying information under 30 C.F.R. Part 40. We respectfully dissent, however, from the majority's decision to the extent that it reverses the judge and permits an operator to extract a release and waiver of liability from the nonemployee miners' representative before he is permitted to exercise his section 103(f) rights.

Congress, in granting to the miners' authorized representative an opportunity to accompany the inspector for the purpose of aiding the inspection, placed no conditions or qualifications upon the representative's exercise of this statutory right, other than it being subject to regulations to be issued by the Secretary of Labor. While it is true, as the majority states, that the statute does not mandate the presence of a miners' representative during an inspection nor require the operator to pay more than one employee representative, the fact remains that the only condition placed by Congress on the exercise by the miners' representative of his statutory right to accompany the inspector is that the right is subject to regulations issued by the Secretary. 1/

We do not disagree with the majority that, under labor relations law, there must be a balanced accommodation between the rights granted to employees under the National Labor Relations Act ("NLRA") and the legitimate property rights of employers. 2/ "However, these [labor] cases arise under statutes whose very purpose is the governance of labor-management relations.... The entirely discrete purpose of the Mine Act ... prevent[s] us from transferring this reasoning to the

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1/ The Commission has decided that those regulations do not operate to deprive Mr. Rabbitt of his right to accompany the inspector.

2/ The decision in Council of So. Mtns., 751 F. 2d 1418 (D.C. Cir. 1985) cited by the majority in support of this proposition rests not on a balancing of employers' property rights with employees' statutory rights but rather on a finding by the court that no statutory right to monitor training classes existed. 751 F.2d 1422. See also n. 10 of the majority's decision.

It should be noted also that none of the cited cases go beyond accommodation of the rights granted.under the NLRA to deal with the question of liability or indemnification for injuries suffered while those rights are being exercised.

Mine Act." UMWA v. Peabody Coal Co., 7 FMSHRC 1357, 1365, aff'd sub nom. Brock v. Peabody Coal Co., 822 F. 2d 1134 (D.C.Cir. 1987). Accordingly, we do not find the labor relations cases, nor the balancing of interests test, to be dispositive of the issue at hand. 3/

Rather, we submit that the proper test for determining whether Emery may impose its waiver of liability policy is whether the imposition of this requirement upon the miners' representative interferes with his representational rights, Council of So. Mtns., v. FMSHRC, 751 F.2d 1418, 1420, 1422 and n. 31 (D.C. Cir. 1985), or inhibits the miners or the representative from exercising those rights granted to them under the Mine Act.

Section 105(c)(1) of the Mine Act provides, in part, as follows:

> No person shall... interfere with the exercise of the statutory rights of any ... representative of miners ... because of the exercise by such ... representative of miners ... of any statutory right afforded by this Act.

The legislative history of section 105(c)(1) states:

> The wording of section 10[5](c) is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. (Emphasis added.)

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (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 624 (1978).

Irrespective of whether Emery's Release and Waiver would be enforceable or would fail for lack of consideration, we believe that the very act of requiring the nonemployee miners' representative to sign it, before permitting him to exercise a right that the Commission has unanimously agreed was granted to him by the Mine Act, interferes with his statutory rights and is inhibiting both to him and to the miners who might otherwise request his assistance. As the procedure advocated by Emery is contrary to Congress' intent as set forth in the legislative history of section 105(c)(1), we would affirm the administrative law

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3/ The majority also notes that Mr. Rabbitt was an ',additional miners' representative" and that "there is no suggestion that the miners would not have had effective walkaround representation if Rabbitt had not appeared to participate..." (Emphasis added.) We find the distinction between one miners' representative and another to be without merit and the relative effectiveness of the representation to be an inappropriate consideration.

judge's conclusion that the operator may not require the representative to sign a release and waiver of liability in order to exercise his section 103(f) rights. 4/

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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4/ We intimate no view in this dissent as to the existence or extent of any liability on Emery's part in the event of injury to Mr. Rabbitt while underground nor as to the enforceability of the waiver. Those matters lie beyond the purview of the Mine Act.

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