

CCASE:

JACK GRAVELY V. RANGER FUEL

DDATE:

19840113

TTEXT:

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

JACK E. GRAVELY, JR.,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 83-101-D

v.

HOPE CD 82-52

RANGER FUEL CORPORATION,
RESPONDENT

Beckley No. 2 Mine

DECISION

Appearances: Belinda S. Morton, Esq., Fayetteville, West
Virginia, for Complainant;
W.H. File, Jr. and John L. File, Esqs.,
File, Payne, Scherer & Brown, Beckley,
West Virginia; Fletcher A. Cooke, Esq., Lebanon,
Virginia, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the complainant against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The complaint was initially filed pro se by the complainant after he was advised by the Secretary of Labor, MSHA, that an investigation of his complaint determined that a violation of Section 105(c) had not occurred. The complainant then retained counsel to pursue his case before this Commission.

The respondent filed an answer denying the allegations of discrimination, and pursuant to notice a hearing was conducted at Beckley, West Virginia, on October 4, 1983, and the parties appeared and participated fully therein. They were given an opportunity to file post-hearing proposed findings and conclusions, with supporting briefs, and the arguments presented therein have been reviewed and considered by me in the course of this decision.

Issue

The issue in this case is whether or not Mr. Gravely's discharge was prompted by his engaging in protected activity

under the Act. Mr. Gravely asserts that he was fired because the respondent held him responsible for a roof fall. According to Mr. Gravely, the respondent expected him to take his work crew beyond a danger board to perform work in supporting the roof area which fell. The respondent contends that Mr. Gravely was discharged because of his asserted failure to properly and adequately supervise his work crew. Respondent contends that this failure on Mr. Gravely's part resulted in damage to two pumps, and that Mr. Gravely's work performance as a foreman was less than adequate.

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, 29 CFR 2700.1, et seq.

Testimony and evidence adduced by the Complainant

Ralph D. Carr, shuttle car operator, testified that on or about July 27, 1982, he was working on Mr. Gravely's crew and he was instructed to operate a uni-track machine hauling crib blocks and headers to be used in supporting the top. During the operation of this machine he ran over a pump which was placed in the roadway, and he did so after believing that the person assigned to watch it and move it had done so. Mr. Carr believed that mine foreman Dennis Myers had assigned the person to watch the pump (Tr. 11-15).

Mr. Carr confirmed that a danger board was posted on the section in July 1982, and it was located approximately "one break back from where the top worked" (Tr. 14). Work to support the top was started at the location of the danger board and Mr. Gravely instructed him to start work at the danger board and that is what he did. Mr. Carr stated that Mr. Myers wanted the crew to go further into the dangered area, but he did not do so because it was against the law to go beyond the danger board (Tr. 15).

In response to questions from the bench, Mr. Carr stated that Mr. Gravely was a foreman in charge of his crew and that Mr. Myers was the night shift foreman and was Mr. Gravely's supervisor (Tr. 16).

~60

Mr. Carr confirmed that Mr. Gravely's crew was working on roof support, starting at the danger board and working towards the face and the fall area. Roof headers were installed at the danger board and work proceeded towards the face to support the top. He later learned that Mr. Gravely had been discharged, and Mr. Gravely advised him he had been fired because "we wouldn't go in behind and work on the top and where he had run over the pump" (Tr. 21).

On cross-examination, Mr. Carr stated that starting work at the danger board and working toward the face supporting the roof as they progressed was the normal and proper procedure (Tr. 24). He explained the circumstances surrounding his running over the pump (Tr. 27-30).

Bernard R. Campbell, Jr., testified that he works on the mine "hoot owl" shift, and that he knew Mr. Gravely when he worked as a foreman. Mr. Campbell stated that he was on Mr. Gravely's shift in July 1982, working at the posted danger board area installing roof supports at the track entry. Mr. Gravely was supervising the work. The work began at the danger board and progressed inby, and no one "coaxed" him to go any further than where they were actually working (Tr. 34).

Mr. Campbell stated that during the time he worked for Mr. Gravely he never asked him to do anything which would violate the law. Mr. Campbell stated that while there was no roof fall at the danger board area, the area at the cross-cut inby that area "fell some" (Tr. 35).

In response to bench questions, Mr. Campbell stated that there was no violation at the danger board area because the roof was permanently supported there. No MSHA inspectors were present on the evening in question, and as far as he knows the company was not cited for any loose roof violations (Tr. 37).

Mr. Campbell stated that he is a UMWA safety committeeman, was aware of the danger board situation, and that no one complained about the roof being loose, when asked if he knew what this case was about, he responded as follows (Tr. 38-39):

JUDGE KOUTRAS: Do you know what this case is all about?

THE WITNESS: Not exactly.

JUDGE KOUTRAS: Do you know what Mr. Gravely is complaining about?

THE WITNESS: Being discharged over pumps and bad top is the only thing I can understand.

JUDGE KOUTRAS: He claims--at least part of his claim here is that he was required to take--that part of the reason for discharge was that he refused to take his crew into an area that he thought was unsafe.

Do you have anything to contribute to that allegation, based on your own personal knowledge?

THE WITNESS: Well, if Mr. Gravely says that we have to go in here to save this place, if I hadn't of been there the employees still didn't have to go in by it, they could ask for a committeeman, then they would have had to have got a hold of me and the mine foreman. But still, for a bad top, it's common knowledge to try to save it if you can.

Mr. Campbell stated that when work started at the danger board Mr. Gravely had the responsibility to make sure the area was safe to start work and he made the decision that it was. Work was completed the first night, and he returned to the area on the next working shift and continued installing roof supports (Tr. 41). Mr. Gravely never indicated that he did not want to go beyond the danger board (Tr. 43).

Jim L. Ellis, currently employed by Phillips Coal Company, testified that he was employed by the respondent from December 1980 until November 1982, as a foreman. He worked with Mr. Gravely over a period of a year and a half, but on different shifts (Tr. 45-46).

Mr. Ellis stated that it was company policy to post a list of persons assigned to work weekends. He recalled a shift during the Memorial Day weekend in 1982, and that Mr. Gravely's name was not posted. Mr. Ellis worked that weekend as a fire-boss (Tr. 47-48).

Mr. Ellis confirmed that a member of his crew destroyed a pump approximately a year and half ago during the summer of 1982. He also confirmed that the shuttle car operator who ran over it was not disciplined because it was not his fault (Tr. 50). Mr. Ellis also stated that it was his responsibility to watch the pumps, that he assigned no one to watch them, and that no one was written up over this incident (Tr. 53).

~62

On cross-examination, Mr. Ellis confirmed that the shuttle car operator was not careless or negligent and that is why he was not reprimanded (Tr. 54). He also confirmed that he left the respondent's employ when the mine shut down and he found another job (Tr. 55).

