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SOL (MSHA) V. EASTERN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF, ROBERT RIBEL, JOHN KANOSKY, JR., & DANNY WELLS, COMPLAINANTS v. EASTERN ASSOCIATED COAL CORP., RESPONDENT	DISCRIMINATION PROCEEDINGS Docket No: WEVA 84-4-D MSHA Case No. MORG CD 83-16 Docket No. WEVA 84-33-D MSHA Case No. MORG CD 83-18 Docket No. WEVA 84-66-D MSHA Case No. MORG CD 83-19 Federal No. 2 Mine

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Complainants;
Barbara J. Fleischauer, Esq., Morgantown, West Virginia, for Complainant Robert Ribel.
Ronald S. Cusano and Anthony J. Polito, Esqs., Corcoran, Hardesty, Ewart, Whyte, and Polito, Pittsburgh, Pennsylvania, for Respondent;
Sally Rock, Associate General Counsel, Eastern Associated Coal Corp., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern discrimination complaints filed by the Secretary of Labor on behalf of the named complainants pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, charging the respondent with certain alleged acts of discrimination against the complainants because of their asserted exercise of certain protected safety rights under the Act.

Docket No. WEVA 84-4-D concerns a complaint filed by MSHA on behalf of complainants Ribel, Kanosky, and Wells, on or about October 17, 1983. That complaint is based on

a written complaint filed by these individuals with MSHA on May 31, 1983, in which they make the following allegations:

> On or about May 18, 1983, during the shift we were approached by Jack Hawkins in regards to double cutting on the longwall face. He gave us two options in regards to double cutting on the face, which were:
>
> (1) If we agreed to double cut we would receive benefits that included overtime opportunities and favorable job assignments.
>
> (2) Should we not agree to double cut, we would not receive overtime opportunities and would be assigned work in a manner that would cause us to either bid from our present jobs or quit our employment with Eastern. Being our belief that the foreman's request that we perform work inby was unsafe and violative of the Act, we refused to accede to his request.
> As a result of exercising our rights under the Act, we have been discriminated against by our foreman and Eastern Associated Coal Corporation by being assigned job duties that have not been customarily a part of our regular job and, in addition, we have been denied overtime opportunities and other benefits afforded other employees on the crew.

Docket No. WEVA 84-33-D, concerns a complaint filed by MSHA on or about December 5, 1983, on behalf of Mr. Ribel, challenging Mr. Ribel's suspension on August 5, 1983, with intent to discharge, for his allegedly having engaged in the destruction, or alleged "sabotage", of a company telephone on the 7-Right longwall section of respondent's Federal No. 2 Mine. Mr. Ribel filed a grievance on this discharge, and on August 22, 1983, an arbitrator denied his grievance and upheld the discharge.

As a result of MSHA's complaint on Mr. Ribel's behalf, Chief Judge Merlin ordered his temporary reinstatement on November 14, 1983, and after a hearing held by me on November 28, 1983, the parties agreed and stipulated that Mr. Ribel would be "economically reinstated". The respondent agreed to continue paying Mr. Ribel his regular rate of pay, as well as other benefits flowing from his employment with the respondent, without actually returning him to work at the mine.

Docket No. WEVA 84-66-D, concerns a complaint filed by MSHA on behalf of Mr. Wells on or about December 15, 1983, and this complaint is based on an August 8, 1983, complaint filed by Mr. Wells with MSHA claiming that his supervisor, Jack E. Hawkins, issued him a "safety slip" for an alleged safety violation, and that he did so out of retaliation for his prior safety complaint filed with MSHA and the Commission.

Issues Presented

Docket No. WEVA 84-4-D

1. Whether the complainants, Ribel, Kanosky and Wells were engaged in protected activity on or about May 18, 1983, when they refused to double-cut on the 7-Right longwall section of the respondent's Federal No. 2 Mine.

2. Whether the respondent, by and through its agent, section foreman Jack E. Hawkins, retaliated or discriminated against the complainants during the period May 18, 1983 until approximately June 1, 1983, by withholding certain employee benefits.

Docket No. WEVA 84-33-D

Whether the respondent violated the Act on or about August 5, 1983, when it suspended with intent to discharge the complainant Robert Ribel for allegedly destroying or "sabotaging" a company telephone.

Docket No. WEVA 84-66-D

Whether the respondent, by and through its agent, section foreman Jack E. Hawkins, retaliated or discriminated against the complainant Danny Wells by issuing him a "safety slip" for an asserted safety violation.

DOCKET NO. WEVA 84-4-D AND 84-33-D.
MSHA's TESTIMONY AND EVIDENCE

Complainant Robert A. Ribel testified that he has been unemployed since August 5, 1983, and that prior to this date he was employed by the respondent as a chock setter and had been in that position for approximately six years. He confirmed that he worked on the midnight shift, and he confirmed that his duties included moving the

longwall hydraulic roof supports as the shift cuts the coal, and pulling the shields as the longwall advances. He indicated that in addition to himself, two other chock setters would normally work with him during the shift, and on May 17, 1983, chock setters John Kanosky and Danny Wells were working with him. Mr. Ribel identified his supervisor as section foreman Jack Hawkins, and he indicated that Mr. Hawkins had been so employed for two or three months (Tr. 13-15).

Mr. Ribel identified exhibit G-1, as a complaint which he and Mr. Kanosky and Mr. Wells signed and filed with MSHA on May 31, 1983, and he explained the circumstances which led to the complaint. He stated that approximately two or three weeks prior to May 18, 1983, he, Mr. Kanosky, and Mr. Wells informed Mr. Hawkins that they were not going to "double cut" coal any more. A meeting was held with the union safety committee and mine management, and Mr. Hawkins' supervisors advised the complainants that they did not have to double cut (Tr. 17).

Mr. Ribel stated that the complainants did not double cut after the meeting was held, but that on or about May 15, 1983, Mr. Hawkins summoned them to the dinner hole and informed them as follows (Tr. 18):

> [W]hen Jack Hawkins called myself, Danny Wells, and John Kanosky into the dinner hole, sat us down, and told us that he was going to make it twice as hard on us, to single cut, as it was to double cut, and he read us our options, and he said among the options, if we refuse to double cut, we wouldn't be granted the opportunity to work through dinner, as we had in the past, we wouldn't be allowed to stay in between shifts, and there would only be two of us on the face, instead of three, one of us would be doing dead work all the time, we would alternate which one of us that was, and he said, he would make it so tough on us, we would either bid off, or he would find a way of getting rid of us.
>
> That was about the extent of the conversation. Danny asked him for a copy of the two options, he just laughed and put them in his pocket.

Mr. Ribel explained that in "double cutting", the coal cutting shearer would move from the tailpiece to the head along the longwall face, and then would repeat

the process, moving back from the head to the tailpiece, making a second cut of coal. He confirmed that while he had been involved in double cutting for a period of six years while assigned to the longwall section, he did not like it because he believed that it was not safe because when he is inby the shearer the dust would impair his vision, and he would be exposed to the dusty conditions generated by the shearer. He was not sure whether double cutting was legal, and while it "seemed dangerous to me all along", until the time that he "got together" with Mr. Wells and Mr. Kanosky to refuse to continue double cutting, he did nothing about it because he could not find others who openly shared the same views (Tr. 19).

Mr. Ribel stated that during double cutting he had to work behind the shearer, and the dust would get into his lungs and eyes, and this would impair his vision. Further, in the event of a shearer fire, the smoke could come in his direction because the air is flowing from the head, down the face, out the tail, and down the return. He would experience no such problems during single cutting. (Tr. 21-24).

Mr. Ribel stated that the first time the complainants approached management about double cutting was when they had the meeting in early May. He confirmed that during his early training, he was instructed that it was illegal to work inby any piece of moving equipment, but that during his six years on the longwall he did not follow this procedure, and he, as well as others, worked inby the longwall shearer. He did so to "just kind of go with the flow", and that "I just kept my mouth shut and did what everyone else did" (Tr. 25)

Mr. Ribel explained that he believed that working "inby the shears" is the same as double cutting, and that the only reason a chock setter would be inby the shearer would be while he was double cutting (Tr. 28). He confirmed that during the May meeting, mine management told him that he did not have to work inby the shearer and he took it for granted that this meant that he did not have to double cut. (Tr. 29-31).

Mr. Ribel stated that prior to May 18, he was allowed to work through his dinner period of a half-an-hour, and that he would be paid time and a half for this. After May 18, Mr. Hawkins would assign the crew a specific time to take dinner, and he did not work during this time. However, sometime after June 1, after the complaint was filed, Mr. Hawkins "seemed like he got a little nicer", and asked him if he wanted to work through his dinner

period. Further, subsequent to June 1, he assumed he was free to work through dinner if he wanted to (Tr. 36).

Mr. Ribel stated that prior to May 18, he and the other chock setters always had the opportunity to stay and work between shifts, for once or twice a week, but that between May 18 and June 1, they were not asked. After June 1, he believed that he was again asked to stay and work between shifts (Tr. 37). He also indicated that after the complaint was filed, three chock setters were again permitted to work together, and this made it easier for them to do their jobs properly (Tr. 38).

Mr. Ribel stated that prior to May 18, the chock setters did "dead work" at the beginning of the shift before production started. However, after this time, and until June 1, the chock setters "did almost all the dead work that was done", and the utility man who previously did it while the chock setters were running coal "stayed at the headgate" (Tr. 40).

Mr. Ribel stated that after June 1, he was single cutting and was not doing as much "dead work" as he had done previously (Tr. 42). He also confirmed that between May 18 and June, other members of his crew were allowed to work through dinner and were given the opportunity to work between shifts. (Tr. 43).

Mr. Ribel testified that while he never filed a written safety complaint with the mine safety committee about the practice of double cutting, he "talked to" several committee members about it (Tr. 52). He indicated that he spoke to them before May 18, and that he discussed whether or not he had to work inby the shearers and they indicated that he did not (Tr. 54)

Mr. Ribel confirmed that he never personally approached any Federal or state inspector about double cutting because he had not taken the time to do so, and because he wanted to wait until he was working with two other people who felt the way that he did about it. (Tr. 54). He also confirmed that he never brought up the subject at any safety meetings or discussions held with mine management (Tr. 55), and that he had never previously filed any safety complaints with mine management over conditions which he believed were hazardous (Tr. 57, 59).

Mr. Ribel identified exhibit G-2, as the complaint he filed with MSHA after he was discharged by the respondent on August 5, 1983 (Tr. 60). He explained the circumstances concerning his discharge, and what transpired

at the time Mr. Toth accused him of sabotaging the phone (Tr. 60-76). Mr. Ribel confirmed that this was the first disciplinary action ever taken against him by the respondent (Tr. 76).

On cross-examination, Mr. Ribel confirmed that during the entire six-year period that he worked on the longwall section as a chock setter, he never complained to any Federal or state inspectors about double cutting, and he never formally complained to his safety committee. Although he did discuss the matter with certain members of the safety committee, they advised him that as long as the day shift and afternoon shift continued to double cut, nothing could be done about the midnight shifts' complaint (Tr. 80).

Mr. Ribel testified that compared with other bosses he has worked with, Mr. Hawkins was "better than some, and worse than others", and that he "was harder than some, but he was easier than others." He also confirmed that the mine had several lay-offs, one of which occurred in mid-March of 1983, when Mr. Hawkins was assigned as his boss (Tr. 81). He also confirmed that these lay-offs resulted in long-time members of his crew being laid off, less people available for work, and more work for him to do. (Tr. 82).

Mr. Ribel conceded that at no time during the six years that he worked on the longwall did anyone, prior to the May incident with Mr. Hawkins, ever ask him to double cut, and no one ever told him where he was to stand or work while he was double cutting (Tr. 84). He confirmed that during double cutting, he could either work inby the shearer, or stand between the drums and the shearer (Tr. 84-85).

Mr. Ribel explained the ventilation system across the longwall, and he confirmed that water sprays are used to control the dust, and that respirators are provided for those miners who choose to use them (Tr. 90-92). He explained where the drum operator would be positioned, and he confirmed that the reasons he first complained in May was that he was working with two other chock setters who concurred in his concerns about double cutting (Tr. 97).

Mr. Ribel confirmed that the respondent changed the cutting bits on the longwall over the years, and that this probably increased or created more water spray to help dilute the dust, and if they work properly, "they do put out quite a bit of water" (Tr. 99). He confirmed that at no time during the six years that he worked as a chock setter during double cutting was there ever a fire on the

shearer (Tr. 101). He confirmed that air hats containing a dust filter system were made available to the crew, but that he found them to be bulky (Tr. 101). He also confirmed that the shearer operators were exposed to more dust than the chock setters, and that they wore the air hat (Tr. 102).

When asked to explain why his vision would be impaired more when he was double cutting, Mr. Ribel responded as follows: (Tr. 104-105):

> A. Because when you are double cutting, you are setting up the shields, on the inby side, the down wind side of the shears, and you get a whole lot more dust down there, than you do, when you are on the upwind side of it, the upwind side of it, the only dust that you get is just the dust from the shield, that you are letting down, and moving.
>
> Q. What about--
>
> A. And sometimes not even that.
>
> Q. What about if you work inby, in between the shear operators, that's between these two drums, that we have shown on the sketch, which you have indicated you have done in the past, would you get the same dust exposure, that the shear operators would?
>
> A. I would say probably about much, if you are working there right beside them, yes.
>
> Q. If anything less than they?
>
> A. Yes.
>
> Q. And you have done that in the past?
>
> A. Yes.
>
> Q. Would your vision be any more impaired or less impaired than the shear operators?
>
> A. I wouldn't think that there would be much difference, no.

