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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

RONNIE R. ROSS,
APPLICANT

Application for Review of
Acts of Discrimination

v.

Docket No. VINC 78-38

MONTEREY COAL COMPANY,
MCNALLY-PITTSBURG CORPORATION,
LOOKING GLASS CONSTRUCTION CO.,
RESPONDENTS

AND

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
INTERVENOR

DECISION

Appearances: Mary Lou Jordan, Esq., for the Applicant;
Timothy M. Biddle, Esq., for Monterey Coal Company;
William H. Howe, Esq., and Donald L. Rosenthal, Esq., for McNally-Pittsburg;
James E. Heimann, for Looking Glass Construction Company;
Thomas P. Piliero, Esq., for the United States Department of Labor, Mine Safety and Health Administration.

Before: Administrative Law Judge Michels

This case involves an application for review of alleged acts of discrimination brought by the Applicant against the Respondents, Monterey Coal Company (Monterey), McNally-Pittsburg Corporation (McNally), and Looking Glass Construction Company (Looking Glass), pursuant to section 110(b) of the Federal Coal Mine Health and Safety Act of 1969 (the Act).(FOOTNOTE 1)

Pursuant to an order of this court, MSHA conducted an investigation of the alleged acts and on May 5, 1978, filed its report. At the same time, MSHA filed a motion to intervene in this proceeding which was granted.

Mr. Ross alleges that two separate acts of discrimination occurred, one on November 8, 1977, and the other on November 30, 1977, in connection with his making safety complaints and conducting safety inspections. The November 8th incident concerns an allegation that Mr. James Heimann of Looking Glass Construction Company threatened Mr. Ross when Mr. Heimann assertedly told him, in connection with an inspection of his machines, that if he got shut down he would hang Mr. Ross from a water tower. The other incident involves a letter given by McNally-Pittsburg Construction Company, Mr. Ross' employer, to Mr. Ross on November 30, 1977, advising him that if he did not confine his safety activity to the McNally operations he would be suspended and subjected to discharge.

Applicant Ross requests the following relief, including, but not limited to, a clear declaration that the alleged "abuse, harrassment, intimidation and threats perpetrated and/or condoned by Respondents" constitute discrimination prescribed by section 110(b) of the Act; an order that the Commission's decision be posted at the Respondents' worksites; a cease and desist order prohibiting Respondents from engaging in further discriminatory conduct; an order that any unfavorable reports in Applicant's personnel files that exist as a result of his safety activities be removed; and payment of all costs and expenses, including attorneys' fees, incurred by Applicant in connection with the institution and prosecution of the instant case.

A hearing was held in St. Louis, Missouri, on November 7, 1978, at which all parties were present. All the parties, except Looking Glass Construction Company, were represented by counsel. Looking Glass was represented by Mr. James Heimann, the company's president. The parties were given the opportunity to file posthearing briefs and proposed findings of fact and conclusions; such briefs were filed by Applicant Ross and Respondents Monterey and McNally-Pittsburg.

General factual background

Monterey in 1974 began development of an underground coal mine near Albers, Illinois, called Monterey No. 2 (Monterey Exh. 2). At the times relevant to Mr. Ross' application, the underground portion of the mine development was completed and Monterey was mining coal (Tr. 284). Construction of surface facilities and related activities were underway by several contractors including McNally and Looking Glass (Tr. 264-265, 308, 315).

In order to work at the mine site, the employees of each contractor were required to be members of Local 2015 of the United Mine

Workers of America (UMWA) (Tr. 73, 76). The relationship between the construction employers and their employees was governed by the National Coal Mine Construction Agreement, effective December 23, 1974 (the 1974 Agreement), between the Association of Bituminous Contractors (an industry wide bargaining unit) and the UMWA (McNally Exh. 1, Tr. 20). This agreement reads in pertinent part: "The Health and Safety Committee may inspect any portion of the project site at which employees of the Employer are employed. * * *" (Art. IV, section (c)2 of the 1974 Agreement).

