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R. INMAN & K. HIMKLE V. MID-OHIO MINING

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

RANDY INMAN AND KENNY HINKLE,
COMPLAINANTS

v.

MID-OHIO MINING COMPANY,
RESPONDENT

Discrimination Complaint

Docket No. VINC 79-184

Redfield No. 2 Strip Mine

DECISION

Appearances: William Safranek, Esquire, McConnelsville, Ohio,
for the complainants
Robert H. Albert, Esquire, Columbus, Ohio, for
the respondent
Thomas P. Piliero, Trial Attorney, Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, amicus curiae

Before: Judge Koutras

Statement of the Proceeding

This matter concerns a discrimination complaint filed by the complainants against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and health Act of 1977, 30 U.S.C. 801 et seq. The complaint was filed with the Commission on February 12, 1979, and the respondent filed a timely answer denying any discrimination against the complainants. After a period of discovery in which interrogatories were served on and answered by the respondent, the matter was heard in Columbus, Ohio, on May 1, 1979, and the parties appeared by and through counsel and participated fully in the hearing. Post-hearing proposed findings, conclusions, and supporting briefs were filed by the parties and the arguments presented therein have been duly considered by me in the course of this decision.

The thrust of the complaint is the assertion by the complainants that they were laid off from their jobs with the respondent on November 25, 1978, because of a complaint made to State mine inspectors concerning unsafe equipment. A previous complaint filed by the complainants with the Labor Department resulted in a finding by that Department that the complainants were not discriminated against and their complaint was dismissed.

Issue Presented

The principal issue presented in this proceeding is whether the termination of Mr. Inman and Mr. Hinkle from their employment was, in fact, prompted by their reporting certain unsafe conditions at the mine to a State mine inspector.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3), which provide:

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

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt

of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to

the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of the miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

Testimony and Evidence Adduced by the Parties

Complainants

Ronald K. Leigh, State of Ohio mining inspector, testified he was familiar with the Redfield No. 2 Mine operated by the respondent and that he has conducted inspections at that mine, and did so on November 24, 1978. The mine is a nonunion mine and employed approximately 10 people during that time. On November 24, one of his fellow State inspectors, a Mr. Jackson, came to his home and advised him that he had received complaints about equipment with no brakes being operated at the mine. He and Mr. Jackson went to the mine and met the mine foreman, Donald Vernon, who introduced himself and advised them that he had shut the pans down because they had no brakes. Mr. Vernon admitted that the pans were operated with no brakes because it was difficult to obtain parts. Mr. Vernon assured him that the machinery would be repaired and he (Leigh) put a danger sign on the machinery and instructed Mr. Vernon not to operate it until the brakes were repaired. During the course of the inspection, Mr. Leigh found some other violations, a dozer with a blown fuse, a loader with a defective windshield wiper, no first-aid equipment on the property, and a fuel truck with no brakes, defective turn signals, and a defective exhaust system (Tr. 9-19).

Mr. Leigh stated that after finding the violations, he discussed the matter with Mr. Vernon, and Mr. Vernon indicated he was having problems with the equipment and admitted that some of the pans had run together and one turned over. Prior to this time, Mr. Leigh had received no reports of such incidents at the mine. Mr. Leigh stated he "let it slip" to Mr. Vernon that he had learned about the pans, but did not mention any names. Mr. Vernon produced copies of equipment worksheets required to be filled out on the equipment when it is checked, and he mentioned that one of his employees was doing his job because he had noted some equipment defects on the worksheets. Mr. Vernon also asked about Mr. Jackson and indicated that he knew his father. The equipment that was tagged out was subsequently repaired and put back in operation in a matter of days (Tr. 19-26).

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On cross-examination, Mr. Leigh testified that when he went to the mine on November 24, he did not know who had informed Mr. Jackson about the safety violations at the mine. He did not give Mr. Vernon the names of Mr. Inman or Mr. Hinkle as the parties who had informed State inspectors about the violations, and he would never tell a mine owner or foreman who had informed, and that is his practice. He could recall nothing in his conversation with Mr. Vernon that would lead Mr. Vernon to know who had informed, except for the conversation with Mr. Jackson that Mr. Hinkle and Mr. Inman lived in the area near Mr. Jackson. Mr. Leigh did not know Mr. Inman or Mr. Hinkle, nor did he know where any of the mine employees lived (Tr. 26-28).

The usual practice when the equipment is down, is to have mine employees help repair it, but he did not know the mechanical abilities of Mr. Inman or Mr. Hinkle (Tr. 29-31). Mr. Vernon did remark that "Randy" was the only person marking the equipment sheets as indicating that something had been wrong with the equipment (Tr. 33).

In response to bench questions, Mr. Leigh described a "pan" as a scraper used to take off topsoil (Tr. 34), and that during his prior inspection some 7 months earlier, he found no major violations or equipment defects (Tr. 36). Neither Mr. Hinkle nor Mr. Inman made any specific complaints to him, and Mr. Jackson was the person who notified him, and he (Leigh) did not know Mr. Inman or Mr. Hinkle prior to that time (Tr. 37-38).

Richard Jackson, State mining inspector, testified he was acquainted with Mr. Hinkle and Mr. Inman and indicated that they live approximately a mile and a half from him. He testified that Mr. Inman reported mine safety violations to him at a local school carnival on approximately November 10, 1978. Mr. Inman told him that the pans were running unsafe, running into each other, and that one had turned over, and he asked him if there were anything he could do about it. Mr. Jackson advised him that he would report it to the inspector who had jurisdiction in the mine district and that he did so by telling Mr. Leigh about it. Upon inspection at the mine on November 24, they found the pans operating without brakes, a defective exhaust system on a truck, and the fact that no first-aid equipment was available (Tr. 40-45, 57).

Mr. Jackson discussed the violations with Mr. Vernon and he produced the equipment worksheets. One particular individual who had filled out the sheets had noted items that needed to be fixed, while the other sheets simply noted that the equipment was "O.K." This individual was Mr. Inman and he pointed it out to Mr. Vernon and he knew who he was talking about because he looked at Mr. Inman's worksheets. Mr. Vernon then asked him about his father and asked whether he lived near him and he indicated that he did. Mr. Leigh "let it slip" that they had known about the equipment defects (Tr. 45-48).

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On cross-examination, Mr. Jackson testified that Mr. Inman specifically mentioned the pans and the fact that the equipment was running into each other. The complaints were not in writing and he did not indicate to Mr. Vernon or to the respondent company as to who filed the complaint, nor did he make any specific statements to Mr. Vernon which would indicate to him who filed the complaint, and Mr. Vernon did not ask (Tr. 49-53). At the time of the complaint on November 10, Mr. Hinkle was present but merely asked him whether Mr. Inman had had spoken to him (Tr. 57).

