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C. E. BLANKENSHIP, v. W-P COAL

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

CHARLES E. BLANKENSHIP, COMPLAINANT	Complaint of Discrimination
v.	Docket No. WEVA 79-336-D
W-P COAL COMPANY, RESPONDENT	No. 21 Mine

DECISION

Appearances: Larry Harless, Esquire, Charleston, West Virginia,
for the complainant;
Harold S. Albertson, Jr., Esquire, Charleston, West
Virginia, for the respondent

Before: Judge Koutras

Statement of the Case

On May 29, 1979, complainant filed a discrimination complaint with the Secretary of Labor against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was in the form of a summary statement of the alleged discriminatory action, and it was filed with MSHA's District No. 4 field office in Logan, West Virginia. Subsequently, on July 10, 1979, MSHA informed the complainant that upon completion of an investigation concerning his discrimination complaint, MSHA determined that a violation of section 105(c) had not occurred. Complainant was advised that if he disagreed with MSHA's disposition of his complaint, he was free to file a complaint on his own behalf with the Commission.

By letter received August 9, 1979, complainant filed his discrimination complaint with the Commission, and asserted that he had been threatened, discriminated against, and punished unjustly because of his position as the chairman of the mine health and safety committee, and he enclosed a copy of his previous complaint filed with MSHA in support of his Commission complaint. He also asserted that "there were other actions taken against me that aren't in the report," but he failed to furnish any details in this regard, or to otherwise indicate the nature of the alleged "other actions." With regard to his original claims of discrimination, they are summarized as follows in a statement executed by the complainant:

(1) On or about April 4, 1979 a dispute arose about firebossing the mine after the fan shut down. Mr. Blankenship complained about this and the state mine inspector supported his position. As punishment, Mr. Blankenship was required to "shovel in the hole" by Freddy Vance. Witnesses: R. Evans, B. Sipple, Blevins, C. Bailey, Jr.

(2) On April 10, 1979 a dispute arose about Foreman Pedro Mendez transporting heavy rails into the mine on a mantrip carrying men to the section. Mr. Blankenship discussed this dispute with Ray Herndon and Dewey Wiley in the mine office. Dewey Wiley became very angry and told Mr. Blankenship "the first chance I get, I'll fire your rump". Witness: Danny Neace.

(3) On April 12, 1979 Mr. Blankenship was fired for allegedly instigating a work stoppage. The facts are that Mr. Blankenship was following the instructions of his local union president to stop the men from leaving the mine site, and instead to meet on the company parking lot to discuss the problem. The company had previously requested that the men meet on the parking lot instead of leaving the premises. The discharge of Mr. Blankenship thus put into concrete effect Mr. Wiley's April 10, 1979 threat to "fire your rump".

(4) On or about April 13, 1979 at the contractual "24-48 hour" meeting on Mr. Blankenship's discharge, Dewey Wiley offered to rescind the discharge if Mr. Blankenship would enter into a written agreement removing him from the Mine Health and Safety Committee for a period of one (1) years [sic]. Mr. Blankenship rejected this offer. Witnesses: B. Belcher, Pete Brown, D. Neace, T. Hodge, F. Robinette, R. Accord.

By letter filed August 30, 1979, Mr. Blankenship advised that he was seeking to clear his work record and to recoup back pay lost during his suspension. The suspension resulted from an arbitration proceeding concerning Mr. Blankenship's proposed discharge for allegedly instigating the work stoppage referred to in his complaint. In addition, in response to my order of August 19, 1980, directing the complainant to provide specific details concerning the "other actions" of alleged discrimination, Mr. Blankenship responded by letter filed September 22, 1980, as follows:

The other actions stated in the letter were other threats by Dewey Wiley (company personal director). Also, I feel I have been punished because of my position as Mine Health & Safety Committee. I filed a grievance on #21 bathhouse for failure to comply with the federal law under MSHA, our district safety

coordinators Ronald Nelson and Richard Cooper responded to the grievance and went to the bathhouse. Dewey Wiley threatened me with my job as he had done before. I am sending a copy of the district report.

I submitted a safety grievance on toilet facilities in the mines after W-P Coal Company complied with the law by furnishing portable potties in the mines. W-P Coal Company stated who ever used one of the toilet facilities had to empty it. I asked the company to also comply with the article on keeping them sanitary. I asked the company to have it cleaned. Joe Bragg, day shift foreman, came to the section and acknowledged I asked them to have it cleaned and he removed me from my job and told me to take it to the track so it could be took outside and cleaned. I did not use the portable potties. I feel the company did this to punish me for filing a grievance on portable potties because of my position as Chairman of [sic] Health & Safety Committee. Witness: Randall Evans.

Mr. Dewey Wiley also stated that he would see to it that I would empty the potties if I filed a grievance on keeping portable potties sanitary. Witnesses: Frank Robinette, Field Representative, Ronald Nelson, safety director for District 17.

Respondent filed a response to the complaint filed by Mr. Blankenship and denied that it had discriminated against him. Further, respondent asserted that since the initial complaint and relief requested by Mr. Blankenship related to his suspension on April 12, 1979, no consideration should be given in this proceeding to any alleged acts of discrimination which the complainant claims occurred after May 29, 1979, the date his discrimination complaint was filed, and that no testimony regarding these alleged additional acts of discrimination should be permitted at the hearing. Respondent filed a written motion seeking to limit the hearing to events prior to May 29, 1979, and after oral argument on the record at the hearing of January 6, 1981, the motion was denied (Tr. 7-A), and testimony was taken concerning the "other actions" referred to by the complainant in his letter of September 22, 1980.

This matter was heard in Charleston, West Virginia, during the term January 6-7, 1981, and the parties appeared by and through counsel and participated fully in the hearing. Posthearing proposed findings, conclusions, and supporting briefs were filed by the parties and the arguments presented therein have been fully considered by me in the course of this decision.

Issue Presented

The principal issue presented in this case is whether Mr. Blankenship's suspension was in fact prompted by his mine health and safety activities, and whether or not the asserted acts of discrimination as detailed by the

~972

complainant in his complaints of May 29, 1979, as well as September 22, 1980, constituted acts of discriminatory retaliation, intimidation, or harrassment as a result of complainant's protected mine health and safety activities in his capacity as chairman of the mine safety and health committee.

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).

Testimony and Evidence Adduced by the Complainant

Charles E. Blankenship testified that he is employed by the respondent as a continuous miner operator, that he has been so employed for approximately 7 years, and is assigned to the No. 21 Mine, one of two mines currently operated by the respondent. He is a member of UMWA Local Union 5922 and serves as chairman of the mine health and safety committee as well as the mine committee, and in these capacities he has represented the miners at both the No. 21 Mine as well as the No. 19-C Mine continuously since 1977. He also serves as chairman of COMPAC, a UMWA-endorsed political action committee relating to mining industry laws and community-related miner activities (Tr. 10-17).

Mr. Blankenship testified that on February 13, 1979, he filed a grievance with mine superintendent Ray Herndon concerning the lack of water at the bathhouse which had been installed at the then operating No. 20 Mine (Exh. C-2). Mr. Herndon assured him that water would be provided or the men would be paid \$1.75 each per day as compensation for the lack of water. Water was not provided and the men were not compensated, and this resulted in a strike or work stoppage on April 13, 1979. Prior to this time, another bathhouse grievance had been filed (Exh. C-3) but it was withdrawn after the respondent corrected the condition which was in issue, namely, the installation of floor safety strips to preclude stumbling hazards (Tr. 17-26).

Mr. Blankenship testified that on April 4, 1979, the main mine ventilation fan went down on the "hoot owl" shift. After he reported to work, he and Mr. Randall Evans were assigned to "police" and clean up the parking lot by his immediate supervisor, foreman Freddie Vance, while the other seven members of his crew were "standing around." While he was doing this, mine safety director Junior Oliver and he got into a dispute as to whether the mine had to be fire bossed before the men were permitted to go in. Mr. Blankenship believed that since the fan had been down for over 2 hours, the state law required the mine to be fire bossed, but Mr. Oliver did not. A telephone call was made to a state mine inspector and he confirmed Mr. Blankenship's position. Shortly thereafter, he and his crew were assigned by Mr. Vance to shovel coal spillage in and around the underground

panline area known as "the hole" while another crew remained outside "laughing at us." Eventually,

~973

after the fire bossing was completed at 11 a.m., he and his crew resumed their normal work duties in the mine (Tr. 27-31).

Mr. Blankenship testified that on April 10, 1979, safety committeeman Daniel Neace came to him with a complaint that the third shift mine foreman, Pedro Mendez, had permitted several inexperienced miners to be transported in a battery-powered car together with 80-pound steel rails positioned over their heads. A meeting was held over this incident, where Mr. Mendez, Mr. Neace, personnel director Dewey Wiley, and superintendent Ray Herndon were present. After the meeting was over and as they were leaving the room, Mr. Wiley remarked: "This nit-picking stuff - I'll get you yet" (Tr. 32-34). Several days later on April 12, when he reported to work at 8 a.m., he learned that the previous midnight or "hoot owl" shift had gone on strike, and Bill Belcher, president of the local, informed him of this fact. Mr. Belcher advised him that a meeting had been called at the No. 19-C bathhouse to discuss the strike and Mr. Belcher instructed him to go to the No. 19 Mine, 3 miles away, to advise the men not to go home and to remain for the meeting to discuss and settle the dispute. He went to the parking lot area of the No. 19 Mine and waited for Mr. Belcher with several of his fellow workers (Tr. 26, 35-36).

Mr. Blankenship stated that the strike dispute was over the fact that the men had not been compensated for the lack of water in the bathhouse. He stated that he tried to talk the men into going back to work because the work stoppage was illegal, but that they went home after the meeting. He also left and went home but returned on the evening shift and tried to get the men to stay. He then returned on the following third or "hoot owl" shift and finally convinced the men on that shift to go back to work. Upon reporting to work, the next day, Mr. Herndon gave him an envelope which contained a discharge slip and told him that "this wasn't my idea." Mr. Blankenship took the slip to his union field representative and initiated a discharge grievance (Tr. 37-41).

Mr. Blankenship indicated that the initial step in his grievance was the "24-48 hour" meeting with mine management, where each side presented testimony. He stated that throughout this meeting mine management requested him to relinquish his mine committee and safety committee positions, and that if he agreed, he would only receive a small suspension rather than a discharge. When he declined to relinquish the committee positions, his case proceeded to arbitration the following week (Tr. 42-46; Exhs. C-4 through C-7). The arbitration was resolved by Mr. Blankenship receiving a 30-day suspension, and Mr. Blankenship testified that his representative, Frank Robinette, told him that mine management had sought his resignation from his safety committee job but that the arbitrator denied that request. Mr. Blankenship was in fact suspended for 30 days without pay (Tr. 47-52).

After returning to work following his suspension, Mr. Blankenship indicated that he filed another grievance (Exh. C-8) concerning the bathhouse because the men still had not been paid

for the periods when there was no water available. That grievance was settled when the men, including himself, were paid compensation (Tr. 54), but subsequent bathhouse problems

~974

with water, lights, an exhaust fan, and lack of sufficient shower heads resulted in additional periodic grievances being filed (Tr. 55). A meeting was held at the bathhouse, where union district safety director Richard Cooper, Ron Nelson, Mr. Wiley, and Mr. Herndon were present. At that meeting, Mr. Wiley told him he would "fire me" and "get rid of me" (Tr. 56).

Mr. Blankenship testified that on one occasion, following his suspension, his immediate foreman, Freddie Vance, stated: "Charlie, you're going to keep it up and they've probably got a hit man after you right now" and that "the company will catch you in the wrong place one of these times and they'll get you." These statements were made in the presence of his entire crew, but Mr. Vance offered no further specifics (Tr. 58).

Mr. Blankenship testified that he requested the respondent to provide sanitary portable toilets for the men underground and that one was provided for his section. However, when the respondent failed to provide them for others, he filed a grievance insisting that the respondent comply with the law. Although the company policy dictated that each miner had to remove the toilet which he used from the mine, he was instructed by assistant mine foreman Joe Bragg to help another miner remove his used toilet. Mr. Bragg told him that it was not his idea and that "I just got orders to tell you to get it out of here" (Tr. 60). He helped Mr. Randall Evans carry the toilet to the track under protest and Mr. Wiley later told him that "I'll see that you empty it" (Tr. 61). The toilets weigh approximately 10 to 15 pounds (Tr. 62).

Mr. Blankenship stated that during his tenure as chairman of the mine safety committee, he has filed numerous bathhouse complaints concerning 30 C.F.R. 75.1712, roof-control problems, manbus problems, and other violations, and when the respondent would not cooperate with him, he resorted to section 103(g) of the Act and requested MSHA inspectors to come in and obtain compliance (Tr. 66-67). He also contacted state inspectors and union safety representatives both before and after his 30-day suspension (Tr. 68).

