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JOSEPH DELISIO V. MATHIES COAL  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
December 4, 1990

JOSEPH G. DELISIO

v. Docket No. PENN 89-8-D

MATHIES COAL COMPANY

BEFORE: Backley, Acting Chairman; Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by Joseph Delisio pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) (the "Mine Act" or "Act"). The issue presented is whether Mathies Coal Company ("Mathies") discriminated against Delisio in violation of section 105(c)(1) of the Mine Act by not paying Delisio, an hourly employee, wages that he lost as a result of testifying as a witness under subpoena by the Secretary of Labor in a contest proceeding involving Mathies, while paying the salaries of its management officials whom it had subpoenaed as witnesses in the same proceeding. 1/ Commission

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1/ Section 105(c)(1) of the Mine Act provides in pertinent part:

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] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has

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Administrative Law Judge William Fauver concluded that Mathies discriminated against Delisio by not paying Delisio his wages for that day while paying the salaries of its management employee witnesses. 11 FMSHRC 2352 (November 1989)(ALJ). The judge awarded Delisio back pay, plus interest, and litigation expenses, including reasonable attorney's fees, 11 FMSHRC 2628 (December 1989)(ALJ). We granted Mathies' petition for discretionary review and permitted the American Mining Congress ("AMC") and the National Coal Association ("NCA"), proceeding jointly, and Pennsylvania Coal Association to participate on review as amici curiae. We hold that, under the circumstances of this case, Mathies' treatment of Delisio did not violate the discrimination provisions of the Mine Act. Accordingly, we reverse the judge's decision.

Complainant Joseph Delisio is employed as a mine examiner by Mathies at the Mathies Mine, an underground coal mine in Pennsylvania. 2/ In his job as a mine examiner, Delisio, an hourly employee, conducts on-shift and pre-shift examinations. Delisio also serves as chairman of the local United Mine Workers of America ("UMWA") safety committee and is a representative of miners for purposes of the Mine Act.

On July 21, 1988, in Mathies Coal Company, Docket No. PENN 88-36-R, Commission Administrative Law Judge Roy J. Maurer held a hearing in connection with Mathies' contest of a citation and a withdrawal order issued to it by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary subpoenaed Delisio to testify as part of the Secretary's case against Mathies, and Delisio testified at the hearing. The citation and order were ultimately upheld by the judge, based, in part, on Delisio's testimony. Mathies Coal Co., 11 FMSHRC 90 (January 1989) (ALJ). 3/

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testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

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

2/ The parties stipulated the facts and submitted the case for decision without an evidentiary hearing. This narrative of facts is based on the parties' stipulation of facts, the parties' pleadings, and the record and judge's decision in Mathies Coal Company, Docket No. PENN 88-36-R, the contest proceeding that gave rise to the subpoenas, including Delisio's.

3/ The citation involved in Docket No. PENN 88-36-R alleged a violation of

30 C.F.R. 50.20 for failure by Mathies to report an accident. Delisio reported the alleged violation to MSHA and requested an inspection under section 103(g) of the Mine Act, 30 U.S.C. 813(g). The withdrawal order cited a violation of 30 C.F.R. 75.400 for accumulation of float coal dust in four locations. Delisio was the miners' representative who accompanied the MSHA inspector, Francis Wehr, on the inspection that resulted in the issuance of the order.

Attendance at the contest hearing caused Delisio to miss his normally scheduled working hours for the day, and Delisio did not perform any work for Mathies that day. The UMWA's collective bargaining agreement does not contain any provision requiring Mathies to compensate employees for wages lost because of attendance at judicial hearings, and Mathies did not pay Delisio for the day he spent testifying. Delisio did receive a \$30.00 witness fee paid by the Secretary. Delisio's usual wages for the day in question would have been \$126.52. The UMWA local union ultimately paid Delisio the difference between his usual wages and the \$30 witness fee. The witnesses called to testify by Mathies on its behalf were salaried management employees who received their regular salaries for the day spent testifying.

