

February 1, 2008

Mr. Richard Stickler
Assistant Secretary of Labor for Mine Safety and Health
Mine Safety and Health Administration
1100 Wilson Blvd., 21st Floor
Arlington, VA 22209-3939

Petition for Rulemaking

Dear Assistant Secretary Stickler:

This Petition for Rulemaking is submitted by the West Virginia Mine Safety Project of the Appalachian Center for the Economy and the Environment¹, the Appalachian Citizens' Law Center², United Support & Memorial for Workplace Families³, and the United Mine Workers of America⁴ pursuant to 5 U.S.C. § 553(e). The Petitioners request that the Mine Safety and Health Administration (MSHA) revise its regulations governing training of miners regarding statutory rights by:

- (1) Prohibiting mine operators from providing training to miners and prospective miners regarding miners' statutory rights, and instead direct that either MSHA or state mine safety regulators, or other entities who act independently of coal operators/management, will conduct all statutory rights training;
- (2) Requiring more frequent training of miners regarding their statutory rights;
- (3) Delineating with greater particularity which statutory rights are to be covered in such training; and,
- (4) Describing with particularity the materials and other pertinent information to be disseminated in statutory rights training.

The Petitioners believe that this action is required under the Mine Act of 1977. However, even if the Act does not require this regulatory change, MSHA certainly has the authority to require such a change

¹ The Appalachian Center is a regional, non-profit law and policy organization. The West Virginia Mine Safety Project offers *pro bono* legal assistance to coal miners regarding workplace health and safety matters and advocates for protective mine health and safety standards.

² The Appalachian Citizens' Law Center is a non-profit law firm based in eastern Kentucky, and represents clients in many types of claims, including current and former miners seeking federal black lung benefits and coal miners who have suffered discrimination at the workplace after complaining about unsafe conditions.

³ United Support & Memorial for Workplace Fatalities (USMWF.ORG, Inc.) aims to prevent future workplace tragedies through awareness, direction, assembly and support of afflicted families.

⁴ The United Mine Workers of America is the labor union representing coal miners throughout the United States and Canada, and has been an unwavering advocate for miners' health and safety as well as other workplace issues for 118 years.

and should exercise its ability to do so.⁵ While Congress envisioned a robust program to train the nation's miners in the duties of their occupations – which includes thorough training of miners as to their statutory rights – the Petitioners have observed repeated and systemic shortcomings in the program. The result is that countless miners do not have a thorough understanding of their statutory rights and/or are unable or unwilling to exercise such rights even in the most dire and pressing situations.

A. Background

Under the 1977 Mine Act, miners are to receive mandatory health and safety training. 30 U.S.C. § 825(a). Mine operators are to devise health and safety training programs for their employees. *Id.* The Mine Act also tasks MSHA with reviewing and approving each operator's training plan, as well as with promulgating regulations that govern the specifics of these training plans. *Id.* Importantly, training miners as to their statutory rights is an integral part of the Mine Act's requirements for health and safety training. For example, for new underground miners:

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.

30 U.S.C. § 825(a)(1) (emphasis added). Similarly, for new surface miners,

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.

30 U.S.C. § 825(a)(2) (emphasis added). Importantly, the Mine Act also requires that all miners receive at least eight hours of refresher training annually. 30 U.S.C. § 825(a)(3).

Pursuant to the directive at 30 U.S.C. § 825(a) that MSHA promulgate regulations governing operators' training plans, Part 48 of Title 30, Code of Federal Regulations, sets forth requirements for training and retraining of underground and surface miners, including training as to statutory rights. Similarly, Part 46 of Title 30, Code of Federal Regulations, sets forth requirements for training and retraining of miners engaged in shell dredging or employed at sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mines.⁶

⁵ Indeed, the Petitioners note that at least one MSHA District Manager (MSHA Coal District 3) once required, in the mid-1990s, statutory rights training to be included in annual refresher training. District Managers in other Districts may have made similar directives in the agency's history.

⁶ While this Petition for Rulemaking primarily addresses Part 48 as those regulations pertain to coal mining, it also speaks to a lesser extent to metal and non-metal mining, including the statutory rights training provisions of Part 46.

However, Part 48 requires that miners receive such statutory rights training only if they are new miners, 30 C.F.R. § 48.5(b)(1) (underground miners), 30 C.F.R. § 48.25(b)(1) (surface miners), and to a lesser extent, if they are experienced miners who are newly employed by an operator, transferring to the mine, or returning to a mine after an absence of 12 months or more (experienced/newly-employed miners). 30 C.F.R. § 48.6(b)(3) (underground miners), 30 C.F.R. § 48.26(b)(3) (surface miners). Part 48 does not at all specify that miners must receive statutory rights training during their annual refresher training. 30 C.F.R. § 48.8.