Mr. Ross was employed by McNally at the Monterey project from May 1975 through the project's termination in August 1978 (Tr. 151). He was hired as a carpenter and he bid for and was awarded the position of lead millwright shortly prior to his layoff (Tr. 151).

Under the 1974 Agreement, the employees of each contractor at the project were entitled to form a health and safety committee. Each committee was authorized to inspect any portion of the project site where the employees of that contractor worked (the 1974 Agreement, Article IV, section (c) (Tr. 73-74, 85)). In October and November of 1977, a number of the contractors at the project had a committee made up of an employee or employees. Some of the small contractors, however, appear not to have had committees (Tr. 89-91).

Such a committee was formed at the Monterey project by McNally employees. While in the employment of McNally, Mr. Ross held the position of project health and safety committeeman (Tr. 151). After becoming committeeman, Mr. Ross took courses at the local junior college and state schools to increase his knowledge of state and Federal safety and health requirements. He was also selected by the local to attend the various training programs offered by MSHA and the State Department of Mines. Because of his background and training and his activities as a committeeman, Mr. Ross tended to be the person to whom employees came when they had a safety problem (Tr. 32-33, 55, 92, 151-156, 169-170). Mr. Ross was also selected by McNally to give employees safety training (Tr. 186).

The practice of the union local was to appoint at the Monterey No. 2 Mine a chairman of all project health and safety committees. Prior to Mr. Ross' appointment, the position was held by the president of the local (Tr. 86-87, 109-110). Mr. Ross, although not president, was appointed by the executive board of the local union sometime in the spring of 1977 as chairman of the safety committee (Tr. 87, 120). This appointment was hand carried to the superintendent of McNally and a carbon copy sent to Monterey (Tr. 120-122, Applicant's Exh. 2). The position of chairman, while sanctioned by the local union by-laws, is not provided for in the 1974 Agreement (Tr. 86, Applicant's Exh. 2).

Under the 1974 Agreement, safety committees made regular safety inspection tours and at the McNally project the committee did this

monthly (Tr. 181). While some of the witnesses suggested that McNally committeemen covered virtually the entire project, other evidence indicates that their tours were basically restricted to the McNally site (Tr. 41, 48, 50-52). Mr. Ross testified that he was authorized to inspect the whole mine site where McNally employees were working, but he claimed generally that he also inspected outside that area (Tr. 201-202).

McNally committeemen, including Mr. Ross, did not inspect underground, the administration building, the shafts and other areas of the mine project (Tr. 41, 50). However, they did observe and report on alleged safety conditions at non-McNally sites. Examples were citations against Zeni, McKinney, Williams for oxygen and acetylene bottle violations and Christian County Contractors for fire extinguisher and backup alarm violations (Tr. 49, 52). These conditions appear to have been observed in connection with a McNally site inspection, although not necessarily on the McNally site. As part of their duties, committeemen accompanied Federal inspectors on their inspection of the job site and usually stayed with them during the entire inspection tour (Tr. 30, 154).

Mr. Ross and his committee made an inspection tour on November 4, 1977, and found certain conditions which they believed to be violations and prepared a request under 103(g) of the Act.(FOOTNOTE 2) It was Mr. Ross' practice, at least toward the end of his employment, to write up requests for inspection under 103(g). The request written as a result of the inspection tour on November 4, 1977, was given to Inspectors Tisdale and Plaub on November 8. It lists, among others, alleged violations by Looking Glass Construction Company (Tr. 165).

In conducting their inspection on November 8, the inspectors were accompanied by Mr. Ross, Mr. Terry Cannon, a McNally employee and also a member of the McNally safety committee, as well as the management representatives from McNally and Monterey (Tr. 149-150, 164, 207). It was at the time of the inspection on November 8, that Mr. Heimann made his angry outburst about hanging Mr. Ross from the water tower, one of the charges in this proceeding.

