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WILLAM HARO V. MAGA COPPER  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

WILLIAM A. HARO,  
COMPLAINANT

v.

MAGMA COPPER COMPANY,  
RESPONDENT

Docket No. WEST 79-49-DM  
MD 79-05

Docket No. WEST 80-116-DM  
MD 78-43

San Manuel Mine

DISCRIMINATION PROCEEDINGS

DECISION

Appearances: Paul F. Tosca, Jr., Esq., Tucson, Arizona,  
for Complainant; N. Douglas Grimwood, Esq., VanCott, Bagley,  
Cornwall & McCarthy, Phoenix, Arizona, for Respondent.

Before: Judge Morris

On November 30, 1982, the Federal Mine Safety and Health Review Commission remanded Docket No. WEST 80-116-DM and instructed the judge to analyze whether respondent Magma Copper Company, "proved that it would have transferred Haro anyway for legitimate business reasons, regardless of his protected refusal to cut the B.O. car", 4 FMSHRC 1935, 1941. Subsequently, in a separate order, the Commission directed the judge to make his findings as to the merits of the respondent's defenses on the basis of the record presently before him, 5 FMSHRC 805.

Prior to ruling on respondent's defense the parties were granted an opportunity to file briefs. After receipt of the briefs, and a review of the issues, the judge entered an interim order reaffirming complainant's claim of discrimination. The interim order, with a few clarifying changes, is restated here.

Inasmuch as the interim order reaffirmed the claim of discrimination it became necessary, by virtue of the order of remand, to determine what amount, if any, was due to complainant. In lieu of a further hearing on damages the parties submitted a stipulation concerning back pay, interest, attorneys fees and special damages. The stipulated facts are discussed, infra, together with the issues raised in a subsequent brief filed by respondent.

Analysis of respondent's defense

The Commission order of remand directs the entry of findings of fact and conclusions of law on the evidence relevant to respondent's defense. The principal thrust of the defense is that Haro was transferred because he placed a telephone call outside of the "chain of command" at the mine without trying to work out the problem with his supervisor; further, that a conflict of personalities necessitated Haro's transfer.

The evidence relevant to respondent's defenses appears in the evidence of both parties. Such evidence is summarized in this decision in the same order as it was received at the hearing. It follows:

Complainant William Haro

The discrimination occurred on June 13, 1978 when dispatcher Lockhart instructed Haro to remove a bad order (B.O.) car on the production train. Lockhart is the dispatcher of supervisory personnel with the same pay rate as Stonehouse. Haro refused because Lockhart would not assign another person to assist him (Tr. 15, 60-61).

After Haro refused to remove the B.O. car, Stonehouse recommended that Haro call Frank Torres, (Haro's supervisor) at his home. Stonehouse, the shaft boss, reports to Cothern (Tr. 18, 59, 60, 62). In the ensuing telephone conversation Torres told Haro to return to his maintenance work (Tr. 66).

Before this incident occurred Haro had received written instructions, in the form of a company memorandum, to the effect that two men were to be used when a railroad car was cut from a train (Tr. 57, Exhibit C2).

Haro did not contact Cothern about his refusal to cut the B.O. car; nor did he contact the mine mechanic supervisor (Tr. 18, 64-65).

After the tail light bracket incident (which occurred the following day) Haro submitted a grievance. At Torres's request Haro held the grievance until he [Torres] had an opportunity to look at it (Tr. 70, 71).

On two prior terminations Haro quit respondent to seek employment elsewhere (Tr. 53). Haro did not recall any specific conflicts with supervisors (Tr. 53).

After the B.O. car incident Navarro told Haro he was moving him from dump mechanic to another underground position on straight days. This was because Navarro wanted to protect Haro from Cothern. It was Navarro's responsibility to keep harmony among

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the crews (Tr. 71, 72). Durago, the shift boss, told Haro he thought he and Cothorn had a personality conflict. Cothorn denied that there was a personality conflict (Tr. 73). Bob Zerga told Haro the same thing about the personality conflict (Tr. 73).

Haro felt threatened by Traynor's statement about his (Haro's) activities stirring up more conflict in the mine operating division (Tr. 74).

The purpose of the meeting on June 23rd with Traynor and Navarro was to try to work out differences with Cothorn. The meeting didn't go any further than the second step of the grievance procedure. Haro received a letter from the general manager indicating it was not a proper subject for a grievance and he refused to hear it (Tr. 78-82).

On June 23 (or June 25) Haro received a notice that he was being removed as dump mechanic and placed on straight days (Tr. 225, 226). He then called MSHA (Tr. 226, 227).

The "stress" started about June 13th (Tr. 227).

