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CARROLL TENNEY, v. EASTERN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CARROLL D. TENNEY, COMPLAINANT	Complaint of Discrimination
v.	Docket No. WEVA 80-279-D
EASTERN ASSOCIATED COAL CORPORATION, RESPONDENT	Federal No. 2 Mine

DECISION

Appearances: J. Montgomery Brown, Esq., Attorney at Law, Fairmont, West Virginia for Complainant;
R. Henry Moore, Esq., and Sally S. Rock, Esq., Pittsburgh, Pennsylvania, for Respondent.

This proceeding arises under section 105(c) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Morgantown, West Virginia, on August 25, 26, 27, 1981, and September 9, 10, 1981, at which both parties were represented by counsel. On September 10, after consideration of evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, a decision was entered on the record without benefit of transcript. This bench decision appears below as it appears in the transcript aside from minor corrections:

PROCEDURAL BACKGROUND AND STATEMENT OF THE CASE

This proceeding was initiated by the filing of a complaint in letter form by Mr. Carroll D. Tenney on April 9, 1980. Mr. Tenney had previously filed a complaint of discrimination with the Mine Safety and Health Administration. By letter dated February 5, 1980 (Exh. R-9), MSHA advised Mr. Tenney that after an investigation it had been determined that a violation of section 105(c) had not occurred. Under the Federal Mine Safety and Health Act of 1977, a complaining miner has an independent right to bring a complaint and this proceeding is based on that right. The Complainant contends that he was discharged because of his activities as a safety committeeman for approximately 3-1/2 years during the period 1974-1977 and for otherwise insisting on rigid safety practices during his tenure as an employee of the Respondent. The Complainant alleges that there were several instances where he had either been disciplined or harrassed for his safety activity and that he was discharged by Respondent in retaliation therefor. He also alleges that his discharge which resulted from his admitted refusal to obey an order on November 30, 1979, to walk down a haulageway to his work place, was a setup, that is, it resulted from a plan or a conspiracy set up by Respondent's management to effect his removal.

Respondent denies the various allegations made by Complainant, denies that Complainant's discharge was the result of a conspiracy, and contends that Complainant made no safety complaint on November 30, 1979. Respondent charges that Complainant did not refuse to walk down the haulageway for safety reasons, but that he based his refusal on his right under the Union contract to be given a ride to his work place. If this contention is valid, then Mr. Tenney's remedy would appear to be confined to the grievance and arbitration procedures provided in the labor agreement.

Respondent also contended that Mr. Tenney's evidence should be limited to allegations of discrimination within the period of the statute of limitations and that the Complainant should not be permitted to attempt to prove a course of discriminatory conduct going back some 10 years. The Respondent's motion in limine to so limit Complainant's evidence was denied by me by order dated May 20, 1981, in which I held that such evidence of prior incidents might be relevant to establish discriminatory motivation. This ruling, I must note at the outset, may be contrary to the decision of the Mine Safety and Health Review Commission in Local Union 1957, UMWA v. Southern Ohio Coal Company, 2 FMSHRC 3472 (December 9, 1980), which held by clear implication, although not expressly stated, that discriminatory motivation is not an essential element of proof for a complainant in a discrimination proceeding, even under the 1969 Act.

The primary and decisive issue is whether the Complainant on November 30, 1979, at the time he refused to obey an order from his foreman, Augustine Nunez, to walk a haulageway to his work place, was engaged in a protected activity. A subsidiary question is whether Complainant raised the issue of safety at this time, or more generally, whether any safety complaint or description of unsafe conditions was raised by Complainant. Other questions which were litigated in this proceeding were whether or not the haulageway in question was safe, whether or not Mr. Tenney was a satisfactory employee, whether or not there was evidence of a pattern of harrassment on the part of the Respondent directed against Mr. Tenney because of his activities as a safety committeeman or otherwise because of his safety practices, and whether or not Respondent treated Mr. Tenney differently from other employees similarly situated in connection with his discharge as well as other incidents which Mr. Tenney has complained of during the period 1974 through 1979.

To establish a prima facie case of discrimination under section 105(c) of the Act a complainant must establish by a preponderance of the evidence (1) that he engaged in a protective activity and (2) that the adverse action was motivated in party by the protected activity. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980). Complainant must establish these elements by a preponderance of the evidence, Secretary of Labor v. Richardson, 3 FMSHRC 8 (Janaury 19, 1981).

At the outset of the hearing the parties stipulated that Complainant worked at Respondent's Federal No. 2 Mine until he

was discharged on November 30, 1979. The parties subsequently stipulated that his employment

commenced in 1969, and I would footnote that it appears that Mr. Tenney actually was discharged on December 3, 1979, based on incidents which occurred on November 30, 1979. The parties also stipulated that this federal agency has jurisdiction over the parties to and the subject matter involved in this proceeding and, with respect to Complainant, that he had not been employed by Respondent since November 30, 1979, that on November 30, 1979, Complainant was working on the day shift, and that Complainant served on the mine safety committee from January 13, 1974, through April 13, 1977. In addition, the parties stipulated that Respondent has a payroll of 650 employees, that employees of Respondent other than Mr. Tenney have in the past received disciplinary slips for failure to clock in and for unsatisfactory performance of duties, and finally, that the distance that Mr. Tenney was ordered to walk on November 30, 1979, was 2,500 feet and that the distance Mr. Tenney had been ordered to walk in another incident on February 17, 1977, was 6,700 feet.

The general parameters of the factual material relevant in this proceeding were covered from Complainant's standpoint, by Mr. Tenney's initial pleading herein, and by his testimony.

ANALYSIS OF THE EVIDENCE AND PRELIMINARY FINDINGS

Mr. Tenney is presently 37 years of age and he has a high school education. He is married and has three children and he has worked only 2 weeks since November 30, 1979. He has been employed as a general inside laborer and (he thereafter) progressed to the top paying job at the mine, roof-bolt machine operator. His total mining experience has been over a period of approximately 12 years. Mr. Tenney was originally employed at the Federal No. 2 Mine of Respondent from August 1968, to March of 1969, at which time he was discharged for illegal picket line activity. Subsequently, he was rehired by Respondent at its Federal No. 1 Mine where he worked for approximately 8 months at which time he returned to the Federal No. 2 Mine where he worked as a general laborer for several months and then became a roof bolter.

With respect to the incidents of November 30, 1979, Mr. Tenney testified that at this time he was a roof bolter on the day shift and he arrived at work at 7:30 a.m. At approximately 10 minutes to 8, the cage (elevator) took him to a waiting room in the A-section where his roof-bolter helper, Jimmy Moore, and his foreman, Augustine Nunez, were waiting. Approximately four blocks from the waiting room is an 80-foot block area with steel doors on one side called the "transportation foreman's shanty." This shanty is shown as "X" on Exhibit R-2, a map of the mine. Mr. Tenney had not previously worked with Nunez as his foreman, other than the day before, November 29, 1979. An area called "old eleven switch," located about 2,500 feet down the haulageway in question from the "shanty", was the projected work place for Tenney and Moore, it being the same place they had worked the day before. On November 29, Tenney, Moore and Nunez had been transported from the shanty to the old eleven switch by a supply jeep driven by one John Long. According to Mr. Tenney, on

November 30, the transportation foreman, Ed Jones, told Nunez that the jeep would be "down" an hour to an hour and a half. Nunez then told Moore and Tenney that no transportation was available and said

"We'll have to walk." Tenney said, "I told Nunez we would not walk up there." Tenney said, "I told Nunez under the contract we were entitled to a safe ride up there." I footnote at this juncture that Respondent's witnesses deny that Mr. Tenney used the phrase "safe ride" and allege that he only used the word "ride." Based upon subsequent holdings therein, I find this to be a distinction without a difference insofar as the resolution of the ultimate issues are concerned.