Mr. Blankenship explained the procedures for filing safety complaints and he identified several documents which constituted telephone complaints which he made or was somehow responsible for initiating (Tr. 88-93, Exhs. C-10 through C-18). All but the first two are dated after May 29, 1979, and they were received in evidence over the respondent's objections (Tr. 96). Mr. Blankenship stated that mine management accused him of "nit-picking" and being "radical" and that he would cause the mine to shut down because his complaints resulted in fines (Tr. 94).

On cross-examination, Mr. Blankenship confirmed that the strike or work stoppage occurred on April 12, approximately 2 months after his bathhouse grievance of February 13, 1979, was filed. He stated that he did not pursue the bathhouse grievance (Exh. C-2) further with the respondent because he relied on its

word that the men would be paid (Tr. 98-101). He considered

~975

the shoveling incident in the "hole" with his crew to be punishment and considered it "less desirable" work (Tr. 102). Regarding the incident concerning transporting inexperienced miners, he confirmed that Mr. Wiley "made the accusation to me that he'd get rid of me." Mr. Blankenship recalled no conversation concerning absenteeism or the respondent's policy concerning absenteeism, and he denied telling Mr. Wiley that the policy "was not worth the paper it was written on" (Tr. 104).

Regarding the strike, Mr. Blankenship stated that Union President Belcher conducted the meeting with the men and that it was his position that the dispute should be settled through the grievance procedure. He stated that he told the men to go to work but that they left spontaneously. Following the strike, the respondent accused him of being the instigator and advised him of its intent to suspend him with the intent to discharge (Tr. 105-111).

Mr. Blankenship confirmed the 24-48 hour meeting concerning his suspension grievance and stated that he was satisfied with Mr. Robinette's representation on his behalf at that meeting but was dissatisfied with the subsequent arbitrator's action in excluding him from the hearing room prior to rendering his decision (Tr. 112-114). He denied ever threatening Mr. Robinette with a lawsuit as a result of the arbitration decision but rather that Mr. Robinette and his union advised him to pursue the matter further through the instant discrimination action under the Act. He did so because he believed he was discriminated against through the proposed discharge because of safety reasons rather than for instigating the strike in question (Tr. 113-114).

Mr. Blankenship confirmed that at the 24-48 hour grievance meeting with mine management, he was asked to relinquish both his safety committee job as well as his union committee job. He believed that the April 12 or 13 strike was related to his mine safety committee activities because "the company brought this on me because of safety reasons" because the failure of the respondent to settle the miners' grievance resulted in the dispute which led to the strike. At the time he received Mr. Belcher's instructions to proceed to the parking lot meeting, he believed he was acting in his capacity as both the safety committeeman as well as the mine committeeman because of the combination of factors concerning the lack of water in the bathhouse as well as the failure by the respondent to compensate the men for this (Tr. 118). He also confirmed that Mr. Vance never threatened him and that he had never received any threatening phone calls at his home. While he has received obscene calls, he cannot attribute them to the instant proceeding and stated that his phone number is readily available (Tr. 120).

Regarding the portable toilet incident, Mr. Blankenship confirmed that on the day in question it was used by his continuous miner helper, Mr. Evans, and that the miner was temporarily down and idle. He conceded that mine management decided that he should help Mr. Evans carry the toilet out, and while he did not like it, he had no argument with the decision

(Tr. 123-125). He also indicated that he advised Mr. Bragg that he was acting under protest and that Mr. Bragg told him that the order came from "outside" but he did not state

~976

who gave the order (Tr. 130). Mr. Blankenship stated that several persons laughed about the incident (Tr. 131).

In response to bench questions, Mr. Blankenship stated that the portable toilet was carried three breaks and placed on the mantrip to be taken outside (Tr. 136). Regarding the shoveling incident, he stated that it was the first time he could recall an entire crew being assigned to shovel and clean the belt in question, and in the event of a breakdown it was not unusual for a shuttle car operator to be assigned such duties. However, he believed he was being punished at the time because he prevailed in the confrontation over the ventilation fan being down and the requirement for fire bossing the mine. When asked who assigned him the task of shoveling, Mr. Blankenship replied as follows (Tr. 140-141):

Q. Shortly after the telephone conversation, someone from mine management told you to go shovel in the hole.

A. Mr. Freddie Vance. He also stipulated it wasn't his idea.

Q. Now, that's the second time somebody from mine management has assigned you to do certain chores which you felt was retaliation and in both instances these individuals purportedly told you it wasn't their idea.

A. Yes, sir.

Q. Whose idea was it? Do you have any idea?

A. It had to come from outside, I figure from mine management -- from higher up than they are. See, a section boss -- you deal with them every day. You know what I mean. They're just like a working person with you. You get used to them.

Q. Is it possible the section bosses were trying to retaliate against you and used the outside as an excuse so you wouldn't know it was really them that was punishing you?

A. No, sir.

Q. Have you ever had a dispute with the section boss?

A. I've had a few times -- not really disputes. We've had things to happen over safety and stuff but the section boss -- it's in his power. He'll get it corrected even if he wants me to do it.

But see, on most of the section bosses, if you ask about a safety dispute they say you have to go to mine management.

~977

You had to go to Ray or Dewey or someone like that. They ain't got no power to do nothing.

Mr. Blankenship conceded that there have been occasions where respondent has corrected safety complaints that he brought to its attention (Tr. 145), and he also conceded that mine management does not totally ignore his safety complaints (Tr. 148).

Richard C. Cooper, UMWA International Safety Inspector, testified that he has worked with Mr. Blankenship for a number of years and considers him to be a very good committeeman. Although he has not received too many recent safety complaints from Mr. Blankenship, there were quite a few received from him at one time concerning the respondent. Mr. Cooper stated that on two occasions he personally heard Mr. Wiley threaten Mr. Blankenship because of his safety activities. The first incident occurred at the bathhouse during the meeting referred to by Mr. Blankenship, and the second occurred during a telephone conversation he had with Mr. Wiley on the following day. He remembered the incidents because he found it unusual for mine management to threaten a union man in the presence of a union representative. Mr. Cooper prepared a memorandum dated September 26, 1979, regarding the incident and gave a copy to Mr. Blankenship upon his request (Tr. 70-74; Exh. C-9).

On cross-examination, Mr. Cooper stated that he has received a few complaints from safety committeeman Randall Evans but that most of them came through the committee chairman. He confirmed that his memorandum of September 26, 1979, regarding his conversation with Mr. Wiley was typed by his former secretary on the day he received the phone call from him. Although he could not recall the exact words Mr. Wiley used during the September 19th bathhouse meeting, he stated that the memorandum was accurate. He also distinctly recalled Mr. Wiley stating that "if Charlie Blankenship didn't like working with that company that he would find a way to get rid of him" (Tr. 74-78). He also recalled the phone conversation when Mr. Wiley stated that "if Charlie Blankenship keeps writing safety grievances that the company is going to get rid of him" (Tr. 79).

Mr. Cooper stated that it is the respondent's responsibility to keep the bathhouse clean but that some mines use a union attendant for this task (Tr. 86). He confirmed that he made the notation concerning Mr. Wiley's threats in order to keep a record of it, and if additional threats were made he would have taken some action himself (Tr. 82-83). Regarding the alleged statement at the bathhouse on September 19, 1979, Mr. Cooper stated that Mr. Wiley did not make the statement directly to him but made it in his presence as he was leaving, and he believed that he was speaking to Mr. Herndon at the time (Tr. 83). After the phone conversation, he assumed that Mr. Wiley was going to suspend Mr. Blankenship subject to discharge, but that was not done (Tr. 85). Mr. Cooper believed that it was easier to fire someone than to remove him from the safety committee (Tr. 85).

Randall Evans, testified that he is employed as Mr. Blankenship's continuous miner helper and that he is also a union safety committeeman. He

~978

confirmed the facts concerning the dispute over the fire bossing of the mine after the ventilation fan went down, and confirmed the fact that Mr. Vance assigned the crew to clean the coal which had accumulated around the underground belt line. Another crew was laughing at them and after the mine was fire bossed, they resumed their normal work. Prior to shoveling, he and Mr. Blankenship were cleaning up the parking lot while waiting for the mine to be fire bossed (Tr. 150-154).

Regarding the strike meeting, Mr. Evans testified that Mr. Blankenship tried to get the men to go back to work (Tr. 156), and he confirmed the "hit man" comment made by Mr. Vance. Although he expressed concern over the statement, he stated that Mr. Vance had been "under a lot of medical attention" (Tr. 157).

Mr. Evans confirmed the incident concerning the portable toilet and confirmed that Mr. Bragg assigned Mr. Blankenship to assist him in taking the toilet to the track area and Mr. Evans then took it out of the mine. Mr. Evans had previously used the toilet (Tr. 160-162). During a previous meeting with mine management concerning the toilets, Mr. Evans stated that Mr. Ray Herndon had made the following statements (Tr. 158-159):

A. Well, on the portable potties, Charlie come to me and informed me -- he said some men on the hootowl were wanting portable potties put inside the mine. Charlie said they had to be there -- the law requires them to be in there, so we'll ask them to put them in there.

We asked them to put them up there -- to furnish all the sections with portable potties. Instead of furnishing all the sections, they furnished it on the one section we worked on. And I informed Charlie -- I said, "No, Charlie, that don't get it." I said, "The law requires it to be on all sections within five hundred foot."

So, we went down in a second-step meeting on portable potties and it was just an outrageous meeting. There wasn't nothing come out of it -- just threats. Character -- just downgrading of people. I, myself, got downgraded in it.

Q. Okay. I don't want to take up too much time. What was said by whom?

A. Mr. Ray Herndon stated plainly -- he said, "It's because of radicals like you all this company is going to be shut down." He said, "You all are not going to have to worry about portable potties. You're not going to be here long enough to worry about portable potties."

I said, "What?" And he said, "You're right. You heard me right. Just because of radicals like you" -- then he said

"Radicals like you -- this company's not going to be here long." And that was the outcome of the second-step meeting on the portable potties.

Q. Was there anything said at that meeting about the company said they would put them in?

A. Yeah. The company agreed to put them in but they said whoever used it would empty it.

On cross-examination, Mr. Evans stated that the shovels used to shovel the belt line were stored in a shed some 70 feet from the center of the parking lot. There were enough for the men, and two were located at the belt location. It was customary for a truck driver to clean the belt by shoveling after loading his truck, but "inside men" had never done this work in the past and he was not aware that a "belt-man" was assigned to shovel at the belt. He confirmed that he and Mr. Blankenship carried the portable toilet together for a distance of some 210 feet and placed it on a rail rover. He transported it out of the mine after being furnished safety goggles to wear while driving the rover, and Mr. Bragg rode out with him. He and Mr. Blankenship did it under protest because suitable transfer tanks were not available to transfer the toilet to the surface and he believed that this is a violation. He also indicated that he was the only person who ever used such a toilet (Tr. 162-167).

In response to bench questions, Mr. Evans stated that he protested handling the toilet because respondent did not furnish him with suitable equipment to transfer it out of the mine (Tr. 169). Mr. Evans stated that Mr. Vance was the section boss, that he had known him about a month, that Mr. Vance had never given him or Mr. Blankenship any problems over their safety activities, and he had never threatened or intimidated them (Tr. 171-172).

Mr. Evans testified that "policing" the parking lot while the mine is down is a normally acceptable chore. The miners simply stand around until one of the bosses tells them what to do and none of the miners have objected. His testimony with respect to this incident is as follows (Tr. 174-177):

Q. Is it normal -- okay. Is it normal for your fellow employees and the following crew guys when you're out with them one evening or out on the parking lot somewhere to say, "Ha-ha, you had to shovel the hole today?" Is that unusual? I assume you fellows kid a lot don't you. Not when you're working.

A. No, the company has a policy of no horseplay.

Q. I'm not talking about -- have you ever hollered or giggered [sic] or teased any of your fellow miners when they had to shovel the hole?

A. I haven't known any of the fellows -- miners that had to shovel the hole other than our section.

Q. Yours was the only crew that had ever been assigned to go down and shovel that belt?

A. Yes, sir.

Q. But if the section foreman told you to do it while you were spinning your wheels, so to speak, waiting to go underground you wouldn't object to it.

A. No, sir. I don't object to no direct order as long as it's within the law.

Q. Was this shoveling the hole this day within the law.

A. No, sir.

Q. Why wasn't it?

A. Because we was inside the hole shoveling and there was an endloader overtop of us loading coal trucks.

Q. Wait a minute.

A. We're in under a stockpile of coal. There's a conveyor right in the bottom of the stockple. It comes out of the stockpile and feeds it into the truck. Okay, we're down here. Okay, the belt's not running. There is a bulldozer up here pushing coal back and forth (indicating) over our heads.

Q. Your objection to shoveling in the hole was because you felt it was an unsafe act?

A. No, I didn't object to shoveling in the hole, I did it because at the time I didn't know there was a bulldozer up there over our heads -- an endloader loading coal.