Delisio subsequently filed a discrimination complaint with the Secretary, alleging that Mathies' failure to pay him the difference between his usual wages and the \$30 witness fee, while paying the salaries of its management witnesses, constituted unlawful discrimination under the Mine Act. After completing her investigation of the complaint pursuant to section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), the Secretary notified Delisio of her determination that no violation of section 105(c)(1) of the Act had occurred. Delisio thereupon filed his own discrimination complaint with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and the matter proceeded to hearing before Judge Fauver

In his decision, the judge concluded that section 105(c)(1) of the Mine Act prohibits a mine operator from withholding wages from a miner witness who testifies against the operator at a Commission hearing while compensating other employee witnesses who testify on behalf of the operator. 11 FMSHRC at 2356.

In reaching this conclusion, the judge discussed decisions by the National Labor Relations Board ("NLRB") under the National Labor Relations Act, 29 U.S.C. 151 et seq. (1988) ("NLRA"), concerning allegations of employer discrimination against employees testifying at NLRB hearings, including *Electronic Research Co.*, 187 NLRB 733 (1971) ("Electronic Research I"), *Electronic Research Co.*, 190 NLRB 778 (1971) ("Electronic Research II"), and *General Electric Company*, 230 NLRB 683 (1977), 11 FMSHRC 2355-56. In general, the NLRB does not deem unlawful, under the NLRA, the practice of an employer paying the wages of its employee witnesses while not paying the lost wages of employees called by other parties. *General Electric*, supra, 230 NLRB at 684-86; *Electronic Research II*, supra. On the other hand, if an employer distinguishes between its employees "in their employment

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In upholding the float dust violation, the judge relied in

significant part on Delisio's testimony. 11 FMSHRC at 96. The judge also concurred with the opinions of the MSHA inspector who issued the order and Delisio, that the violative conditions in two of the cited locations were "significant and substantial" ("S&S"). 11 FMSHRC at 97-98. Finally, the judge relied in part on Delisio's testimony that the two S&S violations were also the result of Mathies' "unwarrantable failure" to comply with the standard. 11 FMSHRC at 99. The judge accordingly affirmed the withdrawal order. 11 FMSHRC at 100.

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relationship" on the basis of whether they were summoned by it or the opposition as, for example, in granting or denying perfect attendance awards, it violates the NLRA. *General Electric*, 230 NLRB at 686; *Electronic Research I*, supra. Rather than following the NLRB approach, however, the judge relied on the dissent in *General Electric* of then Chairman Fanning, which argued that the employer's denial of wages to opposition witness employees "was disparate treatment based on whether the testimony was on behalf of or against [the employer's] interest" (230 NLRB at 686) and therefore constituted discrimination within the meaning of the NLRA. 11 FMSHRC at 2356.

In determining that Mathies violated section 105(c)(1) of the Mine Act, the judge stated:

The distinction relied upon by the majority opinion in *General Electric* ... between (1) discrimination as to a perfect attendance award or the use of vacation time and (2) discrimination as to wages -- appears to me to [be] artificial and in any event distinguishable from Mine Act cases. The broad protection of 105(c) of the Mine Act prohibits "any manner" of discrimination.

... Because of Respondent's discriminatory treatment of witnesses in a Mine Act proceeding, i.e., refusing to pay wages to Complainant who was an opposition witness but paying the wages of the witnesses who appeared on its behalf, no further examination of discriminatory motive is necessary.

11 FMSHRC at 2356.

On review, Mathies and amici take the position that Delisio failed to establish a prima facie case of discrimination because he did not show any adverse action against him. Mathies and amici argue that Delisio, while testifying pursuant to the Secretary's subpoena, was not working for Mathies and that, therefore, its failure to pay Delisio his wages did not involve his employment relationship. Conversely, Mathies and amici argue that Mathies' witnesses were performing their job duties for their employer in testifying at the hearing.

Mathies and amici also state that Congress knew how to establish specific compensation for miners involved in safety and health tasks and duties under the Mine Act. They argue that neither section 105(c)(1) nor

any other provision of the Mine Act requires an operator to compensate witnesses subpoenaed by adverse parties merely because it compensates its own witnesses. Mathies specifically points out that section 113(e) of the Mine Act, 30 U.S.C. 823(e), provides only that "witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States... ." Mathies and amici additionally rely on the NLRB's decision in General Electric as compelling. Moreover, the amici argue that the Commission's Rules provide only that each side pay for its own witness



fees and mileage. The AMC and NCA also contend that nothing in common law or federal law requires a party to subsidize the opposing party's witnesses or provide compensation outside the employment relationship confines.

