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SOL (MSHA) V. PHELPS DODGE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOHNNY N. CHACON,	APPLICANT	Complaint of Discrimination Docket No. WEST 79-349-DM Morenci Mine
v.		
PHELPS DODGE CORPORATION,	RESPONDENT	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Applicant Stephen W. Pogson, Esq., Evans, Kitchell & Jenckes, Phoenix, Arizona, for Respondent

Before: Judge Lasher

This proceeding arises under section 105(c) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Clifton, Arizona, on April 16, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered an opinion on the record.(FOOTNOTE 1) My bench decision containing findings, conclusions and rationale appears below as it appears in the transcript, other than for minor corrections of grammar and punctuation and the excision of dicta:

> This proceeding arises upon the filing of a discrimination complaint by the Secretary of Labor on behalf of Johnny N. Chacon against the Phelps Dodge Corporation pursuant to the provisions of section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., wherein the Applicant alleges that the Respondent unlawfully discriminated against Mr. Chacon by issuing him a written warning on or about February 6, 1979, and by suspending him from employment without pay for 3 days on February 13, 14, and 15, 1979.

In its answer, the Respondent denies the allegations of the complaint with respect to the alleged discrimination and affirmatively alleges that Mr. Chacon was warned and suspended because he operated a locomotive at excessive speeds which caused derailments at the two times involved.

The Respondent also alleged in its answer that the "Alleged Complaint of Discrimination could have been raised in the grievance and arbitration procedure in that because an effective grievance and arbitration procedure is in operation the Secretary is precluded from bringing this action." At the commencement of this hearing, I ruled that the availability of arbitration procedures in the labor contract between the United Transportation Union and its Local 1668 and the Respondent did not preclude the Federal Mine Safety and Health Review Commission from proceeding with the instant case nor did it bar the Commission's jurisdiction. In Phillips v. Kentucky Carbon Corporation, 2 IBMA 5, decided by the Interior Department's Board of Mine Operations Appeals on January 30, 1973, the Board pointed out that, "Should we defer to an umpire's decision made under the National Labor Relations Act of 1947, or an arbitration agreement, as controlling upon us, we would be abdicating the statutory obligations assigned to the Secretary by the Congress." The Board went on to point out that in NRLB v. Pacific Intermountain Express Company, 228 F.2d 170, the court found that each fact finding agency is entitled to make its own decision upon the evidence before it. I thus affirm the ruling which I made at the beginning of this proceeding in this connection.

The general issues involved in this proceeding are whether the alleged discriminatee, Mr. Chacon, engaged in activities protected by the Act, particularly those in Paragraph 105(c)(1) thereof, and, if so, whether the Respondent mine operator was aware of those activities and, if so, if the Respondent disciplined Mr. Chacon because of his engaging in such activities. The precise facets of these issues will be subsequently dealt with in this decision.

Mr. Chacon has been an employee of Respondent for nearly 15 years and has been a locomotive engineer for approximately the last 10 years of his employment. He is employed at Respondent's Morenci Mine located at Morenci, Arizona. The Morenci Mine is an open-pit mine. It employs approximately 70 to 75 locomotive engineers who work three shifts and who operate locomotives which weigh approximately 75,000 pounds, are 54 feet long, are 15 feet high, and 10 feet wide. Each car pulled by the locomotive has a capacity of 72 tons and the locomotive and the cars it pulls move over a railroad track which for the purposes of this proceeding run along

"benches" along the sides of the open pit. The track which is laid on "panel grades" comes in 30- to 50-foot lengths and is placed on ties. The track is portable and it is constantly being moved. When the track is moved, the ties can become loose and when there is bad or rainy weather the stability of the track is adversely affected in that the spikes holding the ties "give." Each locomotive which pulls a train is operated by one locomotive engineer who operates the locomotive either from the cab of the locomotive, from the caboose, or from the side of the locomotive. The cab of each locomotive contains a speedometer and a "Chicago-Pneumatic" speed recorder which is mechanically attached to the engine and which records the speed of the locomotive on a tape. The speed recorded on the tape is that which is shown on the speedometer of the locomotive.