Witness Frank Torres

Frank Torres, a supervisor in the mechanical division, was familiar with the incident of June 13, 1978. On this date a dispatcher (Lockhart) asked Haro to remove a B.O. car from a production train (Tr. 89-92, 111). Because he was to do it alone Haro refused and called Torres at home.

Torres told Haro they would have someone help him remove the car (Tr. 91-92). It would violate company policy not to provide Haro with an assistant to remove the car (Tr. 92). In their phone conversation, Torres asked Haro to request that his shift boss furnish someone to assist (Tr. 92-93). Stonehouse was the shaft foreman. Further, Torres told Stonehouse on the extension to help Haro himself or to provide someone to assist. Stonehouse agreed (Tr. 111). Torres assumed Stonehouse provided the assistant to cut the ore car (Tr. 92-93). Torres and Stonehouse are on about the same management level (Tr. 111-112).

Haro was acting in accordance with instructions from Torres when he called him at home (Tr. 93). Torres tells this to each of his dump mechanics. They may call Torres or his supervisor, Navarro (Tr. 93).

On June 15 Haro came to Torres with a grievance regarding the conflict over the tail light matter that had occurred between Haro and Cothorn (Tr. 105-106). Torres told Haro to hold onto his grievances a couple of days. Torres wanted to try to smooth it over without going through the grievance procedure (Tr. 105-106).

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On June 22, 1978 Torres discussed with his supervisor, Navarro, the conflict problems between Cothorn and Haro (Tr. 106). Torres felt they should look into it, or he (Navarro), as Torres' supervisor, should look into it (Tr. 106). Navarro would be the more appropriate one to investigate because he is on a level closer to Cothorn (Tr. 106).

Witness Rudy Navarro

This witness is section foreman of the three shaft area.

Navarro testified that Haro's transfer to the surface job could be a direct result of the airlusher accident (Tr. 126).

Concerning the ore cars: Mechanics are to go to the mine operating department and get a helper. They are not to remove the ore cars by themselves (Tr. 132).

Navarro put Haro on straight days because of the conflict with Cothorn. The statements were made by Cothorn that Haro was arguing, and a big shot. Cothorn didn't want him (Tr. 133-134).

Witness John Zagorsky

It seemed to this witness, who replaced Haro as dump mechanic, that "they" were pressuring Bill Haro all of the time (Tr. 174). By "they", Zagorsky means management consisting of Frank Torres, John Traynor, Tom Traynor, and Rudy Navarro. The pressure included undue stress. Also there was a silent period when they refused to talk to Haro. They would also needle him and ask more than the usual questions. There was more silent treatment than needling (Tr. 186).

The Torres to Haro conversation [about the grease line] was more of a form of harassment than an explanation (Tr. 187). Haro is not a troublemaker. But he is conscious of what is safe around him and willing to speak up (Tr. 174, 175).

Harry Miller, Thomas Traynor, Tom Howard, Gregory Korn, and Donald Graham also testified for Haro. However, those witnesses did not offer any evidence relevant to the issues now being considered.

Respondent's Evidence

Witness Robert Zerga

Robert Zerga, Magma's development superintendent, is responsible for the maintenance division (Tr. 285).

Zerga did not recall the chronological order, but the first personnel problem involving Haro was when Frank Bunch related to him that he had a confrontation with Haro off the job. Further,

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there was some indication from Haro that he felt that the confrontation was going to run over onto the job (Tr. 290). Zerga told Bunch, the area supervisor, that if there were any problems on the site with Haro, he was to exclude himself and let his foreman handle them (Tr. 291).

The next matter was the problem between Haro and Cothorn. The problem came to the attention of the mine operating group because Haro had called the maintenance people instead of dealing with Cothorn who was in his chain of command (Tr. 291). The immediate result was that Cothorn and Haro met to solve the problem and rectify the situation (Tr. 292). The meeting went poorly and it did not resolve the problem but amplified it. There were grievances turned in by Haro saying he was being set up and discriminated against (Tr. 292).

After discussing the matter with Haro's foreman, Zerga felt the only reasonable position the company could take was to separate the two individuals because of an irreconcilable difference or conflict. They were separated. Haro was taken off as dump mechanic and put in the same area working for the mechanical foreman (Tr. 292). Zerga felt Haro required more supervision than he was receiving as a dump mechanic (Tr. 292).

At the time of Haro's removal from the dump mechanic position the scenario was this: Cothorn said that he didn't like someone going off the job when he [Cothorn] could have resolved the problem. And he had never asked Bill Haro to do anything that was unsafe or out of line. Haro said he was being harassed and intimidated, further he claimed Cothorn was trying to set him up to get him fired (Tr. 314).

Lockhart was not Haro's boss and the problem was that Haro did not go to Cothorn (Tr. 315). Stonehouse, the shaft foreman, worked for Cothorn (Tr. 315).