Delisio argues that the judge's decision should be affirmed, because section 105(c) prohibits a person from discriminating "in any manner" against miners who have exercised their statutory rights under the Mine Act. Delisio asserts that he established a prima facie case, because his testimony in support of MSHA's enforcement action constituted protected activity and he suffered adverse action when he was deprived of wages that he otherwise would have received. Accordingly, in Delisio's view, Mathies discriminated against him in violation of section 105(c)(1) when it refused to pay him for time spent testifying in the proceeding while at the same time paying its other employees who testified on its behalf in the same enforcement action. Delisio argues that Mathies, having elected to pay the salaries of some of its employees, was required to treat all of its employees alike, on the basis that the activities of the employees -- testifying about the conditions present when MSHA issued the challenged citation and closure order -- were identical.

The question raised is whether Mathies discriminated against Delisio, in violation of section 105(c)(1) of the Mine Act, when it refused to pay wages to Delisio, who had been subpoenaed by the Secretary, for time spent testifying in support of the Secretary's case against Mathies, while at the same time paying the salaries of its managerial employees, who testified on its behalf in the same proceeding.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (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 Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1989), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula- Robinette test).

It is undisputed that Delisio, in testifying in the earlier Mine Act proceeding, engaged in protected activity. Section 105(c)(1) provides: "No person shall ... discriminate against ... any miner ... because such miner ... has testified ... in any ... proceeding [under or related to the Mine Act]...." However, we conclude that Delisio did not show that Mathies took an adverse action against him or, even assuming that an adverse action had

occurred, that it was discriminatorily motivated. Hence, we conclude that Delisio did not establish the second element of a prima facie case. We find the judge's conclusion to the contrary unsupported by the evidence and legally erroneous.

A showing that an adverse action was taken is part of the second element of a prima facie case of unlawful discrimination under section

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105(c) of the Mine Act. Generally, "an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." Secretary on behalf of *Jenkins v. Hecla Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (August 1984). However, an "adverse action under ... section 105(c) of the Mine Act is not simply any operator action that a miner does not like." Secretary on behalf of *Price & Vacha v. Jim Walter Resources. Inc.*, 12 FMSHRC 1521, 1533 (August 1990), citing *Jenkins*, supra, 6 FMSHRC at 1848 n.2. Moreover, as emphasized in *Price & Vacha*, "Not every classification or difference in the treatment of employees ... amounts to illegal 'discrimination,' especially where there is sufficient lawful reason for the challenged distinction." 12 FMSHRC at 1532.

Did Mathies refuse to pay Delisio's wages for time spent testifying in behalf of another party, in and of itself, constitute a discriminatory adverse action under the facts of this case? At common law, witnesses are not entitled to compensation. The right to witness fees is purely statutory. 97 C.J.S., *Witnesses*, 35 at 421; 81 Am Jur. 2d, *Witnesses*, 23 at 47. Under the American legal system, parties have traditionally paid only their own witnesses and witness fees may be taxed against the other party only if allowed by legislative enactment. 20 C.J.S., *Costs*, 221 at 466. Absent such legislation, a litigant on one side is not required to subsidize the fees or compensation of the other side's witnesses. Here, Mathies' conduct mirrors this established system that, absent legislation providing otherwise, litigants bear their own costs, including the payment of compensation to witnesses. We perceive no statutory mandate under the Mine Act supporting the kind of compensation sought by Delisio here.

With respect to witness fees, section 113(e) of the Mine Act provides:

In connection with hearings before the Commission or its administrative law judges under this [Act], the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects, and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence before the Commission and its administrative law judges. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of

the United States and at depositions ordered by such courts.

