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NICHOLAS V. W-P COAL
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19811229
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

NICHOLAS RAMIREZ,
COMPLAINANT

v.

W-P COAL COMPANY,
RESPONDENT

Complaint of Discharge,
Discrimination or Interference

Docket No. WEVA 81-248-D

No. 21 Mine

DECISION

Appearances: Larry Harless, Esq., Charleston, West Virginia, on behalf
of Complainant;
Harold S. Albertson, Esq., Hall, Albertson and Jones,
Charleston, West Virginia, on behalf of Respondent

Before: Judge Stewart

I. Procedural Background

This is a discrimination or interference proceeding arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter, the Act).

Nicholas Ramirez (Complainant) alleges that W-P Coal Company (Respondent) committed acts of discrimination or interference in violation of section 105(c)(1) of the Act. The complaint was filed before the Federal Mine Safety and Health Review Commission (Commission) pursuant to section 105(c)(3) of the Act following the Complainant's receipt of a written notification of the Secretary of Labor's determination that no violation of section 105(c)(1) occurred. (FOOTNOTE 1)

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The hearing in this matter was held on June 17, 1981, in Charleston, West Virginia, with representatives of both parties present and participating. The Complainant called three witnesses: Nicholas Ramirez, Charles Blankenship, and Thomas Marcum. The Respondent called one witness, Kenneth Cooper. Both parties submitted posthearing briefs.

II. Findings of Fact and Conclusions of Law

The Complainant has been employed as a roof bolter at the Respondent's No. 21 Mine for over 4-1/2 years.

When the Complainant arrived on the Second South Section on November 5, 1980, he was directed by one of his supervisors, William Meade, to drill test

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holes in the Nos. 1 and 2 Entries. The test drilling confirmed reports that the roof therein was bad. Mr. Meade then directed the Complainant to bolt No. 3 Entry at 3 Left Break. Upon entering that area, the Complainant observed a board lying in the break which read "needs six foot bolts." After the Complainant drilled test holes in the No. 3 Entry, he discovered that the roof had broken at 5 feet and conveyed this information to Mr. Meade. Mr. Meade ordered the Complainant to proceed elsewhere.

Before the Complainant left the area, Joe Bragg, the assistant mine foreman, ordered him to drill yet another test hole. Mr. Bragg then ordered the Complainant to bolt the area with 30-inch bolts. The Complainant questioned Mr. Bragg's decision, pointing out that the roof was broken, but Mr. Bragg responded "we'll take care of it later on." The Complainant performed the work as ordered until Mr. Meade returned and ordered the Complainant to work elsewhere.

Federal mine inspector Thomas Marcum conducted a regular inspection at the Respondent's No. 21 Mine on November 5, 1980. While conducting this inspection, he was informed, during a telephone conversation with his supervisor, of a complaint that had been made during the earlier shift concerning the roof conditions in the Nos. 1 and 2 Entries on Second South Section. He proceeded to the Second South Section accompanied by Charles Blankenship, the chairman of the local UMWA safety committee and an employee of the Respondent, Mr. Hawkins, the Respondent's safety representative, and Ray Herndon, the superintendent of the Respondent's property in West Virginia. After a number of test holes were drilled in the roof and it was confirmed that the roof in the two entries had broken, the inspection party discussed the alternative methods for supporting the roof. Inspector Marcum, Mr. Blankenship, and management ultimately agreed that the use of straps, headers, legs, and pins would be appropriate. After this agreement had been reached, Inspector Marcum asked the Complainant for his opinion. The Complainant replied that he did not think that the methods proposed would be safe. As a consequence, Inspector Marcum decided to call in a Mine Safety and Health Administration (MSHA) roof-control specialist and obtain his opinion. Management agreed, dangered off the Nos. 1 and 2 Entries and directed that work continue only on the left side of the mine.

Before the inspector left, the Complainant informed him of the conditions in the No. 3 Entry at 3 Left Break, including Mr. Bragg's instruction that 30-inch roof bolts be used. Inspector Marcum thereafter told Mr. Bragg that he wished to speak with him outside.

