

CCASE:
LLOYD BRAZELL v. ISLAND COAL
DDATE:
19810713
TTEXT:

~1773

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

LLOYD BRAZELL,	COMPLAINANT	Complaint of Discharge, Discrimination, or Interference
v.		
ISLAND CREEK COAL COMPANY,	RESPONDENT	Docket No. KENT 81-46-D Hamilton No. 1 Mine

DECISION

Appearances: Jerry W. Nall, Esq., Owensboro, Kentucky, for
Complainant;
William R. Whitledge, Esq., Logan, Morton & Whitledge,
Madisonville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 26, 1981, a hearing in the above-entitled proceeding was held on April 14 and 15, 1981, in Madisonville, Kentucky, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 553-591):

This proceeding involves a complaint of discharge, discrimination, or interference filed on December 5, 1980, in Docket No. KENT 81-46-D by complainant, Lloyd Brazell, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, alleging that respondent, Island Creek Coal Company, discharged Brazell in violation of Section 105(c)(1) of the Act because he had notified respondent's management of dangers relative to safety violations in the coal mine where complainant was employed.

I shall make some findings of fact on which my decision will be based, and these will be given in enumerated paragraphs.

1. Lloyd Brazell, the complainant in this proceeding, was born on November 5, 1924, and is 56 years old. He has a wife and a son and daughter who are 29 and 34 years old, respectively. Mr. Brazell began working for Island Creek on June 15, 1970, at Island Creek's Hamilton No. 1 North Mine. He began as a member of the union and performed various types of work until December 6, 1974, when he was promoted to a management position. He first supervised a working section, then became what he called an assistant mine foreman on the 4 p.m.-to-12 midnight shift. Finally, he was a belt foreman on the 12 midnight-to-8 a.m. shift.

2. On Friday, May 30, 1980, Brazell was asked to see James Jennings, the superintendent of Hamilton No. 1 North Mine. Brazell

was told that he was being laid off because Jennings had been ordered to "cut the fat." Jennings stated that he did not like to play God but he had to reduce personnel. Brazell was laid off, effective that day, and the period of termination was indefinite.

3. Brazell filed on August 5, 1980, a discrimination complaint with the Mine Safety and Health Administration. That complaint is Exhibit A in this proceeding. On the last page of the complaint, Brazell suggests 7 occurrences which contributed to Brazell's termination. Brazell received a letter from MSHA dated November 10, 1980, stating that MSHA had concluded, on the basis of its investigation of his complaint, that no violation of section 105(c) had occurred.

4. Brazell testified at the hearing that he had been laid off for the reasons given in his complaint filed with MSHA, and for other matters in addition to those mentioned in his MSHA complaint.

5. Item A in Brazell's complaint, or Exhibit A, is that known employees were cutting grounds out of trailing cables. Brazell maintained a watchful eye on the personnel in the mine and eventually concluded that an employee named Barkley was cutting out the grounds. One day Brazell found all men on his section gathered around a splice in the trailing cable to the coal drill. The coal drill wouldn't operate because of a malfunction of the cable from which ground wires had been cut. Brazell had the defective splice removed from the cable. Brazell wanted to show the splice to Jim Scott, the mine foreman, so he asked a qualified man named O'Leary to take charge of the section while Brazell took the splice to Scott. Scott was upset with Brazell for bringing the splice to him at that time. So, Brazell went to show the splice to the mine superintendent, Jim Jennings, who threatened to have Brazell's license revoked for leaving the section. After Brazell's shift ended that day, Brazell was called to the office where management advised Brazell that he had violated an Island Creek rule to the effect that section foremen are not permitted to go outby the belt tailpiece during their working shifts. Brazell had never heard of that rule before. In Jennings' testimony, he stated that he did not threaten to revoke Brazell's license, but that he did tell Brazell that he should not have left his section to bring the splice outside, and that if Brazell insisted on leaving to take the splice to MSHA before his shift was over, that he would be discharged. Jennings made it clear in his testimony that he had no objection to Brazell taking the splice to MSHA provided he did not do it during his working shift while leaving his crew of men unsupervised. It was Jennings' contention that Brazell did not inform Jennings that he had left O'Leary in

charge of his section at the time he left with the splice.

6. Brazell never did report to management that he believed Barkley was responsible for cutting grounds out of cables. One reason for Brazell's failure to report Barkley to management was that Barkley's father-in-law is a management official. Brazell said the incident regarding cutting of ground wires out of trailing cables occurred about 4 years prior to Brazell's termination.