Q. I got the impression from Mr. Blankenship his objection about shoveling in the hole was the fact he felt he was sent there to be punished.

A. Yes, sir.

Q. Was that your objection?

A. That's my opinion of it. I didn't object to it because I was following a direct order, but my opinion of

the reason we had to do it was because of our actions we took in making them fire boss the mines is the reason they put us in there doing it.

Q. You're not suggesting -- or are you suggesting somebody from mine management assigned you to shovel in the hole knowing there was a bulldozer loading coal above you that put you in a position of possibly getting hurt as punishment for --

A. Well, they did put us in that position, but I don't know if they knew that endloader was up there working or not.

Q. Well, let's assume you finished your policing duties on the parking lot and the section was still not operational.

A. Yes, sir.

Q. And they've said okay, now we're finished policing. The next thing we're going to do now is we're going to clean up and shovel around this belt. Would that be a problem to you?

A. No, sir, as long as they told everybody to do it and not just one section of men.

Q. In other words, what you thought it was more than a coincidence you were put down there to shovel in the hole?

A. Yes, sir, they put one section down there and left one section up on the hill laughing at us.

Q. Now, where was -- okay, there were two sections down and two crews waiting.

A. Yes, sir, it was a two-section mines [sic].

Mr. Evans testified as follows concerning the allegation that Mr. Wiley threatened to fire Mr. Blankenship (Tr. 177-180):

Q. Did you hear Mr. Wiley or anybody else make any threats? Have you ever heard anybody from mine management make any threats to Mr. Blankenship or take any action against him?

A. Yes, sir, I sure have.

Q. Tell me about it.

A. Well, on a safety dispute on the bathhouse, me and Charlie -- we had to get hold of the district and we had

Mr. Richard Cooper and Ronald Nelson accompany us at a third-step meeting at the lab. And we went from the lab to the bathhouse, Number 20 bathhouse.

We got over there and when we got over there, we started making the -- the international safety coordinatory started making the safety run to see what was in violation. While we were doing that, Mr. Wiley looked at me and Charlie right in the face -- looked at us dead in the eyes and said, "This nit-picking safety matters like this, you're all not going to be here long." And I replied, I said, "Well, Mr. Wiley, if I'm not going to be here long, my house has got wheels on it. I'll just go find somewhere else to work when I get out of a job."

Q. And that's what he said?

A. Yes, sir.

Q. Who else was there besides you and Mr. Blankenship when he looked you in the eye and said that to you?

A. Well, Mr. Cooper and Ronald Nelson were present. Mr. Ray Herndon was present, and that's it.

Q. And this was when Mr. Cooper went there to look at the bathhouse?

A. Yes, sir.

Q. Now, when Mr. Wiley said this -- made this statement, what was his demeanor? I mean, was he angry? Was he calm? Was he frustrated? Was he ticked off?

A. My opinion of his emotions was he was ticked off because we are constantly asking them to try to cure some safety factor. And in this instance it was the bathhouse and he was ticked off because we took it further to the third step meeting where we couldn't get no -- we couldn't get nothing out of the second-step meeting, which if the company wanted to they could've went ahead and settled it.

They could've fixed the bathhouse and the matter would've been settled. It wouldn't have had to went anywhere. But in this instance, it went to the third-step and I feel they just got mad because we took it on to the third step.

Q. Were you here in the courtroom when Mr. Cooper testified this morning?

A. Yes, sir, I was.

Q. Mr. Cooper purportedly said -- I don't know what his direct statements were -- that he's a pretty busy man. He got a little irritated having to run to the mine all the time to the bathhouse.

A. Yes, sir.

Q. Let's assume Mr. Cooper was in that frame of mind when he went to the mine. Let's assume Mr. Wiley was in the same frame of mind. Let's assume Mr. Wiley, as he's going out the door, looks at you and Mr. Blankenship and says, "You fellows keep this nit-picking up, we're going to close this mine down." Is that the way it happened?

A. No, sir.

Q. Are we going to be out of business?

A. No, sir. Mr. Cooper never stated nothing like that?

Q. Did he specifically look at you and say, "I'm going to fire you over this?"

A. Mr. Wiley looked at me and Charlie Blankenship both right dead in the eyes just like I'm sitting here looking at you right now and he said -- he said, "If you don't quit this nit-picking, you're not going to be here much longer. I'm going to get rid of you." That's exactly what he stated.

I said, "Well, one thing about it, if you get rid of me, my house is on wheels and I can roll any time."

Daniel Neace testified that he has been employed as an electrician for 2 years and works on the "hoot owl" shift. He confirmed the incident regarding several new miners being transported together with some rails and stated that he advised Mr. Mendez that it was a safety violation. Although he was on the safety committee, Mr. Mendez told him it was none of his business, but after he lodged a complaint, Mr. Mendez apologized to him (Tr. 182-185).

At the conclusion of the meeting concerning the mantrip incident, Mr. Neace stated that Mr. Wiley made a statement that "Charlie would make a mistake and he would fire him" (Tr. 186). Mr. Neace testified as follows concerning this incident (Tr. 186):

Maybe he didn't use the word fire. He said, "I'll get you when you do make that mistake," or words pretty close to that effect. It's been a long time and in fact, I didn't

have any reason for remembering it. It's just -- I didn't know this was all going to come up again because I was in the original arbitration. I was there as a witness but they didn't call me or talk to me or anything. They just come out and informed us what their verdict was.

On cross-examination, Mr. Neace stated that he previously served on both the mine committee as well as the safety committee and that he considers the duties of each to be different. He has since resigned from both of those positions (Tr. 190-191). Mr. Neace confirmed that he had to meet once with Mr. Herndon over a written "slip" he received for absenteeism but that he could recall no discussions between Mr. Blankenship and Mr. Wiley concerning the subject. However, he has heard the men state that the absenteeism policy is "not worth the paper it's written on" (Tr. 193).

Mr. Neace stated that since he quit his mine safety committee position, he has worked solely as an electrician and is given assistance when he has to haul cables into the mine, whereas on previous occasions, while serving as committeeman, he had to handle cables alone (Tr. 195).

In response to further questions from the bench, Mr. Neace testified as follows (Tr. 197-199):

Q. When you were on the safety committee, were you employed as an electrician?

A. Yes.

Q. Did your normal duties require you to take cable in and out?

A. When I was on the safety committee I was on a section and I paneled outside. It required me to take cables in but I had more men to help me.

Q. Let me ask you this, Mr. Neace. Were you ever, during your tenure as committeeman, assigned such tasks as what I've heard today -- digging in the hole, shoveling in the hole, carrying out potties, anything of that nature?

A. No.

Q. Did you ever feel that you were --

A. Now, there was a dispute come up over the potties one time and I was involved in it. Let me think just a minute. But at that time I believe they told me -- I said it was the company's responsibility to see that these were emptied and they said the men that used them emptied them and I was the only one at that particular time who voiced

an objection and I think Mr. Wiley would substantiate that if you would ask him.

Q. Were you ever threatened or intimidated or feel intimidated by either Mr. Wiley or anyone else in mine management with regard to any of your safety activities when you were on the committee?

A. Well, I knew things were kind of rough for me but I never felt like -- I never felt like they put any extra heat or anything on me. I did-feel like they put it on Charlie because they more or less held him responsible with a lot of actions I done because at the time I went on [sic] safety committee -- took the position of safety, I did not know how to write up grievances and things.

So, I would take them to Charlie and he would write them up for me. Therefore, he carried the brunt of the heat on everything whether I wrote it up or anybody else wrote it up.

And, at pages 200-202:

Q. I've heard testimony today that Mr. Herndon, for example, on the two instances concerning the mantrip -- when that dispute arose that Mr. Herndon purportedly indicated that Mr. Blankenship had a right which Mr. Herndon recognized to get involved in that because he was a safety committeeman.

A. Yes, sir.

Q. And that Mr. Herndon had purportedly dressed down Mr. Mendez.

A. Yes.

Q. I've also heard testimony that Mr. Herndon, on another occasion when a dispute arose on safety, also conceded that Mr. Blankenship had the right to be involved because he was on the safety committee. Okay?

A. Yes, sir.

Q. Now, if I can accept that as true, what am I to believe about Mr. Herndon's attitude with regard to Mr. Blankenship and his role as a safety committeeman?

A. Well, I always found him to be honorable in anything I went to him with -- calm. But he also takes his orders from Mr. Wiley. He may not take direct orders or something

from Mr. Wiley but he takes a lot of suggestions from Mr. Wiley and he takes orders from other people, too.

Q. Mr. Neace, you impress me as being a very candid, honest individual, now and you've sat here all day and heard all the testimony so far, right?

A. Yes, sir.

Q. And I think I made the statement earlier today that, you know, this whole dispute seems to center around or at least the starting point is the bathhouse and from then on everything was downhill.

Let me ask you this: Just from your own, can you give me a capsule view of what your impression is as to what the dispute is all about here. It seems to me on the one hand we've got a vigorous safety committeeman over there who has an interest in safety and is doing his thing on safety.

On the other hand, the picture that's being painted of the company is the company just doesn't care about safety. They're out to get this guy. Just what is your --

A. Well, you know, without being involved and seeing everything that's happening in all directions it's quite hard to understand. I felt, personally, that given half a chance they would dismiss him much quicker than they would dismiss me because he is a thorn in their side -- not saying they won't comply with safety. I've worked for companies that was worse.

But they don't comply as fast as they should at times and by -- Charlie is a very persistent, conscientious safety man and it did bring pressure upon him and I feel they would dismiss him quicker over a small thing than they would me or anybody else.

Mr. Neace testified that he was present during the 24-48 hour meeting of April 13, 1979, and he believed Mr. Wiley offered to rescind the proposed discharge of Mr. Blankenship if he would accept a suspension and give up his union activities. Mr. Neace stated further that he did not believe Mr. Blankenship was asked to give up his mine safety and health job and his testimony is as follows (Tr. 211-214):

Q. Were you present during this twenty-four, forty-eight-hour thing --

A. Yes.

Q. -- on April 13 --

A. Yes, I was.

Q. 1979?

A. Yes.

Q. Tell us in your own words what you recollect of that event?

A. There was an offer made to him. If he would give up his -- but I didn't think they said mine safety and health. I thought they said his union activities.

Q. To the best of your recollection, how was this offer -- or how did it happen?

A. For one year and they would rescind the firing. But they wanted him to accept a suspension.

Q. Who was they?

A. It was Mr. Wiley, I believe, is the one who brought the idea up and it was backed by Mr. Cliff Herndon.

Q. Mr. Cliff Herndon?

A. I believe he was presiding over the meeting.

Q. Is he related to Ray Herndon?

A. Yes, he is.

Q. What's the relationship?

A. I think he's your father isn't he, Ray?

Q. Why were you there at this?

A. I was one of the safety committeemen and I was there as a witness for Charlie.

Q. And your recollection of the offer was that Mr. Blankenship cease and desist or quit his union activities for a year and the company wouldn't go ahead and fire him but would suspend him.

A. Yes, sir.

Q. But you don't know who said that.

A. I'm pretty sure Mr. Wiley is the one that mentioned it. But it was substantiated by the company president at that time -- or superintendent.

* * * * *

Q. But in any event, Mr. Blankenship didn't take them up on the offer, is that right?

A. That's right. He didn't take them up on the offer, so they stood by the dismissal which is --

Q. But your recollection was it was just general union duties rather than Mine Health and Safety activities, specifically?

A. No. His reason for being there was, I believe, with all my heart -- stems from his mine safety activity.

Clarkson Browning testified that he has been employed by the respondent for approximately 8 years as a day shift miner operator, and served as a member of the mine committee until he resigned sometime at the end of 1979. He confirmed that he was present at the April 13, 1979, 24-48 hour meeting concerning Mr. Blankenship's proposed discharge. Mr. Herndon presided at the meeting and Mr. Wiley was present.

Mr. Browning testified that both union and management representatives were consulting with each other in their efforts to resolve the dispute but that no agreement was reached. He stated that Mr. Wiley made an offer to restore Mr. Blankenship's job if he were to agree to a 60-day suspension and give up his committee jobs (Tr. 6, January 7, 1981). Mr. Browning's testimony concerning this meeting is as follows (Tr. 8):

Q. As best you can, what were his exact words? As best you can remember, realizing it's been a while.

A. He said that Charley could have his job back, you know, with the agreement that he take a sixty-day suspension and be relieved of his committee jobs.

Q. Now you're saying "jobs"?

A. Yes, sir. He didn't specify safety or mine committee either one. He said, "Committee jobs".

Q. Did you or anyone on the union side ask him, Mr. Wiley -- to be clear, you said "committee jobs". I mean nothing was pursued along that or was it?

A. No, sir.

Q. What was the response? What was your all's -- you're a union rep -- what was your response or your other union officials' response to his offer?

