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FRED GANCHUK V. ALOE COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FRED GANCHUK, LESKO BUGAY, COMPLAINANTS v.	Complaint of Discrimination Docket No. PENN 81-164-D Docket No. PENN 81-165-D
ALOE COAL COMPANY, RESPONDENT	

DECISION

Appearances: Ronald J. Zera, Esquire, Belle Vernon, Pennsylvania, for the complainants Robert A. Kelly, Esquire, Pittsburgh, Pennsylvania, for the respondent

Before: Judge Koutras

Statement of the Proceedings

On February 19, 1981, the complainants filed discrimination complaints with the Secretary of Labor (MSHA), against the respondent pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, claiming that the respondent had discriminated against them by issuing two letters concerning an accident which had occurred on mine property. Both complainants were involved in the accident, and the letters advised them that should such an accident be repeated, the respondent company would take "necessary disciplinary steps appropriate with the accident" against them. Subsequently, on May 8, 1981, MSHA advised the complainants that upon completion of an investigation concerning their complaints MSHA determined that violations of section 105(c) had not occurred. Complainants were advised that if they disagreed with MSHA's disposition of their complaints, they were free to file complaints on their own behalf with this Commission. Complainants subsequently filed their complaints pro se with the Commission on June 3, 1981, and subsequently retained counsel to represent them.

The letters which prompted the complaints of discrimination are dated January 2, 1981, are addressed to the complainants at their residences, and are signed by respondent's Safety Director, P. R. Belculfine. The content of both letters are identical, and they state as follows (Exhibit R-2):

> This letter is being written in reference to the incident on January 2, at noon, whereby the 275-B Hi-Lift backed into the right front side of Company Jeep #20 at the raw coal feed area of the Coal Washer.
>
> Due to the rash of such accidents happening in the last two months, we reposted a Notice in reference to Company Safety Rules and Policy regarding moving equipment in work areas. Fortunately no one has been injured by these accidents, but the near misses and expensive repair bills due to these accidents warrant us to put you on notice.
>
> Equipment operators should have their equipment in control at all times and personnel vehicles should keep far enough away that they will not be backed into by heavy equipment.
> Should such a similar accident happen again, the Company will have to take the necessary disciplinary steps appropriate with the accident.

By agreement of the parties, these cases were consolidated for trial in Pittsburgh, Pennsylvania, April 7, 1982, and the parties appeared and participated fully therein. Posthearing briefs were filed, and the arguments presented have been fully considered by me in the course of these decisions.

Issues

The principal issue presented in these proceedings is whether or not the respondent has discriminated against the complainants and whether the letters which they received as a result of the accident in question were in fact prompted by any protected mine health and safety activities.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 30 CFR 2700.1 et seq.

Testimony and evidence adduced by the complainants.

Lesko Bugay testified that he has been employed by the respondent for 38 years, is a member of the mine safety committee, and also serves as President of Local Union 9636. On January 2, 1981, he was performing

his duties as a "hi-lift" operator at the coal stock pile located on a hill above the mine office. In accordance with the usual procedure, he had been relieved for lunch by Mr. Fred Ganchuk, and he drove a company jeep to lunch. Upon his return, he parked the jeep in the usual spot. As he alighted from the vehicle and looked back, Mr. Ganchuk backed the hi-lift up and struck the jeep. After a few words between them, Mr. Ganchuk went to the mine office and reported the accident. The next day, Mr. Pat Belculfine gave him a letter concerning the incident and informed him that "it didn't mean anything". However, upon reading the letter Mr. Bugay concluded that the last paragraph of the letter placed him on probation for being involved in the accident and he asked Mr. Belculfine to withdraw the letter. When he refused, Mr. Bugay filed a "regular grievance", and another "safety grievance" was also subsequently filed (Tr. 10-14).