The speedometer is approximately the size of a standard American automobile's and it measure speeds up to 70 to 80 miles per hour. I find that the needle of the speedometer fluctuates or "bounces" regularly between 5 and 15 miles per hour based upon the testimony of the locomotive operators who operate the same who testified in this hearing. I find that the speedometer and the speed recorder which records the speeds shown on the speedometer are unreliable as a precise indicator of the speed of the locomotive based upon the credible evidence in this proceeding. All witnesses who testified on the subject conceded that to some extent there was or there could be a variance between the speed shown on the speedometer and the actual speed being traveled. One of the reasons mentioned for the imprecision of the speedometer was "slippage of wheels." I find that because of the imprecision of the speedometer that the responsibility for operating a locomotive at a safe and proper speed under the circumstances and under varying circumstances must necessarily rest upon the judgment of the locomotive operator. This, of course, is a subjective judgment.

Under the Code of Safe Practice for Railroad Train Operations applicable to the Morenci Mine, Exhibit R-2, unless a so-called "slow order" is posted on a call board, located for purposes of this proceeding in a lineup shack, the maximum permissible speed on good track which is to be observed by locomotive engineers is 15 miles per hour for "bench tracks." I note that the Code also provides that "track conditions may dictate speeds slower than those listed above," which also is evidence that in the final analysis the subjective judgment of the locomotive engineer must determine what a safe and proper speed is.

Derailments are common occurrences at the Morenci Mine. The damage caused by a derailment can be negligible and can

range upward to a cost of approximately $100,000. The cost of derailments where panels are damaged is approximately $1,500 per panel. In 1977, 1,082 derailments occurred at the Morenci Mine, in 1978, 1,164, and for the month of September 1979, a total of 77 derailments occurred. Figures for the first 8 months of 1979 were not available. Following a derailment, the track can be made operable the majority of the time by "rerailing." Locomotive engineers experience a derailment at the rate of approximately one per month. Derailments can occur at slow speed as well as high speed because of defects in the rails, the track generally, or the equipment. A locomotive operator, upon the occurrence of a derailment, customarily reports the derailment to his foreman and ultimately a "Foreman's Derailment Report" is prepared which indicates among other things the speed of the train based upon the speed recorder tape. See Exhibit A-3.

When "slow orders" are posted on the call board, the "slow order" does not customarily indicate what the maximum speed is to be. However, on occasion, a "slow order" does specify the maximum speed. There is no written instruction or provision in operators' manuals or in courses taught by either the Government or the operator or elsewhere or otherwise which express what a maximum speed is under a "slow order." Neither Chacon specifically, nor other operators have been advised by management personnel that there is a maximum permissible speed under a "slow order," although Respondent's witnesses generally were of the opinion that the maximum speed would range from 5 to 10 miles per hour. See testimony of Wesley Brooks, general mine foreman; Joseph Hayes, assistant training coordinator--8 to 10 miles per hour.

Chacon became a union safety committeeman in 1977 and in January 1979, he became Vice-Chairman of Local 1668, UTU. As Vice-Chairman, he handled grievances usually in conjunction with James Starr, the Chairman of the Local. When Chacon became Vice-Chairman, the union's concern and degree of militancy with respect to handling safety complaints elevated beyond its previous level. Testimony of Starr and Exhibit A attached to Answers to Interrogatories. On December 7, 1978, Chacon participated in a grievance involving a safety complaint, a signal system defect, which was filed pursuant to Article VIII of the Labor Agreement above mentioned. On January 31, 1979, Chacon signed a grievance as committeeman containing approximately 72 signatures of union members complaining of unsafe and improper maintenance on cabooses. Exhibit A-7. On February 11, 1979, Lester D. Olson, mine superintendent, issued a letter to Mr. E. H. Franco, representative of Local #1668 in connection with grievance hearings which were held in Olson's office on February 7 and 8,

1979, which indicated, among other things, that the caboose conditions were being investigated. On approximately February 21,(FOOTNOTE 2) 1979, Chacon issued a letter to the acting subdistrict manager of MSHA concerning the conditions involved in the January 31, 1979, grievance. Exhibit A-9. On February 8, 1979, Starr and Chacon signed a grievance for the purpose of having the written warning which was issued to Chacon on February 6, 1979, removed from his records. Exhibit A-14. The written warning referred to, Exhibit A-13, was signed by Kenneth A. Lines, assistant shift foreman, on February 6, 1979, and warned Chacon for "excessive speed under a slow order" on "2-5-79." The written warning is entitled "Notice of Warning or Discipline" and indicates that Mr. Chacon was informed that a repetition of such an offense would subject him to a "more severe penalty."

On February 12, 1979, Mr. Chacon received a suspension for 3 days. The suspension was contained on the same standard printed form as the prior warning. The heading of the document was entitled "Notice of Warning or Discipline" with the word "Discipline" underlined. In this suspension, Mr. Chacon was disciplined for "excessive speed on slow order track (designated) all bench tracks and dumps." Chacon was given a disciplinary lay-off from February 13, 1979, to February 16, 1979, a total of 3 working days.

