CCASE:

ROGER SAMMONS V. MINE CO

DDATE: 19820915 TTEXT: Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ROGER E. SAMMONS,

COMPLAINANT

Complaint of Discrimination

v.

Docket No. SE 82-15-D

MINE SERVICES CO., A WHOLLY
OWNED SUBSIDIARY OF DRUMMOND
COAL COMPANY, (FOOTNOTE a)
RESPONDENT

Short Creek Project

DECISION

Appearances: George C. Longshore, Esquire, Birmingham, Alabama, for the complainant Peyton Lacy, Jr., Esquire, Birmingham, Alabama, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed with the Commission on November 12, 1981, after the complainant was advised by the U.S. Department of Labor's Mine Safety and Health Administration (MSHA), on November 5, 1981, that upon investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred.

In his complaint, Mr. Sammons states that on September 21, 1981, he and a fellow employee (Billy Canada) were relieved of their duties as Ironworkers (connectors) under Article 16, Section (H) of the UMWA-ABC contract. He states further that grievances were filed, and on September 24, 1981, he and Mr. Canada also filed complaints with MSHA pursuant to section 105(c) of the Act. According to Mr. Sammons his grievance was withdrawn without his consent and Mr. Canada was put back to work with full back pay.

Mr. Sammons' complaint of alleged discrimination is stated as follows in his complaint filed with the Commission:

While employed with Mine Services, Inc., at the Short Creek project there were no complaints made to me about my work. I feel therefore that the only reason for me being relieved of my duties was the complaints which I made about getting safe operators, safety belts, building cages and getting tag lines to be used on the larger pieces of steel.

By letter dated December 4, 1981, and filed with the Commission on December 7, 1981, the respondent took the position that Mr. Sammons was unqualified to perform his job responsibilities and was relieved of his duties as allowed under the provisions of the existing Labor Agreement.

A hearing was conducted in this matter in Birmingham, Alabama, on May 6, 1982, and the parties appeared and participated fully therein. The parties filed post-hearing briefs, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The principal issue in this case is whether or not Mr. Sammons has been discriminated against by the respondent because of protected safety and health activities. Additional issues raised by the parties are identified and discussed in the course of this decision.

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, 20 CFR 2700.1 et seq.

Testimony and Evidence Adduced by the Complainant

George M. Ellis testified that he is the Director of Personnel for Drummond Coal Coal Company, that he holds similar duties with Mine Services, Inc., and that Mine Services is a wholly owned subsidiary of Drummond Coal Company. Mine Services performs construction work at coal mines and coal preparation facilities and is a signatory to the National Coal Mine Construction Agreement. Mine Services hires some of its personnel from the UMW local construction Panel, and some "from the street". Mine Services currently has 130 active employees and almost that many on layoff status due to the completion of some of its construction projects. In August or September of 1981, Mine Services had approximately 200 to 210 classified employees on its payroll. Employment from the UMW Panel varies depending on the projects and staffing requirements, and he estimated that in the course of any given year less than 100 employees would be hired from the Panel (Tr. 18-23).

Mr. Ellis confirmed that since 1976, two employees were referred back to the Panel for unsatisfactory work, namely Mr.

Sammons and Michael Ashby. Mr. Ashby was a carpenter referred back in 1977, and during this same $\,$

period of time he estimated that hundreds of names have been referred to Mine Services from the UMW District Panel, and on many occasions the Panel has been exhausted for particular job classifications. By "referred back" he means individuals referred back during the first 30-days of their probationary work period. Anyone accused of misconduct, drinking, or insubordination would be discharged, rather than referred back to the Panel (Tr. 23-24).

Henry E. Bates testified that he has worked for the Mine Services Division of Drummond Coal Company since 1976 in construction and engineering. He confirmed that Mr. Sammons was hired as an ironworker sometime in August of 1981 and that he worked on the "sample house". He also recalled granting Mr. Sammons a half a day off to campaign for a union office, that he recalled a conversation with Mr. Sammons regarding his interest in bidding for the job of boom truck operator, and he also recalled Mr. Sammons commenting about some safety belts which did not fit properly and Mr. Sammons' desire to use his own personal belt. He also recalled granting him permission to use his own belt, and Mr. Sammons' complaint that the men on the boom trucks were not qualified. However, Mr. Bates indicated that he believed the men were qualified, and so informed Mr. Sammons (Tr. 24-29).

Mr. Bates indicated that Mr. Sammons was one of a crew of men assigned to work on the sample house sometime during the first two weeks of September. The sample house was partially constructed at the time and Mr. Bates visited it on occasion and a new foreman was supervising the job. The crew was later moved to work on the refuse bin and a new foreman was assigned to that job. He identified a copy of a memorandum concerning a meeting on September 16, 1981, with Mr. Sammons and certain union and company representatives concerning the progress made on the construction of the refuse bin, and he indicated that the memorandum was typed up from notes made at that meeting (Exh. R-2; Tr. 30-33). Mr. Bates indicated that seven men were hired as connectors, including Mr. Sammons, and after he and Billy Canada were initially assigned work at the sample house, they were transferred to do work on the refuse bin during the third week of September (Tr. 37). He identified photographs of the sample house and refuse bin which were under construction (Exhs. C-1 through C-3).

Mr. Bates described the work being performed by Mr. Sammons and Mr. Canada on the refuse bin during the time he observed them from the ground, and based on his observations of their work he concluded that they did not know how to use their tools properly in making certain steel beam connections, that they experienced other difficulties in removing a choker line which had been disconnected from a crane and was attached to one of the beams, and that neither man would climb up the beam to remove the choker or to make the required connection. Atlhough he indicated that he never worked as an ironworker, Mr. Bates stated a prudent ironworker would be expected to, and would be willing to, climb up the diagonal beam and make the upper connection. Atlhough the upper end of the beam in question was not bolted to the building

frame, Mr. Bates indicated that it was held firmly in place over a "gusset plate in the web of the column", and the lower end of the beam was securely bolted in place

(Tr. 40-53). Mr. Bates also indicated that there was no way the beam in question could have fallen out of place and he saw nothing wrong in expecting the men to climb up and make the necessary connection (Tr. 58).