Eric Coleman, roof bolter operator since 1979, testified that in July 1982, he worked the "hoot owl" shift, and that he "probably" worked on Mr. Gravely's shift as he had done on several different occasions (Tr. 57). He recalled the posted danger board and indicated that he and his roof bolter helper were assigned there to bolt the top. The roof "was working too bad" and no bolting took place until the area was cleaned up (Tr. 58). He considered Mr. Gravely to be a safe foreman (Tr. 59).

When asked about the danger board incident, Mr. Coleman responded as follows (Tr. 62):

JUDGE KOUTRAS: At any time during this entire episode, this one or two nights now that this incident took place about the headers and the danger board and all that business, did anyone ever instruct you specifically to go beyond the danger board to expose yourself to any hazard or anything?

THE WITNESS: No.

JUDGE KOUTRAS: Mr. Gravely or anybody else?

THE WITNESS: No.

JUDGE KOUTRAS: Do you know whether Mr. Gravely asked any of his crew to do that?

THE WITNESS: Not that I recall.

JUDGE KOUTRAS: Did Mr. Myers or anyone else from management, to your personal knowledge, instruct Mr. Gravely to take his crew beyond the danger board?

THE WITNESS: Not that I can recall. I don't remember.

Clifton P. Chandler, testified that he previously worked for the respondent for 12 years in various foreman positions but left when the mine shut down in November 1982.

~63

He worked with Mr. Gravely, and he did not see Mr. Gravely's name on any list to work the Memorial Day weekend in 1982. Mr. Chandler stated that he didn't work, but that he checked the posted list and did not see Mr. Gravely's name on it (Tr. 67).

In response to further questions, Mr. Chandler stated that while his name was not posted to work the weekend in question, if he were notified by a superior to work he would do so (Tr. 68-69).

Gary Lee Kiblinger testified that he has been employed by the respondent for four years as a plow operator. He stated that in July 30, 1982, he was working under Mr. Gravely's supervision while operating a continuous miner "scraping bottom." He explained the circumstances under which he ran over and damaged a pump. He was not disciplined by Mr. Gravely, and he believed the pump could have been avoided if the pump line had been moved (Tr. 160-163).

Mr. Kiblinger confirmed that he worked the "hoot owl" shift on July 27, 1982, and that the work involved pinning and timbering the roof at the area where it had been dangered off with a danger board. He worked again on July 28, but he was not there when the roof actually fell, but he did indicate that at the time he was working to support it "it had bellied, it hadn't lacked much falling. It was belying when we was putting them six by eight headers up" (Tr. 164). He also indicated that the roof condition was bad, and that "It was going to fall, don't matter what they put under it, it was going to fall", and that "when we put the three by eights up it started bowing" (Tr. 165-166).

On cross-examination, Mr. Kiblinger stated that the pump casing was pierced, and that in order to use it again it would have to be repaired. The usual way to repair it is to install a new casing (Tr. 167). He also indicated that pumps have been "burned up" through negligence when they are allowed to "sit there and burn up" (Tr. 167).

Jack E. Gravely, Jr., testified that he is currently employed as a salesman for the 84 Lumber Company, and that he previously worked for the respondent from February 13, 1981 to July 30, 1982, as a section and construction foreman. As construction foreman on the midnight shift his job entailed doing "everything," and he worked on different sections with different crews (Tr. 75). His salary during 1982 was approximately \$2600 a month (Tr. 98).

Mr. Gravely stated that he was never reprimanded in March 1982, and he denied ever being verbally reprimanded by Harrison Blankenship or Dennis Myers during his employment with the respondent. He did confirm that he received a three day suspension from Bill Ward for missing a day of work the Saturday, May 29, before Memorial Day. Mr. Gravely stated that he was told he was scheduled to work, but he insisted that his name was not on the work list and no one told him to work (Tr. 77). Mr. Gravely explained the procedure for posting the work list, and he indicated that while he was informed that his suspension would be without pay, he was in fact paid for the three days he was suspended (Tr. 78-82).

Mr. Gravely denied that he was ever reprimanded over an incident concerning a continuous miner operator being off center on a 20 foot cut, and that he in fact had reprimanded the miner operator over that incident (Tr. 82-82).

With regard to the incident concerning Mr. Carr running over a pump, Mr. Gravely explained the circumstances. He indicated that Mr. Carr was not at fault, and that the person assigned to watch and move the pump was moved to another location by Dennis Myers, and since Mr. Myers was his supervisor, Mr. Gravely did not question his decision (Tr. 84-86).

Mr. Gravely stated that on July 27, 1982, his crew was composed of Ralph Carr, Gary Kiblinger, and Kenny Davis. The crew intended to work on scraping the bottom, and after some preparation work he checked the roof and found that "it was working pretty bad." He instructed the crew not to scrape bottom and they began setting timbers. Mr. Myers came to the area, and after looking at the top, ordered some headers, and Mr. Gravely's crew worked the rest of the shift on the top. Mr. Gravely left the danger board for the next shift coming on the section (Tr. 88).

Mr. Gravely stated that he next returned to work on the midnight shift on July 28, 1982, and Mr. Myers was his shift supervisor that night. Assistant shift foreman Larry Burgess informed him that the top on the section was bad and that he had placed the danger board all the way out into the entry and that any roof support work would have to be started at the location where the danger board had been moved. Mr. Gravely then proceeded to work his crew for the entire shift, starting at the danger board, and they proceeded inby to secure the roof, but at 5:00 a.m. that morning a roof fall occurred inby the area where they were working (Tr. 90).

~65

When asked whether anyone told him to go any further than where he was working on July 28, Mr. Gravely responded as follows (Tr. 90-91):

Q. Did anyone tell you to go any farther than where you were working?

A. Well, Mr. Myers told me that, you know, it would have been a lot better if I could have started further in, but it would have placed my whole crew and myself in imminent danger had we went any further in. And the next day, Harrison Blankenship told me that I definitely should have went further in there and secured the area that fell.

Q. Did you hear any crackling noise from the top?

A. Oh, you can always hear the top breaking up if it's bad. You see it dripping.

Q. Had you had any run-ins before with Mr. Blankenship or Mr. Burgess as to the techniques that you used with your men?

A. No, ma'am.

When asked why the respondent terminated him, Mr. Gravely responded as follows (Tr. 91-92):

Q. So why do you believe that Ranger Fuel terminated you?

A. They told me--on Friday the 30th, I worked that same section. There was another roof fall that wouldn't have been classified as a legal roof fall by MSHA regulations because it wasn't bolted yet. Larry Burgess again told me that he had been on that section, that they had cut a break-through through from both sides and the top was too bad--they bolted it on one side and they cut it on the other side without it being bolted, and then give me two men, Eric Coleman and Dennis Cello to bolt it and three men to scrape bottom. I called Dennis Myers, and he come and looked at it and decided that he wanted to take the miner in and clean the rock up. So he called and got more people and got

all kinds of timbers and headers and stuff and started securing the area into that roof fall. We timbered the roadway down there and everything and made it pretty safe just to get in the area, but by the time we had done all that it had fell in some more. And at that time, Dennis decided that we just crib it off and leave it and go ahead and take them down and scrape the bottom, but he told me they were thinking about firing me over allowing the first roof fall.