In passing the Mine Act, Congress realized that miners must play a crucial role in maintaining a safe and healthy workplace:

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

Sen. Rpt. 95-181 (May 16, 1977). After all, miners know the day-to-day work atmosphere as well as or better than anyone, obviously have a great interest in maintaining a safe and healthy workplace, and are in a unique position to monitor workplace conditions when inspectors are absent. The Mine Act's legislative history shows that Congress also realized that miners often work in rural areas where other employment may be rare:

The Committee is also aware that mining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity.

Id. Therefore, Congress mandated that miners receive thorough training on their statutory rights and be protected from vindictive operators when exercising those rights.

However, many miners, especially those in non-union mines, have only vague knowledge of their statutory rights, if they have any knowledge at all. The organizational Petitioners have had contact with numerous miners who do not know that they can, for instance, voice concerns about workplace health and safety, refuse to perform unsafe work, review and give input to many aspects of an operator's plans for mining, or speak with MSHA inspectors and investigators, all without retaliation. Many miners do not realize that they may designate a representative to perform numerous functions under the Mine Act, and that such a representative need not necessarily be affiliated with a labor union. Even when miners do designate a representative, it often is a representative who does not correspond with Congress's vision under the Mine Act of miners acting independently of their employer to improve working conditions and assist regulators. For example, miners often feel pressured to name management personnel as their walkaround representatives. Miners' representatives in MSHA accident investigation interviews often are company lawyers. In any case, even if miners have some understanding of their statutory rights, they will not exercise those rights for fear of retaliation. They lack confidence in regulators' ability to protect them from retaliation, and do not know where to turn for assistance otherwise.

The upshot of this dynamic is that miners who find themselves working in unsafe or unhealthy conditions usually face a “Sophie’s choice”: (1) keep quiet about the untenable conditions and hope that no harm befalls themselves or others, (2) find different work, either with another mine, or in another industry altogether – often difficult in the rural and economically depressed areas where mining jobs are concentrated, or (3) exercise their statutory rights (if they even know about such rights) and risk retaliation – from assignment to undesirable work, to threats from management, to outright discharge and “blacklisting.”

Thus, to meet Congress’s goals under the Mine Act, miners need more robust and more frequent training of their statutory rights.

B. Basis for Petition for Rulemaking

Under the Administrative Procedure Act, “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). Also, the Mine Act itself incorporates this APA provision in speaking to petitions for rulemaking:

The Secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

30 U.S.C. § 811(a). Thus, any interested person or organization, such as the Petitioners herein, may submit a petition for rulemaking to MSHA.

C. Specific Changes Necessary for Statutory Rights Training Scheme

To remedy the problems outlined above, MSHA must change not only the frequency of miners’ statutory rights training, but also the quality of and methods by which miners receive such training.

As to the issue of frequency of statutory rights training, as noted above, MSHA requires statutory rights training under Part 48 primarily only for new miners. This obviously presents a problem, because even if new miners received the most dynamic and memorable statutory rights training, such knowledge fades as the years pass. A miner may not need to exercise his or her statutory rights until several years into a mining career. At that juncture, if such miners have had relevant training only at the outset of their careers, they often do not know their statutory rights well at all and cannot protect themselves. An obvious solution to this dilemma is to require statutory rights training in annual refresher training at 30 C.F.R. § 48.8, and the Petitioners request that MSHA do just that.

As previously noted, the Mine Act specifies the subject areas for training of new underground miners, 30 U.S.C. § 825(a)(1), and new surface miners, 30 U.S.C. § 825(a)(2). Both subsections require, among other specifically-enumerated measures, “instruction in the statutory rights of miners and their representatives under this Act.” The next immediate subsection at 30 U.S.C. § 825(a)(3) requires annual refresher training for all miners. Congress took pains to set forth statutory rights training as one of a handful of fundamental areas of instruction for new miners. Congress then set forth the refresher training requirement, as if encompassing all of the training requirements delineated for new miners in

the two subsections immediately preceding the subsection requiring refresher training. In fact, in its regulations for refresher training for both underground and surface miners, 30 C.F.R. § 48.8 and 30 C.F.R. § 48.28, respectively, MSHA requires refresher training for virtually all other subject areas outlined in 30 U.S.C. § 825(a)(1)-(2) *except for statutory rights*. Thus, it only stands to reason that refresher training must include a unit on instruction in statutory rights if MSHA is to effectuate Congress's intent to keep miners informed of their statutory rights.