In response to bench questions, Mr. Jackson stated that he said nothing to Mr. Vernon which would lead him to believe that Mr. Inman or Mr. Hinkle had filed any safety complaints. He could not recall the specific periods of time covered by the equipment worksheets which he reviewed, nor could he recall the specific equipment which was covered. He had no way of knowing whether the equipment marked "O.K." was, in fact, in good condition, and it was possible that it was. When he handed Mr. Vernon the worksheets filled out by Mr. Inman, Mr. Vernon remarked that "Randy does a good job," but he could conclude nothing from that remark, nor could he conclude that Mr. Vernon suspected him as being the person who had complained (Tr. 62-69).

Richard E. Cooper testified that he was formerly employed by the respondent as a mechanic from May to December of 1978 and quit because of a disagreement. He was aware of defective brakes on the scrapers and since they had so much work, as long as the equipment would run, it would be operated in that condition. Mr. Vernon instructed him to operate the equipment by "backing off the brakes," and they simply did not have the time to make brake repairs. He was not at the mine site on November 24, but he does know Mr. Inman and Mr. Hinkle and considers them to be good operators. He worked for Mine Foreman Vernon on a day-to-day basis and did not consider him to be a good foreman because he did not know how to move his dirt or work with his men. Company President Rybski had asked him to assist Mr. Vernon, but he would not take the foreman's job, although he took such a job at a different mining company. When the equipment was down, Mr. Inman and Mr. Hinkle would "help out a little bit" in assisting the mechanic in making repairs (Tr. 76-84).

On cross-examination, Mr. Cooper testified he was terminated by the respondent on December 7, 1978, and that Mr. Rybski stated, "[w]e had better part company." He recalled repairing a scraper shortly before he left the company, and indicated that it "blowed up" shortly after that, but insisted he was not at fault since he believed he had repaired the machine properly (Tr. 85-87).

William McCormick testified that he was employed by the respondent in November of 1978 and recalled the day the State inspectors came to the mine, but knows nothing about what they found. He

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recalled mine foreman Don Vernon addressing the men as a group after the inspectors left and recalls him asking "[w]ho was the dirty son-of-a-bitch that called the inspectors in?" (Tr. 88-91).

On cross-examination, Mr. McCormick stated that Mr. Vernon met with the men the morning following the departure of the inspectors from the mine, and the whole crew was present. Nothing else was discussed and no one said anything else and Mr. Vernon mentioned no names as possible parties who may have filed the complaint. Mr. McCormick had no knowledge as to who may have made any safety complaints, and Mr. Vernon never made any further inquiries in this regard. Mr. Vernon did remark that Mr. Inman was "a damned good operator" (Tr. 91-96).

Wayne Baker is employed by the respondent and was so employed in November 1978. He recalls Mr. Vernon making a remark concerning "[w]ho was the dirty son-of-a-bitch" that turned him in to the inspectors, but the remark was not addressed to anyone in particular. He knows Mr. Inman and Mr. Hinkle and stated that they seemed to do their work as scraper operators. He recalled an accident when the engine on his pan quit and went backwards and ran into another one. The fact that the brakes were inoperative would not have made any difference since once the engine quits, all power is lost. The pan had no brakes that day and Mr. Vernon knew it (Tr. 99-102).

On cross-examination, Mr. Baker stated that Mr. Vernon received no information from his remark that would indicate to him that Mr. Inman or Mr. Hinkle were the ones that contacted the State inspectors (Tr. 102).

Mr. Baker had no idea who had contacted the State inspectors at the time Mr. Vernon made his remark, and when he learned that Mr. Inman and Mr. Hinkle were laid off, he did not know what to make of it. The remark made by Mr. Vernon was "off-the-cuff" at the end of the shift, the day the inspectors came and was not directed to anyone in particular (Tr. 103-105).

Robert Robinson was formerly employed by the respondent as a dozer operator and indicated that when problems arose with the equipment, he would help repair it. Problems were experienced with equipment brakes. He was working on a front-end loader the day the inspectors came to the mine, and they did not have time to fix the brakes. As far as he knew, mine management and the foreman were aware that the brakes were not working on some of the equipment. He recalled Mr. Vernon making the remark concerning who may have complained to the inspectors and believed that Mr. Inman and Mr. Hinkle did their job (Tr. 106-109).

Larry Jennings was employed by the respondent until the end of November 1978, but was not at the mine when the inspectors were

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there. He was involved in an accident concerning Mr. Baker when his pan engine quit and his machine came down a hill, and he also rolled a pan. If the pan had good brakes, the accident may have been prevented (Tr. 111-112). He rolled his pan when he tried to cut a square corner and rolled over. That incident was not caused by bad brakes, but by a mistake in judgment on his part (Tr. 116-117).

Randy Inman testified that he is now employed as a pottery worker and ram press operator. He was previously employed in mining beginning in 1973, and has operated loaders, trucks, and bulldozers, and has had 7 years of mining experience. He worked at respondent's mine from August 11 to November 25, 1978, and he indicated that there had been accidents at the mine involving a highwall collapse and pans colliding. The pans did not have brakes and company management knew about it. As long as they would run, he was supposed to run them and he was concerned that someone would be injured. He spoke with Mr. Jackson about the situation and Mr. Hinkle was with him at the time, although he was not directly involved in making the report to Mr. Jackson. He was simply standing nearby. He was operating equipment at the mine when the inspectors appeared and he told John Hammond that he had spoken to Mr. Jackson about the situation and this was before they came to the mine. Mr. Vernon addressed the miners and wanted to know "[w]hich one of you dirty son-of-a-bitches called the inspectors?," but no one said anything (Tr. 120-132). When he and Mr. Inman reported to work later on a Saturday, Mr. Vernon instructed them to go to his office and told them that he wanted to speak to them. Mr. Vernon advised them that since the pans were shut down, they would have to be laid off, even though other miners were hired after they were (Tr. 135). Mr. Vernon told them he "did not like your act" (Tr. 136) and advised them that they were trying to "stir up trouble" (Tr. 136). Mr. Vernon advised them that he would indicate that they were let go for lack of work (Tr. 136).

Mr. Inman indicated that he had received recent pay increases, and about 3 weeks before he was laid off, he received a 50-cent per hour increase, which other older workers did not receive. He also indicated that Mr. Vernon made him a leadman over two other workers and that he never missed any work time. He also indicated that he averaged 20 to 25 hours of overtime each week and that he had assisted in the repair of equipment and he assumed that there was work of this type available after November 24. He identified several daily worksheets which he turned in and which indicated that equipment needed repairs (Tr. 136-144; Exhs. C-2 through C-2(h)).