And, at Tr. 99:

Q. Are you sure that's the only reason that Ranger Fuel discharged you was because of the danger board incident?

A. Yes, ma'am.

Q. He specifically said that when he discharged you?

A. Harrison Blankenship, yes, ma'am, he told me specifically that I should have gotten that top secured. And Dennis Myers had already told me before that, that they were thinking about firing me over that fall.

Mr. Gravely testified as to the circumstances surrounding a second pump which was damaged at the same water hole where the first pump had been destroyed. Miner operator Gary Kiblinger caught the pump hose with his miner while it was laying by the rib after being disconnected by electrician Randy Johnson. The pump was dragged some 75 to 100 feet, and Mr. Gravely believed that only the "goose neck" used to hook on the discharge hose was damaged and that this piece cost eight to ten dollars. Mr. Kiblinger was not reprimanded and the electrician was under the supervision of maintenance foreman Floyd Holthouser (Tr. 95-97).

Mr. Gravely stated that the value of the second pump was probably two or three thousand dollars, and he denied that he had ever previously been blamed for destroying material on his shift (Tr. 98).

Mr. Gravely confirmed that he was not given a written letter of discharge. He was advised orally by Mr. Blankenship and mine manager Walt Crickmer that he was discharged (Tr. 100).

~67

On cross-examination, Mr. Gravely denied that he was ever given a company personnel termination form. He also denied that Mr. Blankenship ever advised him he was being discharged because two pumps were damaged during his shifts and that he had been warned about this on July 27, 1982. He also denied that Mr. Crickmer ever told him that he was being discharged for these reasons. Mr. Gravely stated that Mr. Blankenship "gave me the reason that I was being discharged over the roof fall, and on the 30th there was the second roof fall" (Tr. 101).

Mr. Gravely denied that Mr. Blankenship ever advised him that he would be suspended on March 16, 17, or 18, 1982, because cribs had to be installed on the No. 3 entry when the ribs were cut off center. He also denied that he was in fact suspended on those days (Tr. 103-104).

Mr. Gravely identified exhibit R-2 as a report he prepared and filed with his superior as part of his duties as a foreman. The report reflects that miner operator Rick Stewart cut certain areas too wide on March 3, 5, and 12, 1982, and that Mr. Gravely verbally warned Mr. Stewart about the incidents (Tr. 109-112). Mr. Gravely denied that Mr. Blankenship reprimanded him on March 12, 1982, nor did he suspend him (Tr. 113).

Mr. Gravely identified exhibit R-3 as a mine map, and that the No. 2 entry is the intake air entry, a track entry, and a belt entry. He confirmed that this is the entry where the pump incidents occurred and where the danger board in question was placed (Tr. 115-117). He denied that the principal roof fall occurred in the No. 1 entry, and stated that it occurred in the break-through between the No. 1 and 2 entries, and that it actually blocked the break-through and not the entry. He indicated that the fall was some 30 feet from the No. 2 entry and that it was not possible to approach that area from another direction other than going by the danger board on No. 2. He also indicated that the area could not be approached by going in the No. 1 entry out by the danger board because the area was solidly cribbed off (Tr. 121).

Referring to the mine map, Mr. Gravely contended that the area where he was criticized for not going with his crew was "in by that danger board and to the left in the break" (Tr. 122). Mr. Gravely stated that at no time did he refuse to go into an area because it was beyond the danger board, and he further testified as follows (Tr. 123-124):

Q. And did anyone direct you to go into an area beyond the danger board?

A. Did anyone "direct" me?

Q. Yes; order you to?

A. No.

Q. And did any of your men refuse to go into an area that was marked or dangered off?

A. I had better sense than to take my men into an area like that; and, because I didn't take them in there, they didn't have to refuse.

Q. So you didn't refuse to go and the men didn't refuse to go. Is that correct?

A. We didn't go. My men, nor myself went into that area.

Q. And the fall that later occurred, and it was a rather large fall, was over at the break-through near or in the No. 1 entry. Is that not correct?

A. It was in the break-through, yes.

Q. But no one ever specifically--did anyone ever specifically tell you to go to correct that?

A. Specifically tell me to correct that; yes, sir.

Q. Who did that?

A. Dennis Myers and Larry Burgess.

Q. And why did you not do it?

A. I started where they told me to start.

Regarding his conversations with Mr. Myers and Mr. Blankenship over the pumps, Mr. Gravely testified as follows (Tr. 124-125):

Q. Now, when you were called in after the second event relating to the pump, who was present at that time?

A. After the second one?

Q. Yes.

A. Dennis Myers and Harrison Blankenship.

Q. And was anyone else present?

A. No, sir.

Q. Did you have a conversation with Walter Crickmer about it?

A. That was later, that wasn't at the time that I was called in.

Q. And what did Walter Crickmer state to you?

A. Walt just told me that I was being discharged. Harrison Blankenship had already talked to me, all I was seeing Walt for was to turn my equipment in.

Q. What did Mr. Blankenship say to you in particular as to why you were being discharged?

A. For not getting in that area and timbering that fall.

Q. Did he say anything else to you about the pumps?

A. No, sir, not to my knowledge.

Q. Now, he talked to you. Would it have been to your knowledge?

A. Well, that's a year and a half ago and I don't remember word for word his specific conversation.

Q. You're not prepared to state under oath that he did not tell you that you were being fired because of the pumps, are you?

A. I'm not prepared to say under oath that he did or didn't. I'm saying under oath that it was a year and a half ago and I don't remember word for word what he said.

And, at Tr. 126:

Q. Mr. Gravely, then you do not deny that you were told--since you cannot recall, you do not

deny that you were told that you were being discharged because you had permitted an employee to run over and destroy a pump on the 27th, and that you had permitted the same thing to occur and seriously damaged a pump on the 30th?

A. Yes, sir, I do deny that.

Q. You deny it?

A. Yes, sir.

Q. Well, a minute ago you said you couldn't remember.

A. I couldn't remember his exact words, but I can remember that I wasn't told all of that.

Mr. Gravely stated that he was never told to go into an unsafe area, and that therefore, he did not refuse to go into an unsafe area (Tr. 128). He confirmed that a danger board is moved as the work progresses in by to support the roof, and that he would always be working in the vicinity of the danger board as it is moved in by with the roof support work (Tr. 129).

