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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
FRANK CRONIN AND MERREL NIXON,
COMPLAINANT

DISCRIMINATION PROCEEDING
Docket No. LAKE 83-9-D
MSHA Case No. VINC-CD-82-17
Sunnyhill No. 9 South Mine

v.

PEABODY COAL COMPANY,
RESPONDENT

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U. S. Department of Labor, Cleveland, Ohio, for
Complainant Michael O. McKown, Esq., St. Louis,
Missouri, for Respondent Thomas Myers, Esq.,
Shadyside, Ohio, for Intervenor Local Union
1340, UMWA District Six

Before: Judge Steffey

Pursuant to an order consolidating issues and providing for hearing issued August 12, 1983, a hearing in the above-entitled proceeding was held on September 27 through September 30, 1983, in Columbus, Ohio, under section 105(c)(2), 30 U.S.C. 815(c)(2), of the Federal Mine Safety and Health Act of 1977.

The complaint was filed on October 19, 1982, and alleges that respondent attempted to discharge both complainants because they refused to shovel coal out of a belt feeder without proper precautions having been taken to assure that the belt feeder was deenergized and that all power to the belt feeder had been disconnected. It is also alleged that respondent prohibited complainants from exercising their right to have a safety committeeman called to determine if complainants were properly exercising their individual safety rights. The discharge was subsequently modified by an arbitrator to a 5-day suspension without pay and employee benefits. Therefore, the primary economic relief sought by complainants was full back pay and employment benefits for the 5-day suspension.

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Vol. IV, Tr. 30-59):

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It is necessary in a decision such as this to make some findings of fact. After 3 long days of hearing, the findings are somewhat extensive, but I feel that they are necessary in order to set forth the basic facts which the various witnesses have presented. The findings will be made in enumerated paragraphs.

1. Merrel Nixon and Frank Cronin were working in Peabody's Sunnyhill No. 9 South Mine on June 23, 1982, on the 4-p.m.-to-midnight shift as the loader operator and loader helper, respectively, in the 1 South 1 East Section. They traveled into the mine in a man trip and arrived on the section about 4:45 p.m. There was a lack of brattice curtains and there were some water leaks in the hoses supplying water to the loading machine, but eventually enough curtains were obtained to provide the required 9,000 cubic feet of air per minute at the last open crosscut and an adequate amount of water was provided for loading coal.

2. After Nixon and Cronin had loaded two or three cuts of coal, their section foreman, Ralph Simms, ordered them to go to the feeder which was out of order. They went to the feeder and found that it had been trammed to a point about 25 feet in by the tailpiece where the feeder was stuck in a diagonal position in D Entry, which is also known as the belt entry.

3. A repairman named Milan Bizic had determined that the tram chain had broken which prevented further movement of the feeder under its own power. The conveyor belt on the feeder was also inoperable, and Simms, the section foreman, believed that the repairs to the conveyor belt could not be made unless someone shoveled about 2 tons of coal out of the feeder. Simms, therefore, asked Cronin to obtain two coal shovels at the tailpiece so that the coal could be removed from the feeder where it had been left in a pile when the conveyor chain broke. After Cronin had obtained the two shovels, Nixon and Cronin claim that Simms asked them to get into the feeder and shovel out of the feeder 2 tons of coal which were in the feeder when the feeder's conveyor belt ceased to work.

4. Cronin asked Simms if the power was off the feeder and Simms did not answer Cronin until Cronin had asked about the feeder's deenergization a second time. After Cronin's second question, Simms told Cronin the power would not hurt him and that the breaker had been knocked or turned off. Cronin and Nixon then went around to the end of the feeder into which the shuttle cars dump coal and started shoveling coal from that position with their feet on the mine floor. Nixon and Cronin say, however, that Simms, after telling them to get up into the feeder twice, gave them a third order to get up in the feeder and shovel coal. At that point, Nixon claims he asked Simms to

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call the Safety Committee. Nixon and Cronin say that without responding to Nixon's request for the Safety Committee, Simms left the feeder and went into the dinner hole. Nixon and Cronin say they thought Simms had gone to call the Safety Committeemen, but, in fact, he called the Mine Manager, John Ludwig, and asked him to send a vehicle to the section to transport from the mine two employees who had refused to shovel coal when Simms asked them to do so.