On cross-examination, Mr. Inman testified that after he was laid off, he began work with Hall Pottery Company on January 27, 1979, at a daily pay of \$27, plus a weekly bonus ranging from \$30 to \$60. He indicated that he has made as much as \$208 in 1 week, and that he was on unemployment drawing \$51 a week from the time he was laid off until he went to work with Hall Pottery. He stated that he told no one

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other than John Hammond that he had reported the unsafe working conditions. He told Mr. Hammond because they were co-workers and good friends. He did not tell Mr. Vernon that he reported the conditions. On the day he was laid off, he called Mr. Rybski to inform him that he and Mr. Hinkle had been laid off and Mr. Rybski indicated that he did not know about it, but would make an inquiry into the matter. He denied ever telling anyone that he "would get Don Vernon." No one other than Mr. Hinkle and Mr. Hammond knew that he had informed the the State inspectors about the equipment defects. He made no statements prior to November 24 to Mr. Vernon which would lead him to conclude that he had made any complaints (Tr. 144-154).

On redirect examination, Mr. Inman testified that when they were getting ready to leave work on the day the inspectors arrived, he observed Mr. Hammond and Mr. Vernon talking together in a truck, but he did not know what they were talking about. He indicated that several other employees were hired after he was, and this included Mr. Hammond, Mr. Hinkle, and Mr. Vernon.

On recross-examination, he could offer no reason as to why Mr. Hammond would have breached his confidence and informed Mr. Vernon of the fact that he had complained to the State inspectors (Tr. 155-159).

In response to questions from the bench, Mr. Inman stated that he knew of no reason why Mr. Hammond would inform Mr. Vernon about the fact that he had complained to the State inspectors, except possibly "to better himself in the company." Although the mine is inspected by Federal Mine inspectors, he never saw any on the property, and the reason he did not complain to them is that he did not know how to contact them. During the period of his employment at the mine, he did not see fit to bring the equipment conditions and roll-overs to the attention of mine management because they knew about them. He also believed that mine management should have known about the equipment defects because of the fact that they were reported on the daily work reports, and, even though mine management knew about them, they did nothing (Tr. 159-167).

Mr. Inman stated that he believed he was laid off because he had complained to the State mine inspectors. He and Mr. Vernon had been friends and Mr. Vernon simply told him he "didn't like his act" when he informed him that he was being laid off. He gave Mr. Vernon no reason to believe that he had informed the State inspectors (Tr. 167-169). On the day that he was laid off, he contacted State Inspector Jackson and asked him whether he had told anyone about the complaint and Mr. Jackson informed him that he had not. Mr. Jackson arranged for him to speak with the MSHA people in New Lexington the following Monday (Tr. 172-176).

On further recross-examination, Mr. Inman identified a signed statement he made to MSHA on November 27, 1978 (Exh. R-2). He conceded that his statement does not contain any indication that Mr. Vernon told him that he "didn't like his act" or that he was a "troublemaker," and he explained that he evidently forgot to mention it at the time his MSHA statement was made and that his statement was incomplete. He indicated that when Mr. Vernon first arrived at the office on the day of the lay-off, he did "hem-haw at first," poured himself a cup of coffee, and was leisurely talking to him and Mr. Hinkle (Tr. 178-181).

In response to bench questions, Mr. Inman indicated that he and Mr. Vernon had gotten along well in the past and Mr. Vernon had visited his home. He and Mr. Vernon never had any "run-ins" and as far as he knew, Mr. Vernon never "had it in for him" (Tr. 183, 184).

Kenny Hinkle testified that he was acquainted with State mine inspector Richard Jackson and that he lives about a mile from him. Mr. Hinkle is now employed in the oil fields, but previously worked at the Redfield No. 2 Mine from October 1 to November 25, 1978, and has had a year and a half experience in working with heavy equipment. He testified that he was aware of equipment defects at the mine, namely, two pans which had no brakes. He did not report the defects because mine management knew about it and Mr. Vernon would have him operate the equipment even though he knew the brakes were bad. Mr. Hinkle indicated that he was with Mr. Inman on November 10 at a carnival when he (Inman) complained to Mr. Jackson, and that he was also at the mine when the State inspectors arrived and tagged some equipment. On that day, Mr. Vernon made a statement "[w]ho is the dirty son-of-a-bitch that called them?," meaning the mine inspectors. The next day, he and Mr. Inman arrived at work as usual and Mr. Vernon made some work assignments but asked them to go to his office. Mr. Vernon arrived at the office and informed them that he would have to let them go because the mine inspectors shut the pans down. When Mr. Inman asked why he was being laid off, Mr. Vernon told him "I didn't like your act." When he (Hinkle) asked Mr. Vernon why he was being laid off, Mr. Vernon told him that he did not have enough experience (Tr. 186-194).

Mr. Hinkle testified that he believed he and Mr. Inman were laid off because Mr. Vernon somehow learned that they had informed the State mine inspectors. During the lunch hour on the day the inspectors arrived at the mine, he and Mr. Inman went to Mr. Hammond and he heard Mr. Inman tell Mr. Hammond what he had done. Mr. Hinkle then gave Mr. Inman a "dirty look" and left because he did not believe Mr. Inman should have told Mr. Hammond about the complaint. Later that day, he saw Mr. Hammond talking with Mr. Vernon. Mr. Hinkle indicated that he never missed a day of work, had worked overtime, and had also performed some maintenance work on his equipment (Tr. 194-197).

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On cross-examination, Mr. Hinkle testified that he was currently employed with Altier Petroleum in oil and gas drilling and began work there in March at a weekly gross pay of \$165.70. Prior to this employment, he was unemployed and drawing \$167 unemployment compensation pay. He confirmed that he rolled a pan over on its side on November 14, and Mr. Vernon told him to be more careful. Mr. Hinkle stated he told no one that he and Mr. Inman had contacted State mine inspectors and he did not discuss it with Mr. Hammond, was not in on that discussion, and it was strictly between Mr. Hammond and Mr. Inman. Mr. Hinkle admitted that he did make a statement that he would "get Don Vernon." He made this statement to Mr. Vernon a week after he was laid off and he made it during the course of a conversation when he attempted to learn why he was laid off (Tr. 198-202).

On redirect examination, Mr. Hinkle stated that at the time he rolled over the pan, Mr. Vernon asked him whether he wanted to make out a report. Mr. Hinkle declined to make a report and Mr. Vernon asked him to keep quiet about it. Although he did not discuss the fact that he had made complaints to State inspectors with Mr. Hammond, he was present when Mr. Inman advised Mr. Hammond of this fact.