Subsequent to the Bunch and Cothorn incidents, Haro's pattern of personality conflicts repeated themselves in subsequent incidents (Tr. 319). Through the grievance procedure it was claimed that Navarro, Torres, and Traynor were trying to "get" Haro. Pursuant to Haro's request he was moved to the surface. After that he had problems in the new area into which he had been moved. He had problems with Leno Gonzales over the use of telephones and over the use of wrong grease (Tr. 319). He had problems where he [Haro] said "they're just harassing me" (Tr. 320).

Witness Zerga had problems with finding a solution to Haro's grievances. Concerning the grease line: Haro said he tried to explain the situation to Torres but he (Torres) wouldn't let him (Tr. 335-336).

Witness Rudy Navarro

This witness (recalled) had been Haro's supervisor for one and a half years. One of his welders told Navarro that Haro had smoked a marijuana cigarette. Navarro contacted Haro. He said it wouldn't happen again. (FOOTNOTE 1)

The marijuana cigarette incident occurred six months before Haro was assigned as a dump mechanic (Tr. 339, 340). It is a violation of company policy for a worker to have drugs in his possession while working (Tr. 342-343).  
Discussion

The Commission has ruled that an operator may produce evidence in support of its legitimate business reasons to justify the challenged adverse action. In the words of the Commission "ordinarily an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question," Bradley v. Belva, 4 FMSHRC 982, at 993 (June 1982). Belva does not exclude other avenues of evidence that would establish legitimate business reasons to justify the operator's defense.

But in this case respondent's evidence does not approach any of the criteria mentioned in Belva. To the contrary, the evidence establishes that Haro was transferred as a direct result of having engaged in a protected activity.

The pivotal evidence arises from the testimony of witness Robert Zerga. This individual, as the person responsible for personnel problems, clearly establishes the reason why Haro was transferred. In the words of witness Zerga: "The problem came to my attention because the mine operating group brought to my attention that Mr. Haro had, instead of dealing with Mr. Cothorn on a problem, had gone outside and called maintenance people instead of dealing with the line of command that was at work" (Tr. 291).

Notwithstanding whatever "line of command" existed at the mine, Haro was justified in calling his superior at his home. His supervisors, Torres and Navarro, told him he could call "outside" (Tr. 93, 267). Such authorization was not only given to Haro but to "each one" of the dump mechanics (Tr. 93).

Supervisor Torres states the rationale: "We have three or four of them [dump mechanics] that are on rotating shifts, that if for some reason they cannot work with the shaft foreman or the assistant shift boss in regard to cutting off cars, which ordinarily they furnish somebody to help and assist on this certain thing, that if there was any question, they could not get anybody, they'd either call me or Mr. Navarro, which is my supervisor" (Tr. 93).

Respondent claims Cothorn was upset because Haro called outside to maintenance. Although Cothorn did not testify, as an assistant superintendent, he should have knowledge of the instructions given to the dump mechanics by their supervisors.

Haro claims, and it is now the law of the case, that his refusal to cut the B.O. car was a protected activity. In this regard he established a prima facie case. Commission decision, 4 FMSHRC at 1941.

Was his subsequent telephone call to Torres a further protected activity? Or, as the defense urges, did that call violate respondent's chain of command.

Under some circumstances a telephone call to an operator's supervisor off of the worksite might not be a protected activity. But here the telephone call directly interconnected with Haro's refusal to remove the railroad car. It was, in these unique circumstances, a protected activity.

Additional uncontroverted evidence indicates Haro did not unilaterally call Torres. Stonehouse, the shaft boss, recommended the call be made (Tr. 59-62).

I agree with respondent that it is clear that Haro did not contact Cothorn concerning the B.O. car. No such contact was necessary. Stonehouse, the shaft boss, recommended that Haro call Torres. At that point Stonehouse hadn't been aware of the policy to provide a worker to assist the dump mechanic when an ore car is removed from the train (Tr. 62, 268). However, in talking to Torres, Stonehouse agreed to provide such an assistant (Tr. 111). That concluded the matter. No further purpose would be served by Haro going beyond Stonehouse and contacting Cothorn.

Additional evidence in the case requires review. Witness Zerga testified concerning a personnel problem involving Frank Bunch and Haro. This problem apparently arose out of a confrontation between Bunch and Haro off of the job. Zerga handled this by instructing Bunch, an area supervisor, to exclude himself from any problems involving Haro. He [Bunch] was to let his foreman handle any problem (Tr. 291).



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For several reasons there is a failure of proof that these events played any part in causing respondent to remove Haro as the dump mechanic. The initial reason is that Zerga's testimony presents no time frame relating to the Bunch/Haro confrontation. It could have been as early as 1972, when the personnel records show Haro was hired or at any subsequent time (Exhibit R8). In addition, witness Zerga is clear that he didn't know the chronology between the Bunch incident and the Cothern incident.

