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SOL (RONNIE BEAVERS) AND UMWA V. KITT ENERGY
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 15, 1988

SECRETARY OF LABOR,
on behalf of RONNIE D.
BEAVERS, et al.

and

UNITED MINE WORKERS OF AMERICA

v. Docket No. WEVA 85-73-D

KITT ENERGY CORPORATION

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

DECISION

BY THE COMMISSION:

This case involves a discrimination complaint brought by the Secretary of Labor on behalf of Ronnie D. Beavers and 25 other miners against Kitt Energy Corporation ("Kitt"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) (the "Mine Act"). The issue presented on review is whether Kitt violated section 105(c) of the Mine Act, 30 U.S.C. $ 815(c), when it laid off the complainants who were surface miners, notwithstanding their seniority in terms of length of service and their technical ability to perform the remaining underground jobs, solely because they required additional health and safety training under 30 U.S.C. $ 825 and 30 C.F.R. Part 48

before they could perform those jobs. 1/ Administrative Law Judge

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1/ Section 115 states in part:

(a) Approved program; regulations

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

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this [Act], use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this [Act], use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;

(4) any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the

Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

(5) any training required by paragraphs (1), (2)

Roy J. Maurer held that the complainants were "miners" within the meaning of the Act and therefore were entitled to the training required by the Mine Act and 30 C.F.R. Part 48. The judge concluded that Kitt, by laying off the complainants, unlawfully interfered with their statutory rights to training in violation of section 105(c)(1) of the Act. 2/ 8 FMSHRC 1342 (September 1986)(ALJ). The judge assessed a

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> or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.
>
> (b) Training compensation
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> Any health and safety training provided under subsection (a) of this section shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while taking such training, and new miners shall be paid at their starting wage rate when they take the new miner training....

30 U.S.C. $ 825(a) & (b).

30 C.F.R. Part 48 implements section 115 of the Act and sets forth the regulatory training requirements for miners.

2/ Section 105(c)(1) provides in pertinent part:

> Discrimination or interference prohibited; complaint; investigation; determination; hearing
>
> 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 has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine ... or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and

potential transfer under a standard published pursuant to section [101] ... or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for

civil penalty of $1,000 for the violation of section 105(c)(l), awarded the complainants back pay, and ordered Kitt to pay attorneys' fees. 8 FMSHRC at 1355; 9 FMSHRC 93 (January 1987)(ALJ). 3/ Because we conclude that the judge granted rights to the complainants beyond the text and intent of section 115, we reverse.

The facts are not in dispute. Kitt owns and operates the Kitt No. 1 Mine, an underground coal mine located at Philippi, West Virginia. Both Kitt and the UMWA, the recognized representative of miners at the mine, are parties to the National Bituminous Coal Wage Agreement of 1981 (the "Wage Agreement"). On August 29, 1983, as the result of a legitimate reduction and realignment of the workforce, Kitt reduced the total underground and surface workforce at the mine from 565 to 210 miners and the surface workforce from 91 to 59. On September 6, 1983, Kitt laid off 43 more miners, reducing the total workforce to 167 miners and the surface workforce to 15.

To determine which employees would be retained in the jobs remaining after each layoff, Kitt was bound by the Wage Agreement. Article XVII(b)(1) of the Wage Agreement provides:

> In all cases where the workforce is to be reduced, employees with the greatest seniority at the mine shall be retained provided that they have the ability to perform available work.

"Seniority" is defined in Article XVII(a) of the Wage Agreement as "length of service and the ability to step into and perform the work of the job at the time the job is awarded." In deciding whether a miner had such "ability to step into and perform the work of the job," Kitt considered whether the miner met the "experienced miner" definitions of 30 C.F.R. Part 48, 30 C.F.R. $$ 48.2(b) and 48.22(b). 4/ Kitt deter-

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> employment on behalf of himself or others of any statutory right afforded by this [Act].

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

3/ Before the judge, the United Mine Workers of America ("UMWA") sought and was granted the right to participate in the case as an intervenor.