If the roof conditions were discussed by Inspector Marcum and mine management either on the way out of the mine or upon reaching the surface, they did so casually. Inspector Marcum, Mr. Blankenship, Mr. Hawkins, Mr. Herndon, and Mr. Kenneth Cooper gathered in the trailer which served as the mine office. Kenneth Cooper was the general manager of the Respondent's property in West Virginia. Inspector Marcum, Mr. Blankenship, and Mr.

Hawkins were in one office, either filling out forms or eating lunch. Messrs. Herndon and Cooper went into the adjoining office, closing the door

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behind them. These two remained in that office for approximately 5 to 10 minutes. Inspector Marcum testified that some loud talking went on in Mr. Cooper's office, but that he did not recall anything that was said.

After Mr. Herndon left Mr. Cooper's office, and while Mr. Blankenship sat approximately 3 to 5 feet from the door eating his lunch, Mr. Blankenship overheard Mr. Cooper make a telephone call and ask for Cleve Campbell, Director of Public Relations for Picketts and Mathes Company. Mr. Blankenship heard Mr. Cooper say that "one man has the whole operation shut down up here" and asked if he had grounds to discharge him. Mr. Blankenship, who testified that Mr. Cooper talked on the telephone in a "hollering manner," believed that Kenneth Cooper intended for him to overhear the conversation.

Mr. Cooper testified that he called Cleve Campbell because he felt that management "had exercised every option." Mr. Cooper knew Mr. Blankenship was in the adjoining office but the telephone call was not staged for Mr. Blankenship's benefit. Although Mr. Blankenship testified that the office door was open, the testimony of Mr. Cooper and that of the disinterested witness Inspector Marcum that the door was closed is more persuasive. However, notwithstanding the fact that the office door was closed, Mr. Cooper testified that he has no doubt that Mr. Blankenship overheard the conversation because the office door was thin.

Mr. Cooper called Mr. Campbell because he believed that the Complainant had caused a drop in production. Mr. Campbell told Mr. Cooper to get the facts, weigh them and make a decision. When the shift ended, Mr. Cooper asked his foremen whether they had directed the Complainant to pin the affected area and was told that they had not. Because the Complainant had not disobeyed orders, Mr. Cooper felt that he did not have grounds to suspend him with intent to discharge. Mr. Cooper testified that "that was the end of it." (FOOTNOTE 2)

When the shift concluded, the Complainant found Mr. Bragg waiting for him in the parking lot. Mr. Bragg asked the Complainant what he had told Inspector Marcum. The Complainant responded that he had told Inspector Marcum what Mr. Bragg had ordered him to do. Mr. Bragg then accused the Complainant of lying. The Complainant responded that he would not lie for Mr. Bragg to keep Mr. Bragg out of trouble because Mr. Bragg knew that what he did was wrong.

Mr. Blankenship observed Joe Bragg and the Complainant in the parking lot. Mr. Blankenship testified that Mr. Bragg was "kind of yelling." However, Mr. Blankenship did not hear what was said. After Mr. Bragg left, Mr. Blankenship informed the Complainant of the telephone call and stated that he would contact Richard Cooper, the union safety representative, for assistance.

On the following day, an inspection party comprised of Inspector Marcum, Mr. Alitzer (Inspector Marcum's supervisor), Mr. J. C. Wharf (an MSHA roof-control specialist), Mr. Griffin (a state roof-control man), Richard Cooper, the Complainant, Clifford Tomlin (the Complainant's helper), Mr. Herndon, Mr. Meade, Mr. Bragg, and Mr. Blankenship returned to the Second South Section. Kenneth Cooper did not enter the mine. Earlier that morning, Kenneth Cooper was asked by Mr. Alitzer if somebody was "going to lose their job over this." Mr. Cooper responded to the question by asking Mr. Alitzer what he was referring to. Mr. Alitzer then said "We're here because we heard somebody was going to be discharged." Mr. Cooper stated that no one was to be discharged.

The inspection party observed the condition and discussed resolution of the problem. They agreed among themselves that the area should be supported with 5-foot roof bolts, and with "headers and legs." (FOOTNOTE 3) This conclusion was the same as that reached on November 5. The miners working in the area were called together and asked if they thought this would be safe. No one responded. Mr. Wharf then asked the Complainant what he thought of this method of supporting the roof. The Complainant responded with the following statement: "Well, I heard the company was trying to fire me yesterday for what I had suggested or the statement that I had made and I don't want to say anything about it today."