On cross-examination, Mr. Bugay stated that he parked the jeep in question in the same spot where Mr. Ganchuk had parked it when he came to relieve him for lunch. He also indicated that he parked it next to the fuel tanks near the coal pile, but no personal vehicles were parked there and he does not park his personal vehicle there either. Mr. Bugay described the coal loading process with the hi-lift and confirmed that he was aware of company policy and the posting of a notice on December 15, 1980, concerning vehicles.

Mr. Bugay testified that the vision to the rear of the hi-lift is bad because of the different equipment obstacles and he assumed that Mr. Ganchuk had observed him when he parked the jeep. He also indicated that Mr. Ganchuk did not waive to him, and he confirmed that he was aware of the fact that prior accidents had occurred and that from his experience around heavy equipment, extra precautions were called for (Tr. 14-18). He also confirmed that during the grievance complaint which he filed, his position was that an oral reprimand, rather than a written letter, would have been appropriate in his case and he wanted the letter retracted, particularly the last paragraph (Tr. 19). He also indicated that others who have been involved in similar accidents never received any letters, and while the company did give him an opportunity to make restitution for the damage to the vehicles, he declined to pay because he did not believe it was "the right way" (Tr. 21).

In response to bench questions, Mr. Bugay stated that the procedure of parking the jeep and being relieved by Mr. Ganchuk for lunch had been followed by both of them over a period of a year prior to the accident. The fender of the company jeep was damaged, but he could not estimate the cost of repairs, and he confirmed that a "hi-lift" is in fact a front-end loader (Tr. 24). It had a back-up alarm, but he could not recall whether it was operational and he confirmed that the loader backed into the jeep while the jeep was parked, and that he was standing approximately 15 feet away at the time of impact. He did not have to get out of the way of the loader in trying to get Mr. Ganchuk's attention, and he assumed that Mr. Ganchuk had seen him and that is why he parked the jeep where he did (Tr. 24-25).

Mr. Bugay stated that the letter jeopardized his job because it places him in an "evaluation program", that "the next step could be my job", and that this was true even if the last paragraph of the letter were to be deleted. He believed that an oral reprimand would have been more appropriate because it makes a person be more alert "by someone telling you that they're not happy with it" (Tr. 26-27).

Fred Ganchuk testified that he was operating the front-end loader which collided with the jeep in question on January 2, 1981. He confirmed that he had relieved Mr. Bugay for lunch and that he did not see Mr. Bugay when he parked the jeep because "he pulled into my blind spot". The jeep was able to move after he hit it, and he reported the accident (Tr. 27-29).

On cross-examination, Mr. Ganchuk described the loader in question as a "six or seven yard bucket", and generally described its dimensions. He conceded that the accident was serious and could have resulted in a fatality. He also confirmed that he was aware of the posted company policy concerning vehicles, and he explained the accident as follows (Tr. 30-31):

> Q. And yet, Mr. Bugay went ahead and parked within your working radius and within your blind spot as you say?
>
> A. Well, this is where we always stop at, because, we watch for each other coming in there. It just happened to be he got in when I wasn't looking back. Got into the blind spot and I didn't see him.
>
> Q. Now, before you pull in there don't you gain the attention of the operator?
>
> A. We do now. At that time we didn't. I watched to make sure that he was looking back and see me and I pulled in there and stopped.
>
> Q. So before this you would always try to gain his attention before you entered his work area?
>
> A. I always watched to make sure he was looking back to see me. He would always give me some kind of a signal that he had seen me in some sort or other, he'd wave his hand or something.
>
> Q. Did you give any signal on this day that you had seen Mr. Bugay come back from lunch?
>
> A. No, sir.
>
> Q. In fact, you say, he must have been within your blind spot?
>
> A. Yes, sir.

Mr. Ganchuk stated that had he seen Mr. Bugay the accident would have been avoidable, and had he waited until he acknowledged his presence the accident would not have happened. He confirmed that the company gave him an opportunity to make restitution for the damaged vehicles but that he declined to do so (Tr. 33).