4/ 30 C.F.R. $ 48.2(b) defines "experienced [underground] miner" as:

[A] person who is employed as an underground miner, as defined in paragraph (a)(1) of this section, on the effective date of these rules: or a person who has received training acceptable to MSHA from an appropriate State agency within the preceding 12 months; or a person who has had at least 12 months experience working in an underground mine during the preceding 3 years@ or a person who has received the training for a new miner within the preceding 12 months as prescribed in $ 48.5 (Training of new

mined that in order to be retained as an employee and to be assigned one of the remaining jobs at the mine, a miner was required to have training or prior experience as defined by the regulations or to have been employed underground on October 13, 1978, the effective date of the training regulations (the "Grandfather Provision").

At the time of Kitt's reduction of its workforce, the complainants were surface miners who sought to be employed in underground positions remaining at the mine. Of the 26 complainants, 23 did not qualify as "experienced miners" pursuant to 30 C.F.R. $ 48.2(b) and therefore required safety and health training before Kitt would consider them eligible to work underground. Because they lacked the appropriate underground training they were laid off by Kitt. (Three other complainants qualified as "experienced miners" by virtue of the Grandfather Provision, but were laid off due to Kitt's mistaken belief that they were not. qualified.) The parties stipulated that had Kitt not interpreted the Wage Agreement to require underground training, the complainants would have been placed in the jobs that they sought. The parties also agreed that all of the miners who were retained as Kitt's employees in the underground positions sought by the complainants qualified as experienced miners in accordance with Kitt's policy.

On or about September 7, 1983, MSHA advised Kitt that use of the training provisions as a basis to lay off miners conflicted with MSHA's training regulations and that the laid off employees should be recalled. Kitt disagreed with MSHA's position, but in order to limit its exposure to potential civil penalties and damages, Kitt abandoned its policy of laying off surface miners who required underground health and safety training. On September 13 and 14, 1983, Kitt recalled the complainants to work and provided them with the necessary training to permit them to work underground.

Subsequently, the complainants filed a complaint with MSHA alleging that they had been unlawfully discriminated against when they were laid off by Kitt. In addition, the UMWA challenged the experienced miner policy through the arbitration procedure of the Wage Agreement. On February 24, 1984, the arbitrator held that Kitt's interpretation of the phrase "ability to step into and perform the work of the job" to

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miners) of this Subpart A.

30 C.F.R. $ 48.22(b) defines "experienced [surface] miner" as:

[A] person who is employed as a miner, as defined in paragraph (a)(1) of this section, on the effective date of these rules: or a person who has received training acceptable to MSHA from an appropriate State agency within the preceding 12 months; or a person who has had at least 12 months' experience working in a surface mine or surface area of an underground mine during the preceding 3 years; or a person who has received the training for a new miner within the preceding 12 months as prescribed in $ 48.25 (Training of new miners) of this Subpart B.

include a requirement that a miner meet the "experienced miner" definitions of 30 C.F.R. Part 48 did not violate the Wage Agreement.

On January 8, 1985, following an investigation of the complainants' allegations, the Secretary filed a complaint with the Commission on the complainants' behalf. The complaint asserted that by laying off the complainants because they lacked underground training, Kitt had violated section 105(c) of the Mine Act. The complaint requested that Kitt be ordered to reimburse the complainants for all backpay and damages resulting from the layoff. Judge Maurer decided the case on the basis of stipulated facts and cross-motions for summary decision. In holding for the complainants, the judge focused upon the fact that when the complainants were laid off they were "miners" within the meaning of the Mine Act and therefore were entitled, in the judge's view, to the training granted by section 115 and Part 48. The judge stated:

> The fact that all the employees of Kitt who were considered for lay off were "miners" within the meaning of the Act at the time the operator picked and chose among them based on the federal training requirements is ... decisive in this case. As "miners", the complainants ... were entitled to whatever training was required under section 115. By laying off these complainants rather than providing the required training, the operator interfered with their statutory right to training under section 115.

8 FMSHRC at 1354. 5/

The Commission granted Kitt's petition for discretionary review. The principal question on review is whether the judge erred in concluding that the complainant@ enjoyed a statutory and regulatory right to obtain the training that would have entitled them to assignment to the remaining underground jobs.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of prohibited discrimination under section 105(c) of the Act, the complainant bears the burden of proving (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of David 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

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5/ The judge also found that the three complainants who qualified as experienced miners under the Grandfather Provision, but who Kitt mistakenly believed would need training, were unlawfully discriminated against because they were laid off based upon Kitt's "perceived lack of federally mandated training" on the part of the miners. 8 FMSHRC at 1354.