In addition to the warning and suspension involved in this proceeding, Mr. Chacon had received a warning in December 1971, involving operation of his train, a warning on June 18, 1972, involving a failure to control his train and the derailing of a caboose, a disciplinary 3-day lay-off on September 26, 1973, for running a light, a 7-day disciplinary lay-off on December 22, 1973, involving an operating violation, a warning on October 14, 1975, for failing to control his train which resulted in a collision, a warning on March 14, 1977, for being AWOL, a warning on August 28, 1977, for not wearing a safety hat, a 3-day suspension on December 27, 1977, for AWOL, a warning on July 30, 1978, for an operating violation; to wit, "He is to maintain total control of his train at all times and avoid splitting a switch," a warning on January 8, 1979, for reading on the job and again another warning on January 8, 1979, for not wearing a safety hat and glasses. Whether that number of warnings is unusual I am not able to find on this record since there are no comparative statistics or information. Likewise, I do not infer that Chacon is a bad or unsatisfactory employee on the basis of that history of warnings and suspensions all of which are reflected in Exhibit R-3.

Respondent's records indicate that in 1977 there were no warnings to employees for excessive speeds which resulted in derailments. These records indicate that in 1978 there were four warnings given to employees for excessive speeds which resulted in derailments and that with respect to three of the four the records do not indicate what the speed was or the amount of damage. With respect to the fourth 1978 warning, the speed was 20 miles per hour and the damage was described as "Track destroyed under locomotive which was partially buried in the ballast." For the first 9 months of 1978, Respondent's records indicate there were three warnings for excessive speeds which resulted in derailments, the speeds on two of which were 15 and 20 miles per hour, respectively, and the damage indicated being "Damage to track and locomotive" and "Tore up seven or eight panels," respectively. With respect to the third 1979 warning, no indication was given with respect to speed or damage. Exhibit A-2, page 2. During the years 1976, 1977, 1978, and 1979, only one of Respondent's employees, aside from Johnny Chacon, was suspended from employment without pay for operating a locomotive at an excessive speed causing a derailment. Respondent's records indicate that one M. F. Naccarati was suspended for 3 days for violating the Code and that there was no record of the speed or damage. For the same 4-year period, only five locomotive engineers were suspended for reasons other than excessive speed. Four of these involved running a red light. In addition, three locomotive engineers received disciplinary lay-offs for unexcused absences in 1978. I conclude that warnings and suspensions generally are rarely given and that in particular warnings and suspensions for excessive speed infractions involving derailments are exceedingly rare and have been during the 4-year period 1976 through 1979.

I find that in December 1978, two letters were sent by Local 1668 to Robert Riley, District Manager, MSHA, Phoenix, Arizona, which were signed by James Starr, Chairman, but which were prepared by Mr. Chacon. Exhibits A-4 and A-5. I find in that connection that Chacon prepared the letters for Starr to sign for the reason that Starr's signature as chairman would carry more weight than Chacon's signature. I find, based upon the testimony of Starr, that if Local 1668 members had safety complaints they customarily would go to Chacon who, in turn, would take the problem to the management of Respondent and also that Chacon was the first union representative to take complaints to MSHA. I find that Chacon brought the subject matter involved in the complaints to MSHA signed by Starr, Exhibits A-4 and A-5, which were mailed to MSHA in December, to the attention of management some 4 or 5 days before writing those letters and that subsequently there was a hearing or meeting in December at which L. B. Olson, the

mine superintendent, and Joseph Roche, general mine foreman, attended as well as Chacon and Michael Cranford of the union. At this meeting--and at the very beginning--Mr. Olson mentioned the letters sent to MSHA and indicated he did not appreciate the union's sending such letters to MSHA. I find that Mr. Olson's mood was angry or as described by Cranford, "agitated" and that his tone was loud. Olson indicated that the company should have been given more time to make the corrections.