Without further supportive evidence I give no weight to a view that the Bunch incident was involved in the decision to remove Haro as dump mechanic.

An additional issue arising from the evidence concerns witness Navarro's testimony that Haro's transfer to the surface could have been a direct result of the [airslusher] accident (Tr. 125-126).

The foregoing evidence is entitled to zero weight. Whether something "could" have caused Haro to be transferred lies within the realm of possibilities and conjecture.

A final point raised by the evidence concerns the incident where it is claimed that Haro smoked a marijuana cigarette. The use of drugs violates company policy. No one claims this was involved in Haro's transfer. Respondent apparently thought nothing of the incident because it subsequently assigned Haro to the position of dump mechanic.  
Respondent's contentions after remand and before interim order

In its brief filed after the order of remand and before the entry of the interim order respondent urges various arguments in support of its position. The initial condition:

Respondent states that Haro could well be obstreperous. He had been reassigned on six (6) different occasions due to his inability to get along with supervisors. These reassignments, respondent states, were not alleged to have been motivated by unlawful motives (Brief, page 5, paragraph 1).

I disagree with respondent's contentions. No evidence supports the view that Haro was transferred on six different occasions. Respondent's assertions do not cite any part of the transcript. Further, I find no evidence supporting respondent's statement. The evidence concerning transfers by Haro are stated in the foregoing summary of the evidence. There are two such transfers. Both occurred after the B.O. car incident. The first was when Navarro transferred Haro off of the position of dump mechanic. The second was when Haro requested a transfer to the surface because he was being harassed.

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Respondent's personnel records (R8) fail to show any such transfers. In fact, the personnel records show nothing after May 25, 1976.

Respondent's claim that Haro was fired because he couldn't get along with his supervisors seems contradicted by the records (R8). The records show Haro quit in July 1972. Further, he was dropped as an employee in February 1973 (AWOL), in April 1973 (excessive absenteeism), as well as August 1973 (AWOL). These are legitimate business reasons to terminate and to refuse to rehire a worker. But the contradiction lies in the fact that Haro was rehired after each of these terminations.

Respondent's brief does not cite any portion of the transcript in its assertion that Haro couldn't get along with supervisors. There is evidence that Haro "had problems" with Anderson, Zunica, and Pena as well as Gonzales (use of telephone and wrong grease). Even if I assume these men were Haro's supervisors I cannot overlook the obvious. These "problems" all occurred after Haro refused to remove the B.O. railroad car. Further, the record does not disclose what the "problems" were between Haro and the first three individuals.

Respondent's second contention: On June 13, 1978 Haro was asked by a co-worker to cut a "bad order" car by himself. He refused to do so. Instead of referring the matter to Cothorn, his supervisor on shift, he called a supervisor off shift at the supervisor's home (Brief, page 5).

This contention has been discussed. To restate the holding: Stonehouse, the level boss, recommended the phone call and he concurred in Torres' suggestion. Haro did not have to take the matter to Cothorn.

The third contention: Cothorn deeply resented the Haro telephone call to another supervisor. Cothorn told Haro he would try to have Haro removed from his shift for that reason. Cothorn gave the same explanation to Zerga, who had made similar decisions regarding Haro in the past (Brief, page 5).

Cothorn did not testify and in fact he wasn't shown to have been on the shift at the time. But there is sufficient evidence to infer Cothorn's reaction to Haro. However, no defense is established. Haro was engaged in a protected activity. Cothorn told Haro he would get him removed. He did.

Magma's claim that Zerga had made "similar decisions" concerning Haro can, on this record, relate only to the Bunch/Haro incident. As previously discussed the Bunch/Haro incident is without any reference to a time frame. Further, it is obvious

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from Zerga's testimony that it played no part in the decision to remove Haro as dump mechanic.

The fourth contention: The decision was made to place Haro directly under a mechanical supervisor, so that any questions could be resolved on shift (Brief, page 5).

This view really asserts that when a miner engages in a protected activity he can be demoted under a guise including the one that more supervision is required. But Zerga's stated reason for removing Haro was because of the telephone call to the maintenance people on the "outside." If a protected activity in part causes adverse action against a miner then a violation of the Act occurs. As a matter of fact such a transfer as occurred here would eliminate the necessity of any telephone calls. A supervisor would then be "on shift."

The fifth contention: Not one supervisor ever told Mr. Haro he had been wrong in refusing to cut the B.O. car (Brief, page 5).