In response to bench questions, Mr. Ganchuk confirmed that the reason the jeep was brought in close proximity to the end loader he was operating was for the convenience of he and Mr. Bugay, and that this "was a routine thing" (Tr. 35). He also indicated that there is no written procedure as to where the jeep is parked when he relieves Mr. Bugay, and it is "a matter of habit" (Tr. 35). He believed the letter discriminated against him because "the next time that anything happens I lose my job" (Tr. 36). He believes the letter could be used against him as the first step in any future disciplinary action against him, and he confirmed that he also filed a grievance over the incident (Tr. 36).

On further cross, Mr. Ganchuk conceded that the accident merited an oral reprimand from his supervisor, but since it was his first offense of this kind, he believes that the letter was not appropriate (Tr. 40).

Pat Belculfine respondent's safety engineer and safety director, was called as an adverse witness and confirmed that he issued the letters in question to Mr. Bugay and to Mr. Ganchuk. The letters were issued to make them aware of company policy dealing with working around equipment and they are still in their personnel files and will remain there until the instant case is decided. He stated that the accident in question was a serious one and could have resulted in serious injury or death. He explained the last paragraph of the letter and indicated that any future accidents would have to be considered on the merits (Tr. 41-44). Mr. Belculfine identified a copy of a company Notice dated February 13, 1981, dealing with the operation of heavy equipment and a system for operators acknowledging each other. The notice was issued after the letters in question were served on the complainants, and it was part of the settlement of the Union safety grievance (Tr. 44, exhibit R-4).

Mr. Belculfine confirmed that other accidents had occurred at the site of the accident involving Mr. Bugay and Mr. Ganchuk, as well as other accidents involving equipment operators. However, he denied that those involved in those accidents did not even receive a verbal warning (Tr. 45). In response to questions concerning prior accidents involving a Mr. Wolfe and a Mr. Chumpko, Mr. Belculfine acknowledged that they received no letters from the company concerning the incidents (Tr. 46). Mr. Belculfine conceded that the Union had made complaints about the coal pile in question, but insisted that they dealth with "different matters" (Tr. 46).

With regard to the incident involving Mr. Wolfe, Mr. Belculfine stated that while Mr. Wolfe backed into a coal truck, the truck driver was at fault and Mr. Wolfe was not required to

make restitution because it was his own truck (Tr. 46). As for Mr. Chumpko, he was verbally reprimanded, and it was one of the determining factors leading to his discharge (Tr. 47).

Mr. Belculfine confirmed that he spoke with Mr. Bugay about the accident, but could not recall whether he discussed it with Mr. Ganchuk. He denied that he issued the letter to Mr. Bugay because he was on the safety committee and the president of the local (Tr. 48). He also indicated that in considering other accidents which had occurred prior to the incident in question, each incident is taken on its own merits, and in certain instances, reprimands were given (Tr. 48). In response to questions concerning these past accidents, Mr. Belculfine testified as follows (Tr. 50-53):

> THE WITNESS: Okay. On December 12th, there was a hi-lift that backed over the supply truck and demolished the supply truck. The person involved in that accident didn't come back to work. There was a letter drafted to be given to this person. This person did not come back to work and this person voluntarily quit.
>
> The other accident that I think he is referring to at that time, is the Wolfe accident where the hi-lift backed into the coal truck.
>
> JUDGE KOUTRAS: Okay. And is that the case, in which you stated that the truck, that the trucker owned the truck?
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: He was at fault?
>
> THE WITNESS: Yes, the trucker was at fault.
>
> JUDGE KOUTRAS: Who would have been a recipient of a letter, in that case, the other individual?
> I take it that since you made a determination that the trucker was at fault, that he was the only one that would have been reprimanded. And was he an independent contractor, owned his own truck?
>
> THE WITNESS: Independent, yes.
>
> JUDGE KOUTRAS: Not a company employee?
>
> THE WITNESS: No.
>
> JUDGE KOUTRAS: Does that explain why you didn't send him a letter?
> THE WITNESS: Yes.