Turning now to the incidents which resulted in the issuance of the warning and the suspension I find that on February 5,(FOOTNOTE 3) 1979, Chacon was operating his locomotive on the bench proceeding towards the dump when his train was derailed. Chacon was in the caboose which contained no speedometer. Chacon had not been told by management either in writing or orally what the maximum permissible speed was that he should go. There was, however, a "slow order" in effect and (I find) that Chacon was going no more than 10 miles per hour. I make this finding on the basis of the following reasons: Various witnesses for the Respondent have indicated that they can tell or should be able to tell how fast a locomotive is going within 2 or 3 miles per hour; that is, a locomotive engineer should be able to make such a judgment. On the other hand, Mr. Starr testified that he could estimate his speed only within 5 to 7 miles per hour and that it is difficult at speeds above 5 miles per hour to determine exact speed. Mr. Chacon testified that he was going between 5 and 10 miles per hour and that he could tell he was not going 15 miles an hour based upon his experience. I conclude that Mr. Chacon, being the operator of the locomotive at the time, is in the best position to determine his speed. The tape mechanism, in my judgment, is not sufficiently credible based upon the testimony in this hearing for me to rely on it. Were the speed-recording tape reliable, I would consider it to be the best evidence and to have overwhelmed the opinions and subjective judgment of the individuals. The testimony in this case with respect to speed has been all over the lot. I do not find it sufficiently accurate from the standpoint of Respondent to credit it. On the basis of the testimony in this case, I am inclined to credit the testimony of the individual who was operating the locomotive and also the opinion of a locomotive engineer. I further find for similar reasons that gauging damage--and surveying damage done--is not particularly probative of the speed that a train is traveling in a given instance. There is testimony in this

record with respect to factors which could change that--including the weather, the conditions, the wetness, the rain, and the like. The opinions given, likewise, are suspect for the reason that gauging speed on the basis of damage is not particularly susceptible to persuasive proof by the rendering of a mere general opinion. There was really little corroboration beyond the expression of such general opinions in this case. Certainly, these were not sufficient evidence to overwhelm the testimony of the person in the best position to gauge the speed, which in this case is the operator himself. I also find no reason to discredit in this case the testimony of Mr. Chacon on this subject and on other subjects contained in his testimony. The occurrence of derailments is very frequent and can occur from many, many causes. To attribute the derailments to excessive speed in this instance would require a higher quality of proof than that presented by Respondent.

The following morning, that is, February 6, 1979, Kenneth A. Lines delivered a written warning to Chacon saying, "They told me to give you this." Chacon asked, "Who is they?" to which Lines replied, "The Office." Chacon took this to mean, and I find, that this meant Mr. Olson or Mr. Roche since they were the only ones in the office who could impose disciplinary punishment. Aside from the written warning of July 30, 1978, Chacon had received no warnings, oral or written, for operating violations prior to the February 6, 1979, warning. I footnote that he did receive two warnings on January 8, 1979, for reading on the job and for not wearing a safety hat.

On February 12, 1979, Chacon was in the cab of the locomotive which was on the south side of the pit. The speedometer was indicating between 5 and 15 miles per hour. Chacon believed he was going 10 miles per hour when the derailment occurred. At this time, Chacon was not working on his usual shift and was working for a different assistant shift foreman, Mr. William D. Pounds. Following the derailment, Chacon and Pounds discussed the speed he was going and according to Chacon, agreed that Chacon had been going between 10 and 12 miles per hour. At approximately 3:30 p.m., on February 12, 1979, Mr. Pounds drove up in a truck and handed Chacon the written 3-day suspension indicating that Chacon was being given the suspension because he had been given a previous warning. Pounds and Chacon went to the call board to determine if a 5-mile per hour designated speed maximum had been established. While a "slow order" had been posted, no excessive 5-mile per hour speed limit had been set. Subsequently, when Chacon returned from the suspension, Pounds asked Chacon if he enjoyed the time off, Chacon replied, no, it was blankety blank (an epithet) to which

Pounds replied that it had been up to him he would not have given Chacon the suspension and that the suspension had come from the office.

Chacon subsequently filed grievances with respect to both the warning and suspension and was rejected on both grievances by two levels of management, Olson and Bolles. During the hearing of the grievances before Mr. Olson under the grievance procedure provided in the labor contract, Mr. Olson indicated that there had been "Lots of derailments" and that "they had to start somewhere." Following the derailment on February 12, 1979, on February 13, the locomotive involved received repairs on its speedometer.

I find that Respondent's management was aware of Chacon's engagement in activities protected under the Act and, in particular, his activities involved with the filing of grievances in December, the forwarding of complaints to MSHA reflected in Exhibits A-4 and A-5 and also with the complaint to MSHA concerning the grievance which was signed by some 72 employees and union members. In the grievance meeting at which Mr. Olson complained to Chacon about taking safety complaints to MSHA before allowing the company to correct the same, the expression of Mr. Olson establishes that the company was aware of Chacon's activities. Furthermore, Chacon had created a change in the force with which safety complaints were being handled by the local union. There has been no contention of a lack of knowledge of this and I find that the requisite element of awareness by the mine operator of the alleged discriminatee's safety reporting activities was clearly established in this record. Mr. Olson, in his testimony, admitted that he told Chacon at the grievance meeting that he felt that any safety problem should go to the company first by way of the safety suggestion or safety grievance procedure before being sent to MSHA. Mr. Olson subsequently indicated that his remarks were addressed to the group in general, not Mr. Chacon personally.

