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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
RICHARD N. TRUEX,
COMPLAINANT
v.

DISCRIMINATION PROCEEDING
Docket No. WEVA 85-151-D
MSHA Case No. MORG CD 85-2
McElroy Mine

CONSOLIDATION COAL COMPANY,
RESPONDENT

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Complainant;
Karl T. Skrypak, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Richard N. Truex, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." Mr. Truex alleges herein that he suffered a discriminatory loss of pay in violation of section 105(c)(1) of the Act (FOOTNOTE.1) because of

~1402

his participation as a representative of miners at a post-inspection conference under section 103(f) of the Act.(FOOTNOTE.2) A motion to dismiss filed by the Consolidation Coal Company (Consol) on the grounds that the complaint had been untimely filed was denied by interlocutory decision dated May 17, 1985 (Appendix A).

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that Mr. Truex engaged in an activity protected by that section and that he suffered discrimination that was motivated in any part by the protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir.1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar those in the Pasula case.

The essential facts in this case are not in dispute. Richard Truex was, during relevant times, a member of the Union Local 1638 Safety Committee (under the United Mine Workers of America) chaired by Local President, Richard E. Lipinski. On August 27, 1984, an inspector for the Federal Mine Safety and Health Administration (MSHA), an authorized representative of the Secretary, telephoned Consol's Mine Safety Director, Tom Olzer, to inform him that he would be arriving at the mine at approximately 9:30 the next morning for what has been agreed was to be a section 103(f) post-inspection conference. Olzer later advised Truex of MSHA's plans and, in turn, Truex told Lipinski. It is not disputed that Lipinski, on behalf of the union, then asked Truex to act as representative of miners at the conference.

At 7:50 the next morning Truex told Olzer that he would be the union representative for the conference. Olzer responded that since no inspector was then at the mine Truex would have to go to work with his regular crew on the 8:00 a.m. to 4:00 p.m. shift. Truex then asked if he could work

~1403

until the MSHA inspector arrived. Olzer responded that Consol's policy was to obtain miners' representatives from the area an inspector visits. Truex then asked if he could work in the "Bottom" so that he could be available for the inspection. Olzer refused.

It is not disputed that Truex at this point stated that he was on "union business" because he believed that he would otherwise have been unable to attend the post-inspection conference as the representative of miners. Olzer told him that if he was on "union business", he would not be permitted to perform any work that day.(FOOTNOTE.3) It is not disputed that Truex performed no "union business" that day other than that related specifically to the section 103(f) post-inspection conference.

The MSHA inspector arrived around 9:20 a.m. and Truex accompanied him for the 1 1/2 hour conference. At the conclusion of the conference Truex asked to go to work for the remainder of the shift. Olzer refused the request. Consol has paid Truex at his regular rate of pay for only the 1 1/2 hour conference. Accordingly he seeks compensation in this case only for the remaining 6 1/2 hours of the shift he would have worked but for his assumption of "union business" and the related refusal of Consol to allow him to return to work.

Consol argues that under the National Bituminous Coal Wage Agreement of 1981 once Mr. Truex declared himself to be on "union business" he was no longer under its direction or control and that it therefore had no obligation to pay him for his subsequent activities. Consol further argues that it did not have to accept Mr. Truex as a representative of miners on the day in question but could have complied with section 103(f) of the Act by giving any one of the approximately 130 miners then working the opportunity to accompany the inspector during the conference at issue.

Section 103(f) of the Act provides, as relevant, that "a representative authorized by his miners shall be given an opportunity to accompany the . . . [inspector] . . . during the physical inspection of any coal . . . mine . . . for the purpose aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." [Emphasis added] Since it is not disputed in this case that the post-inspection conference which Mr. Truex attended was a

~1404

conference within the meaning of section 103(f) of the Act it is clear from the above language that it is the miners and not the mine operator, who authorize or designate a representative for the purpose of participating in such a conference. There is no statutory ambiguity on this point and the plain meaning must prevail.

Consol nevertheless claims that the failure of Mr. Truex to have complied with the filing requirements under 30 C.F.R. Part 40 entitled it to deny him the right to participate as a representative under section 103(f). The same type of claim has, however, already been rejected by the Commission in a case brought by this same operator in Consolidation Coal Company v. Secretary and UMWA, 3 FMSHRC 617 (1981). That decision was not appealed by Consol. In the case at bar, just as in the cited case, Consol makes no claim that it lacked a basis for believing that the purported representative, Mr. Truex, was not in fact an authorized miner representative. For the reasons stated in the cited decision the claim at bar is also rejected.

Within this framework I find that Consol did in fact discriminate against Mr. Truex in denying him the statutory right to act as the "authorized" representative of miners under section 103(f) without in effect compelling him to first declare himself to be on "union business". Pasula, supra. Because Consol thereby so compelled Mr. Truex to go on "union business" he was denied the opportunity to return to his regular work shift upon the completion of his activities as the representative of miners. I find accordingly that Mr. Truex is entitled to damages under section 105(c)(1) including wages lost for the remainder of his work shift and interest.

DAMAGES

In accordance with the stipulations submitted in this case Richard Truex is entitled to back pay in the amount of \$92.07 for the 6 1/2 hour period on August 28, 1984, during which he was unlawfully denied the opportunity to work and interest on that amount of \$7.81.

CIVIL PENALTY

In light of the clear and unambiguous language of section 103(f) of the Act that the miners representative shall be "authorized by his miners" and not by the mine operator and the previous unsuccessful litigation on this issue brought by this same operator before this Commission I find that Tom Olzer in this case knew or should have known,

post-inspection conferences held at the mine. . . ." That section also provides that "the representative of mines who is also an employee of the operator shall suffer no loss of pay during the period of the participation in the inspection. . . ."

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3 "Union business" is an unpaid leave of absence recognized in the applicable collective bargaining agreement, i.e., Article XVII section (1) of the National Bituminous Coal Wage Agreement of 1981.