A. Everybody got quite upset about it because the fact they wanted to suspend him for sixty days plus remove him from the committee, which, you know, you have steps to remove somebody from the committee. You just don't tell them to quit or ask them to quit.

You know, it looked like it was either quit the committees or lose his job, one of the two.

On cross-examination, Mr. Browning stated that he would not consider an offer by Mr. Wiley to Mr. Blankenship allowing him to relinquish only his union committee job, accept a 60-day suspension, but permitting him to retain his safety committee job, to be fair. He believed that Mr. Wiley's offer encompassed resignation of both committee jobs as well as a 60-day suspension (Tr. 11-12).

In response to further questions, Mr. Browning stated that removal of a miner from committee jobs is covered by their contract and he personally believed that Mr. Blankenship was a "victim of circumstances" and that mine management was trying to blame him for the strike incident because he was on the mine committee and was a tough mine safety committeeman (Tr. 13). Mr. Browning also stated that Mr. Blankenship never "stirred up strikes," and that since he and Mr. Blankenship have served on the safety committee, there have been no wildcat strikes, except for the one over the bathhouse (Tr. 15).

In response to bench questions, Mr. Browning testified that he no longer serves on the mine safety committee and that he resigned voluntarily for "personal reasons." He also stated that Mr. Ray Herndon was always fair with him but that some of his fellow miners did not like the idea that he and Mr. Herndon "were close" so he quit (Tr. 19). Mr. Browning also stated that any decision to accept Mr. Wiley's offer with respect to the strike incident would have been a personal choice for Mr. Blankenship to make, but he has never heard of any similar offers made in the past to other committeemen (Tr. 19). Mr. Browning stated that the function of a mine safety committeeman is to deal with safety matters, and the mine committeeman deals with pay and other management problems. The contract calls for a separation of the functions, although occasionally the same individual holds both positions. Both committeemen are paid and supported by the local union (Tr. 20-21).

Testimony and Evidence Adduced by the Respondent

Clifton R. Herndon testified that he has been employed with the respondent for 10 years and now serves as the general mine superintendent. He indicated that Mr. Dewey Wiley handles personnel matters and industrial relations, but has no authority over him. He stated that his position on the

~990

bathhouse was that he would do his best to furnish water but then he explained the problems with the system. He also stated that the respondent's policy was to pay the men when water was not available (Tr. 22-26).

With regard to the shoveling incident, Mr. Herndon stated that it occurred at a time when the ventilation fan was down. He wanted to take the men to the end of the track and leave them there while the foreman fire bossed the faces and called out his reports. However, a dispute arose between the mine committee and the safety director, and after calling the State Department of Mines, he determined not to send the men in at all and he told the foreman to keep each crew busy while waiting for the mine to be fire bossed. He did not specify which crew was to be assigned to any specific task and did not order Mr. Blankenship's crew to shovel the belt, but he simply told the foreman what he wanted done. The so-called "hole" is a reclaim belt where coal dumps on to a stockpile and is fed on the belt to be taken out of the mine and dumped on a truck. He did not consider this to be a dangerous job and the belt is protected by corrugated steel and concrete and the entire stockpile rests on that structure. Although the area is damp, it is sheltered from the weather and is lighted (Tr. 27-30).

With regard to the incident concerning new miners being transported with steel rails, the meeting which was held concerning that event had finished and the issue resolved when Mr. Blankenship engaged Mr. Wiley in a conversation concerning the company policy of absenteeism. Mr. Blankenship made a comment that the policy "wasn't any good or wasn't worth the paper it was wrote on," and Mr. Wiley told him: "Charley, if you lay off we'll get you, too," meaning that if he violated the absenteeism policy he, too, would be held accountable. Mr. Herndon denied that Mr. Wiley threatened to fire Mr. Blankenship for his safety activities at that meeting (Tr. 32).

With regard to the April 12, 1979, strike, Mr. Herndon stated that the decision to discharge Mr. Blankenship over that incident was a joint decision made by him, Mr. Wiley, and mine manager John Demotta (Tr. 33). Mr. Blankenship was observed by his truck near the parking lot road between the two mines and he was observed stopping a vehicle and informing the driver about the meeting (Tr. 34). He confirmed that he was at the 24-48 hour discharge meeting and mine management made a joint decision to offer to settle the matter by Mr. Blankenship accepting a 60-day suspension and giving up his mine committee jobs, but management specifically did not want to mention safety because "that could bring trouble on down the road. So we stayed away from it" (Tr. 36). He was not sure who made the offer, and indicated that it could have been Mr. Wiley. He saw nothing unusual about the offer and stated that it is common for both sides to make settlement offers (Tr. 35). His father, Cliff Herndon, conducted the meeting, and he believed he made the following offer (Tr. 37): "Well, what we've decided is we'll give Charley a sixty-day suspension. If he will relinquish his job as a mine committeeman, we'll put him back to work at the end of sixty days."

~991

Mr. Herndon stated that Union President Belcher advised Mr. Blankenship not to accept the offer and to pursue the matter further and the meeting ended. When asked why he wanted Mr. Blankenship to resign from the mine committee, he responded as follows (Tr. 37):

We felt because of Charley's position that's what instigated this work stoppage, his activities as a mine committeeman. Like I said, it was testified he was a victim of circumstances. It may have well been, but the circumstances all pointed toward Charley's activities that morning is the reason the men went home.

Mr. Herndon stated that he had no knowledge of the alleged "hit man" comment allegedly made by Mr. Vance and he heard it for the first time during the instant hearing (Tr. 38). Regarding the portable toilet incident, he acknowledged that company policy dictated that Mr. Evans bring it out because he was the one who used it and he did not order Mr. Blankenship to assist him (Tr. 39). He acknowledged that Mr. Evans complained about it and that the law required it to be sanitary but he did not know when it had been used. When Mr. Evans told him that the job of emptying toilets had to be posted, he responded that it was a mine management decision and that Mr. Evans' suggestion was not justified. He acknowledged making the statement that Mr. Evans had a radical attitude, but only after being provoked by Mr. Evans (Tr. 40).

Mr. Herndon acknowledged that he was aware of the fact that Mr. Blankenship had at various times made complaints to State and Federal mine safety officials. However, he also stated that he had a good working relationship with the mine safety committee before Mr. Blankenship and Mr. Evans came into office.

In response to a question as to Mr. Blankenship's ability to cooperate, Mr. Herndon responded as follows (Tr. 42):

It's hot and cold to tell you the truth in my opinion. What really upsets me is when they don't give us time to straighten up a problem or come to us and tell us we've got a problem, and they go directly to the agencies. They said yesterday there's a procedure they have to go through. They have to go through the first step and second step, and then they file one of these 103's.

That's not right. They don't have to go through any steps to file a 103. They don't even have to let you know you've got a safety problem to file one.

Q. Can you ever recall a 103 that was filed without consulting you first?

A. Yes, several of them.

Mr. Herndon recalled one incident when Mr. Evans called in an inspector after he (Herndon) thought the problem had been resolved, and when he confronted Mr. Evans, Mr. Evans admitted that he did so over the portable toilet incident where he was told to take it out of the mine (Tr. 43).

With regard to the condition of the bathhouse, Mr. Herndon stated that the "UMWA people" keep several others clean and he has had no complaints about those (Tr. 44). Regarding the alleged threats made by Mr. Wiley to Mr. Cooper concerning Mr. Blakenship, Mr. Herndon stated he was present during this exchange, and his recollection of the incident is as follows (Tr. 45-47):

A. Okay. Let me explain a little bit about the bathhouse situation. Mr. Cooper was called in twice. He never cited us for anything neither time. The UMWA man didn't. He wrote no paperwork on it. He didn't produce any. They found the bathhouse in good shape both times.

Q. Is it your testimony that Mr. Cooper found the bathhouse in good shape on both occasions?

A. Yes. And the UMWA man that was responsible for cleaning them traveled with him when he made those inspections on that shift. The federal man wrote one notice the ventilation fan was out of order. Someone had stuck a pop can up in it. And that's the only notice that was wrote on both inspections.

They found them in good operating order. Now on this one inspection we were going through one of the bathhouses and we weren't happy. I'll tell you the truth. We weren't happy with the situation. Mr. Cooper wasn't either.

He told me he was tired of running checking bathhouses when he had people getting killed underground. And we were walking through the bathhouse and Mr. Blankenship was telling me about other mines, how they done it, how they took care of their bathhouses, what kind of bathhouses they had, first one thing and another.

And I said to Mr. Blankenship, "Charley, if you're not satisfied with this place and these other places are so much better, why don't you go to one of them and get you a job?" And he said, "No, I plan on working here a long time."

And Mr. Wiley then said, "I wouldn't count on it." That's what was said.

Q. And how did you take that?

A. What Mr. Wiley as talking about, we'd already shut down one mine, Number 20 Mine. We were in the process, which the union didn't know at the time but we did, of shutting down the 19C Mine. It's shut down now.

Now we're in the process of phasing out 19L Mine. This is what Mr. Wiley was talking about.

Q. Did you understand Mr. Wiley to be threatening Charley Blankenship individually with the loss of his job?

A. No, sir. He was being truthful with him if you want to know the facts.

On cross-examination, Mr. Herndon admitted that he was discouraged when miners filed section 103(g) safety complaints because he believed that it should be brought to the first and second mine level before an outside agency is brought in. He acknowledged that some Federal safety regulations were at times "a little bit picky," but believed they are necessary (Tr. 48). He also acknowledged that Mr. Blankenship may have been "a victim of circumstances" concerning the meeting which preceded the strike, but that he was informed by a foreman that Mr. Blankenship stopped every miner who pulled in where he was parked and they congregated at his truck. Since he was the mine committeeman, mine management believed that he was in charge of what was going on at the time. Mr. Blankenship acted as the spokesman and told him that the men wanted a guarantee that they would be paid for the lack of bathhouse water and Mr. Herndon told him he would do his best to get water or pay the men. Mr. Herndon returned to his office, and 30 minutes later the men left the mine (Tr. 50).

Mr. Herndon stated that some of the men had been paid for the lack of water but that all of them probably had not because the water problems changed from day to day and shift to shift and he was having payroll computer problems (Tr. 50-51). He personally never heard Mr. Blankenship advise the men to strike and in the 6 years he has known him, the strike in question was the first one that he believed Mr. Blankenship had instigated, and that was the company's position at the arbitration hearing (Tr. 51, 54).

In response to a direct question as to why Mr. Blankenship was discharged, Mr. Herndon replied as follows (Tr. 58-59):

Because we felt because of his position and his meeting and the actions we observed that morning, that he was the reason the men turned around and went home that day.

Q. Did he instigate a work stoppage?

A. Come eight o'clock, no one was at work. They were having a meeting. Eight o'clock is work time.

Q. And that's what you mean by interfering with management?

A. Right. At eight o'clock for the day shift, they become our employees. We expect them to start to work. At eight o'clock they were at a meeting. At eight thirty they were in a meeting.

Q. How do you know those men would have worked if Charley Blankenship hadn't been down there?

A. I don't know. I don't know that. You don't know that. No one knows that.

Q. You suspected that, right?

A. I suspected what?

Q. You suspected they would have worked if Charley hadn't been down there?

A. Yes, I do. 19C men anyway.

A. And based on suspecting, your company feels that is a legitimate basis for taking the job from a man who has worked there for six years?

A. Our company observed what we talked about and we put forth our position and went through the grievance procedure. If we had been proven wrong, we would have been proven wrong. And we would have accepted that, too.

Mr. Herndon stated that it was not unusual to use underground section crews to clean and shovel belts as it had been done several times prior to and after the incident in question when there was trouble with mantrips or crews could not be sent in for some reason, and he stated that "I'm a firm believer in people giving an honest day's work for an honest day's pay" (Tr. 64). He conceded that the offer made to Mr. Blankenship concerning his resignation from the mine committee was an unusual case, but that the strike was also unusual and management felt that a mine committeeman had caused it and it was an "unusual" offer simply for that fact (Tr. 65). He explained it further as follows (Tr. 66-69):

Q. Did you see this as a welcome opportunity to get rid of what you fellows might have considered to be a troublemaker, or someone overzealous in enforcing safety?

A. No, sir, we did not. We felt to resolve the problem in a fair way [sic]. We felt because of his mine committeeman activities that he had been part of the reason that these men

had went home. He was the leading factor, we felt these men went home that day. And this would be part of the resolve of the problem.

Q. How could that be when you said you met with Mr. Wiley and the other Mr. Herndon and you discussed whether or not you could go into negotiations and ask for his safety committee job? You decided you might get into trouble on up the road.

A. We decided we'd better make a distinct difference in how we said that that day, because we didn't want safety involved in the issue.

Q. That's what I'm saying. I'm not talking about what you were saying. I'm talking about what you were thinking. The fact is you openly discussed with them about "Well, we'd better not bring up the safety matter". This was discussed openly, wasn't it?