In response to certain questions concerning the meeting with mine management with respect to the question of double cutting, Mr. Ribel responded as follows Tr. 106-107):

Q. Now, let's talk about this meeting with Mr. Hawkins, you indicated that you told Mr. Hawkins that you had decided, I guess you, and Mr. Kanosky, and Mr. Wells, had decided that you weren't going to double cut any more, after six years of doing it, is that pretty much what you told Mr. Hawkins?

A. That's right.

Q. And this was in May of 1983, early May?

A. Early May.

Q. When you told Mr. Hawkins that, did he threaten to fire you then?

A. No.

Q. In fact he suggested that you get a safety committeeman to come in, and discuss the situation?

A. Yes.

Q. And rather than doing that on shift, and causing a loss of production, it was agreed between the three of you and Mr. Hawkins, that you would have a meeting with whoever you wanted to meet with, the following morning after your shift was completed?

A. That's right.

Q. And you did in fact have such a meeting?

A. Yes, we did.

* * * * * * *

Q. And isn't it correct that what Mr. Dennison told you, was that you and the other chock setters, did not have to work inby the shears?

A. I don't recall if he said, we don't have to work inby or double cut, I think he said we don't have to work inby the shears, but I'm not sure.

And, at (Tr. 109-114):

Q. Mr. Ribel, isn't it true that you assumed from what Mr. Dennison told you, that you didn't have to double cut?

A. Yes, that was what I assumed, yes.

Q. Isn't it correct, Mr. Ribel that after this meeting with Mr. Dennison, and the others, that you were never ordered or required to double cut at Federal Number 2 Mine, up until the time that you were discharged?
A. No, that's not true. I was never ordered to, but I was given a list of options, that led me to believe it would be bad for me, if I didn't.

Q. But isn't it true that Mr. Hawkins, neither Mr. Hawkins, or anybody else, ever said, either specifically or directly ordered you to double cut, after the meeting with Mr. Dennison?

A. That's true, I was never ordered to after that meeting.

Q. In fact you never did double cut after that meeting with Mr. Dennison, is that true?

A. That's true.

* * * * * * *

Q. Now, let's talk about these things, I think you mentioned that he said, that he was going to ask you to do other work. Isn't what Mr. Hawkins told you that, he was only going to use two shear operators, to move the shields, and use the third shear operator, to do the dead work?

A. What do you mean, chock setters, not shield operators.

Q. Chock setters, I'm sorry.

A. I understood what you meant.

Q. Yes, thank you. At this point in time, up until May, you had been using three chock setters, to move these shields?

A. That's correct.

Q. And isn't what Mr. Hawkins told you, that he was going to use two chock setters, to move the shields, and use the third chock setter to do general work?

A. He said that there will be one of you at all time, doing dead work.

Q. And didn't he indicate that he was going to rotate who that person was, I mean it wouldn't be the same--

A. Oh, he said that it would be a difference one of us every day, yes.

* * * * * * *

Q. What Mr. Hawkins was telling you in mid-May, when this conversation took place, I think you have indicated was either the 17th or 18th of May, is that he was only going to use two chock setters, to move the shields, and he was going to put the other one to work doing other things?

A. Yes.

Q. In fact that's what he did?

A. That's what he did.

Q. And the type of work, he was alternating the three of you, the third person out, would be the person doing this called dead work?

A. That's right.

Q. Isn't it true that you had done those other jobs before, whatever Mr. Hawkins assigned you to do?

A. Not during production, during production, the chock setters were always on the face, and the utility man did the dead work.

Q. Now, when you say during production, you mean while the shear was operating.

A. That's right.

Q. Okay, now, he's taken one of you out of the cycle?

A. Um hmm.

Q. Now, the jobs that you were performing out of cycle, are the same types of jobs that you were

performing before, but you just hadn't done as much before, would that be true?

A. There were jobs, when we were down, everybody did maintenance, or dead work, when we were down. When we ran coal, it was never--the chock setters were always on the face when we were running coal, doing jobs pertaining to production, not dragging cables, or overhead netting, carrying cribs, or rock dust.

Q. Would it be fair to state that Mr. Hawkins didn't ask you to do anything, during this two week period, that you hadn't done before?

A. That's right.

Q. Now, you were doing more of it?

A. Yeah, doing the utility man's job.

With regard to the question of working through his dinner hour, Mr. Ribel testified as follows: (Tr. 118-122):

Q. Mr. Ribel, you also mentioned that one of the three things that Mr. Hawkins talked to you about, one was the assignment on the work, and we discussed that already, and I think the other was about working through the dinner hour. Am I correct, that the practice at the mine is that the dinner hour, or dinner half an hour, we'll call it, is normally, has to be taken between the third the the fifth hour?

A. Yes, if you take it between the third and fifth hour, I don't know if they have changed their rule or not, but that was the policy.

Q. And if it was not taken, say if it is taken the sixth hour, the company has to pay you, whether you take it, or don't take it?

A. I believe so, yes.

Q. And the pay you had received for working through dinner hour, would be overtime pay, time and a half, isn't that correct?

A. Yes.

Q. Are you aware of anything in the contract, the National Bituminous Coal Wage Agreement which gives any miner, or yourself the right to claim that overtime pay?

A. No, just that it was past practice.

Q. Would you agree with, that's a management prerogative, right, mine manager's prerogative, as to whether he is going to work you, on an overtime basis, between shifts, or during the lunch hour?

A. That's correct.

Q. You are saying that Mr. Hawkins discontinued that, discontinued giving you the opportunity to work, for some short period around May 18th to May 31, if I understood you correctly?

A. That's right.

* * * * * * *

Q. Let me go back, the company can, in accordance with the contract, stagger, the lunch period?

A. Yes, sir, that's correct.

Q. Okay, now, if you are going to be involved in single cutting, you take your lunch break, well, whether single or double, you take your lunch break between the third and fifth hour?

A. That's correct.

Q. He could stagger each one of the three of you, so that no more than one of you, would be missing at one time, taking your lunch break?

A. Yeah, that's right.

* * * * * * *

Q. In fact, during the time, during that two week week period, while you were taking your lunch break, and not working through it, this did not in any way affect production, I mean it could be done, Mr. Hawkins didn't have to shut down the shear, or do anything to interrupt production, and still give you fellows your lunch break?

A. That's right.

Q. Without paying any overtime for that period?

A. That's correct.

Q. Did you file any grievance with the mine committee, or anyone protesting the fact that you were not offered the opportunity to work through your lunch hour?

A. I didn't know anybody to go to, after we had already gone to his superiors, and worked things out, after that, when he gave us those options, I just figured there wasn't any sense in saying anything to anybody, until I couldn't stand it any more.

Q. Was the answer to my question, no, that you did not file any grievance?

A. No, I never filed any grievance with anyone, until the first one you have.

Q. And that was the grievance with MSHA, and not the mine committee?

A. That is correct.

With regard to the question of working between shifts, Mr. Ribel confirmed that this is something that management gives him an opportunity to do as the need arises, and that he has "no right" to work between shifts (Tr. 123). Mr. Ribel identified copies of certain work reports for the period April 18 through June 17, 1983, indicating the amount of overtime pay he received on his midnight shift (exhibits G-4A, 4B, 4C Tr. 123-124). He conceded that the records reflect that he never worked between shifts during these periods, and he stated that "I very seldom stayed in between shifts, but that since he always asked in the past, I felt that, whether I was going to or not, it was nice if he asked everybody else on the crew, he would ask me." (Tr. 125). He again confirmed that "I very seldom stayed between shifts" (Tr. 126).

In response to further questions concerning working through lunch, Mr. Ribel stated as follows (Tr. 130-132):

Q. Mr. Ribel, would you agree with me, that after May 31, 1983, you had no more problems, no problems or confrontations, anything, with Mr. Hawkins?

A. I didn't personally have any problems with him after that time, no.

Q. You suggested here this morning, your testimony was because you filed this complaint with the Government, which is shown as the statement that you signed on May 31, and that it was because of that that Mr. Hawkins changed his attitude towards you, is that your testimony?

A. Yeah, I believe that.

Q. I ask you to look at Government exhibit 4B, ask you if you would confirm the fact that you started, well, you yourself were off on June 1, 1983, is that correct, at least that's what this document shows?

A. That's quite possible, yes.

Q. You don't have any reason to disagree with that?

A. No, I don't, no.

Q. And it shows that you started receiving .50 hours, or lunch time, again, on June 2?

A. That's correct.

Q. Did you yourself, tell Mr. Hawkins on June 2, or between May 31 and June 2, that you had gone to MSHA, and signed this statement, which has been identified as Government exhibit 1.

A. No, I've never told him to this day.

Q. Okay, did you have any reason to believe that Mr. Hawkins was, or could have been aware that you and Mr. Kanosky, and Mr. Wells, had gone to the MSHA office, and signed this statement?

A. Yeah, I do have reason to believe that.

Q. And prior to June 2, 1983?

A. No, starting June 2, when he started allowing me to work through dinner, that was reason for me to believe that he heard something about it, in some way.

Q. Well, do you know how he heard about it?

A. No, sir, I have no idea.

Q. You, yourself didn't tell him?

A. No, I didn't.

Q. Did either Mr. Wells or Mr. Kanosky tell him in your presence, that they had filed this?

A. Not that I recall.

With regard to his discharge, Mr. Ribel confirmed that the longwall phones are required to be operative before mining can proceed, and he also confirmed that starting in mid or late July, 1983, there were more reports on inoperative phones on his section than in the past (Tr. 132-136).

Mr. Ribel testified as to the events on the August 5, 1983, midnight shift, and he described the movements of Mr. Toth, Mr. Toothman, and himself, and how they went about checking the longwall telephones (Tr. 137-146). He confirmed that Mr. Toth was the person who informed him that he was being suspended with intent to discharge (Tr. 147). When asked whether Mr. Toth was in any way involved with the prior May incidents concerning double cutting, Mr. Ribel answered that he had heard comments from other foreman that Mr. Toth becomes upset with his foremen when they do not have good production (Tr. 148). However, he conceded that it was Mr. Toth's job to be concerned about production, and he admitted that prior to his discharge he had no problems or confrontations with Mr. Toth (Tr. 148). He also admitted that at no time did Mr. Toth say or indicate to him that he was trying to "set him up" (Tr. 150).

When asked to explain why Mr. Toth would want to "set him up", Mr. Ribel responded as follows (Tr. 151):

> THE WITNESS: One, I think that if he found a way of getting rid of myself or Danny Wells, that everybody else would have just done things the way he wanted them done, and would have been afraid to say anything about it, even though they felt it was unsafe, and that's one reason, I believe.

Mr. Ribel testified as to the meeting called by Mr. Toth on the midnight shift of August 5, (Tr. 156-166). Mr. Ribel confirmed that he lost his arbitration discharge

case (Tr. 167), and he explained the reasons why he carried a hawk-bill knife. (Tr. 169-170).

Mr. Ribel stated that he had no reason to believe that Mr. Wells, Mr. Toth, or Mr. Hawkins would be involved in any "set ups" to discharge him (Tr. 174). He believed that Mr. Toth was the one individual "who engineered" his discharge by accusing him of cutting the telephone wire (Tr. 174). Mr. Ribel confirmed that he worked for Mr. Hawkins prior to his discharge, and that he did not know him prior to this time (Tr. 174).

Danny Wells confirmed that he is one of the complainants in this case, and he confirmed that he filed his complaint on May 31, 1983, with Mr. Ribel and Mr. Kanosky. He also confirmed that he has been employed by the respondent as a tipple boom operator since October 17, 1983, and that prior to this time he was employed as a longwall chock setter for approximately 2 1/2 to 3 years. His total employment with the respondent consists of 8 years, and he has worked the midnight shift. He stated that he initially bid off the afternoon shift to the midnight shift, and then bid on his current job. (Tr. 176-178).

Mr. Wells testified that he has worked with Mr. Kanosky and Mr. Ribel on the longwall in question, and he indicated that when he was first assigned to the longwall it was standard procedure for everyone to double cut coal (Tr. 179). He later refused to double cut because he felt it was too dangerous because of the dusty conditions which presented breathing and vision problems. He indicated that he expressed those concerns to his fellow miners, to the mine safety committee, and to respondent's safety department. He could not supply any specific dates or names of persons with whom he spoke, but he did state that he made contact with the respondent's safety department prior to May, 1983 (Tr. 181).

Mr. Wells stated that approximately two or three weeks prior to the filing of the complaint he discussed the question of double cutting with Mr. Ribel and Mr. Kanosky, and a meeting was held with the safety department. After they were told they did not have to double cut, Mr. Hawkins asked them to double cut, but when they refused Mr. Hawkins became hard to get along with (Tr. 185).

Mr. Wells stated that on a prior occasion when he complained to Mr. Hawkins about some coal spillage on the walkway, Mr. Hawkins assigned him to other work after refusing to call in a safety committeeman (Tr. 187).

Mr. Wells confirmed that the respondent had advised him of his right to remove himself from hazardous work, but he also indicated that he believed he was branded as a "trouble-maker" because of this (Tr. 189).

Mr. Wells stated that after the meeting with mine management about double cutting, Mr. Hawkins met with him, Mr. Ribel, and Mr. Kanosky on May 18, 1983, in the dinner hole, and his testimony as to what transpired is as follows (Tr. 191):

> A. Mr. Hawkins, the foreman, approached us, and took us to the dinner hole, the three chock setters and his self and went to the dinner hole, and he told us that he had two options for us, one was for double cutting, and one was for single cutting.
>
> He said if you 'uns want to double cut, I will leave three chock setters on the face, you 'uns can work through dinner, you 'uns can have the option to stay in between the shifts, and one of you come in, a' not feeling good, I will let the other two cover for you, you know, and you just take it easy.
>
> But if we didn't, we couldn't work through dinner, we douln't stay in between shifts, he was going to take one of the chock setters off of the face, and he was going to make things so rough for us, that we would either bid off of our job, or quit our job completely.