The alleged threat of November 8, 1977, which is charged against Looking Glass and Monterey

The first charge for consideration in this proceeding is that Mr. James Heimann, owner and president of Looking Glass, threatened Mr. Ronnie R. Ross, the Applicant, and that this threat was a discriminatory action in violation of section 110(b) of the Act. On November 8, 1977, the Applicant, while on an inspection tour in the company of Federal inspectors and others, was allegedly verbally abused and threatened by Mr. Heimann when the latter told him that if he (Mr. Heimann) got shut down, he would hang Mr. Ross from the water tower. The charge in this connection is against Looking Glass, a contracting company owned by Mr. Heimann, and Monterey, the owner of Monterey No. 2 Mine. Monterey is charged on the basis of the principle of "vicarious liability" as well as on the basis of asserted control at the mine site.

A. Discussion of the specific facts relevant to this charge

On November 8, 1977, MSHA Inspectors Tisdale and Plaub conducted an inspection of Monterey No. 2 Mine. Safety committeemen of Local No. 2015 regularly accompanied MSHA inspectors on their inspections of the mine, and on this occasion, Mr. Ross, as well as Mr. Terry Cannon, another committeeman, was on the tour. At the beginning or during the inspection tour, Mr. Ross presented the inspectors with a 103(g) request. The request cited, among others, a number of alleged violations or safety conditions involving the equipment of Looking Glass (Tr. 142, 162, 165, Applicant's Exh. No. 3).

The inspection party included not only the inspectors and committeemen Ross and Cannon, but Leonard Lewis, a McNally supervisor, and John Lanzerotte, a Monterey safety official (Tr. 18, 149-150, 207, 235). It toured several parts of the mine before arriving at the Looking Glass area.

When the inspecting group came to this area, Mr. Heimann was not at the site. He was at home eating lunch and he returned to the site after receiving a telephone call from one of his employees who notified him of the inspection (Tr. 268, 272). Mr. Heimann thus arrived at the site aware that several persons were inspecting his equipment. His testimony indicates that he did not become angry because of the telephone call and that prior to his arrival at the work site he did not foresee any problem (Tr. 272-273). A few days before November 8, Mr. Heimann had discussed safety aspects of all his equipment at the site with the same inspectors and, as the result of these conversations, he believed his equipment complied with the applicable safety standards (Tr. 256-257, 267).

When Mr. Heimann arrived at the site, he saw that a particular tractor was being inspected for possible violations (Tr. 273). At

this point, he became angry. He first made a statement to the effect that he could easily quit his Monterey contracting work and go back to farming. Next, he used language to the effect that if he were closed down, he would hang the person responsible from a nearby water tower (Tr. 143, 166, 274). Witnesses testified that the statement was made in such a way that it was clearly directed toward Mr. Ross. Also, Mr. Heimann testified that although he did not use Mr. Ross' name, he felt that the latter knew who he meant (Tr. 274). Mr. Heimann had not had any significant contact with Mr. Ross previously and knew about him by reputation. The indications are that Mr. Heimann was angry because of a history of difficulties in carrying out his work at the site--difficulties which, rightly or wrongly, he attributed to the union. He testified that destructive and increasingly violent actions had been taken against his property on the site and near his home (Tr. 265). The presence of Mr. Ross on the inspection tour, was apparently an embodiment of his troubles. His own explanation for his outburst is contained in the following exchange:

> Q. Do you recall any particular statement or anything at all that caused you to get angry enough to say something to the effect about hanging somebody from the water tower?
>
> A. It was the fact that the very tractor that had been declared unsafe had been declared safe just several days before by Mr. Plaub and Mr. Tisdale, and I was almost convinced that Mr. Ross had pressured them into going back and reexamining it.

(Tr. 273).

After making his angry statement, Mr. Heimann walked away from the site and returned home (Tr. 143, 274-275). He testified that a little later he went back to the site to talk with Inspectors Plaub and Tisdale, but they were no longer present. The record does not contain evidence of any further interaction between Mr. Ross and Mr. Heimann immediately following this confrontation. There is testimony about a later meeting between the two men at which time Mr. Heimann asserts they agreed to get along better in the future (Tr. 198). Nothing further came of the incident. There is no evidence that Mr. Heimann was in any way thereafter abusive to Mr. Ross.