A. Yes, it was.

Q. I want to know why you were discussing safety when this was over a wildcat strike and it was a mine committee function. What's safety got to do with it?

A. There's two separate distinct jobs. Safety committeeman and a mine committeeman. Safety had nothing to do with this issue whatsoever, so we did not want to try to take his safety position away from him; only his mine committeeman position. You don't understand what I'm saying?

A. I think I understand. You said, "If we took the safety away, we might get in trouble on up the road," you said.

A. Safety wasn't an issue. We had no right to ask for his safety position.

Q. And you did say that if you took his safety committee job, you decided not to do it because you might get in trouble on up the road. Isn't that what you said?

A. We didn't decide not to take his -- we decided to make sure we didn't mention his mine safety committee job because it wasn't an issue.

Q. All right. The record will speak for itself on that score. I want to ask you one final question. Why would you be worried about getting in trouble on up the road?

A. Because this was not a safety issue and we didn't want to involve safety in it. This was strictly a contractual issue interfering with mine management.

Q. Then why didn't you say, "We'll take the man's mine committee job and we won't worry about safety"?

A. That's all we did. We just decided to make a distinct difference and not say anything about his safety job, so someone might come along later like today and say that we were making that kind of inference, and we weren't.

Regarding the portable toilet incident, Mr. Herndon testified as follows (Tr. 69-70):

Q. And you say your policy was on the portable potty deals that each man would carry out his own?

A. Yes. If he used it, yes.

Q. Are you familiar with the situation where Charley Blankenship was told to help Randall Evans to help carry one out?

A. After it happened, yes, I was made familiar with it.

Q. Why did that foreman give that order?

A. You get in forty inches of coal and you try to carry a box. We talked about the box, a wooden box. The Port-a-Potty was in a three-quarter inch plywood box with handles on each side of it. And like the man said, try to pick it up and bend over and walk.

It was just a thing of helping your buddy. And he didn't take it outside. He helped him take it three hundred foot to the end of the track and Mr. Evans took it on outside. And he was the logical man to help because his machine was down and he was his helper.

Q. You mean individual miners working underground in low coal don't have to struggle and carry bigger loads than that portable potty?

A. Sure they do. But as the supervisor, you want to make it as easy as you can on a man whenever you can. Why should we leave Mr. Blankenship sitting there on a miner not operating and have Mr. Evans do something that would be twice as hard on him as it would if Mr. Blankenship had helped him?

~997

Mr. Herndon testified that respondent operated five mines in 1979, but due to economic conditions, two have been closed and the three remaining ones are not in full operation (Tr. 82). He believed that the bathhouse in question has only been cited one time by MSHA, and that respondent has four bathhouses, each of which costs \$85,000 (Tr. 83).

Dewey L. Wiley testified that he has been employed by the respondent for 3 years and prior to that worked for the United Mine Workers as a district representative and in other underground mines. He is employed as respondent's director of industrial relations, but health and safety matters are handled by the general mine superintendent. He was not present on April 4, 1979, when the shoveling and fire-bossing incidents took place. Regarding the April 10 meeting concerning hauling steel rails on a mantrip, he explained the incident after the meeting as follows (Tr. 88-89):

Q. Did you speak with Mr. Blankenship about the Pedro Mendez dispute?

A. No. I don't think we had anything --

Q. Did you speak to Mr. Blankenship at all?

A. Yeah.

Q. What did you talk with Mr. Blankenship about?

A. Well, I might have just said, "Good morning, Charley," or something like that, or made a comment or something. But I know what you're referring to.

When Charley started to leave the thing broke up, and some of the people had already left. And I was quite interested in who he was talking to yesterday, because I couldn't remember who he was talking to.

Evidently, whoever it was had a problem. We have an absentee rule program and under this program -- it's a livable program -- it's progressive. You can just about not get fired for being under it. We think it's good. It's been in use since 1976.

Anyway, I overheard -- maybe I was walking out behind Charley or something -- but the man had a complaint. I can't remember who the man was. It was about the absentee policy. Charley made the comment, "Don't worry about it. It's not worth the paper it's written on."

Well, that didn't set too well with me, because knowing Charley's position as a mine committeeman, he does have a lot of influence on our employees. I don't want him

to go out and say to the other employees, you know, "Don't worry about that absentee policy. It ain't worth the paper it's written on."

Because he could lead them into believing that it wasn't and, you know, that nothing could happen to them under it. I said, "Charley, you shouldn't tell people that the thing is not worth the paper it's written on, because it could get somebody in trouble. It could lead them into feeling secure about something that is not there."

And he said something else. And I said, Well, now Charley, it's a good policy. There's nothing wrong with it. And if people lay off and they don't work and they are unexcused, you could cause them by telling them that to get themselves in trouble. And that includes you. If you lay off, it applies to you, too. So he left. That was it.

Q. Is the absentee policy a safety issue?

A. No.

Q. Is it an issue involving management of the mines?

A. Yeah, very much so. Yeah.

Regarding the April 12 strike, Mr. Wiley stated that he was not at the mine, but was in his office some 9 miles away and observed none of Mr. Blankenship's activities that day (Tr. 90). However, he was present at the 24-48 hour discharge meeting with Ray and Cliff Herndon, and he recalled the settlement offer made to Mr. Blankenship as follows (Tr. 90-91):

Q. Did you participate in the discussion with other management employees to determine whether an offer of settlement would be made?

A. Yes, sir.

Q. Who else participated in that discussion?

A. Ray Herndon and Cliff Herndon.

Q. As a result of that discussion, did someone ultimately make an offer of settlement?

A. Yes, sir. And I'm like Ray. It's been a year and a half ago, and I don't recall whether I said it or whether Cliff Herndon, the general manager, said it. What the contract does, it says, if we suspend Charley with intent

to discharge, he has a right to meet with the general superintendent or the mine manager in the twenty-four or forty-eight hours.

At that meeting, the mine management or the general superintendent, whichever one it may be, will make a decision whether or not, you know, to go ahead or whatever. And I'm sure that we all discussed the decision. I know we did.

And Mr. Cliff Herndon, the general manager, might have made the offer or I might have made it. You know, it was no big issue, so it wasn't something you could just nail down in your mind.

Q. What was the settlement offer?

A. It was a sixty-days suspension and him give up his right as a mine committeeman. Now let me explain that. We had discussed it and we felt, due to the fact what had happened, the way it came about -- and I think Pete said it lasted a couple of hours there -- that Charley had acted arbitrarily and capriciously in the way he conducted himself as a committeeman, and hadn't acted in the best interests of the local union or the company.

And it was to our best interest and the local union's maybe, that he relinquish his position as a mine committeeman. There's no way to force him to do it. It's something he could have done himself, and he certainly could have done it.

Regarding the arbitration hearing, Mr. Wiley testified as follows (Tr. 92-95):

Q. After Mr. Feldman cleared the room, was a settlement offer made?

A. Well, Mr. Feldman, he asked me -- he heard our testimony and then he heard, I'm sure, whatever Bill Jack had said. The other people would be like repetitious, you know, the same thing maybe. Maybe not. I don't know what his reasoning was -- if we actually wanted to fire Charley.

I told him, "We don't actually want to fire anybody." There's no way we set out to fire people. We wouldn't hire them in the first place, if we didn't need them or want them. And he said, "Would you be adverse to settling this dispute?" I said, "No, if it would resolve it and we'd have some kind of assurance it wouldn't happen again. I'm not adverse to any kind of a settlement."

~1000

And he asked Frank the same thing. He said, "Frank would you be against a settlement?" And he said, "It wouldn't have anything to do with going on with the case if you wanted to, wouldn't have any bearing on my decision after the settlement."

I said, "Well, what do you suggest?" And he said, "What do you suggest?" I said, "I'm not going to suggest anything. I got burnt for suggesting things before. That's why I'm here today, I guess, for offering settlements."

And he suggested the thirty-day suspension. And he asked Frank if he thought Charley would accept it. He said, "Well, I don't know." He said, "Will your people accept it?" I said, "I'll ask them." He told me and Frank to go ask them.

We went out and we talked. I talked to my people and I'm sure Frank talked to Charley and them, you know. We went out the back of the building and they stayed in the building.

My people said, "Well, all we want to do is make the people aware of what they've done. We feel like it's wrong, and we still do. If they can give us some kind of assurance this sort of thing won't happen again, sure. A thirty-day suspension is fine. We don't want to discharge him."

So we came back in and I told the arbitrator then. He said, "Fine. I'll make it into an Order. You know, I'll send it to you in writing."

But he also called Charley back in again. And Charley could tell you what he said to him. I don't know what he said to him.

Q. Was this a compromise settlement?

A. Yes.

Mr. Wiley testified that he knew nothing about the "hit man" comment made by Mr. Vance, and he had nothing to do with the decision concerning Mr. Blankenship's helping Mr. Evans remove the portable toilet from the mine (Tr. 95-96). Mr. Wiley denied ever threatening Mr. Blankenship with his job in Mr. Cooper's presence, and he recalled the meeting at the bathhouse as follows (Tr. 98-99):

But we was walking on down to the next bathhouses. There's two bathhouses there. I don't think we got anything on that one either. It wasn't very clean. They never are where miners change clothes. Just naturally due to the nature of the job you're going to get the thing dirty. It's for use. It's not to look pretty.

Charley kept saying what good bathhouses they have at other companies or something like that. You know, like they've got a good one over somewhere. But there was no big issue here, so this stuff -- we wasn't at each others throats. We was just walking along talking.

He kept saying that and I think Ray said, "Well, Charley, if it's a good place over there -- "wherever it was at he was talking about -- "at these other companies, why don't you go get you a job over there?"

He said, "No. I plan on being here a long time." And I said, "Well, I wouldn't plan on it." You know, just talking. And I didn't explain myself because like I said, it wasn't no big issue.

But what I meant was, the bathhouses we was in at that time had been moved from another mine we had shut down. We was in the process -- along about that time we had had some real problems. Even though we are captive, steel companies got to the point where they didn't need our coal anymore.

We'd already shut down the Number 20 Mine. I knew, which they didn't know, that Number 19C Mine was on the line to be shut down. And it eventually was. Also the 19L Mine was on the list to be shut down, which half of it is gone now. We just recently shut two sections down on it on the second shift.

I didn't bother to explain it myself, because I didn't think it was a big issue, you know, about that. And that's about where it ended at.

Findings and Conclusions

As correctly stated by the complainant at pages 8-10 of his posthearing brief, the reporting of safety violations to mine management or to governmental mine safety agencies is protected activity under the Act. Further, I believe that the parties recognize the fact that any safety activities engaged in by Mr. Blankenship in his capacity as chairman of the mine health and safety committee are clearly protected activities, and that any attempts by mine management to curtail those activities through discriminatory acts of harassment, retaliation, intimidation, or threats is clearly illegal and subject to severe penalties and sanctions under the law. The record in this case establishes that Mr. Blankenship is a conscientious and diligent safety committeeman who obviously has no fear of mine management insofar as his mine safety activities are concerned. Conversely, mine management concedes that Mr. Blankenship is a vigorous safety committeeman, but the record suggests that both Mr. Herndon and Mr. Wiley are not totally enchanted with the manner in which Mr. Blankenship exercises his day-to-day mine safety committeeman's

~1002

duties. However, the critical issue presented is not whether Mr. Blankenship and mine management like each other. The question presented is whether mine management, either directly or indirectly, has discriminated against Mr. Blankenship in the exercise of his mine safety activities. Further, with respect to the specific complaints lodged by Mr. Blankenship against the respondent in this case, the question presented is whether the record supports a conclusion that the incidents and events which complainant believes amount to discrimination and retaliation for his safety activities do in fact individually or collectively constitute discrimination under section 105 of the Act.

Complainant argues that all of the separate events preceding and following his 30-day suspension raise the spectre of retaliation for mine safety enforcement efforts on his part and establishes the respondent's discriminatory motive in suspending him from his job. The separate instances of alleged discrimination relied on by the complainant are identified and discussed in this case as (1) the April 4, 1979, fire-bossing dispute, (2) the April 10, 1979, mantrip safety meeting, (3) the events surrounding a work stoppage and mine walkout of April 12, 1979, (4) a section foreman's "hit man" comment, (5) the portable toilet or "pottie" incident, and (6) the September 1979, bathhouse dispute, and two alleged threats purportedly made by mine industrial relations director Dewey Wiley on September 19 and 26 to fire the complainant for making or filing safety complaints.

In addition to his argument concerning the separate alleged acts of discrimination, complainant argues that even if those separate acts were to be given little weight in and of themselves, when viewed in totality and taken in the aggregate, the tilt toward discrimination against the complainant is manifest. With regard to those alleged acts of discrimination which purportedly took place after the complainant's 30-day suspension, complainant argues that those events must be closely scrutinized with care since any discriminatory actions or implications thus established may retroactively go towards showing the motive which actuated the suspension itself. Complainant also asserts that the overall conduct of all company management officials in this situation, both past and present, must be considered.