Mr. Tenney (testified) that the top in the area was low, that it had fallen in several times, that it had to be repaired constantly, and that the track had curves and bends in it. Mr. Tenney said he knew of the conditions along the haulageway as a result of his having been on the safety committee and that after his tenure as committeeman he had heard rumors that there had been falls. Mr. Tenney indicated that he kept close watch on the bulletin board after he was removed from the safety committee to see what kind of violations were being written and where. This accounts for his awareness of conditions in the mine and presumably along the haulageway. Mr. Tenney also testified that in May 1979, he injured his neck and had 3 days of therapy at a hospital in October 1979. Because of a low top along the haulageway, he did not want to bend over and reinjure his neck. Other complaints expressed by Mr. Tenney concerning the haulageway during this proceeding were that the crosscuts along the haulageway which were designated as "manholes" contained cribs and posts which would cause a "hassle" for a miner walking along the haulageway to get into and out of the way of any incoming or outgoing motor or other vehicle traveling along the haulageway. Mr. Tenney mentioned that there had been incidents where portal buses had run into each other in this area and that on one occasion after a portal bus had run into a wire Respondent had cut down the height of the portal buses.

With respect to the conversation he had with Foreman Nunez, Mr. Tenney indicated that both Moore and he told Nunez that they would not walk the haulageway and that Nunez then called outside and other work was obtained in another area where cribs had fallen down creating an emergency. This development which is critical will be discussed at greater length subsequently.

Mr. Tenney indicated that from 8:10 a.m. to 10:30 a.m. he and Moore performed the emergency work, sometimes referred to in the record as "crib work," and that approximately 15 minutes into this work he and Moore saw the supply jeep which was reported to be broken down.

Thereafter, at approximately 10:30 a.m., Moore and Tenney returned to the shanty which was occupied by Nunez, Dale Gallagher, the general assistant mine foreman, foreman Gene Lamb, and foreman Frank A. "Rock" Hudson. According to Tenney, Nunez came out of the office and said, "You're going to have to walk." Nunez said that the jeep was at One West. Tenney asked how long it would be before the jeep would return. At this point, Gallagher came outside and said, "It would make no difference, you'll have to walk." According to Tenney, he said to Gallagher

"I want a safe ride to my working section," and Gallagher said,
"If you're not going to walk get your bucket and let's

go." Being told to "get your bucket" in terms of the parlance or jargon prevalent in the Federal No. 2 Mine means that a miner is being subjected to some form of disciplinary action.

Significantly, Mr. Tenney admitted that on the way out of the mine Mr. Gallagher said to him, "Take my advice and walk," to which Mr. Tenney replied that he would not walk.

When Gallagher and Tenney arrived at the office of the general mine foreman, Clifford Dennison, according to Tenney, while he was waiting for Dennison, he told Gallagher that he wanted a mine committeeman to go in with him. The events which occurred in Mr. Dennison's office are the subject of some dispute and findings will be made subsequently with respect thereto. Suffice it to say at this point that Mr. Tenney indicated that he complained in terms of safety to Mr. Dennison, which is denied by Mr. Dennison and by the assistant mine foreman, Mr. Gallagher. At this time, Dennison filled out a disciplinary slip entitled "Notice of Improper Action" (Exh. C-10 a) which appears to originally have been completed showing, "disobeying order," and changed to "disobeying safe and reasonable order," with the word "order" as originally used, being stricken. Complainant contends that this shows that the subject of safety was brought up in Mr. Dennison's office which is why the change was made.

Mr. Tenney went on to describe various incidents which occurred during his employment, commencing with his discharge for illegal picketing on March 28, 1969, and his receiving a discipline slip for unsatisfactory work on November 28, 1969, which, because of its remoteness, I find is irrelevant to the issues involved in this proceeding either to show a pattern of harrassment, discriminatory motivation or the quality of employee Complainant was at anytime material herein.

In one incident which occurred on May 8, 1974, Mr. Tenney was observed engaging in an unsafe practice when he walked under a boom and he was given a disciplinary slip. Mr. Tenney admitted committing this infraction and filed no grievance or complaint as a result thereof. Mr. Tenney also admitted that it might be an unsafe act and, in vague terms, indicated that no grievance was taken in order not to influence others into engaging in the same practice, or words to this effect. In connection with this May 8, 1974, incident, Mr. Tenney was observed by Mr. George Tippner, an assistant mine foreman, who testified that at the time he mentioned to Tenney that it was a violation of company policy and federal law to walk under an unblocked piece of equipment. Mr. Tippner indicated that this was a flagrant violation and that since Tenney was on the safety committee at the time it set a bad example.

Mr. Tenney also testified concerning his receiving a disciplinary slip on September 20, 1975, for failing to clock out. He admitted that he forgot to punch out and that he filed no grievance with respect to this incident.

Mr. Tenney also described an incident which occurred on October 23, 1975, when he was running a transfer feeder under the supervision of foreman Rock Hudson. According to Mr. Tenney, the belt would not run because coal and dust had pushed the belt off of the rollers. Mr. Tenney turned the power off after which Hudson came down to the belt and asked what was going on. According to Mr. Tenney, Hudson told him not to shut the belt down again and if he did it again he, Hudson, would "kick his ass." Mr. Tenney filed no grievance or complaint with respect to this incident, although he did apparently discuss the matter with his safety committee chairman. Mr. Tenney received no disciplinary slip as a result of this episode. Mr. Hudson, in his testimony, denied that he reprimanded Mr. Tenney on this occasion and I find, after considering the testimony of Mr. Tenney and Mr. Hudson, that no reprimand was in fact given, that any harsh language, if such was used by Mr. Hudson, was not disciplinary in nature, and that Mr. Hudson's concern about the belt being shut down was justified.

I find that this incident, as well as all those previously discussed in 1969, 1974, and 1975, involved no harrassment on the part of the Respondent directed toward Mr. Tenney. Nor is there, in any of the conversations which occurred during these episodes, evidence of discriminatory motivation or an anti-safety frame of mind on the part of the Respondent. Indeed, most if not all of these infractions were admitted by Mr. Tenney.

Proceeding now to subsequent episodes related by Mr. Tenney, on January 28, 1977, while he was still on the safety committee, Mr. Tenney testified he received two slips, one for not punching in, one for not punching out. Mr. Tenney claims with respect to this incident that he did not know they were in his personnel folder until he was discharged and it came up at his hearing. I find no evidence of harrassment, discriminatory motivation or animus towards Mr. Tenney generally contained in this episode based on the evidence presented, nor do I find that it played a part in Mr. Tenney's being discharged in view of the testimony of John Hetrick, the mine superintendent, who indicated that he gave no weight to it at the Step 2 stage of the grievance procedure. More specifically, I find that Hetrick's decision to effectuate the discharge of Tenney at this stage of the grievance procedure was based on the fact that Mr. Tenney in a similar situation on February 18, 1977, had refused to obey an order to walk to his work place and was disciplined. This episode will likewise be discussed in more detail subsequently.

Mr. Tenney contends that part of the Respondent's pattern of discrimination directed towards him for his engagement in safety activities was the fact that he was removed from the safety committee in February 1977. As a mine safety committeeman, Respondent's evidence shows, Mr. Tenney had more power than other miners in the mine including the power to close the mine in the event of an imminent danger. On December 29, 1976, Mr. Tenney exercised this power when he handed the general mine foreman a report stating that an imminent danger existed on Section Six Left. The details of this incident are best described in Exhibit

R-10 which is the Arbitrator's Decision dated April 13, 1977, upholding Mr. Tenney's removal from the safety committee at

the request of Respondent for the reason that Mr. Tenney's action in closing down the section was arbitrary and capricious. The burden of proof on the Respondent in the Arbitration Proceeding to effectuate the removal of Tenney as safety committeeman was to show that his actions were arbitrary and capricious. At Page 15 of Exhibit R-10, Arbitrator Jay Scott Thorpe stated that Tenney was confronted with three alternatives under the contract in seeking a cure to the problem involved:

> First, he could proceed as he did, by declaring an imminent danger, and facing the possible consequences of being removed from the safety committee. Secondly, he could file a safety grievance, and let an arbitrator decide the matter if the company failed to lay the necessary track. If such a grievance had been filed in the past, the matter might have been long since resolved. Thirdly, Tenney, or any of the other employees in the section (particularly those who testified that an imminent danger existed), if they had reasonable grounds to believe that they were required to work under conditions abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice could be abated, had the right to notify their supervisor of such a belief under Article III, Section (i)(1), and if the situation was not corrected, could be relieved from duty. None of the persons on the section, including Tenney, availed himself of this remedy.

The Arbitrator went on to indicate that the declaration of an imminent danger must not be based on mere whim or will of a safety committeeman and found that, "Tenney's action was without fair, solid and substantial cause and was not based upon the rules fixed by the contract and therefore must be considered arbitrary and capricious."