The angry outburst of Mr. Heimann on its face appears to be a threat to do bodily harm to Mr. Ross. However, under the circumstances and in light of the actual statement made it seems relatively obvious that this was not a threat which Mr. Heimann either intended to carry out or had the capability of executing. There is no evidence of Mr. Heimann having a past history of physical violence at the site or of mistreating employees. In fact, the record shows generally to the contrary (Tr. 77-78, 104-105). Mr. Heimann had never before threatened anyone else with hanging them from the water

tower or with injury. He characterized his threat as "more a figure of speech" and explained clearly that he did not intend to hang anyone (Tr. 278).

There is little indication that Mr. Ross felt actually threatened. He testified that the statement made him feel sick to his stomach, but that could have been because of the stress caused by the confrontation. It strains credulity to suggest that anyone would believe Mr. Heimann intended to carry out the act of hanging. It was an outburst of pent-up anger; not an actual threat. There is no evidence that the incident had any impact on Mr. Ross' subsequent activities. As will be shown under the second charge, after this incident Mr. Ross continued his inspection tours as he had done before.

Thus, I find that the statement made on November 8 by Mr. Heimann about hanging someone from the water tower was a statement made to Mr. Ross. I further find that while this angry outburst was verbally abusive, it was not an actual threat on Mr. Ross' life.

B. Consideration of the law and the sufficiency of the evidence to prove the charge

The Applicant contends, as mentioned above, that Mr. Heimann's statement constitutes discriminatory action under section 110 of the Act and that both Looking Glass, which is owned by Mr. Heimann, and Monterey, the owner of the mine, are liable.

The part of the section charged and that pertinent to this action reads as follows:

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger * * *.

The Applicant argues that (a) in notifying the inspectors about the Looking Glass equipment, Mr. Ross brought himself under the protection of section 110; and (b) that he is entitled to protection, not only from his own employer, McNally, but also from other employers on the project site, including Looking Glass. He contends that "[t]o hold otherwise would completely thwart the purpose of the Act, since retaliation from contractors other than one's employer can, never-theless, result in a chilling effect on the exercise of a miner's right to notify the Secretary" (Applicant's Brief, p. 16).

Looking Glass filed no posthearing brief. Respondent Monterey, however, addressed itself to the subject in its brief. It contends

the alleged threat did not amount to discrimination under the Act, and, among other things, argues that although section 110(b) prohibits "persons"--as opposed to employers--from discriminating against miners, it is reasonable to assume that by the use of the term "discrimination" Congress intended some connection between the person alleged to have committed an act of discrimination and the miner's employer. According to Monterey, such connection could be one of conspiracy, encouragement, ratification, remuneration, or promise, but it would have to be something to connect the employer. It avers that never has liability been put on someone such as Mr. Heimann, who is neither the employer, nor an agent or fellow employee, but one who bears no relation to the employer at all (Monterey Brief, pp. 9-10).

The language of the Act and the few references in the legislative history to the provision appear to suggest that its coverage is limited to an employment connection of some kind. The principal specific reference is to a discharge and this presupposes an employment status. The relief provided in section 110(b), although not limited, specifies only rehiring or reinstatement which again presupposes prior employment. The Senate Conference Report, in its section-by-section analysis in a brief reference to section 110(b), states that the subsection provides procedures for obtaining reinstatement and back pay for miners discharged by operators and other remedies for miners discriminated against (Legislative History of the Act, House Committee on Education and Labor, March 1970, p. 1122). Again, the only specific remedies referred to are reinstatement and back pay which are employment connected. While other remedies are mentioned, there is lacking any indication that the reference is to actions having no connection with employment.