In the same vein, the Petitioners request that MSHA require statutory rights instruction in experienced/newly-employed miner training to the same degree as requested in annual refresher training herein⁷. The existing Part 48 training requirements for experienced/newly-employed miners (who have been absent from the profession for five years or more) provide only that:

Authority and responsibility of supervisors and miners' representatives. The course shall include a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards.

30 C.F.R. § 48.6(b)(3) (underground miners), 30 C.F.R. § 48.26(b)(3) (surface miners). The requirements for experienced/newly-employed miners do not include "instruction in the statutory rights of miners and their representatives under the Act" as do requirements for new miners, and as would the requirements for annual refresher training as proposed by the Petitioners. However, a miner who has been absent from the workplace for an extended time (experienced/newly-employed miner) should receive, in the Petitioners' experience, instruction in miners' statutory rights. As already noted, even miners with a history of continuous work in the mining industry often lose knowledge of their statutory rights over time (if they ever were given effective statutory rights training to begin with). By force of logic, then, miners who have been away from the workplace for an extended time often lose such knowledge to an even greater degree. The Petitioners elsewhere request that MSHA enhance annual refresher training, and accordingly request that MSHA enhance experienced/newly-employed miner training to be identical to the enhanced annual refresher training.

As to the methods by which miners receive statutory rights training, and the substance and quality of that training, the Petitioners request that the regulation be amended to expressly prohibit operators/management personnel from providing any statutory rights training whatsoever to miners. It is perverse to permit mine operators/management to conduct statutory rights training. Obviously, operators have incentive to downplay the expansiveness and importance of these rights, the key role which Congress envisioned miners playing in regulation of the workplace, and the particulars of how miners can most effectively and fairly exercise such rights in the face of operator obstinacy and wrongdoing. Instead, miners should receive statutory rights training only from trainers who are independent of mine operators/management. In particular, a revised regulation should require that statutory rights training be conducted by federal or state mine health and safety regulators or other independent parties, such as trainers at United Mine Workers of America Career Centers. The Petitioners envision that if operators themselves are the entities providing new miner training,

⁷ Both annual refresher training and experienced/newly-employed miner training requirements are less (i.e. at least eight hours) than that for new miners (i.e. at least 40 hours for underground miners and 24 hours for surface miners).

experienced/newly-employed miner, or annual refresher training, independent instructors nevertheless would present the portion of the program dealing with statutory rights. Of course, the revised regulation should permit other independent statutory rights training already available to miners, such as that encompassed in the new miner training offered at United Mine Workers of America Career Centers.

Furthermore, the Petitioners request that the regulation be amended to delineate each statutory right enjoyed by miners and/or miners' representatives under the Mine Act and to require coverage of each such right in new miner, experienced/newly-employed miner, and refresher training. Of course, new miner training as to statutory rights would be more extensive than, for example, statutory rights training covered in refresher training. Nevertheless, the regulation should delineate – and each of these three types of training should encompass – the following statutory (and regulatory) rights of coal miners and/or miners' representatives:

- Protection against discrimination for exercising any rights under the Mine Act
- How-to's of naming a miners' representative for the various functions a representative can serve under the Mine Act and its implementing regulations
- Participation in inspections
- Reporting and notifying inspectors of violations and imminent dangers, and requesting inspections
- Pay for being idled by withdrawal order
- Contesting enforcement actions
- Participation in investigations where dangerous conditions cannot be corrected with existing technology
- Review of imminent danger orders
- Participation in cases before Federal Mine Safety Health Review Commission that affect the miner
- Part 48 training rights, including:
 - Training during working hours
 - Pay while receiving training
 - Receiving training records from operator
 - Protection from discrimination and loss of pay for lack of training
 - Review of all types of Part 48 training plans
- Free examinations to ascertain exposure to toxic materials or harmful agents
- Request of Department of Health and Human Services to study/research substance in mine environment for toxicity, or whether physical agents/equipment within mine are dangerous
- Availability of chest x-rays free of charge, including explanation of intervals when such x-rays are to be made available
- Transfer to less dusty atmosphere upon black lung diagnosis
- Review and comment upon/objection to proposed standards, including legal challenges to proposed standards
- Request to modify application of a certain safety standard at a mine, and participation in MSHA's decision when operator requests such a modification
- Right to access information (recordings, findings, reports, citations, notices, orders, etc.) within MSHA and Department of Health and Human Resources