JUDGE KOUTRAS: All right, Mr. Zera.

BY MR. ZERA:

Q. The hi-lift operator who backed into the supply truck, was that your employee?

A. Yes.

Q. He didn't receive a letter, did he?

A. No he didn't.

JUDGE KOUTRAS: But, Mr. Zera, I think he explained. Is that the gentleman that --- just a minute.

Am I to understand that the hi-lift operator is the fellow that never came back to work?

THE WITNESS: No. The supply truck driver, the union employee who was driving the supply truck, behind the hi-lift.

JUDGE KOUTRAS: Didn't return to work?

THE WITNESS: No.

JUDGE KOUTRAS: Why didn't the hi-lift operator get a letter? That's what he's asking you.

THE WITNESS: Because, it was not his fault.

BY MR. ZERA:

Q. Well, who's fault was the accident between Mr. Bugay and Mr. Ganchuk?

A. Both.

Q. What was the incident involving Mr. Chumpko?

A. Foreman on the midnight turn approached Mr. Chumpko, it was foggy and bad visibility and he approached the hi-lift and the hi-lift operator didn't see him.

Q. What happened?

A. His wheel hit the pick up truck.

Q. Who's wheel?

A. The foreman's truck. The hi-lift wheel hit the foreman's vehicle.

Q. Who was driving the hi-lift?

A. Danny Chumpko. The hi-lift operator.

Q. And he hit the foreman's truck?

A. Yes.

Q. And Danny Chumpko, the hi-lift operator, hit the foreman's truck did not receive a disciplinary letter?

A. No.

Q. And that's very similar to the accident between Mr. Bugay and Mr. Ganchuk, is it not?

A. No. That is different.

On cross-examination, Mr.Belculfine identified a copy of a letter that he had personally drafted in December 1980, for the mine superintendent proposing to suspend an employee for five days for violating company policy and safety rules in connection with an accident involving a company supply truck. The employee subsequently quit his job voluntarily, and Mr. Belculfine identified a copy of company personnel records confirming this fact (Tr. 53-59; exhibits R-6 and R-7). He also indicated that after he spoke with Mr. Bugay about the accident on January 2, 1981, he discussed the matter with Mark and David Aloe in the mine office and they instructed him to write the two letters in question because of the seriousness of the accident (Tr. 61).

In response to bench questions, Mr. Belculfine stated that he considered Mr. Bugay to be a very good worker and commented that I wish I had two more dozen men like him". He stated that the damage to the jeep was approximately $650 and that the loader sustained no damage. He indicated that there is no company policy concerning an employee making restitution for damaging company property, but conceded that had Mr. Bugay and Mr. Ganchuk made restitution the instant case would have been settled (Tr. 63-64). In further explanation, respondent's counsel stated that had restitution been made, the letters would have been retracted and the matter resolved (Tr. 66-67).

Testimony and evidence adduced by the respondent

Mark Aloe, President, Aloe Coal Company, testified that he has known Mr. Bugay for all of his life, and that Mr. Ganchuk has worked for the company approximately seven years. He confirmed that he instructed Mr. Belculfine to send the letters in question after he informed him about the accident in question. He explained that he did so because of a rash of the same kind of accidents, which were potentially serious in that someone could have been injured or killed, and because of the potential loss of company property. He considered both Mr. Bugay and Mr. Ganchuk to be good employees and confirmed that this was the first such incident in which they were involved (Tr. 93-95).

On cross-examination, Mr. Aloe stated that he was not involved in the question of restitution and that his brother David, a company vice-president, made that decision. He confirmed that he employs approximately 63 miners, but that he normally does not attend grievance meetings, but on occasion attends monthly union and management communications meetings. He never attended any meetings in which the safety of the coal pile was discussed (Tr. 95-97).