One week later, Ray Herndon approached the Complainant while the Complainant and his helper, Clifford Tomlin, were putting up headers and were roof bolting. There were four or five other union men in the area helping to put up the headers. Mr. Herndon watched the work for a while and then asked the Complainant who had told him that the company was trying to fire him. The Complainant "didn't say anything." Mr. Meade, who was present at the time, said, "Well, I guess he don't want to tell you Ray, he's not saying anything." The Complainant replied, "No, I don't." Herndon then said, "Well, there must be something wrong with you." The Complainant replied, "No, Ray. There's not. What's wrong up here is bad management, you've got bad management up here." Mr. Herndon "got kind of mad at that." The Complainant "just went about his job and started to bolt the headers." Mr. Herndon ordered Clifford Tomlin to shut the machine off, but the Complainant turned the machine off before Tomlin could do so. Mr. Herndon told the Complainant that, if the conditions were

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as bad as the Complainant thought, he should find employment somewhere else. Mr. Herndon stated that the Complainant was given his job through Pedro Mendez, a night foreman at the mine who was a distant relative of the Complainant. The Complainant interpreted the statement as implying that he was somehow indebted to the company for hiring him, and he responded by stating, "Well, what does that mean, Ray, am I supposed to kiss your butt or something for it * * *." When Mr. Herndon attempted to continue arguing, the Complainant did not say anything in response because he felt that Mr. Herndon was trying to "start something up." This opinion as to Mr. Herndon's motive stemmed from the Complainant's belief that the Respondent was attempting to discharge him. The Complainant finished his shift.

Mr. Herndon reported this incident to Mr. Cooper. He stated that he had gone to the Complainant because he "want[ed] things to be different" but when he attempted to talk with the Complainant, the latter began cursing and said that he was not a fit mine manager; that the Complainant had called Mr. Herndon a liar in the presence of other miners but, when questioned, had failed to identify the occasions on which Mr. Herndon had lied. Mr. Herndon also told Mr. Cooper that he wanted to bring suit against the Complainant because he felt that the statements jeopardized his job. Mr. Cooper advised Mr. Herndon to simply forget the incident.

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 order to establish illegal discrimination or interference within the meaning of section 105(c)(1) of the Act, the Complainant must prove by a preponderance of the evidence: (1)

that he engaged in protected activity, and (2) that an adverse action was taken against him which was motivated in

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any part by the protected activity. Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2 BNA MSHC 1001, 1980 CCH OSHD par. 24,878 (1980), rev'd. on other grounds sub nom. Consolidation Coal Company v. Marshall, No. 80-2600 (3rd Cir., filed October 30, 1981); Secretary of Labor ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803, 2 BNA MSHC 1213, 1981 CCH OSHD par. 25,287 (1981); Secretary of Labor ex rel. Johnny N. Chacon v. Phelps Dodge Corporation, No. WEST 79-349-DM (FMSHRC, filed November 13, 1981).

The Complainant maintains in his posthearing brief that he engaged in protected activity on November 5, 1980, when he voiced his disagreement with the decision reached by Inspector Marcum and the other members of the inspection party regarding correction of the roof problems in the Nos. 1 and 2 Entries. The Complainant argues that the Respondent's management employees reacted to such protected activity in such a fashion as to discriminate against him and interfere with the exercise of his statutory rights under the Act; and that such unlawful discrimination or interference can reasonably be expected to have a chilling effect on the exercise of statutory rights by other miners in that they will be deterred either from reporting safety violations or from expressing their concerns over safety matters.

The initial question presented is whether the Complainant engaged in protected activity on November 5, 1980. The evidence establishes three separate instances of protected activity occurring on that day. The first instance of protected activity occurred when the Complainant questioned Mr. Bragg's decision to use 30-inch roof bolts in the No. 3 Entry of the Second South Section. The second instance occurred when the Complainant voiced his disagreement with the decision reached by Inspector Marcum and the other members of the inspection party regarding the roof problems in the Nos. 1 and 2 Entries. In challenging the proposed solution, the Complainant engaged in protected activity. (FOOTNOTE 4) The third instance of protected activity occurred when the Complainant informed Inspector Marcum of the roof conditions in the No. 3 Entry and of Mr. Bragg's instructions to use 30-inch roof bolts there.