I am unable to perceive how this assertion establishes a defense. Haro followed company policy and refused to cut the B.O. car without assistance; then he called "outside" as he had been instructed to do. It is not relevant whether a supervisor tells a miner whether his actions are wrong. Haro, Torres, Navarro and the company memorandum all clearly establish a mechanic was not to remove a railroad car without an assistant (Haro 15-16; Torres 92-93; Navarro 132; Exhibit C2).

The sixth contention: The San Manuel Mine employs 1,500 persons underground. Miners, craft persons and laborers are assigned work by their supervisors pursuant to orders which the supervisors themselves are given. The orders are carried out in an environment of noise, dust and frequent darkness amid heavy machinery and explosives. If a supervisor loses control over the men he supervises, disaster can result. In the present case, Cothorn did not order Haro to do an unsafe act. A co-worker made that request. Haro did not discuss it with Cothorn or otherwise follow the chain of command. He solicited instructions from a supervisor off the job. This was in derogation of the authority and responsibility given to Mr. Cothorn as a supervisor (Brief, pages 5-6).

This contention was previously discussed, but to briefly restate it: Magma's brief (pages 1, 2) shows a chain of command with Haro as dump mechanic on a level with Lockhart. On the next echelon it shows the "level boss" to be Stonehouse. On the next level Cothorn is listed as shift boss. Zerga is shown as the final supervisor. When Stonehouse, on a level above Haro, decided the issue, that concluded it. Cothorn should know Haro had been

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authorized to call maintenance people on the outside. Further, the telephone call was legitimate since Stonehouse didn't know about the company policy.

Magma's final statement in its brief is that neither Cothorn's request that Haro be reassigned, nor Zerga's granting of that request, were so weak, so implausible or so out of line with normal practice, to be considered as mere pretext seized to cloak discriminatory motive. Zerga was merely trying to keep two employees from creating conflicts which were inhibiting the productivity of both of them (Brief, page 6).

The issues raised by this contention have been previously reviewed. In sum, the evidence does not establish that respondent transferred complainant Haro for legitimate business reasons but to the contrary he was transferred for engaging in a protected activity.

Respondent's contentions after  
issuance of interim order

After the parties filed their stipulation concerning damages the parties were granted an additional opportunity to file briefs. Complainant Haro did not file. Respondent did. Respondent's contentions all address the interim order that was entered reaffirming the original discrimination concerning the B.O. car incident. The issues raised were in addition to those previously raised and discussed when respondent filed its brief after the order of remand and before the entry of the interim order. Magma's contentions entitled "Exceptions to order after remand," are basically credibility arguments. They follow:

Contention No. 1:

The Order draws a negative inference in several places from the failure of Supervisor Cothorn to testify. (e.g., p. 6 paragraph 3; p. 8 paragraph 5) Mine Superintendent, Bob Zerga, testified that Mr. Cothorn was then employed by Freeport Mining Co., in West Irian, on the Island of Java, in Indonesia, and that he was not available to testify (Tr. 293). Further explanation of his failure to appear would seem superfluous.

It is true that the evidence is uncontroverted that Cothorn was out of the country at the time of the hearing. It is not necessary to explore whether an adverse inference was drawn from his failure to testify or whether it was a recitation of a fact. In any event the evidence from both complainant and respondent support Haro's authority to call "outside."

Contention No. 2:

The Order states that Mr. Haro call Mr. Torres at Torres' home at the suggestion of Mr. Stonehouse (Tr. 62; p. 2 of Order). This account differs substantially from the account given by Mr. Haro in his written account at the time of the event (p. 1 Complaint of Haro to MSHA in Review Commission Record), his deposition given on July 18, 1980 (see Tr. 63-64), and his direct examination (Tr. 19).

In his complaint to MSHA, Haro goes into exquisite detail concerning the personnel involved, their level assignments and the conversations he had with each one. At no time does he mention that Stonehouse told him to call Torres.

In an attempt to destroy Haro's credibility on this point respondent initially cites Haro's complaint to MSHA "in the Review Commission record."

Haro's statement to MSHA was not offered as an exhibit nor did any party request the judge take official notice of such statement. Accordingly, the statement is not part of the evidentiary record and not before me.

Respondent further cites Haro's direct examination, citing the transcript at pages 19, 63-64.

In order to analyze these points I deem it necessary to set forth the pertinent portions of the transcript.

The direct examination at pages 16-19 of the transcript shows the following:

A. Yes, sir. Mr. Tosca: Your Honor, this is a memorandum of Magma Copper Company which directly related to the questions I just asked. I offer it into evidence.

(Whereupon the above mentioned Exhibit was marked for identification at this time.)

Judge Morris: C-2 has been offered in evidence. It's a memo from a J. Herndon. Any objection to C-2, Mr. Grimwood?

Mr. Grimwood: Your Honor, no, there's no objection and

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the company will stipulate that Mr. J. Herndon did prepare this memorandum and post it on the date indicated.

