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P.M HUGHES & (UMWA) v. CONSOLIDATION COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

UNITED MINE WORKERS OF  
AMERICA ON BEHALF OF  
PATRICK M. HUGHES,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 84-404-D

MORG CD 84-10

v.

McElroy Mine

CONSOLIDATION COAL COMPANY,  
RESPONDENT

DECISION

Appearances: Thomas M. Myers, Esq., United Mine Workers  
of America, Wheeling, West Virginia, for  
Complainant.  
H. Brann Altmeyer, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania, for  
Respondent.

Before: Judge Fauver

This proceeding was brought by United Mine Workers of  
America on behalf of Patrick M. Hughes (Complainant) under  
section 105(c) of the Federal Mine Safety and Health Act of 1977,  
30 U.S.C. 801, et seq. The Complainant charges a violation of  
section 105(c) based upon Respondent's refusal to pay Complainant  
for his time as a walkaround (FOOTNOTE.1) on the midnight shift, March  
14, 1983, and its refusal to assign him duties for the remainder  
of that shift after the Federal inspection was concluded. On the  
date in question Complainant was scheduled to work on the day  
shift, but not the midnight shift.

The controlling issue is whether section 103(f) grants  
compensation rights to a miners' representative who accompanies a  
Federal inspector on a shift other than his regularly scheduled  
shift.

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Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

#### FINDINGS OF FACT

1. Consolidation Coal Company is the operator of the McElroy Mine, an underground coal mine in Marshall County, West Virginia, where Complainant is employed.

2. During the week beginning Sunday, March 11, 1984, and ending Saturday, March 17, 1984, Complainant held the job classification of trackman, which paid \$12.798 per hour. At all relevant times, Complainant was a member of the miners' elected Safety Committee.

3. During the week beginning Sunday, March 11, 1984, and ending Saturday, March 17, 1984, Complainant was scheduled to work the dayshift (8:00 to 4:00) for five days, Monday through Friday.

4. Complainant worked the day shift on Monday, March 12, Tuesday, March 13, Thursday, March 15, and Friday, March 16, 1984.

5. On Wednesday, March 14, 1984, Complainant did not work the day shift, but instead had come to the McElroy mine on the midnight shift ( 00:01 a.m. - 8:00 a.m.) and participated as the walkaround with Federal Inspector Charles Cruny for part of that shift.

6. The inspection conducted by Charles Cruny and participated in by Complainant ended at about 5:10 a.m., March 14, 1984.

7. Upon completion of the inspection, Complainant asked William Blackwell, a safety inspector of Consolidation Coal Company, for a job assignment for the rest of the midnight shift.

8. Respondent refused to provide Complainant Hughes with a job assignment for the rest of the midnight shift, and refused to pay Complainant Hughes any wages for that shift.

9. Complainant filed a timely complaint of discrimination pursuant to 105(c) of the Act with the Mine Safety and Health Administration, United States Department of Labor.

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By letter dated August 22, 1984, the Mine Safety and Health Administration determined that discrimination had not occurred. Complainant thereafter filed a timely complaint with this independent Commission.

10. Federal inspectors most frequently conduct their regular inspections of the McElroy Mine on the day shift, occasionally on the afternoon shift, and rarely on the midnight shift.

11. From January 1, 1984 through March 14, 1984, Federal inspections at the McElroy Mine occurred on the midnight shift only on March 12, 13, and 14.

12. At the McElroy Mine, the elected Safety Committeemen participated as walkarounds with Federal inspectors on all occasions, except when such committeemen were unavailable to participate or when a rank and file miner expressed a desire to accompany a Federal inspector as the walkaround.

13. No elected Safety Committeemen were assigned to work the midnight shift during the period between March 12 and 17, 1984.

14. On Friday, March 9, 1984, at the request of Rick Lipinski, Chairman of the Safety Committee, Safety Committeeman Randall Mulvey made reasonable efforts to find an employee assigned to the midnight shift during the week of March 12, 1984, who would be willing to participate as the walkaround with Inspector Cruny on that shift. Inspector Cruny had informed the union and company representatives that his inspections during that week would be conducted on the midnight shift.

15. Prior to the day shift on Monday, March 12, 1984, Lipinski found out that no one had traveled as the walkaround with Inspector Cruny on the preceding midnight shift. Lipinski again made reasonable but unsuccessful efforts to find an employee on the midnight shift who would agree to travel as the walkaround with Inspector Cruny for the upcoming midnight shift, Tuesday, March 13, 1984. One miner agreed to serve as a walkaround, but later declined to do so.

16. No employee participated as a walkaround with Inspector Cruny on the midnight shift on March 13.

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17. On the day shift, Tuesday, March 13, Lipinski called a meeting of the Safety Committee to discuss the fact that no midnight shift employee had participated as the walkaround for Inspector Cruny on the two preceding midnight shifts.

18. At that meeting, Complainant volunteered to come to the mine for the midnight shift on Wednesday, March 14, 1984, so that a representative of the miners would be available to accompany Inspector Cruny on his inspection.

19. Had an employee on the midnight shift of Wednesday, March 14, 1984, chosen to participate as the walkaround for Inspector Cruny, Complainant would have gone home instead of so participating.

20. No midnight shift employee chose to participate as the walkaround with Inspector Cruny on Wednesday, March 14, 1984.

21. The miners at the McElroy Mine were generally aware of the fact that employees who participated as walkarounds were routinely assigned the task of picking up papers and trash for the rest of the shift, when the inspection was concluded toward the end of such shift.

22. On Monday, March 12, and Tuesday, March 13, 1984, Inspector Cruny wrote no citations or orders during his inspections of the McElroy Mine on the midnight shift.