Castle Coal Co., 3 FMSHRC 803, 817-18 @April 1981). See also Eastern Assoc. Coal Corp. v. FMSHRC 813 F.2d 639, 642 (4th Cir. 1987), Donovan v. Stafford Constr. 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 Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

If the complainant does not establish that he engaged in a protected activity, the discrimination complaint must fail. The judge concluded that "[t]he insistence of the complainants on their right to be provided training ... is activity protected by the Act." 8 FMSHRC at 1354. Thus, the initial question, and the one dispositive of this case, is whether under the Mine Act the complainants had a protected right to the training at issue here.

Section 115(a) of the Mine Act provides that "new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground@' The complainants in this case were "miners" since at the time of the alleged act of discrimination they fell within the broad definition contained in section 3(g) of the Mine Act. 6/ Under the Secretary's regulations implementing section 115(a) of the Mine Act, the complainants were "new miners having no underground experience" because they did not have the requisite degree of underground training or experience set forth in 30 C.F.R. $ 48.2(b) and (c), supra. As a consequence, under the Mine Act Kitt could not have transferred the complainants to underground positions without providing them training. Instead, Kitt laid off complainants in favor of other miners who already were qualified as experienced underground miners and thus did not require additional section 115(a) training. We conclude that in asserting that Kitt's policy in choosing miners for layoff contravened the Mine Act, complainants claim too broad a statutory right to operator-provided training.

In Peabody Coal Co., 7 FMSHRC 1357, 1363 (September 1985), and Jim Walter Resources, 7 FMSHRC 1348, 1354 (September 1985), aff'd sub nom. Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987), the Commission concluded that mine operator policies to bypass for rehire laid-off individuals because those individuals lacked current safety and health training required by the Mine Act did not constitute discrimination under the Mine Act. The Commission determined that

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6/ Section 3(g) of the Act provides:

For the purpose of this [Act], the term --

"miner" means any individual working in a coal or other mine.

30 U.S.C. $ 802(g).

section 115 of the Act grants training rights to "new miners" and that laid-off individuals do not become entitled to the training rights of section 115 until they are rehired as miners. Thus, since there is no statutory right to operator-provided training for those on lay off status, we concluded that an operator's refusal to rehire a laid-off individual due to lack of required training does not violate the Mine Act.

In Peabody and in Jim Walter the Commission stressed that the Mine Act is a health and safety statute, not an employment statute. The Commission noted that in enacting section 115 Congress was concerned with preventing "the presence of miners ... in a dangerous mine environment who have not had ... training in self-preservation and safety practices." S. Rep. No. 181, 95th Cong., 1st Sess. 50 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637-38 (1978). The Commission determined that the rights of particular laid-off individuals to recall, including the extent to which an operator can favor for recall fully trained persons over persons with greater length of service, properly are within the sphere of collective bargaining and arbitration. 7 FMSHRC at 1364; 7 FMSHRC at 1354.

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision. Brock v. Peabody Coal Co., supra, 822 F.2d 1134. In its decision the D.C. Circuit also emphasized that the purpose of section 115 of the Mine Act and the Secretary's training regulations is to protect the health and safety of miners. 822 F.2d at 1146. The court summarized the purpose of sections 115 and 104(g) 7/ as follows:

> Sections 115(a) and 104(g)(1) of the Act therefore confer upon a "miner" the right not to "work" or to be "employed" in the mines without having first received the requisite training. Put more simply, the Act accords a miner the right not to be placed in a dangerous environment without the benefit of proper safety training. In order to protect this central statutory right, Congress in 1977 amended section 105(c)(1) and inserted section 104(g)(2), thereby conferring upon a miner the corollary right not to be discharged or otherwise discriminated against either when he or she exercises the right by

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7/ Section 104(g)(1) of the Act, 30 U.S.C. $ 824(g)(1), requires

the Secretary to withdraw from a mine any miner who has not received the requisite safety training required by section 115 of the Act. Section 104(g)(2) provides that no miner withdrawn from a mine pursuant to section 104(g)(1) of the Act shall be discharged or discriminated against as a result of the withdrawal and further provides that such miner shall not suffer loss of compensation during the period necessary for such miner to receive the requisite safety training required by section 115 of the Act.

> refusing to work without having received the required training or when the Secretary issues an order withdrawing that miner from the mine.