Judge Morris: May 8, 1976.

Mr. Grimwood: May 8, 1976, yes.

Judge Morris: Exhibit C-2 will be received together with the stipulation.

(Whereupon the above mentioned Exhibit was received into evidence at this time.)

By Mr. Tosca:

Q. Will you please read that short memorandum to the Court, please?

A. "May 8, 1976, Subject, Production Training Message. In the last 30 days there has been two instances of mud trains losing cars on the main line. From this day forward there will be no cutting of cars from the production train to service development or any other reason except to cut out a B.O. car.

When a B.O. car is cut, a supervisor will be present. The safety hooks and couplings are to be inspected as often as necessary and cleaned if necessary."

Q. Well, according to your testimony, Mr. Haro, Mr. Lockhart apparently asked you to break company policy; is that right?

A. That's correct.

Q. Did you ask your supervisor?

A. I asked him that the policy be followed.

Judge Morris: You asked for what?

The Witness: I asked that the policy be followed.

By Mr. Tosca:

Q. You were aware of this memo at the time?

A. Yes, I was, sir.

Q. What was Mr. Lockhart's response to your request?

A. Mr. Lockhart asked me if I was refusing to do the job as assigned.

Q. And your response?

A. No, sir, that I wasn't refusing to do the job, that I was just asking that the policy be enforced as stated.

Q. Did you cut the ore car from the train?

A. No, sir.

Q. What was the result of that?

A. At that point in time, I called my immediate supervisor, Mr. Frank Torres at his home as I had been told to do by Mr. Torres if I had run into this situation and at that point in time Mr. Torres explained over the telephone to myself and the shaft foreman, Mr. Stonehouse, the procedure as stated in the memorandum. (Emphasis added).

Then Mr. Torres called Mr. Lockhart and explained the procedure to Mr. Lockhart and I was never asked after that point in time to go out and cut the car.

Q. And that was the end of that issue?

A. At that point in time, sir.

Q. On June 14, 1978, were you working under a Mr. Cothern, a foreman for Magma Copper Company?

A. Yes, sir, Mr. Cothern was an assistant chief foreman.

Q. On that date did you have a conversation with Mr. Cothern regarding the tail light on the rear of one of these ore cars?

A. I did, sir, on two different occasions on the same date.

Q. Can you give me, in substance, a brief synopsis of that conversation?

A. Yes, sir, Mr. Cothern instructed me to tie with bailing wire, a light to the end of the production train and when I brought Mr. Cothern's attention to the policy stating that we did not tie lights on the end of trains, that we installed them on light brackets, the tail car of the trains, and I showed Mr. Cothern that one of these tail cars that

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was equipped with a light bracket and a light, that was in working order, was in the middle of the train, that that's all he needed to do was to remove the car from the middle of the train and put it on the back of the train as the procedure calls for it.

Mr. Cothern asked me if I was refusing to do a job order as instructed.

Q. What was your response?

A. I told him, "No, sir, I wasn't."

Further relevant verbatim testimony appears in Haro's cross-examination:

Transcript at 61-64:

Q. And Mr. Lockhart was a dispatcher?

A. That's correct, sir.

Q. Was Mr. Lockhart in, well, he wasn't in that chain of command I just described was he?

A. Oh yes.

Q. Where does he fit in?

A. He is a dispatcher of supervisory personnel. I imagine he's probably the same pay rate as Mr. Stonehouse.

Q. Right, but at least as far as Mr. Stonehouse being your card signing boss, Mr. Stonehouse reporting to Mr. Cothern, he's not in there any place, but he did ask you to do something.

A. Yes, sir.

Q. Okay, so isn't it true that when Mr. Lockhart asked you to do that and you told him that you didn't want to do it, it was against policy and you pointed out that thing, isn't it true that you simply, at that time, went over to the telephone and called Mr. Torres? I believe that's what your testimony was. You immediately went and placed a call to Mr. Torres; is that correct?

A. This is at the conclusion of three conversations that I had with Mr. Lockhart in reference to cutting the B.O. car out.



Q. Well, you testified as to those, I'm sure, didn't you testify in full as to whatever conversations you had with Mr. Lockhart; right?

A. Yes, sir.

Q. And then so you just went ahead and just got on the phone and called up Mr. Torres at his home. He was off shift at that time, right?

A. Sir, I believe my first complaint will show that I went to the 2075 and I reported to Mr. Stonehouse. I told Mr. Stonehouse what the policy was. I told Mr. Stonehouse what the situation was at that point in time and I asked him for his suggestion.

A. Mr. Stonehouse indicated to me that he did not have any knowledge of such policy and that he himself recommended that I call Mr. Torres as Mr. Torres told me to do if I ran into this situation. (Emphasis added).