After advising Mr. Hawkins that he would not double cut, Mr. Wells claimed that Mr. Hawkins assigned him to do work tasks that he would normally assign to other miners, or to at least more than one man (Tr. 192-194). Mr. Wells also indicated that after the meeting of May 18, he was no longer permitted to work through his dinner hour, and that prior to this he worked through dinner with pay approximately every day while on production (Tr. 195). Mr. Wells also indicated that during the period May 18 to June 1, 1983, other members of the crew worked through dinner, and that Mr. Hawkins did not present his "options" to anyone but the chock setters (Tr. 196).

Mr. Wells testified that after June 1, 1983, he and the crew were single cutting, and that Mr. Hawkins "had changed" and permitted him to work through dinner with pay and that Mr. Hawkins "let us do our job" (Tr. 197). Mr. Wells testified as to the meeting which occurred on the midnight shift of August 5, 1983, and he confirmed that Mr. Hawkins asked him to assist in conducting the

fire boss examination. He also confirmed that Mr. Toth was present during the meeting, and Mr. Wells claims that Mr. Toth told him that he "was next" because of his prior discrimination complaint. Mr. Wells stated that he did not know what Mr. Toth meant by this remark since it was made before Mr. Ribel was taken out of the section (Tr. 199-200).

Mr. Wells stated that he became a "boom man" on October 17, 1983, and that sometime between June and October of 1983, he sustained an injury while dragging some cable with Mr. Kanosky. Mr. Hawkins assigned them to that task, and as a result of his injury, Mr. Wells stated that he missed a month's work (Tr. 201). After returning to work, he was assigned to another foreman for two shifts. He then was re-assigned as a chock setter, and he stated that Mr. Hawkins told him that "it was Mr. Mick Toth's doing" (Tr. 203). Mr. Wells also indicated that Mr. Hawkins told him that "just between you and me, Mick is out to get you". Mr. Wells stated that he then bid off the longwall "in order to protect my job" (Tr. 203). He confirmed that this was a voluntary act on his part, and while the boom job is less strenuous, it pays less money. He also confirmed that his prior injury did not prevent him from doing the chock setter's work (Tr. 204).

On cross-examination, Mr. Wells confirmed that he engaged in double cutting during the 2 1/2 to 3 years he was on the longwall. Although respirators and air helmets were provided and available for the chock setters, he could not wear a respirator because he had difficulty breathing with it. He conceded that the respirator exposed him to less dust (Tr. 216).

Mr. Wells denied that during the time he was double cutting, he never had an occasion to work between the shearer drums while installing the shields. With regard to his safety complaints to respondent's safety department, Mr. Wells stated that while he spoke with a Mr. Cumberlich, a member of the safety department, about general safety matters, he did not specifically mention double cutting to him (Tr. 218).

Mr. Wells confirmed that he spoke with his mine safety committee about double cutting, but that they could not do anything unless "they were caught double cutting (Tr. 219). Mr. Wells conceded that no one from mine management ever threatened or advised him that action would be taken against him if he made safety complaints to Federal or state inspectors. The only incident he is aware of is when Mr. Toth purportedly told him that he

"was next" (Tr. 221). He further explained as follows (Tr. 221-222):

> Q. So these indications that you have or these feelings that you have, that you were afraid to take a stand, because you would be singled out, it's an assumption, a belief you have, just a belief that you have, I mean is that fair to state?
>
> A. I don't understand what you are saying?
>
> Q. Well, is it--it's not based upon any statement that anybody from mine management, at the Federal Number 2 Mine, or Eastern has ever said to you.?
>
> A. No, they don't have to. You can get the picture just by their actions towards you.
>
> Q. Well, their actions towards you, have they ever done anything to you, which leads you to believe that if you complained to a Federal or State inspector you would be disciplined in some way, or treated differently than the other employees?
>
> A. Well, like I said, in light of the incident of August the 5th, Mick Toth sat there and made the statement, this little trivial bullshit, that you 'uns have turned in to the safety department is going to make you end up losing your job, he's getting tired of it, and he wants it stopped.
>
> Q. Anything other than this incident on August 5, with Mr. Toth talking?
>
> A. Other than the people at the coalmines, union brothers, in the same union, would tell me, I mean this is where a lot of this stuff from the longwall, you guys on the longwall is nuts, you are going to be old before your time, eating all that dirt. This one, this one, well, you know, it's a part of your job, but you don't make a stand by yourself.

Mr. Wells stated that when mine management decided that he and other chock setters did not have to double cut, there was nothing wrong in management deciding to use one of the chock setters, on a rotating basis, to do other work such as carrying rock dust bags, shovelling coal, or dragging cables. Mr. Wells stated that he did not complain about this until Mr. Hawkins began using a utility man to do the work of one of the rotating chock setters (Tr. 225-226).

Mr. Wells stated that there have been occasions in the past that utility men would be called upon to replace chock setters. His complaint is that he (Wells) should be utilized as a chock setter, and the utility man should be left in that capacity to do his own work (Tr. 233). Mr. Wells confirmed that he believed that he was being worked out of classification, and that he has filed grievances over this issue, including one concerning Mr. Hawkins' doing the work of a chock setter (Tr. 234-236).

Mr. Wells confirmed that he did not confront Mr. Toth concerning Mr. Hawkins' assertion that he was out to get him, nor did he file any complaint over this incident. He confirmed that he voluntarily bid to the boom man's job and that no one from management suggested that he do this (Tr. 242).

John Kanosky testified that he is employed by the respondent as a chock setter and has been so employed for six years. He confirmed that he worked with Mr. Ribel and Mr. Wells on the longwall, and he confirmed that he joined with them in filing the discrimination complaint against the respondent. He also confirmed that he engaged in double cutting for as long as he worked on the longwall and that he was trained to do this. (Tr. 268-272). He also indicated that "in the back of his mind" he has always been concerned about the dust which is generated by double cutting, but has never filed any complaints about it until the instant discrimination complaint. He confirmed that about three weeks before the filing of the complaint, he spoke to mine management about double cutting, and when asked why he had not complained earlier, he stated as follows (Tr. 273-275):

> Q. Why is it that you never talked to anyone in management about the dust?
>
> A. Well, usually, by myself, you know, if I would go out there, they would cause me to be a trouble maker, you know, make me do dead work for, you know, building cribs, or someplace else, not doing my job, you know, as chock setter.
>
> Q. Have you ever made any other safety complaints, have you ever--other than the double cutting, have you ever talked to anyone in management about any other safety problems?
>
> A. No, not safety problems, no.

Q. Have you ever been tagged as a trouble maker?

A. No, as far as I know I wasn't, I don't know what they say.

Q. What led you to talk to management in the beginning of May about this?

A. Well, me and Rob and Danny got together and just talked about it, and we all felt the same way about it, so that's why that we filed this.

Q. Do you recall that discussion, what was said during that discussion?

A. Well, we just went over it, you know, discussed about different things and that, and they finally talked about double cutting, and different things.

Q. Did you discuss the dust during that discussion?

A. Yeah, that was part of it.

Q. And do you recall what it was that was said about the dust?

A. Probably was hazardous to your health, and all that, and you can't see for one thing, when you go behind that shear, and that.

Q. Did you feel that way, or were you agreeing with what they were saying?

A. I felt that way, yeah, and they felt, they give me the impression that they felt the same way.

Mr. Kanosky testified that after a May, 1983, meeting with mine management, he, Mr. Ribel and Mr. Wells were informed that they no longer had to double cut. Later, on May 18, Mr. Hawkins met with them, and Mr. Kanosky testified as follows with respect to that meeting (Tr. 278-279):

A. Well, he told us that, give us two options, you know, single cut, and then double cut, one was for the double cutting, you don't get no overtime benefits--no, that's for single cutting, I'm sorry, you don't get no overtime benefits, you don't get paid through dinner, none of that, you don't get, and double cutting will do that, so that's what happened.

Q. And what did you decide at that time?

A. Well, we all decided to single cut, we always did decide single cut, before that, we did that before.

Q. Were you allowed, or did you work through dinner before May 18, 1983?

A. Yes, I did.

Q. Did you work every day through dinner?

A. Well, maybe some days we was broke down or something, we didn't work through dinner, but when we was running coal, we would get paid through dinner.

Q. And what happened after May 18th?

A. That dinner and overtime stopped.

Q. Were you told that you could not work the overtime, or what happened to make you realize you were not working through dinner any more?

A. Well he told us, we weren't going to work through dinner, and we would get no more overtime benefits, if we don't double cut.

Q. Were there any other benefits denied you?

A. Overtime, double cutting, I can't recall right now.

Q. Okay, what happened after June 1st, 1983, with reference to the overtime?

A. Well, they started to paying us through dinner again, you know, three chock setters on the face, and while we come up towards the head, we had to dead work and that, pull cables, and carry cribs, and build cribs, whatever, until they cut out the head, and then we would go back and set shields again.

With regard to the August 5, 1983, meeting at the mine with Mr. Toth, Mr. Kanosky stated that double cutting was not mentioned. During the meeting the question of his (Kanosky) installing some curtains was brought up by Mr. Toth, and that Mr. Wells began giggling. Mr. Toth stated that "he (Wells) would be next on the list, for all this stuff that's going on right now" (Tr. 286). When asked to explain, Mr. Kanosky stated "he said you would be

either fired or something like, that's what he meant" (Tr. 286). Mr. Kanosky stated that Mr. Toth was referring to a complaint that he (Kanosky) had filed with the safety committee about installing the curtain in bad roof, and Mr. Toth brought this up during the August 5 meeting (Tr. 289).

On cross-examination, Mr. Kanosky confirmed that at the time he complained to the safety committee about the ventilation curtain, a Federal inspector was present in the safety office, but he could not recall his name. Mr. Kanosky stated that the inspector simply told him and Mr. Ribel "not to do it anymore" (Tr. 299).

In response to further questions, Mr. Kanosky stated that during the August 5, 1983, meeting with Mr. Toth, Mr. Toth stated that "if you do all this stuff right here, that one of us is going to get fired" (Tr. 304).

Joseph Norwich MSHA Morgantown District office, testified that he is an inspector, and that for the past seven years has been a ventilation specialist. He testified as to his experience and background in the mining industry, and he confirmed that his present duties include the review of mine ventilation and dust plans, and the making of recommendations for approval or disapproval of those plans.

Mr. Norwich confirmed that he was involved in the review and approval of the respondent's longwall dust plan at the Federal No. 2 Mine, and he identified exhibit G-3 as a page from that plan which was in effect in May, 1983 (Tr. 304-311).

Referring to Item #2, on the dust plan labeled "dust parameters", and in particular the sentence which reads "No employee permitted inby shearer machine, during mining", Mr. Norwich explained that no one should be inby the machine when it is mining coal, and the term "inby" was explained as the area from the "tailgate" to the edge of the machine (Tr. 312). He explained that no one should be there because the chocks are moved up "to catch the bad roof," and he indicated that "I don't know of any other reason" (Tr. 312). When asked whether he would issue a citation if he found a miner inby the shearer, Mr. Norwich replied as follows (Tr. 313-314).

> Q. Let's say you were on a section, as an inspector conducting an inspection, if you saw an employee or a miner, working from the tailgate, up to the tail drum of the shear, as you pointed out, would that be a violation of the plan, while the machine was mining coal?

A. If his need back there was only because of the productive oriented situation, I would say that it would be a violation.

Q. And what would be a productive oriented situation?

A. Well, I mean if he was back there only to increase productivity, in that sense, I would find that--

JUDGE KOUTRAS: Let's get a little more specific now. Let's take this machine, that's on its way to the headgate.

THE WITNESS: To the headgate.

JUDGE KOUTRAS: And it is mining, the question is, is the tail, right?

MS. ROONEY: Right.

JUDGE KOUTRAS: And he said only in certain exceptions if it were needed for maintenance, or to do the roof?

MS. ROONEY. Right.

JUDGE KOUTRAS: Okay.

BY MS. ROONEY:

Q. And if you observed someone other than in those two circumstances, would that be a violation of the plan?

A. Yes, we would ask him to come out of there, and I guess, the people that I've cautioned, they had a need back in there, for some reason, you know, it would always be presented, there was a reason, why he was back in there, and then I would accept that.

When asked to explain the term "double cutting", Mr. Norwich stated as follows: (Tr. 314-317):

Q. Are you familiar with the term double cutting?

A. I've heard that.

BY MS. ROONEY:

Q. Now, what is that term--how are you familiar with that term?

A. It is taking a full cut, when it would be started at the headgate, make a complete cut, off to the back, and then on the back, pick up a full face, on the way back, so actually, you are cutting with both passes, from the headgate, or from the intake to the return, or the headgate to the tailgate, and then from the tailgate, back to the headgate.

Q. Is there anything illegal about double cutting?

A. Well, personally, I think there would be, I don't think you could stay in compliance with the dust control. I've never been exposed to a plan double cutting was permitted, I'm not saying it is not done. We feel, we question anyone submitting a plan that has double cutting, under the normal dust control measures, we have. We may ask them to come up with a plan, to show more sprays, I would have to say, if I was on that section, and they were double cutting, I would probably give them a violation.

Q. And why would you do that?

A. If I found people inby.

JUDGE KOUTRAS: Now wait a minute, you just added two caveats, you would issue them a violation if you found people inby, and if you found dust, right?