5. After Simms had finished talking to Ludwig, he returned to the feeder where Nixon and Cronin say they were still shoveling coal from the dumping end of the feeder. Nixon and Cronin say that Simms advised them that their time had stopped and he told them to go to the dinner hole and wait to be taken out of the mine.

6. About 20 minutes later, Ludwig arrived on the section with Assistant Mine Manager John Holskey. Ludwig went into the dinner hole where other miners were waiting for Simms to give them further orders. While Ludwig was in the dinner hole, the operator of the roof-bolting machine, Ronald Baker, told Ludwig that he had personally observed both Nixon and Cronin shoveling coal out of the feeder when he walked within 30 feet of the feeder on the way to the dinner hole. Ludwig responded that he had come to take Nixon and Cronin out of the mine rather than to argue the merits of the situation.

7. While Nixon and Cronin were walking to the personnel carrier, known as a "mule," to be taken out of the mine, Nixon asked for safety glasses because Peabody has a rule that persons riding in open vehicles should wear safety glasses. Ludwig wanted to know if they had not been issued safety glasses, and they replied, "Yes," but Cronin had left his at home and Nixon had left his in his clothes basket in the bathhouse. Ludwig obtained glasses for them and they started out of the mine in the mule, but the batteries were low on power and would hardly move the mule. The batteries continued to lose power, so Ludwig and Holskey called for another vehicle to come to pick them up and they transferred to another personnel carrier called a four-man rover. Nixon asked to inspect the brakes and lights before he got into the rover, but Cronin said that Holskey told Nixon to get the goddamn hell in here; you don't need to inspect. Therefore, Nixon and Cronin got into the rover and all four men went on out of the mine. Once they reached the surface, Nixon saw MSHA Inspector Elmer Cornett and went to him to ask him to check the lights and the brakes on the rover because Holskey had refused to let him examine the rover. Nixon went with Cornett to examine the brakes and lights on the rover and Cornett found them to be satisfactory. Nixon then told Cornett about a missing jack and bar. Cornett wrote a citation for the failure of the rover to have a jack and bar, after

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Cornett had returned to his office and had obtained a proper safeguard notice for inclusion in the citation as a basis for its issuance.

8. Nixon also told Cornett that he and Cronin had been fired, but Nixon did not finish explaining the details to Cornett because Ludwig advised Nixon and Cronin that they should leave the mine property as they had been suspended.

9. Nixon and Cronin came back to the mine for a 24/48-hour meeting on their suspension notices, but there had been a partial work stoppage and John Goroncy, the mine superintendent, declined to participate in a discussion of the merits of the suspension at that time. Goroncy did, however, hand Nixon and Cronin a letter of suspension with intent to discharge. A meeting on the merits was eventually held after the 48-hour period had expired and the matter went to arbitration. A hearing was held on July 15 and July 22, 1982, and the arbitrator's decision was issued on August 10, 1982. The arbitrator held that Nixon and Cronin had contrived the safety issue as a pretext after they were discharged, but he also held that discharge was overly severe under the circumstances and required Peabody to reinstate Nixon and Cronin after suspending them for 5 days without pay and other employee benefits.

10. Elmer Cornett, the inspector who wrote the citation for failure of Peabody to have a jack in the rover, as described in Finding No. 7 above, was at the mine on June 23 for the purpose of performing a respirable dust inspection. He had been on the 1 South off 1 East Section for about the first 2 or 3 hours of the shift and had taken an air reading indicating at that time that there was a velocity of 9,500 cubic feet per minute at the last open crosscut. Although he was performing a respirable dust inspection, he could have written a citation for any violation he might have seen, but wrote none. He left the 1 South off 1 East Section before the feeder became inoperable, but he testified that it would have been a violation of section 75.1725(c) for Nixon and Cronin to have been inside the feeder shoveling coal without having the power cable locked out at the power center. The inspector said he would consider it a violation for Nixon and Cronin to shovel from the dumping end of the feeder if their shovels had come into contact with the conveyor belt while the breaker was off on the feeder but with the power cable still energized. He also said he would consider it unsafe for Nixon and Cronin to shovel out coal from the dumping end of the feeder while the breaker was off if the power cable was still energized; and that while he might not write a citation for shoveling in the last-described instance, he would still require them, that is, Nixon and Cronin, to stop shoveling in that situation as he considered that such shoveling would be an unsafe practice, because there is always

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a chance that the feeder could move even though the breaker has been put in the off position.