Mr. Tenney testified in the instant proceeding that he was thinking of taking action against the Respondent for having him removed from the safety committee but that he was fired before it went through. Mr. Tenney indicated that after he was removed from the safety committee, shortly thereafter he was taken off of roof bolting by Respondent and thereafter he worked approximately 90 percent of the time shoveling. Other duties he performed were picking up papers on the section, driving a truck, and similar chores.

On February 18, 1977, Mr. Tenney was given a disciplinary slip for refusing to walk to his work place (see Exhs. R-6 a, b, and c). This incident, together with the episode involving his removal from the safety committee, constitute the very critical incidents out of the numerous episodes which Mr. Tenney has listed--from the standpoint of the issues involved in this proceeding. The disciplinary slip indicated Mr. Tenney was to be suspended for 5 days with intent to discharge. Respondent has

clearly established that insubordination or a miner's refusal to obey any direct

order is a dischargeable offense and not subject to what is called the Respondent's "progressive disciplinary plan" which for minor infractions requires preliminary warnings and a progressive upgrading of discipline before a miner can be discharged.

Mr. Tenney's punishment for refusal to walk on February 18, 1977, became the subject of a grievance filed by Mr. Tenney on March 7, 1977. The Arbitrator's Opinion and Award (Exh. R-13) sets forth the salient details of this episode and Pages 2 through 5 thereof are incorporated herein by reference. See Attachment "A".

I find that in the respects material to this proceeding the incident of February 18, 1977, is similar to the circumstances involving Mr. Tenney's refusal to walk in this proceeding. The critical provisions of the National Bituminous Coal Wage Agreement of 1978 (Court Exh. 1) was involved in both episodes. Article III, section (o)8 of this contract provides: "The employer shall provide a safe man trip for every miner as transportation in and out of the mines, to and from the working section." Harold G. Wren, the Arbitrator, reached the following conclusions:

> For several reasons, the Union's argument that the Company is required at all times to provide transportation for miners to their work stations must be rejected. In the first place the clause in the contract is found in Article III, dealing with matters of "Health and Safety." Its purpose is to insure the safety of every employee; it does not purport to confer an additional benefit on the employee. To the extent that an employee can proceed to and from his work station safely during the course of his working hours, the company is not required to provide vehicular transportation. There may be situations where considerations of health and of safety would require that the company provide some form of motor transportation. But in the case before us, Grievant was capable of walking to his work station without jeopardizing the health or safety of himself or other employees."
>
> Secondly, the clause is concerned with transits "in and out of the mines" and "to and from the working section." These phrases refer to those activities occuring at the beginning and end of every shift.
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> * * * * * * *
>
> Thirdly, to construe section (o)(8) in the manner that the Union suggests would place an unrealistic burden on the Company's facilities for its day-to-day operations.
>
> While management may be expected to utilize the various types of motor transport within the mine to aid employees as much as possible, normal considerations of

efficient operation require

> that the transportation facilities be used primarily to meet the needs of production. Transportation of personnel within the mine during the course of a particular shift must necessarily take a second priority to the Company's operational requirements. It was not unreasonable for the company to ask Grievant to walk to his work station, a distance of 6,700 feet, or approximately 1.27 miles. Grievant knew the area well.

The Arbitrator went on to find Mr. Tenney "technically guilty of insubordination" and concluded that a punishment of 4 days (Respondent after investigation had reduced the initial 5-day suspension, Exh. R-6) was too severe for such an infraction.

Finally, with respect to the listing of incidents relied on by Mr. Tenney to show either harassment, discriminatory motivation, or disparate treatment, three final episodes of exceedingly minor importance will be mentioned.

Mr. Tenney testified that sometime in the winter of 1978 Bill Lemley, who is believed to be either mine foreman or assistant mine foreman at the time, caused an unsatisfactory work slip to be given to Mr. Tenney. A grievance was filed, according to Mr. Tenney, but management removed the slip at the conference stage of the procedure.

Again, in August 1979, Mr. Tenney recalls an incident where he observed an unsafe practice and caused it to cease. In his testimony and in his initial complaint herein, this incident is described. According to Mr. Tenney, he was working on One West Transfer. The transfer was about 10 blocks from the section. On this day, the supply crew was putting supplies on the section. At quitting time, Mr. Tenney went to the track where they had left him off that some morning. In his complaint, Mr. Tenney goes on:

> I waited for the bus to catch a ride back. The supply crew was coming out, and I saw cap lights all over the two motors. The men, including Jack Shear the foreman, were riding on the motors, on the bumpers and in the deck with the motormen. This is against state and federal law. When they got to me they said, "get on,' I said no, I would not ride the motor out because it was dangerous to ride out like that. The boss said to bring the bus up, and we rode out on the bus.

Again, in his testimony and in his initial complaint a final incident was described by Mr. Tenney as follows:

> On September 18th, 1979 they switched me from day shift to afternoons. I told them that, according to the contract, they should not put me on afternoons, because they had general laborers bolting on the day shift, and I was a classified bolter. I told the superintendent that they had made a mistake, and that they needed to

switch me back to day shift.

> After telling them that I was going to file a grievance, they told me that they would check with Joe Luketic and find out if they had made a mistake. Evidently they checked, found they had made a mistake and placed me back on day shift. I feel this was another form of harassment."

I find these last two incidents more as evidence that the Respondent did not interfere with or attempt to stop Mr. Tenney's ultra-safe approach to safety, and the last event was one where the Respondent apparently acquiesced to another one of Mr. Tenney's demands without any evidence of rancor or other reaction indicating anger or a retaliatory frame of mine.

Mr. Tenney in his testimony and in his initial pleading described a final episode which occurred on the same day as the last incident described, September 18, 1979. According to Mr. Tenney,

> There was another incident where I refused to work in an unsafe condition. A crew of men were sent to pick up all the trash in a given section. A foreman told me to pick up trash on the wire side. I said the wall was not guarded, and I wouldn't work under it. So, I worked on the clearance side while three or four men worked under the wire.

This incident, as well as the preceding three incidents, show not the pattern of harassment as contended by Mr. Tenney, or continuing animus on the part of Respondent, but rather they show a pattern of the Respondent's foremen acquiescing to Mr. Tenney's demands, one of which was a contract demand. This completes the listing of numerous episodes raised by Complainant some of which will be discussed subsequently herein insofar as they relate to other issues. It is found that these incidents, whether considered individually or cumulatively, do not establish a pattern of harassment by Respondent.

Returning now to the critical incident on November 30, 1979, which resulted in Mr. Tenney's discharge, his claim that a conspiracy existed primarily must rest on the testimony of then transportation foreman, Edward Jones. Mr. Jones testified that on November 30 he arrived at the mine at 6 a.m., at the shanty at 6:45 a.m., and that he received a call from Clifford Dennison, the general mine foreman. In his testimony, Mr. Jones was inconsistent as to the exact time this phone call took place, but indicated that Dennison told him "not to give Tenney transportation back to the job," or words to that effect. According to Jones, Dennison gave no reason. Jones said, "I knew the reason, it was because Tenney was on the safety committee." Jones said that, "we've been holding it against Tenney since he was on the safety committee." Jones then told Tenney that no transportation was available.

Mr. Jones then testified that Tenney and Moore went down to repair the cribs and that when they came back he told Jimmy Moore, "you'd better get away from here, because Tenney is going

to get fired." I footnote that

Jimmy Moore did not confirm this latter testimony. Mr. Jones said that later in the day he heard Mr. Gallagher and Mr. Dennison talking in the shanty and they said something to the effect, "Well we finally got him." Mr. Jones said that they talked and joked about it.

Jones indicated that he had filed a "law suit" with the Equal Employment Opportunity Commission against Respondent for race discrimination (he is a Negro), harrassment on the job, and age discrimination (he is 56 years old). This EEOC proceeding was filed sometime from July-September 1978, or more than a year before the Tenney discharge. The EEOC proceeding is still pending. Mr. Jones was transportation foreman from November 1979, until July 25, 1981.