7. Item B in Brazell's complaint, or Exhibit A, states that Island Creek should eliminate from its payroll the outlaw miners who were creating hazards and causing injuries and death at Hamilton No. 1 Mine. Brazell defined outlaw miners as miners who won't produce coal and who don't want others to produce. The primary offender named as an outlaw miner was C. P. Parrish who was a loading-machine operator. Parrish wouldn't run the loader along the ribs to clean up loose coal and gave reasons, such as curtains being in the way, for not cleaning up the coal. Parrish was eventually killed by another miner named Buddy Higdon who was operating the loading machine and caught Parrish between the rib and the loader and crushed him to death. That incident occurred about 5 years prior to Brazell's termination.

8. Item C in Brazell's complaint, or Exhibit A, is that some miners engaged in deliberate acts which created phony accidents and destroyed equipment. Brazell gave two examples of such activities, one occurring about 5-1/2 years before Brazell's termination and the other one occurring about 1-1/2 years later. The first incident was that Brazell was asked to supervise the No. 5 Unit because it had not been running coal very well. Brazell discovered a man named Coffman was deliberately causing tram motors to cease working. A total of 13 motors were ruined before that practice was stopped. The second incident also involved Coffman. This time Coffman deliberately ran a loading machine under an overhang so that the materials would cover the loading machine. Two young shuttle car operators were alarmed by the fabricated roof fall and Coffman made it appear that Brazell was at fault. Brazell filled out an accident report at the end of the shift and told Coffman to go to the hospital for a physical examination. Brazell does not claim that he explained to management that the roof fall was deliberately contrived by Coffman. Jennings, in his testimony, stated that he had not been told about any phony accidents that had been caused in the mine and that an accident report should indicate the fact that there was a contrived accident, if that, in fact, was the cause of the accident.

9. Item D in the MSHA complaint, or Exhibit A, is a suggestion that fire-bossing irregularities occurred over a long period of time and that they were condoned by management. Brazell explained the fire-boss irregularities by stating that a UMWA fire boss named Dan Brown was a safety committeeman who was able to bargain for things with management. Brazell said Brown wasn't preshifting on Sunday when he was supposed to preshift and that Brown didn't check 43 seals that he was supposed to check. His initials and date of examination did not appear at the seals. That could be a serious oversight if methane should seep through a seal. Brazell said that when he reported Brown's

inadequate fire bossing to management, Brazell was told that they didn't question Brown because of his seniority, or that they were obligated to Brown in some unexplained way. This went on for 4 or 5 years, according to Brazell. In his testimony, Jennings stated that a meeting was held involving the union and management in which Brown was told that he had to do thorough preshifts if he expected to continue in that position.

10. Item E in the MSHA complaint, or Exhibit A, is about bomb threats as to which Brazell claims to have revealed the persons responsible and got the threats stopped. Brazell stated that he found out, by overhearing a conversation off of mine property, that a redheaded woman was making the bomb threats on behalf of a miner who wanted to have the mine shut down so that the miner wouldn't have to work. After Brazell advised Jennings of the names of the persons responsible for the bomb threats, they stopped occurring after the miner reported by Brazell to Jennings had left Island Creek's mine. In his testimony, Jennings denied that Brazell had ever given him the name of any person who had made bomb threats and that all he could elicit from Brazell were innuendos, about which he was unable to make any investigation.

11. Item F in the MSHA complaint, or Exhibit A, refers to known false safety obfuscations. Brazell said that the aforesaid reference was to bomb threats and to occurrences such as Ken Hermes' objection to walking over or around tires leading to the mantrip. Brazell and Bill Green loaded out some of the tires just to get Hermes to move out of the way. Brazell said that the relationship of Hermes' objection to tires and Brazell's termination, was attributable to the fact that Hermes is still working for Island Creek while Brazell is gone. In his testimony, Jennings stated that materials did accumulate at times near the slope and that he would not challenge Brazell's statement that tires might have been in the miners' way at times, but he said that the tires were not there by design and that they were removed when it was brought to his attention.