The U.S. Court of Appeals for the District of Columbia has interpreted the section in two leading decisions: Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974), and Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974). Therein, the court delineated the elements necessary for relief under section 110, which will be discussed, infra, in more detail as they relate to this proceeding. It is apparent, however, that these cases concern actions taken by an employer against employees or former employees. Even though the court indicates that a liberal construction of the statute is warranted, there is no hint of an application of this provision beyond the employment context.

It is worth noting that the new law, the Federal Mine Safety and Health Act of 1977, expanded the rights of miners under this provision, but even so, there is no indication in the law or the legislative history that the reach of the provision was extended beyond the employment context. Administrative Law Judge Broderick in interpreting the comparable provision in the new Act held that the Secretary and other administrative officials are not proper parties,

ruling to the effect that the rights granted by section 105(c) arise from an employment relationship. Neil Humphreys, et al. v. R. C. Samples, et al., MORG 78-370 (October 26, 1978). This is not the definitive word on the meaning of section 105(c) in the new Act, but it illustrates a point of view favoring such a construction. If the new Act is confined to employment relationships in discrimination cases, there is considerably more reason to hold that the 1969 Act is similarly limited.(FOOTNOTE 3)

In light of the considerations mentioned above, I hold that the phrase in the Act "No person shall * * * in any other way discriminate against or cause to be * * * discriminated against * * *" means that protection is granted only in connection with employment. The "person" so discriminating need not necessarily be the employer, but, if not, he must be one who in some way, such as by conspiracy, aiding or abetting or otherwise, affects the employment status of the reporting miner.

There was no direct employment connection with respect to either party named in this charge. Mr. Ross was not employed, presently or in the past, by either Looking Glass or Monterey. The remaining question is whether the alleged act of discrimination in any other way affected his employment status or pay. No discriminatory action was proposed to the employer, McNally, by either party nor was any discriminatory action taken by McNally after the incident.

So far as Looking Glass is concerned, the incident began and ended with the angry outburst. Since Looking Glass did not employ Mr. Ross, its action did not directly affect his employment or pay. The record shows that McNally wrote a disciplinary letter on November 30, 1977, to Mr. Ross, the second charge considered herein, which action was at least in part caused by the November 8 incident. However, Looking Glass did not request that this letter be written, nor did it request any other action against Mr. Ross. As found below, the letter was not a retaliatory action against Mr. Ross and was not a discriminatory act by McNally. To an extent, Looking Glass was a cause of the action taken by McNally in that it was involved in one of the acts which McNally considered before writing the letter, but

since it did not cause a retaliatory or discriminatory act, there is no liability under the section.

Monterey, like Looking Glass, was not the employer of Mr. Ross and none of its actions directly affected the employment or pay of Mr. Ross. Indirectly, Monterey was the cause of the disciplinary letter from McNally to Mr. Ross dated November 30, 1977, referred to above. While Monterey had requested that Mr. Ross be stopped from making inspection tours outside the McNally project area, there is no evidence that it caused McNally's specific actions against Mr. Ross. (See discussion of this subject in next section of the decision). Since the letter was not retaliatory or discriminatory, Monterey, although it indirectly caused the action, is not liable under the Act.

Accordingly, I find that the actions of Looking Glass and of Monterey resulting from the incident of November 8 are not in violation of section 110(b) of the Act.

The allegation against McNally and Monterey involving the letter

The second charge concerns a letter which was delivered to the Applicant by McNally on November 30, 1977, signed by McNally project superintendent Robert W. Stearman. The Applicant contends that this letter which threatened him with discharge was a discriminatory act in violation of section 110(b)(1)(A) of the Act.(FOOTNOTE 4) The entire text of the letter is as follows:

> This is to advise you that your duties as Project Union Health and Safety Committeeman are limited exclusively to McNally Operations at the Monterey Coal Mine # 2. In the event of your violating the above, you will be suspended-Subjected to discharge.

McNally, the contractor for whom Mr. Ross worked, and Monterey Coal Company, the owner of the mine, are named as Respondents in this charge. As with the threat, Monterey is charged on the basis of the principle of "vicarious liability" as well as on the basis of asserted control at the mine site.