11. Wayne Hart was one of the shuttle car operators on June 23 when the feeder became inoperable. Simms asked him to assist in the repair work on the feeder. After Hart had assisted Simms and Milan Bizic, the repairman, in lining up the tram chain, Bizic went to the parts wagon to get a connecting link. Therefore, Hart claims that he was the only other person present at the time Simms ordered Nixon and Cronin to get into the feeder and shovel coal. Hart said that he is certain that Simms wanted Nixon and Cronin to get inside the feeder to shovel coal, and Hart insisted that the only way the feeder could have been completely cleared of coal would have been for them to get into the feeder at its narrowest point, that is, inby the apron where the shuttle cars dump coal. Nixon and Cronin would have had to have been very close to the pick breakers in order to shovel from the position described in the preceding sentence. Hart claims that he is certain from the gesture made by Simms when he ordered Nixon and Cronin to shovel coal that Simms wanted them to shovel coal from inside the feeder in the aforesaid position which is also the location which Nixon and Cronin say they believe they were ordered by Simms to position themselves for shoveling. Hart also claims to have heard Nixon ask for the Safety Committee and alternate work and he supported Nixon's claim that Simms did not respond to Nixon's request for the Safety Committee to be called. Hart also claims that he thought Simms had gone to call the Safety Committee and said that he was very surprised when Simms returned and advised Nixon and Cronin that their time had stopped and that they should go to the dinner hole to be taken out of the mine.

12. Milan Bizic was the repairman on 1 South off 1 East Section. He explained that the feeder stopped functioning when the chain which drives the conveyor belt stopped working and that he and Simms agreed that coal could still be produced on that shift if the feeder were trammed out of the way so that one of the shuttle cars could be lined up with the conveyor belt and used as a temporary feeder while the other shuttle car continued to haul coal. It was their intention to tram the feeder into the second crosscut outby the face, but the tram chain also broke so as to leave the feeder in a position which prevented use of a shuttle car as a substitute feeder. After Simms, Bizic, DeMoss, and Hart had done some alignment on the tram chain, Bizic left to get a connecting link. He spent about an hour at the parts wagon without ever finding the part he wanted, but finally he started back to the feeder with a bolt with which he hoped to make a temporary repair of the tram chain. He found that everyone else on the crew had gone away from the feeder to the dinner hole, so he also went to the dinner hole and did not go back to work on the feeder at all.

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13. Bizic has had 34 years of experience in coal mines including a lot of work as a repairman and as a safety inspector for Consolidation Coal Company. He did not hear Simms order Nixon and Cronin to get into the feeder to shovel coal, but he did not think it would have been safe for them to work in the feeder without having the trailing cable locked out at the power center. He said any miner had the right to go to the power center and disconnect the cathead before getting on a piece of equipment to work where moving parts might cause him injury, if the machine were to start as he has known equipment to start, even after the breaker switch has been turned off. Bizic said that if he had been present when Simms ordered Nixon and Cronin to shovel coal, he would have gone to the power center and would have locked out the cathead for the feeder's power cable regardless of whether Simms asked that that be done or not.

14. The superintendent of the Sunnyhill Mine on June 23, 1982, when Nixon and Cronin were suspended with intent to discharge, was John Goroncy. He was called at home by Ludwig between 11:30 p.m. and midnight and was told that Ludwig had brought Nixon and Cronin out of the mine for refusing to obey Simms' direct order to shovel coal out of the feeder. Goroncy specifically asked Ludwig if a safety issue was involved, and Ludwig said that no safety issue was raised about the refusal to shovel coal, but that Nixon and Cronin had requested safety glasses before riding in the mule and had been given glasses, and that Nixon had requested that he be allowed to inspect the four-man rover when they transferred to that vehicle, after the batteries ran down on the mule, and that Nixon would not get into the rover until Holskey had given him a direct order to do so. Goroncy denied that Holskey used profanity in ordering Nixon to get into the rover.