23. On Wednesday, March 14, 1984, while accompanied by a walkaround (Complainant), Inspector Cruny wrote three citations during his inspection of the McElroy Mine on the midnight shift.

24. Complainant's absence from his regularly scheduled shift on March 14 (the day shift) was excused by Respondent.

25. On March 13, Complainant told mine management that he would be coming to the mine to serve as walkaround on the midnight shift, March 14. Complainant was advised by William Blackwell and Allen Olzer, safety inspector and supervisor for Respondent, respectively, that he would not be prevented from participating as a walkaround on other than his regularly scheduled shift, but that he would neither be paid for the period of such participation nor assigned work for the remainder of the shift, because he was not regularly scheduled or entitled to be paid for that shift.

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26. Fifteen of the 35 miners scheduled to work on the midnight shift of March 14, 1984, had previously served as walkaround representatives of miners.

27. As conceded by Complainant's witnesses, and in Complainant's answers to Respondent's interrogatories, any of the 35 regularly scheduled miners assigned to the midnight shift on March 14 were fully qualified to serve as walkarounds.

28. The miners' Safety Committee never requested that the mine superintendent assign a Safety Committeeman to each of the three shifts, in order to facilitate their participation as walkarounds on any shift.

29. As a matter of established practice, miners who participated as walkarounds were reassigned to their regularly assigned duties for the remainder of the relevant shift, if time permitted.

30. As a matter of custom and practice, when the duration of the inspection did not leave reasonable time for the walkaround to return to his regular location to finish the shift, the walkaround was assigned the task of policing the mine, including picking up combustible materials which were left on the mine floor.

31. Management of the mine, including the assignment of miners to their work shifts, was exclusively reserved to Respondent under the governing collective bargaining agreement.

#### DISCUSSION WITH FURTHER FINDINGS

Section 103(f) of the Act provides that "a representative authorized by his miners shall be given an opportunity to accompany [a Federal inspector]," and when the "representative of miners ... is also an employee of the operator [he] shall suffer no loss of pay during the period of his participation in the inspection made under this subsection."

Complainant was not scheduled to work on the midnight shift of March 14, 1984, during which he acted as a walkaround representative of miners on a Federal inspection. As he was not scheduled to work on the shift in question, his claim raises the question whether a refusal to pay him for that shift constituted a "loss of pay."

In *Beaver v. North American Coal Corporation*, 3 FMSHRC 1428 (1981), the complainant charged discrimination for the operator's refusal to compensate him for participation in an inspection on a day when the complainant was not scheduled to work. Judge Cook rejected arguments similar to those made herein that the only germane considerations are whether the individual was selected by the miners to act as a walkaround representative and whether that individual was an employee of the operator. Consistent with Respondent's position herein, the Judge stated:

"the walkaround provision is designed to encourage miner participation in inspections by providing an assurance that their designated representative will suffer no loss in pay as a result of participating in such inspection i.e., that his participation in an inspection will place him in the same position with respect to his pay that he would have occupied had he not participated in the inspection. It was not intended to create a right to compensation where none otherwise existed."

In *UMWA ex rel Colchagie v. Consolidation Coal Company*, 5 FMSHRC 1469 (1983), complainant was a walkaround on a shift when he was not scheduled to work. Citing the *Beaver* decision, Judge Melick held that the employer did not discriminate against complainant in failing to compensate him, nor in charging him with an unexcused absence for failing to appear at his next, regularly scheduled shift. The complainant argued that he was the only qualified miner available to accompany the inspector during the shift in question. Judge Melick found the evidence in that regard unpersuasive, in view of the nature of the inspection and the availability of other miners. In the instant case, the evidence shows that Inspector Crunty was conducting merely a regular, general inspection, and that any of the midnight shift miners were qualified to serve as a walkaround. Examination of the list of 35 miners scheduled to work the shift in question revealed that at least 15 of those miners had previously served as walkarounds.

~1283

Complainant relies upon Secretary of Labor v. Virginia Pocahontas Coal Company, 3 FMSHRC 1493 (1981), in which Judge Steffey found that the employer had discriminated against the complainant in failing to provide him with a work assignment for the remainder of the shift (not his scheduled shift) during which he had served as walkaround, where the complainant had been paid for the time during which he participated in the inspection. However, Judge Steffey indicated that, absent a compelling showing of the necessity for a walkaround assigned from a different shift, management may insist that a scheduled employee on the inspection shift act as the walkaround in the order to invoke the protection of section 103(f). In that case, there was evidence that the mine employees conducted a special meeting for the purpose of designating the Safety Committee members as their walkaround representatives and that, presumably with knowledge of that designation, the operator scheduled the Safety Committee members so that no committee member was on the shift inspected. Virginia Pocahontas, 3 FMSHRC, at 1494-1495. In the instant case, the facts are different. Complainant's own evidence shows that any of the midnight shift miners could have served as a walkaround, and in fact repeated union efforts were made to appeal to them to serve as a walkaround. Safety Committeeman Richard Lipinski testified that he had managed to persuade Forrest Allen, a midnight shift miner, to serve as a walkaround during that week. Mr. Allen was not, and never had been, a member of the Safety Committee. (Allen did not serve as a walkaround that week, stating that he had a cold.) In addition, nearly half of the regularly scheduled midnight shift employees had previously served as walkarounds, and yet had never been Safety Committee members.

Also distinguishing the instant case from Virginia Pocahontas is the testimony of Respondent's mine superintendent, conceded by Complainant's witnesses, that despite repeated requests, no list of designated walkarounds was ever provided to Respondent. In fact, union representatives advised Respondent that they had not designated specific walkarounds, but that in their opinion all employees on the seniority roster should be considered "designated walkarounds."