30 U.S.C. 823(e). Section 113(e) thus incorporates by reference the practice of the courts of the United States in terms of the amount of fees paid to witnesses. 28 U.S.C. 1821(b) provides that, absent explicit statutory authority or contractual authorization to the contrary, a witness fee of \$30/day applies in the courts of the United States.

Implementing section 113(e) of the Act, Commission Procedural Rule 58(b), 29 C.F.R. 2700.58(b)(1990), provides:

Fees payable to witnesses. Witnesses subpoenaed by any party shall be paid the same fees and mileage as are paid for like service in the district courts of the United States. The witness fees and mileage shall be paid by the party at whose request the witness appears, or by the Commission if a witness is subpoenaed on its own motion or the motion of a judge. This paragraph does not apply to Government employees who are called as witnesses by the Government.

Therefore, under our Rule 58(b), witness fees must be paid by the party at whose request the witness appears. This, of course, parallels the general practice of the American litigation system, under which each party pays its own witnesses. Accordingly, in accordance with Rule 58(b), Delisio was paid \$30 by the Secretary for the day he testified at the hearing, based on the level authorized by 28 U.S.C. 1821(b).

Section 113(e) of the Mine Act, in conjunction with Rule 58(b), essentially authorizes a per diem fee paid to a witness by the party calling the witness, but creates no additional statutory entitlement to compensation for wages or salaries. Neither the Mine Act nor its legislative history suggests any intention to provide for operator-paid compensation for miners testifying in Mine Act proceedings. Indeed, Congress established a number of specific operator-paid compensation provisions for miners under the Mine Act. Congress required walkaround pay for one miner representative during the physical inspection of the mine and pre- or post-inspection conferences (30 U.S.C. 813(f)), provided for compensation where a miner is withdrawn because he has not received requisite safety training (30 U.S.C. 814(g)(2)), established a graduated scheme of miner compensation where a mine is closed under various withdrawal orders issued under the Act (30 U.S.C. 821), and mandated compensation for miners for required training (30 U.S.C. 825(b)). Congress did not provide for operator-paid compensation for miners testifying in Mine Act proceedings, instead providing under section 113(e) only for per diem witness fees. While we are not implying an expressing unius est exclusio alterius construction here (see, e.g., *Loc. U. 2274, UMW v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1502 (November 1988), *aff'd*, 895 F.2d 773 (D.C. Cir. 1990), cert. denied, October 1, 1990)(No. 90.77)), this legislative silence involving the question before the Commission dictates cautious judicial review of Delisio's position (see, e.g., *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989), and authority cited).

Our concern with the Mine Act's silence on the subject is further accentuated by 5 U.S.C. 6322(a)(1988). That provision generally provides that federal employees are entitled to leave without loss of pay when testifying as witnesses on behalf of any party in connection with any judicial proceeding in which a government is a party. Essentially, Congress has provided for full compensation by the United States for its employees

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testifying in such proceedings, regardless of the party for whom such employees may be testifying. Delisio's position is essentially analogous to the statutory policy embedded in 5 U.S.C. 6322(a). However, there is no comparable provision imposing similar compensation obligations on operators under the Mine Act.

Here, Delisio was subpoenaed by the Secretary of Labor and paid a standard witness fee by the Secretary in accordance with Rule 58(b). Although Delisio was scheduled to work at Mathies' mine on the date of the hearing, he did not report for work to Mathies and did not perform any work on that day for Mathies. Mathies did not compensate Delisio for that day. As a general matter, Delisio was not paid by Mathies simply because he did not work for Mathies on the day of the hearing. Consequently, Mathies' failure to compensate Delisio was not in itself, adverse action directed at his employment relationship. Delisio's right to a witness fee payment under section 113(e) of the Mine Act is not a term or condition of his employment relationship with Mathies and he was subpoenaed as a witness by another party, the Secretary.