The second question presented is whether the Respondent either discriminated against the Complainant or otherwise interfered with the exercise of the Complainant's statutory rights. The burden is upon the Complainant to prove by a preponderance of the evidence that the Respondent took adverse action against him and that such action was motivated in any part by the Complainant's participation in protected activity.

It is undisputed that the Respondent neither suspended nor discharged the Complainant. Instead, the Complainant argues that adverse action was

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taken against him in that he was the "recipient of a series of threats or verbal reprisals merely because he gave an honest answer to a directed question by a federal safety inspector" (Complainant's Posthearing Brief, p. 1). The so-called series of threats or verbal reprisals which allegedly constitute the adverse action taken against the Complainant allegedly occurred when the Respondent's agents allegedly (1) berated the Complainant, (2) threatened him with the loss of his job through his safety committeeman, and (3) impliedly threatened him with the loss of his job on November 12, 1980, because he had participated in a Federal mine safety inspection. For the reasons set forth below, I conclude that no threats or verbal reprisals were directed against the Complainant in retaliation for his having engaged in protected activities.

The incident in which the Respondent's agent allegedly berated the Complainant occurred at the end of the November 5, 1980, day shift when Mr. Bragg, the assistant mine foreman, confronted the Complainant on the parking lot (Complainant's Posthearing Brief, p. 2). The relevant facts and circumstances surrounding the incident show that the Complainant was never ordered to bolt the roof in the Nos. 1 and 2 Entries. However, early in the day shift on November 5, 1980, Mr. Bragg ordered the Complainant to perform roof bolting in the No. 3 Entry at 3 Left Break. Mr. Bragg ordered the Complainant to use 30-inch roof bolts despite the fact that the roof was broken at a depth of approximately 5 feet. The Complainant questioned Mr. Bragg's decision, but performed the work as ordered until told by Mr. Meade to work elsewhere.

Later that shift, during the inspection of the Second South Section, the Complainant informed Inspector Marcum of the conditions in the No. 3 Entry at 3 Left Break and of Mr. Bragg's instruction to use 30-inch roof bolts. The Complainant subsequently overheard Inspector Marcum tell Mr. Bragg that he wanted to talk to him outside.

After the November 5, 1980, day shift, Mr. Bragg confronted the Complainant on the parking lot. He asked the Complainant what he had said to Inspector Marcum and accused the Complainant of lying to the inspector. Mr. Bragg left after the Complainant responded forcefully.

The Complainant has failed to prove either that this confrontation amounted to adverse action or that it was motivated in any part by the Complainant's participation in protected activity. First, the Complainant's characterization of the parking lot episode is palpably inaccurate. The Complainant argues that the confrontation on the parking lot addressed the incident in which he voiced his disagreement with the decision reached by Inspector Marcum and the other members of the inspection party regarding correction of the roof problems in the Nos. 1 and 2 Entries. In his posthearing brief (p. 2), Complainant states:

Surely the accusation of a supervisor to an employee

that the latter is "lying" about his participation in a safety inspection, when all the employee did was to voice his solicited, unenforceable opinion to a government safety

inspector, constitutes a clear violation of the Act and undermines its effective enforcement.

The record clearly discloses that Mr. Bragg was not motivated by such considerations. Additionally, it should be noted that during the confrontation neither the Complainant nor Mr. Bragg addressed the incident of protected activity which the Complainant relies upon in his posthearing brief as forming the basis for the claim of unlawful discrimination or interference.

Second, Mr. Bragg did not challenge the Complainant for his having spoken with Inspector Marcum concerning the situation in the No. 3 Entry at 3 Left Break. Rather, he disputed only the accuracy of that communication and the truthfulness of the Complainant. (FOOTNOTE 5) The Complainant did not establish that Mr. Bragg attempted to intimidate or threaten the Complainant in any manner. In fact, the record indicates that Mr. Bragg walked away from the Complainant and did not raise the matter again. To put things in complete perspective, note should be taken of the inflammatory statements made by the Complainant to Mr. Herndon on November 12, 1980, in which the Complainant vilified Mr. Herndon in the presence of other miners, cursing and berating him, and calling him a liar and an unfit mine manager.

In view of the foregoing, the Complainant's assertion that Mr. Bragg's action amounted to a violation of section 105(c)(1) of the Act is rejected.