Responding to the complainants' assertions that none of the individuals involved in the prior accidents received any reprimand letters, Mr. Aloe stated that each accident is taken on its own basis, and that mine management attempts to determine who was at fault. Conceding that a foreman was fired some months after his involvement in an accident, Mr. Aloe stated that the accident was approximately 85% of the reason why he was fired (Tr. 98). With regard to the so-called "rash of accidents" mentioned in the letters sent to Mr. Ganchuk and Mr. Bugay, Mr. Aloe confirmed that they refer to the prior accidents testified to in this proceeding (Tr. 99).

Complainants' arguments

In their post-hearing arguments, complainants assert that the "disciplinary letter" they received violates the Act in that they were discriminated against for engaging in protected activity. In support of this conclusion, complainants maintain that the testimony at the hearing reflects that the Union, by and through its president and spokesman Lesko Bugay, made frequent complaints about the safety of the coal pile area, and that the respondent was aware of the employees concern about this area and that Mr. Bugay was the spokesman for these concerns. Since Mr. Bugay is president of the local, as well as a safety committeeman, complainants suggest that he was singled out for discipline so as "to stem the constant complaints and concerns of the membership". No such argument is advanced on behalf of Mr. Ganchuk.

Aside from Mr. Bugay's service as a union officer and member of the safety committee, complainants argue that prior accidents had occurred at the coal pile area in question, but that no one involved in those accidents received letters of the type given to the complainants. Citing an incident involving a Mr. Wolfe, complainants state that he was involved in a serious incident where a hi-lift backed into a truck, but received no disciplinary letter. Citing a second incident involving a Mr. Danny Chumpko, where another hi-lift operator again hit a foreman's truck, complainants assert that again, the hi-lift operator never received a disciplinary letter or warning. Although respondent maintained that the foreman was discharged as a result of this incident, since the discharge occurred four months after the incident, complainants argue that it is incredible to believe that the discharge was motivated by the accident in question.

With regard to the respondent's posting of the December 15, 1980, "Notice", complainants maintain that this notice does not

justify the letters issued to the complainants, and that the notice does not cover

the circumstances of the Bugay-Ganchuk accident. Since a new "Notice" was reposted with new instructions after the January 2, 1981, accident, complainants conclude that the respondent recognized the fact that the prior notice did not cover the incident in question, and that had the complainants violated the December 15 notice, respondent would not have found it necessary to post a new and different notice.

Complainants assert that the facts of this case lead to the conclusion that Mr. Bugay and Mr. Ganchuk were treated disparately or differently than other employees who happened to be in similar or identical accidents, and that the only one factor that separates them from all of the other individuals involved in accidents at the coal pile is the fact that Mr. Bugay is an officer of the union and a safety committeeman, and that the respondent sought to stem the complaints concerning the inherent dangers in that area.

Complainants believe that it is obvious that if all other employees involved in like or similar accidents at the coal pile received warning letters, there would be nothing to distinguish Mr. Bugay and Mr. Ganchuk from the normal practice of the respondent. However, on the facts of this case, complainants maintain that this is not so and that the complainants cases are a "first". This is all the more shocking, argue the complainants, when one considers Mr. Bugay's previous unblemished record with nearly 40 years work experience and the employer's statement that he wished he had "two dozen more" like him (Bugay). If that were true, maintains the complainants, no warning letter would issue.

In conclusion, the complainants assert that the letters they received are "threats" which have placed their jobs in jeopardy, even though some 15 months have elapsed since the accident in this matter and there have no intervening accidents involving the complainants here. Citing the cases of Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), and Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978), complainants assert that they have the right, and are protected in the exercise of that right, to express their safety concerns to their immediate supervisor or to their employer.