The roof-bolter helper for Mr. Tenney on November 30, James E. (Jimmy) Moore, likewise is an important Complainant's witness. On November 30, according to Mr. Moore, after Nunez ordered him and Tenney the first time (at approximately 8:15 a.m.) to walk up the haulageway to their work place, Tenney said he was not going to walk and that it was unsafe to walk up there. Moore said that Nunez got on the phone and talked to Gallagher at this point and that subsequently he and Tenney walked to the emergency crib job which was 500 to 600 feet away. Mr. Moore said that in terms of custom and practice in the mine it was customary for miners to go to the transportation shanty where they would get a ride to go to work, it was common to wait for a ride and, if it was going to take a while the miners would be assigned to pick up papers, etc. Mr. Moore said that he thought Tenney and he got these "work while waiting" assignments more than other miners.

On cross-examination, Mr. Moore confirmed that he refused to walk the first time, meaning that on November 30, as the record shows, there were two occasions when he and Tenney were asked to walk down the haulageway to their work assignment--at 8:15 a.m., approximately and 10:30 a.m., approximately. Mr. Moore admitted that he might have said, "I won't walk up there because there won't be anything for me to do without Carroll." Mr. Moore also said that he saw the jeep go by shortly after they had gone to work on the emergency crib job and on cross-examination, when told that Mr. Tenney was uncertain whether he had explained to Foreman Nunez why he thought walking down the haulageway was unsafe, said: I think he did tell him." (Emphasis added.) Mr. Moore was unable to recall the specific names of other miners who did not pick up papers while waiting for transportation at the shanty. Mr. Moore said that he was not aware that the transportation foreman had standing orders to assign work to miners waiting for transportation.

With respect to the 10:30 a.m. conversation with Nunez--after Tenney and he had returned to the shanty--Mr. Moore indicated that after Nunez said they would have to walk, Mr. Tenney said he would not walk because (1) what the contract provided, and (2) that it was unsafe. Mr. Moore said that he told Mr. Gallagher that he would walk at some point during this conversation, his reason being that he had "seen a man fired."

Mr. Moore said that he shoveled that day. Finally, he characterized Mr. Tenney as a safe worker and not "necessarily" a slow worker.

The testimony of Mr. Tenney, Mr. Moore, and Mr. Jones having been analyzed with respect to the November 30th incident, it is appropriate to consider the Respondent's position with respect to this incident focusing now on the issues raised by Mr. Tenney of ultimate importance: Whether or not Mr. Tenney engaged in a protected activity by raising a safety matter at that time and whether or not Respondent or any of its management personnel conspired to discharge Mr. Tenney.

Mr. Nunez testified that he was Mr. Tenney's supervisor on November 29 and November 30, 1979, and that these were the only 2 days he had ever been Mr. Tenney's superior. Mr. Nunez said that when they arrived at the shanty at approximately 8 a.m. Ed Jones, the transportation foreman, advised him that the supply jeep was broken down and it would take 1 to 1-1/2 hours to repair. Nunez said that he had no reason to question this. Nunez told Moore and Tenney that the jeep was down and they would have to walk and Mr. Tenney said that he did not "give a darn" if it was down 4 or 5 hours he was not walking. The precise quote of Mr. Tenney at this time appears in Exhibit R-7 at Page 2. Mr. Tenney denied making this statement and for reasons which subsequently will be given in resolving credibility in this case, I credit the version of Mr. Nunez and the version found by Arbitrator Martin Lubow in his Opinion and Award dated December 14, 1979, at Page 2 of said exhibit. Nunez then asked Jones to let him use the phone, which he did. Nunez called Dennison and told him he had a problem. Dennison said, "Here, talk to your shift foreman," and turned the phone over to Gallagher. Nunez told Gallagher what had happened and Gallagher told Nunez to go through the standard procedure which included emphasizing to Mr. Tenney that he, Nunez, was giving him a direct order. Gallagher at the time was on the surface and while they were speaking on the telephone between the mine and the surface, Gallagher was informed of a sagging support which had developed near the location of Nunez and his men. Gallagher instructed Nunez to proceed to work on the emergency crib job. Because this work arose, Nunez, at the 8 to 8:15 a.m. refusal episode, did not go through the procedure of telling Mr. Tenney that he was giving him a direct order at that time. Nunez testified that neither Moore nor Tenney complained to him while they were working on the cribs about the Jeep going by.

Upon returning to the shanty after the crib work was completed Nunez asked Jones if the Jeep was available and Jones replied that it was not. Nunez told Tenney and Moore the Jeep was not available and that they would have to walk. Tenney told Nunez, "I understand your order; I'm not walking because the contract says I don't have to, the contract says I'd be supplied with a ride and I want a ride." (See Exh. R-7, Page 2.) At the hearing, Nunez said that Tenney said, "I understand what you're saying and I want you to understand what I'm saying." At this point, Gallagher came out and asked Mr. Tenney why he would not walk, to which Tenney replied, the contract provides a ride to the work place. Gallagher told Tenney to take some good advise and walk. Gallagher told Tenney he would have to take him outside and give him disciplinary action. Tenney said, this has been tried before and they did not get away with it, and "You're

not going to get away with it." Gallagher said, "Well, we'll see."

Nunez indicated that at this point he was not aware that Tenney had been involved in the February 18, 1977, episode, where he had refused to walk. With respect to the amount of traffic going down the haulageway at the time of the two refusals, Mr. Nunez testified that at 8 a.m. the traffic would have been light and no trips would have been going through, and that at 10 to 10:15 a.m. possibly one trip would have been going through. Nunez, who has an artificial foot, gave the opinion that there was no hazard in walking up the haulageway, that it was relatively clear, and that the shelter holes (crosscuts) were accessible. Nunez said that he had walked from the shanty to "old eleven" many times and that other people have walked up there. On cross-examination, Nunez indicated that the others who have walked up there were fire bosses and shift inspectors, and they were not Union contract personnel as far as he knew. Nunez did not recall ever ordering any contract employee to walk up the haulageway.

According to Nunez, Mr. Tenney said he would not walk because the contract provided for a "ride" not a "safe ride." The duties Tenney and Moore were to perform on November 30 were to install additional bolts in the haulageway. Nunez did not recall that there had been a fall in the area in February of 1977.

With respect to whether or not Moore refused to walk, Nunez testified that at the 8 a.m. refusal episode Moore was asked if he would walk and Moore replied, "I can't operate the machine by myself." Nunez said that Moore at first said, "There's nothing for me to do", and that he replied, "I'll find something for you to do," and that Moore then said, "Well, I will walk because I get paid as much for walking as I do working." Then, Nunez said, he started talking to Mr. Tenney again and told him that they had to walk. Nunez testified that he did not tell Gallagher that both Tenney and Moore would not walk and that Gallagher asked Mr. Moore to walk prior to telling Mr. Tenney "to get his bucket." During his testimony, Nunez subsequently clarified the above testimony by indicating that it was at the 10:15 refusal that Mr. Moore said, "I'll walk, I get paid as much for walking as for working." And again, it was at the 8 a.m. refusal that Moore said there was nothing he could do by himself, to which Mr. Nunez responded that he would find something for Moore to do.

Mr. Gallagher testified that Nunez called him on November 30, 1979, and told him that Tenney and Moore did not want to walk up the haulageway to their work place. At this point, Ed Jones came on the phone and said that there was a bad crib that needed repairs immediately, and that he then told (Nunez) to take Tenney and Moore down to repair the crib. Gallagher said that Nunez did not advise (him) why Tenney would not walk up to the assigned work place. After Gallagher got off the phone with Nunez, he had a conversation with Cliff Dennison and all he said to Dennison was that Tenney would have to walk up the haulageway.

Gallagher was in the shanty when he overheard Tenney say he would not walk and Gallagher went out to take care of the situation at the time of the second refusal. Gallagher said he thought that Tenney was refusing a direct order from Nunez.

Gallagher told Tenney, "Do you understand what he's saying to you?" Tenney replied, "Do you know what I'm saying?"

According to Gallagher, Tenney did not say it was unsafe to walk nor did he mention that he had a bad neck or mention low top or traffic along the haulageway. Gallagher said that he told Tenney two or three times, "If you don't walk up there I will have to suspend you," and that Tenney replied, "I have a contract right for a ride." Gallagher said he told Tenney, "Carroll take some good advice and walk up there and we'll forget the whole thing." Gallagher said, "I thought I could reason with him one more time and he might change his mind." Gallagher verified that at one point Tenney said that Anthony Harris had tried the same thing. Gallagher was not familiar with this episode.