12. Item G, in the MSHA complaint, or Exhibit A, is a reference to known users and usage of drugs. Brazell told about two different miners who were allegedly using drugs, or carrying them. One was a miner named Heady who was a son of a mine official named Dorris Heady. On one occasion Brazell found Heady asleep on coal where equipment had to move coal. So, Brazell put Heady in the shack and told Heady to stay there. But the mine foreman and the mine superintendent advised Brazell that he should not have done that. The next day Heady was alert and was operating a shuttle car when Grassiano, a mine official, complained to Brazell that Brazell should get Heady out of the mine. Brazell claims that he later heard that Heady had tried to run over Grassiano with the shuttle car Heady was driving. In his testimony, Jennings stated that Grassiano had never reported to him that anyone was trying to run him down and that he did not have any knowledge of that situation. The second miner on drugs referred to by Brazell was a man named Mike Albright who was once speeding in a railrunner and became upset when Brazell and his men blocked his path while they were doing work on the track. Brazell eventually arranged for a safety

committee meeting regarding Albright, and Albright was put on medical leave and eventually overcame his drug problem. Jennings, in his testimony, corroborated the fact that Albright had been assisted in overcoming his drug problem, and that the man recently thanked Jennings for the role Island Creek had played in rehabilitating him.

13. Brazell testified at the hearing about other matters which he thinks resulted in his being terminated. One area of discussion was Brazell's description of the slope belt which became Brazell's responsibility during the last position Brazell held prior to his termination. The slope was the most outby portion of the conveyor system. It was about 2,300 feet long and when Brazell started supervising it, there were 19 employees shoveling coal along it. There was such a strong velocity of air along the belt that large accumulations of coal dust and float coal dust would accumulate along it. Brazell said the accumulation constituted both a fire and explosion hazard. The coal accumulations were greatly reduced after Brazell found an escapeway that had been blocked by a roof fall. When the escapeway was cleared out, intake air traveled a different route which reduced the velocity of air in the slope and permitted the slope belt to operate without as much danger or problems resulting from coal spillage. Brazell does not know if his finding the roof fall contributed in any way to his termination. Jennings, in his testimony, stated that the roof fall which Brazell discussed had already been brought to his attention and that the airway was cleaned out and that the traveling of the air was changed afterwards. Jennings denies that Brazell had any material part to do with the change in airflow or the cleaning out of the airway.

14. Brazell testified that an MSHA inspector named Goldsberry cited Island Creek for failure to have a guard at a tailpiece at the bottom of the slope. After guards were made, they were installed under Brazell's supervision. Later Brazell heard that Jennings, the mine manager, was trying to obtain an affidavit from two men named Cooper and Underwood stating that a guard existed at the tailpiece. Brazell didn't know what this guard, or alleged effort to get affidavits contributed to his termination. Jennings testified that no citation was issued for failure to have a guard at the tailpiece but that an inspector did suggest that one be placed there, and that it took two efforts by management personnel before one was constructed which met the inspector's specifications. Jennings also denied that he had ever tried to get an affidavit from people that the guard existed before it became the subject of a suggestion by an inspector. Jennings further explained that it would have been unnecessary to get an affidavit, in any event, because the fact that no citations had been issued made it unnecessary for Island Creek to compile evidence concerning the mitigating factor of negligence.

15. Brazell received some bonus checks but he did not like to get them because they appeared to be based on a combination of factors such as achievement of significant production as well as safety-related efforts. To show his disdain for such checks, Brazell once endorsed one for about \$5.00 and gave it to Jerry Stewart when Jerry was on his way to buy drinks at a

tavern. Brazell never did cash other bonus checks, he says. It is not clear how Brazell's aversion for the bonus checks affected his termination. Jennings testified in connection with Exhibit 1 in this proceeding, which shows that Brazell was paid a \$50 bonus for safety-related activities, that a person getting a bonus check would know whether he was given it for achieving high production or for being safety-minded.

16. Brazell testified that the South Mine sometimes had personnel who could be spared to help clean along the belt at the North Slope where Brazell worked as belt foreman on the 12-to-8 a.m. shift. The South Mine personnel were sent on the surface to the slope at the North Mine. They would look in the slope and then would remain outside or go back to the South Mine without doing any work. Eventually, Brazell was notified of the men's names so that he could be certain that miners from the South Mine actually came into the slope to work. Once a miner named Mudbone got sick and was picked up by an ambulance. Mudbone had the ambulance to take him to Hamilton No. 2 Mine instead of to a doctor or a hospital. Brazell never heard of Mudbone after that, and Brazell doesn't know what the sending of miners from the South Mine to work in the slope in the North Mine contributed to his termination. Jennings testified that he had never heard of Mudbone, but he did say that they had had some trouble getting the men from the South Mine to report for work and actually work in the slope at the North Mine, and that that problem was overcome after they started sending a supervisor along with the men to make sure that they stayed and worked in the slope.