Mr. Gravely denied that Mr. Blankenship, Mr. Burgess, or Mr. Crickmer ever specifically counseled him about his work or the way he was carrying out his duties (Tr. 129-130).

When asked about the roof fall that Mr. Gravely contends caused his discharge, he stated as follows (Tr. 147-152):

JUDGE KOUTRAS: Mr. Gravely, in your earlier statement that you filed, the written statement, you say that Mr. Myers had told you that Mr. Blankenship had said that they were going to fire you for the fall that occurred on the 28th.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And then your statement says that Mr. Blankenship told you that he was firing you because of the fall that occurred on the 28th.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Did he blame you for the fall that occurred on the 30th, too?

THE WITNESS: He didn't mention the fall.
I just said there had been another fall there
and he didn't say that I was to blame for that.

JUDGE KOUTRAS: So he didn't lay the responsibility for
the July 30th fall on your shoulders?

THE WITNESS: No, sir.
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JUDGE KOUTRAS: What was your response to him when he
allegedly told you that's why they were firing you?

THE WITNESS: I told him that the top was too bad, that
we started where I had been instructed to start.
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JUDGE KOUTRAS: Did you tell Mr. Crickmer that Mr.
Blankenship fired you because he wanted you to go into
an area that you thought was unsafe?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And what was his response?

THE WITNESS: His response was that there was nothing
wrong and that I had destroyed the pump.

And, at Tr. 153-155:

JUDGE KOUTRAS: Okay. So the nuts and bolts of your
complaint is your contention that the company fired you
for failing to take care of a roof fall to the
satisfaction of your supervisor or your superior?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And your response to that is that you
weren't responsible for the roof fall and that you
weren't about to go into an unsecured area with your
crew and do some work?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: But nobody from the company, none of
your superiors or anybody ever suggested to you
directly that you do that. Is that right?

THE WITNESS: Mr. Blankenship did.

JUDGE KOUTRAS: But this happened after the fact.

THE WITNESS: Oh, he told me that after.

JUDGE KOUTRAS: But at all times when you and your crew were down in the section addressing the roof fall conditions starting at the danger board and all that, did anybody suggest to you specifically how you were to go about your duties of addressing the roof fall?

THE WITNESS: Well by the time anybody came to check on me--which would have been Mr. Myers--I was already doing it.

JUDGE KOUTRAS: But nobody from management, none of your superiors, suggested to you that you were to take your crew in by a danger board?

THE WITNESS: Well, Dennis said it would have been better if I would have got started further in, which would have been in by the--

JUDGE KOUTRAS: When was this though?

THE WITNESS: That would have been during the shift, probably two or three o'clock in the morning.

JUDGE KOUTRAS: And you told Dennis--what did you say to him?

THE WITNESS: I started where Larry Burgess had told me. Larry Burgess was the man who had dangered the area off initially.

JUDGE KOUTRAS: But no one said anything to you at that point, Mr. Myers or no one else said anything to you other than maybe you should have started in a little further?

THE WITNESS: No, not at that point.

Testimony and Evidence Adduced by the Respondent

Walter B. Crickmer, III, testified that he is a graduate geologist and has worked for the Pittston Company for eight years. At the time of Mr. Gravely's discharge he was the mine manager at Ranger Fuel Company's Beckley No. 2 Mine. He stated that prior to Mr. Gravely's discharge, he discussed his work performance with him. He described the nature of these discussions as follows (Tr. 178-179):

A. Well, it was a repeated history. Over a period of time--it could go back as far as maybe even up to a year or eight or nine months before the discharge took place. I had fivesuperintendents working for me at the time, Harrison was one in charge of production; I had people in charge of construction; a superintendent at each level, and it was our job to reorganize the mine and get the mines back on the right track. We discussed all the foremen at different times.

We had Harrison, and Jack worked for him on production. He had a problem with keeping Jack's crew on-center. I'm not saying that that was the only problem with Jack. We had Jack--we moved him from production to construction, construction to general work all over the mine, on every shift, on every production shift, you know, day, evening and owl, trying to find a place for Jack to work. We had problems in each category.

It kept going right along, and all of a sudden I started noticing, one of the miner foremen mentioned something to me that well, maybe Jim Campbell, one of the general work superintendents, said we have a problem with absenteeism with Jack. We looked at this record and started to see that every Friday and every Monday he was off; every Friday and every Monday he was off--I mean not every one but a tremendous majority, 30 or 32 days or something within a year's period. He was always off Mondays and Fridays.

And we kept moving him from shift to shift and from one section of the mine from construction to production and these pump episodes came up and, you know, I've been through this with the Unemployment Commission and MSHA and all this before and there wasn't ever any question of Jack's discharge ever being involved with this roof problem.

When Harrison approached me that morning after he had talked with Dennis about a second pump being destroyed--it wasn't destroyed, we repaired it for \$800--he approached me with the thought that: okay, we have another pump

incident; we already had the first one, we lost it totally, \$3500. I knew Jack had been involved with the center episode, with the absenteeism, with this and that all the way along continuously, continuously. He had been reprimanded before. He said: now, we've got two pumps back to back, what are you doing to do? He said: I'd like to fire him. I said: I agree.

Mr. Crickmer identified exhibit C-1 as Mr. Gravely's "discharge paper", and he confirmed the "W.C." shown at the bottom of the document are his initials evidencing the fact he approved the discharge (Tr. 180).

Mr. Crickmer stated that in 1982 it was possible for a foreman to be paid when in fact he had not reported to work. He explained that this was possible because of poor management and record keeping and that foremen were permitted to turn in their own time sheets. Since that time, company policy brought about changes and improvements (Tr. 182). Mr. Crickmer stated that Mr. Gravely was paid for three days on June 2, 3, and 4, 1982, because he turned in his own time. Mr. Crickmer stated that he was aware that Mr. Gravely had been suspended on those days, but he didn't know that he had been paid "until all these things started taking place" (Tr. 183).

Mr. Crickmer stated that while Mr. Gravely's discharge paper lists only the pump as the reason for his discharge, every other reason is not always listed (Tr. 181).

On cross-examination, Mr. Crickmer confirmed that his present employer is Clinchfield Coal Company, and that Ranger Fuel and Clinchfield are divisions of the Pittston Company Coal Group. Mr. Crickmer confirmed that he appeared and testified at a hearing before the West Virginia Department of Employment Security on September 23, 1982 (Tr. 185).