On recross-examination, Mr. Hinkle stated that during the carnival of November 10, he did not specifically complain to State Mine Inspector Jackson, but simply asked him whether Mr. Inman had told him everything. However, after he was terminated on November 25, he did discuss the bad pan brakes with Mr. Jackson (Tr. 205-206). After he was fired, he and Mr. Inman discussed the matter with Mr. Jackson and Mr. Hinkle believed he was fired because he thought that Mr. Hammond had told Mr. Vernon about the complaint to the State mine inspector (Tr. 207). Mr. Hinkle stated that he did not know whether Mr. Inman advised Mr. Hammond that he (Hinkle) had gone with Mr. Inman to make a complaint to Mr. Jackson. Mr. Hinkle stated that when he heard Mr. Inman getting ready to tell Mr. Hammond, he left the area (Tr. 208). Mr. Hinkle stated that prior to his termination, he was on good terms with Mr. Vernon (Tr. 210).

Respondent's Testimony

Mr. Donald Vernon testified that he was employed by the respondent from approximately August 14, 1978, until January 3, 1979, beginning as a bulldozer operator and ending as a mine foreman, a position to which he was appointed in October 1978. His responsibilities as a foreman included keeping all equipment running properly, assigning work, ordering parts, and generally running the entire mine. For a brief period of time before becoming mine foreman, he worked with Mr. Inman and Mr. Hinkle as an equipment operator, and after his appointment as mine foreman, they worked for him.

Mr. Vernon testified that in his capacity as mine foreman, he kept records pertaining to personnel evaluations concerning the work

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performance and proficiency of his employees, including Mr. Inman and Mr. Hinkle (Exhs. R-3 and R-4). He testified as to certain entries made by him on Mr. Hinkle's personnel card, and those were as follows:

11/7/78, fair operator; tries to do the best he can.
11/14/78, he put a -- laid a pan up on its side. No damage or no report made and there was no time lost.
11/16/78, he gets excited and he's cowboying his machine.

11/18/78, he's not working out and he doesn't listen to instructions. 11/25/78, I laid him off: lack of work and poor performance. 11/30/78, come in to pick up his check. He threatened me with bodily harm. There was nobody around but myself.

Mr. Vernon testified as to certain entries that he made on Mr. Inman's personnel card, and they were as follows:

10/23/78, he operates good, but needs to improve. He will do anything he's told, but he complains. 11/2/78 -- came in and picked up his check and went home sick. 11/7/78, I talked to him about moving a little bit faster. 11/9/78, I raised him to \$6.50 on a previous week because he had cried or after he had cried. 11/13/78, run 400 and fed to 560; should have been the other way around; left a big pile of dirt in the pit. 11/13/78, switched him to the 560 because of poor work. 11/14/78, 560 went out of service so I laid him off for a few days. 11/25/78, I laid him off for poor performance and lack of work.

(Tr. 211-226).

Mr. Vernon testified that he believed Mr. Inman was "afraid of his machine" and did not know the "ins and outs of the machine." As for Mr. Hinkle, he believed that he operated his machine too fast, failed to listen to safety instructions, and was an unsafe operator. He would rate Mr. Hinkle as "bad" in following instructions, and Mr. Inman as "fair" in this regard. He terminated them on November 15, 1978, because of lack of work in that four of the machines were down, and the week following he was going to lose two additional rental machines. In these circumstances, he stated that he would have an overage of three people and someone had to be laid off. He evaluated all of his personnel and decided to retain those who he believed were the best, efficient, and safest machine operators, and seniority had nothing to do with his decision in this regard. There was a decrease in the number of personnel working for the respondent during the period November 24, 1978, and January 3, 1979, namely three, and on November 4, 1978, the company had approximately 17 employees (Tr. 226-229, 236).

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Mr. Vernon stated that he first observed the two State mine inspectors in question at the mine on November 24, 1978, while giving Mr. Inman some instructions on how to operate the 355 bulldozer. Mr. Vernon confirmed that he was aware of the fact that two pieces of equipment were operating with bad brakes and since he saw the inspectors, he shut the machines down. The inspectors went directly to those machines and after some discussion, they "red tagged" them. He could recall nothing in his conversation with Inspectors Leigh or Jackson which would give him any indication as to who may have complained to them. He did not terminate Mr. Hinkle or Mr. Inman because of any knowledge or suspicion on his part that they may have complained to the inspectors, and the first time he learned about their complaint was the following Wednesday after they were terminated (Tr. 229-233).

Mr. Vernon confirmed that after the State inspectors left the mine site, he did remark to his work crew as to "[w]ho is the dirty S.O.B.'s that called the inspectors." However, he stated that he made the remark in a "joking manner" and everyone took it as such. At that time, since the State inspectors informed him that he would need a foreman for the night shift, and since the only two people available were John Hammond and assistant mine foreman Bob Rybski, he took Mr. Hammond aside and asked him whether he would be interested in the job. Mr. Hammond told him he had to check with his wife and that he would let him know later. Mr. Rybski was used as the night foreman for awhile and Mr. Hammond was later appointed to the job (Tr. 233-238).

On cross-examination, Mr. Vernon confirmed that he was aware of the bad brakes on the machines, was aware of it for a week, and had instructed the mechanic to take care of the matter. The mechanic informed him that he could not obtain parts and did not know what was wrong with the brakes. Rather than shut the machines down, which would have entailed laying people off, he decided on the "lesser of two evils" and permitted the machines to run. He believed they could be operated without brakes since the 12-foot blade could serve as a braking device, and the area where the machines were operating was flat and presented no grave danger. The incident involving the collision of two machines was caused by engine failure rather than bad brakes. He could recall making no remarks that he considered Mr. Inman to be a good operator, although he did appoint him as a "leadman" for a brief period of time over two loader operators on his shift, namely himself and Mr. Hinkle, and for a brief period of time, Mr. John Hammond. However, he took him off as lead operator over Mr. Hammond the day after he appointed him, because he did not know as much about the machine as did Mr. Hammond. Both Mr. Hinkle and Mr. Inman worked substantial overtime, and he believed that Mr. Hinkle was a steady worker, but that Mr. Inman was not because he missed several days of work, 2 pay days in a row, supposedly due to the illness of his father (Tr. 238-246).

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Mr. Vernon testified that during his conversation with Mr. Hammond on November 24, he did not question him as to who may have complained to the State inspectors. Mr. Vernon confirmed that he told the MSHA investigator that he terminated Mr. Hinkle and Mr. Inman because of "lack of work and poor performance" (Tr. 249-253). Mr. Vernon denied that he had been offered reemployment with the respondent or that the respondent was going to assist him in obtaining employment (Tr. 254).