THE WITNESS: Well, double cutting, usually, the way I interpret double cutting--

JUDGE KOUTRAS: No, the question is, is double cutting per se, a violation of any standard, per se, in and of itself?

THE WITNESS: Okay, no, I would say no.

JUDGE KOUTRAS: Okay, now.

BY MS. ROONEY:

Q. Are there any problems that you are aware of, that are associated with double cutting, with reference to dust?

A. I don't think we have ever evaluated a longwall with double cutting, so I wouldn't know.

Q. Okay.

If during the course of double cutting, a person had to work inby the shear machine, would that be a violation of the plan?

A. It would be.

Mr. Norwich stated that he has no knowledge that double cutting was being done at the mine. He indicated that dust would be the principal hazard associated with working inby the shearer machine during longwall mining (Tr. 318). He also stated that "longwalls historically have a bad record of compliance within the two milligram standards" (Tr. 319). During the review of the respondent's dust plan, he assumed they were single cutting and using a single clean up run. He also alluded to a "half cut", which he could not explain. (Tr. 320). He confirmed that during the four years of reviewing the mine ventilation plan, he has never observed any double cutting, and no one ever reported it to him. Although he has heard some "talk" among his fellow inspectors about double cutting, he could not remember whether it pertained to the mine here in question (Tr. 321).

On cross-examination Mr. Norwich confirmed that the mine ventilation plan contains no specific prohibition against double cutting, and when asked why he assumed the respondent was only single cutting at the mine, he responded as follows (Tr. 322):

Q. Why did you assume that they were only single cutting?

A. Maybe I'm not that well acquainted with long wall systems, I'm assuming, they are doing everything that I see done at other mines that I inspect, and I didn't know that anyone was double cutting.

Q. You are not familiar with any mine that is now double cutting on the long wall?

A. I am not.

Mr. Norwich stated that if a chock setter positioned himself between the two shearer drums while moving the shields, he would not be considered to be "inby the shearer" (Tr. 322). He confirmed that the ventilation on

the longwall is pulled across the front of the face from the headgate, and then down the face of the longwall and into the rear return, and he described the three locations on the longwall where the ventilation is checked (Tr. 323). He confirmed that he personally is not aware that the respondent was not complying with the ventilation requirements in the 7 right longwall section (Tr. 324)

With regard to paragraph 7 of the dust plan (exhibit P-3), Mr. Norwich offered the following explanation concerning the positioning of the shearer operators (Tr. 324-325):

> Q. You have already read paragraph number 2 in, and then there's paragraph number 7, which says both shear operators, will stay outby the machine as much as possible, can you explain to us what is meant by that.
>
> A. It's hard to regulate any type of a control, if you don't try to get in something, and I think the intent of this one was, is when they cut headgate side, it was not required for both of them to be at the machine, because one of them would have to get over on the intake side.
>
> I know sometimes it takes two people to run the shear, they need it for the back drum, and forward drum, and there could be times, and this was a heavy generating source of dust, at the head gate, because all the velocity comes in this way, but there probably wouldn't be the two people there, so as much as possible, we like to see, the people that are not required to be in the dust, to get away from it, stay on fresh air. That was the intent.

Mr. Norwich confirmed that he visited the longwall section in question, and he described the dust control measures which were being used. He also confirmed that he had no reason to believe that the respondent was out of compliance with the required dust control measures during May, 1983, and he indicated that the plan in use at that time had been in effect for some 4 years (Tr. 328).

Mr. Norwich stated that the dust plan was revised as of October, 1983 (Exhibit G-3-A), and during the review process he confirmed that he recommended that the change be adopted, and it was approved. He explained the change as follows (Tr. 329-331):

> Q. What is the current language that may be comparable to it, if at all?

A. The new one?

Q. Yes, sir.

A. We asked, we said no employee permitted inby the shear machine during mining. Eastern approached us, and they said that there was times, they needed an employee, inby the shear, when it is mining coal or cutting, to take care of the shields, when they are into bad top, they had two or three instances, where it was necessary, to have someone inby these machines. And we said, all right, or the district manager approved in that way, our thinking was, if you have to have people in that area, and we understand that there's times in mining, where you would have to have someone inby, inby the drums, or the longwall machine. So we would have to give them some little bit of leeway in here, bad top is one thing, you want to get the chocks pulled up, or the shields pulled up, so it might be necessary to have a man back there, so they said it was necessary, to make gas tests, or for what reason.

* * * * * * *

Read paragraph number 1 in here, which says, "No employee is permitted inby the tail drum of the shear, exception, when wearing a Racal, R-a-c-a-l air stream type of air helmet, or approved filter type respirator, or B, when inspecting areas inby for brief periods, of time, "did I read that correctly?

A. You did.

Q. And is this a part of the ventilation plan that you approved, as well as your district manager?

A. That's right, I recommended it for approval.

In response to further questions, Mr. Norwich confirmed that as long as the provisions of the new dust plan are followed, it makes no difference whether the respondent single cuts or double cuts. Although he indicated that he was under the impression that the respondent was single cutting, he also confirmed that he

has never specifically approved a plan involving double cutting in his District No. 3. (Tr. 337).

Mr. Norwich stated that if an inspector reported to the mine manager that an operator was engaged in double cutting, MSHA would evaluate the dust atmosphere on the tailgate side to determine whether the dust exceeded the two milligram standard (Tr. 338-339). He confirmed that if the respondent could stay in compliance with the two milligram dust standard while double cutting, MSHA could do nothing about it (Tr. 339).

During further testimony, it was confirmed that the new dust plan provision recommended by Mr. Norwich was finally approved on December 20, 1983, and that the UMWA had contested that plan approval and is in the process of attempting to obtain a restraining order in court (Tr. 340-341).

When asked about the respondent's dust compliance record on the longwall section in question during its operation, Mr. Norwich stated "I don't know" (Tr. 345). He then indicated that "I think it is a big improvement now, I would say, than when they first started" (Tr. 346). When asked whether he knew what the instant proceedings were all about, Mr. Norwich replied "No, I don't, sir" (Tr. 348).

Russell Toothman, testified that he has been employed by the respondent at the Federal No. 2 Mine for nine years on the midnight shift. He has been a longwall mechanic for the past nine months, and prior to that he was a certified electrician for four years. Mr. Toothman confirmed that part of his duties including the checking of the longwall mine telephones, and he indicated that he usually carries tools such as screwdrivers, crescent wrenches and a hawk bill knife (Tr. 366).

Mr. Toothman confirmed that he was at work on August 5, 1983, and that Mr. Toth conducted a meeting. After the section boss and Mr. Wells firebossed the face, Mr. Toothman instructed to turn on the power and to check the phones, and he believed that Mr. Toth asked him to do this (Tr. 367). Mr. Toothman indicated that he proceeded to the headgate where he encountered Mr. Ribel. Mr. Ribel told him that he was going down the face to check the phones. Mr. Ribel then started down the pan line across the longwall face, and Mr. Toothman explained how this was done by paging each other over the phones which Mr. Ribel was checking (Tr. 369-372).

Mr. Toothman stated that the telephones are about 100 feet apart, and he assumed that Mr. Ribel called him from each of the phones as he walked past them (Tr. 372). Mr. Ribel advised him that the #52 phone and the #89 phones were weak, and he then called him at the tail to advise him again that the two phones were not working properly and that he had been instructed to wait for the pan line to start (Tr. 373-374).

Mr. Toothman stated that after he received the calls from Mr. Ribel, he proceeded to grease the shearer head drum, and while he was doing this somewhere between the No. 14 and 20 shields, Mr. Toth approached him and asked him if there were any trouble with the phones (Tr. 375). Mr. Toothman reported what Mr. Ribel had told him about the #52 and #89 phones, and Mr. Toth proceeded to the head gate and called Mr. Ribel who was positioned at the tail (Tr. 376). Mr. Toothman and Mr. Toth then proceeded together down the pan line checking the phones. They stopped at the #51 phone and called Mr. Ribel at the tail, and the phone sounded weak. They then stopped at the #89 phone, and Mr. Toth wanted him to call the headgate to test the phone, but no one was there to answer. Mr. Ribel then approached him and indicated that he would go to the headgate so that the phone could be tested, and Mr. Toothman observed Mr. Ribel walk towards the headgate, but after reaching the area around the #69 or #70 phone, Mr. Toothman was diverted because he was checking for loose wires on the #89 phone. He then called Mr. Ribel at the headgate on that phone, and it was weak (Tr. 377).

Mr. Toothman confirmed that while he and Mr. Toth were at the #89 phone, he discussed the fact that he (Toothman) repaired the #89 phone the previous evening and he showed Mr. Toth where a wire had corroded off. Mr. Ribel had left before that conversation took place, and Mr. Toothman estimated that it would have taken Mr. Ribel 5 or 6 minutes to reach the headgate from the #89 phone (Tr. 380).

Mr. Toothman stated that after speaking with Mr. Ribel over the #89 phone, Mr. Toth instructed him to proceed toward the tail to check out the other phones. Mr. Toth proceeded towards the head, and Mr. Toothman observed him walk up the longwall towards the head for a distance of approximately 20 shields, but was distracted by a phone call and lost sight of him (Tr. 378).

Mr. Toothman stated that as he proceeded to the #52 phone to check it, he heard Mr. Toth calling him to come to the head. When he arrived there, Mr. Toth and another mechanic were there, and the mechanic was preparing to

take the wires off the #32 phone to check it. Mr. Toth instructed Mr. Toothman to take the face off the phone, and when Mr. Toothman unscrewed it and lifted up the lid he found an orange speaker wire hanging down. The #32 phone was one which was checked earlier by Mr. Ribel, and Mr. Toothman received no report that it was not working. As soon as Mr. Toth observed the loose wire, he summoned Mr. Ribel to the phone, and Mr. Toothman stated that the following conversation took place (Tr. 382-383):

> Q. What occurred, when Mr. Ribel came down?
>
> A. Mick said, do you see that, and he said, what, that wire, and Mick said yes.
>
> Q. Did anything else occur?
>
> A. Rob said I didn't cut it, and then they went to the head.

Mr. Toothman testified that a wire in the #32 phone appeared to have been cut, and he confirmed that he had a hawk bill knife with him that evening, that he always carried one, and that he used it to change and reconnect electrical wires (Tr. 383).

On cross-examination, Mr. Toothman stated that the wire on the #89 phone which he repaired did not appear to have been intentionally pulled off, and he denied that he told Mr. Toth that this was the case (Tr. 384). Mr. Toothman confirmed that during the two or three week period prior to August 5, 1983, there were problems with the longwall phones due to dampness and water, and he detected no difference in the number of phones that required repairs in the weeks prior to August 5, than there had been on other occasions. He confirmed that the phone problems he encountered were caused by wet phone receivers and bad batteries (Tr. 385).

Mr. Toothman stated that no special qualifications were required for Mr. Ribel to check the telephones in question, and he confirmed that when Mr. Ribel walked away from the #89 phone to the headgate he could not observe him as he passed the #32 phone and no one else was on the face at that time (Tr. 386). Mr. Toothman confirmed that Mr. Ribel had not previously reported that the #32 phone was not operating properly. He also confirmed that he and Mr. Toth walked down the face in response to Mr. Ribel's report of two inoperative phones, and neither Mr. Toth nor Mr. Toothman touched the #32 phone as they passed it together.

Mr. Toothman stated that after Mr. Ribel left the #89 phone to proceed to the head, he would have walked the face for the second time by himself. After this, Mr. Toothman and Mr. Toth proceeded down the face from the tailgate to the headgate to check the phones, and when they stopped at the #70 shield, Mr. Toothman stopped to check it and Mr. Toth continued to walk ahead of him, and before that time Mr. Toth would have been about 100 feet ahead of him as they walked the face checking the phones (Tr. 390-391). Mr. Toothman confirmed that he never saw Mr. Toth doing anything to, or even being around, the #32 phone (Tr. 393). He also estimated that it took him about a minute to unscrew the cover from the phone which he checked, and that someone could have cut the wire in a matter of seconds (Tr. 395).

Steve R. Reeseman testified that he has been employed at the Federal No. 2 Mine for 8 years as a longwall shearer operator. He confirmed that he was at work on the midnight shift on August 5, 1983, and was present during the meeting conducted by Mr. Toth. Mr. Reeseman believed that the meeting was called to settle "some of the disputes that was going on at this time" (Tr. 404). He stated that the "disputes" involved "this double cutting, being inby the shearer", and he also indicated that there was a morale problem and arguments over double cutting in the dust while the machine as running (Tr. 404).

Mr. Reeseman testified that at the meeting, Mr. Toth discussed the matter of a ventilation curtain being installed by Mr. Kanosky in an area where the top was bad. Mr. Kanosky was upset, and Mr. Wells began giggling. Mr. Toth became upset with Mr. Wells, and when he asked him why he was giggling, Mr. Wells replied "none of your business" (Tr. 405). Mr. Reeseman then stated that Mr. Toth made the remark that "if you think it's funny * * * all this petty stuff that has been going out to the safety department, every day, and every day, is going to stop, or you will be next" (Tr. 406). Mr. Reeseman also claimed that Mr. Toth made the statement that he was tired of Mr. Kanosky complaining to the safety department every day (Tr. 412-413).