The record is clear that the primary management figure engaged in the decision to issue the written warning on February 6th and the 3-day suspension on February 12, 1979, was Mr. Joseph Roche, the general mine foreman, who transferred to Respondent's Ajo operation in approximately July of 1979 and was not a witness in this proceeding. Mr. Lines testified that on the morning of February 6, 1979, when he went to Mr. Roche's office that Mr. Roche raised the subject of the warning. Mr. Olson denies that he knew of the situation before the warning issued, although he did put on Mr. Roche's desk on the morning the warning was issued two reports which showed excess speed derailments and suggested

that Mr. Roche look at them. Mr. Olson denies knowing that Chacon was involved in either of the two derailments. With respect to the suspension, the two management figures involved were again Mr. Roche, and Mr. Pounds--who was not Mr. Chacon's usual assistant shift foreman. From Mr. Pounds' testimony, it is clear that the decision to suspend Chacon was made by Mr. Roche. In analyzing the evidence with respect to discriminatory motivation in a case such as this which involves a corporate defendant with numerous personalities engaged in the channel of management's command, it is necessary to pinpoint exactly which person actually made the decision to levy the punitive action. In this action, I find that person was Mr. Roche. While I make no inference with respect to the fact that Respondent did not call Mr. Roche, I do note at this point that if there is evidence of discriminatory motivation of a circumstantial nature or indirect nature it would seem that he would be the only person who would be in a position as the top management executive involved who could set the record straight, if such is possible.

The question remains at this point whether there is evidence of discriminatory motivation since I have found that there were protected activities engaged in by Chacon as specified in section 105(c)(1) of the Act, specifically, that Mr. Chacon as a representative of miners--not just a miner--had filed and made complaints under the Act, including complaints notifying the operator of alleged dangers and safety and health problems and also because Mr. Chacon, as a union representative on behalf of other miners, made such reports both to the mine operator and the government agency charged with enforcing the Act.

In Munsey v. Morton, et al., 507 F.2d 1202 (D.C. Cir. 1979), the Circuit Court of Appeals established the elements under the 1969 Act, of which the 1977 Act is an amendment, necessary to constitute a prima facie case of discrimination. Those elements were:

> (1) That the miner had reported to the Government or its authorized representative an alleged violation or danger in a coal mine.
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> (2) That after such reporting occurred such miner was discharged from his employment, and I would footnote, or otherwise subjected to a retaliatory action. And,
>
> (3) That such discharge was motivated by reason of such reporting and not for some other reason.

The 1977 Act, among other things, broadens the jurisdiction to include all mines not just coal mines and also broadens the types of activities which are protected. The objective of section 105(c) is the protection of mine safety reporting. I conclude that under the 1977 Act the general elements of proof an Applicant must meet are that:

> (1) The miner has engaged in the safety reporting activities or any of them described in and protected by Section 105(c)(1) of the Act.
>
> (2) After such reporting occurred such miner was the subject of retaliatory action by his employer adversely effecting the conditions or incidents of his employment and,
>
> (3) That such (action) was motivated in at least significant part by reason of such protected activities and not for some other reason.

In the instant case there is evidence, based upon Mr. Olson's statement at the grievance meeting, that Respondent was unhappy with Chacon's taking a safety complaint to MSHA. I have found that this was expressed in an angry tone. In addition, there is evidence that at the time of the February 12, 1979, derailment Mr. Olson came across Mr. Pounds, who was Chacon's assistant shift foreman on that particular day, at which time Mr. Pounds stated to Mr. Olson these words: "Your boy done it again," or words to a similar effect. By using the words "Your boy" in this conversation I infer a prior knowledge or awareness on the part of Pounds that Chacon was more than an ordinary locomotive engineer. The words "your boy this" or "your boy did that" in the abstract would normally carry two meanings. First, it could mean an awareness on the part of the one uttering such a phrase that the person referred to is a favorite of the individual to whom the words were uttered. In the real world, it can also mean a sarcasm and an inference that the person referred to is an enemy of or otherwise stands in disfavor with the person to whom such words are uttered. The context of the conversation, the words uttered by Pounds to Olson, was one laden with the problem which Chacon had caused, i.e., "Your boy done it again." This means he had done something unfavorable again. By uttering such a phrase, Pounds understood that Olson would know who he meant even though he did not mention Chacon's name. Olson said he knew who Pounds was referring to because he had heard on the radio that there had been a derailment, but that does not answer the question ... Pounds did not know that Olson knew that from being on the radio. Pounds knew when he uttered the expression that

Olson would know who he was talking about. Olson told Pounds at this point that he should take it from there. We thus have Olson's unhappiness with Chacon for filing safety complaints with MSHA, we have the Olson-Pounds conversation which in and of itself means nothing, but which taken in context creates an inference of displeasure on the part of management with Chacon.