Referring to a memorandum he prepared regarding the aforesaid event at the construction bin (Exh. R-1), Mr. Bates confirmed that he stopped Mr. Sammons and Mr. Canada from using a basket connected to a crane to go up and attempt to make the beam connection, and that he asked another workman (Smith) whether he needed the basket. Smith replied "no", and after securing the bottom end of the beam with a second bolt and satisfying himself that the beam would not come out at the top, Mr. Smith climbed up the beam and attempted to make the connection. After discovering that the hole in the beam would not fit and would have to be "burned", Smith came back down. Mr. Bates indicated that while he did not ask Mr. Sammons and Mr. Canada why they wanted to use the basket, he assumed that they showed a lack of confidence in their ability or some fright in climbing up the steel beam (Tr. 60). He confirmed that the connection was finally made by two men who went up to the upper end of the beam in a basket with a torch (Tr. 61).

Mr. Bates stated that he previously referred one man back to the UMW Panel, but he could not recall the details. He confirmed that he was not consulted at the time the grievances filed by Mr. Sammons and Mr. Canada were settled and Mr. Canada was allowed to return to employment. Although there were some problems with the steel connections fitting properly on the refuse bin, he did not believe that the slow productivity was caused by those problems. He did not believe there were any safety problems with the construction work on the building in question, and he believed that Mr. Canada and Mr. Sammons were fearful of climbing the steel because of their inexperience (Tr. 67). He could not recall who eventually made the connection at the lower and upper ends of the steel beam, and he believed that both connections could have been made by someone climbing up the beam. He also stated that he had no reason to ask Mr. Sammons or Mr. Canada why they did not not climb up the beam to make the upper connection because "I felt I shouldn't have to ask them; that a connector would have went on up there to it" (Tr. 68). He also confirmed his belief that there was no way anyone could simply look up the beam and determined that the connection could not be made (Tr. 68).

Mr. Bates stated that of the seven connectors hired off the panel for the jobs in question, only Mr. Sammons and Mr. Canada were referred back to the Panel. Another individual, Mr. Gravlee, was not referred back, but bid on another job of lower classification after admitting that he was afraid to climb heights. Also, except for one man who has been sick, all of the other men referred from the Panel have been working (Tr. 69).

Mr. Bates indicated that as a general rule an ironworker climbing a diagonal beam would take his safety belt with him and put it around the piece he was climbing. He could not recall whether Mr. Smith had his safety belt around him when he climbed up the beam, but he did know that he "tied off" when he got to the top. However, he also indicated that a safety belt is always around an ironworker and that he uses a lanyard to tie off once he reaches the location where he is to work. Although he was not sure, he did indicate that a lanyard was not used in climbing the beam since it's difficult to use it while climbing (Tr. 70-71).

On cross-examination, Mr. Bates stated that Mr. Sammons' complaints about the boom trucks was that he wanted those jobs posted so that they could be bid on. He advised Mr. Sammons that he had temporarily assigned two conscientious men to the boom trucks and that Mr. Sammons filed no grievances regarding this incident (Tr. 72). Mr. Bates described the various duties of a "bolt-up" ironworker and a "connector" ironworker, described how connections are normally made, and he indicated that bolt-up work sometimes requires the use of a basket by the men performing the work, but that connection work is not done out of a basket (Tr. 74).

Mr. Bates testified that at the time he observed Mr. Sammons and Mr. Canada working on the refuse bin, they said nothing to him about any difficulties they were having in making the beam connections. They made no complaints to him about the conditions under which they were required to work, did not ask him whether they could get the basket, did not ask for a torch, and made no mention of any MSHA or OSHA safety regulations. While there are provisions in the labor-management contract for raising safety complaints, Mr. Sammons exercised none of his rights in this regard and made no complaints during the three and half weeks of his employment. He had no knowledge of any complaints that the beam holes were not matching up until the third step of their grievance, and at the time they were referred back to the panel he had no knowledge of any OSHA and MSHA violations (Tr. 80).

Mr. Bates confirmed that he brought all of the recently hired connectors to the refuse bin construction site on September 18 for the purpose of observing their performance. Although they were given examinations, he personally never observed them doing any work and he wanted to determine how each man performed his job. As a result of the work performed on the refuse bin, he rated each man's performance. Two connectors (Hogland and Smith), were rated "very good"; two others (Gann and Harliss), were rated as "capable" but not as good as Hogland and Smith; and two were rated "not capable". He reported his observations and ratings to his supervisor Jerry Corvin in the memorandum of September 18, 1981 (Exh. R-1), and after further discussion with Mr. Corvin, the decision was made to refer Mr. Sammons and Mr. Canada back to the Panel for "unsatisfactory work" as connectors and the basis for that decision was that they were not "competent" connectors (Tr. 81-82). The previous work done by Mr. Sammons during his first two weeks on the job at the sample house had nothing to do with his decision to send him back to the Panel and his decision in this regard was based on what he observed during the work at the refuse bin (Tr. 84).

Regarding Mr. Sammons' complaint about the boom trucks and any other compalints, Mr. Bates testified as follows (Tr. 87-89):

- Q. Well, I gather the answer to my question is you don't recall Roger -- the reasons why he wanted you to post the job. Did he mention qualifications?
- A. Yes. He mentioned qualifications in his opening statement to me; something of that nature, about wanting qualified people. And I responded to him that I had qualified people when I placed the two people, qualified and competent people, on there.
- Q. Now, he complained about, and wanted you to post the bids for, the boom trucks because of what he felt to be a lack of qualified operators. Now, he also complained about the safety belts that the company had furnished him. Do you remember that?

A. Yes.

- Q. And in your meeting to the 16th of September, he said that you need another crane, and you vetoed that. Just one crane is all you need. He said you need a basket.
- A. And I vetoed that.
- Q. Well, wasn't there a basket on the scene by Friday?
- A. There was a basket there, but I would not allow any connector to make a connection out of a basket. It's not done. There could have been twenty baskets there; I wouldn't have allowed them to use them to make a normal connection.
- Q. Well, all right, but the point is it occasionally becomes necessary to make abnormal connections, such as Mr. Smith made, isn't that correct, out of a basket?
- A. Right. And we have three or four baskets.
- Q. Do you recall that Roger was saying that we need a basket, meaning there wasn't a basket available to him right there? Do you recall that?
- A. I didn't take it that way.
- Q. And he said -- I gather Roger -- at least his notes reflect -- that he said that the going was slow -- in other words, he agreed with you that the production was somewhat slow -- because mainly of a safety situation. Now, he made that statement to you.
- A. That was his opinion, yes.