Q. Okay, what I'm saying though, Mr. Haro, is that's not the way you testified on direct examination and I believe--

Mr. Tosca: I don't believe the question was asked whether he had called Mr. Torres on direct or not. It wasn't asked.

Judge Morris: Well, we don't have a full question here. I believe, that's where it trailed off so you can hold your objection for a minute.

Mr. Grimwood: Well, the record will reflect whether the question was there or not.

Judge Morris: Well, you haven't asked him a question,

Mr. Grimwood. How can he answer it? Do you want to ask him a question and if Mr. Tosca has an objection he can make it, but right now there's no question.

By Mr. Grimwood:

Q. Okay, Mr. Haro, do you recall when I took your deposition on July 18, 1980, about three weeks ago on this matter, on these discrimination charges, do you recall that?

A. Do I remember the deposition?

Q. Yes.

A. Yes, sir.

Q. Okay, I refer to page 14 of the deposition, which is in the record and I ask, I direct your attention to the events of June 13, 1978, "What happened on that date?" Answer: "On June 13, 1978, I informed Mr. Lockhart that car 222 had a B.O. safety latch. Mr. Lockhart told me to remove the car from the train and to replace it with a good car. I asked Mr. Lockhart for assistance in this and he refused to comply with my request so I referred him to the memorandum and Mr. Lockhart asked me if I was refusing to do a job as was given to me. I informed Mr. Lockhart that I was not refusing to do a job, that I was merely trying to comply with the memorandum policy as stated.

I, at that time, called Mr. Torres at home and informed Mr. Torres of the situation." Now is that pretty much how it happened?

A. First of all, sir, during the deposition I tried to explain my answers as thoroughly as I possibly could. If I deleted the conversation that I had with Mr. Stonehouse prior to that, I didn't do it purposely.

It is on the record on my first complaint with MSHA and I did put that in. If you'd care to check those records, it's in writing.

Q. Well, there's been quite a bit of writing here. Well, okay, so at least you talked to Mr. Lockhart. Mr. Lockhart didn't give you satisfaction. Now you say you also talked to Mr. Stonehouse. Did you talk to Mr. Cothorn about this situation?

A. Mr. Stonehouse indicated to me that Mr. Cothorn and Mr. Corwin were not available.

Q. Well, were they on that shift?

A. They were, sir, but they were not in an area where they could be reached at.

Contrary to respondent's contentions I find Haro's testimony that Stonehouse suggested he call Torres to be very credible.

In his direct examination, Haro is explaining his telephone call to Torres (Tr. 18, lines 8-14). At this point, without any leading question or suggestion, Torres, on the telephone, is explaining the procedure to Haro "and the shaft foreman, Mr. Stonehouse." (Tr. 18, lines 12, 13).

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Haro's cross examination, as set forth above, further amplifies the testimony.

Haro's evidence on this point is uncontroverted. Stonehouse did not testify. I find Haro's evidence credible and no contrary evidence causes me to reject it.

Concerning Haro's deposition: the broadly worded question (Tr. 63, 64), of "what happened on that date?" [June 13, 1978] does not require a party to state every detail of the events of that day.

The concluding paragraph of respondent's argument again refers to Haro's written complaint to MSHA. As previously stated that evidence is not before me.

For the foregoing reasons I conclude that Stonehouse in fact suggested that Haro call Torres.

Contention No. 3:

Mr. Torres specifically instructed Mr. Haro and other mechanics involved not cut B.O. cars by themselves. Torres' specific instructions were to contact him at home only after having contacted the shift foreman and the shaft boss on duty and not having gotten satisfactory response from them (Tr. 102-103).

In support of its position respondent cites the transcript at pages 102, 103. This portion of the testimony is as follows:

Q. Okay, Mr. Torres, Mr. Haro has testified here today about some problems he had with Mr. Cothern in the mine operating division and that sort of thing. Do you give your mechanics, you said you had three or four of them who work on B and C shift, any special instructions about handling these kinds of problems that they might run into with operating people?

A. Yes, sir, let me explain this. On B and C shift there is no mechanical supervisor in this area where we work and they work, the dump mechanic works for the shaft foreman which the shaft foreman answers, in this particular case, to Mr. Cothern who was assistant shift foreman or shift foreman of this crew, and I have given them instructions as to, if they asked, say for instance, to cut a B.O. car off the train to if they ask them to go cut it off to ask for assistance. To try, if they cannot get anywhere with the shaft boss, his immediate supervisor at that time, to ask to talk to the assistant shift foreman or the shift foreman whichever the case may be, to get some help to do the job of cutting off cars or whatever.