On redirect examination, Mr. Vernon identified Mr. Inman's and Mr. Hinkle's time cards and notations which he made on the cards as to their final pay checks, and the fact that they were terminated for lack of work (Exhs. R-5 and R-6, Tr. 263).

On recross-examination, Mr. Vernon confirmed that he asked State Inspector Jackson about his father and whether they were related and he did so because his father helped him in studying for his mine foreman's test. He did recall Mr. Jackson giving him work slips pertaining to Mr. Inman, or Mr. Jackson remarking that Mr. Inman was doing a good job (Tr. 266-268).

In response to bench questions, Mr. Vernon stated that he left his employment with the respondent on January 3, 1979, because he was not making enough money, that Mr. Hammond never indicated to him that Mr. Hinkle and Mr. Inman had made any complaints, and he was not aware that they made such complaints (Tr. 270).

John Hammond is employed as a night foreman bulldozer operator for the respondent. He testified that he has been employed by the respondent for 7 months. He confirmed that Mr. Inman told him that he had called Mr. Jackson about the pan brakes, and believed that the conversation took place "around November 22," but he was not sure. He did not recall discussing the subject with Mr. Hinkle. He recalled the day, November 24, 1978, when the State inspectors came to the mine to check the equipment, but was not involved in any discussions with them. He confirmed the comment made by Mr. Vernon to the men about "[w]hich S.O.B. turned us in to the State mine inspectors?," but he (Hammond) and the others took it as a joke and they laughed about it. He denied any conversations with Mr. Vernon after that with regard to the State inspectors, and indicated that Mr. Vernon talked to him about being a shift foreman (Tr. 272-276).

On cross-examination, Mr. Hammond confirmed that Mr. Inman contacted him the night before the instant hearing and asked to speak with him about the case. He also confirmed that he told Mr. Inman that he did not want to discuss it with him because he would have to give up his job, and that he had a family to support and "was not messing up for nobody" (Tr. 278). He told no one about Mr. Inman's advising him that he had called the inspectors (Tr. 279).

In response to bench questions, Mr. Hammond stated that he could recall no conversation with Mr. Inman concerning his complaining to

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the State mine inspectors on the day the inspectors came to the mine. He was not surprised to see the inspectors because he knew that Mr. Inman had called them and he (Hammond) was looking for them. Mr. Hammond did not recall Mr. Inmann telling him that he personally discussed the matter with Inspector Jackson, and his recollection was that he said he "called him" (Tr. 281).

Witnesses Recalled for Testimony by the Presiding Judge

William McCormick was recalled and testified as follows (Tr. 285-287):

JUDGE KOUTRAS: I don't want to leave you with the impression I'm picking on you, but you've been called as my witness, and you are still under oath. And I just picked you at random; you just happened to be the first one on the list here.

I just wanted to ask you one or two questions. With respect to the incident where Mr. Vernon went to the salamander and made some statements as to which of you S.O.B.'s -- and I'm quoting the testimony here -- blew the whistle so to speak, do you recall that incident? I believe you testified to that.

A. Yeah.

Q. How did you take that?

A. Well, I just -- It just was a figure of speech. I don't know; we all might have laughed or I don't -- I mean, I don't know. I -- of course I didn't know -- really know what it was all about.

Q. Did you laugh?

A. I might have at the time.

Q. Was that his only comment?

A. At that time, yes, sir, that I recall.

Wayne Baker was recalled and testified as follows (Tr. 287-289):

JUDGE KOUTRAS: Mr. Baker, have a seat please. I just want you to know that I have asked you to come back in because I've got a couple of questions I want to ask you so you are my witness now and you are still under oath.

Q. You testified earlier in the day with regard to the incident at the salamander where Mr. Vernon had made

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a statement of some sort, which of you S.O.B.'s reported it to the inspector, or words to that effect. Do you recall that testimony?

A. Uh-huh.

Q. And do you recall that incident?

A. Right.

Q. How did you personally take his remark?

A. I don't think it was directed to anybody personally. I mean, I didn't take it personally directed to me.

Q. Well, I mean, what was your reaction. Was he serious when he said it?

A. No, I don't think he was. He had kind of a smile on his face and we all laughed at it when he said it.

Q. Did you laugh?

A. Yes.

Q. Was it an off-the-cuff-type situation or did he assemble everyone there and say, hey, listen, I want to -- to the best of your recollection?

A. No. We was already standing around there and I think it was just an off-the-cuff remark.

Q. I believe someone asked you earlier whether you knew for a fact or whether you have the information as to whether Mr. Inman and Mr. Hinkle had reported safety infractions to the State mining inspectors; and I believe your answer was no, you had no knowledge of it?

A. Right.

Q. Do you know whether there was anything in terms of any rumors or any stories floating around the mine that either of these two gentlemen may have made any complaints?

A. No. I never heard any. No.

Mr. Inman was called in rebuttal by his counsel, and testified as follows:

BY MR. SAFRANEK:

Q. This remark that he made, did you laugh?

A. No, I didn't laugh.

Q. Did anybody else laugh to your recollection?

A. I -- don't remember of anybody laughing. They could have; of course, you know, like Bill said, I -- you know, it's been a long time. You know, I don't --

Q. If they had, could it have possibly been nervous laughter of a sort?

A. It just struck me because, you know, I knew that I was the one that told them. And I was about half afraid to say anything or laugh or do anything. But I figured maybe he was throwing the remark right to me. I took it personally because I did call him. I didn't call him; I told him there at the Bingo thing. And I kind of took it kind of personal, myself.

Rebuttal Testimony

Mr. Inman was recalled and testified that he could recall no one laughing over Mr. Vernon's remark, but admitted that he could not remember because of the passage of time. He took it personally because he was the person who complained to the State inspectors (Tr. 209). Mr. Inman also clarified and confirmed the fact that he complained to Inspector Jackson personally at a local carnival where he was in attendance (Tr. 297). Mr. Hinkle was recalled and denied making any "smart remarks" to Mr. Vernon, and also stated that he followed work directions given him by Mr. Vernon (Tr. 300).