- Q. And then one of the last things Roger said to you was, "I won't do anything unsafe. If that means working slow, then that's the way I'll do it." There was no place to climb except on the outside of the steel; there was only one crane. That statement was made to you on Wednesday the 16th.
- A. That's probably a true statement. But my contention was that a connector would have climbed it. A connector would have had no problem with this.
- Q. You concluded that Billy Canada and Roger Sammons both were incompetent.

A. I did.

Mr. Bates explained that a "basket" is a structure with posts and handrails around it and that it is hooked to a crane and hoisted up so as to enable a man to stand in a safe and secure area to work. In order to use such a basket in connection work, a second crane is required. One crane lifts the basket and the men, and the second crane hoists the steel beam up to the location where it is to be connected. In the case at hand, his decision was not to furnish a second crane to facilitate the use of a basket by the connectors. Mr. Bates also testified as to the delays and lack of production progress on the refuse bin and the foreman told him it was due to "the people" he had to do the job, and that it had prompted him to go to the refuse bin construction site to personally observe the work (Tr. 91).

In response to questions from the bench, Mr. Bates confirmed that "on paper" Mr. Sammons was qualified as an ironworker connector and that during his initial work which involved the cutting of steel and construction of the sample house he received no complaints about his work. The complaints he received were connected with the fact that some of the structural steel parts for the sample house did not fit, and this resulted in a slowdown of the work. However, this was not true of the construction at the refuse bin. The only complaint he received from Mr. Sammons related to his contention that the company furnished safety belt was too big, and he permitted Mr. Sammons to use his own personal belt (Tr. 95). He confirmed that his judgment that Mr. Sammons was not a competent connector was based on his observations of his work on the refuse bin (Tr. 96), and he summed up his observations as follows (Tr. 98-99):

A. I had observed Mr. Canada and Roger Sammons in the manner in which they climbed the steel and in the manner in which they used their tools, and I had a big job here to put together, and I needed competent, good connectors; that when a piece of steel went up there, they slapped a spud wrench in each end of it and "zap" over to the other end and get it in, and then get another piece.

Two good connectors, on a simple structure, can erect 50 or 100 pieces of steel a day, depending on what it is. I was getting two and three pieces of steel a day put in place. When I watched all the connectors, they just weren't connectors. They just weren't connectors. Now, carpenters or some other qualifications, I don't know. But I know they weren't connectors.

- Q. Were they serving some kind of a probationary period during this on-the-job testing situation, or what?
- A. By contract you've got 30 days to observe a man to see that he can perform the work that he was hired to perform. And if he cannot perform the work that he was hired to perform, you have the right to refer them back to the panel.

Mr. Bates testified that the height of the first horizontal beam on the refuse bin was some 18 or 20 feet above ground, and that the highest point a man would be expected to climb to make the upper diagonal beam connection was 30 to 32 feet. He confirmed that Mr. Sammons had never filed any formal complaints about safety belts, and as far as he knew the safety committee or union never filed any safety grievances or complaints concerning safety practices. He also indicated that regular safety meetings are held and he has always advised his men to report any safety matters to him (Tr. 101). He also confirmed that the safety committee could exercise their right and file a grievance if they believe that the use of a basket is required while doing steel connecting work, and he indicated that "they do have the option, if there is an unsafe practice, to even walk off from it" (Tr. 102).

Mr. Bates confirmed that Mr. Sammons and Mr. Canada were hired and referred back to the Panel under Article XVI, Section (h) of the National Coal Mine Construction Agreement (Exh. J-1; Tr. 106). He conceded both were working "at heights", and that a cage would afford them a means of protection from falling, but he indicated that there are times when a man has no other alternative than to climb (Tr. 111).

Roger E. Sammons testified that prior to working for the respondent he had experience in working at heights, climbing structural steel, and that he passed a test as an ironworker. He indicated that when he was first hired by the respondent at the sample house project he was elected to serve as the grievance committeeman by the workers at that project. The work there included the use of boom trucks to lift and load steel onto a flatbed truck and several of the employees on this project asked him to "confront management about the bidding of the boom trucks" (Tr. 131). He discussed the matter with Mr. Bates who told him it was none of his business, and when he discussed the matter of his safety belt with Mr. Bates, Mr. Sammons claims that Mr. Bates never answered him (Tr. 133).

Mr. Sammons indicated that he and Mr. Canada worked at the sample house during the first two weeks of their employment and no one complained about the quality of his work. He then went to work on the refuse bin project and immediately experienced problems because the holes in the steel beams would not align and fit when they attempted to construct the structure, and he testified as to the work performed on that project during Monday through Wednesday of the week they started that project. After Mr. Bates expressed some disappointed in the rate of production at the project, he called a meeting at which he (Sammons) mentioned the need for another crane, and since two boom trucks were idle, Mr. Sammons believed that one of those trucks could have been used to hoist a cage. Mr. Sammons believed that one of those trucks could have been used to hoist a cage. Mr. Sammons stated that he also mentioned belts that would fit and taglines (Tr. 140-141). He confirmed that Mr. Bates agreed with "the safety part of the job" but disagreed that "extra equipment" such as cranes, baskets, or safety belts were required to do the job (Tr. 143). When asked whether Mr. Bates actually made the statement that no extra equipment would be provided, Mr. Sammons replied "that's my interpretation of what he meant" (Tr. 143). When asked whether Mr. Bates specifically addressed safety belts, Mr. Sammons replied "Not specific. It was talked in general except for the crane and the basket". As for the use of the basket, Mr. Sammons testified as follows (Tr. 143-144):

A. He made it plain and clear on Thursday when they was building the basket that nobody was to use that basket except the bolt-up men. As I said, there was no access to the inside of the building, and it was a flat surface, vertical, and there was no way to station yourself there.