Mr. Crickmer stated that Mr. Gravely's alleged absenteeism was not a factor in the decision to discharge him, and he explained his answer as follows (Tr. 188):

A. No, not a factor of his discharge. His discharge was brought about by his inability to control his crew; his inability to perform under each one of the superintendents; his constant moving from one job area to another; my discussions with Jack personally on these problems that he was having with staying on-centers;

Harrison talked to me about staying on-centers; Jim Campbell talking to me about problems, whatever, and then came up with these back-to-back destruction of the pumps; you know, you go to a certain point you reach, you say; is this man worthwhile keeping. You know, always in the back of your mind you think about the days absent and so forth, why does a man miss so many days; but, you can't discharge a person because of that, ma'am.

Mr. Crickmer testified as to the value of the two pumps which were "destroyed," and he stated that the first pump was "completely destroyed" and that the second one was "damaged severely." He could not state the precise costs for the pumps (Tr. 198-201).

Mr. Crickmer stated that Mr. Blankenship suspended Mr. Gravely on March 16 and 17, 1982, for "being off-center; controlling his crew," but he did not know whether it was written or verbal (Tr. 201-202).

Mr. Crickmer identified exhibit R-4 as a copy of an invoice from the respondent's records indicating that the cost to repair the second pump in question was \$854 (Tr. 206). He also identified exhibit R-5 as copies of Mr. Gravely's attendance record for the period February to December 1981, and January to July 1982 (Tr. 208).

After referring to Mr. Gravely's attendance records, Mr. Crickmer stated that they reflect that he worked on March 17 and 18, 1982, but missed March 16 (Tr. 218). Respondent's counsel conceded that Mr. Crickmer had no personal knowledge as to whether Mr. Gravely was actually suspended on March 16 and 17, 1982 (Tr. 224-225). Under the circumstances, the payroll records, exhibits R-5 and R-6 were rejected and not admitted (Tr. 226).

With regard to Mr. Gravely's alleged failure to work over the Memorial Day weekend, Mr. Crickmer conceded that his name was not posted on a work list but that he was personally informed verbally by his immediate supervisor that he had to work (Tr. 229-230).

In response to bench questions, Mr. Crickmer stated that aside from the matter of Mr. Gravely not working on the Memorial Day weekend, none of the other asserted disciplinary actions, counseling, warnings, etc., were ever reduced to writing (Tr. 235).

Billy G. Smith, testified that he is employed by the respondent and was employed at the mine in 1982. He stated that on the Memorial Day weekend of May 29 and 30, 1982, Larry Burgess was scheduled to work, and after "kidding him" about it, Mr. Burgess informed him that he was going to put Mr. Gravely's name on the work list for that weekend. Later, when Mr. Smith mentioned this to Mr. Gravely, Mr. Gravely told him "I'm not working Saturday" (Tr. 262).

On cross-examination, Mr. Smith stated that while he did not hear Mr. Burgess tell Mr. Gravely that he had to work, he did see Mr. Gravely's name "on the board where Larry had marked his out and put Jack's" (Tr. 262). The board is in the foremen's office where a foreman would normally go to make notations in the books (Tr. 263). Mr. Smith did not know whether Mr. Gravely ever saw the list when it was posted on Wednesday (Tr. 267).

Larry Burgess, assistant shift foreman, second shift, testified that he was so employed in 1982. He stated that he scheduled Mr. Gravely to work the Memorial Day weekend by crossing out his own name from the posted list and inserting Mr. Gravely's. He did so after clearing it through mine foreman Bill Ward and Mr. Blankenship, and he stated that he told Mr. Gravely about the change (Tr. 271-272). The change was made on a Wednesday, and Mr. Gravely informed him that "hell, no, I ain't going to work" (Tr. 274).

When asked to evaluate Mr. Gravely's work performance, Mr. Burgess responded as follows (Tr. 274-276):

Q. Well, in the time that he worked for you prior to May and up until the time he was discharged, did you have any opinion about the type of work he was doing and whether or not--

A. Yes, sir, I did.

Q. --it was satisfactory work?

A. It was very unsatisfactory. Jack resented me for some reason or another, and it was my section to look after and I would make checks of it and I'd give him my opinion of what needed to be done and what I wanted him to do and so forth.

Q. And what reaction did you get to that?

A. Well, he acted like he resented me all the time, and he didn't pay a whole lot of attention to what I had to say. And there was several problems I had with Jack; one of them was the centers; one of them was with floating out through dinner, running the miner through dinner, which we're supposed to do, and I asked Jack to do it and he never did do it. And several times I come on the section and everybody would be in the dinner hole.

Q. Had you ever recommended that he be terminated prior to the time he was?

A. Yes, sir. I had been in trouble over Jack several times through my superiors for center lines, how critical it would have to be for the belt going through. Mr. Campbell, which is over construction, he was over the belt lines and all, he called me into his office several times over it; and, Harrison, we had discussed Jack several times. I couldn't do a thing with him.

Q. Is it true from what you say that the center lines are very important in driving the--

A. Yes, sir.

Q. And that if they're off three to six feet, does that create a problem?

A. It sure does if it's in your belting, absolutely.

Q. So you would have to come back and straighten it out. Is that right?

A. Yes, sir. What time that you have to back up to shear your ribs, that's time that you're losing in production in the face. You know, you could be getting a cut of coal for what time you was getting two or three buggies to straighten up the miss and taking it back to the face up here and bolting the ribs, and it's a lot of time and a lot of loss in production.

Q. Is there also a lot of risk of violations of regulations?

A. Well, sure. It's a state law that all places must have a center line in before the cut. Several

times I had went on a section and caught them cutting without a center line. They'll put a center line up and get two cuts before they would put the next one up. I mean there's a lot of that that went on.

Q. Was this under Jack's supervision?

A. Yes, sir.

On cross-examination, Mr. Burgess stated that no violations were ever issued against the respondent for cutting the places in question too wide (Tr. 276). He also stated that while he could have disciplined Mr. Gravely for not working over the weekend in question, he did not do so and turned the matter over to Mr. Ward and Mr. Blankenship (Tr. 282).

When asked about the events of July 27 through 30, 1982, and the roof fall, Mr. Burgess testified as follows (Tr. 284-285, 286, 288):

JUDGE KOUTRAS: Are you aware of the events of July 27th, 28th, 29th, and 30th, this roof fall business and all that?

THE WITNESS: Yes, sir, I was.

JUDGE KOUTRAS: Tell me in your own words what you know about that.

THE WITNESS: Well, it's my opinion if it was taken care of the way it should have been to start with we wouldn't have had all the problems that we had.

JUDGE KOUTRAS: That's a little too broad and too general.