Arguments Presented by the Parties

Complainant

In their posthearing brief, complainants argue that prior to the November 24, 1978, State inspection of the mine, the mine had been inspected by State inspectors and found to be in good shape as far as safety violations were concerned. However, after November 24, major safety violations occurred, namely, much of the equipment was operating without brakes or with brakes which were inadequate, and that mine foreman Donald Vernon was aware of these brake conditions and, in fact, shut down two defective pans on November 24 before the State inspectors could get to them. The November 24 State inspection was prompted by complaints made by Mr. Inman and Mr. Hinkle to

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State mining inspector Richard Jackson at a local school carnival on November 10, 1978, and when Mr. Jackson and his fellow inspector, Ronald Leigh, inspected the mine on that date, they found several major violations, in addition to the defective brakes, namely, the lack of first-aid equipment at the mine, and a fuel oil truck operating without brakes and a defective exhaust system.

With regard to Mr. Vernon's alleged motivation in terminating the complainants from their employment, it is argued that before the termination, Mr. Inman told fellow miner John Hammond that he and Mr. Hinkle had talked to Inspector Jackson, and that Mr. Vernon had a conversation with Mr. Hammond about the report the complainants had made to Mr. Jackson (Brief, p. 3). In view of this fact, complainants argue that there could not have been any other reason for their terminations since their attendance records were excellent, both had worked substantial overtime, and both were considered satisfactory employees, particularly, Mr. Inmann, who in the past had been characterized by Mr. Vernon as a "damned good operator," had received a raise just 3 weeks before his termination, and had been designated by Mr. Vernon as a lead loader operator over other loader operators.

With respect to the respondent's defense concerning the terminations, complainants argue that respondent's purported excuse for the lay-offs, namely, that someone had to be laid off because two pieces of equipment were shut down and the complainants were selected because they were less than satisfactory employees is a ludicrous argument which does not square with the realities of mining practice, particularly in a situation where the two employees selected just happen to be the ones who complained about safety conditions. Complainants assert that the mathematical probabilities of two employees in such a situation being terminated is 1 chance in 272 (one-seventeenth x (one-sixteenth) (16 x 17 = 272). Further, in support of these assertions, complainants argue that there is substantial evidence in the record to the effect that the practice in the coal fields when equipment is down or out is to throw every available man onto the job of getting it back in working order, even if they are used only as runners and general laborers, and they cite the testimony of State Inspector Leigh (Tr. 25-26), and former Mine Mechanic Cooper (Tr. 83) as support for this contention.

Considering common experience, complainants argue that one can only conclude that they were terminated because of their report to Inspector Jackson and point to the fact that their perception of this motivation on the part of Mr. Vernon is indicated by the fact that they immediately contacted Mr. Jackson after they were terminated, who introduced them to Federal mine inspector Joe Zavora, who assisted them in the filing of their initial discrimination complaint on November 27, 1978. As for Mr. Vernon's knowledge that the complainants had made the complaint to Mr. Jackson, complainants assert that

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the "evidence did show a channel from Inman to John Hammond from foreman Vernon through which the fact of complainants' report to the state mining inspector could have been communicated" (Brief, pp. 5-6). Further, complainants argue that the evidence establishes that Mr. Inman was substantially more diligent than other workers in reporting safety defects through certain daily maintenance sheets, which fact was brought to Foreman Vernon's attention by Inspector Jackson (Tr. 22, 46-47). A violation of section 110(b)(1) is established when discriminatory action is taken as a result of a report of a safety violation to the supervisory personnel. *Munsey v. Morton*, 507 F.2d 1202 (1974). And likewise, a violation is made out when discriminatory action is also taken against a fellow employee who is a close friend and companion as Inman and Hinkle were (Tr. 121, 186, 191).

Respondent's Arguments

Respondent argues that insofar as the alleged discrimination is concerned, the fact that the respondent was using defective equipment on the day of the State inspection is not an issue. However, by shutting the equipment down, respondent asserts that the natural consequence of this event was the fact that together with the loss of other equipment, the operators of the equipment had to be laid off. Regarding the assertion that the complainants could have been retained and used in making machinery repairs, respondent argues that complainants were not qualified or able to make equipment repairs and that even if they were, this was a judgment decision for mine management to make, and since the complainants were not mechanics, the respondent properly felt that they were not capable of making such repairs.

With regard to the termination of the complainants by the respondent, respondent argues that the complainants were terminated following the loss of certain equipment, namely, the equipment which was shut down and other rental equipment. In the judgment of the respondent, since the work performance of the complainants was less than satisfactory, and since someone had to be let go, the decision to terminate the complainants for "lack of work" was a management prerogative which is fully supported by the record, including the official work records concerning the complainants' period of employment with the respondent. Mr. Inman had been employed for a little over 3 months prior to his termination, and Mr. Hinkle for less than 2 months.

Regarding Mine Foreman Vernon's purported motive in terminating the complainants, respondent argues that there is no credible evidence that Mr. Vernon knew that the complainants had made any safety complaints to State Mine Inspector Jackson. Respondent dismisses as "trite guessing and conjecture," the attempts by the complainants to link Mr. Vernon's conversations with Mr. Jackson concerning the identity of Mr. Jackson's father and his place of residence with the

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fact that the complainants may have been the individuals who complained to Mr. Jackson. As for Mr. Vernon's remarks concerning "[w]hich of you S.O.B.'s complained?," respondent asserts that this remark was made in jest and that the men accepted it as such. In summary, respondent asserts that the complainants have failed to establish by a preponderance of the evidence that they were discriminated against or that their terminations were prompted by any safety complaints made to State mining inspectors.

Findings and Conclusions

Based on a close and careful scrutiny of the entire record in this proceeding, it seems clear to me that the assertions made by the complainants concerning the alleged discrimination may be summarized as follows:

- Complainants were good workers, missed no time at work, worked substantial overtime, and were for all intents and purposes, good machine operators capable of performing maintenance on their equipment.
- Complainant Inman complained to State Mine Inspector Jackson about certain safety practices taking place at the mine and asked him to look into the matter. Since complainant Hinkle was with him at the time the complaint was lodged, complainant Hinkle must be deemed to be a complainant along with Inman.
- As a result of their complaints to the State inspector, Inspector Jackson and a fellow inspector came to the mine, discussed the matter with Mine Foreman Vernon, advised Vernon that Hinkle was a conscientious worker, and then proceeded to tag out certain equipment for safety violations.
- After inquiring about the residence of Mr. Jackson's father, and after attempting to learn who complained by making the "S.O.B." statement and discussing the matter with John Hammond, a friend and co-worker of Mr. Inman, Vernon learned or surmised that Inman and Hinkle had filed the complaints, and in retaliation, fired them for making the safety complaints.

Respondent's defense may be summarized as follows:

- Complainants were not the best employees, had worked only a short time with the respondent, and after the equipment was taken out of service, this resulted in a surplus of employees.