Mr. Sammons confirmed that Mr. Gravlee bid off the connectors job, and he believed he did so because he was afraid of climbing the steel (Tr. 146). Mr. Sammons also confirmed the fact that the steel was wet from dew until about 9:45 a.m., on the day they were assigned to the bin structure, but he conceded that other work was performed while waiting for it to dry out (Tr. 148). Mr. Sammons also indicated that he discussed the matter of safety belts and a lanyard with Mr. Bates and advised him that they were needed to secure themselves to the outside of the structure, but Mr. Bates denied it. However, he stated that he was provided with a safety belt and lanyard but that they were too big, and he had to use his own belt (Tr. 151).

Mr. Sammons described the work he performed on September 18, and indicated that he and Mr. Canada were working together on the steel structure, but that he made the upper connection at the "X" where the two beams crossed and then went to assist Mr. Canada make the lower one. Mr. Canada was experiencing a problem with alighment of the holes and it eventually had to be "burned". In his opinion, the holes could not be lined up sufficient enough to put a bolt through without being "burned" (Tr. 156-160). Mr. Sammons stated that he was tied off at the "X" location while making that connection (Tr. 161). He described the diagonal

beam in question as a six-inch I-beam, ten feet long, and he indicated that from where he was positioned he could see that it would not fit at the upper diagonal end and disagreed with Mr. Bates' opinion that he could not see whether a connection could be made (Tr. 162).

Mr. Sammons indicated that it had always been his practice in working "in the building trades" and "around the construction industry" that "you don't go up a piece of steel". He explained that he thought the upper end of the beam would fall off the gusset and he felt that he needed a basket to go up because there was no place for him to fasten himself on and felt that once he got there there would be no room for him to work. Both he and Mr. Canada agreed that the connection could not be made, and while they were in the process of securing a basket, they were instructed to climb down off the structure. Mr. Bates did not ask them why they did not climb up the diagonal, nor did he ask for an explanation as to why they needed a basket. Mr. Smith went up to look. He did so after unhooking his belt, and while at the top of the diagonal he was not tied to anything. Once there, Mr. Smith discovered that the connection would not fit and Mr. Canada and Mr. Hoagland eventually went up in the basket and made the connection (Tr. 166). Mr. Bates did not discuss the matter further, and the next Monday he was told that he would be referred back to the Panel. After the grievance was filed, Mr. Canada was reinstated, and although Mr. Sammons indicated that his grievance was withdrawn, he stated that it was done without his approval and that he filed charges against the union person who withdrew it. He identified this person as Gene Hyche, and he indicated that he campaigned against Mr. Hyche for election to union office (Tr. 168).

On cross-examination, Mr. Sammons testified as to hie prior experience for a year as an ironworker during 1977 to 1978, and he indicated that he did some work as a connector during this time for approximately two or three days a week. However, he indicated that at that time he was classified as a lead carpenter, but often worked out of that job classification. His connector work at that time was during the construction of a warehouse and hoist house, and it entailed the same time of steel connection work as in the instant case. He also testified as to some prior work in 1973 and 1974 in construction where he "assisted" as a connector, and he explained by stating that he did the work but was not paid the connector's wage scale (Tr. 168-181).

Mr. Sammons indicated that he had previously served as a union grievance committeeman and safety committeeman, indicated that he was aware of the fact that he could have filed a safety grievance on safety issues, but that he did not file any safety grievance concerning any "safety problems" connected with the refuse bin construction project in this case. He also conceded that he had a right to complain to OSHA, but did not (Tr. 184). With regard to the job for which Mr. Gravlee bid after he opted not to work as a connector anymore, Mr. Sammons conceded that he was aware of the fact that the posting for that job was in effect

for three days, but that he (Sammons) did not consider bidding for it. Mr. Sammons also claimed that Mr. Canada told him that Mike Rigsby stated that Mr. Bates was going to get "rid of him", and that Mr. Rigsby stated this on the Thursday preceding the "test", but he admitted that he never heard Mr. Rigsby make the statement (Tr. 185).

In response to questions from the bench, Mr. Sammons conceded that the fact that someone passes a written examination given for ironworker-connectors does not necessarily mean that such a person can actually perform such work. While he was confident that he could perform the duties, he did not believe it was unreasonable for a project supervisor to conclude that someone who was afraid to climb could not (Tr. 191).

With regard to the respondent's furnishing of safety belts, Mr. Sammons first testified that they were not furnished to the men and that he had to supply his own. He stated that he had his own belt when he first reported to the project, but that the company stated that tools and safety equipment would be supplied to him by the company. He then testified that he was supplied a belt but it was a "large size", and he conceded that the operator supplied belts for the men (Tr. 192-193). He also testified that the company provided six-foot safety lines and lanyards (Tr. 193), and that at the time he worked on the refuse bin project he was tied off to the steel beam where he was working with a six-foot lanyard (Tr. 199). Mr. Sammons indicated that to his knowledge the respondent had never been cited by MSHA for safety belt or safety line infractions (Tr. 206). He also confirmed that when he was on the steel "diagonal" during the construction of the refuse bin he had a safety belt with him, and he conceded that Mr. Bates' opinion that he could not perform as well as Mr. Bates would like had nothing to do with the safety belt (Tr. 206).

With regard to the boom trucks, Mr. Sammons confirmed that while he could have filed a grievance in his capacity as safety committeeman, he did not do so because he was not an "aggravated party". He explained that he did not want to bid on a boom truck operator's job, and even though he may have believed that there was something unsafe in the manner in which the boom trucks were being operated, he still did not file any grievance. He stated that he did not like to file grievances because it is time consuming and he also indicated that he did not consider contacting MSHA to observe the manner in which the boom trucks were being operated because "I don't believe he would have caught him in the act" (Tr. 198).

Billy W. Canada, testified that he was hired by the respondent as an ironworker-connector along with Mr. Sammons and several others, and worked on the sample house and refuse bin. He confirmed that Mr. Gravlee was "a little afraid of the steel" and admitted as much to Mr. Bates. Mr. Canada believed that Mr. Sammons was capable of performing connector's work, and indicated that he was confident in working with him at heights. Mr. Canada confirmed the fact that the work production on the refuse bin was slow and he attributed this to "mainly, the safety factor, I would think" (Tr. 230). He explained that he requested a Mr. Mike Rigsby to put tag lines on two panels being installed on the bin, but the company had no rope. However, rope was furnished the next day. In addition, Mr. Canada referred to the fact that the steel was wet in the morning, and that even though a basket was not supplied, it could not be used with the panels. The

panels were hoisted up with a boom, and while a basket may have speeded up production on the bin, such a basket could not have been used to install the panels (Tr. 233).