822 F.2d at 1147 (footnotes omitted). The court stated that it could not "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." 822 F.2d at 1148. The court concluded by holding that "[n]either the language Congress employed nor the legislative history supports the Secretary's contention that Congress intended to require 'training neutral' hiring." 822 F.2d at 1151.

We recognize that the complainants in the instant case, unlike the complainants in Peabody, were "miners" at the time the alleged act of discrimination occurred. This distinction, however, does not require a different result because in the crucial and controlling respect, this case and Peabody @re the same. In both cases, the operator chose for placement in underground mining positions persons who by training or experience fully met the training requirements of section 115 of the Act and the Secretary's implementing regulations. In placing trained miners underground the operator did not violate the language of the Mine Act or the safety and health objectives of the training requirements. To the contrary, the Act's purpose was fulfilled. In addition, no miner was discharged or otherwise discriminated against either because of a refusal to work without having the required training or because of a withdrawal from the mine pursuant to an order issued by the Secretary under section 104(g) of the Act due to a lack of training. See 822 F.2d at 1147. In sum, the Secretary's argument that section 115 of the Mine Act mandates that "training neutral" employment decisions be made by mine operators is just as wide of the mark in the present situation as it was in Peabody, and must be rejected here for the same reasons.

In order to reach the result argued for by the Secretary and the UMWA, we would be required to go beyond the Act and examine the Wage Agreement. It is not the Commission's province, however, to interpret the rights and obligations mandated by the Act through an interpretation of a private contractual agreement unless required to do so by the Act itself. Peabody, supra, 7 FMSHRC at 1364. In holding that the complainants as miners" had the right to whatever training was required to continue their employment, the judge misperceived the proper focus of section 115. To require an operator to train miners for underground work so that they, rather than other miners, would have the opportunity for continued employment would

transform section 115 from a health and safety provision to an employment provision. This type of employment issue is appropriately resolved through the collective bargaining and grievance and arbitration process. Indeed, the issue of the validity of Kitt's experienced miner policy was pursued through the contractual grievance process and Kitt's position was upheld. Stip. 9. 8/

8/ The Secretary argues that Kitt's use of the experienced miner policy to determine whom to retain as employees "will always bar miners from being awarded jobs if training is required" and will prevent training rights from ever "com[ing] into play." S. Br. 14. On the

Finally, we are left with the UMWA's argument that when enacting section 115 Congress could not have intended that miners who would not otherwise have been laid off would lose their employment as the result of the application of the Mine Act's training requirements. Whatever one might speculate as the intention of Congress in this respect, the fact is that neither the language of the Mine Act nor the legislative history support the assertion of the complainants. 9/ If there is a problem, it lies within the Act itself, and any remedy is through the collective bargaining process or, as Judge Ruth Bader Ginsburg stressed in her concurring opinion in Peabody, through legislative amendment by Congress. Peabody, 822 F.2d at 1152-53.

Contrary, training rights always "come into play" when the experienced miner policy is invoked. All miners chosen by Kitt to work had the necessary health and safety training.

We also reject the Secretary's argument purporting to be based on Wygant v. Jackson Board of Education, 476 U.S. 267 reh'g denied, 478 U.S. 1014 (1986), that Kitt's experienced miner policy unlawfully interferes with the complainants' property interest in and expectation of continued employment. Supp. Br. Sec. 2-6. That argument does not consider the fact that the Mine Act is not an employment statute. Moreover, in Wygant the Court was careful to note the difference between unconstitutional and permissible infringements upon a worker's property interest in a job.

9/ The conclusion that Kitt did not violate the Act makes it unnecessary for us to address two additional issues raised in Kitt's petition for discretionary review, i.e@, that the judge erred in assessing a civil penalty for the violation of section 105(c) and in awarding attorneys' fees to counsel for the UMWA. We note, however, that the Secretary failed to include in the discrimination complaint a proposal for a specific civil penalty for the alleged violation of section 105(c). Commission Procedural Rule 42(b), 29 C.F.R. $ 2700.42(b), requires such a proposal. See also Secretary on behalf of Milton Bailey v. Arkansas Carbona Co. and Michael Walker, 5 FMSHRC 2042, 2044 (December 1983).

Accordingly, we reverse the conclusion of the judge that Kitt discriminated against the complainants by violating their statutory rights with regard to training. The judge's assessment of a civil penalty and the judge's award of damages and attorneys' fees are vacated.

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