Gallagher was present at the meeting in Dennison's office between Tenney and Dennison. According to Gallagher, Mr. Tenney at this time kept saying that the contract afforded him a right to a ride to his working place. Gallagher did not hear Tenney say that it was unsafe to walk up there or say anything about his neck injury or bad top. Gallagher said that miners and foremen walk up the main haulageway if no ride is available. He did not consider it unsafe. Gallagher also described the Respondent's standard procedure for handling a miner's failure to punch in or out.

Gallagher specifically testified that in the conversation in Mr. Dennison's office at the point when Dennison made the change on the disciplinary slip, he did not remember Mr. Tenney telling Dennison about safety. Gallagher vertified that Tenney did say he was available for other work. Gallagher, as in the case of all witnesses, testified at length concerning the haulageway and other practices and the foregoing is not intended to be an exhaustive summary of his testimony.

With respect to whether or not Tenney made a safety complaint or raised a safety matter at an appropriate time on November 30, 1979, the Arbitrator found that, "Tenney never raised any basis for his refusal other than his contractual rights" (Page 3, Exh. R-7).

DISCUSSION, CREDIBILITY RESOLUTIONS, AND ULTIMATE FINDINGS AND CONCLUSIONS

There is no question but that Mr. Tenney was discharged for failing to obey a direct order to walk down the haulageway to his work site. The general question involved is whether Mr. Tenney engaged in a protected activity, that is, whether his refusal to walk to the work site was because the travelway was unsafe.

Did Mr. Tenney make a safety complaint or raise a safety issue on November 30, 1979? Mr. Gallagher, Mr. Nunez and Mr. Dennison all deny it. Although by the time this matter got to Dennison, I conclude that it was too late for any safety complaint to be made in any event: Tenney had been taken out of the mine at this point and was in the process of being disciplined, having been given repeated chances over a period of time to change his mind. This time period included the time involved in the conversation with Gallagher and with Nunez below

ground, as well as the time spent going up in the cage to the surface and the time spent waiting for Mr. Dennison at his office before the conversation in Mr. Dennison's office occurred.

Highly persuasive evidence establishing that Mr. Tenney did not raise a safety matter on November 30, 1979, is reflected in the transcript of the Lubow Arbitration Proceeding (Exh. R-8). At the bottom of Page 27 of this transcript, Mr. Tenney gives this account of the 8 a.m. refusal after Nunez said they would have to work:

> I asked him how long it would take to get the pole fixed and he said, "An hour and a half." I said, "Well, it's never taken an hour and a half before. It's an outrageous amount of time," and that I felt that I was afforded a ride under the contract, Article III, section (o), paragraph (8). He asked Jim Moore, at the same time, he said, "Are you walking Jim" and Jim told him, "No." [Emphasis added.]

Subsequently, on page 28 after describing interim events, Mr. Tenney made this statement:

> After Mr. Shear went out of there, then Augie told me that we was going to have to walk, and I told him that we wasn't, and I never used no four-letter word, and I didn't tell him that I didn't care whether it took four to six hours. I just told him that I felt under the contract that I was afforded a ride into and out of the coal mine, to and from the working section. Before I could tell him anything else he got on the phone. So, there was other reasons why I wasn't walking, and they said that it's been brought out that it was unsafe or whatever. I thought it was unsafe, but they never even gave me a chance to tell them it was unsafe." [Emphasis added.]

Subsequently, in his testimony, again at Page 28, Mr. Tenney said:

> In my mind, there was two reasons why I didn't do it, didn't walk. One was the contract, and that I felt it was unsafe because it was low top and that area back through there had been, I guess, I was under the assumption it was dangered off. I really didn't know. Plus the fact that it was low. [Emphasis added.]

Again in this transcript (Page 29), Mr. Tenney said:

> We finished doing what we had to do there to tighten up those cribs. We tightened them up the best we could, and once we got that finished, we took the ladder back down to the steps where the jeep runner could come down and get it and take it to where it was going. It was going to some section. Then we went over to the dispatcher's shanty. When I looked at my watch, when I got down off the beams and cribs, it was ten thirty-five, and by the time we got back over to the transportation foreman, it was more like twenty

> 'till eleven. I went in and sat down there in the waiting room. Augie went in and talked to Mr. Jones, he's the transportation foreman. Mr. Gallagher, Mr. Hudson and I don't know who else was in there, I never heard all of the asking of where the jeep was at. I could hear a bunch of whispering going on, it wasn't normal talking, it was whispering. He turned around and came outside and said, he told me, "The jeep ain't available. We're going to have to walk." I told him, "Well, under the contract I still believe I am afforded the ride into and out of the coal mine, to and from the working section." I said, "I am still available to do other work. I am not wanting not to work. I will work." Then I was going to tell him about where I thought it was unsafe. In the next instant Mr. Gallagher came out behind him and said, I think his first words were, You are not walking?" or something to this effect. I really don't know because he said he didn't, he told me he didn't care where the jeep was at, he was giving me a direct order. I said, "Well, I still feel that I am afforded a ride into and out of the coal mine. I still feel that." He said, he asked me if I understood what I was doing and I guess I did, I thought I did, and I told him yes. He said, "I'm going to take you outside." He wasn't talking to Jim Moore. He never said one word to Jim Moore this second time, until after he said that he was going to take me out. Then he turned around and asked Jim, he said, "Are you walking." Jim told him, "Yes, I'll walk" after he told him that he was going to suspend me. Then he said, "Get your bucket" and I told him I didn't have no bucket, I don't carry one. Then he told me, "Come on let's go." I went with him. Going up on the cage I told him, I said, "Anthony Harris tried to fire me before for the same thing" I made the statement, "You tried to fire me before" and he said "No, I ain't never tried to fire you before. It wasn't me. I have't tried." I said, "Well, management tried it." We got outside, went to Mr. Dennison's office, and Mr. Dennison wasn't there at the time. We waited there a couple of minutes or whatever and Mr. Dennison was across the street to the superintendent's office or the main mine office and he came in a minute or two later. I don't know exactly how long it was. [Emphasis added.]

On Page 31 of this same transcript, is a recognition that this proceeding was not a safety matter. Commissioner Luketic made the following statement, "Mr. Arbitrator I am going to have to object to the Commissioner for the Mine Workers getting into Mr. Tenney's feelings about it being unsafe. This was never an issue at any of the prior steps, and to bring in safety at this point would be adding to the grievance." There were Union representatives in attendance at this meeting, as well as Mr. Tenney. No one made any exception to this recognition.

Both the grievance involving the February 18, 1977, grievance for Mr. Tenney's refusal to walk and the entire proceeding for the November 30, 1979, refusal to walk discharge, were treated by all involved parties as a "contract" matter and not a safety matter. In the Pasula decision, supra, the Commission in dicta expressed its approval of the use of arbitrators' findings: "We believe that according weight to the findings of Arbitrators may aid the Commission's Judges in finding facts. A Judge faced with a credibility problem may find the views of the Arbitrator on labor practices in the mine's customs or on the common law of the shop helpful." The sections of the transcript above quoted are not arbitrators' findings which I am adopting. This is a transcript of testimony which Mr. Tenney rendered in these proceedings and thus takes on a much higher degree of weight than even an arbitrator's conclusions and findings. This transcript showing Mr. Tenney's statements was of a proceeding conducted on December 7, 1979--within a very short period after the incident with which we are concerned transpired. I believe it is entitled, in and of itself, to controlling weight on the issue of whether or not Mr. Tenney was engaged in a protected activity on November 30, 1979, when he refused to obey repeatedly an order to walk down the haulageway from the shanty to Old Eleven. There are other reasons for my finding in this connection which will subsequently appear herein.