Mr. Canada explained how he and Mr. Sammons connected the steel on the day Mr. Bates had them under observation. He indicated that the bottom part of the diagonal had to be "burned" because the holes did not match up. After the lower end was connected, Mr. Sammons was standing at the "X" location and from that vantage point Mr. Canada stated that he could tell that the upper portion of the diagonal steel holes would not line up and that a torch would be required (Tr. 238). He and Mr. Sammons then removed the "choker line" off the crane which was holding the diagonal brace and came down to obtain a basket. Mr. Smith then climbed up the diagonal and attempted to attach the brace with a wrench, but he couldn't make the connection (Tr. 230). In his opinion, neither he nor Mr. Sammons did anything which would indicate a lack of confidence as a connector (Tr. 240). He indicated that Mr. Smith's decision to climb up the diagonal with the choker removed was his own decision, and he too would have climbed it if he thought he could make the connection, but he would not have done so unless the choker were attached to the steel with some tension on it (Tr. 241).

With regard to safety belts, Mr. Canada stated that he was furnished one that fit him. As for the boom trucks, he stated Mr. Bates took the position that he could hire operators during the 60-day period without posting the jobs, and as the temporary safety committeeman, Mr. Canada believed that qualified people had to be hired to operate the trucks (Tr. 242-243).

On cross-examination, Mr. Canada testified that during his employment with the respondent no safety job grievances were filed, and no safety complaints were ever lodged with MSHA, other than the discrimination complaint filed by Mr. Sammons (Tr. 245). He could not recall what Mr. Sammons said to Mr. Bates when he informed him that the boom truck jobs should be posted. He did recall that Mr. Bates "was hostile", and stated that he had sixty days to post the jobs. Mr. Canada acknowledged that he said nothing to Mr. Bates about safety at the time of this incident, even though he was the safety committeeman (Tr. 249). As for the use of baskets while installing the steel at the refuse bin, Mr. Canada acknowledged that as a general practice it would not speed production while erecting the entire diagonal structure unless two cranes were provided, and that it would not be possible to connect the sheets of steel with the use of a basket. However, in the instant case, the basket was at the site and it would be a simple matter to use it to burn the upper diagonal (Tr. 249-250).

In response to questions from the bench, Mr. Canada stated that he did not dispute the fact that Mr. Bates was free to choose anyone he desired as a boom truck operator during the initial 60-days. He also acknowledged that the two men he selected were capable and did the job, and that he and Mr. Bates simply had a difference of opinion as to whether other people should have been given an opportunity to bid on the jobs (Tr. 253). During the time the two men selected by Mr. Bates operated the trucks, no incidents occurred which placed any miners in jeopardy, and at no time during his employment did he file any safety complaints with state or federal inspectors (Tr. 253).

In response to questions concerning safety belts, tag lines, and the operation of the boom trucks, Mr. Canada responded as follows:

- Q. How about the question of whether or not -- am I to understand that the first time you and Mr. Sammons were working on the sample house where you didn't have any rope and the wind was blowing 20 knots or something, that slowed you down a little bit?
- A. That was on the refuse bin.
- O. On this?
- A. Yes, sir.
- Q. Am I to understand that you went up there without a rope?
- A. We had our safety rope, but we didn't have a tagline, no, sir. Yes, sir, we did go up.
- Q. What was required? What was your understanding at that time as to what was required under the mandatory safety standards? Did you need both, or did one do?
- A. You needed both.
- Q. But they had no rope?
- A. No.
- Q. But you went up anyway?
- A. Yes, sir.
- Q. And the rope was provided the next day?
- A. Yes, sir.
- Q. Were you aware of the fact that you weren't required to go up there without a rope?
- A. Yes, sir.
- Q. But you went anyway?
- A. Yes, sir.
- Q. Can you explain that to me as a Safety Committeeman?
- A. Insanity, I quess.
- Q. Have you since regained your senses?

A. I guess I was just trying to, as the saying goes, make a few brownie points. (Tr. 253-254).

And, at pages 256-257:

- Q. Well, do you think Mr. Bates' hostility -- I mean, did Mr. Sammons say anything to provoke him; "pull his chain" a little bit, so to speak?
- A. No, I didn't think so.
- Q. He just went up to him and said: "I think you ought to bid the jobs," and all of a sudden Mr. Bates blew up and became hostile and said: "I'll do what I want to do?"
- A. That was my opinion.
- Q. Did you ever have any encounters with Mr. Bates prior to this, prior to your employment with -- I take it this is your first job with this company?
- A. No, I didn't think so.
- Q. He just went up to him and said: "I think you ought to bid the jobs," and all of a sudden Mr. Bates blew up and became hostile and said: "I'll do what I want to do?"
- A. That was my opinion.
- Q. Did you ever have any encounters with Mr. Bates prior to this, prior to your employment with -- I take it this is your first job with this company?
- A. No, sir; I never met him before.
- Q. Why did you file your complaint with MSHA at the time you were referred back to the panel? What was the reasons that you had for filing that complaint?
- A. Well, because I felt like they had used -- had discriminated against me because of safety reasons. Because we had requested to post the boom truck and because we had requested safety lines and asked for things that other people out there, nobody else had asked for. They had more or less just done what they were told to do.
- Q. And the first time someone asked Mr. Bates to post the boom truck operators, you feel he got his nose out of joint over that, and that was one of the reasons why he referred you back?
- A. Yes, sir.
- Q. And you asked him for a safety belt for Mr. Sammons and he got a little aggravated at you over that, too, did he?

- A. Yes, sir.
- Q. But you had a belt?
- A. Yes, sir.