15. Goroncy confirmed Nixon's and Cronin's statement that the next morning, June 24, Goroncy personally handed Nixon and Cronin letters stating that they had been suspended with intent to discharge. Goroncy said that he refused to hold a 24/48-hour meeting provided for in the Wage Agreement when he learned that there had been a work stoppage at the Sunnyhill Mine. Goroncy said a 24/48-hour meeting was eventually held within the 48-hour period based on the date when the miners returned to work. Goroncy declined to reinstate Nixon and Cronin to their jobs after that meeting and the matter went to arbitration as described in Finding No. 9, supra.

16. Goroncy, who has a B.S. degree and is a professional engineer with electrical training, introduced Exhibits A, G, H, and I to show the power circuits on the feeder. In layman's terms, there is a lever on the side of the feeder which, when pushed down, stops the power from flowing into the circuit breaker. The lever has to be pushed down and pulled back through a horizontal position to reenergize the circuit breaker.

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Additionally, there are 3 buttons to the right of the breaker lever as shown on Exhibit A. They are labeled and one starts the pick breakers to running when held in for about 2 seconds; another button starts the conveyor belt moving after the pick breakers have started; and the third button is a stop button which will stop both the pick breakers and the belt conveyor from moving, but the circuit breaker does not open until the lever is pushed down. Although Goroncy thinks it is safe to shovel coal out of the feeder with only the breaker switch pushed down, he would feel safe about having a person work inside the feeder near the pick breakers only with the cathead on the feeder cable withdrawn at the power center.

17. Goroncy made the decision to discharge Nixon and Cronin. In doing so, he did not take into consideration that neither of them had ever previously refused to obey a work order given by their supervisor. Goroncy said that it was important that discipline be maintained, because Peabody is responsible for all personnel and discipline is easily eroded if employees can ignore a section foreman's work orders without giving a reason which management can consider and evaluate at the time the employee refuses to obey the order. Goroncy thinks that the issue of Simms having ordered Nixon and Cronin to get into the feeder to shovel coal was raised for the first time at the arbitration hearing.

18. Ralph Simms' testimony agreed in general with the findings made above. He agrees that he was confronted with a number of production problems during the early part of the shift on June 23, but he considers them to have been routine in nature. He agrees that there were broken trailing cables and problems with curtains and water hose connections, but he said that his first real difficulty occurred about 9:30 p.m. when the conveyor chain on the feeder broke just as a shuttle car was dumping coal on it. He said that he tried to get the feeder out of the belt entry so that a shuttle car could be used as a substitute, temporary feeder, but the tram chain broke, thereby leaving the feeder stalled partially in the second crosscut from the face and partially in the belt entry. At that point he knew he could not produce any more coal, so he left the feeder and made a tour of the face giving orders to the miners to hang curtains, take the cutting machine to the track for replacement of a tire, and requesting Nixon, Cronin, and Hart to assist down at the feeder.

19. Simms' testimony varies from Nixon's and Cronin's in important respects from the point that DeMoss, Bizic, Hart, Nixon, and Cronin gathered at the feeder. Simms said they first tried to get the tram chain repaired and that DeMoss, Bizic, and Hart were working on that while he asked Cronin to get two shovels to shovel coal out of the feeder. Simms agreed that

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Cronin asked if the power was off the feeder; and Simms stated that he told Nixon and Cronin that the breaker had been knocked and stated that Nixon and Cronin finally went to the dumping end of the feeder and threw out three or four shovels of coal. At that point, Bizic asked that the tram cogs be jogged so that it was necessary to ask Nixon and Cronin to stand back while he reenergized or closed the circuit breaker on the side of the feeder. After Simms had lined up the cogs to Bizic's satisfaction, he pushed the breaker lever back down to deenergize the circuit breaker. By that time, Nixon and Cronin had gone over and had sat down against the rib of the closest pillar in the crosscut. Simms stated that he asked them twice again to resume shoveling; and that after one request, Nixon told Simms to get off his back. Simms said he told Nixon he was not on Nixon's back, but that the coal needed to be shoveled out of the feeder so that the next shift, which was purely a maintenance shift, could repair the conveyor chain. Simms claimed that he finally addressed Nixon and Cronin by name and told them he was giving them a direct order to shovel coal. When they still did not respond, he told them that if they were not going to work, he would get them a ride out of the mine. Thereafter, Simms called Ludwig, the mine manager, and asked him to send transportation for two miners who refused to obey an order to shovel coal. After calling Ludwig, Simms returned to the feeder and told Nixon and Cronin that, as far as he was concerned, their time had stopped and that they could go to the dinner hole and wait for their transportation out of the mine.