Mr. Reeseman stated that after the meeting, he proceeded to work on the face shield, and that he wore an air hat while doing that work. The shearer was at the #9 shield, and he was at the #11 shield (Tr. 409). While there, he observed Mr. Toth coming in his direction, and when he first saw him, he was between the #32 and #18 phones, and there was enough illumination for him to see Mr. Toth clearly (Tr. 410). Mr. Toth asked him whether

the #9 phone was paging in, and Mr. Reeseman replied that it was. Mr. Toth then proceeded to the #32 phone, picked it up, and asked him, if it was paging in, and Mr. Toothman replied that it was not. Mr. Toth then asked for a mechanic to take the phone apart to see what was wrong with it. Mr. Reeseman then told the mechanic trainee, Jim Fowley, to take a screwdriver and to proceed to the #32 phone in response to Mr. Toth's request for a mechanic. Mr. Fowley left, and Mr. Reeseman "went on about my business, checking the shearer", and he did not observe the #32 phone being opened (Tr. 412).

On cross-examination, Mr. Reeseman confirmed that at the time Mr. Toth made the statement about Mr. Kanosky, Mr. Ribel and Mr. Toothman were not present. When asked whether he was certain that double cutting was discussed by Mr. Toth at the August 5, meeting, Mr. Reeseman replied "it's been so long, I don't really remember" and he indicated that he was not certain (Tr. 413). Mr. Reeseman was asked about his prior testimony during the arbitration hearing in Mr. Ribel's case, and in particular his testimony that what was discussed at the meeting was "the firebossing and the gas checks, and this little penny-ante stuff" (Tr. 415).

Mr. Reeseman confirmed that he did not see Mr. Toth alone at the #32 phone, and that he was between the #32 and #18 phones when he observed him (Tr. 415). In response to further questions concerning the purported arguments among the men over double cutting, Mr. Reeseman indicated that the chock setters and shearer operators "would be the only ones inby the shearers, and the dust at the time" (Tr. 416). He confirmed that the shift before his was a maintenance shift, and that the one after it was production. He believed that shift was double cutting, but he never observed it (Tr. 417).

Larry Hayes, testified that he has been employed by the respondent at the mine in question as a longwall mechanic for approximately seven years. He was laid off from March 12 through July 12, 1983, and he confirmed that he was working on August 5, 1983, when the meeting at the mine was held by Mr. Toth. Mr. Hayes stated that he had just returned to work after his lay off. He recalled a discussion about Mr. Kanosky refusing to go under bad top to install a curtain. Mr. Wells laughed about this, and this made Mr. Toth angry. When Mr. Toth asked Mr. Wells what he was laughing about, Mr. Wells told him it was none of his business.

Mr. Hayes stated that the subject of double cutting was not discussed at the August 5 meeting. He confirmed

that during his employment at the mine he has observed double cutting "off and on". He has observed Mr. Wells, Mr. Kanosky, and Mr. Ribel double cutting, and he stated that they would be working inby the shearer as it moved from the tailgate to the headgate (Tr. 421-422). He has never discussed double cutting with Mr. Ribel, Mr. Kanosky, or Mr. Wells, and he indicated that "it had been discussed among different members, * * * some say they didn't mind, and others say they did mind" (Tr. 422).

Mr. Hayes stated that he has checked the phones on the longwall face in question and that he found problems such as mashed cables, and broken receivers which had fallen into the gob (Tr. 422). Although he has opened phones to check the batteries, since he is not a phone mechanic, he could not state whether any phone wires have been cut. He indicated that it is much easier to "change out" a phone rather than to repair it (Tr. 423).

On cross-examination, Mr. Hayes confirmed that during the August 5, meeting, Mr. Toth did mention the fact that he was concerned over "problems" with the phones, but that he did not elaborate further (Tr. 424). Mr. Hayes also confirmed that he had not previously worked under Mr. Hawkins' supervision, and Mr. Hawkins would not likely know about his prior job classifications (Tr. 425).

With regard to the purported statement made by Mr. Toth concerning Mr. Kanosky, Mr. Hayes stated as follows (Tr. 426-426):

> Q. You were talking about Mr. Toth's comments to Mr. Kanosky, and if I understood you, you were saying that he said something to Mr. Knosky about if you were wrong, you would suffer some consequences?
>
> A. Yes.
>
> Q. If I understand this incident about the curtain, hanging the curtain that Mr. Knosky had refused to do the job, is that pretty much what it was?
>
> A. He didn't really refuse, he had questioned about being bad top, going under the bad top, to get the curtain and bring it outby.

And, at Tr. 427:

> A. [W]hat he was really trying to say to him, I don't know, like I said, this meeting did not really pertain to me. I hadn't been out there before, I

> wasn't involved in any of the disputes that had bee
> n going on. So other than hearing him say that, and
> what he meant by it, I have no idea.

James Merchant testified that he has been employed at the Federal No. 2 Mine since October 19, 1968, and that he is presently employed as a shuttle car operator. He confirmed that he has served on the UMWA mine safety committee for eleven years, and until three years ago he served as the committee chairman (Tr. 429).

Mr. Merchant testified that the complainants "approached him" about double cutting, and a meeting was called sometime in May, 1983, with mine management. Prior to this time, meetings were held with the longwall coordinator, Mick Toth. Present at these meetings were representatives of the International UMWA, and the issue of double cutting was only one of the many issues under discussion (Tr. 432). Mr. Merchant confirmed that discussions were also held with MSHA "several years ago" over the question of double cutting, and he indicated that MSHA's position was that nothing could be done about it unless the respondent was caught in the act of double cutting (Tr. 433). Mr. Merchant claimed that at that time, an MSHA inspector named "Phillips" advised him that double cutting was illegal, but that when they went to the longwall to observe the process, single cutting was taking place (Tr. 434).

Mr. Merchant stated that his normal mine duties do not entail work on the longwall, and he indicated that safety complaints which he has passed on to mine management have met with mixed results (Tr. 435).

On cross-examination, Mr. Merchant stated that while the safety committee may inspect any area of the mine without prior notice, they still have to notify the dispatcher so that arrangements may be made to take them to the particular section which they may wish to examine (Tr. 437). Mr. Merchant expressed an opinion that he is not too enchanted with Mr. Hawkins as a foreman, but he conceded that he has not formally complained to mine management about Mr. Hawkins (Tr. 440). He could not recall when he met with Mr. Toth about the subject of double cutting. In response to further bench questions, Mr. Merchant stated as follows (Tr. 444-450).

> JUDGE KOUTRAS: What's a violation of law, in your
> opinion?
>
> THE WITNESS: Double cutting, number one, is.

JUDGE KOUTRAS: What does it violate? Sir. I'm going to hand you Title 30, Code of Federal Regulations, and I defy you to find in there, any standard that says that double cutting is illegal. You haven't been here all day, hearing all the testimony. What law do you think double cutting violates?

THE WITNESS: Number one, it violates the man's health hazards, breathing that dust.

JUDGE KOUTRAS: Well, now, I don't want to get you upset, but what I want to ask you, is you made a statement that double cutting violates the law. In your opinion, what law does it violate, the procedure, double cutting, in and of itself?

THE WITNESS: The flow of air, when you double cutting, that man is behind, he is eating all--that air is shoving all that dust, coal dust, right down his throat, face, his vision, his ears, and everything, you are eating all that dust.

JUDGE KOUTRAS: What does that violate?

THE WITNESS: That violates, what we are fighting for now, black lung, which I have it real bad, out of thirty-seven years in the coal mine.

JUDGE KOUTRAS: Well, now, if you have got six miners telling you that they are double cutting, why does it take someone to actually be there to see them, before anything is done, before MSHA is called to come to the mine, to conduct an investigation, and to issue citations, because of the double cutting. if it is illegal, why hasn't there been the first citation issued, at this mine?

You have people who come to you, who work right in it, that's first hand evidence, why do you have to have somebody there observing the process?

THE WITNESS: You don't, we have people that's afraid to come forward, and they tell us, they say we don't want to be involved, whether they are threatened, I can't prove that.

JUDGE KOUTRAS: Do you realize that under this law, you have an absolute right to call an MSHA inspector, and ask for an inspection right on the spot?

THE WITNESS: True.

JUDGE KOUTRAS: Has that ever been done on double cutting.

THE WITNESS: No.

JUDGE KOUTRAS: Why?

THE WITNESS: Because they can't catch them.

JUDGE KOUTRAS: Have you ever called an inspector to come to the mine, to interview any miners who worked in double cutting, and have been exposed to all this dust?

THE WITNESS: No, I haven't.

JUDGE KOUTRAS: Why?

THE WITNESS: Because I know that you can't catch them.

JUDGE KOUTRAS: The point is, I don't think that you have to catch them, do you, do you feel that you actually have to see them double cutting, and inby this machine, before you can say that they are doing it? I can't believe that Eastern Associated, with all these people in there, can double cut in secret?

THE WITNESS: They are not double cutting in secret. When we are there, they are single cutting, and the minute, which I'm told, I'm not there, when I leave, what happens when I leave. But as soon as the men get on the outside, they way, before you all call for the right of way to come outside, they went back to double cutting.

JUDGE KOUTRAS: Well, let me ask you this, has a Federal inspector ever been called, and has a Federal inspector ever come to that mine, and confronted the mine superintendent, and said to him, number one, are you double cutting, and if the answer to that is in the affirmative, then double cutting I understand--has that ever happened?

THE WITNESS: Because it is impossible to catch them.

* * * * * * *

JUDGE KOUTRAS: Do you know what Eastern Associated

Federal 2 Mine's track record is, with regard to the two milligram respirable dust standard?

THE WITNESS: Not right off, I don't.

JUDGE KOUTRAS: Do you know whether they have a dust problem?

THE WITNESS: They used to, they used to have a bad dust problem.

JUDGE KOUTRAS: You don't know whether the longwall dust situation at that mine is such that would--if they are double cutting, then theoretically they should be out of compliance, shouldn't they?

THE WITNESS: They used to be out of compliance all the time.

JUDGE KOUTRAS: Well, how long ago was that?

THE WITNESS: Well, dates I don't have them, because I didn't--

JUDGE KOUTRAS: I don't need dates, give me years?

THE WITNESS: Oh, it hasn't been a little over a year ago, I don't know the standards now, I could bring my records and show you.

Respondent's Testimony and Evidence

Jack E. Hawkins, testified that he is employed by the the respondent at the subject mine as a longwall foreman. He testified as to his background and experience, including his foreman's duties, and he confirmed that he has been a longwall foreman for two years, but held other foreman positions prior to this time. He holds a B.S. degree in wood science from West Virginia University, and he identified exhibit RX-1 as a sketch of the longwall face as it existed on the 7 right longwall section at the relevant times in question (Tr. 463-467).

Mr. Hawkins explained the operation of the longwall shearer, and he identified exhibit RX-6 as a photograph of the "Dowty four legged shields" used to support the roof during longwall mining. He also identified photographic exhibits RX-6-a and RX-6-b, which depict the shields and the coal conveyor used to transport the mined coal from the longwall face.

Mr. Hawkins explained that the face ventilation comes up the longwall headgate, sweeps across the face, and then

down towards the tailgate. He characterized the mine ventilation system as an "exhaust system", and he explained that air is exhausted from the mine. He indicated that the air ventilation is checked with an anemometer during each shift, and he explained the methods to diffuse the dust created during longwall mining, including the use of ventilation check curtains, dust deflectors located on the shearer and shield, watersprays on the shearer cutting drums, and standard respirators and air hats which are available for all employees (Tr. 467-477).

Mr. Hawkins testified that over the past two years the amount of dust on the longwall has decreased significantly and he attributed this to the aforementioned dust control devices, and the installation of a new Sager Shearer which permits a better dispersion of the dust. He stated that all of this equipment was in use on the 7 right longwall in May, 1983, and that it had been in use for approximately ten months prior to that time (Tr. 479).

Mr. Hawkins confirmed that layoffs occurred at the mine in January and March, 1983, and that 120 miners were laid off as a result of the March reduction. He also confirmed that the layoffs resulted in a realignment of the workforce and that he was changed from afternoon foreman to midnight shift foreman. In Mid-March, 1983, he became the longwall foreman for the crew which included the three complainants (Tr. 481).

Mr. Hawkins stated that in single cutting of the longwall face the shearer would cut the coal starting from the tail entry toward the head, and would then simply then back toward the tail without cutting coal in a "clean-up" mode. In double cutting, the shearer would actually cut the coal a second time while proceeding from the head back to the head (Tr. 482).

Mr. Hawkins admitted that after becoming longwall foreman on the 7 right face, he frequently talked to his crew about double cutting, and that this was "an ongoing thing" between mid-March and April, 1983. He indicated that the crew was not double cutting at that time, and that they did not agree to double cut. He confirmed that he spoke to Mr. Ribel, Mr. Kanosky, and Mr. Wells on 10 to 15 occasions, but they refused to double cut because "they felt that double cutting involved more work, and that it would increase production and jeopardize the union brothers called back that had been laid off." Mr. Hawkins denied that the complainants ever indicated any safety concerns in double cutting and that "safety wasn't really an issue." (Tr. 483).

Mr. Hawkins confirmed that he spoke to his crew about double cutting because production on his shift was so far below that of the other shifts, and he was trying to increase production. He also confirmed that the complainants expressed no interest in double cutting, that he again spoke with them on approximately May 18, 1983, and he explained what he told them. Mr. Hawkins stated that at no time did he ever direct or order the complainants to double cut (Tr. 486).