17. Brazell testified that new men are supposed to wear green hats to identify their lack of training and experience, but Brazell said that the experienced miners also started wearing green hats so that if they were inclined to avoid work they didn't like, they could plead ignorance or lack of experience. Brazell told about a young man named Buchanan who was only 20 years old, but who falsified the records so that it would make it appear that he had the experience of a 34-year-old man. The mine foreman, George Caudill, happened to use Buchanan on a special detail where his actual lack of training became obvious and caused the mine foreman to be extremely upset. Brazell did not say that anyone blamed him for the fact that Buchanan's records had been falsified or for the fact that experienced miners were wearing green hats. Consequently, there was no way to determine what these incidents had to do with Brazell's termination. Jennings, in his testimony, stated that he was unaware of a problem of a lot of miners who had experience wearing green hats to feign inexperience to avoid work. He pointed out, however, that any section foreman worth his salt would know which men on his shift were experienced miners and which ones were not.

18. Brazell testified about a miner named Don Brown who came to work on Brazell's midnight-to-8 a.m. shift after having spent some time in prison. Don was the son of the fire boss mentioned in Finding No. 9 above. Don had a habit of sleeping on the job and also had an affinity to be near a female miner named Smith. Brazell stated that Don Brown never molested the woman, but some of the miners criticized Brazell for not separating Don from the female miner. Eventually, the

other miners stopped covering for Don's habit of sleeping on the job and Don was sent to another place after he had, on one occasion, been observed sleeping overly close to the haulage track. Brazell did not know how Don Brown's sleeping and attraction to the female miner contributed to his termination. Jennings, in his testimony, said that he was not aware of Don Brown's sleeping problem or of his affinity for the female miner.

19. Brazell, on cross-examination, agreed that he and an hourly employee named Powell had had a disagreement over the sharing of some welding equipment which Brazell needed for installing some pans along the belt conveyor. There were three oxygen cylinders and three acetylene cylinders and Powell was used to earning extra money for doing overtime in welding or cutting and he resented Brazell's use of the tanks because Powell sometimes had less oxygen and acetylene than he wanted. Powell started placing the cylinders where they didn't belong and that created a safety hazard, according to Brazell. This occurrence was put into the record by Island Creek's counsel, but the facts are as much in Brazell's favor as they are against him. So, it is not clear why it was made the subject of an inquiry.

In Jennings testimony, he

agreed that a conflict had occurred between Powell and Brazell concerning the use of the welding equipment and Jennings resolved the problem by having both men given keys to the place where the oxygen and the acetylene cylinders were kept, with the understanding that each man was entitled to use the equipment.

20. Four other managerial employees were laid off on May 30, 1980, at the time Brazell was laid off. One was L. W. Harris, who was physically older than Brazell and had been there longer than Brazell. The other three men were named Ballard or Doc Morgan, James Scott, and Red Wilson. Those three were all younger than Brazell, but James Scott had worked for Island Creek longer than Brazell. Since Brazell was not the oldest, physically, or the one with the most seniority, his being included among those laid off, does not indicate any specific kind of discrimination. In his testimony, Jennings agreed that L. W. Harris was not physically able to keep working as a section foreman. He also agreed that Ballard Morgan and James Scott had problems, and that all of the men would have been people whose absence from the work force would be advantageous to Island Creek. Jennings explained that Brazell had been included among the five men from the North Mine who were laid off on May 30, 1980, because Brazell was unable to coordinate the work of a crew of men on a working section. The result was that Brazell's section produced less coal on an average basis than other sections produced. Jennings did not present any figures to support that contention, but he insisted that if the slope job [described in Finding No. 13, supra] had not been created for Brazell, Brazell would have been laid off as a section foreman at the time he was transferred to the job of supervising the slope belt and the bottom area.