Respondent's arguments

Citing Pasula v. Consolidation Coal Company, 2 FMSHRC 2786; 2 BNA MSHC 1001, October 14, 1980, respondent argues that to establish a prima facie violation of section 105(c) of the Act, complainants must prove by a preponderance of the evidence:

(1) That they engaged in a protected activity; and

(2) That the adverse action was motivated in any part by the protected activity.

Respondent maintains that a search of the pleadings and record in this case fails to reveal or identify the nature of the protected activity in which the complainants were engaging at the time the letters in question were given to them. Conceding that complainant Bugay has been president of the local Union for 12 years, and has served as a safety committeeman for 15 to 18 years, respondent points out that complainant Ganchuk holds no position at the mine other then as an employee. Further, respondent asserts that the only testimony of protected activity as argued by the complainants appears during the following colloquy with the presiding Judge in the questioning of Patrick Belculfine, respondent's safety director and the person who signed the letters in questions, and in the cross-examination of Mr. Belculfine by complainants' counsel:

> Q. You handled both regular and contractual grievances and safety grievances?
>
> A. Yes.
>
> Q. As part of your duties did you also meet periodically with the union concerning safety matters?
>
> A. Yes.
>
> Q. How often were these safety meetings held?
>
> A. At least once a month we would have a two hour safety meeting. (Tr. 42).
>
> * * * *
>
> Q. Now you are aware that the union made constant complaints about the danger of that area because, of the height of the coal pile, were you not?
>
> A. Not the height of the coal pile, no.
>
> Q. You are aware that the union made complaints, in safety meetings, about that area?
>
> A. Dealing with different matters. (Tr. 46).

Respondent maintains that the fact that there were conversations between union leaders and mine management about safety at the mine is not only customary in the coal industry, but is also mandated by the collective bargaining agreement. Respondent sees nothing unusual about conversations and meetings on safety, and believes that the mentioning of these meetings at the hearing appears to be an afterthought and not a basis of filing the complaint as they were never mentioned in the original pleadings. Respondent concludes that the accident which occurred was not protected activity, and to hold otherwise would mean any activity by an employee would qualify as a protected activity.

Assuming that the complainants were engaged in a protected activity, respondent nonetheless argues that the action taken by the respondent in this case was not motivated in any part by the protected activity. Respondent maintains that the action taken by the respondent was based on its sincere desire to protect its employees and equipment, and since accidents had happened previously, and since appropriate action had been taken by the respondent, these incidents evidence a consistent and fair policy by the respondent.

With regard to the posting of the December 15, 1980, safety notice, respondent states that it was in fact a reposting of a safety notice issued March 30, 1976, and that it was posted on December 15 because of an accident which occurred on December 12, 1980. The notice required all employees to "make sure the equipment operators see you when approaching them", and respondent asserts that both complainants were aware of this safety notice and knew of its contents. Respondent asserts that the notice was reposted because mine management wanted to protect its legitimate interest in its employees and equipment, and concludes that the accident which occurred would not have happened but for a violation of this rule.

Regarding the December 12, 1980, accident, respondent states that the incident occurred at a different area of the mine where a supply truck driven by one August Parilli, Jr., was struck by a piece of heavy equipment. Since Mr. Parilli was at fault, a letter of reprimand was drafted to him but was never sent because he voluntarily terminated his employment. With respect to a second incident where a hi-lift operator backed into the side of the struck of an independent coal hauler (the Wolfe incident), respondent states that the truck driver was at fault because his truck was in an inappropriate area and no reprimand was given to the hi-lift operator. Since the truck driver was an independent contractor, respondent states that he could not be reprimanded.

Regarding the third accident which occurred in mid-1980, where the wheel of a piece of heavy equipment struck a foreman's vehicle (the Chumpko incident), respondent states that it was determined that because of the foggy conditions, the employee was not at fault. However, respondent also states that the foreman was orally reprimanded for this incident and it was but one of the factors leading to his subsequent termination in November of 1980.