Mr. Hawkins stated that when he spoke to the complainants about double cutting, he explained certain "benefits" which would result, and he explained what he said as follows (Tr. 486-487; 492):

> Q. What were those benefits, and what did you tell these three men?
>
> A. First of all, our production being as low as it was, we weren't allowed to have any overtime, between shift type work. At that time, there had been several members of the crew that were interested in working between shifts. The other shifts were working between shifts, and we weren't allowed to because our production didn't warrant it. I told them that if our production increased that we would be allowed to stay in between shifts. Of course, they really didn't--. They weren't interested in staying in. So, it didn't affect them--
>
> BY MR. POLITO:
>
> Q. Did they tell you that, or, how do you know that?
>
> A. Just from past experience. They didn't stay in. Especially, Rob and Danny had never--, Mr. Wells and Ribel had never stayed in much between shifts. John Kanosky had frequently stayed in.
>
> * * * * * * *
>
> Q. Had you assigned some, or all, of these duties that you just described, these tasks, to the chock setters, prior to May 18, 1983?
>
> A. Yes, they'd done them all before, I'm sure.
>
> Q. Now, you started to testify about what you told them about their opportunities to work through their

> dinner hour or not, depending on whether or not they single cut or double cut. Now, just explain the relationship between the two and what you told the men?
>
> A. Well, obviously, if they were standing at the headgate, without anything to do for a half hour, I was going to put them on dinner during that half hour until they were needed again. If they were single cutting, they were going to be there for that half hour. If they were double cutting, they'd be setting the shields up as the shearer came to the headgate, and they wouldn't be idle, obviously. It would be to my advantage, then, and the Company's advantage, to work them through their dinner, and they'd get the benefit of the extra money; I'd get the benefit of the extra production.
>
> Q. If they were not double cutting, you say that you would have an opportunity to stagger them through their lunch breaks?
>
> A. Right. One or two of them at the end of the time that the shields were pulled in and the shearer was at the tailgate, ready to come back to the head, I could, at that time, send one or two of them to dinner. They could have their dinner over with by the time they were needed again to set the shields.

Mr. Hawkins stated that the day after the May 18 meeting with the complainants', he asked them "to set the shields up beside the shearer", and they refused and advised him that they wanted to invoke their individual safety rights. However, they agreed to continue the shift single-cutting, and he advised them that a meeting would be held after the shift. Pending the meeting, he asked the complainant's to work between the two cutting drums on the shearer, an area of some 30 feet (Tr. 494-495). As a result of the meeting with the mine safety committee, the company safety department, and division longwall coordinator Cliff Dennison, it was decided by Mr. Dennison that the crew would not be made to double cut beside the shearer. Mr. Hawkins never again asked, ordered, or directed the complainants to double cut, and as far as he was concerned, that was the end of the matter. (Tr. 496).

Mr. Hawkins denied that he subsequently met with the complainants and gave them certain "options" about double cutting versus single cutting (Tr. 496). With regard to the question as to why the complainants did not work through their dinner hour and get paid overtime. Mr. Hawkins explained as follows (Tr. 498-501):

Q. There were a couple of days in there, though, between the 18th and 31st, that he did not work through the dinner hour?

A. Right.

Q. And, with respect to Mr. Wells, I believe it shows that he did not work through the dinner hour from May 19 until June 1.

A. Right.

Q. Okay? Then, with respect to Mr. Ribel, the next man, it shows that he did not work over the lunch hour from May 19 through May 31, and also shows that he was off on May 24. Is that correct?

A. Right. May 24 and 31.

Q. Well, actually, it was June 1, wasn't it, that he was off?

A. Yes, it would be.

Q. Can you explain for us, please, why these three chock setters did not receive overtime, why they didn't work through and get paid overtime for the dinner hour during those periods?

A. Sure. The first couple of times after I had met with them and told them I was going to make them double cut, they had come up to me and insisted that they take their dinner--. We have a district agreement that says I have to offer the men dinner between the third and the fifth hour of the shift. So, what was happening here was, these three guys were coming up,--well, two of them, normally, sometimes three,--were coming up and saying, "We want to take our dinner--".

Q. Are these men you're talking about, Kanosky, Wells and Ribel?

A. Yes, sir. The three Complainants.

They were insisting on taking their dinner four and a half hours into the shift Well, if they want to take it, I have to offer it to them. At that point, I had to give them, all three, their dinner at the same time. I didn't have the opportunity to

float them out through dinner, one at a time. This happened twice, that I remember, in which they insisted on taking their dinner, and it was late enough in the shift that I had to give them dinner all at the same time. At that time--

Q. Why would you have to give it to them, if they came to you four and a half hours into the shift and said, "We want to take our dinner. We don't want to work through our dinner." Why did you have to give it to them in that half hour?

A. As I said, by district agreement, they have to be offered dinner between the third and the fifth hour of the shift.

Q. What if they are not? What are the consequences?

A. If they're not, they have to be given their dinner and paid through it also.

Q. Oh, they would be paid whether they took it or didn't.

A. Right. They'd take their dinner and still get paid for it. So, after that happened a couple of times, I started sending them to dinner for several days without asking them. I just--. The third hour came. I'd sent one of them to dinner. A half hour later, I'd send another one, until I had all three in. That way, I could operate the face and still have two chock setters up there and one on dinner, at that time.
That didn't continue for very long until I realized that I wasn't giving them the same opportunity as I was the rest of the crew. Basically, the rest of the crew had the opportunity to work through dinner. I wasn't asking them to do it. So, I started asking them, again, every day, if they wanted to work through dinner, and, normally, they refused to work. They wanted to take their dinner instead of working through it.

Q. Was there a period of time, from the period May 19 through May 31, that you asked them to let you know at the beginning of the shift whether they wanted to work through or take their lunch break?

A. Well, the first day that they all came at one

time and wanted to take their dinner, I asked them to let me know. They wouldn't do it though. They'd let me know four and a half hours into the shift that they wanted to take it.

Q. So, there was a period of time then, when you were just telling them that you wanted them to take their dinner break, and didn't want them to work through their dinner break.

A. For a few days, I didn't give them the option, no, sir.

Q. Okay. And why was that, Mr. Hawkins?

A. Well, I just sent them to dinner instead of letting them wait until four and a half hours into the shift and insisting on taking it.

Q. And, by sending them, you were able to stagger them?

A. Right. I was able to send them one at a time so that I could still have two chock setters to operate the shields.

Q. You were avoiding the situation where all three of them would have to take it during the same half an hour, and you would be without chock setters?

A. Right.

Mr. Hawkins denied that he ever refused to let the complainants work through their dinner hour in retaliation for their refusal to double cut. With reference to the question of working between shifts, Mr. Hawkins explained as follows (Tr. 503-504):

Q. Do those records show that, with one or two minor exceptions, no employees worked overtime between shifts from approximately April 18, through May 18?

A. Right. They--. In that time, we didn't work any amount of over.

Q. I think there is one exception in there, if I recall, that an employee had worked.

A. There may be if we had been broken down at the end of the shift that somebody would have stayed to

repair the equipment to get ready for the next shift or something.

Q. Okay. Now you say, at that point in time, that is, April and May, were you or were you not authorized to permit employees to work between shifts and collect overtime pay?

A. No, I wasn't authorized to do it.

* * * * * * *

Q. On these occasions when overtime between shifts was available, after June 2, do the records reflect whether

Mr. Ribel worked overtime?

A. Not according to the time we have listed here, down through June 17th.

Q. I believe you have already testified there were occasions prior to May 18, prior to this incident on My 18th that he refused opportunities for overtime between shifts on this one?

A. Yes, sir.

With regard to reassigning one of the chock setters away from his normal classified work, Mr. Hawkins explained as follows (Tr, 504-507; 508):

Q. Now, there was testimony yesterday, Mr. Hawkins, that, between May 18th, or May 19th and May 31, you took one of the chock setters away from his normal classified work of chock setting and assigned him other work. Is that true?

A. For a very few days, yes, sir.

Q. Explain what you did, and why you did it.

A. At this time, we had quite a high amount of absenteeism. We normally have 15 men and a Foreman in each crew, on a longwall crew. We were experiencing anywhere from two to five people being off every day, and that left us short in some areas of--as far as manpower goes, particularly what we term the utility man, the man who's responsible for watching the stage loader and tailpiece area, keeping the spillage cleaned up, keeping the cables drug. We didn't have a utility man. To the best of my memory, the utility man at that time, was Tom Walls,

and he was operating the headgate while the headgate man operated the shearer. And so, the utility job was not filled and someone had to pick up that work that he normally did. One of the chock setters normally did that while two chock setters did their normal job.

* * * * * * *

Q. You started to explain and I interrupted you, why you assigned the one chock setter to perform these duties.

A. They had to be done. Spillage and so forth has to be cleaned up our of the walkway to avoid a violation on that. The cables, of course, had to be drug. If they're not drug down, the machine basically, would pass them up. Of course, the rock-dusting is common mining practice. The area has to be rockdusted and kept that way. It's work that has to be done by someone, and the classified man that normally did it was performing another job then.

Q. Did you feel that you could operate a single cutting method with just two chock setters?

A. Yes, sir.

Q. Were you, during that period, those few days that you said you did it this way, able, efficiently, to operate with just two chock setters?

A. Yes, we had no problem in doing that.

Q. Did you, at some point in time then, change again, and go back from two chock setters to three chock setters?

A. Yes, I did.

Q. And why was that?

A. Basically, they staged a slowdown so that the chock setters were not operating fast enough to keep up with the shearer as it idled back to the tail.
And, at Tr. (509-512):

Q. Was your assignment of the two men--, your assignment of one chock setter each shift for these several days to do general work, or utility work, in

retaliation for the fact that they had refused to double cut for you?

A. No, sir.

Q. Then what was the reason for it?

A. As I stated, we were short people. Someone had to do the outby work. At that time, it was beneficial for the man that was, basically, idle, to do that. Whenever I had to put three chock setters back on the face, then the mechanics had to do the outby work that they had been doing.

Q. The work that you had assigned the third chock setter to do, the general work, was there any type of work you assigned them to do during these several days that they had not done before?

A. No, sir. They had done it before. Really every member of the crew had done most every job up there.

Q. Was that work assigned to other members of the crew besides the chock setters?

A. Yes, sir. It had to be done. When they didn't do it, some other member had to do it.

Q. There was testimony yesterday that, while you were using just two chock setters to move the shields and assigned the third chock setter to do general setters work. Do you agree with that?

A. No sir. In reviewing the time sheets for that period, there was never a utility man paid chock setter rate, if he did perform--

JUDGE KOUTRAS: That wasn't the question. Forget reviewing. Was a man actually doing it?

THE WITNESS: No, sir. The chock--, or, the utility man did not perform chock setter duty.

* * * * * * *

Q. Did you have any confrontations, or problems of any kind with Mr. Ribel after June 1, or after May 31, 1983?

A. Nothing to speak of. There were a lot things that came up, safety disputes that they thought

were--, that I was doing something wrong. They would take it outside; bring the commiteeman in, or sometimes, involve the State or Federal Inspector. In every case, I can't--. In every case there wasn't anything came of it.

Q. Did you, at any time, threaten Mr. Ribel, after June 1, or any time, before or after June 1, to discharge him or take any other adverse action against him for refusing to double cut or filing his complaint with MSHA?

A. No, sir.

Q. The records show that the affidavit, or the statement, was signed by Mr. Ribel, Mr. Wells, and Mr. Kanosky on May 31, that is, the first complaint they made to MSHA. Do you know when you became aware of the fact that they had even filed that complaint with MSHA?

A. I'm not positive. I would say about a week later.

Q. Would they have told you about a week later?

A. No, they didn't tell me.

Q. You received a copy of the Complaint in the mail. Is that correct?

A. Yes, sir.

Mr. Hawkins confirmed that Mr. Wells was injured on the job. However, he denied that he ever refused Mr. Wells any help in pulling the cables, and he indicated that Mr. Kanosky was helping Mr. Wells with the cable at the time of the injury. When Mr. Wells fell, Mr. Kanosky summoned Mr. Hawkins to the scene, and Mr. Hawkins stated that he filled out the accident report and listed Mr. Kanosky as a witness to the incident. (Tr. 513).

Mr. Hawkins stated that in August, 1983, an unusual number of problems existed with the telephones used along the 7 right longwall faces. He explained that the phones were being intentionally damaged, and he demonstrated how this was done (Tr. 514-517). He also explained that inoperative or damaged phones were replaced (Tr. 519). He also confirmed that production delays resulted from inoperative or damaged phones (Tr. 521).

With regard to the events on the midnight shift on August 5, 1983, when Mr. Ribel was discharged, Mr. Hawkins stated that longwall coordinator Toth went into the section with the crew to meet with them at the request of a State inspector to resolve a union-management conflict. Mr. Hawkins took Mr. Wells with him to fireboss the section, and when they returned, Mr. Toth asked him to send two men to check the face phones. Mr. Hawkins sent Mr. Ribel and Mr. Toothman to check the phones, and he explained why he did this (Tr. 526-530).

Mr. Hawkins stated that after the meeting was over, he went to the face area, and Mr. Toth, Mr. Ribel, and Mr. Toothman were in the process of checking the telephones along the longwall face. Mr. Hawkins confirmed that he was present when the #32 telephone was opened, and he identified the telephone produced at the hearing as the same telephone in question. (Tr. 534). Upon examination of the inside of the phone, he confirmed that the orange wire in question is "separated" (Tr. 537).

Mr. Hawkins stated that the hawkbill knife which Mr. Ribel had on his person on the evening of August 5, was not necessary for him to use while performing any of his normal duties as a chock setter (Tr. 540). Mr. Hawkins also stated that Mr. Toth did not consult with him when he suspended Mr. Ribel with intent to discharge him, nor did he ever suggest to Mr. Toth prior to that time that Mr. Ribel be terminated (Tr. 540-541).