20. Simms' testimony also differs from Nixon's and Cronin's in that Simms claims DeMoss came around the dumping end and began shoveling coal when Nixon and Cronin failed to respond to Simms' order. Simms' statement also differs from Hart's testimony in that Simms claims he told Hart to shovel when Nixon and Cronin failed to do so, and that Hart did shovel, whereas Hart denies that he ever shoveled any coal at all. Hart also claims that DeMoss went with Bizic to the parts trailer and that no one was left around the feeder other than Hart, Simms, Nixon, and Cronin. Simms also denies that Nixon requested the Safety Committee, whereas Nixon and Hart both say Nixon requested the Safety Committee; and Hart even claims that Nixon asked for alternate work, which Nixon himself never claims to have requested.

21. Ludwig received the phone call from Simms about 11:30 or 11:40 p.m. Ludwig first asked Holskey to go in the mine by himself and bring Nixon and Cronin out, and then decided he would go along and get first-hand knowledge of the facts. On the way in, they came to a derailed supply car and transferred from a four-man rover to a five-man mule. The jack from the mule was being used to get the car back on the track, so Ludwig took the jack from the rover and put it in the mule. On the way back out of the mine, the batteries became so weak in the mule that Holskey had to call for another vehicle and the pumper

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brought them the four-man rover they had used to commence their trip into the mine in the first place. Ludwig forgot to remove the jack from the mule and replace it in the rover. Therefore, when all four men arrived on the surface, Inspector Cornett was waiting for Nixon to come out of the mine with the respirable dust sampling device which Cornett had put on Nixon at the beginning of the shift. Nixon asked Cornett to inspect the rover, and Nixon told Cornett that there was no jack in the rover. Cornett found the brakes and the lights working satisfactorily, but as indicated in Finding No. 7, supra, there was no jack in the rover.

22. Ludwig's testimony generally conforms with the other witnesses' testimony except that he denied that Holskey used profanity in ordering Nixon to get into the rover when they transferred from the mule to the rover on the way out of the mine. Also Ludwig stated that Baker remarked when he, Nixon, and Cronin were leaving the dinner hole to go to the mule, that Baker told Nixon and Cronin to go on to the surface with Ludwig and that the Union would see that they returned to work the next day with full pay. Ludwig also claims that even though he declined to argue with Baker as to whether Nixon and Cronin had actually shoveled any coal, that his refusal to argue that point was no reason for Baker to refrain from discussing a safety issue with him if one existed. Ludwig's recollection of Nixon's discussion with Cornett was that Nixon only told Cornett about the jack in the rover, whereas Cornett claims that Nixon told him about other things, including the fact that he had been fired.

23. Holskey's testimony is also in general agreement with that of the other witnesses, except that he denied that he used profanity in ordering Nixon to get into the rover and stated that it is contrary to Peabody's policy for management personnel to use profanity in giving orders to employees. Holskey had just come out of the mine from accompanying Inspector Cornett underground when Simms called, thereby requiring him to go immediately back underground. Neither Ludwig nor Holskey recall that Cornett was at the mine on June 23 to make a respirable dust inspection and neither recalls that Nixon was wearing a respirable dust collecting device, but Holskey said the mine was inspected so frequently that he could not recall the specifics as to the inspectors' visits to the mine. Holskey said that he, Ludwig, and Simms discussed the shoveling incident and each of them wrote a separate report at Goroncy's request, and that it was about 1:00 a.m. when he and Simms left the mine to return home. Holskey and Simms are in the same car pool.

In the arguments which the parties made prior to the rendering of the bench decision, Mr. McKown referred to some pertinent Commission and court cases with respect to what is required before it can be said that a miner has properly raised his right to refuse to work because of a safety problem.

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One of the cases that Mr. McKown mentioned is Secretary on behalf of Michael J. Dunmire and James Estle v. Northern Coal Co., 4 FMSHRC 126 (1982). In that case the Commission stated that where reasonably possible, a miner should ordinarily give the operator an expression of the hazard at issue before leaving; and if not possible, as soon after leaving as reasonably possible. There should also be a good-faith belief as to the existence of the hazard.