Respondent maintains that the record in this case demonstrates that the next logical step by mine management when the rules were violated was to send a letter to those who failed to comply with those rules, and to deny the respondent to take this step would prevent it from any protection of its interests in such situations. Respondent asserts that the aforesaid incidents with the hi-lift and truck of the independent coal operator and the incident concerning the foreman further demonstrates the fair, consistent and unbiased approach in similar matters. Respondent also notes that Patrick Belculfine, when called by the complainants as per cross-examination,

testified as to questions of counsel Zera on Record, Page 48, as follows:

Q. It is also not true, had Mr. Bugay not been on the safety committee and president of the local, he would not have received this letter?

A. I wouldn't reprimand a man because he's a union official, no.

In conclusion, respondent maintains that any conclusion of a prohibited motivation in this case is entirely unwarranted, and that from a reading of the entire record, respondent suggests that the conclusion most warranted is that the complainants are upset that their otherwise good working record and history is now blemished by the letters which they received. Respondent notes that both complainants acknowledge some form of reprimand would have been appropriate. The mere fact that they do not feel the reprimand should have been in writing is of no consequence, since it is a matter for mine management to determine the nature and tenor it its reprimands. The mere fact that the complainants do not agree with the nature and tenor of the reprimand does not give grounds for the filing of a discrimination case under the Act, and the degree of discipline or whether any discipline should have been issued at all is not the determining factor. The test to be applied is whether or not the complainants were engaged in protected activity and whether the action of the mine operator was notivated in any part by reason of the protected activity. Respondent concludes that both items must be answered in the negative.

Discussion

The record in this case reflects that the union grievances filed by Mr. Bugay and Mr. Ganchuk concerning the letters they received have been held in abeyance pending the outcome of the instant discrimination complaints. The grievances have progressed through the first three stages, but any final decision in this regard has been "allowed to lie dormant" (Tr. 37).

With regard to the union safety grievance, exhibit R-4, concerning the area where the accident in question occurred, the information of record reflects that it was resolved at the second stage by the Union and Mine Management through the posting a notice and the distribution to all employees of an established procedure for operating equipment in work areas (Tr. 38-39).

It seems clear to me that under certain conditions a disciplinary letter of reprimand may be discriminatory under the Act since it may affect an employees pay, promotional opportunities, and even employment. See: Local Union 1110, UMWA et al., v. Consolidation Coal Company, MORG 76X138, Judge Michels, May 26, 1977. In that case, Judge Michels concluded that certain disciplinary letters were not issued in retaliation for reporting alleged safety violations, and therefore were not discriminatory.

In the case of Ronnie Ross v. Monterey Coal Company, et al., 3 FMSHRC 1171; 2 BNA MSHC 1300 (May 11, 1981), it was held that

singling out one safety committeeman to receive a letter of reprimand, while ignoring another committeeman who engaged in similar conduct, was discrimination under the

Act. However, in Ross, the reprimand was affirmed and the complaint was dismissed because it was found that the conduct engaged in by Mr. Ross which led to the letter of reprimand was improper, and there was no showing that the letter was issued out of retaliation for safety complaints.

In Local Union 1110 and Carney v. Consolidation Coal Company, 1 FMSHRC 388 (1979), the Commission affirmed a Judge's ruling that giving a safety committeeman three letters of reprimand for insubordination because he failed to ask mine management's permission to leave his work area for the purpose of filing safety complaints was discriminatory under the Act because the leaving of work for that purpose was protected activity.

Complainants do not dispute the fact that an accident occurred and that they were at fault. In addition, they conceded that the circumstances surrounding the accident which occurred in this case warranted a reprimand. Their contention is that the reprimand should have been an oral one, rather than one in writing. They believe that the written record of a reprimand will, at some future time, possibly expose them to discharge if they are again found to be in violation of company rules. Aside from the fact that an oral reprimand is not in the form of a written document, I have some difficulty in accepting complainants' conclusions on this question. A reprimand is a reprimand, and if it is justified in the first place, I see little distinction in putting it in writing. It seems to me that once an employee is reprimanded by management, or someone authorized to mete out such punishment, management is free to document this fact, whether it be by a notation placed in the employee's record, or whether it be in some other form, such as the supervisor making a note of the fact that he orally admonished an employee so that he can rely on this in taking any future action against him if warranted.