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--- Mine Foreman Vernon did not know that the complainants had complained to the State mine inspectors, his "S.O.B." remarks were in jest, and his conversation with John Hammond and Inspector Jackson had nothing to do with any complaints made to the State mine inspectors.

--- Respondent exercised its management prerogative in terminating the complainants rather than keeping them on in some other capacity.

The record adduced in this proceeding establishes that there were, in fact, certain unsafe practices taking place at the mine at or about the time that the complainants were terminated from employment. These practices included the operation of several pieces of equipment with either marginal or no brakes, and the condition of the equipment was known to mine foreman Donald Vernon. The record also establishes that as a result of these unsafe conditions, Mr. Inman personally advised State Mine Inspector Jackson about them and asked him what he could do about the situation. Although the evidence reflects that Mr. Hinkle did not personally complain to Inspector Jackson, he was with Mr. Inman at the time the complaint was lodged, apparently overheard the complaint, and I conclude for purposes of this proceeding, Inspector Jackson could reasonably infer that both Mr. Inman and Mr. Hinkle were making the complaint. Subsequently, as a result of the complaint made to Inspector Jackson, the mine was inspected, and although the equipment had been taken out of service voluntarily by Mine Foreman Vernon when he saw the inspectors approaching, the inspectors tagged out two pieces of equipment and advised Mr. Vernon not to put them back into operation until they were repaired.

Aside from the fact that there is no direct evidence that Mr. Vernon knew that Mr. Inman and Mr. Hinkle had complained to Inspector Jackson, I cannot conclude that the testimony presented can even support an inference that he knew that they had complained and retaliated by firing them. While the inspectors did not tell Mr. Vernon at the time of the November 24 inspection that Mr. Hinkle and Mr. Inman had complained, Inspector Leigh let it be known that he "had heard" about the bad brakes on the equipment prior to the inspection, and Mr. Vernon purportedly acknowledged that he "kind of thought so" (Tr. 21). As for the worksheets alluded to by Inspector Leigh, Mr. Vernon produced them at Mr. Jackson's request, and Mr. Leigh overheard Mr. Jackson comment that one of the two (meaning Inman or Hinkle) "was doing their job" because the worksheets contained "marks on it that there had been something being reported of bad equipment," and Mr. Leigh believed that Mr. Jackson "mentioned the fellow's name on that sheet at that time" (Tr. 22). Mr. Jackson testified that he asked Mr. Vernon to produce the equipment worksheets and Mr. Vernon produced "a big stack of them."

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Upon examining the worksheets in Mr. Vernon's presence, Mr. Jackson commented that most of them were marked "okay," meaning that the equipment was in good working order, but that one of the sheets filled out by Mr. Inman indicated that a particular piece of equipment was in need of attention, and he handed Mr. Vernon that particular worksheet.

The testimony establishes that when Mr. Vernon observed the State inspectors on November 24, he voluntarily took the equipment with defective brakes out of service and did so because he obviously believed that they would discover the defects. Mr. Vernon candidly admitted to the inspectors that the scrapers were operating without brakes and indicated he was experiencing difficulty in obtaining the necessary parts to keep them in repair (Tr. 15-16). And, while Mr. Jackson testified that upon inspection, the inspectors found "exactly what had been reported to us," in terms of equipment operating without brakes, the fact is that Mr. Vernon shut the equipment down when he saw the inspectors (Tr. 44).

Inspector Jackson stated that when he showed Mr. Vernon the sheet filled out by Mr. Inman, Mr. Vernon commented that Mr. Inman "does a good job," said nothing which would lead him to believe that he knew Mr. Inman had complained, did not attempt to single Mr. Inman out as the one who had complained, and said nothing derogatory about Mr. Inman (Tr. 65-66). As a matter of fact, Mr. Vernon made no inquiries of the inspectors as to who may have complained to them, and Mr. Jackson stated that Mr. Vernon said nothing which would lead Mr. Jackson to believe that Mr. Vernon suspected Mr. Inman as being the one who complained (Tr. 66).

With regard to the conversation between Mr. Vernon and Mr. Jackson concerning the identity of Mr. Jackson's father and his place of residence, I cannot conclude that Mr. Vernon had some devious motive in making the inquiry or that he was in some way attempting to learn who had complained. I find Mr. Vernon's explanation to be credible and plausible and find nothing in the record to support a conclusion or an inference that he was in any way attempting to learn the identity of the complainants. As for Mr. Vernon's "S.O.B." comments, when viewed in context, I believe and conclude from the testimony of the witnesses who testified on this comment that it was an "off-the-cuff" remark made by Mr. Vernon which the employees took as such. There is nothing to suggest that Mr. Vernon threatened anyone or made any searching inquiries of the employees in an attempt to learn who may have complained. It seems to me that if Mr. Vernon believed that Mr. Inman or Mr. Hinkle had complained, he would have confronted them and asked them about it. As for Mr. Vernon's conversation with Mr. Hammond, both denied under oath that they had any discussion about who may have complained, and since Mr. Hammond and the complainants were on friendly terms, I find nothing in the record to support any inferences or conclusions that Mr. Hammond had anything

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to gain by telling Mr. Vernon who may have complained. Although Mr. Hammond refused to discuss the matter with Mr. Inman or his attorney before the hearing, and purportedly made a comment that he did not want to jeopardize his employment with the respondent, these events transpired after the fact, that is, after the termination of the complainants. Further, Mr. Hammond was cross-examined by complainants' counsel at the hearing, and I find his testimony to be consistent and credible.

Mr. Vernon was initially employed by the respondent on approximately August 14, 1978, as an equipment operator, and in October was appointed as a foreman. He terminated his employment with the respondent on January 3, 1979, and at that time was the assistant mine foreman. As foreman, his duties included assigning personnel to various job tasks, insuring that the employees were at work on time, and insuring that the equipment was in good working order (Tr. 213-214). For a brief period of time before he assumed a supervisory role, he and the complainants were fellow equipment operators, worked together, and apparently enjoyed a good working relationship. In his capacity of assistant mine foreman, his duties included the making of performance evaluations of the employees, and in this capacity he maintained certain company personnel records and documented the work performance of the employees, including the complainants which he produced (Exhs. R-3, R-4).

Mr. Vernon testified as to certain entries that he made on the company personnel records with regard to Mr. Hinkle during the period November 7, 1978, through November 30 1978 (Exh. R-3). On November 7, 1978, he noted that Mr. Hinkle was a "fair loader operator who tries to do the best he can." Subsequent entries made on November 14, 16, and 18, reflect that Mr. Hinkle "laid pan on its side," "gets too excited, cowboy's his machine," "not working out, does not listen to instructions." On August 25, the records reflect "laid him off due to lack of work and poor performance," and on November 30 there is a notation "came in to pick up his check. Threatened bodily harm. No witnesses."