THE WITNESS: No. Seriously, if the intersection where the top had give way had been supported like it was supposed to have been to start with, the top wouldn't have took off. I mean it has to break out somewhere.
%y(4)5C

JUDGE KOUTRAS: All right. But on the 27th, do you agree that they were sent down to do some scraping and that they encountered a bad top?

THE WITNESS: I don't know what the dates were, but I know that Harrison give me the same diagram that he give Jack to go by. And Harrison explained it to me--you know, Harrison was the day shift man and I was the evening shift man and he knowed I'd seen Jack before Jack went in.

JUDGE KOUTRAS: Okay.

THE WITNESS: Harrison explained to me what he wanted done up there, and I had the map. All right. When I come out that evening I told Jack, I said: Jack, I've got a map here--he said I've got one, too. And I said, well, let me show you what Harrison wants, and he said: I know what he wants.
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THE WITNESS: No, sir. I showed him the map of--

JUDGE KOUTRAS: Of what he was expected to do?

THE WITNESS: That's right.

JUDGE KOUTRAS: At what area?

THE WITNESS: In No. 1 intersection.

JUDGE KOUTRAS: In No. 1 intersection?

THE WITNESS: That's right.

JUDGE KOUTRAS: And his response to you was?

THE WITNESS: He knowed what to do.

JUDGE KOUTRAS: Did he take the map from you?

THE WITNESS: No, he had his own map.

Harrison L. Blankenship, Jr., assistant mine foreman, testified that in 1982 he was the mine production superintendent, and that he has 12 1/2 years of mining experience. Mr. Blankenship stated that he first became aware of a problem in the No. 1 and No. 2 entry area on the morning of July 26, 1982, when either Mr. Gravely or an electrician reported a bad top in the No. 1 entry and asked him to look at it. Mr. Blankenship went to the area, which he described as the last open cross-cut in the No. 1 face between the No. 1 and No. 2 entries (Tr. 298). The entry itself is used for air return.

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Mr. Blankenship stated that he found some cracks in the roof and he instructed evening shift foreman Burgess to install some "turn cribs" to support the roof and to allow "a hallway to work No. 1 Face" (Tr. 299). He described the area on exhibit R-7, and he stated that he gave Mr. Burgess a sketch, and also gave one to the "hoot owl" shift supervised by Mr. Myers. Mr. Myers sent Mr. Gravely to install the cribs, but they were not installed according to his instructions and the sketch, and he explained how they were installed (Tr. 301-303).

Mr. Blankenship stated that when he returned to the area the next morning, July 27, he found that the cribs had been installed improperly and contrary to his instructions. He examined the roof, and while it did not look any worse he decided to let Mr. Gravely's "hoot owl" shift install additional cribs in the way he had explained the day before. He personally drew a diagram on a yellow pad and told him how he wanted the roof cribs installed. At that time no danger board had been put up, and he does not know when the board was put up or who put it up. He was aware of a danger board in the No. 2 entry approximately 130 to 140 feet out by the bad top area (Tr. 306).

Mr. Blankenship stated that when Mr. Gravely went to the area which he sketched out for him, he found a danger board and started his work at that point. Mr. Blankenship believed the danger board "was put or set much too far out by the bad top," and six hours after his shift the top in the No. 1 entry intersection fell in, and it sheared off at the extension over the area where the cribs had been installed. Mr. Blankenship stated that there was no doubt that the fall would not have occurred if his initial orders to install "turn cribs" had been followed (Tr. 308).

Mr. Blankenship stated that at the time the roof condition initially developed it was possible to approach the intersection from two directions. He stated that six cribs were set in the No. 1 entry along the left rib, but there was still room to take a piece of equipment up to the entry. There was no danger board at the approach to the No. 1 entry, and the only danger board was set at the No. 2 entry (Tr. 309).

When asked whether it would have been unsafe for Mr. Gravely and his crew to have done anything that he either ordered or asked him to do in regard to the roof situation, Mr. Blankenship responded as follows (Tr. 309-310):

A. To start with, the conditions changed from my shift to his shift, it was a period of at least eight hours, that the top conditions is subject to change in minutes. At the time I left the top was safe enough for even equipment to run through it. The danger board was put there after I left and by the time I got there the top had fallen in. So to answer your question truthfully I can't.

Q. Well, I think what you're talking about is on the 28th.

A. Yes, sir.

Q. Now, on the 27th, was there anything that you asked him to do or which your plan required which would have been in your opinion unsafe for them to have done at that time?

A. No, sir. There was no danger board; the top hadn't started to fall. They took the unitrack and hauled cribs all the way through this work site, but just set them improperly.

Mr. Blankenship identified exhibits R-8 through R-12 as records which he maintained on Mr. Gravely, and they include references to an incident on March 12, 1982, his suspension of March 16 and 17, 1982, his failure to work on May 29, 1982, his suspension of June 2-4, 1982 for his failure to work, the pump incidents of July 27 and 30, 1982 (Tr. 310-318).

Mr. Blankenship reviewed the actions shown on the records in question and stated that he personally informed Mr. Gravely of the first suspension, that he approved of the second one and that Mr. Ward informed Mr. Gravely of this. Mr. Blankenship also stated that he personally discussed the pumps with him (Tr. 314, 318).

With regard to Mr. Gravely's failure to timber the fall area as instructed, Mr. Blankenship stated as follows (Tr. 316-317):

Q. Now, you did not take any action or give any reprimand or discipline as a result of this event that took place, did you?

A. No, sir. I did talk to Mr. Gravely about this. I explained to him that there was a time

frame between the time I had written this note and the time that he was actively engaged in this type work and that things happened and that there was a danger board there which wasn't when I left; that he has to correct the danger board first and that the top fell in and that that's something we will have to deal with later, but I did also mention to him that if it had been cribbed right to start with that it wouldn't be on the ground.

Q. But you did not take any disciplinary action, did you?

A. No, sir.

With regard to the second pump incident, Mr. Blankenship stated (Tr. 317-319):

Q. On July the 30th, which is two days later, of course, you state that the same or a similar occurrence with regard to the loss of a pump took place. Is that not correct?

A. Yes, sir.

Q. Was this pump located at the same spad number as the one before?

A. Yes, sir.

Q. 1944. And that's the same sump area that served the same pump. Is that correct?

A. Yes, sir.

Q. And you state here: "When I asked Mr. Gravely about this, he said he had no explanation." Did that take place?

A. Yes, sir.

Q. And then, did you tell him that you had no choice but to relieve him from his duty because of negligence?

A. Yes, sir.

Q. Now, what did you do after that in carrying out your statement as to what you should do?

A. Well, the first thing I done, I got the pump and made sure that the pump had been destroyed as called out by the owl shift. And after I saw the pump, then I brought Mr. Gravely in and Mr. Myers and we talked about it and decided to discharge him. And I got the okay from my superior to discharge him.