One of the principles of mine safety law is that "a miner who reasonably believes that conditions are unsafe is not required to accept a foreman's evaluation of danger." Phillips v. IBMA, 500 F.2d 772, 780 (D.C. Cir. 1974). A necessary corollary to this concept would seem to be that a mine foreman would have the right to discuss the safety problem with the miner--and evaluate it. To do that, it would be necessary, of course, for him to know what the safety hazard or safety complaint is. On the facts established in this proceeding, neither Foreman, Nunez nor Gallagher, had any cause to evaluate any dangerous condition or to discuss it with Mr. Tenney or to reason with Mr. Tenney with respect to the same. Because of Mr. Tenney's handling of his refusal to walk, discussion of safety or the nature of hazardous conditions was shut off. If Mr. Tenney had the time to make the statement that the company "had tried it before," and the like, he certainly would have had the time to have emphasized any safety complaint or complaints that he might have had as a basis for his refusal. During the considerable length of time that was involved with Nunez and Gallagher prior to the meeting in Dennison's office, it seems inconceivable that if he was so concerned with safety that that would not have been the immediate matter raised by him and emphasized by him at every stage of this episode as it developed from conversation to conversation. The absence of such discussion at any time compels the conclusion that Mr. Tenney was not engaged in a protected activity. Other evidence of this is the fact that the grievance proceeding filed in this proceeding was not treated as a safety matter. At no time during the conversations with Nunez or Gallagher, did Mr. Tenney treat his complaint as a safety matter.

I also find, because of the credibility resolution I make

subsequently, that the accounts of Nunez and Gallagher with respect to the conversation in Dennison's office are to be credited and that Mr. Tenney did not raise a safety matter at that time either.

Mr. Tenney was well aware of his contract rights as a safety commiteeman. If this record establishes anything, it is that Mr. Tenney is not inclined to sit on such rights and in his own testimony Mr. Tenney has pointed out his awareness of the bulletin board, safety matters, and the like at all times, even after he was removed from the safety committee. This matter has not been treated as a safety matter by Mr. Tenney or any of the other parties, including the Union.

To fully understand the November 30, 1979, refusal to obey an order, the February 18, 1977, episode must be examined as well as a third "refusal" incident testified about by Respondent's section foreman, John Wujcik. Complainant admits that the grievance proceeding filed by him on the 1977 refusal to walk was not processed as a safety grievance under the contract. Mr. Wujcik testified that in 1979, when Mr. Tenney was a roof bolter on his section (No. 3 South) for 2 weeks, a portal bus broke down. Wujcik asked the crew to walk to the section. Mr. Tenney said that they were supposed to have transportation and that he would walk under protest. The significance of this testimony is simply that the contract right asserted by Mr. Tenney in refusing to walk on two prior occasions did not involve a safety matter. It indicates that this right to transportation has been a major cause of Mr. Tenney in the past.

I find that Mr. Tenney's refusal on November 30 was not made in good faith for the following reasons. The result reached in the arbitration of the February 18, 1977, refusal to walk was that the contract right to transportation applies only to the beginning and ending of a shift. While this ironically might have justified Mr. Tenney's refusal at 8 a.m. on November 30, 1979, it underscored that there was no such right to transportation otherwise. This was a proceeding which involved Mr. Tenney himself. Although Mr. Tenney denied that he had read the Arbitrator's Decision, he did admit that he had been told what it said. I therefore find that Mr. Tenney had knowledge of the content of that award, even assuming, arguendo, that his denial (that he did not read the award) is to be credited. I therefore find that Mr. Tenney's refusal on November 30 was made in full knowledge of the illegality of doing so and that, accordingly, it was not made in good faith within the meaning of the Commission's ruling in Secretary of Labor v. United Castle Coal Company, 3 MSHRC 803 (1981). I find that the Respondent has met the exceedingly difficult burden of proof placed on it by the United Castle decision in that it has established an absence of good faith in Mr. Tenney's work refusal--assuming the same should become relevant. The finding of an absence of good faith would be relevant only in the event that my finding that Mr. Tenney was not engaged in a protected activity on November 30, 1979, is overturned.

Taking up now Complainant's contention that he was a victim of a conspiracy by Respondent's management, it is well to recall initially that Edmund Jones, the transportation foreman on November 30, 1979, mentioned a telephone call that he received from Mr. Dennison telling him not to give Mr. Tenney

transportation back to his job. Jones said that Dennison gave him no reason, but that he, Jones, knew the reason. Another witness for

Complainant, Ira Varner, a motorman at the No. 2 Mine testified, inter alia, that he had heard Mr. Jones say something to the effect that Mr. Tenney had been set up. Respondent's witnesses, Gallagher, Nunez and Dennison have denied this allegation. In final argument, Complainant's counsel has taken the position that Nunez and Gallagher were not involved and that the conspiracy would have been between Dennison and Jones. Thus, to find any basis for the conclusion that Mr. Tenney was set up would necessarily require the crediting of Mr. Jones' testimony. To find a conspiracy in this connection, so also would Mr. Tenney's testimony to some extent have to be credited.

Mr. Jones' testimony is suspect for several reasons. The first is that as a member of Respondent's management he, patently, is a renegade. In and of itself this means nothing, but the fact stands out that he is attempting to blow the whistle against others in management in this case. Secondly, his testimony with respect to the instruction he received from Dennison contains an uncertainty. Assuming, arguendo, that Dennison did tell Jones that he was not to give Tenney transportation, Jones acknowledges that Dennison gave him no reason for this order. Jones says, "I knew the reason," meaning that he was reading into what Mr. Dennison said Mr. Dennison's motivation. A third reason why I do not credit Mr. Jones' testimony in this respect, is the confusion that he had with respect to the time of this conversation. Furthermore, his testimony that he told James Moore that he had better get away because Tenney was going to be fired was not confirmed by Moore.

In determining whether Mr. Jones' testimony should be credited or Mr. Dennison's denial should be credited, the demeanor of the witnesses plays an important part of the resolution in this case. Although in many cases a witness' demeanor and what is physically displayed by a witness while testifying is not a bellwether of the trustworthiness of the witness, I find in this case that it is. Mr. Jones conveyed a sense of being in touch with a different reality than all other witnesses in this proceeding including Mr. Tenney. There are two sides in this proceeding and naturally there are wide divergences in testimony between the witnesses on one side and the other. Mr. Jones' testimony struck me as totally out of line with the testimony of the other witnesses in the way that it was delivered, in its quality, and with the sense of sincerity in which it was presented. This was not entirely traceable to the fact that he smiled throughout his testimony which, I believe, is simply his personality.

Finally, a powerful reason for the reduction of the weight in reliability to be accorded to his testimony is the fact that he is engaged in a discrimination suit which is still pending against the Respondent in this proceeding. The type and nature of this litigation like the present litigation is one which stirs high emotions. I therefore credit Mr. Dennison's denial of this alleged conversation and find that in all the circumstances and for the reasons stated, Mr. Jones' testimony is not trustworthy.

With respect to the weight to be accorded to the testimony of Mr. Tenney, it is noted that Mr. Tenney's account of the conversations with Foremen Nunez and Gallagher were not sufficiently detailed to be persuasive. His testimony

at times with respect to whether he raised a safety complaint or not seemed calculated to avoid a direct answer. His testimony in contexts other than the conspiracy contention are also found to not inspire a high degree of confidence. For example, on cross-examination, he did not satisfactorily explain his failure in the Lubow proceeding to mention that a complaint of unsafe conditions along the haulageway in the November 30 episode had been made. In at least one point in that part of the transcript, which I have included previously in this decision, I find that Mr. Tenney was evasive on this point.

Again, Mr. Tenney claimed that he had no time to make a safety complaint on November 30, 1979, a crucial point in this proceeding. Yet, he talked for a considerable time to Foreman Nunez and Dale Gallagher according to his own testimony. This explanation, that he lacked the time to complain about safety conditions, does not ring true and is directly contrary to facts overwhelmingly established in this record.

Again, in resolving credibility I must consider the February 18, 1977, incident. Although this matter was pursued to final arbitration and involved a matter obviously important to Mr. Tenney, Mr. Tenney testified that he had never read the Arbitrator's Decision. This conflicts with his emphasis that he has an intense interest in safety matters and his denial that he did not read this decision is shockingly at odds with every other sense of the man which is shown in this record.

Again, Mr. Tenney's statement that he was thinking of taking action over his removal as a member of the safety committee but was discharged before he got around to doing so, is not the kind of explaination which lends itself to the trustworthiness of other testimony.(FOOTNOTE.1) It is similar in type to the other somewhat incredible explanations mentioned above, all of which are on critical points. Therefore, I am constrained to accept the accounts and versions of the conversations and incidents described by Dennison, Gallagher, Nunez and other of Respondent's witnesses over that of Mr. Tenney in the several places where there is disagreement between them previously set forth above.