Is there any further evidence of discriminatory motivation? It appears that Chacon was the first, or from Respondent's standpoint, the second employee ever suspended for an excessive speed derailment. I find that the statistical evidence which I previously specified indicates that Chacon was treated in a disparate manner. The general burden of establishing by a preponderance of the evidence a case of discrimination is on the Applicant. However, the burden of proof is on Respondent as proponent of the rule that it urges in this case, that is that Chacon was warned and suspended for operating a locomotive at excessive speeds causing derailment. Thus, Respondent's argument that the Government has failed to show that there were other derailments where excessive damage was done and where the locomotive engineer was not punished in retaliation for safety reporting activities in my judgment has no merit if the Government has established otherwise a prima facie case. I would conclude that the burden would shift to Respondent to show that there were excessive speed derailments and that the locomotive engineer did receive a suspension. The Government has shown that such was not the case clearly. The records furnished by Respondent in answering the interrogatories show no such suspension other than the Naccarati incident which is not sufficiently documented, in my judgment, to count. So, I conclude on the basis of the statistical information that the Government has established that Chacon was treated disparately.

Now then we turn to the timing of this treatment. The treatment occurred within approximately 1-1/2 months-and possibly less time since we do not apparently have an exact date--(from) the grievance meeting where the Olson-Chacon confrontation occurred. We have the first warning and the suspension occurring in proximity to the expression of discontent by management's top man at the mine and such treatment is a first. I find that to be very significant. I find that Mr. Lines' testimony to the effect that several days after he had warned Mr. Chacon on February the 5th he similarly warned another locomotive engineer for an excessive speed derailment to be actual evidence of bad faith in the context of the facts of this record. Up to that point there had been no such warnings and then a warning is given to Chacon for the first time and then a warning follows to somebody else within 3 or 4 days and then after that there are no

similar episodes. That smacks of action taken to bolster the disciplinary action taken against Chacon. It smacks of pretext. It does not lend itself to being viewed as part of action taken in accordance with the general pattern of disciplinary action on the part of Respondent's management over a period of 1 year or (even of) several years.

Respondent's case, as I have previously indicated, is exceedingly weak from the standpoint of justification for its punitive actions, that is, its evidence as to the speed the locomotive was traveling. The argument that it makes with respect to being able to estimate (speed) by (damage) was too general, in my opinion, to overcome the more reliable testimony of the other locomotive engineers who testified. There is evidence that the speedometer bounces between 5 and 15 miles per hour that I find credible and I do accept that evidence. That, in turn, makes the tape recording which was offered by Respondent as Exhibit R-4 unreliable as evidence, in my opinion. The Respondent sought to keep absolute control not only of the operating engineers while they were on the job, but of the evidence, in my opinion, by its handling of the "slow order." If the Respondent wishes a forum or a tribunal or a court to recognize that there is some maximum speed involved in the "slow order," then it should print or publish such a maximum speed. It should teach its engineers what it is. It should spell it out on the call board. It would then have the proof that it can come in and say, "Look this is what it is," but to come into a hearing and express an opinion, and there were different opinions even among Respondent's witnesses apparently as to what it meant, would seem to give it complete latitude to say anything it would want in a tribunal. If it wants to set a maximum, it should do it either by printing it or at least when a "slow order" is put up to specify what the maximum speed is. The reliability of the speed recorder would still be a problem from the standpoint of proof. So the affirmative defense that Respondent raised, in my opinion, was not established by probative evidence that I can recognize.

Respondent has argued that at the grievance hearings which were argued before management's personnel, Mr. Chacon did not raise the question about what Mr. Olson had said and what Mr. Pounds had stated. I do not find this unusual. In the grievance proceeding, it is for management to make these determinations, not an independent, impartial forum. It would not be unusual in my opinion for one charged by a party to come in and (not) argue before that very party the points that are actually adverse to the very party who is deciding the outcome of his case. I do not find that a persuasive point under those circumstances. Thus, I do not infer from

the fact that Mr. Chacon had not previously raised those points that such incidents did not happen or that this was simply an afterthought on his part in this proceeding to raise those arguments. Indeed, his prospects of succeeding in the grievance area might well have been recognized by him to be enhanced by not raising this point.