Discussion

The facts in this case show that in late August 1981, the respondent had a need for the services of several ironworker connectors to work on the construction of a sample house and a refuse bin at its Short Creek Project. Mr. Sammons was hired by the respondent together with six other connectors on August 24, 1981, from a multi-employer UMWA district panel maintained by the UMWA local. The panel is a "hiring hall" from which mine companies can obtain UMWA member workers with various construction skills, and complainant's hiring and employment was governed by the terms and conditions of the UMWA-ABC collective bargaining argeement. After passing a written test and a physical, Mr. Sammons, reported for work on August 27, 1981. After working several days at an area known as "Flat top", loading and unloading to steel beams, Mr. Sammons, with Mr. Canada and Mr. Gravlee, were assigned to steel erection work at the sample house and worked on this project for approximately the first two weeks in September without incident and without complaint by mine management.

On or about Monday, September 14, after the construction work on the sample house had been completed, project superintendent Edward Bates assigned Mr. Sammons, Mr. Canada, and Mr. Gravlee to work on the construction of the refuse bin. Mr. Bates became dissatisfied over the slow progress being made on the construction of the bin, and after receiving a report from the project foreman, Mr. Bates had a meeting with Mr. Sammons, Mr. Canada, and Mr. Gravlee on Wednesday, September 16. At that meeting, Mr. Bates voiced his displeasure over the slow progress made on the bin construction. According to Mr. Sammons, he and Mr. Canada defended their slow progress on the ground that they were not given an additional crane and basket, and were not furnished tag lines or safety belts. Mr. Sammons also mentioned the fact that the "wet steel" slowed their progress and he indicated that "the going was slow because of a safety situation."

Subsequent to the meeting, on Friday, September 18, Mr. Bates summoned all seven connectors to the refuse bin construction site, and he stated that he did so for the purpose of "testing" them to determine their competence as connectors by having them demonstrate their abilities as connectors. Mr. Bates outlined his observations and conclusions regarding the competence of the connectors as demonstrated to him during the "test" and he rated two of them "very good", two "average", and he concluded that Mr. Sammons and Mr. Canada lacked the ability to perform as connectors. Mr. Gravlee admitted that he was afraid to climb the steel and he was allowed to bid on another job and was retained in another job capacity. Mr. Sammons and Mr. Canada were referred back to the panel. Both of them filed

grievances, and Mr. Canada's case was "settled" when the respondent agreed to take him back. Mr. Sammons' grievance was withdrawn by his union representative, and Mr. Sammons claims this was done without his permission and he stated that he has filed a complaint against this union official, an individual against whom he ran for election to a union office.

In his post-hearing brief the complainant argues that he was discharged because he made several complaints "on behalf of himself or others" with respect to unsafe practices at the mine, and that these complaints concerned a poorly fitting safety belt, lack of tag lines, and unqualified boom truck operators. Further, complainant asserts that he made himself unpopular with the mine superintendent when he and his co-workers insisted on strict adherence to safe work rules when climbing steel. Complainant concludes that the so-called "test" of September 18, at which time Mr. Bates observed the work being performed by Mr. Sammons and Mr. Canada, was used as a pretext to terminate him, and that the actual reasons for his termination were his safety complaints and his insistence on observing safe work practices. In short, contestant maintains that his case is one involving retaliation rather than a refusal to perform work because of any safety considerations. Even assuming that the latter is present, contestant maintains that any such work refusal was protected because it was made in good faith and in the reasonable belief that the work exposed him to a hazard.

Findings and Conclusions

The crucial issue in this case is whether Mr. Sammons was referred back to the panel because project superintendent Bates believed him to be an imcompetent connector or because Mr. Bates retaliated against him because Mr. Sammons had complained to him about safety hazards. Complainant's position is that his case is one of retaliation rather than work refusal (Pgs. 9-10, post-hearing brief). His contention is that the respondent, through Mr. Bates, retaliated against him because of the "many complaints he voiced concerning the lack of safety equipment". However, it should be noted at the outset that the record in this case establishes that aside from the instant discrimination complaint, neither Mr. Sammons nor Mr. Canada, both of whom served as safety or grievance committeeman during their employment tenure with the respondent, ever filed prior safety grievances through the union grievance procedure. Further, the record also established that no safety complaints were ever filed by these individuals with MSHA or with any State or local mining enforcement inspector or agency.

The UMWA-ABC Contract, Joint Exhibit 1, at pgs. 16-17, specifically covers safety procedures to be followed when an employee is required to work at heights. Article IV, Section 0(11)(a), provides for certain safety devices, but does not mention safety baskets. Subsection (b) provides that "no employee will work at heights such as on steel in hazardous weather conditions". Although Mr. Sammons testified that at times the "going was slow" due to early morning dampness and dew which made the steel slippery, or that windy conditions hampered production, there is no evidence that these conditions prevailed during the time periods in question in this case or that mine management required or expected the crew to work under those conditions. Further, Section P of the contract provides for specific procedures to be followed in matters concerning

health and safety disputes, and there is no evidence that Mr. Sammons ever filed any safety grievance or complaint addressing any of the so-called "safety complaints" which he now brings into issue in these proceedings. A discussion of these complaints follows.

The "boom truck" driver jobs

I cannot conclude from the evidence and testimony adduced in this case that Mr. Sammons' complaints concerning the boom truck drivers had anything to do with an actual complaint concerning safety. I conclude that the so-called "safety complaint" was in fact a dispute or difference of opinion between Mr. Sammons and Mr. Bates over the posting of those jobs for bids. Mr. Sammons does not dispute the fact that under the contract Mr. Bates had the right to initially assign personnel to those jobs. Mr. Bates confirmed that the dispute resulted from Mr. Sammons' insistence that the jobs be posted for bid, and Mr. Bates testimony that he assigned two conscienteous drivers to those jobs was confirmed by Mr. Canada. Mr. Canada also candidly conceded that the dispute was in reality a difference of opinion as to whether someone other than those men selected by Mr. Bates should have been given an opportunity to bid on the jobs. Further, Mr. Canada conceded that the men selected by Mr. Bates were capable, that they performed their job tasks, and that no incidents occurred during their performance which may have placed any miners in jeopardy. Finally, no MSHA, State, or union safety grievances or complaints were filed in connection with the "boom trucks". Accordingly, complainants' assertion that his "complaint" concerning these trucks was based on any safety considerations is rejected.