In order to properly consider and evaluate complainant's arguments, it is necessary to closely examine the testimony and evidence concerning each of the incidents complained of by Mr. Blankenship, as well as the cast of mine management officials who Mr. Blankenship obviously believes have somehow collectively conspired to retaliate and discriminate against him because of his protected mine health and safety activities. The specific incidents have been itemized above and a discussion and analysis of each follows below. As for the accused mine management officials in question, they are identified in this case as (1) general mine superintendent Clifton R. Herndon, (2) director of industrial relations Dewey L. Wiley, (3) section foreman Freddy Vance, the individual who assigned Mr. Blankenship and his crew

to shovel coal at the belt line, and the individual who purportedly made the "hit man" comment to Mr. Blankenship, and (4) shift foreman Joe Bragg, the individual who ordered Mr. Blankenship to assist Mr. Evans in carrying the portable toilet from the section.

The April 4, 1979, Fire-bossing Dispute

Mr. Blankenship contends that mine management retaliated against him for the dispute arising out of the fire-bossing incident of April 4, 1979, by requiring him and his crew to "shovel coal in the hole." The so-called "hole" is an underground reclaim belt which dumps coal onto a stockpile so as to facilitate its removal from the mine. At page 11 of his posthearing brief, counsel for Mr. Blankenship contends that, due to Mr. Blankenship's reluctance to permit his crew to go underground prior to completion of the firebossing that followed the ventilation fan problem, he and his crew were assigned a retaliatory transfer of work duties, when ordered to shovel and clean coal spillage from the belt. Respondent denies that this work assignment was in any way improper or discriminatory.

In his complaint, Mr. Blankenship states that the work assignment was made by section boss Freddy Vance, who purportedly told him it was "not his idea." Mr. Vance was not called as a witness in this proceeding and there is no credible evidence to establish his motivation in making this work assignment. Further, although Mr. Blankenship listed four members of his work crew as "witnesses" to the work assignment, only he and Mr. Evans testified, and both of them testified that Mr. Vance never threatened or intimidated them over their mine safety activities.

Mr. Evans conceded that he did not object to the shoveling chores because the work assignment was a direct order from mine management. His objections stemmed from his unsubstantiated assertion that the assignment of the crew to the shoveling detail somehow exposed the men to a safety hazard because of the presence of a bulldozer "overhead" which was loading coal. A close examination of this assertion reflects that the bulldozer was operating outside of the mine in an area which was well supported and in fact exposed no one to danger. Objectively viewed, I believe that Mr. Evans' displeasure with the shoveling chores was prompted by his own subjective opinion that he was somehow being punished, along with Mr. Blankenship, because of the difference of opinion concerning the fire bossing of the section. I also believe that it was prompted by the obvious fact that shoveling work is physically more demanding than "policing" a parking lot, and that the other section crew was needling Mr. Evans' crew. Further, I take note of the fact that Mr. Evans displayed no displeasure over the somewhat menial task of cleaning up the parking lot while the crew was waiting to enter the mine. As a matter of fact, the testimony reflects that such duties are routinely assigned to crews by mine management while they are idle and standing by to enter the mine.

There is no evidence or testimony that Mr. Wiley was in any way connected with the shoveling work assignment. Mr. Wiley's office is not on the immediate mine property and his duties do not entail the supervision of miners in their day-to-day work assignments. Mr. Herndon testified that it was not unusual for underground crews to be assigned to clean and shovel belts and that this has been done on several occasions, both before and

after the incident in question. Mr. Herndon also testified that he did not specifically assign Mr. Blankenship to the shoveling chore but simply told the foreman to keep each crew busy while awaiting the completion of the fire bossing.

~1004

After careful consideration of the testimony of record in this case, I cannot conclude that the assignment of Mr. Blankenship and his crew to the shoveling duties in question was an act of discrimination or retaliation because of Mr. Blankenship's difference of opinion with mine management over whether the section should have been fire bossed after the ventilation fan problem was corrected. I conclude that mine management has the right to direct the work force and assign employees to work details, and absent any showing that such assignments are illegal or contrary to the contract, I am not persuaded that it is discriminatory merely by the fact that a miner is not too enchanted with the assignment.

The April 10, 1979, Mantrip Meeting

Mr. Blankenship's complaint asserts that at a meeting on April 10 concerning the mantrip incident, Mr. Wiley threatened to fire him at the first opportunity, and Mr. Neace is listed as a witness to this alleged statement by Mr. Wiley. There is some dispute as to when the alleged threat was made as well as a dispute as to the issue or event that prompted it. Mr. Blankenship testified that Mr. Wiley told him he would "get rid" of him during the meeting concerning the mantrip incident, and he denied any conversation concerning absenteeism at that meeting. He indicated that any comment concerning the company's absenteeism policy was made by Mr. Evans at the time Mr. Evans received the warning slip in question (Tr. 137, January 1, 1981).

Mr. Wiley attributed the alleged remark to a comment that he made to Mr. Blankenship while leaving the meeting over the company's absenteeism policy, and he readily conceded that he told Mr. Blankenship that any miner violating the policy would be in trouble, including Mr. Blankenship. In short, respondent argues that any discussion "to get rid" of Mr. Blankenship at the meeting in question resulted from a discussion concerning absenteeism, and that Mr. Blankenship obviously misinterpreted the statement.

Mr. Neace confirmed that he was present during the mantrip meeting and conceded that he previously received a warning slip from Mr. Herndon over the question of absenteeism. However, he denied that the subject was discussed at the mantrip meeting, and confirmed that he heard Mr. Wiley state that Mr. Blankenship would "make a mistake" and that Mr. Wiley would fire him. He then clarified his testimony as follows: "Maybe he didn't use the word fire. He said, 'I'll get you when you do make that mistake,' or words pretty close to that effect. It's been a long time and in fact, I didn't have any reason for remembering it."

Mr. Herndon's version of the conversation and the asserted threat by Mr. Wiley to fire Mr. Blankenship is that once the meeting concerning the mantrip incident had concluded and the issue resolved, Mr. Blankenship engaged Mr. Wiley in a conversation concerning the company absenteeism policy. During a conversation which followed, Mr. Herndon stated that Mr. Wiley did indicate to Mr. Blankenship that "[w]e'll get you too," but

~1005

that the statement was made in the context of the absenteeism policy, and that Mr. Wiley was upset over adverse comments made by Mr. Blankenship concerning that policy.

Having viewed the witnesses on the stand during their testimony, and after careful scrutiny of the record in this regard, I cannot conclude that Mr. Wiley threatened to fire Mr. Blankenship because of his involvement in the safety complaint which resulted from a section foreman permitting new miners to be transported on a mantrip with materials which may have posed a hazard. Both Mr. Herndon and Mr. Wiley impressed me as being credible witnesses and I believe their account that Mr. Wiley's statement was prompted by the rather heated discussion concerning the company absenteeism policy and that Mr. Wiley may have been provoked and lost his temper when he made the statement. More importantly, the record establishes that Mr. Herndon supported Mr. Blankenship's position concerning the mantrip incident, acknowledged that he had a right to be involved in the meeting concerning that incident, and in fact took the foreman to task over the incident. Furthermore, there is nothing to suggest that Mr. Wiley was directly involved in the mantrip incident, and he indicated that he did not speak with Mr. Blankenship about that issue, and that the meeting had ended when the absenteeism policy was brought up.

In view of the foregoing, I find that the complainant has failed to establish any connection between any comments Mr. Wiley may have made on April 10, 1979, at the mantrip meeting, and Mr. Blankenship's discharge which followed on April 12, 1979, for his purported role in the work stoppage.

The Work Stoppage of April 12, 1979

The focal point of the alleged discrimination in this case is the work stoppage of April 12, 1979, and the subsequent 24-48 hour grievance meeting which followed that event. The relief sought by Mr. Blankenship in this case includes payment of full back wages and benefits, with interest, for the 30-day suspension period, and expungement from his personnel records of all references to that suspension. From the complainant's point of view, the totality of the aforementioned incidents of alleged discrimination which have been discussed and analyzed, which occurred both before and after his proposed discharge and subsequent suspension, when considered together suggest a pattern of discrimination which culminated in a retaliatory response from mine management, namely, the proposed discharge of Mr. Blankenship because of mine management's bare unsupported "belief" that he was somehow responsible for the illegal work stoppage. In short, complainant believes that mine management found a convenient excuse to get rid of Mr. Blankenship and to rid themselves of his somewhat troublesome mine safety activities by proposing his discharge based on a charge that he instigated the work stoppage and subsequent walkout.

Complainant's argument that the basis of the respondent's assumption that Mr. Blankenship instigated the work stoppage

stems solely from mine

~1006

management's "feelings" and unsubstantiated "assumptions" is not totally correct. Although Mr. Herndon conceded that it was altogether possible that Mr. Blankenship was a "victim of circumstances," he stated that the basis for his assumption that Mr. Blankenship instigated the work stoppage was the fact that he was observed by his truck at the parking lot, stopping and talking to miners who were driving by. None of the miners who were driving by progressed beyond the point where they were intercepted by Mr. Blankenship, and it appears that each of them pulled into the parking lot area where all of the miners were assembling for the meeting. In addition, Mr. Herndon testified that the men were attending the meeting at 8 a.m. and at 8:30 a.m., and they were supposed to start work at 8 a.m. He believed the men from the 19-C Mine would have gone to work if Mr. Blankenship were not present, although he was not sure as to what the other men would have done. Once assembled, and after the discussion with Mr. Herndon concerning the bathhouse issue, a discussion in which Mr. Blankenship acted as the principal spokesman for the miners, the miners went home rather than returning and resuming their normal work activities.

Under the foregoing circumstances, I cannot conclude that mine management was totally wrong in assuming that Mr. Blankenship had something to do with the walkout, notwithstanding Mr. Blankenship's assertions that he tried to get the men to go back to work. Even if he did, the fact is that viewed in perspective, mine management's perceptions, based on Mr. Blankenship's stopping and talking to miners on their way to work, which resulted in their assembling in the parking lot area for a meeting during normal working hours, lends some credence to mine management's contention that Mr. Blankenship's actions interfered with and interrupted the normal work activities of the miners. Of course, the merits of Mr. Blankenship's proposed discharge for allegedly instigating an illegal work stoppage was never resolved at the arbitration stage because the hearing was abruptly ended when the parties to that dispute agreed to a settlement. Significantly, Mr. Blankenship was represented at that arbitration proceeding by the president of his own local union, the same individual who represented him at the 24-48 hour grievance, and the same individual who recommended that he reject the asserted offer by mine management to resign from his mine committee positions and proceed to arbitration on the suspension and proposed discharge. More significantly, this individual was not called as a witness by Mr. Blankenship and he did not testify in this proceeding.

Complainant's arguments that I am not bound by any decision of an arbitrator and may decide this case on my de novo consideration of the evidence and my own view of the facts is correct. After careful evaluation and assessment of the testimony presented in this case, I cannot totally discount the result of the arbitration which culminated in Mr. Blankenship's acceptance of the 30-day suspension. The arbitration decision reflects that Mr. Blankenship voluntarily agreed to accept a 30-day suspension without pay through May 12, 1979, with no loss in seniority (Exh. C-7, p. 3).

Although Mr. Blankenship asserted that his decision to accept a 30-day suspension was based on his desire to insure his job security and to provide

~1007

continued support for his family, the fact is that the record supports a conclusion that his decision was reluctantly made and that his intention was to pursue the matter further with the "Feds" under the discrimination provisions of the Act after receiving advice from others in this regard. However, I believe that this decision was prompted by Mr. Blankenship's belief that by pursuing the matter further he could somehow be compensated and receive back pay for the period of time he was in suspension status from his mine employment. I also believe that his decision to accept a 30-day suspension was also prompted in part by his belief that he could possibly lose the arbitration case and end up without a job.

The 24-48 Hour Work-Stoppage Grievance Meeting

In his complaint, Mr. Blankenship asserted that during the 24-48 hour contractual meeting concerning his proposed discharge, Mr. Wiley offered to rescind the discharge if Mr. Blankenship would resign from his safety committee positions for a period of 1 year. Mr. Blankenship testified that he was asked to relinquish his position on the mine committee as well as his safety committee position, and to accept a "small suspension" in return for the respondent's offer to rescind his proposed discharge for interfering with the work force and instigating the work stoppage. Mr. Browning, who was present at the meeting, testified that the offer made by Mr. Wiley encompassed a proposed and suggested resignation by Mr. Blankenship from both of his committee jobs, and Mr. Browning believed that requiring Mr. Blankenship to resign from either committee as the quid pro quo for management's agreement not to discharge him was patently wrong.