Q. And who was your superior?

A. Walter Crickmer.

Q. Did you at the time you terminated Mr. Gravely prepare a personnel termination form?

A. Yes, sir, I did.

Q. I hand you what purports to be such a form dated July the 30th. Is that filled out by you?
(Witness examines the above-referred to document.)
(Pause in proceedings.)

A. Yes, sir, it is.

Q. And did you give Mr. Gravely a copy of that?

A. Yes, sir, I did.

Q. And I believe you said you did that after talking to Mr. Crickmer?

A. Yes, sir.

With regard to the discharge, Mr. Blankenship stated as follows (Tr. 324):

Q. Do you remember the gist of the discussion you had with him about the reasons for discharging him?

A. Yes, sir. We talked about it several minutes and we decided--and we even talked with Jack in our presence--that the reason that he was being discharged wasn't because of the top falling in and not going in by the danger board, but just multiple events that led up to the discharge.

Q. Well, was this a true and correct statement of your reason for the discharge?

A. Yes, sir, it was.

Q. Mr. Blankenship, if a foreman, or a man or employee, not a foreman, were to tell you they were apprehensive or afraid to go in an area in which the top was working, would you respect their opinions on that?

A. Yes, sir. And on occasion I have even gone out on an out-shift and worked with them on a top that they were afraid of.

Mr. Blankenship could not recall asking Mr. Gravely to sign the termination form in question. Mr. Gravely, Mr. Ward, and Mr. Myers were all present at the time the form was completed, and Mr. Ward completed part of the form from information from Mr. Gravely's personnel files. The form was presented to Mr. Gravely with an explanation as to why he was being discharged (Tr. 327-330).

With regard to Mr. Gravely's suspension on March 16 and 17, 1982, Mr. Blankenship stated that if Mr. Gravely in fact worked on those days "it was an oversight on somebody's part." He explained that 60 or 65 foremen are at the mine and it is difficult to keep up with all of them (Tr. 343).

Mr. Blankenship stated at least four or five other foremen have been suspended, fired, or asked to resign for offenses similar to those engaged in by Mr. Gravely, and that Mr. Gravely has not been treated in any harsher manner. Some of these actions against foremen were before and after Mr. Gravely's discharge. Mr. Blankenship named at least four foremen who were suspended. One was suspended for five days for a first offense for "getting off centers" (Tr. 369). He also indicated that three of the foremen opted to quit rather than being fired (Tr. 370).

Mr. Kiblinger and Mr. Carr were recalled in rebuttal by Mr. Gravely's counsel. They testified further with respect to the roof control cribs which were set at the break between the No. 1 and No. 2 entries, as well as the danger boards mentioned in this case.

Mr. Gravely was recalled by me, and except for his suspension for three days in June 1982, which he readily acknowledged, he denied that he had otherwise been disciplined, suspended, or counseled about his work (Tr. 383). Mr. Gravely reiterated his belief that when Mr. Blankenship attempted to

blame him for the roof fall, he (Gravely) concluded that the only way he could have prevented the fall was to go inby the posted danger board to do something to prevent it (Tr. 387).

Findings and Conclusions

Mr. Gravely's discrimination complaint is based on his belief that he was discharged by the respondent after being held accountable and to blame for a roof fall which occurred on the section where his crew had engaged in some roof support work. Mr. Gravely asserted that assistant mine foreman Harrison Blankenship expected him to take his work crew inby an area which had been "dangered off" by the posting of a danger board sign to perform certain work to support the roof.

The respondent's defense in this case is based on its assertion that Mr. Gravely was discharged from his management position as a foreman because of an accumulation of prior incidents and conduct which occurred during his employment tenure. These incidents and allegations by the respondent with regard to Mr. Gravely's work performance include the following:

1. Lack of proper supervision by Mr. Gravely over his work crew which resulted in the destruction or damage to two sump pumps.
2. Lack of proper supervision by Mr. Gravely over his work crew which resulted in the continuous miner operator making certain coal cuts "off center."
3. Excessive absences during weekends, and the failure by Mr. Gravely to report for work on a weekend when he was previously scheduled to work.

In support of its allegations concerning Mr. Gravely's work performance, the respondent presented testimony by former mine manager Walter Crickmer, assistant shift foreman Larry Burgess, and assistant mine foreman Harrison Blankenship.

Mr. Crickmer testified that prior to the discharge, he had discussed Mr. Gravely's work performance with him and that Mr. Gravely had been assigned and reassigned to various foreman positions in an effort to find a place for him to work, but that in each instance management had problems with him. Although conceding that none of the prior warnings or suspensions given to Mr. Gravely for his work performance were reduced

to writing, Mr. Crickmer confirmed that he was aware of Mr. Gravely's alleged absenteeism, his failure to report to work when scheduled, his suspension which resulted because coal was cut "off center," and the incidents concerning the damaging of the sump pumps. Mr. Crickmer also confirmed that after the pump incidents, Mr. Blankenship advised him that he wanted to fire Mr. Blankenship, and Mr. Crickmer agreed that this should be done.

Mr. Burgess testified that he considered Mr. Gravely's work performance to be unsatisfactory, and that he had previously made recommendations that Mr. Gravely be terminated because of the incidents concerning the "off center" coal cuts. Mr. Burgess conceded that he had been in trouble with his own superiors over these incidents, and he believed that Mr. Gravely resented him and paid little attention to his instructions.

Mr. Blankenship testified as to certain suspensions given to Mr. Gravely prior to his discharge, and he produced his personal records and notes to support these suspension actions. Mr. Blankenship stated that he personally informed Mr. Gravely of the first suspension, and that he approved a second suspension. He also confirmed that he personally discussed the damaged pumps with Mr. Gravely, as well as Mr. Gravely's failure to follow instructions as to how certain roof cribbing should have been installed at the roof fall area.

Mr. Blankenship testified that after the second sump pump was damaged he decided to discharge Mr. Gravely for negligence, and he did so after obtaining Mr. Crickmer's approval. Mr. Blankenship also testified that he advised Mr. Gravely that he was not being discharged because of the roof fall, but because of "multiple events."

Mr. Gravely took issue with the reported prior disciplinary actions taken against him. In his defense, he testified as to certain mitigating circumstances surrounding the damaged pumps, and attempted to establish that even though he was the foreman in charge, the damage to the pumps resulted from actions by other foremen and by the negligence of the individuals who were assigned to watch the pumps.

Although Mr. Gravely denied that he was ever reprimanded by Mr. Blankenship or Mr. Myers, he confirmed that he received a three day suspension for missing a day of work over a Memorial Day weekend. Mr. Gravely insisted that he was not scheduled to work, and even though the suspension was to be without pay, he stated that he was in fact paid for the days he was suspended.