A. Discussion of the specific facts relevant to this charge

A few weeks after the November 8 inspection, at which time Mr. Heimann made his angry outburst about hanging Mr. Ross from the water tower, Mr. Ross received the disciplinary letter from

Mr. Stearman which is here in issue. In this letter, as quoted above, he was told that unless he limited his duties as committeeman to the McNally site, he would be suspended, subject to discharge. No such letter was sent to Mr. Cannon, who was also a committeeman and who had been at the scene at the time of the Heimann outburst.

It does not appear, however, that the letter was prepared solely because of the November 8 incident. Mr. Charles Bradley, vice president of construction for McNally, testified it had come to his attention that Mr. Ross was inspecting areas other than where McNally employees were working, and that he learned of this when he received a call from Monterey. The information as to Mr. Ross' inspections in other areas was first received the latter part of October 1977, and it had to do with Monterey's underground mine. Other notices of his activity continued to come in and "the letter was written because the inspection of other areas had continued after that" such as the Looking Glass area (Tr. 225). Prior to October 1977, Mr. Bradley had not received any similar complaints either at Monterey No. 2 Mine or other projects in which McNally was working.

Mr. Bradley testified that upon receiving the notice from Monterey he told the company that he "would take care of it" and he thereupon called Mr. Stearman. The latter was told to limit the committee's activities to the McNally scope of work. Mr. Bradley also instructed Mr. Stearman to write and deliver to Mr. Ross the letter (Tr. 216, 224-225). Mr. Bradley testified that the letter was written as a result of the Looking Glass incident and other reports of Mr. Ross' activities outside the McNally site (Tr. 226). He also had knowledge that Mr. Ross was filing 103(g) requests. Mr. Stearman was given instructions to write the letter on November 8, but it was not delivered until the 30th of November (Tr. 231). Information the same as that in the letter were also given orally to Mr. Ross (Tr. 184, 192).

Mr. Ross, during the course of his employment with McNally, had frequent occasions to report what he believed to be violations or unsafe conditions. He claimed that McNally was slow to correct the conditions reported and that he reached the point where upon finding a safety problem he would write up a 103(g) request for inspection (Tr. 167, 182, 188-189, 187). Michael Hill, a McNally employee, also testified that McNally was slow to correct reported safety infractions (Tr. 40).

Mr. Ross upon reporting asserted safety violations was frequently given the task of correcting the conditions (Tr. 155, 36-38, 95). He believed he was required to do such clean up jobs more than other safety committeemen. He was assigned at different times to clean up the tipple and the wash house and at another time to repair handrails (Tr. 155). He was also assigned to pick up scraps after citing an area as being full of debris (Tr. 36). Mr. Ross upon insisting that

a portal man, that is, a man who works at the top of the portal, was needed, was given the job of portal man. This was a class C or B position and Mr. Ross at the time was a class A millwright. His pay, however, was not reduced (Tr. 37, 38, 95, 185). Mr. Ross and his coworkers testified to their belief that he was harrassed by McNally (Tr. 37, 60, 95, 155).

There is evidence that it was a regular practice of McNally to assign the person reporting unsafe conditions to correct those conditions if they were qualified to do so. Mr. Lewis, McNally's control supervisor, testified that he would assign the first individual handy if danger was imminent and that he had assigned Terry Cannon, a safety committeeman, to clean up cited conditions. If Mr. Cannon reported the violation, he was usually asked to correct it (Tr. 241). Mr. Lewis followed a practice of assigning the individual best suited to handle the situation (Tr. 252-253).

After Mr. Ross was instructed orally and by letter to restrict his safety inspections to the McNally site, he continued to inspect both the McNally site and other areas as he had done before (Tr. 191). He was not discharged, reprimanded or penalized for failing to comply with the instruction set forth in the letter of November 30.