Mr. McKown has made that same observation about the requirements for raising a refusal to work because of a hazardous condition. And, as Mr. McKown also pointed out, if a miner does refuse to work, he should make the complaint about the unsafe condition so that the operator would be able to take action to correct the unsafe condition and protect other miners who are still working.

I think that Mr. Zohn has stated in reply to Mr. McKown's argument that there were no other people who could have been assigned to shovel in this instance, but, it is a fact that Cronin testified that when he went into the dinner hole, Hart and Bizic were shoveling coal out of the feeder. That was also the testimony of Simms, except that Simms stated that DeMoss and Hart were shoveling coal out of the feeder. So, at least Cronin agreed with Simms to the extent that they both testified that Hart was shoveling coal out of the feeder.

By Cronin's only having asked Simms if there was power on the feeder without expressly talking about the safety hazard, Simms failed to realize that a safety hazard was involved. Therefore, he also ordered Hart to shovel coal after Cronin and Nixon declined to do so, and Cronin agrees that Hart was shoveling coal at the time Cronin and Nixon left the feeder to go to the dinner hole to await transportation out of the mine.

Now, as for the argument that all Cronin had to do was to ask Simms if the power was on, and at that point it became Simms' obligation to figure out what needed to be done and interpret that as a refusal to work because of a safety hazard, the evidence does not support an argument to that effect, because Simms believed that as long as a person is not actually working on an electrical circuit, it is only necessary to knock the circuit breaker on the side of the machine to make it entirely safe to work on such things as shoveling coal out of the feeder even if a person is inside the feeder doing the shoveling.

The issue of whether power must be turned off at the power source before mechanical labor, as distinguished from electrical work, is performed on equipment was decided by the Commission in Kaiser Steel Corp., 3 FMSHRC 2463 (1981). In that case, the

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Commission held that it is a violation of section 75.509 for an operator to fail to deenergize equipment before mechanical work is done on it, even if the mechanical work involves only the changing of bits on a shearing wheel because, in that case, the wheel started running accidentally even though the operator thought he had turned off the power.

Therefore, the Commission has already rejected the same argument that Simms felt was appropriate in this case, namely, that knocking the breaker on the feeder was sufficient deenergization preparatory to having coal shoveled out of the feeder. Ludwig and Goroncy both agreed with Simms, that is, Ludwig believed that all a person had to do in the case of the feeder was to knock the breaker at the feeder and that he did not have to go back and pull the cathead out of the power center. The only time Goroncy differed from that view was that he thought that the cathead had to be pulled if a person intends to work right beside the pick breakers.

As I understand the requirement for raising a safety issue in connection with a refusal to work, the burden is on the miner to establish that there is a safety matter to be considered, that the work he has been asked to do is dangerous, and that he is refusing to do the work because it is unreasonable for him to be asked to expose himself to the hazards involved. The burden is not on the section foreman to read the employee's mind and try to determine why the employee is refusing to work, especially as was true in this case, when the section foreman thinks that he has satisfied the miner's complaint about safety by knocking the breaker, assuming that the section foreman even comprehended that a safety issue had been raised in this case.

The Commission expressly ruled in *Kenneth E. Bush*, 5 FMSHRC 993 (1983), that if an operator listens to a complaint about safety and eliminates the hazards raised by the complaint, the work refusal loses protection under the Act. Mr. Zohn, on behalf of complainants, has argued that Simms' interpretation of the safety standards is incorrect. The Commission's ruling in the *Kaiser Steel* case, *supra*, shows that Mr. Zohn is correct in arguing that Simms did not properly understand the deenergization requirement which is necessary before mechanical work may be done on equipment powered by electricity.

Nevertheless, the fact remains that if the miners, as was true in this case, are unable to explain to their section foreman what safety matter they have in mind and what it is that they fear and, if, as was also true in this case, the section foreman does all that he thinks is necessary to alleviate their fear or problem, then I think that the section foreman has done all that can be done to make their working conditions safe at that point. Unless the miners continue to express a fear that the machine still has not been sufficiently deenergized to make

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shoveling a safe activity, the section foreman does not know why the miners are continuing to refuse to shovel coal out of the feeder.