21. Brazell was laid off on Friday, May 30, 1980. He went back to see Island Creek's president, Pete Petzold, who was courteous but made no commitments. Then Stilley Mason wrote Brazell a letter explaining to Brazell how he could keep his insurance in effect. Also, Island Creek recognized that Brazell had been

laid off just 1 week before he would have received a vested interest in Island Creek's retirement program. Island Creek credited Brazell with the extra required week and gave him papers to fill out if he wished to do so. Brazell has never filled out the papers because he said that if he had kept working, he was covered by about \$250,000 in insurance as compared with \$5,000 as a retiree. Also, he would receive about \$176 per month as a retiree with his wife claimed as a joint beneficiary. Brazell has been referred

to an Island Creek employee named Osborne in Lexington, Kentucky, for additional question about retirement.

22. Brazell stated that on one occasion a miner named Pyro Williams tried to smuggle beneath his clothes 13 sex books as he was getting into the mantrip. Brazell made Williams leave the books in the safety office. Williams was mad about Brazell's not letting him take the books with him underground and thereafter made passes at the cables of some of the equipment until he succeeded in damaging the cable to the loading machine. Brazell said he found out afterwards that Williams was buying a trailer from an Island Creek superintendent named Cunningham, and that if he had known Williams had such connections, he wouldn't have objected to Williams' taking the books underground in the first place. Cunningham testified that he had not sold a trailer to Williams and that he didn't understand where Brazell obtained the information to the effect that he had sold a trailer to Williams. Also, Jennings testified that Cunningham is not in the business of selling trailers. The only trailer that was sold, apparently, was a house trailer and it wasn't sold to Pyro Williams.

23. Donald H. Watson testified on Brazell's behalf. Watson is a battery maintenance person at Island Creek. He thinks Brazell would rate a 9 on a scale of 1 to 10 for safety. He thought Brazell had made safety reports to management but couldn't cite a single example. He did not know of a time when Brazell refused to work on account of safety.

24. Kenneth W. Butts testified on Brazell's behalf. He still works for Island Creek. He respected Brazell's knowledge and rated him as a 10 on a scale of 1 to 10. Butts never knew of a slope boss prior to Brazell holding that position. Butts is a mechanic who goes where he's needed. He found fire in the slope at the end of his shift one day in February 1981. He and some other men put out the fire in about 45 minutes or an hour. The slope was closed down for cleanup for about one or two shifts. Butts also found a ground monitoring wire cut out of a cable, or blocked out of a cable, in March 1981, but these things occurred long after Brazell had been laid off. Butts had heard of an incident where miners were paid a bonus so that coal could be produced in quantity without worrying about safety. He said that that had occurred in March 1981, and that he had heard of it before that. Jennings testified that when he was transferred from the South Mine to the North Mine, he became aware of the fact that some miners were given extra pay to do work which they should have been required to do in the regular course of their assigned duties. He discouraged and stopped that type of thing, and by the conversion of

the mine to a computer system for payroll purposes, he thinks he has been able to eliminate the juggling of time cards whereby a mine could be paid extra for either not being at the mine or for work not actually performed. Additionally, Jennings did away with the giving of barbeques for any section which might produce the most coal in the mine in a given week or a given month. The union itself objected to the process of giving special awards to those units which produced the most coal.

25. Charles A. Pease testified in Brazell's behalf. He was an electrician and still works for Island Creek. He believes Brazell is safety-minded, but he didn't work under Brazell's supervision. Pease sees things done occasionally that are an indication of meddling with electrical connections, but he said that he would have to see someone actually do something before he would be able to state that anyone had done an unsafe act. He thought that the Hamilton Mine was a safe mine in which to work.

26. Everett Miller testified in Brazell's behalf. He is a supply person now for Island Creek. He thinks Brazell is safety oriented and would rate him at the top of the scale from 1 to 10 as a safety-minded person. Miller thinks Island Creek has brought in new management personnel in the South Mine, where he moved in 1979, but he doesn't know about the North Mine. He knows that Brazell found methane in a section where it had never previously been found, but he said that methane comes and goes and can be found anywhere at certain times. He thought that management had worked to achieve a safe operation in the North Mine.

27. Dale E. Damin testified on Brazell's behalf. He is a temporary mechanic for Island Creek at the present time. He thinks that Brazell is an extremely safety-conscious miner, and he would rate Brazell as an 8 or 9 on a scale of 1 to 10. He doesn't know why Brazell would have been terminated, and he stated that Island Creek had employed Stan Belmar as a face boss on the No. 1 Unit after Brazell was laid off.