B. Discussion of the law and the sufficiency of the proof

Insofar as the November 30 letter is concerned, the charge is that the document which threatened the applicant with discharge was a discriminatory action in violation of section 110(b)(1)(A) of the Act. This provision, to again quote it for convenience, reads as follows:

> No person shall discharge or any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger * * *.

The Applicant must show in this instance three elements to sustain a charge of a violation of the Act: (a) The reporting of an alleged violation or danger in the mine to the Secretary, (b) that the reporting miner was discriminated against and (c) that the reporting was the precipitating cause of the discrimination, that is, that the discrimination was in retaliation for the reported alleged violations or danger. Munsey v. Morton, supra; Phillips v. Interior Board of Mine Operations Appeals, supra.

The first element is established without question. Mr. Ross had on a number of occasions and in particular on the occasion of the Looking Glass incident, reported asserted violations by requesting

103(g) inspections and this reporting was known to the McNally management.

In regard to the second element of proof, i.e., an act of discrimination, the evidence shows that a disciplinary letter was given to Mr. Ross and that it was not given to other committeemen in approximately similar circumstances. No letter was given to Mr. Terry Cannon, who was with the group on the day of the Looking Glass incident. I have ruled in a prior case that a disciplinary letter may be a discrimination within the meaning of the phrase "in any other way discriminated" in the Act. Local Union 1110, UMWA, et al., v. Consolidation Coal Company, Docket No. MORG 76 x 138 (May 26, 1977). In that case, I found that such a letter in an employee's personnel file might affect further pay, advancement or even employment. In that respect, it is or may be a punitive act. Mr. Ross in this instance was singled out to receive the letter and was thus discriminated against within the meaning of the Act.

The third and final element of proof is whether this discrimination was motivated by or in retaliation for the reporting of an alleged danger or violation. The letter, as the parties generally agree, was directed to Mr. Ross' safety inspections outside of the McNally area of operations. The letter does not limit inspections otherwise. It is not directed at the fact that Mr. Ross, as a committeeman, was looking for and reporting conditions which he believed to be a danger or a violation. It was directed solely at his activity of inspecting for safety violations off the McNally site, which was perceived by McNally management to be unauthorized.

McNally had good reason to believe, and there is no evidence to the contrary, that the 1974 Contract was the governing instrument in its relationship with its employees. The contract provided that Mr. Ross or other committeemen might inspect at any portion of the project site on which McNally employees were employed. This document might fairly be interpreted as limiting a committeeman to inspections on the McNally site and, at least in the usual circumstances, that requirement does not appear to be unreasonable. Even without a contractual provision, an employer would be reluctant to have his employees inspect and report on violations of other employers. The employer would lose some control over activities of its employees and its relationship with other employers could be adversely affected.

There is not the slightest question that Mr. Ross regularly made off-site inspections. He readily concedes this in his testimony and such activity was confirmed by other witnesses. Mr. Ross, even before he was appointed the chairman of the committee, accompanied Mr. Bathens to "Mr. Heimann's job site across the road" (Tr. 156). The 103(g) request which was written up and handed to the inspectors on November 8, included a listing of alleged deficiencies in the Looking Glass Construction Company equipment which was not located on the McNally site.

The testimony of Mr. Bradley and other evidence demonstrates that the letter of November 30, was written and given to Mr. Ross solely because of the reports of Mr. Ross' safety inspections outside of the McNally site and in particular his off-site inspection of the Looking Glass equipment. There is no evidence to show that the letter is in any way a pretext to hide an unlawful motive. The motive was to prevent Mr. Ross from inspecting off the McNally site, not to punish him for reporting asserted dangers or violations.