Mr. Inman's personnel record for the period October 23, 1978, to November 25, 1978, contained entries made by Mr. Vernon indicating that he was good loader operator, did anything he was told, but "complains and needs to improve." A notation for November 7, 1978, reflects that Mr. Vernon talked to him "about moving a little faster." On November 9, Mr. Inman was given a pay increase to \$6.50 an hour, and on November 13, he was reassigned to another piece of equipment because of "poor work," and on November 14, he was given a "few days off" because the "560 is out of service." The final entry for November 25, 1978, reflects that he was "laid off for lack of work and poor performance."

In addition to the personnel entries which he made, Mr. Vernon characterized Mr. Hinkle as an unsafe equipment operator, and stated

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that he operated his machine too fast and would not listen to instructions (Tr. 226). As for Mr. Inman, Mr. Vernon stated that he was "afraid of his machine" and that based on his performance in the operation of his machine, he believed that Mr. Inman did not know all of the "ins and outs of the machine" (Tr. 226).

In explaining his reasons for terminating the complainants, Mr. Vernon testified that after the defective equipment was taken out of service, a total of four pieces of equipment were out of service, since two additional rental machines would be lost the following week. Faced with a surplus of three employees, he contended that he made an evaluation of the performance of all of his workforce as to who could operate the equipment in the best, efficient, and safest manner and that seniority had nothing to do with his decision to terminate the complainants (Tr. 226-227). In these circumstances, while it may be true that the usual practice in the mines is to assign employees to other chores when equipment is down, I cannot conclude that the Act requires an operator to make such an accommodation for its employees, nor can I conclude from the evidence presented, that respondent discriminated against Mr. Inman or Mr. Hinkle by not assigning them to other tasks, while at the same time treating other employees similarly situated any differently. Absent any contractual obligations or agreements to the contrary, I believe that the assignment of personnel is a matter within the discretion and judgment of an employer and not the employee. Further, I cannot conclude that the complainants have established that they were qualified mechanics; and even if they were, I cannot conclude that respondent was under any obligation to retain them as mechanics for the purpose of repairing the equipment which had been taken out of service.

Shortly after their termination, the complainants filed a complaint with MSHA, and in connection therewith, executed a written statement (Exh. R-2). In that statement, no mention is made about Mr. Vernon's alleged comments that he considered Mr. Inman to be a "troublemaker" and that he "didn't like his act." At the hearing, Mr. Inman testified that Mr. Vernon had made these statements to him at the time he informed him of his termination, and Mr. Hinkle used the same phrases in testifying as to what Mr. Vernon purportedly said to Mr. Inman. When asked why he had not included these statements attributed to Mr. Vernon in his original written complaint, Mr. Inman answered as follows (Tr. 178):

Whether I had forgotten it at the time? I don't know. This has been so long ago.

I had been going over and over and trying to remember everything Don had said, about everything that was said in that office that morning. Whether it was in here or not, I don't know. Evidently, I had forgotten to put it in.

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But there's a lot of things you remember after you think about it.

During his testimony at the hearing, Mr. Hinkle testified that at the time Mr. Vernon advised them that they were being terminated, he said "Well, I'm going to let you guys off because you know that the mine inspectors come in here and shut the pans down and you know they come in there, * * * (Tr. 193). Yet, Mr. Hinkle failed to include this in the written complaint. Thus, viewed in perspective, both of the complainants failed to include in their original written complaint, statements attributed to the mine foreman which go to the very heart of their present assertion that he was motivated to terminate them because they had complained to a State mine inspector.

With respect to the prior MSHA inquiry concerning the complaint, it was disclosed during the hearing that Mr. Vernon had made a previous statement to an MSHA investigator in which he indicated that he terminated the complainants for lack of work and poor performance (Tr. 249). Although a copy of his previous statement was produced and examined and used by complainants' counsel during cross-examination, counsel decided not to introduce it for the record (Tr. 253). And, although the MSHA inspector was present in the courtroom in response to a subpoena, complainants' counsel decided not to call him as a witness (Tr. 271). Thus, from the record adduced in this proceeding, I conclude that Mr. Vernon has been consistent in his testimony as to why he terminated the employees, and as for his own departure as an employee, he indicated that he quit because he was not making enough money (Tr. 269), and denied that he has been offered reemployment with the respondent or that the respondent was going to help him obtain other employment (Tr. 255). Thus, when viewed in perspective, I cannot conclude that Mr. Vernon had anything to gain by coloring his testimony or concealing the fact that he did, in fact, terminate the complainants because of their complaints to the State inspectors. Further, after viewing Mr. Vernon on the stand, I find him to be a credible witness and his testimony is consistent with the personnel evaluations and notations made by him with respect to the complainants' work performance. For example, one of the notations that he made was that Mr. Hinkle had threatened him on November 30 when he came to the mine to pick up his pay check. Mr. Hinkle candidly admitted that he "would get" Mr. Vernon (Tr. 201-202).

Having viewed the witnesses on the stand, and after careful evaluation of all of the testimony, I cannot conclude that the complainants have established through a preponderance of the evidence that respondent discriminated against them for exercising their rights under the Act to bring to the attention of State mine officials certain unsafe mine practices. It is clear that these rights are protected under the Act. However, the burden of proof lies with the complainants. I find and conclude that they have not carried their burdens and have not established that their termination was

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prompted by their protected activities. To the contrary, I find and conclude that respondent has established through credible and probative evidence that the termination of the complainants was based on a lack of work and a management judgment that a reduction in personnel was necessary. In the exercise of that judgment, I am not convinced that the respondent acted out of any retaliation against the complainants for reasons connected with their protected activities. I believe that in the final analysis, and after their termination, complainants speculated that on the day of the inspection by the State mine inspectors, Mr. Hammond informed Mr. Vernon that they had complained, and that Mr. Vernon retaliated by firing them (Tr. 207). As a result of this speculation, they shortly thereafter again contacted Mr. Jackson, who, in turn, arranged for an interview with an MSHA investigator. Upon investigation, MSHA obviously believed that the discrimination complaint was not well-grounded since MSHA found no discrimination and dismissed the complaint after finding that the complainants' safety complaints were not a contributing factor to their termination by the respondent.

ORDER

In view of the foregoing findings and conclusions, I conclude and find that respondent's decision to terminate the complainants was not motivated by respondent's attempts to discriminate against them for protected mine safety activities. Accordingly, the complaints are DISMISSED, and the relief requested is DENIED.

George A. Koutras
Administrative Law Judge