Mr. Wiley's and Mr. Herndon's versions of the offer made at the 24-48 hour meeting stand in marked contrast to that of Mr. Blankenship and Mr. Browning. Mr. Herndon contended that it was common for both labor and management to make settlement offers to resolve a dispute without the necessity for formal arbitration. He testified that the offer to Mr. Blankenship was "probably made" by Mr. Wiley, but he insisted that it only encompassed Mr. Blankenship's resignation from the mine committee and not the safety committee. Mr. Herndon believed that the work stoppage had nothing to do with safety and that it was purely a labor-management dispute over compensation in lieu of water in the bathhouse, and that in this context, he saw nothing wrong in seeking Mr. Blankenship's resignation from the mine committee as a compromise offer of settlement.

Mr. Herndon candidly admitted that the reason mine management sought Mr. Blankenship's resignation from the mine committee was that they believed Mr. Blankenship's actions caused the work stoppage and was the reason the men went home that day. As a matter of fact, Mr. Herndon testified that mine management wanted to make it absolutely clear that Mr. Blankenship's safety activities had nothing to do with the decision to discharge him for interfering with the work force and instigating the work stoppage, and he maintained that this issue was openly discussed

so that it would be clear that Mr. Blankenship's discharge had nothing to do with his safety activities. He also indicated that management had no right to deprive Mr. Blankenship of his

~1008

safety committee position and he wanted to insure that it was made clear that his proposed discharge was strictly a contractual issue dealing with his interference with the work force.

Mr. Wiley testified that he may have made the offer in question to Mr. Blankenship during the 24-48 hour discussions. He believed that Mr. Blankenship's conduct concerning the work stoppage was not in the best interests of the union or mine management, and during the discussions the suggestion was made that Mr. Blankenship resign from the mine committee and accept a 60-day suspension in lieu of being fired for his role in the walkout. Mr. Wiley insisted that his intent was to insure that there was no repetition of future walkouts, and he sought assurances that it would not happen again. He also insisted that he did not wish to fire Mr. Blankenship, and that he accepted Mr. Blankenship's later arbitration offer of a 30-day suspension in lieu of a discharge because he was satisfied that the respondent's position was correct.

Complainant recognizes the fact that there is conflicting testimony concerning mine management's offer made during the 24-48 hour meeting that he resign from one or both of his mine committee jobs. Even so, complainant suggests that all of the events which transpired in this case make it far more likely that the company sought to strip him of both positions. Even if it were found that they did not, complainant emphasizes that the dispute which led to the work stoppage, and his subsequent suspension subject to discharge, were based upon alleged violations of Federal safety regulations.

The question of mine management's "offer" to Mr. Blankenship that he resign from one or more of his mine committees and accept a suspension in lieu of discharge is a troublesome one, particularly in light of the fact that Mr. Blankenship held both positions. Threatening or intimidating a miner to resign from his safety committee position is clearly a discriminatory action under the Act. Even though an "offer" of this type is made during grievance or settlement negotiations, there is an inference that such offers are subtle pressures that could be used by mine management to rid themselves of a safety committeeman who may not see eye-to-eye with mine management on matters dealing with safety and health. Whether the same can be said with respect to "offers" dealing with a miner's membership on a mine committee other than safety may be debatable, but the fact is that while a clear distinction may be made as to the separability of the two jobs, in this case it is somewhat difficult to separate the two because Mr. Blankenship served on both committees, as well as a third "political action" committee. Therefore, a critical question which must be addressed is whether a miner who serves on several mine committees may cry "foul" when mine management seeks to discipline him for conduct which may not be clearly isolated from his safety activities.

Mr. Blankenship testified that during the 24-48 hour meeting, he was asked to step down from both of his committee jobs. Mr. Neace, one of the signatories to Mr. Blankenship's

initial grievance on his proposed discharge which was filed with the respondent, testified on two occasions in reply to

~1009

my questions during the hearing, that while he was present at the 24-48 hour meeting, his recollection of the asserted "offer" made by mine management focused on Mr. Blankenship's "union activities" rather than his safety committeeman position (see previous transcript references, pp. 211-213, January 6, 1981). Although Mr. Neace later testified that it was his belief that Mr. Blankenship's predicament stemmed from his mine safety activity (Tr. 214), his conclusion does not detract from his recollection of the asserted "offer" in question, and corroborates mine management's version of the event. On the other hand, Mr. Browning, who was also a signatory to the initial grievance, testified that the "offer" encompassed both committee jobs held by Mr. Blankenship (Tr. 8). Thus, Mr. Browning's testimony corroborates Mr. Blankenship's version of the incident.

After careful consideration of all of the testimony adduced in this case, I find mine management's version of the offer made to Mr. Blankenship to be plausible and believable, and when coupled with my analysis of this entire episode, which follows below, I simply cannot conclude that management's suggestion that Mr. Blankenship step down from his mine committee position in itself constituted an act of discrimination or intimidation.

The initial grievance filed with the respondent by Mr. Blankenship on April 18, 1979, with respect to his proposed discharge for interfering with the work force (Exh. C-4), states as follows:

There was a work stoppage on the 12:01 shift on April 12, 1979, because we had problems all winter long getting water in the bathhouse. Article XXII Bathhouse. The Company has promised to compensate the men and we are having problems getting paid under this Agreement, which resulted in the work stoppage.

Article XXIV Discharge Procedure, Sections (a), (b), (c), (d), and (f). I, Charlie Blankenship, ask to be reinstated and compensated for lost time.

Article XXV Discrimination. The Company has also discriminated against me under this Article.

Article XXII Section (r). It has always been a prior practice of the Local Union to use the bathhouse at 19-C for a union meeting at 8:00 a.m. when a work stoppage has occurred [sic] for the purpose of getting the men back to work. It has been posted on the bulletin board and the Company has agreed with us that we can hold the meeting there for the purpose of trying to get the men back to work.

Article XXII(a) of the contract (Exh. C-1), deals with providing bathhouse facilities for mine employees, and section (r) of that article deals with the use of the bathhouse as a union meeting place. Article XXV, which deals with discrimination, is limited to discrimination dealing with terms

~1010

of employment, race, creed, sex, age, or "political activity, whether intra-Union or otherwise." Significantly, while the three members of the mine committee who endorsed the grievance stated thereon that it was their belief that Mr. Blankenship had been discriminated against because of his membership on both the mine committee and mine safety committee, Mr. Blankenship made no such claim. His complaint, on its face, pertains to matters dealing with contract provisions which do not appear to have any direct connection with matters of safety.

As I view the dispute over the bathhouse, it goes beyond a simple question of a mine operator violating specific safety or health standards and then failing to correct the conditions. The essence of the dispute centered not so much on the fact that the bathhouse was not always kept tidy, but rather, focused on compensating the miners \$1.75 a day for the days that the bathhouse was without water. From the company's perspective, considering the number of miners affected and the periods of time in question, the compensation amounted to a relatively substantial amount of money. From the miners' point of view, I can understand their frustration over what they believed to be a recalcitrant mine operator who found convenient "computer breakdowns" as an excuse for not providing compensation. Viewed in this light, I believe that the bathhouse dispute became the focal point of a longstanding and continual labor-management dispute which affected both sides dearly, namely, their pocketbooks.

I believe that mine management has a legitimate interest and concern in preventing illegal work stoppages among its work force and insisting that its personnel adhere to normal work hours and schedules. I also believe that mine management has a legitimate interest in addressing questions concerning employee absenteeism so that normal production is not unduly interrupted by miners who may absent themselves from work without bona fide excuses. Although the latter issue is not directly involved in this proceeding, I detect an undercurrent concerning these and other labor-management confrontations cutting across this entire proceeding. As I stated to the parties during the course of the hearing, the discrimination provisions found in section 105 of the Act are there to protect miners from discriminatory acts by mine management which infringe on their clearly recognizable right to insist on a safe and healthy work environment. The Act should not be used to provide a Federal forum for settling labor-management disputes which have no rational relationship to the health and safety of the work force.

In *Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2 BNA MSHC 1001, 1980 CCH OSHD par. 24,878 (1980), the Commission established the following test for resolving discrimination cases:

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the

adverse action was motivated in any part by the protected activity. On these issues, the

complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis in original.]

Respondent argues that the suspension and proposed discharge taken against Mr. Blankenship for his perceived role in the work stoppage of April 12, 1979, would have been taken against any person similarly situated and would have been taken against Mr. Blankenship whether or not he was a member of the safety committee and whether or not he ever participated in safety complaints against the respondent. In support of this argument, respondent points to the unequivocal testimony of Mr. Wiley, which appears at pages 132-133 of the January 7, 1981, hearing transcript:

MR. ALBERTSON: My question is a hypothetical question. If Mr. Blankenship had not been a member of the mine committee -- strike that.

If Mr. Blankenship had not been a member of the safety committee, but he was a member of the mine committee, and your management people had observed his activities on the day of the strike, would you still have taken the action that you took?

A. Yes, sir. If Mr. Blankenship would have been an employee, we would have taken the action.

Q. The fact he was a member of the mine committee, and especially the fact he was a member of the safety committee, would not have affected your decision in dismissing or discharging him?

MR. HARLESS: Objection.

JUDGE KOUTRAS: Overruled.

THE WITNESS: That wouldn't have had anything to do with it. Had he been an ordinary employee, just an employee, then his activities would have warranted a suspension with intent to discharge.

MR. ALBERTSON: Mr Wiley, would you have taken the adverse action even if Mr. Blankenship were not a member of the mine committee?

A. Yes.

It seems clear to me that respondent's counsel was well aware of the Pasula guidelines when he posed the above questions to Mr. Wiley since he used that decision as a reference point while posing his questions (Tr. 133-134). However, having viewed Mr. Wiley on the witness stand, I find him to be a credible witness, and I accept his testimony on this question. Further, the facts surrounding the work stoppage and the resulting suspension action which flowed from that event establish that mine management took swift and almost instantaneous action in giving Mr. Blankenship notice that the respondent intended to suspend him with a view to his ultimate discharge because of his actions in interfering with the work force and instigating the work stoppage. Exhibit C-5, a copy of the notice served on Mr. Blankenship by Mr. Herndon on April 13, 1979, the day following the work stoppage, informed Mr. Blankenship of the respondent's intent to discharge him for the following stated reasons: "Violation of Article I, Section D, interfering with direction of work force management of the mines and instigating and participating in an unauthorized work stoppage."

Although Mr. Herndon testified that he personally never heard Mr. Blankenship advise the men to strike, and that the work stoppage in question was the first "strike" at the mine, it seems clear to me from Mr. Herndon's testimony that he considered Mr. Blankenship's leadership role at the mine as one of a "spokesman" for the rank and file for practically all matters flowing from his mine committee positions. Viewed in this context, and considering Mr. Herndon's perceptions of the role played by Mr. Blankenship with regard to the work stoppage, I conclude that Mr. Herndon's testimony supports mine management's position that the suspension and proposed discharge of Mr. Blankenship on April 13, 1979, was prompted solely by Mr. Blankenship's conduct and activities which led to the work stoppage. I also take note of the fact that complainant does not dispute the fact that the stated charges filed against him are in fact offenses for which an employee may be disciplined under the contractual agreement.

Section Foreman Vance's Alleged "Hit Man" Comment

Although the "hit man" comment by Mr. Vance is not included as part of Mr. Blankenship's original complaint, he brought the matter up for the first time during the course of his testimony at the hearing in this case. The comment by Mr. Vance was purportedly made sometime after Mr. Blankenship's return to work at the conclusion of his 30-day suspension.

~1013

Although Section Boss Vance purportedly made the "hit man" comment to Mr. Blankenship, I cannot conclude that this constituted a threat by mine management. The record suggests that at the time the alleged statement was made, Mr. Vance may have been having some personal problems, and notwithstanding that Mr. Vance was the individual who directed Mr. Blankenship and his crew to police the parking lot and shovel the coal at the belt on the morning the ventilation fan was down, safety committeeman Randall Evans testified that Mr. Vance never caused him or Mr. Blankenship any problems over their safety activities and had never threatened or intimidated them.

Mr. Vance did not testify at the hearing, and there is no credible testimony or evidence to suggest that the "hit man" comment was intended as a mine management threat to Mr. Blankenship. After careful consideration of all of the testimony presented, I have discounted this alleged statement as a threat by mine management.

The Portable Toilet Incident

Complainant asserts that the respondent discriminated against him and punished him for his mine safety activities by removing him from his job and assigning him to remove one of the toilets from the mine. He also asserts that Mr. Wiley made the statement that he would see to it that Mr. Blankenship would empty the portable toilets if he filed grievances concerning keeping them sanitary.

Although Mr. Blankenship contends that Assistant Foreman Bragg told him he "had orders" to assign Mr. Blankenship to assist in removing the toilet in question from the mine, Mr. Bragg was not called as a witness. Furthermore, while Mr. Blankenship stated in his original complaint that a field representative and a safety director of his union were witnesses to Mr. Wiley's purported statement that he would see to it that Mr. Blankenship emptied the toilets, they were not summoned or called as witnesses either. In short, the only corroboration for Mr. Blankenship's conclusion that Mr. Wiley was punishing him by directing others to make sure Mr. Blankenship empties the potties is Mr. Blankenship.