28. William D. Alvey testified on Brazell's behalf. He is now a supply person. He thinks Brazell is safety-conscious and would rate Brazell as an 8 or 9 on a scale of 1 to 10. He doesn't know of anyone who was hired to replace Brazell. He knows that the mine was cut back from 10 to 8 active working sections. He knows of an incident where Brazell would not turn on the electricity when it had been turned off until all men were accounted for, but he also stated that that was standard procedure for turning the power back on after it had been off.

29. Jim Garrett, who is now working for Kenellis as a belt man in Harco, Illinois, was terminated as third-shift belt foreman on June 27, 1980, after Brazell left. He never heard that Brazell was terminated for making safety complaints. He thinks Brazell is safety-conscious and would rate him as a 10 on a scale of 1 to 10. He also knows that the sections were reduced from 10 to 8 active sections with 2 standby units. Garrett says that Island Creek brought in Stan Belmer, Bill Wood, Jack Milner, and Don Beverly. He says that these men were working as UMWA employees who were given supervisory positions.

Jennings, in his testimony, corroborated Garrett's statements to the effect that no new supervisory personnel had been hired and that some of those who had been put in supervisory positions had been given those positions on a temporary, or acting basis, because either some section foreman was ill or there was a need for a replacement on a temporary basis. They were all qualified people to hold the positions that they were asked to hold on a temporary basis.

30. Dwight Witherspoon testified on Brazell's behalf. He was laid off on October 27, 1977, and reinstated and paid back wages after he filed an action against Island Creek in a state court. He was laid off twice again, but the final layoff was on July 10, 1978, after two legally imposed reemployments and occurrence of no actual working period between the first layoff on October 27, 1977, and the present time. He thinks that Brazell is safety-conscious and would rate Brazell as a 10 on a scale of 1 to 10 insofar as his ability as a safe and knowledgeable supervisor is concerned. He thinks Brazell was discharged because of Brazell's stand on safety, but his appraisal of Brazell is based on events which occurred in 1977, or about 3 years before Brazell was laid off. Witherspoon said that some section foremen paid men to run coal, but that involved the top-tonnage unit. If another section foreman, who was not in charge of the top-tonnage unit tried to give a bonus, he didn't succeed. Witherspoon discussed his having to install as many as 800 roof bolts in a crosscut after a top-tonnage shift had worked solely to achieve high production and had skipped placement of roof bolts. Witherspoon thought that the aforesaid events had something to do with Brazell's termination, but he conceded it all occurred about 3 years prior to Brazell's termination. Witherspoon also conceded that Brazell had testified on his behalf in his suit against Island Creek. Jennings testified that it was a fact that sometimes a shift will, in its eagerness to produce coal, fail to put in the proper number of roof bolts, and that nearly all section foremen, from time to time, find themselves slowed down on their shift because they have to do work which the previous shift should have done. Jennings tries to see that that type of thing does not occur.

31. Jennings testified that when he was required to reduce the number of personnel at the Hamilton Mine, the number of union workers, or hourly workers, was reduced from 604 to 548, and that the number of managerial employees was reduced from 96 to 83. He testified that some of the people laid off were his personal friends and that it was a difficult decision for him to determine which individuals should be laid off on May 30, 1980, when Brazell was laid off. He readily agreed that the selection of the personnel to be laid off was based on what was good for the overall operation of the mine, and that the people who were considered the least productive necessarily were among those who were laid off. Mr. Whitley, in his closing argument, stressed the fact that a managerial employee has no contract with management as do the miners, and therefore have no way to insist that they be rehired if a prospective opening is filled at a future time after their discharge.

I believe that those findings of fact cover the essential facts that have been introduced in this proceeding. The question, of course, which is raised by the filing of a complaint under section 105(c)(3) of

the Act is whether a violation of section 105(c)(1) occurred so as to entitle the complainant to the relief which he seeks under section 105(c)(3) of the Act. Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the

statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In his closing argument, Mr. Nall, on behalf of complainant, stressed the fact that it is not always possible to prove by direct evidence that a violation of section 105(c)(1) has occurred. He correctly states that in some instances a violation of section 105(c)(1) can be proved only by inferences and by the fact that the preponderance of the evidence shows that a violation of the Act did occur. Mr. Nall stressed in his argument three different situations or factors that he thinks are particularly persuasive in showing that Island Creek violated section 105(c)(1). The first of his factors was that Island Creek had created a job of slope foreman for complainant to hold and thereby put complainant in a sort of standby position so that when a good excuse came along for laying complainant off, he could readily be cited as a nonessential employee because the job which had been created for him was not an essential job.