I note for the record that Mr. Roche who was not called as a witness is employed at Ajo (Arizona) which is a distance of approximately 300 miles from the site of this hearing.

I conclude that Applicant has established a prima facie case by showing protected activities, the employer's knowledge thereof, retaliatory disciplinary measures by Respondent and inherent, of course, in the concept of retaliation the fact that the warning and suspension were motivated in at least significant party by reason of such protected activities. I find that the Respondent in this case did(not) establish, because of failure of the quality of its proof, its justification for the warning and suspension of Chacon. I further find that in view of the timing of this retaliatory action, the obvious animosity at the top management level toward Chacon for filing complaints with the Government, and the fact that such punitive action constituted a different pattern of disciplinary procedure than had been previously exhibited at the Morenci Mine, that the justification set forth by Respondent for such action was a pretext. I find that the primary reason for the suspension and warning of Chacon was his leadership and his pronounced efforts in processing safety complaints at the Morenci Mine in his role as Vice-Chairman of Local 1668. In the very least I find that there is a mixed motivation situation, that is, where the management has some justifiable basis for punishing Chacon but where also part of its motivation is retaliation because he is becoming a pain in the neck and troublesome to their total control of the safety programs at the Morenci Mine. It is well established in labor law that the mere existence of a valid ground for discharge of an employee is no defense to an unfair labor practice if such ground was a pretext. NLRB v. Yale Manufacturing Company, 356 F.2d 69 (1st Cir. 1969); NLRB v. Ace Comb Company, 342 F.2d 841 (8th Cir. 1965), and (it) is also well established that the disciplining of an employee which is motivated in part by activity protected by a remedial act is unlawful. Socony Mobil Oil Company, Inc. v. NLRB, 357 F.2d 662 (2nd Cir. 1966).

I reach the following decisions or judgment in this case and that is that the alleged discriminatee, Johnny N. Chacon, was indeed the subject of discrimination with respect to the

warning and the suspension and that there is merit to the application for review which was filed by the Government on his behalf in this case.

I reach the following conclusions of law:

(1) The Federal Coal Mine Safety and Health Act of 1977 is remedial. It should be construed liberally in order to carry out the Congressional purpose of protecting and enhancing the health and safety of coal miners.

(2) If one of the reasons for, or a significant part of the motivation for, a mine operator's discharging or otherwise discriminating against a miner is attributable to any of the specified activities set forth in Section 105(c)(1) of the Act by the miner, a violation of the Act occurs.

(3) Even though a valid basis for the discharge or punishment of a miner may exist, if, such punishment or discharge is in significant part motivated by the miner's protected activities under Section 105(c)(1) of the Act the punishment or discharge is unlawful.

(4) In violation of Section 105(c) of the Act the Respondent discriminated against Johnny N. Chacon by warning him on February 6th, 1979, and by suspending him from employment for three days (commencing February 13th, 1979.

All other proposed Conclusions of Law and Findings of Fact not expressly incorporated by me in this decision are rejected.

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It is ordered that within 30 days from the issuance of my written decision which will issue hereafter and which will incorporate the bench decision which I have just rendered in this case aside from grammatical corrections Respondent pay to the Applicant, in full reimbursement of the wages which he lost during the 3-day suspension, his full pay for said period including any overtime which he would have drawn had he been employed on those 3 days together with statutory interest provided in the State of Arizona running on said amount from February 15, 1979, to the date of payment.

Respondent is further ordered to expunge from the personnel records of Mr. Chacon and all other records the warning of February 5, 1979, and the 3-day disciplinary suspension commencing February 13, 1979, and all references thereto.

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I find, in addition, that Respondent has committed a violation of the Act.

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The statute requires a consideration of six criteria in a penalty case. The usual penalty case, however, involves a violation of specific safety or health standards and some of the criteria are not relevant to a discrimination violation, that is, a violation of section 105(c)(1).(FOOTNOTE 4)

I find that this is a very large mine operator. It has a moderate history of previous violations and, as counsel for the Government indicates, it is on the low side of a moderate history of previous violations. With respect to this history of previous violations, I find that there is no record of any similar violation having been committed by this Respondent. In view of the size of Respondent, I find that it would have the economic ability to pay any penalty which I would assess in this case, up to the maximum, without endangering its ability to continue in business.