Delisio and the judge would tie a conclusion of discrimination to the fact that Mathies paid its managerial witnesses their salaries for the day they spent at the hearing. In the judge's view, this was "disparate treatment" that was inherently discriminatory. We are not persuaded. It is undisputed that these witnesses (1) were Mathies' own witnesses and (2) were salaried management safety representatives at the mine. According to Mathies, their managerial positions required testifying, as might be necessary, from time to time. Although the judge made no finding on this point, Delisio has not controverted it. There is no evidence in the record that these employees' salaries were dependent on their testifying in support of Mathies' position and there is no indication that the witnesses would have had their salaries withheld had they testified adversely to Mathies. Under these circumstances, we cannot view Delisio, an hourly employee subpoenaed by the Secretary, as "similarly situated" to the managerial witnesses subpoenaed by Mathies to testify as a part of their job duties. As previously indicated: "Not every classification or difference in the treatment of employees ... amounts to illegal 'discrimination,' especially where there is sufficient lawful reason for the challenged distinction." Price and Vacha, *supra*, 12 FMSHRC at 1532. We therefore find that a "sufficient lawful reason" and a reasonable basis for the difference in treatment Mathies accorded Delisio has been demonstrated on the record.

We also place considerable weight on the NLRB's decision in *General Electric*, *supra*. Like the Mine Act, the NLRA contains a provision protecting employees from discrimination for participating in judicial

proceedings under the statute. The Commission has recognized in several

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4/ Section 8(a)(4) of the NLRA provides:

It shall be an unfair labor practice for an employer -- (4) to discharge or otherwise discriminate against an employee because he has filed charges or



contexts that settled cases decided under the NLRA -- upon which much of the Mine Act's anti-retaliation provisions are modeled -- provide guidance on resolution of discrimination issues under the Mine Act. See, e.g., *Secretary v. Metric Constructors, Inc.*, 6 FMSHRC 226, 231 (February 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985), and authority cited.

In *General Electric*, the employer paid an hourly employee his normal wages for having testified on its behalf at an unfair labor practice hearing, but refused to pay another hourly employee, who testified on behalf of the NLRB's General Counsel at the same hearing, the difference between the statutory witness fee that he received from the NLRB and his normal wage. The NLRB distinguished "between those situations where the employer's actions were directed at the employment relationship" (*Electronic Research I*, *supra*) and those where they are not, "as in the witness fee situation" (*Electronic Research 11*, *supra*). 230 NLRB at 685. 5/ The NLRB moved that in "the latter instance, the obligation to pay witness fees is imposed by statute or fiat and not by the employment relationship." *Id.* The NLRB pointed to its witness rule at 29 C.F.R. 102.32, which (like the Commission's Rule 58(b)), provides that witness fees shall be paid by the party at whose request the witness appears. *Id.*

The NLRB reasoned:

But there is no prohibition against a party paying its witnesses more than the minimum, or more than another party will pay their witnesses, nor should any adverse inferences be drawn against the party paying the higher amount merely from that fact. In this regard, we deem as reasonable a party's use of employee wages as the measure for determining the fee to be paid its witness. Indeed, many parties, recognizing that an individual's employer is not obligated to pay him wages for time away from work testifying as a witness for them, use actual loss of earnings as a criteria for settling the witness fees they will pay.

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given testimony under this [Act]....

5/ In *Electronic Research I*, the NLRB concluded that it was a violation of section 8(a)(4) of the NLRA, *supra*, to deny a perfect attendance award to an employee who was absent from work because he was testifying against the employer in a Board hearing, while awarding the perfect attendance award to those employees who appeared at the same hearing at the employer's

request. See *General Electric*, 230 NLRB at 684. In *Electronic Research II*, the NLRB held that it was not a violation for an employer to pay the wages of the employees whom it called to testify, while at the same time refusing to pay the employees whom had been subpoenaed by the union. See *General Electric*, 230 NLRB at 684. In that case, the NLRB stated that "to order the [employer] to pay the employees for time lost from work in testifying against it is to require a litigant in effect to subsidize its opponent." *Id.*

Furthermore, the obligation exists only between the party and its witnesses; it does not extend to witnesses called by others. It follows, then, that the witness fee paid by one party is not, nor should it be, the concern or affair of another party. In short, no party stands as the guarantor for equal payment to all witnesses summoned by all parties to the proceeding. A fortiori, an employer, as here, -- or a union in a case not involving an employer as a party -- is not as a general proposition obligated to pay opposition witnesses anything in connection with witness fees. Consequently, we conclude that an employer is not discriminating with respect to the employment relationship by not paying an employee called as a witness against it the difference between what such witness would have earned had he worked and what the party calling him as a witness is willing to pay. Nor do we believe that the failure of the employer to pay such difference to employees testifying against it is otherwise per se discriminatory.... As we have previously stated, to hold that an employer must pay this difference would result in making employer liability dependent on what others are willing to pay, something we are unwilling to do.