Safety belts and taglines

There is no evidence in this case that the respondent failed or refused to supply its personnel with safety belts or tag lines. While it is true that Mr. Sammons was initially given one which was to large for him, he was permitted to use his own. In addition, Mr. Sammons conceded that the company supplied the men with belts, that they also provided safety lines and lanyards, and that when he worked on the refuse bin he was tied off with a six-foot lanyard and had a safety belt. He also conceded that Mr. Bates' opinion concerning his work performance had nothing to do with the safety belt question.

Mr. Canada testified that he was supplied with a safety belt that fitted him. As for the tag lines, he stated that he requested a Mr. Rigsby to install tag lines on two steel panels which were being installed on the refuse bin but that the company had none available. They were provided the next day, and there is no evidence that Mr. Sammons or Mr. Canada were required to perform work without the use of such taglines. To the contrary, the evidence in this case reflects that tag lines and belts were used by both men during the refuse bin construction project. With regard to the earlier work performed on the sample house, Mr. Bates testified that most of the work was conducted from the interior steps of that structure and there is no evidence

establishing that respondent

refused requests for the use of safety belts or tags lines, or that the men were required to work without them. As a matter of fact, Mr. Canada admitted that even though he had a safety rope and no tag line, he climbed the steel anyway even though he realized he was not required to do so.

The use of "baskets"

There is no evidence in this case that the use of a "basket" while making steel beam connections is mandated by any mandatory MSHA or State safety standard. I conclude and find that the issue concerning the use of a basket while making the steel connections in question is unrelated to any safety factors. Bates testified that baskets are not normally used to make such connections, and his decision not to use them on the refuse bin was dictated by his concern over slow production on that project and the fact that the use of a basket would have required another crane to be brought to the project site. Even so, he conceded that anyone may "walk away" from any situation if they believed it was unsafe to perform a particular job task, and he recognized this right on the part of any employee. He also indicated that the safety committee could have filed a safety grievance or complaint if they believed that a basket was required while making connections on a steel structure, but that this was never done.

Mr. Canada acknowledged and agreed that the use of a basket to connect certain panels to the steel refuse structure was not feasible. In addition, his testimony that a basket was at the project site and readily available for use had Mr. Bates authorized its use contradicts the complainant's assertion at page 12 of his post-hearing brief that the crew had to fabricate a basket "on their own" for use on the refuse bin. As a matter of fact, the transcript pages referred to by the complainant to support the assertion that the crew had to fabricate their own basket contain absolutely no information in this regard. Mr. Sammons' testimony is that Mr. Bates would only permit the use of a basket for "bolt-up" work, and that Mr. Bates would not permit the use of "extra equipment". Mr. Sammons alluded to the fact that Mr. Bates told him that he would not allow the use of a second extra crane, and that the interpretation placed on the statement "no extra equipment" by Mr. Sammons was that no safety belts or safety baskets would be permitted. Considering all of the testimony in this case, and taking that statement in context, I reject any interpretation that Mr. Bates' concern about the use of any "extra equipment" translates into a complete disregard for the safety of the crew on the project in question. I conclude that Mr. Bates' decision concerning the use of a basket was based on his honest belief that baskets are not feasible when making such connections, that there are times when a competent connector must "climb the steel", that the routine use of baskets in such work require the use of an additional crane which must be transported to the project site, and that the upper portion of the diagonal in question was firmly in place even though the connection had not been made.

I conclude that Mr. Sammons' concern about the use of the basket stemmed from the fact that he believed he would not be able to stand erect while making the steel connection at the upper diagonal, and that he may have had to walk along a beam and hold on while reaching the connecting point. It seems to me that in this type of work a safety lanyard or rope, coupled with use of a safety belt, would permit a connector to make the connection in a safe manner. Safety belts and lanyard ropes were provided and made available to the crew working on the refuse bin, and no one directed or instructed either Mr. Canada or Mr. Sammons to do any work without being tied off. As a matter of fact, Mr. Sammons conceded that he was tied off when he made the lower connection. Since he came to the conclusion through visual observation from his vantage point at the lower end of the diagonal that the upper portion would not fit, he opted not to climb up. At that point in time, Mr. Bates instructed him to come down, and another man climbed up and confirmed that the connection could not be made.

In view of the foregoing, I cannot conclude that Mr. Sammons made any "safety complaints" to Mr. Bates concerning the use of a basket. Although Mr. Sammons may have felt more secure riding up in a basket to take a look at the upper steel diagonal, at this particular point in time no one directed him to climb up and his decision not to was his own.

The retention of Mr. Gravlee and the reinstatement of Mr. Canada

In his post-hearing brief contestant asserts that assuming that his case falls into the category of a "mixed motive" case, the respondent has not shown that Mr. Sammons would have been terminated in any event. In support of this argument, contestant points to the fact that Mr. Canada was reinstated and that this was accomplished in exchange for the dropping of Mr. Sammons grievance. In addition, contestant points out that Mr. Gravlee is still employed with the respondent.

The record adduced in this case reflects that Mr. Gravlee was assigned to another job after he voluntarily relinquished the position of connector, and he did so after expressing his fear and reluctance to climb to heights or to otherwise perform the job of a connector. Mine management apparently agreed to permit him to bid on another position, and I see nothing out of the ordinary in this decision. Contestant's suggestion that the decision to keep Mr. Gravlee on in another job classification is an indication of unequal treatment is simply not supported by the record and is rejected. In my view, the facts and circumstances surrounding Mr. Gravlee are different from those presented in Mr. Sammons' case, and I fail to understand how contestant can argue that they are related.

With regard to Mr. Canada's reinstatement, he declined to give any testimony concerning the rationale for his reinstatement and stated that his reasons in this regard were "personal ones" (Tr. 260-261). In rebuttal, respondent's personnel director Ellis testified that the decision to take Mr. Canada back was a management compromise decision made after the third-step

grievance hearing in his case. The decision was dictated by the fact that management believed Mr. Canada could establish "on paper" that he had $\frac{1}{2} \left(\frac{1}{2} \right) = \frac{1}{2} \left(\frac{1}{2} \right) \left(\frac{$

better qualifying experience as a connector than did Mr. Sammons, and that the union agreed to settle both grievances through the reinstatement of Mr. Canada and the withdrawal of Mr. Sammons' complaint (Tr. 268-275).