That is probably the best argument in this case that can be made for proving that a violation of section 105(c)(1) occurred. But it had to do more with the company's motive than with whether Brazell, or complainant, was discharged because of his reports of safety matters to the company. There is no doubt that complainant was put in a position from which he could be discharged without creating a problem for the company, but I think that Jennings satisfactorily explained that he was dissatisfied with complainant's performance as a section foreman, and that about 1977 or 1978, when complainant was transferred to the position of slope foreman, he could have made a decision to discharge complainant at that time, but instead created the position of slope foreman for him.

Jennings indicated that there had been some problems with the motors installed at the slope belt and that the company was rebuilding and upgrading the equipment so as to eliminate those problems. At that time having someone as a slope foreman was more important than it became later, after the motors had been upgraded and other work had been done on the slope belt to eliminate the need for having people to shovel coal off of the belt so that it could be started, and then having to shovel coal back on after the belt was started.

The next point that Mr. Nall made in his final argument was that complainant had irritated Island Creek by the fact that a problem had arisen with the man named Heady, who apparently was having a drug problem. I'm not persuaded that that argument is very effective because complainant did not discuss Heady with management and Jennings denied that anyone had ever mentioned to him the fact that Heady had been trying to run over Grassiano, one of the company officials, with a shuttle car. Since there's no indication that management was aware of any problems with Heady, who was the son of one of management's officials, I cannot conclude that Heady's having worked under complainant's supervision, would have been any reason for Island Creek to have chosen complainant as a person to be discharged.

The third item that Mr. Nall stressed in his closing argument was that complainant had reported to management that Dan Brown, who was a union fire boss, was failing to make his preshift examinations properly. Mr. Nall stressed the fact that since Brown was also the chairman of the safety committee, that he had a lot of power at the mine. I would agree that Brown had some influence in his position, but no one has refuted Jennings' claim that the alleged failure of Brown to perform his duties as fire boss effectively was the subject of a meeting at which management insisted that Brown satisfactorily carry out his job as fire boss if he wanted to continue doing that work.

Mr. Nall also stresses the fact that complainant demonstrated his abilities when he was called in to supervise 19 men at the slope belt at the beginning of the problems which brought about complainant's transfer from a section foreman to foreman over the slope belt. I cannot see that it would be very difficult to supervise 19 men along a stretch of one belt which is 2,300 feet long, as compared to maintaining supervision over a crew of 10 or 11 men on an active working section where supplies have to be moved smoothly, and the men have to be rotated from shotfiring to loading out coal, securing the roof, and installation of ventilation -- all in a smooth and satisfactory way so as to produce coal on a continuous basis.

Mr. Nall also stressed the fact that complainant stood his ground in dealing with management and that such practices undoubtedly irritated management and caused management to put complainant in a position where he would be vulnerable when it became convenient to lay off some people.

There occurred at least two or three incidents which failed to show that complainant stood his ground for safety against management. For example, when complainant brought the splice, from which the ground had been severed, outside the mine with the intention,

apparently, of showing it to both of his supervisors, and to MSHA, if necessary, to get action taken on the matter, Jennings testified, Jennings being the superintendent of the mine, that after he had explained to complainant that it was improper for him to have left his section without supervision while he came out with the splice, Jennings testified, without being contradicted by any rebuttal evidence, that complainant apologized for his having acted hastily and that they shook hands and the matter was smoothed over at that time.

On another occasion, complainant spoke of having forced Pyro Williams to leave some sex books on the surface. Then complainant noted that Williams was buying a trailer from one of the high officials in the company, which of course is denied, but assuming that it was true, complainant stated that he would not have made an issue of it in the first place if he had known that Williams had connections with management.

The other incident which indicates to me that complainant was not willing to stand his ground against management was in connection with the fact that complainant claims to have discovered the person who was cutting grounds out of cables. He said that one of the reasons he did not report that person to management was that he knew that that person's father-in-law was a management official and that he didn't see any need in tangling with someone with that much influence.

The aforesaid occurrences lead me to believe that complainant was an average employee who would have liked to have gotten along with management and would have preferred to remain employed by working smoothly with management if he could have done so. I think the fact that complainant was included with the group of men who were laid off on May 30, 1980, can be explained on the basis of Jennings' testimony to the effect that despite the fact that Brazell was faithful in reporting to work and trying to do a good job, he simply was not the kind of section foreman that management preferred, insofar as achieving production goals is concerned.