Mr. Zohn is also correct in saying that the entire decision in this proceeding must be based on the credibility of the testimony given by the respective parties' witnesses. It strains my credulity to believe that Cronin and Nixon actually thought that they were supposed to crawl through about a foot or less of space between the side boards on the feeder and the mine roof to get down onto the actual conveyor belt very close to the pick breakers in order to shovel coal which was located closer to the dumping end of the feeder than it was to the pick breakers.

It would have been practically impossible for complainants to have gotten into the feeder since Nixon is about 6 feet 1 inch tall and Cronin is about 5 feet 10 inches tall and quite stocky. In other words, the physical problems associated with complainants' getting into a position inside the feeder are such that I do not believe that Simms would order men to undertake such an unreasonable feat as getting inside the feeder so as to shovel coal out of the narrow opening between the top of the feeder and the mine roof.

The testimony of Hart was that he based his certainty that Simms wanted Nixon and Cronin to get inside the feeder simply on a gesture which he claims Simms made, while Simms claims that his gesture was to the back of the machine where the coal is dumped onto the feeder.

One of the problems in all these cases is that miners have a tremendous amount of difficulty in communicating with each other. I believe that if they would talk over with their section foremen what their real problems are, and vice versa, that they would avoid a great many of the disputes which seem to occur. I cannot understand why Nixon and Cronin could not have asked Simms where he wanted them to position themselves in order to perform the shoveling of coal. Neither of them claims to have asked that question. The most that either one of them claims is that Cronin asked if the power was off and Nixon says he asked for a safety committee meeting. That is the extent of their conversation. The rest of the conversation consists of Simms repeating that he wanted them to get the coal shoveled out of the feeder.

We have in the record the testimony of Baker, a roof bolter, who had come down to the dinner hole after he had finished doing some work at the face assigned to him by Simms. He says that he saw both Nixon and Cronin shoveling coal out of the feeder. But Nixon's and Cronin's testimony confirms that when Baker saw them doing the shoveling, they were doing the only shoveling which Simms agreed that they had done the whole evening. Therefore,

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Baker's statement made to Ludwig that he had seen Nixon and Cronin shoveling coal out of the feeder while standing at the end of the feeder was based on the single instance when all witnesses agreed that Nixon and Cronin did shovel a little coal out of the feeder.

Hart's testimony about the shoveling out of the feeder is flawed by the fact that he became involved in a lengthy discussion about the fact that Simms wanted the coal thrown into the crosscut so that the scoop could come down and pick it up even if the feeder could not be moved, whereas Simms made it perfectly clear that he did not care where the coal was thrown so long as it was taken out of the feeder so that the conveyor chain could be repaired. I believe that Hart's testimony has very low credibility to it in some other respects because Hart claims that DeMoss was not at the feeder because he had gone to the parts wagon with Bizic. Yet Bizic stated that he remained at the parts wagon for an entire hour looking for a connecting link. Simms testified convincingly that there would have been no need for DeMoss to go to the parts trailer with Bizic to bring back one little connecting link for a chain and that he recalls DeMoss shoveling at the feeder. Even if DeMoss did leave for a short time, it is difficult for me to believe that he would have stood for an hour by Bizic who was simply looking for a connecting link.

Hart also testified that Nixon not only asked for the safety committee, but also requested alternate work, but Nixon did not claim that he ever asked for alternate work. Therefore, it appears to me that Hart simply decided to testify on behalf of the two complainants and that his preparation for appearance as a supporting witness was not well organized.

Cronin agreed, when he was being cross-examined by Mr. McKown, that at no time did he ever tell Simms or Ludwig or Goroncy or any boss that he thought it was unsafe to shovel coal out of the feeder with only the circuit breaker on the feeder thrown or in an off position. As Mr. McKown has argued, it is not convincing to believe that two men who are being taken out of the mine to be fired would have the courage to further irritate the very bosses who are going to discharge them by asking for safety glasses, asking to inspect the rover, and going up to an inspector right in their bosses' presence to report the lack of a jack on the rover, but would not have the courage to tell their section foreman that it was too hazardous to shovel coal out of a feeder without having the cathead disconnected at the main power source. Their requests for safety glasses, inspection of the rover, etc., would have been things they would have been happy to forego mentioning, in my opinion, if they had actually been afraid of making complaints to their supervisors.