The issue thus narrows to whether Mr. Ross was disciplined for unauthorized activity. In this sense the matter is not unlike that dealt with by the undersigned in Local Union 1110, UMWA et al., v. the Consolidation Coal Company, supra, in which I found that the disciplinary letters were not issued in retaliation for reporting alleged dangers or violations; they were issued because the committeemen had infringed upon an area reserved to management. I am satisfied that my findings and conclusions should be the same in the circumstances of this proceeding. Accordingly, I find that the letter presented on November 30, 1977, to Mr. Ross was to prevent him from engaging in activity reasonably perceived by management to be unauthorized and it was not in retaliation for safety reporting to the Secretary.(FOOTNOTE 5)

The evidence shows that Mr. Ross, when he reported assertedly unsafe conditions, was given the task of correcting these conditions. As a result, he frequently found himself doing jobs like cleaning up washroom facilities. On one occasion, he was assigned as a top man on the portal after reporting a need therefore, although he was overqualified for the position. There is no charge here that these assignments were a violation of section 110. The record also shows that such assignments were normal and that the miner who reported the violation, where he was capable of doing so, was usually told to correct it. Other committeemen were assigned to correct unsafe conditions which they reported. There is no showing the reporting by Mr. Ross which led to his work details was connected with or that it influenced the writing of the letter of November 30.(FOOTNOTE 6)

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In summary, I find that the letter of November 30 to Mr. Ross was discriminatory, but it was not in retaliation for the reporting by Mr. Ross of alleged safety violations; rather it was motivated by the desire to limit Mr. Ross' off-site activity. In this connection, I note that the letter was subsequently removed from Mr. Ross' file (Tr. 185). Further, it appears that other effects of McNally's action are mooted since the McNally contract at the Monterey site has been completed and Mr. Ross is no longer in the employ of McNally.

Inasmuch as I have found above that the Act was not violated by McNally, the contractor, in giving the letter of November 30, 1977, to Mr. Ross, it follows that the owner, Monterey Coal Company, is also not in violation of that section of the Act.

CONCLUSIONS

1. Monterey Coal Company, McNally-Pittsburg Corporation, and Looking Glass Construction Company are subject to the Federal Coal Mine Health and Safety Act of 1969.

2. The Administrative Law Judge has jurisdiction over this proceeding.

3. The application for review of acts of discrimination and the relief requested by Applicant should be denied for the reasons stated in the findings above.

ORDER

IT IS ORDERED that the application for review of acts of discrimination is DENIED and this proceeding is DISMISSED.

Franklin P. Michels
Administrative Law Judge

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FOOTNOTES DTART HERE

~FOOTNOTE_ONE

1. This Act has been superseded by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

~FOOTNOTE_TWO

2. Section 103(g) reads as follows:

"Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger * * *".

~FOOTNOTE_THREE

3. In a decision in Ronnie R. Ross v. Maurice S. Childers, et al., VINC 78-158 (October 28, 1977), Judge Luoma held the 1969 Act is limited in that the Secretary and other enforcement officials are not proper parties to be charged for acts of

discrimination. In that case, Mr. Ross had filed an application for review of acts of discrimination charging: (1) MESA and the Secretary of Labor with failing to properly administer the 1969 Act, and (2) Inspector Marcell Chamner with having "verbally abused, harassed, intimidated, and threatened Applicant Ross." The appeal from Judge Luoma's decision was withdrawn by Mr. Ross and the proceeding was terminated by the Federal Mine Safety and Health Review Commission on October 25, 1978.

~FOOTNOTE_FOUR

4. See relevant provisions of the Act quoted above.

~FOOTNOTE_FIVE

5. This decision should not be construed as affirming a policy of limiting safety committee inspections to the employer's area. Since in developing a mine contractors frequently work in close conjunction with one another and affect employees of one another, there may be instances in which inspections off the immediate site of the employer are justified. That is not a specific question before me, however, and possibly is a subject which should be considered in negotiations between employees and their employers.

~FOOTNOTE_SIX

6. While not an issue before me, the policy of assigning the miner to clean up or correct the conditions he has reported, particularly where dirty work is involved, is one that is far from satisfactory. It could well have a chilling effect on the reporting of unsafe and unhealthy conditions. Though apparently permitted under the labor agreement, it seems to me the practice should be curtailed or eliminated wherever possible.