As Mr. Whitledge stressed in his closing argument, it is a fact that coal mines are run for profit. If they cease to be profitable, they have to close down. That profit motive is something that the company is entitled to consider and I cannot find on the basis of the many incidents that have been given in complainant's testimony, that those incidents show that there was such a strong bias against complainant for his alleged safety-related activities, that he would have been picked out as a person to eliminate simply because he had complained about certain procedures in the mine.

One of the aspects of Jennings' testimony which is very persuasive for me in deciding this case is that Jennings stated that complainant did not come to him with any more problems than any of the other foremen in the mine. Jennings also stated that complainant had a problem of staying on a given subject long enough for Jennings to be advised in a short period of time of an exact problem and of the exact personnel involved, and what needed to be done. He said that complainant had a problem with rambling in his discussions and that at times it became frustrating to try to determine just what complainant's problems were. If complainant's direct testimony in this case is examined by anyone

interested in reviewing the record, it will be readily perceived that it is very difficult for complainant to keep on any one subject, without engaging in many inferential discussions about other matters. For that reason, it was very difficult to follow any given point in his testimony on direct examination without being led astray into other matters which

were not the ones his counsel was trying to stress. I believe that that characteristic, which was very noticeable at this hearing, supports Jennings' statement that complainant was unable to communicate readily with him so as to apprise him of matters that complainant might have wanted to report, but seemed to get sidetracked in the process.

In *Secretary of Labor, on behalf of Thomas Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (1981), the Commission stated that it was always the burden of the complainant in a discrimination case to show that respondent had violated section 105(c)(1) so as to entitle complainant to recover. The Commission stated that if complainant succeeded in establishing a prima facie case showing that he had been discharged because he was engaged in a protected activity, that the company would then have the responsibility of showing that even if one of the reasons for the complainant's discharge did relate to a protected activity, if the company's case succeeded in showing that complainant would have been discharged in any event for other matters in addition to the protected activity, that respondent should prevail in that situation. In this case, the complainant did not even prevail in establishing a prima facie case in his direct testimony. Assuming that complainant had proven in his direct case that he had been engaged in a protected activity, it appears to me that respondent successfully showed in its case that complainant would have been laid off in any event on May 30, 1980, for nondiscriminatory reasons.

This case is different from nearly all of the other cases that have had come before me under section 105(c) in that the complainant went into great detail and cited a large number of incidents which had occurred over 4 or 5 years prior to his termination. In none of those situations was it ever made perfectly clear that there had been a specific complaint about safety made to management in such a way that the complaint would have been an irritant to management in the sense that management thereafter would have said, "We're going to get rid of this fellow as soon as it's convenient."

Complainant described in his testimony several instances which would have been reasons for the company to have rewarded him, or complimented him, rather than for the company to have been upset about it. For example, assuming that the company didn't already know about the roof fall that was blocking air from getting into the mine, and which was allowing excess air to enter the belt slope, if complainant had been the first person to find that out, and had made it possible to reroute the air so as to permit less float coal dust, etc., to enter the slope entry, that would have been a reason for management to thank him rather than to have

criticized him.

The fact that complainant may have had something to do with calling management's attention to Dan Brown, who was not making proper preshift examinations, that also would have been something they would have appreciated. If complainant could have actually identified the person who was making bomb threats so that that person could be arrested, or at least could have been investigated so as to eliminate him from the work force if necessary, there again, management would have had a reason to appreciate it.

As to the person who was using drugs, Michael Albright, not only did management appreciate Brazell's calling that to management's attention, but Albright himself was pleased with the way that turned out, when he succeeded in overcoming his problem.

Another item was the fact that management wanted some people from the South Mine to work on the slope at the North Mine. When management found out that those people weren't coming, they sent a supervisor along with them to make sure they did come. So, if complainant had reported that to management, it would have been something that management would have appreciated.

Consequently, this case presented me with so many incidents which complainant said may have contributed to his termination which were not things that a company would normally resent, that it's impossible for me to add these inferences up, as suggested by Mr. Nall, in such a fashion that I could find that the preponderance of the evidence supports a finding that a violation of section 105(c)(1) occurred.

WHEREFORE, it is ordered:

The complaint of discharge, discrimination, or interference filed on December 5, 1980, in Docket No. KENT 81-46-D is denied for failure to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)