Mr. Moore's testimony is obviously calculated to help Mr. Tenney. This was carried to the extent that in at least one instance his testimony conflicted with Mr. Tenney's. Thus, Mr. Moore testified that at the 8 a.m. refusal on November 30, Mr. Tenney raised the subject of safety. Even Mr. Tenney does not claim that he did so at that time and Moore's testimony in this respect conflicts with all the other evidence in this record.

Based upon the foregoing credibility findings and for the reasons previously detailed above, I conclude that the Respondent did not plan, plot, or conspire to set Mr. Tenney up for discharge on November 30, 1979. Other factors are also totally inconsistent with this contention of Complainant.

Thus, I note that on that morning Mr. Gallagher told Nunez to assign Mr. Tenney to an emergency situation which arose simultaneously with Mr. Nunez's report to him that Mr. Tenney had refused to walk. Mr. Gallagher attempted to talk Mr. Tenney out of his refusal. Assuming Mr. Gallagher is not in on some attempt to get Mr. Tenney it would not be much of a conspiracy to go about setting up someone without the participation of the key actors. Evidence in this proceeding indicates that Mr. Gallagher and Mr. Nunez both had the authority to suspend Mr. Tenney for 5 days with intent to discharge without the participation of Mr. Dennison.

I infer from the testimony of John Hetrick, who participated at Step 2 of the grievance procedure and made the decision to discharge Mr. Tenney at that time, that Mr. Tenney was given another chance to return to work. This is an inference, and not a direct finding, based upon Mr. Hetrick's asking Mr. Tenney, "If I asked you to walk now, would you," and Mr. Tenney's reply, "probably not," which was then followed by Mr. Tenney saying that he might, why didn't Mr. Hetrick ask him. I infer that at that point Mr. Tenney was given another chance to snatch victory out of the jaws of defeat and to change his mind. This finding is based upon various accounts of that conversation and the psychology which pervaded the conversation.

In conclusion, on the conspiracy issues even if one were to assume, arguendo, that Dennison and Jones did conspire can it be said that Respondent was discriminating against Mr. Tenney because of safety reasons? The various and numerous prior incidents from 1974 through 1979 which Mr. Tenney has complained of in this proceeding for the most part represent situations where Mr. Tenney was indeed guilty of the infractions which the Respondent charged him with, some of which were found in arbitration. Even assuming, arguendo, that there was a conspiracy,(FOOTNOTE.2) there is no proof that such a conspiracy was because of safety activities--other than the testimony of Mr. Jones which was general and which I have previously not credited. Had there been a conspiracy, whether on November 30th or at some other time, to bring about Mr. Tenney's discharge, on the basis of this proceeding, it is found that it is more likely that such would have been based upon Mr. Tenney's clearly established prior wrongful conduct or even possibly because of the approach which Mr. Tenney took in carrying out his duties, all of which have been previously described.

Another issue which was litigated and deserves some discussion is whether or not the haulageway on November 30, 1979, was safe for a foot traveler proceeding from the transportation foreman's shanty to old eleven switch. The haulageway was said to be 14 feet wide (Testimony of William R. Toothman) and the complaints which Complainant has expressed in this proceeding concerning its condition are that the top was bad, the top was too low, there was danger of a walking miner being struck by motors traveling down the haulageway, and that the escape holes and crosscuts had poles and cribs in them which might block a miner's entry into them when he was attempting to avoid a motor.

Again, the witnesses for Respondent and Complainant differed concerning the safety of this area. In view of my prior rulings, a lengthy analysis of this testimony is not in order. Nevertheless, I do find that the haulageway on November 30, 1979, was safe for a miner traveling it on foot. This finding is based upon the testimony of Respondent's witnesses, Nunez, Gallagher, Lamb, Glen Shamblen, John Hetrick, and Gary Cumberledge. Mr. Hetrick, presently a superintendent of another mine of Respondent, testified that state inspectors or federal inspectors inspect this mine (Federal No. 2) at least every 24 hours. In addition, the Union safety committee helps to see that the mine is kept in compliance.

Gary Cumberledge, an assistant mine inspector employed by Respondent, testified that at request of counsel he made a review of federal and state inspections of the haulageway in question for 6-month periods before and after November 30, 1979, that is, from June 1979, to June 1980, to determine how many accidents had occurred along the haulageway and how many violations had occurred. He testified that there was no record of any roof fall or accidents during this period and that while there were violations none pertained to roof control or shelter holes.

Keeping the foregoing in mind, it is important to consider that the four or five conditions mentioned by the Complainant (in his testimony herein) as present in the mine on November 30, 1979, were all generally described. There was no specific place in the mine mentioned nor specific safety hazard which was raised by Mr. Tenney or has been raised in this proceeding. Witnesses have testified on the one hand that there were derailments and, on the other, that there were not derailments along the haulageway. Witnesses have testified that the top was low, while other witnesses have testified it is not low all the way along the area in question. Witnesses have testified that motormen traveling on their equipment through the haulageway have to bend over and cannot see over the top of the equipment, while another witness has testified that they can see over it. Witnesses have testified that it was safe to duck into a cross way or an escape hole, while other witnesses have said that there might be difficulty doing it because they were filled with timber. The quality of the testimony and the type of testimony with respect to these complaints is all relatively general because the complaints themselves are not specific. Complainant did mention one (specific) incident which occurred in the haulageway on February 20, 1979, when a roof fall occurred. This (incident) was also testified to by David Schauffner, a bolt-machine operator. Mr. Tenney testified that he had that in his mind on November 30, 1979. However, at no time was this expressed. In any event, does Complainant ask that because of that roof fall a finding be made that the haulageway on November 30 was unsafe for anyone to travel it? I find that this evidence does not establish (1) the condition of the haulageway on November 30, or (2) that it would be reasonable for a miner to believe that the haulageway was unsafe on November 30, because of a roof fall in February. Otherwise, if such were the case, one roof fall in an area would permanently close down the area. There was much testimony of

similar quality in this record. I find that the fact of the matter is that the haulageway had been in the general condition described by Complainant's witnesses for

a long time and that it was so operating on November 30, 1979, that it was being inspected and repaired regularly, and that there was no showing having any probative value that the haulageway was unsafe at that time. There was no (safety-related) occurrence in proximity to the date of Mr. Tenney's discharge. I find that Mr. Tenney was not reasonably entitled to raise a complaint with respect to the safety of the haulageway on November 30, 1979.

I also find, based upon the testimony of Respondent's witnesses, that miners customarily traveled down the haulageway, and they were not just fire bosses or supervisory personnel but contract employees. In any event, fire bosses and supervisory personnel are "miners" within the meaning of the Act. Complainant might well contend that under the contract what is in issue is the right to a man trip ride down the haulageway. But that is not what is involved in the context of this issue. The question is whether the haulageway was safe and whether whoever was traveling down it, if they are miners (and that includes supervisors, foremen and the like), would be exposed to a hazard. Thus I have found that the haulageway was being walked by miners in different job classifications regularly at that time and that Mr. Tenney was not reasonably entitled to the belief that the haulageway was unsafe on November 30. I infer that this is why he made no such contention at the time. Finally, if the haulageway was as unsafe as claimed by Mr. Tenney and some of his witnesses one would suspect that the Union safety committee would have done something about it during the 2- or 3-day period preceding November 30. Mr. Tenney did not contend or establish that the haulageway was in any different condition or in any unusual condition on November 30, i.e., different from other times prior to or after November 30.

Taking up now another complaint raised by Mr. Tenney, that after he was removed as safety committeeman his roof bolting duties were taken away and that he thereafter spent 90 percent of his time shoveling, the record establishes that this change was necessitated by a change in the safety laws which made it impossible for the Respondent to continue using the type of roof-bolting machine Mr. Tenney was operating at the time. Respondent clearly established that the change in the interpretation of these safety requirements required withdrawal of this type of machine from service. No showing of different or unequal treatment toward Mr. Tenney relative to other employees in this connection was established. No showing or evidence whatsoever that this change in his duties was related to Mr. Tenney's safety complaints or his activities as a safety committee member was presented. Mr. Tenney was given other work at the same rate of pay and he filed no grievance under the Union contract or discrimination charges with the Mine Safety and Health Administration at the time. It is thus found that there is no evidence of disparate treatment, harrassment, or discriminatory motivation involved in this occurrence.