Q. Does it sometimes happen that mine operating people who have essentially mine responsibilities and mine mechanical people who have what you call support responsibilities, take a different attitude or a different approach to certain problems?

A. I don't believe I understand that.

Q. Well okay, I'll withdraw the question. You've testified that the mechanic who works on B and C shift does not have an immediate mechanical supervisor that moreorless is responsible to, that the mine operating division--in your opinion is it important to have someone with some degree of diplomacy or at least some common sense to work in this position, to work with the mine operating people?

A. Yes, sir, it's very important to cooperate, yes, sir.

Additional evidence on this point, not cited by respondent, appears in the direct testimony of Torres at page 93 of the transcript. It follows:

Q. Do you know if--who was it you gave those instructions to?

A. Mr. Stonehouse at the time was the shaft foreman in that area on B shift or whatever shift that it is that we are talking about.

Q. To your knowledge, do you know if Mr. Stonehouse provided assistance to Mr. Haro to cut an ore car from the train?

A. I would assume he did, yes.

Q. But you have no personal knowledge whether he did or not?

A. No.

Q. When Mr. Haro called you at home on June 13, 1978, was he acting in accordance with your instructions?

A. Yes, he was. I tell this to each one of my dump mechanics. We have three or four of them that are on rotating shifts, that if for some reason they cannot work with the shaft foreman or the assistant shift boss in regard to cutting off cars, which ordinarily they

furnish somebody to help and assist on this certain thing, that if there was any question, they could not get anybody, they'd either call me or Mr. Navarro, which is my supervisor.

A fair reading of the foregoing portions of the transcript does not establish the strict construction urged by respondent. But in any event Torres indicated Haro could call "if there was any question" (Tr. 93). There were in fact serious questions. One of these was that Lockhart would not assign another worker to assist Haro (Tr. 15). In reply, Haro was asking that the written company policy be enforced (Tr. 15, 16). Another question arises from the fact that Stonehouse himself "wasn't aware of any such policy" (Tr. 268). This may be the reason why Stonehouse was on the extension when Haro talked to Torres.

Contention No. 4:

Contrary to the language of the Order, the law does not hold that "[i]f a protected activity in part causes adverse action against a miner then a violation of the Act occurs." The petitioner's proof in a "mixed motive" case merely shifts burden to the respondent to articulate a legitimate business necessity for his action.

The law of the case has been clearly articulated by the Commission in its order of remand, 4 FMSHRC 1935. The Commission has directed the judge to analyze respondent's legitimate business reasons. The analysis is made here, and for the reasons stated herein, I reject that defense.

Contention No. 5:

Mr. Haro was never "transferred", but he was reassigned (e.g., Tr. 298). Transfers are shown on the personnel card, assignments to crews or working places are not.

The parties have agreed on the damages incurred by Haro. Whether the adverse action against Haro is called a "transfer" or a "reassignment" is of little consequence.

Contention No. 6:

The fact that Mr. Haro was never told that he was wrong in requesting assistance in cutting a B.O. car shows absence of respondent's animus toward a protected activity. The irritation of Mr. Cothorn arose of Haro's choosing to telephone off the property without having consulted Mr. Cothorn as Mr. Torres told him to do. Haro's testimony that Stonehouse told him to make the call is in

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consistent with all his previous accounts of the event, as stated above.

The issues raised in this contention have already been thoroughly explored and found contrary to respondent's views. Respondent's animus is apparent. Complainant engaged in a protected activity. He was transferred for that activity.

Contention No. 7:

Mr. Cothorn was an operations supervisor. Mr. Torres was a maintenance supervisor. Mr. Cothorn can hardly be charged with knowledge of instructions given by supervisors in other departments. Furthermore, Cothorn's instructions were consistent with those given by Torres: contact the highest responsible person on the job before calling off the property.

I disagree with respondent's initial statement. A management supervisor should have knowledge of a written company safety memorandum. Further, particularly in matters relating to safety, he should know how unsupervised workers handle safety complaints.

The second statement in contention No. 7 has already been discussed.

Contention No. 8:

The Order confuses Haro's reassignment from dump mechanic to maintenance mechanic (underground) to maintenance mechanic (surface). Mr. Zerga granted Mr. Haro's request for the latter reassignment because of the Helmer accident.

The parties have stipulated on Haro's damages. No purpose can be served by exploring this issue.

After considering the record and for the reasons stated herein I conclude that complainant's claim of discrimination arising from the B.O. car incident should be affirmed.

#### Stipulation Concerning Damages

The parties, by their respective counsel, in a written stipulation agreed that if a final order finding unlawful discrimination is to be issued an accurate computation of the amounts to which complainant would be entitled are as follows:

Back pay	\$3,219.71
Interest	2,099.36
Attorney fees	5,644.52
Compromise of Special Damages	361.20