Mr. Gravely denied that he was ever suspended or reprimanded during March 16-18, 1982, because an entry was cut too wide. In fact, he asserted that he verbally reprimanded the miner operator. Mr. Gravely made reference to certain mine records which he stated support his claim that he worked on the days of the purported suspension. (FOOTNOTE a1)

Mr. Gravely's arguments in defense of his prior disciplinary encounters with his management superiors were obviously offered to support inferences that the respondent is somehow attempting to conceal the real reason for his discharge. While it may be true that the respondent's personnel practices leave much to be desired, particularly with respect to the lack of specific documentation and lack of record-keeping concerning the prior suspensions and disciplinary actions taken against Mr. Gravely, I cannot conclude that the respondent has somehow fabricated these incidents so as to support the discharge after-the-fact. To the contrary, I find Mr. Crickmer, Mr. Burgess, and Mr. Blankenship to be credible witnesses, and I find their testimony concerning the prior suspensions, warnings, and counseling with regard to Mr. Gravely's work performance to be believable. Further, absent any showing of a violation of the Act, or a showing that the discharge was motivated by protected safety activities, I believe that disciplinary matters between mine management and its management staff are best left to those parties for resolution.

I find nothing in the record here to support a conclusion that Mr. Blankenship or any other member of mine management ever directly or indirectly requested, directed, ordered, or otherwise suggested that Mr. Gravely take his work crew inby any danger board, or inby any hazardous area of the mine at any time prior to any "work refusal." Although shuttle car operator Ralph Carr stated that night shift foreman Myers asked the crew to go further into the dangered area, the crew did not proceed any further, and Mr. Carr's assertion is not further supported by any credible testimony or evidence.

Two members of Mr. Gravely's crew who testified at the hearing in this case did not support Mr. Gravely's assertion that the crew was expected to work inby the danger board.

Bernard Campbell worked on Mr. Gravely's shift, and Mr. Campbell is also a member of the UMWA safety committee. He testified that work to support the roof started at the danger board, and that no one "coaxed" him to go any further inby than where the roof was supported. He also testified that Mr. Gravely said nothing to him about not wanting to go beyond the danger board.

Eric Coleman, a roof bolter who believed he worked on Mr. Gravely's shift during the danger board incident, testified that no one ever instructed him to go beyond the posted danger board. Mr. Coleman also testified that he could not recall or remember Mr. Gravely, Mr. Myers, or any other manager instruct Mr. Gravely to take his crew beyond the danger board.

Gary Kiblinger, another member of Mr. Gravely's crew, said nothing about anyone ever instructing or ordering the crew to work inby the danger board in question.

Mr. Gravely himself testified that at no time did he take his crew beyond the danger board, and that at no time did anyone ever direct or order him to do so.

I take note of the fact that while Mr. Gravely asserted on the one hand that Mr. Blankenship blamed him for the first fall which occurred on July 28, Mr. Gravely also asserted that Mr. Blankenship never mentioned the subsequent fall which occurred on July 30, nor did he blame him for it. Mr. Gravely's testimony in this regard is rather contradictory, and it occurs to me that if Mr. Blankenship wanted to rely on the roof falls as the basis for Gravely's discharge, he would have blamed both of the falls on him.

Even if I were to accept Mr. Gravely's assertion that the roof fall was the reason for his discharge, there is no evidence to support a conclusion that Mr. Gravely was ordered or requested to do anything which was not safe. Further, there is no evidence that Mr. Gravely's discharge resulted from his refusal to take his crew inby the danger board area in question.

I believe that Mr. Gravely's belief that Mr. Blankenship "expected" him to take his crew inby the danger board stems from the fact that Mr. Gravely believes that he was fired for allowing the roof to fall. In this regard, he apparently relied on a purported statement by Mr. Myers that he should have started the roof support work further in from where he actually did, and Mr. Blankenship's purported statement that he should have started his work further in to secure the roof area that fell. Mr. Gravely also apparently relied on Mr. Myers' purported statement that mine management was thinking about firing him over an earlier fall. Mr. Myers did not testify in this case, and Mr. Blankenship denied that Mr. Gravely's discharge was in any way connected with the danger board situation.

It seems clear to me from the record in this case that any criticism of Mr. Gravely's asserted failure to properly set the roof cribs to Mr. Blankenship's satisfaction, as well as Mr. Blankenship's belief that the roof fall could have been avoided had Mr. Gravely followed his instructions, came after the roof fell.

With regard to the sketch and Mr. Blankenship's instructions as to how the roof was to be supported, Mr. Gravely did not believe that he ever received a copy of the sketch. However, he did acknowledge a conversation the morning after the fall when Mr. Blankenship became "disgusted" with him over the fall (Tr. 384). Further, when asked whether Mr. Myers ever gave him any instructions as to how to crib the roof area in question, Mr. Gravely first answered "no," and he then said "if he did, it was on-the-spot instructions when he was there with me" (Tr. 384). Mr. Gravely then stated that he was sure that Mr. Myers did instruct him as to how to crib the area (Tr. 385). Mr. Gravely also acknowledged that he was aware of the method of using roof supports laid out in an "arc," and that there is nothing unusual about this type of roof support. However, in his opinion, even if he had cribbed the roof in this fashion, it would still have fallen (Tr. 401). Given these circumstances, Mr. Gravely's initial assertions that he had no instructions or knowledge that Mr. Blankenship wanted the roof area which fell cribbed in any particular manner are less than candid.

Mr. Blankenship's testimony reflects that his displeasure over the roof fall stemmed from his belief that Mr. Gravely failed to follow certain instructions which he had given him as to how to support the roof which eventually fell. Mr. Gravely testified that he took corrective action to support the roof at the danger board location where Mr. Myers and Mr. Burgess instructed him to start. Mr. Burgess testified that when he attempted to discuss the proposed roof support work with Mr. Gravely, including going over a diagram or a map, Mr. Gravely advised him that he knew what Mr. Blankenship wanted done. Mr. Burgess also said that Mr. Gravely had his own map.

After careful review of Mr. Blankenship's testimony, I conclude that his explanation as to how he expected the bad roof area to be corrected is both reasonable and plausible. After viewing Mr. Blankenship on the stand during the hearing, I find him to be a credible and straightforward witness. I believe that Mr. Blankenship had given Mr. Gravely certain instructions as to how the roof support work should have proceeded, but that Mr. Gravely did not follow instructions.

It seems obvious from the record in this case that the respondent was not too enganged with Mr. Gravely's work performance as a foreman, and that his discharge came about after a series of incidents which finally convinced mine management that Mr. Gravely should not continue on as a foreman.