At one stage in this proceeding, Mr. Tenney contended the disciplinary slips which he received for not punching in or out

on the time clock on several occasions were part of Respondent's retaliation for his safety activities. Respondent, however, established beyond question that its system for gathering up these time cards at the change of each shift and comparing

them with its personnel roster is automatic. Mr. Tenney's inclusion of these incidents as part of his evidence of alleged animus toward him further colors the credibility to be attached to his ability to objectively interpret the other events he has complained of in this proceeding. (See testimony of Dale Gallagher with respect to the Respondent's procedure.)

Finally, a great deal of the record was devoted to establishing how satisfactory an employee Mr. Tenney was. For the most part, the evidence presented on this topic was in the form of opinion. Again, witnesses on either side of this litigation had different views of Mr. Tenney's worth as an employee. Some said he was lazy, some said he worked hard. Some of the testimony was too remote to be probative. For example, the testimony of Sherman Perkins related to a period in 1971. In any event, it is clear that Mr. Tenney was not discharged because his work performance or production was below par. Nor is there any evidence that his general work performance was unsatisfactory. Respondent's witnesses in one of the arbitration proceedings did indicate that they rated Mr. Tenney in the lower third of the mining force. No evidence was presented that Respondent's management personnel repeatedly or incessantly told Mr. Tenney that his work performance was unsatisfactory or that the amount of work he did was insufficient. Some foremen testified that they considered that it was, but no basis in evidence was established by Respondent to show that he was an unsatisfactory employee. Indeed, Respondent over the period of the years of Mr. Tenney's employment, and during the 2-1/2 years after he was removed from the safety committee, allowed Mr. Tenney to perform his job in the ultra-safe manner that he insisted upon. Considering the length of Mr. Tenney's employment and the absence of comparative statistics comparing Mr. Tenney's experiences with other employees similarly situated, I find no pattern of reprisals, reprimands, harrassment, or even sarcastic remarks has been shown. On the other hand, I also find that Mr. Tenney was not an unsatisfactory worker in terms of production. He was an extremely fastidious person with regard to insisting on the safety aspects of his duties and I accept the characterization of one witness who said that he was "a fair bolter." Finally, however, I do find that the incidents complained of by Mr. Tenney himself in this case do establish somewhat of a record of improper behavior on his part. That has been previously described.

I find that there has been no showing of disparate treatment toward Complainant traceable to his safety activities or otherwise. That is, it was not shown that other miners who refused to obey direct orders were not disciplined or disciplined with the same severity as Mr. Tenney. In this connection, however, Respondent's treatment of Mr. Tenney's helper, Jimmy Moore, should be discussed. Moore did refuse to obey the same order at 8 p.m. as Mr. Tenney did initially, according to Respondent's witnesses. Assuming, arguendo, that this is the case, it is noted that both Mr. Tenney and Mr. Moore were given the opportunity to change their minds. Tenney refused to do so. Moore did change his mind and was put to work. Tenney, even

after this point in time, was given the opportunity but did not change his mind. I find no evidence of disparate treatment in these circumstances.

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For the reasons stated hereinabove, I find that Complainant failed to establish by a preponderance of the evidence a prima facie case of discrimination. In particular, the Complainant did not establish that he was engaged in a protected activity when he refused to obey a lawful order to walk to his work place during the episode which started at approximately 10 a.m. on November 30, 1979.

Accordingly, it is found that there is no merit in Complainant's complaint filed herein and the same should be dismissed. It is ORDERED that all proposed findings of fact and conclusions of law not expressly incorporated in this decision are REJECTED. For the various reasons stated, this proceeding is DISMISSED.

Michael A. Lasher, Jr. Judge

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~FOOTNOTE_ONE

In view of the time interval between the two events.

~FOOTNOTE_TWO

No such finding is made.

ATTACHMENT "A"

Summary of the Documentary Evidence

Joint Exhibit No. 1	National Bituminous Coal Wage Agreement of 1974 (hereinafter, the "Contract").
Joint Exhibit No. 2	Grievance of Carroll Tenney, dated March 7, 1977.
Union Exhibit No. 1	Notice of Improper Action, dated February 18, 1977, for Grievant, Carroll Tenney.
Company Exhibit No. 1	Notice of Suspension with Intent to Discharge, dated February 18, 1977, with accompanying Notice to Return to Work, dated June 21, 1977.

Summary of the Transcript of Testimony

Grievant, Carroll Tenney, roof bolter, works on the day shift at the company's Federal No. 2 Mine, at Miracle Run near Blacksville, West Virginia.

On the morning of Friday, February 18, 1977, Grievant reported at 8 a.m. to the office of Anthony Harris, general mine foreman, for a meeting to discuss progress on the "Two North Tunnel Stall", where Grievant was then working.

Upon completion of the meeting, Grievant went to the dispatcher's shanty at the bottom of the mine. From this point, Grievant and six other employees were planning to commence a safety drill of walking the escapeways. The group proceeded to "One West, Right Side" by portal bus, where they got off and walked the returns to the Scott's Run air shaft. Grievant walked with his roof-bolter helper, Jim Merchant.

The procedure of walking the escapeways was pursuant to the requirement of the Contract that the "Employer shall regularly instruct all Employees as to the location of all escapeways and the proper procedure to be followed in cases of emergency exit." Contract, Article III, Section (o)(12), p. 19.

Upon completing the emergency procedure, Grievant and Merchant returned to the dispatcher's shanty at about 10:30 a.m. to await a mantrip to take them to their work station at "Two North Tunnel Stall".

Glenn Shamblen, transportation foreman, sought to arrange a ride for Grievant and Merchant through Anthony Harris, general mine foreman. Harris determined that there was no transportation available, and then said to

Shamblen: "Let them walk." Grievant, not realizing that Harris was in the area, commented: "That is a long way back." Harris then asked Shamblen again if a ride was available, and upon receiving a negative reply, said to Grievant: "Then you walk."

Grievant remonstrated, and Harris said: "Are you disobeying a direct order?" Grievant replied: "No, I am not disobeying a direct order. The Contract, under Article III, Section (o)(8), guarantees me a ride to and from the working section."

Harris also questioned Merchant as to whether he was refusing to walk, but Merchant replied: "I haven't said anything." Whereupon, Harris put Merchant to work cleaning the transportation shanty. He instructed Robert Sowden, grade foreman, to take Grievant outside and suspend him with intent to discharge.(FOOTNOTE-a) Grievant accompanied Sowden to the outside and took a shower. Sowden prepared a "Notice of Improper Action" (Union Exhibit No. 1), and left it on Grievant's basket.

Grievant missed 4 days of work as the result of his suspension, returning to work on February 24, 1977.

Glenn Shamblen, transportation foreman, testified that it would have been as much as 1-1/2 hours before a mantrip would have become available to take Grievant and Merchant to their work stations. A number of other employees obtained rides to their various stations, after walking the escapeways. Some "got on their motors and left"; while others "took the bus and went to the work area" (Tr. 20).

Robert Sowden, general foreman, testified that the "wire men have their own work bus with all their tools" (Tr. 22). This bus might have accommodated Grievant and Merchant, but Sowden did not suggest that it be used to transport them. In his words, "This is not my job. I don't have anything to do with that" (Tr. 23).

Sowden stated that his own jeep was in use on themorning of Friday, February 18, 1977. And the jeep of the general mine foreman, Anthony Harris, was not readily available.

Rodney Jarrett, mine superintendent, testified that a majority of the employees are furnished transportation to and from their work areas, by the use of individual pieces of equipoment, portal buses, or jeeps.

Anthony Harris, general mine foreman, testified further that the clause in the Contract dealing with mantrips to and from the working section was

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applicable at the beginning and end of every shift, but "doesn't include the middle of the day" (Tr. 14). On a prior occasion, Harris had insisted that Grievant ride, rather than walk, to and from his work station at the beginning and end of his shift.

~FOOTNOTE_a)
Grievant was suspended for 5 days with intent to discharge. The company, however, ordered him back to work on the fifth day (February 24, 1977). As a result, his right to compensation, if any, cannot exceed 4 days (Friday, February 18, and Monday, Tuesday, and Wednesday, February 21 through 23, 1977).