The Complainant also argues that one of the Respondent's agents employed Mr. Blankenship, the union safety committeeman, as a conduit to threaten the Complainant with the loss of his job. The Complainant is referring to the November 5, 1980, telephone call placed by Mr. Kenneth Cooper to Mr. Cleve Campbell from the trailer which served as the mine office, a telephone call which concerned the possibility of discharging the Complainant. The Complainant maintains that Mr. Cooper either staged the telephone call exclusively for Mr. Blankenship's benefit or at least intended for Mr. Blankenship to overhear the call, and, accordingly, argues that Mr. Cooper relied upon Mr. Blankenship to unwittingly act as a company agent by relaying the threat to the Complainant.

The specific facts surrounding the alleged threat show that during the course of the November 5, 1980, inspection of the Second South Section, mine management, Inspector Marcum, and the union safety representative reached a conclusion as to the proper method of supporting the bad roof in the Nos. 1 and 2 Entries. When Inspector Marcum questioned the Complainant, he objected to the methods agreed upon by the others. As a result, the inspector and management agreed to danger off the area and to postpone final decision as to the proper methods for support until the following day when the opinion of a roof-control expert could be obtained. Work was to continue in another area of the mine.

After this decision had been reached, members of the inspection party proceeded to the mine office. Mr. Ray Herndon went into Mr. Kenneth Cooper's office, closing the door after himself. Inspector Marcum, Mr. Hawkins, and Mr. Blankenship remained in the adjoining office. After a few minutes, Mr. Herndon left Mr. Cooper's office, and Mr. Cooper then placed a phone call to Cleve Campbell. Mr. Cooper was aware that Mr. Blankenship and Inspector Marcum were in the adjoining office and that the conversation might be overheard by them. Although the door to the office was closed, the construction of the trailer which housed the offices was such that Mr. Blankenship did overhear the conversation. Although Inspector Marcum was in the room with Mr. Blankenship, he did not know that Mr. Cooper was talking on the telephone and he did not overhear what was said.

Mr. Cooper told Mr. Campbell of the earlier safety complaint filed with MSHA by some unknown individual concerning the roof conditions in the Nos. 1 and 2 Entries of Second South Section, (FOOTNOTE 6) of the subsequent inspection of the two entries, and of the concurrence of all but the Complainant as to the proper method of roof support. Mr. Cooper asked if he had grounds to discharge the Complainant. Mr. Campbell responded by asking whether the Complainant had disobeyed direct orders, and he advised Mr. Cooper to gather and weigh the facts and to thereafter make a decision. At the end of the shift, Mr. Cooper questioned his foremen and found that the Complainant had not disobeyed a direct order to work. He therefore dropped the matter. (FOOTNOTE 7)

As noted above, the gist of Complainant's position here is that Mr. Cooper intended Mr. Blankenship to overhear his conversation with Mr. Campbell, to comprehend it as a threat and to relay the threat to the Complainant. According to the Complainant, Mr. Cooper intended the Complainant to be influenced thereby to drop his objections to the method proposed for supporting the roof in the Second South Section and hesitate to voice safety complaints in the future.

Mr. Cooper testified, and it is accepted herein, that he did not stage a demonstration for Mr. Blankenship's benefit. He had no intention of conveying a threat either to Mr. Blankenship or to the Complainant through the agency of Mr. Blankenship. The surrounding circumstances lend credence to Mr. Cooper's assertion that he did not intend to threaten the Complainant. To begin with, Mr. Cooper knew that Inspector Marcum was also in the adjoining office and that he might overhear the telephone call. It is highly improbable that he would threaten a miner for safety-related activity within hearing of a representative of the Secretary of Labor, the entity with principal responsibility for ensuring compliance with section 105(c) of the

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Act. Furthermore, the testimony of both Mr. Cooper and Inspector Marcum establishes that the door between the offices was closed. That the door was closed further reduces the likelihood that Mr. Cooper intended to have Mr. Blankenship overhear his conversation.

In addition to the foregoing, the telephone conversation was limited to a discussion of the propriety of discharging the Complainant. Clearly, a decision to discharge had not been made. The question was raised as to whether grounds for discharge existed and the conversation concluded with the decision to seek more information.