In short, I believe that neither Nixon nor Cronin had any safety thoughts in mind when they were refusing to shovel coal,

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or they would have brought those safety concerns to their supervisors' attention when they were threatened with suspension.

Cronin discussed several times during his cross-examination that he believed that it was possible for a feeder to start running, even though the breaker switch on the feeder has been thrown to the off position, because moisture and dirt may collect in the panel box and cause a short to occur which will reenergize the machine's motor. Yet, in that very testimony, Cronin stated that he had learned about such things at the arbitration hearing. Since Cronin is basing his knowledge of that kind of danger on testimony given at an arbitration hearing which was held in July, his claim that he was objecting to shoveling coal in June because of his fear of getting a shock, even when the breaker switch was in the off position, is not a credible story and fails to show that he would have had such safety concerns when he refused to shovel coal on June 23 before the arbitration hearing had ever been held.

Mr. Zohn has emphasized that Simms is not a reliable witness because, in filling out his application for employment with Peabody, he stated in the application that he had 1 year of prior experience as a coal miner, but stated in this proceeding that he did not know how the figure "1" got on the form as he did not recall putting it there and had no prior experience as a coal miner. On that same application, Simms also wrote that he had had 3 years of high school. When I asked him about that, he said that it was attendance at a mission school of some sort and that it was not high school training at all, but he had nevertheless entered that schooling in a blank on the form which was labeled "high school" to indicate that only high school training was supposed to be listed in that space. We have to keep in mind that Simms was not able to avail himself of a great deal of formal education. When he is filling out an application, he is likely to make mistakes of a clerical nature. Such mistakes do not necessarily mean that everything he says is subject to doubt.

As far as credibility goes, Cronin assured us several times that he had never had any accidents in the 11 years that he has worked in the coal mines. He even stated that he has developed a sixth sense so that if he just gets in a dangerous situation, he will immediately feel that he is in danger. Yet, Mr. McKown introduced as Exhibits E and F two accident reports showing that Cronin had his thumb mashed by a cinder block in one instance and, in another instance, had his hand wrenched or strained by a steering wheel on a Kersey motor he was driving in the mine. Of course, it is possible for witnesses to forget things and not intentionally be trying to misstate the truth. I think that some incidents just have to be accepted as events which people do not remember. Witnesses' failure to remember does not necessarily mean that everything they say should be thrown out as a fabrication.

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In Frederick G. Bradley, 4 FMSHRC 982 (1982), the Commission pointed out that it is not an administrative law judge's function to pass upon the wisdom or fairness of an operator's action in disciplining an employee, but rather it is his function to determine if the operator's claims are credible, and if those reasons would cause an operator to act as he did. No one in my position enjoys seeing a miner lose his job or even be suspended for 5 days, but the only ground that Nixon and Cronin have in this case for arguing that there was a violation of section 105(c)(1) of the Act is that they were ordered to do an unsafe act and that they had a right to refuse to do that act because of the safety issues involved.

But, as I pointed out with respect to the cases mentioned by Mr. McKown, and one or two others that I referred to above, the Commission has left the burden on the complainants to show that they did have a reasonable basis to raise a safety issue and that it was done in such a fashion that the operator knew what he was required to do in order to satisfy that complaint. I cannot find on the basis of the record in this proceeding that Peabody was properly given a reason to know why Nixon and Cronin refused to shovel the coal from the dumping end of the feeder. It appears to me that there is sufficient credibility to Simms' explanation of what happened to show that he believed he simply had before him two miners who had refused to carry out a reasonable work order. Simms says that he did not intend to do any more than just show them that he could not allow that kind of insubordinate action. Simms said that he also regretted that it was the decision of management above his level to suspend the men with intent to discharge them, but he felt that he had to take the action which he did in order to maintain discipline on his section.

It appears to me that Simms made a credible defense of what he did. It further seems to me that Goroncy, Holskey, and Ludwig also made a credible defense of the action they took. Therefore, I find that there was no violation of section 105(c)(1) of the Act because the evidence fails to support complainants' claim that they refused to shovel coal out of the feeder because such shoveling would have exposed them to hazardous conditions.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

The discrimination complaint filed on October 19, 1982, in Docket No. LAKE 83-9-D is dismissed.

Richard C. Steffey
Administrative Law Judge