During the course of the hearing, the complainants' stated that their real concern was over the last paragraph of the letter, which they view as a perpetual threat to discharge or otherwise punish them at some future time. While it is true that the language used in this paragraph clearly serves as a warning, it is limited to similar accidents of the kind which occurred on January 2, 1981, and since it states that any future discipline taken "will be appropriate with the accident", I assume this means that lack of fault by either individual will not result in any discipline. This is particularly true in this case where the respondent opted not to discipline two employees involved in two prior accidents because they were not at fault.

Findings and Conclusions

While it may be true that complainant Bugay, acting in his capacity as president of the local and as a safety committeeman, was the spokesman for miner complaints concerning the coal pile where the accident in question occurred, the evidence adduced in this case simply does not support any conclusion that the letters given to the complainants were in reprisal for such complaints. As a matter of fact, as correctly pointed out by the respondent's

counsel, the complaint filed in this case did not suggest or aver that the letters were given to the complainants because of any asserted safety complaints. This issue was raised for the first time at trial by the complainants' counsel, and it is rejected.

Further, the record suggests that the safety complaints concerning the coal pile were resolved during the grievance stage, and they were separately and independently addressed and resolved.

With regard to the question of any disparate treatment of the complainants by the respondent with respect to the letter concerning the accident in question, I conclude and find that this is not the case. Respondent has established by a preponderance of the credible evidence and testimony adduced in these proceedings that it did in fact enforce its rules and policies concerning employee involvement in accidents on mine property. The testimony establishes at least three prior accident incidents which gave rise to some action by company management against certain employees who were involved in those accidents. Even though no actual letters were ever delivered in these instances, I conclude and find that the circumstances surrounding these incidents are satisfactorily explained by the respondent, and they do not give rise to any inference, real or imagined, that the respondent intended to treat the individuals involved any differently from the complainants.

One of the prior incidents in question involved a culpable contractor truck driver who was not employed by the respondent. Management decided not to reprimand its employee who was involved in that accident because he was not at fault. Under these circumstances, I cannot conclude that management's discretionary decision not to give out any letters of reprimand in that instant was unreasonable.

With regard to the second incident involving a Mr. Parilli, respondent has established through credible testimony and evidence, which is unrebutted, that had Mr. Parilli not resigned his job voluntarily, he would have received the letter which had been drafted for the mine superintendent's signature by Mr. Belculfine. As for the third incident involving a foreman (Chumpko), respondent has established that it did not reprimand the employee involved because it was determined that he was not at fault. Again, I cannot conclude that management was wrong in not reprimanding him. Further, complainants' arguments that it is incredible to believe that Mr. Chumpko's discharge was prompted by the accident in question must be taken in context. Respondent does not argue that the foreman was discharged solely because of the accident. Rather, respondent's testimony is that this was but one factor in the decision to fire him.

After careful consideration of all of the facts and circumstances presented in these proceedings, including the post-hearing arguments presented by the parties in support of their respective positions, I conclude that the respondent has the better of part of the argument and has satisfactorily rebutted any claims of discrimination in these proceedings. In short, I cannot conclude that the respondent discriminated against the complainants when it issued them the letters in question. To the contrary, given the circumstances of the accident, and the fact that prior incidents

of the same nature resulted in damage to respondent's equipment and property, as well as exposing its personnel to possible serious injuries, I conclude that respondent acted reasonably to protect its legitimate interests when it issued the letters in question. Under the circumstances, the complaints of discrimination filed in these proceedings ARE DISMISSED.

George A. Koutras
Administrative Law Judge