Mr. Hawkins denied that he ever told Mr. Wells that Mr. Toth was "out to get him", and he also denied that Mr. Toth had ever made such a statement to him (Tr. 542). Mr. Hawkins indicated that after Mr. Wells bid off the chock setters' job, a vacancy was created, and Mr. Wells attempted to bid back on that job a week later. However, the vacancy had been filled by someone senior to Mr. Wells (Tr. 542).

With regard to the "safety slips" which he issued to Mr. Wells in August, Mr. Hawkins confirmed that he relied on what Mr. Wells had told him, and that this served as the basis for the slip. (Tr. 543).

On cross-examination, Mr. Hawkins confirmed that the new longwall shearers were obtained in early 1982, and they were used on the 7 right panel in early 1983 when longwall mining began (Tr. 544). He was sure that dust samples were taken by the respondent, but he does not know the results, and he confirmed that he would be made aware of any dust non-compliance, and that it was possible that the panel may have been out of compliance from early 1983 until May, 1983, but he was not sure (Tr. 545).

Mr. Hawkins confirmed that 20 dust air hats were available for use by his crew, and that the two shearer operators usually wore them (Tr. 546). He also explained the procedures for cleaning the shearers, changing the bits, and he confirmed that with the new longwall system it would take approximately a half an hour to complete a double cutting cycle (Tr. 549).

Mr. Hawkins confirmed that as soon as he took over the shift, he asked the complainants to double cut and they refused. When he asked them why, he stated as follows (Tr. 550).

> A. Well, they didn't want--. There were various responses. They didn't want to work beside the shearer operators because there were too many people working in a limited area. They didn't feel that that was safe. They didn't want to increase the production. They felt that double cutting would increase the production. They felt that they were required to do more work whenever they were double cutting, as opposed to single cutting when they had basically, time off to loaf.
>
> Q. Did anyone ever express any concern to you about working inby the shearer because of the dust?
>
> A. No, not to my recollection.
>
> Q. When was the first time that you ever heard about that concern?
>
> A. Whenever I received the complaint and talked to Mr. Cross.

Mr. Hawkins stated that no one ever expressed any concern to him about working inby the shearer because of the dust, and he first became aware of this when he received the complaint (exhibit G-1, Tr. 551). He confirmed that during his tenure on the afternoon shift it was a common practice to double cut, and that single cutting took place occasionally "when the crew was teed off about something" (Tr. 551). When the complainants' refused to double cut Mr. Hawkins stated that he looked more closely at the mine dust control plan and spoke to his supervisor to find out why his midnight crew was the only crew which was not double cutting, particularly when the day shift had never had a complaint about double cutting, and the section was inspected by State and Federal inspectors (Tr. 552).

Mr. Hawkins explained the ventilation along the face of the longwall, and he confirmed that when he discussed the double cutting with the mine safety department it was his understanding that as long as a miner stood beside the shearer machine, and was not inby the machine, this would not be illegal and it would not violate the ventilation plan (Tr. 563).

Mr. Hawkins explained his concern about production on his section and he also explained the reasons why he wanted to stagger the dinner hours for his crew (Tr. 576-578). He also explained that during single cutting, there was less work to be done by the chock setters, and that this prompted him to allocate the time among the crew (Tr. 581-584).

With regard to the telephones on the longwall, Mr. Hawkins confirmed that there were problems during the months of July through August, and these problems included water in the phones, loose electrical connections, and the like, and he confirmed the repair work that was done on the phones (Tr. 586-588). Mr. Hawkins testified as to the events of August 5th, the evening that Mr. Ribel was discharged, including his movements that evening (Tr. 589-596).

Michael Toth, longwall coordinator, testified as to his background and experience, and he stated that he was not involved in any discussions between Mr. Hawkins and his crew with regard to the question of double cutting on the longwall. He explained that under the applicable mine plan in effect in May, 1983, it was legal for miners to work between the cutting drums of the longwall shearing machine, and in his view, working in that position would not place a miner "inby the shearer" (Tr. 635). He confirmed that he has been present on the operating sections of the mine where double cutting was taking place with miners working between the shearer drums, and that Federal and state inspectors were present (Tr. 636). He explained that this was an every-day occurrence, and he named several MSHA inspectors who would have been present when this was going on (Tr. 636-638). Although he indicated that the respondent was cited by an MSHA inspector for a miner being inby the shearer, no citations were ever issued because miners were working between the drums (Tr. 638).

Mr. Toth stated that none of the complainants in this case had ever come to him to complain about the manner in which double cutting was taking place (Tr. 638). In his view, any dust problems which may have existed on the

7 right longwall section have decreased during the two-year period of 1982-1983, and he attributed this improvement to the installation of deflectors, water sprays, and the use of air helmets (Tr. 640).

Mr. Toth stated that problems with the longwall phones increased sometime after the vacation period in July, 1983, and he explained these problems in some detail (Tr. 641-644). With regard to the evening of August 5, 1983, Mr. Toth stated that he went to the mine for a meeting with the midnight crew about the manner in which Mr. Hawkins was fire-bossing the section, and he explained his movements that evening (Tr. 645-650). He stated that the subject of double cutting was not discussed at the meeting, and he denied that he ever made a statement to Mr. Kanosky that he was going to be fired (Tr. 650). Mr. Toth stated that he had no knowledge that Mr. Kanosky had complained to a state inspector about the manner in which a ventilation curtain had been installed (Tr. 651), and he detailed the manner in which he inspected the phones on the longwall the evening of August 5 (Tr. 653-663). He denied that he cut the wires on the #32 telephone, and denied that he had a knife or cutting tools with him that evening (Tr. 664). When asked why he decided to suspend Mr. Ribel, with intent to discharge him, Mr. Toth responded as follows (Tr. 664-667):

> Q. Could you tell us specifically the reason why you decided to suspend Mr. Ribel with intent to discharge that evening?
>
> A. The reasoning behind it was the fact I couldn't place anybody else by that particular phone by himself. You know, he was the only one. I didn't see him do it. I told him I didn't see him do it. But I assumed that he did it because I couldn't put nobody else by it by their self. And--
>
> Q. Would you state whether or not your decision to terminate him or suspend him with intent to discharge was based in any way on the fact that he and other members of his crew had refused to double cut in May, or at any time in the year 1983?
>
> A. None whatsoever, no.
>
> Q. Would you state whether or not your decision to suspend him with intent to discharge was based in any way on the fact that he and Mr. Kanosky and Mr. Wells had filed a Complaint with MSHA on May 31, 1983?

A. You know that had nothing to do with me. I was aware of it, but I had nothing in it, you know.

Q. What effect, if any, did those two situations, refusal to double cut or the filing of the MSHA Complaint have on you?

A. None. I didn't want them to double cut. It wasn't a forced issue Uh, the discrimination charge, you know, I was aware of it. I was real--real aware of the problems that they was having. Jack and everybody at the mine was. But, you know, I had nothing in it, you know. It didn't affect me. I didn't feel that the double cutting had anything to do with the production being low. And, you know, as far as what problems they had with Jack, it didn't--I'd like to seen them got along a lot better, but that had nothing to do with it.

Q. One of your reasons for being there that evening was to discuss and, if possible, try to resolve some of the problems that had existed betwen Mr. Hawkins and his crew. Isn't that true?

A. Yes, sir.

Q. Did you discuss your decision to suspend Mr. Ribel with intent to discharge with Mr. Hawkins before you made the decision?

A. No.

Q. He didn't play any part in the decision?

A. No, he didn't.

Q. Had he ever suggested to you in any way, or, anybody ever suggested to you that you should try to fire or terminate or dismiss, in any way, Mr. Ribel?
A. No, things--. It just don't work like that. Nobody's--. I never discussed it with anybody. Never had it on my mind or nothing. It just wasn't that way.

Q. There has been a suggestion made, or an inference made at this hearing before you testified, that Mr. Ribel was set up by mine management, including you.

A. Well, it wasn't no setup. I've heard a lot about setups and entrapments and stuff. It wasn't that way.

Q. Have you learned anything since August 5 that would indicate to you that anybody else, other than Mr. Ribel, was walking by himself past the 32 phone during the midnight shift on August 5, prior to the time that you and Mr. Reesman and Mr. Toothman opened the phone?

A. No.

Q. Were all of you there when the phone was opened, together?

A. When the phone was opened, Rob wasn't there. I was there, and Foley, and Russell Toothman, and Steve Reesman, and I think Roy McCormick was there. You know, I--. There was several people there, I can't--

JUDGE KOUTRAS: Where was Mr. Ribel at that time, when it was opened?

THE WITNESS: He was at the headgate at that time.

BY MR. POLITO:

Q. Have you ever told Mr. Hawkins, or anybody else, that you were out to get or were going to get Mr. Wells next?

A. No, I never did say that.

Frank Peduti testified that he is employed by the respondent as a division electrical engineer and that the Federal No. 2 Mine is under his area of jurisdiction and has been for the past two years. Mr. Peduti stated that he has been employed by the respondent for 14 years, and he testified as to his background and experience. He stated further that he holds a B.S. degree in electrical engineering from the University of West Virginia and that he is a registered professional engineer (Tr. 709-710).

Mr. Peduti examined the mine telephone in question, exhibit R-7, and he confirmed that he had previously examined it after Mr. Ribel's discharge and that he testified on behalf of the respondent at the arbitration hearing held in Mr. Ribel's case. Mr. Peduti stated that based on his experience, education, and background, it was

his professional opinion that the telephone wire, which is orange in color, and which is used on the telephone speaker, was cut with a sharp instrument or a knife, including possibly a hawkbill knife. He explained the basis for his opinion, which included an examination of the condition of the wire at the time of his examinations, including the teflon protective outer cover of the wire. In his opinion, the separated condition of the wire was not caused by normal wear and tear or corrosion, but by the wire being cut (Tr. 710-715).

On cross-examination, Mr. Peduti reiterated his beliefs and opinions, based on his practical experience, as to why he believed the phone wire in question appeared to have been cut (Tr. 715-718).

Joseph Luketic, respondents Employee Relations Officer testified as to the procedures followed in the adjudication of Mr. Ribel's grievance filed under the applicable National Bituminous Coal Wage Agreement, exhibit R-8, and he identified exhibit R-3 as the standard grievance complaint filed by Ribel, exhibit R-4 as a Western Union mailgram from the arbitrator who heard Mr. Ribel's case advising Mr. Luketic as to his decision denying the grievance, and exhibit R-5 as the arbitration decision issued by the arbitrator, Lewis R. Amis, on August 22, 1983 (Tr. 722-728).

Mr. Luketic explained the procedures followed to select an arbitrator to hear Mr. Ribel's case, and he confirmed that Mr. Amis was selected from a panel of available trained arbitrators, and that his selection as the arbitrator was agreed to by Mr. Ribel's UMWA District 31 representative Fred Kelly. Mr. Luketic stated that Mr. Amis was not an attorney and he indicated that he was a part-time teacher at the University of Pittsburgh (Tr. 729-731).

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In this case, the parties entered into certain stipulations concerning jurisdiction, and agreed that while the issue here is whether or not the safety slip issued to Mr. Wells by Mr. Hawkins was out of retaliation for Mr. Wells' prior safety complaints, all of the testimony and evidence adduced in the prior hearings on January 11 and 15, may be incorporated by reference in this proceeding (Tr. 6).

MSHA's Testimony and Evidence

Mr. Wells confirmed that he filed his complaint in this case on August 8, 1983, and he did so because of a safety slip given to him by Mr. Hawkins on July 29, 1983 (Tr. 20). Mr. Wells explained that while working as a chock setter on that day he reached over the longwall pan line chain to retrieve some roof cribs. The chain was not running. After he had taken the cribs off the spill tray, the chain started up and it had not been cleared over the longwall face telephones. Mr. Wells then went to the longwall head area and asked Mr. Hawkins why the chain had been started without first being cleared over the telephone. Mr. Wells stated that Mr. Hawkins inquired as to why Mr. Wells was concerned, and that he (Wells) informed him that the chain started while he was taking crib blocks off. Mr. Hawkins then asked him if he wanted him to give Mr. Wells a safety slip for being on the chain without first having it locked out. Mr. Wells then informed Mr. Hawkins "if you feel that's what you have to do" (Tr. 21). Later, Mr. Hawkins gave him a safety slip for being on the chain, and Mr. Wells denie that he was on the chainb, and he stated that he tried to explain this to Mr. Hawkins and to Mr. Toth, "but they didn't want to hear" (Tr. 21).

Referring to a diagram (exhibit RX-1), Mr. Wells explained that he was at the tail end of the longwall, somewhere between the No. 9 and 10 shields, and he stated that he was standing on the shield legs when he reached over the chain to remove the cribs, and that it was proper for him to stand on the legs. He had removed at least five cribs, and the chain began moving as he removed the last crib. The proper procedure is for the pan line to be "cleared" by announcing it three times over the phones. After it was "cleared", the headgate attendant may then start the chain (Tr. 25).

Mr. Wells stated that he did not feel that he was exposed to any hazard or danger when the chain started, and he indicated that had he crossed over the pan line to do some work, he would have locked it out. He stated that he was familiar with the lock out procedures, and that he had previously locked out the pan line while performing work on the face side of the line. He confirmed that the pan line should be locked out any time anyone needs to cross over the spill tray to perform any work (Tr. 27). Mr. Wells stated that had the chain been moving, he would not have reached over and picked the cribs off (Tr. 29).

Mr. Wells asserted that to safely perform his work of pulling the shields, it was important for him to be able to hear the pan line clearance. He then stated that on the day in question, the clearance procedure was not

necessary to his work, but that he was simply concerned that the pan line was not cleared over the phone before it was started. He stated that he had a safety concern and made a safety complaint (Tr. 29).