The concept of negligence is one of the statutory criteria which is not relevant in this case. The violation, due to its nature, is found to be willful.

The statutory criterion relating to abatement in good faith after the conditions or problem is discovered is again not relevant.

The remaining statutory criterion is how serious the violation is. There are different aspects of the gravity of this violation. One is that it is very serious because the discriminatee was the vanguard of the union's reporting procedure under the Act. And contrary to Mine Superintendent Olson's belief--directly contrary to Mr. Olson's belief--this is the whole purpose of this law which is passed by Congress and which is applicable in every state of the union, not just this area. The whole purpose of the law is to encourage reporting. Conversely, there is an obligation on the part of MSHA and the Government not to encourage frivolous or bad-faith reporting. Indeed, that is counterproductive even to the purpose of the law. If someone comes and calls wolf all the time after a while nobody pays any attention to it. So there are two aspects of this, but the purpose of this law which I have found to be violated is to do the very thing that the Respondent apparently disagrees with. There is an absolute right of any miner, and particularly the union representative charged with processing safety complaints, to go to MSHA.

I also would like to note with respect to Exhibit R-5, which is the MSHA Surface Miner Training Program, that this is applicable to miners, and granted that Mr. Chacon is a miner he also wears an entirely different hat when he acts as a union safety representative. I do not find this (Exhibit R-5), particularly relevant in this proceeding and particularly I do not view it as much of a restriction which MSHA would have put on any miner to go to the company first. I do not read this training manual to require miners to go to the company first. It states on the third page of the exhibit, "you also have the right to call MSHA to ask for help in the problem." That appears to me to be a collateral right, not one that must be taken in sequence. Certainly, it is not a restriction on the part of the union representative, in his judgment of what to do, and I would certainly expect that the attitude and the belief that there is some restriction on that on the part of Respondent to be straightened out.

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The second aspect is what effect the retaliatory action which I have found in this case will be on the rights of miners and on the rights of the union representative which is expressly provided for in 105(c)(1). It is certainly--in the context of this community and this is a small area where I

would assume most of the people work and where the union is located--discouraging in my opinion for the union representative for the first time to be given a punishment after he has become the spearhead of the safety-reporting activities of the union and of the miners. Had Mr. Roche testified we may have had a clearer understanding of the thinking of the Respondent's management since he was the one who did make the decision. There is little for me to find in the way of mitigation in terms of seriousness. I find this to be a very serious violation in view of the geographical area, the timing, and the dampening effect it would have on safety reporting. The intent of Congress was that safety reporting was to be encouraged since miners are out in the different areas of the mine and in the best position to spot immediately hazardous conditions. The penalty will be raised on the basis of gravity. On the other hand, I would find relatively commendable the history of previous violations and the fact that this is apparently a first as far as discriminatory activity is concerned by this Respondent. Those factors militate for a lowering of the penalty. I find a penalty of $2,500 is appropriate and it is so assessed.

Respondent is ordered to pay the sum of $2,500 to the Secretary of Labor within 30 days after the issuance of my written decision.

ORDER

Respondent, if it has not previously done so, is ORDERED to pay to the Secretary of Labor the sum of $2,500 within 30 days of the issuance date of this decision.

Michael A. Lasher, Jr.
Judge

~FOOTNOTE 1
Tr. 242-277.

~FOOTNOTE 2
Incorrectly shown as "December" 21 (TR. 249) in my bench decision.

~FOOTNOTE 3
Incorrectly shown as February "4", in my bench decision (Tr. 253). See Tr. 81, 134.

~FOOTNOTE 4
Section 110(a) of the Act requires that, in addition to the remedies provided in section 105(c), a penalty be assessed if the mine operator is found to be in violation of section 105(c). The parties were notified by my order of April 4, 1980, that the penalty aspect of this matter would be heard simultaneously with the discrimination aspect if a violation were found. In its complaint in this proceeding the Secretary of Labor asked that a

penalty be assessed. The procedural regulations, 29 C.F.R. 2700.25 through 29 C.F.R. 2700.30, apply to violations of health and safety standards determined after issuance of orders and citations during inspections and investigations pursuant to section 104 of the Act. Such regulations are the procedural implementations of sections 105(a) and (b) of the Act. Such regulations do not appear to be applicable to discrimination proceedings arising under section 105(c) of the Act. To hold otherwise will result in piecemeal litigation and resultant inconvenience to all parties, as well as needless expenditure of the time and resources of the parties and the taxpayers.