- Observation of operator's monitoring of miner's exposure to toxics and other harmful agents, and access to records of exposure and information about operator abatement in cases of overexposure
- Access to operator's accident records and reports
- Notice of MSHA proposed civil penalty levied against operator
- Operator posting of MSHA orders, citations, notices, etc., as well as receipt of same by miners' representative
- Review of roof control plan and instruction in revision to such plan
- Review of mine map illustrating roof falls
- Notification of and instruction on escape from area where ground failure prevents travel out of the section through the tailgate side of a longwall section
- Review of records of examinations and reports (pre-shift examinations, weekly examinations for hazardous conditions, weekly ventilation examinations, daily reports of mine foremen and assistant mine foremen)
- Review of records of electrical examinations and maps showing stationary electrical installations
- Review of underground mine maps
- Operator's notification of submission of new ventilation plan or revision to existing ventilation plan, review of existing ventilation plan, comment upon proposed ventilation plan and any proposed revisions, and instruction from operator on ventilation plan's provisions
- Review of records of examination of main mine fan
- Review of records of examination of methane monitors
- Review of manufacturer's certification that roof bolting materials were manufactured according to ASTM F432-95
- Review of records of torque/tension tests for roof bolts
- Review of records of tests of ATRS roof support/structural capacity
- Special instruction when rehabilitating areas with unsupported roof
- Operator posting of escapeway maps and notification of changes to escapeways
- Participation in escapeway drills
- Posting and explanation of procedures to follow when mining into inaccessible areas
- Review of records of diesel equipment fire suppression systems, fuel transportation units, and underground fuel storage facilities, as well as records of maintenance of diesel equipment and training records of those operating diesel equipment
- Review and comment upon emergency response plans
- Any other rights set forth in either statute or regulation

Furthermore, the Petitioners request that the revised regulation delineate the particular materials that statutory rights instructors must, at minimum, distribute to miners during such training. In particular, the Petitioners request that instructors for all forms of statutory rights training be required to distribute to each trainee written material containing contact information for each MSHA district office and field office, including the most appropriate contacts for discrimination and hazardous conditions complaints. The Petitioners further request that statutory rights instructors for all forms of statutory rights training be required to distribute to each trainee the most recent edition of MSHA's booklet entitled "A Guide to Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977," or a publication containing similar or greater detail of miners' statutory rights. Of course, the regulation should not prohibit the distribution of additional, supplementary materials that may aid miners in the exercise of their statutory rights.

As to the quality of such statutory rights training, it is imperative that trainee-miners will retain as much information as possible. Rather than permit instructors to simply present the litany of statutory rights by rote, MSHA should ensure that trainers and the material they present are dynamic and memorable. To that end, the Petitioners request that the regulation be revised to require statutory rights instructors to utilize teaching methods such as problem-based learning.⁸

D. Remaining Issues with Part 46 Statutory Rights Training

The Petitioners primarily represent the interests of coal miners. However, the Petitioners also occasionally serve as a resource for other types of miners, such as those covered by Part 46 of Title 30, Code of Federal Regulations (miners engaged in shell dredging or employed at sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mines). As such the Petitioners discern identical problems with Part 46 statutory rights training and request that enhancements to MSHA's Part 48 statutory rights training requirements also be included in those for Part 46, as well.

E. Conclusion

The Petitioners look forward to an enhanced statutory rights training regulation that will properly inform and protect the nation's miners. After all, as Congress declared in the Mine Act, "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a). To that end, the Petitioners request that MSHA adopt the measures outlined within this Petition for Rulemaking.

The Petitioners thank MSHA for its consideration of this matter.

⁸ "Problem-based learning is a pedagogical strategy for posing significant, contextualized, real world situations, and providing resources, guidance, and instruction to learners as they develop content knowledge and problem-solving skills. In problem based learning, students collaborate to study the issues of a problem as they strive to create viable solutions. Unlike traditional instruction, which is often conducted in lecture format, teaching in problem based learning normally occurs within small discussion groups of students facilitated by a faculty tutor.

"Because the amount of direct instruction is reduced in problem based learning, students assume greater responsibility for their own learning. The instructor's role becomes one of subject matter expert, resource guide, and task group consultant. This arrangement promotes group processing of information rather than an imparting of information by faculty. The instructor's role is to encourage student participation, provide appropriate information to keep students on track, avoid negative feedback, and assume the role of fellow learner."

California State University Faculty Development Institute on Distributed Course Delivery for Problem Based Learning, *What is Problem-Based Learning* (available at <http://edweb.sdsu.edu/clrit/learningresource/PBL/WhatisPBL.html>) (citing references omitted).