Mr. Cooper's follow-up actions are also inconsistent with the theory that the conversation was a threat. When Mr. Cooper questioned the Complainant's supervisors and discovered that grounds for discharge did not exist, he dropped the matter.

Finally, it is noted that Mr. Herndon initiated his conversation with the Complainant on November 12, 1980, by asking who had told him that he was to be discharged for having voiced a safety complaint. Mr. Herndon left Mr. Cooper's office immediately prior to the telephone call to Mr. Campbell and was present on November 6 when the Complainant stated that he was to be discharged for his safety complaints. If it was the intent of mine management to have threatened the Complainant on November 5, it is likely that Mr. Herndon would have been aware of the threat. His posing the question to the Complainant on November 12, 1980, is inconsistent with his having had such knowledge.

In view of the foregoing, I conclude that Mr. Cooper did not make the telephone call for the purpose of having Mr. Blankenship overhear the telephone conversation and conveying it to the Complainant. I further conclude that in conducting the telephone call, Mr. Cooper neither threatened nor intended to threaten the Complainant, either directly or indirectly, with the loss of his job. Accordingly, the telephone conversation did not constitute discrimination or interference in violation of section 105(c)(1) of the Act.

The Complainant also maintains that an agent of the Respondent, Mr. Ray Herndon, impliedly threatened him with the loss of his job on November 12, 1980, because he had participated in a Federal mine safety inspection. The Complainant argues that one "perceive[s] the unmistakable hues of illegal reprisal" in this conversation.

The record shows that Mr. Herndon approached the Complainant in a conciliatory manner and attempted to discuss the Complainant's allegation that the company was trying to discharge him. The Complainant made little or no effort to accommodate Mr. Herndon. The testimony of both the Complainant and Mr. Cooper established that the Complainant was antagonistic in the presence of other miners to the point of cursing and berating Mr. Herndon, and calling him both a liar and an unfit mine manager. It is Complainant's contention that Mr. Herndon threatened him by

suggesting "that, if the conditions were

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as bad as [the Complainant] thought they were * * * maybe [the Complainant] should find employment somewhere else"; and by reminding him that he had obtained his job through a company supervisor who was also one of the Complainant's distant relatives. However, Mr. Herndon made these statements after the Complainant antagonistically stated that management at the mine was bad. Mr. Herndon reported to Mr. Cooper that the Complainant had specifically stated in the presence of other miners that Mr. Herndon was both a liar and an unfit mine manager. Mr. Herndon's statements are mild even taken out of context. When considered in context, they cannot be considered a threat or reprisal of any sort.

Additionally, a preponderance of the evidence does not support the position that the Respondent, acting through Mr. Herndon, discriminated against the Complainant or interfered with the exercise of his statutory rights when Mr. Herndon approached the Complainant and sought the identity of the individual who had informed him that the Respondent was trying to discharge him. As noted above, Mr. Herndon was aware of the November 5, 1980, telephone conversation between Mr. Kenneth Cooper and Mr. Cleve Campbell during which the latter directed the former to seek more information and to thereafter reach a decision respecting whether or not to discharge the Complainant. Mr. Cooper followed Mr. Campbell's instructions and concluded that grounds for the Complainant's discharge did not exist. The November 5, 1980, telephone call was intended to be a communication between or among members of the Respondent's management, and was not intended for dissemination outside mine management. Additionally, it appears that Mr. Cooper's further inquiries as to whether the Complainant had disobeyed orders were not intended for disclosure to anyone outside mine management.

Mr. Herndon approached the Complainant on November 12, 1980, because he "want[ed] things to be different," which has been construed to mean that he approached the Complainant in a conciliatory manner. This at least arguably implies that the question as to the informant's identity was directed toward ultimately reassuring the Complainant that the informant had been misinformed and that the Respondent was not trying to discharge him. It is also arguable that Mr. Herndon asked the question, at least in part, in order to determine the identity of the individual who had "leaked" confidential information.

In summary, I conclude that although the Complainant engaged in three instances of protected activity on November 5, 1980, he has failed to establish that the Respondent illegally discriminated against him or interfered with the exercise of his statutory rights in violation of section 105(c)(1) of the Act as a result of his having engaged in such protected activities. Accordingly, the complaint will be dismissed.