230 NLRB at 685.

The NLRB further noted that while the disparity in compensation created by a party paying its witnesses more than another party may result in a monetary disadvantage to the latter, "that is not the fault of the higher paying party or within its immediate control. Nor is such a disparity due to actions aimed at the employment relationship." 230 NLRB at 685-86. We agree substantially with the reasoning of General Electric.

Like the NLRB in General Electric, supra, 230 NLRB at 685, we also note that the question of whether an employer is required, in general, to pay an employee for time not worked or, specifically, for time spent testifying, has been reserved to the employment mechanisms and prerogatives of the private sector. Delisio did not perform work for Mathies on the day of the hearing. Lying behind Delisio's complaint of discrimination is an underlying claim of a right: a right to be paid by his employer for time during which he did not work but rather was testifying as an opposition witness in litigation involving his employer. The subject of recognizing any such employment benefit is amenable to collective bargaining or to other private employment agreement. As we have emphasized in related

contexts, the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act. See Price & Vacha, 12 FMSHRC at 1532, citing Price & Vacha, 9 FMSHRC at 1307. See also Mullins v.

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Beth Elkhorn Coal Corp., 9 FMSHRC 891, 899 (May 1987), citing Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp., 3 FMSHRC 1175, 1179 (May 1981),

We conclude as a matter of law that an operator's policy of not paying an employee for time spent testifying as another party's witness, while paying employees who testify as its own witnesses, does not, by itself and without more, amount to an adverse action under the Mine Act. In other words, we do not view such a policy as aimed adversely or discriminatorily at the employment relationship per se. Rather, in the words of General Electric, it stems "from different obligations, considerations, and motives... ." See 230 NLRB at 686. If the record in this case contained evidence of specific retaliatory motivation or discriminatory intent, another question would be presented. The record in this case, however, reveals no evidence of retaliatory motive or discriminatory intent. 6/

In sum, the record contains no evidence of an adverse action cognizable under the Mine Act. To the extent that the judge equated the mere fact of different compensation of the employee-witnesses with unlawful discrimination, we conclude that he erred as a matter of law. Accordingly, and for the foregoing reasons, we hold that Delisio failed to establish a prima facie case of discrimination prohibited under the Mine Act. 7/

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6/ Delisio also relies on *Carpenter v. Miller*, 325 S.E. 2d 123 (WV 1984), a decision by the West Virginia Supreme Court of Appeals. Although the West Virginia statutory anti-discrimination provision is, as pertinent, similar to section 105(c)(1) of the Mine Act, the relevant state statutory witness fee provision provides that all subpoenas are issued by the Director of the Department of Mines and "[a]ny witness so ... subpoenaed ... shall be paid out of the state treasury upon a requisition upon the state auditor." 325 S.E. 2d at 126. The court reasoned that the legislature must therefore have intended that miners receive no reduction in compensation due to absence from employment when testifying in the mine proceedings. The West Virginia court's decision is bottomed on a subpoena provision unlike that involved in the Mine Act. The Commission is not bound by state court decisions interpreting state statutory schemes and we are not persuaded that the court's reasoning applies in the Mine Act context.

Two days prior to the scheduled Commission meeting in this case, the Commission received Mathies' first request for oral argument. The motion is untimely. This case was thoroughly briefed by all concerned, and the Commission would not have found oral argument particularly helpful

in any event. Accordingly, the motion is denied.

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For the foregoing reasons, we reverse the judge's decision, vacate his award of back pay, interest, and costs, and dismiss Delisio's discrimination complaint. 8/

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

Commissioner Holen assumed office after this case had been briefed and shortly before it was considered at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. Commissioner Holen elects not to participate in this case.

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