I see nothing sinister in the decision by mine management to reinstate Mr. Canada and not Mr. Sammons. Both grievances were adjudicated under the union contract procedures and I do not believe that proceedings under section 105(c) of the Act should undercut those established practices where there is no showing of a violation of the anti-discrimination provisions of the Federal Mine Act. If this were permitted, any employee who is dissatisfied with the outcome of any grievance filed in his behalf by his union could cry "discrimination" and have his grievance case readjudicated a second time in a second forum. I do not believe that Congress ever intended the Mine Act to be used as a "mini-NLRB" to air union grievances or politics.

The so-called "test" of September 18th

The manner in which an employer sees fit to determine the competence of its work force is a question that I prefer to leave to the employer and the work force. As indicated earlier, the parties are in agreement that any employee hired from the union panel may be referred back to the panel by the employer within thirty days if the employer is not satisfied with his work (See Section (h), Article XVI, p. 54, Joint Exhibit 1). Referring an employee back to a panel for "union activity" is "discrimination" under Article XXIII of the contract and it is a grievable offense.

Mr. Sammons' union grievance (exhibit R-6), was based on his assertion that he was qualified to do the work of a connector and that he was discriminated against because of his union activities. Although the grievance states that management failed to provide him with sufficient safety equipment that "somewhat hindered" his productivity, I take note of the fact that the grievance was a regular grievance filed pursuant to Article XXI of the contract, rather than one based on safety or health considerations.

Complainant's assertion at page 16 of his post hearing brief that the principal reason for referring him back to the panel was his refusal to climb the diagonal is rejected. Further, his suggestion that his refusal to climb the diagonal is a "protected refusal to work" is rejected. Complainant's counsel conceded that this case does not involve the typical "refusal to work" because of any safety considerations (Tr. 125). Counsel also agreed that the thrust of Mr. Sammons' complaint is the assertion that after he and mine management (Mr. Bates) had a difference of opinion regarding the slow progress being made on the refuse bin construction, and coupled with the fact that Mr. Bates and Mr. Sammons had a previous "discussion" concerning the posting and bidding of certain boom truck operator jobs, Mr. Bates was prejudiced towards Mr. Sammons and found a convenient way to get rid of him by returning him to the Panel (Tr. 126, 129). The

issue here is one of "retaliation" for making safety complaints, not a refusal to perform work because of safety considerations. The record

in this case does not support any conclusion that Mr. Sammons was required or directed to perform work which was unsafe, that he refused to comply, or that he was discharged for that refusal. Under the circumstances, complainant's alternative theory of his case is rejected.

Complainant asserts that the failure by the foremen who supervised his work to testify in these proceedings seriously undercuts the claim that he was incompetent. However, the burden of proof here is on the complainant, and if he believed that this testimony was critical to his case he should have subpoenaed them to testify or at least taken their depositions. He did neither. The fact that the respondent chose to rely on the testimony of the project superintendent on this issue does not dilute the weight to be given to his testimony, particularly when the complainant has had a full and fair opportunity to cross-examine him.

In the final analysis, I believe that Mr. Sammons' discrimination complaint was motivated in large measure by his disagreement with Mr. Bates conclusion that he could not perform his connector duties to his liking. Mr. Sammons admitted as much when he stated as follows (Tr. 203-204):

- Q. What if they provided you with the belt, provided you with the cage, provided you with the lifeline, and still during the 30-day period mine management was of the view that you weren't fast enough and they referred you back to the panel? Then where would you be?
- A. I would have a case before the National Labor Relations Board at this time.
- Q. You would?
- A. Yes, sir.
- Q. On what ground?
- A. Discrimination. Because I don't think I'm not competent. It's just like you think you're competent, and I know that I'm competent, and you know it yourself that you're competent. And it's just in human nature. I mean I'm just stating facts that I believe. And I resent anybody saying that I'm incompetent, and I want them to show me that I'm incompetent. It takes a smart person to stick a wrench in a hole.

After careful reivew and consideration of all of the testimony and evidence adduced in this case, I conclude and find that Mr. Bates' referral of Mr. Sammons back to the UMWA Panel was motivated by his belief that Mr. Sammons could not perform the duties of a connector in a manner which conformed with Mr. Bates expectations. As the project superintendent, Mr. Bates was authorized to supervise the work and to make those management

judgments which were necessary to insure timely completion of the projects. As a matter of fact, there does not appear to be any dispute that under the contract Mr. Bates had the right to send anyone back to the panel within the initial 30 days of their employment if he was not satisfied with their performance.

Although the record here suggests that Mr. Sammons and Mr. Bates may have had some disagreements concerning their respective authority and jurisdiction, having viewed them on the stand during their testimony I conclude that their "encounters" and "confrontations" resulted from their rather headstrong and firm personalities. In short, I believe that Mr. Sammons, in his eagerness to assert his leadership abilities and potential for advancement in his local union, found a ready opportunity to pursue his talents by his confrontations with Mr. Bates. By the same token, Mr. Bates reacted by letting Mr. Sammons know that he and not Mr. Sammons was the project superintendent.

Although complainant's post hearing arguments suggest that Mr. Bates found a convenient way to get rid of Mr. Sammons by simply sending him back to the panel, having viewed Mr. Bates on the stand during the hearing, he impressed me as an honest and straight-forward witness. I conclude and find that his motivation in referring Mr. Sammons back to the panel was based on his honest belief that Mr. Sammons could not perform the duties of connector, and that his decision was not based on any safety complaints made by Mr. Sammons.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude and find that the respondent's referral of Mr. Sammons back to the panel was not motivated in any part by any protected activity on his part. I further conclude and find that the record adduced in this proceeding does not establish that respondent has otherwise discriminated against the complainant by virtue of his mine safety activities. Accordingly, the complaint filed in this matter is DISMISSED, and the requested relief is DENIED.

George A. Koutras Administrative Law Judge

~FOOTNOTE_ONE

a. At the hearing, respondent's counsel advised that Mine Services Company, a wholly owned subsidiary of Drummond Coal Company, is the proper respondent in this case, and he was permitted to amend his pleadings accordingly.