Proposed findings of fact and conclusions of law which are not expressly or impliedly adopted herein are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this

case.

ORDER

Accordingly, IT IS ORDERED that the above-captioned complaint be, and hereby is, DISMISSED.

Forrest E. Stewart
Administrative Law Judge

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~FOOTNOTE_ONE

1 The Complainant, acting pro se, filed various documents between January 28, 1981, and March 16, 1981, which collectively constitute the complaint of discrimination or interference. All documents, except the one filed on January 28, 1981, were filed in response to various orders to show cause issued by Chief Administrative Law Judge James A. Broderick. The Respondent's answer was filed on April 3, 1981.

It is undisputed that the Complainant was not suspended or discharged by the Respondent (see, e.g., Tr. 67). The claim, as set forth in the various documents constituting the complaint, is one of discrimination or interference not entailing suspension or discharge.

One of the documents which is part of the complaint is a copy of a February 2, 1981, letter from the Complainant to the Respondent addressed to the attention of Mr. Joe Bragg, foreman; Mr. Ray Herndon, superintendent; and Mr. Kenneth Cooper, general manager. The letter advises the Respondent of the Complainant's disagreement with the Secretary of Labor's determination that no violation of section 105(c) occurred, and states that the Complainant has "requested that the [Commission] review my case." The letter further states that "I have filed this complaint because of your (Mr. Cooper's) decision to have me discharged because of my opinion (requested by MSHA Mine Inspector) on roof conditions on my section."

Another document which is part of the complaint is a February 23, 1981, letter from the Complainant to the Commission which states, in part, as follows:

"The company more or less requested that I keep quiet on safety or loose [sic] my job. I feel that I was wronged in picking me as a guinny [sic] pig to show the other men (union members) what could happen to them if they spoke up on safety problems.

"I was not the person who requested the safety inspection, but I was the one who they threatened to punish for it. If these practices by the company continue, I fear not only for the safety of myself but for my fellow workers who will be reluctant to report safety violations for fear of their jobs."

Another document which is part of the complaint is a March 12, 1981, statement by the Complainant setting forth a detailed statement as to the facts upon which the claim of

discrimination or interference is based. In the statement, the Complainant maintains that "I fear not only for myself but [also] for my fellow workmen who must work under the fear of being punished for reporting safety violations."

As to the relief requested, the February 23, 1981, letter requested "\$20,000 in damages for myself and my family stemming from the pressures put on us by the company (W-P Coal Co.)." The posthearing brief filed by the Complainant, acting through counsel, requests that the "complaint be upheld; that the company be required to post appropriate notices; that reasonable attorney fees and other costs incident to this matter be awarded; and that Your Honor grant such other and further relief as seems proper and just."

~FOOTNOTE TWO

2 There is some uncertainty in the record as to whether Mr. Cooper received accurate information when the inspection party returned to the surface. The Complainant had informed Inspector Marcum that Mr. Bragg had instructed him to install 30-inch roof bolts in the No. 3 Entry at 3 Left Break. However, Mr. Cooper may have been told, or he may have concluded from what he was told, that the Complainant had been ordered to bolt the roof in the Nos. 1 and 2 Entries. However, it is clear that the Complainant was never ordered to install roof bolts in the Nos. 1 and 2 Entries.

~FOOTNOTE THREE

3 Mr. Blankenship testified that the Nos. 2 and 3 Entries were timbered off as a result of the November 6, 1980, inspection. He further testified that mining continued in the No. 1 Entry which was headered and timbered, and that "forty-some inch" pins were used to bolt the No. 1 Entry.

~FOOTNOTE FOUR

4 This is the sole incident of protected activity expressly relied upon by the Complainant in his posthearing brief as forming the basis for the claim of discrimination or interference.

~FOOTNOTE FIVE

5 See footnote 2, supra.

~FOOTNOTE SIX

6 Mr. Cooper testified that he never discovered the identity of the individual who lodged the complaint with MSHA concerning the roof conditions in the Nos. 1 and 2 entries of Second South Section (Tr. 80-81). It appears that Mr. Cooper also discussed this unidentified individual with Mr. Campbell during their November 5, 1980, telephone conversation (see Tr. 91, lines 5-8).

~FOOTNOTE SEVEN

7 See footnote 2, supra.