There is no evidence that Mr. Blankenship was ever directed or ordered to remove, clean, or otherwise dispose of any portable toilets from the mine except for the one which Mr. Evans had used. Taken in context, and considering the circumstances surrounding the removal of that toilet, I cannot conclude that Mr. Blankenship has established that it constituted an act of discrimination or was part of any plot by mine management to punish or otherwise intimidate him because of his mine safety activities. To begin with, Mr. Blankenship's assertion that he was "removed from his job" and forced to take the toilet of the mine is not totally accurate. The incident occurred at a time when the continuous miner Mr. Blankenship was operating was down and idle. His helper, Mr. Evans, was asked to remove the toilet which he had used from the section, and Mr. Blankenship was asked

to assist him. The toilet was not hand-carried completely out of the mine by Mr. Blankenship or Mr. Evans. They transported it some 300 feet to the end

~1014

of the track and it was subsequently taken out by mantrip. Furthermore, while Mr. Blankenship testified that he assisted Mr. Evans under protest, he conceded that he had no argument with the right of the foreman to order him to do it.

The toilet incident occurred sometime after Mr. Blankenship's return to work following his suspension. After due consideration of this incident, I cannot conclude that assigning Mr. Blankenship to assist his miner helper in carrying the portable toilet a relatively short distance and placing it on a mantrip during an idle moment underground, constituted an act of discrimination or intimidation by management because of Mr. Blankenship's safety activities. There is no evidence to establish that Mr. Blankenship's had been ordered or directed to clean or remove portable toilets as punishment for insisting that they be kept sanitary. As for the company's policy requiring the person who used it to empty it, there is no showing that this is in anyway illegal or discriminatory, and even though Mr. Blankenship did not use the portable toilet in question, I view the incident as a rather innocuous and isolated occurrence. The toilet was rather cumbersome, and was enclosed in such a manner which made it difficult for one man underground to remove it by himself. Furthermore, there is no evidence that Mr. Herndon or Mr. Wiley gave the orders for the toilet to be removed by Mr. Blankenship. In short, complainant has established no connection between the toilet incident and his suspension and proposed discharge which preceded that event.

Mr. Wiley's Alleged Threats of September 19 and 26, 1979

Mr. Blankenship has alleged that subsequent to his return to work following his 30-day suspension, Mr. Wiley threatened to fire or get rid of him because of additional complaints and grievances concerning the bathhouse. In support of this contention, UMWA Safety Inspector Cooper testified that during a meeting at the bathhouse on September 19, 1979, he overheard a comment made by Mr. Wiley to Mr. Herndon as they were leaving to the effect that, "if Charlie Blankenship did not like working with the company he (Wiley) would find a way to get rid of him." He also confirmed a telephone conversation of September 26, 1979, with Mr. Wiley, during which Mr. Wiley purportedly stated that the company would get rid of Mr. Blankenship if he continued making safety complaints. Mr. Cooper identified a copy of a memorandum typed by his secretary concerning the two conversations and confirmed that it accurately reflected the conversations with Mr. Wiley (Exh. C-9). He also confirmed that he made a notation of Mr. Wiley's comment while at the mine and drafted a memorandum for his file after the telephone conversation, and he did so because he thought it highly unusual for a representative of mine management to make such statements to a UMWA official such as himself. He also indicated that Mr. Blankenship had previously advised him about several threats he had received, and this also prompted him to make a memorandum of what he heard. Although conceding that he had no present recollection of precisely what was said by Mr. Wiley, he distinctly recalled the statement that Mr. Wiley would find a way

to get rid of Mr. Blankenship if Mr. Blankenship did not like working for the company (Tr. 78).

Mr. Wiley's recollection of the bathhouse meeting is stated in his previous testimony at pages 98 and 99 of the transcript. Mr. Wiley denied threatening to fire Mr. Blankenship, but confirmed making a statement that if Mr. Blankenship was not happy working for the respondent company he should look for employment elsewhere. Mr. Wiley also indicated that his statement was made in the context of the threatened closure of some of the mines due to economic conditions as well as the continued controversy over the condition of the bathhouse.

Mr. Herndon testified that he was present at the bathhouse while Mr. Cooper was there and while the group was walking through the area, Mr. Herndon responded to a comment by Mr. Blankenship concerning bathhouses at other mines. Mr. Herndon stated that he suggested to Mr. Blankenship that he seek employment with another mine if he was not happy with the bathhouse, and that when Mr. Blankenship responded, "[n]o, I plan on working here a long time," Mr. Wiley commented, "I wouldn't count on it." Mr. Herndon testified that Mr. Wiley's comment was made in the context of a truthful assessment of the existing economic conditions at the mine and he did not view it as a threat to fire Mr. Blankenship because of his bathhouse complaints.

There is a direct conflict between the testimony of Mr. Cooper and Mr. Wiley concerning the purported threatening remarks made by Mr. Wiley to fire or get rid of Mr. Blankenship because of his complaints concerning the bathhouse. Mr. Cooper expressed surprise that Mr. Wiley would make such statements initially in his presence and later to him over the telephone. On the other hand, Mr. Wiley indicated that one would have to be stupid to make threats to a miner in the presence of a union official, let alone making them directly to that official.

The purported statement by Mr. Wiley on September 19 was not made directly to Mr. Cooper. He testified that he overheard a remark made by Mr. Wiley to Mr. Herndon, and both Mr. Herndon's recollection of the statement, as well as Mr. Wiley's, stand in marked contrast to Mr. Cooper's recorded recollection of what he overheard that day as well as his subsequent conversation with Mr. Wiley. Apparently, no one else overheard the remarks since none of the other witnesses who testified in this proceeding mentioned the incident of September 19, and the remarks were not made directly to Mr. Blankenship. He first learned of the purported remarks when Mr. Cooper mentioned the incident to him and gave him a copy of his memorandum some time after Mr. Blankenship filed his complaint in this case.

Significantly, the asserted threats by Mr. Wiley to fire or get rid of Mr. Blankenship came after his return to work following his suspension and there is nothing of record to suggest that mine management has since attempted to fire or otherwise discipline Mr. Blankenship because of his mine safety activities. As I view Mr. Blankenship's complaint in this case, he is arguing that the adverse action by mine management in suspending him for 30 days without pay was a discriminatory act

taken against him because of his protected mine safety and health activities, and that the reasons given by the respondent for the suspension, namely, the charge that Mr. Blankenship

~1016

interfered with the work force in violation of the contract by instigating an illegal strike, was merely a pretext and a convenient excuse by the company to conceal their real reason for suspending him. Recognizing that the alleged threats of September 19 and 26, 1979, came after his suspension, complainant nonetheless argues that these threats may be retroactively considered in establishing mine management's true motives in seeking his discharge. In short, complainant argues that Mr. Wiley's statements of September 19 and 26, purportedly made more than 5 months after the company instituted removal action against him, may be shown to retroactively establish mine management's state of mind and true motivation for this action.

After careful review of all of the testimony and evidence concerning the asserted remarks made by Mr. Wiley on September 19 and 26, 1979, and having viewed the witnesses on the stand during the course of their testimony in this regard, I believe the testimony of Mr. Wiley and Mr. Herndon with respect to their version of the statement in question and I conclude that Mr. Wiley did not threaten to fire Mr. Blankenship because of his complaining about the bathhouse on the two occasions in question. My reasons for this conclusion follow.

Since the work stoppage in question was precipitated by the earlier bathhouse controversy over pay, it seems to me that mine management had ample opportunity to get rid of Mr. Blankenship when they proposed his discharge over that incident by simply refusing to accept a 30-day suspension and continuing ahead with its initial proposal to discharge him for instigating the work stoppage. Furthermore, none of the threatening remarks attributed to Mr. Wiley by Mr. Cooper were directed to Mr. Blankenship, and he obviously was unaware of them until well after he filed his initial complaint. I reject complainant's argument that those remarks made 5 months after his suspension establish a retroactive illegal motive on the part of mine management. Since Mr. Herndon testified that the decision to seek Mr. Blankenship's discharge over the work stoppage was a joint decision made by himself, Mr. Wiley, and the mine manager (John Demotta), acceptance of complainant's theory would necessarily require a finding of a retroactive joint conspiracy by three mine management officials based on the asserted threats purportedly made by one of them well after the proposed discharge. On the basis of the evidence presented in this case, I simply cannot make that conclusion.

In the final analysis, I believe that the thrust of Mr. Blankenship's complaints concern alleged acts of discrimination taken against him by respondent's director of industrial relations, Dewey Wiley. Although mine superintendent Ray Herndon is part of mine management, the testimony and evidence adduced in this proceeding does not establish that he has discriminated against Mr. Blankenship, or has otherwise harassed, threatened, or intimidated him because of his mine safety activities. The testimony reflects that Mr. Herndon recognized Mr. Blankenship's right as the chairman of the safety committee to become involved in the grievance meeting concerning the mantrip incident, and in

fact, Mr. Herndon chastised Foreman Mendez over the incident. Furthermore, former Safety Committeeman Neace testified that Mr. Herndon always acted honorably with him on safety matters. As a matter

~1017

of fact, although Mr. Neace admitted that Mr. Herndon had issued him a "slip" for absenteeism, Mr. Neace nonetheless conceded that he never felt that any "extra heat" was ever put on him because of his mine safety activities.

Former safety committeeman Clarkson Browning testified that Mr. Herndon was always fair to him, and that while his decision to voluntarily quit his safety committee job was for personal reasons, his decision to quit that position was also prompted by the fact that the men did not like the close relationship he had with Mr. Herndon.

The only concrete testimony concerning statements purportedly made by Mr. Herndon which could conceivably be construed as a "threat" is the testimony by safety committeeman Randall Evans that Mr. Herndon referred to him as a "radical" during the grievance meeting concerning the underground portable toilets. Mr. Herndon readily admitted making the statement, but indicated that he was provoked by Mr. Evans.

Having viewed Mr. Herndon during the hearing, I find him to be a candid and credible witness. Taking into consideration the fact that other witnesses called by the complainant were of the opinion that Mr. Herndon treated them fairly in matters concerning safety, and considering the fact that Mr. Evans may have believed that Mr. Herndon was responsible for the incident concerning the removal of the portable toilet which Mr. Evans had used from the mine, I find Mr. Herndon's statement that he may have been provoked by Mr. Evans to be credible. When viewed in perspective, and considering the unrebutted testimony that respondent's mining operations have apparently been seriously curtailed due to economic and other reasons, I cannot conclude that Mr. Herndon's statement made to Mr. Evans was a threat to discharge Mr. Blankenship.

Mr. Herndon conceded that he has not been completely enchanted with Mr. Blankenship's performance as chairman of the mine safety committee, and he candidly admitted that his displeasure stemmed from the fact that Mr. Blankenship has on occasion filed complaints directly with the agencies responsible for mine safety enforcement rather than first bringing them to the attention of mine management. Even so, Mr. Herndon readily conceded that safety complaints may be filed directly with MSHA pursuant to section 103 of the Act without notifying mine management and that this has been done on several occasions. Furthermore, Mr. Blankenship conceded that respondent has corrected safety complaints that he brought to its attention and that mine management does not totally ignore his safety complaints. And, while Mr. Neace stated that he believed the respondent considered Mr. Blankenship to be "a thorn in their side," he did not indicate that the respondent would not comply with safety. He further indicated that "I've worked for companies that was worse," and he characterized respondent's safety attitude when he stated: "They don't comply as fast as they should at times."

During the course of the hearing in this matter it was brought to my attention that Mr. Blankenship has another complaint pending with MSHA which is currently being investigated (Tr. 63, 138). In addition, after

~1018

Mr. Blankenship was called to the stand by me for the purpose of eliciting additional clarifying testimony, he asserted that he had also been threatened by the mine safety director at some unspecified time, and also discussed other alleged acts of discrimination which he characterized as "punishment" because of his safety activities (Tr. 134-138). After consideration of this information, I have given it no further weight or consideration in this proceeding. Complainant is free to pursue those alleged acts of discrimination independent of the instant proceeding. Only in this way may a fair and impartial determination of those allegations be made by the Secretary of Labor as part of his investigative authority under the Act. If the complainant is not satisfied with the results of the Secretary's determination in this regard, he is free to file a subsequent separate action with the Commission.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude and find that respondent's initial suspension and proposed discharge of Mr. Blankenship was not motivated in any part by any protected activities engaged in by Mr. Blankenship in his capacity as chairman of the mine safety committee. I further conclude and find that the record adduced in this proceeding does not establish that respondent has otherwise discriminated against the complainant by virtue of his mine safety activities. Accordingly, the complaint filed in this matter is DISMISSED, and the requested relief is DENIED.

George A. Koutras
Administrative Law Judge