Mr. Wells stated that he never received any prior safety slips, had never previously been disciplined for safety related reasons, and had never received any type of verbal warnings. He believed that Mr. Hawkins was aware of the fact that he had filed a discrimination complaint on June 1, 1983, and he asserted that Mr. Hawkins confronted him "to the fact that he was going to get even with me for the complaints that I filed" (Tr. 29).

On cross-examination, Mr. Wells explained that the procedures for "clearing" the pan line begins with the headgate attendant personally picking up the phone at the headgate and calling or announcing a "warning" that he is about to start the chain by stating "clear the chain" three times. The phones along the longwall face are approximately 100 feet apart, and if they are working properly, the attendant's warning should be heard by those persons working around each of the phones (Tr. 31). Mr. Wells confirmed that he was some 500 feet from the headgate on the day in question, and could not have observed the headgate attendant give any signal. However, he insisted that he was not accusing the attendant of not doing his job, but simply wanted Mr. Hawkins to know that no warning was sounded over the phone in his work area before the chain started up. Mr. Wells asserted that his concern was over the fact that a safety procedure had not been followed in that he heard no warning (Tr. 33).

Mr. Wells confirmed that a lock-out device was available at the phone near where he was working, and that such devices are located by each longwall phone. Once the device is depressed, the face chain will not move. The lock-out device is a back-up safety precaution to the phone pager system (Tr. 35). Mr. Wells conceded that he did not lock-out the chain before removing the crib blocks in question (Tr. 38).

Mr. Wells confirmed that the safety procedures for miners working along the longwall are included as part of the roof control plan, and that an instruction for the use of the lock-out switch is part of these instructions. He confirmed that Mr. Hawkins usually goes over a part of the plan with the work crew every night, and that he has covered the lock-out procedures. Mr. Wells could not specifically state whether Mr. Hawkins discussed the plan on the evening of July 29, 1983, but he recalled that he has explained the plan on other occasions, including the

use of the lock-out device while working on the face (Tr. 41).

Mr. Wells reiterated that while pulling a shield, crib blocks fell down on the chain, and he was removing them. He explained where he was positioned, and in response to further questions, he detailed his work movements and how he reached over the chain to retrieve the cribs (Tr. 44-53). He described the dimensions of the crib block as 36 inches long, six inches wide, and eight inches high, but had no idea how much they weigh. He confirmed that the blocks which fell were stacked up to support the roof in the tailgate entry. He marked exhibit RX-1 with an "A" to show where he reached over to the spill tray to retrieve the blocks, and he described the area as the "head side of the tail motor" (Tr. 55). He denied that the cribs had fallen eight feet from where he claimed he reached over the spill tray, and he asserted that they were within easy reaching distance (Tr. 59).

Mr. Wells confirmed that he was aware that there were problems with the longwall phones. When asked to explain when Mr. Hawkins made the statement that he was "going to get back at him for having filed the 105(c) complaint," Mr. Wells asserted tht "it had occurred on more than one incident, like for instance, I would be pulling cables, or doing something other than my job" (Tr. 60). Mr. Wells could not specify when Mr. Hawkins made the statement. However, he stated that he kept notes on such incidents, but did not have them with him since he keeps them in his clothes basket at the mine (Tr. 61).

Mr. Wells stated that he had no idea what a "contact and observance" is. However, when counsel corrected himself, and indicated that the term is "contact and observation", Mr. Wells stated that he was familiar with that term (Tr. 64). He explained that this is a procedure authorizing a supervisor to give a miner a warning if the supervisor observes a safety regulation infraction (Tr. 65). Mr. Wells denied ever being warned about not following safety procedures. When shown a copy of a document with his name on it (exhibit RX-1), dated January 5, 1983, indicating that Mr. Larry Henderson talked to him about crossing the pan line while it was running, Mr. Wells denied denied any knowledge of the matter. He denied that his signature was on the slip, and he denied ever receiving it (Tr. 66-68). He did acknowledge that the document is a "contact and observation" (Tr. 67).

In response to bench questions, Mr. Wells indicated that the work of retrieving the roof cribs required his reaching over the pan line spill tray, and while that

concerned him, he did not lock it out (Tr. 75). He stated that it was his understanding that simply reaching over the pan line did not require him to lock it out (Tr. 76). Mr. Wells conceded that had he locked the pan line out, he probably would not have received a safety slip (Tr. 79), and he conceded that when Mr. Hawkins gave him the safety slip on July 29, he made no statement that he was doing it out of retaliation (Tr. 83).

Mr. Wells stated that he filed a grievance regarding the safety slip in question, and when asked about the disposition of this action on his part, he replied "in the negligence of our district, nothing came of it" (Tr. 84). He then stated that his union did not take the matter any further (Tr. 86).

John Kanosky, Jr., confirmed that on July 29, 1983, he was working on the longwall as a chock setter with Mr. Wells at the tail of the longwall. He confirmed that the shift started at midnight, and he confirmed that he observed Mr. Wells picking up cribs from the pan line, and when asked whether the pan line was moving, Mr. Kanosky replied "at first no, when he first went over, not at first" (Tr. 92). He confirmed that he heard no "clearance" when the chain started moving. He stated that he asked Mr. Hawkins why the chain hadn't been "cleared", but he could not recall his response (Tr. 94).

On cross-examination, Mr. Kanosky confirmed that he was assisting Mr. Wells in pulling the longwall shields, and he confirmed that the chain was not locked out when Mr. Wells reached over the spill tray to retrieve the crib blocks (Tr. 98). He also confirmed that he and Mr. Wells did not lock out the pan line, and that when it started up, Mr. Wells "pulled away from it" and that no one ever stopped it (Tr. 100).

Mr. Kanosky stated that he did not go with Mr. Wells to seek out Mr. Hawkins after the pan line started up, and that when he later spoke with Mr. Hawkins, he advised him that the phones were out, and he could not recall Mr. Hawkins' reply (Tr. 101). Mr. Kanosky "guessed" that his conversation with Mr. Hawkins was a "safety complaint" (Tr. 102). Mr. Kanosky stated that while helping Mr. Wells, he (Kanosky) did not reach over the spill tray, and he confirmed that after he advised Mr. Hawkins that the phones were not working, Mr Hawkins did not issue him a safety slip, even though Mr. Hawkins knew that he had filed a previous discrimination complaint (Tr. 105).

Mr. Kanosky stated that while normal procedure calls for the locking out of the pan line when one has to cross

the chain to do some work, if he simply has to reach across the chain, he does not lock it out (Tr. 110). When asked why the distinction, he replied "I don't know" (Tr. 111). He did not believe that simply reaching over the chain while it is moving is unsafe, and he conceded that it was possible that one could get his arm caught in the moving chain while reaching over (Tr. 112-113).

James L. Foley testified that he worked on the midnight shift on the longwall on July 29, 1983, and that he was "setting shields towards the tail" (Tr. 116). Mr. Foley stated that the normal procedure calls for the "clearing" of the chain before it starts moving, and on the evening in question he did not hear the chain "cleared" before it began moving. He stated that he asked Mr. Hawkins about it, and Mr. Hawkins told him that "apparently the phone was not working" (Tr. 118).

Mr. Foley stated that any time anyone crossed over the spill tray, the lock-out procedures were to be used, and when asked why anyone would cross the spill tray, he replied "to shovel the pan line, to set bits, in my case, to grease, service, anything you had to do across the spill tray" (Tr. 118).

On cross-examination, Mr. Foley confirmed that after speaking with Mr. Hawkins about the fact that the phone pager did not work, he did not contact the mine safety committee about the matter (Tr. 119).

Respondent's Testimony and Evidence

Jack Hawkins, longwall foreman, testified as to the formal grievance procedures in effect at the mine in question with respect to employee discipline involving safety matters (Tr. 130-133). He confirmed that he issued a safety slip to Mr. Wells on July 29, 1983, and when asked why, he replied as follows (Tr. 133):

> A. He had taken cribs off the pan line at the tailgate, without having locked out, and the conveyor started, and he put himself in a position to be injured, by his own negligence; by not locking it out.

Mr. Hawkins identified exhibit R-1. as the safety slip which he issued to Mr. Wells, and when asked to explain the circumstances under which he issued the slip, he replied as follows (Tr. 134-137):

> Q. Okay, and what was the basis for your decision

to issue Mr. Wells, that slip?

A. The only thing that I knew about this, is exactly what he told me. And like he related the matter, when he came to discuss it with me.

Q. Well, would you explain to the Court, exactly what happened, to cause you to issue the slip, on that evening?

A. Mr. Wells, first of all, Mr. Ribel come to the head gate, from setting shields down the face, and told me that the phones hadn't been working properly.
What he asked me, was why the pan line started without being cleared, because I was standing right beside the man, whenever he cleared it.
So he said, well the phone must not be working, and I asked him where he was, he said that he was down around 89 shield, whenever the chain started, so my electrician at that time, was working on the shear, I went down the pan line myself, and checked the phones, calling the head gate, from the tail. And I would reach the head gate on the phones down to 51, but I couldn't reach the tail.

When I got to 70, of course, each phone, I would check and make sure that everything visibly was right with it. When I got to 70, I called the head gate, called the tail, and couldn't reach the tail, and I moved the wires, where they connected into the phone, and called the tail, and I could reach the tail, so I assumed that that's where the problem was, with the phone system.
At that point, I would call the tail, and would call the head, and I knew that the communication was complete along the face, and I went back to the head gate, and it wasn't very long after that, several minutes later, Mr. Wells came to the head gate, and he was pretty mad, and asked me why the chain had been started without being cleared, and I tried to explain to him, that the chain had been cleared, and he said that he was down there, taking cribs blocks off that pan line, and he got two or three fingers torn off, if John Kanosky hadn't been there to turn the chain off.
Of course, I knew that that was right, because the chain having started, had immediately been turned

off, and then later it had started back up.

But I tried to explain to him, that the trouble was in the phone, and the phones were not working down past 70, but he wouldn't listen to it, and he was wanting to blame the head gate man, because he was nearly injured, and I tried to explain to him, that it was his own fault, for not locking the pan line out, it didn't make any difference whether the head gate man, had given the warning over the phone, if he would have had the pan line locked out, he wouldn't have been nearly injured.

Q. Mr. Hawkins, did you ask Mr. Wells, if he had in fact locked out the pan line, before the chain started?

A. I didn't ask him that directly, what I said was, I believe, you mean to tell me you were up on that chain, without having locked out?

He didn't answer the question, he didn't say yes, no, what he said was, to the best that I remember is, they are supposed to clear that chain before they start it. Then I said, it sounds to me, like you are trying to talk yourself into an unsafe work slip, he said, well, do whatever you think is right. That pretty much was the end of our conversation.

Q. What was your understanding of the position that Mr. Wells was in, when he was removing crib blocks from the chain, based on your conversation?

A. Based on our conversation, he led me to believe that he was up on top of the conveyor, removing crib blocks?

Q. And that's when you--what do you mean, when you say he was on top of the conveyor, removing crib blocks?

A. That he had crossed over the spill tray, and was standing on the conveyor chain, throwing the crib blocks off.

Mr. Hawkins testified as to the location where he believed the crib blocks had fallen, and based on his conversation with Mr. Wells, he believed that Mr. Wells was standing in front of the spill tray reaching across to retrieve the blocks, but was actually standing on the

conveyor itself. Mr. Hawkins again stated that when he asked Mr. Wells whether he was on the chain, Mr. Wells again did not reply but simply stated that the pan line had to be cleared before it was started up (Tr. 142-143).

Mr. Hawkins explained the lock out procedures, and he stated that simply pushing the lock out button located at the person's work area will prevent the chain from moving, and it cannot be started again until that person does it. He also indicated that the lock out procedures are part of company policy as well as the roof control plan. These procedures are part of the miner's training and they are discussed at daily roof control meetings (Tr. 147). While conceding that lock out procedures may not be discussed daily, he stated that they were "probably" discussed every second or third day, and that he did cover the roof control plan provisions on the midnight shift of July 29, 1983, and that Mr. Wells was present (Tr. 148).

Mr. Hawkins admitted that two days after the Wells incident he (Hawkins) had removed a crib block from the moving pan line without locking it out. He stated that he was standing in the walkway beside the spill tray and simply reached over the spill tray and removed the block from the top of the coal as it passed by. He did not believe this to be unsafe since he simply bent over and picked the block off and there was no way he could have been injured (Tr. 150).

Mr. Hawkins stated that when he issued the safety slip to Mr. Wells he was aware that he had filed a safety complaint in June, but he denied that this influenced him in any way. He stated that other employees had complained about inoperative phones, but they were not issued any safety slips (Tr. 152).

On cross-examination, Mr. Hawkins conceded that on July 29, 1983, he did not view the crib blocks in question, nor did he go to the area to investigate the incident (Tr. 154). Mr. Hawkins stated that he made no inquiries as to how far the cribs had fallen over on the chain, and he asserted that Mr. Wells did initially claim he was standing beside the spill tray, and the first time he (Hawkins) heard that contention is when he received a copy of Mr. Wells' discrimination complaint (Tr. 156).

Mr. Hawkins stated that the roof control plan is posted at the mine and that the safety committees have copies (Tr. 162). He explained the safety slip warning procedure, and he confirmed that while Mr. Wells did not receive a copy of the notice that he issued, the safety committeeman did, and the slip was addressed to him (Tr.

164; 166-167). With regard to an asserted previous warning given by Henderson to Mr. Wells, Mr. Hawkins stated that he was not previously aware of this, and did not know whether Mr. Henderson had in fact given it to Mr. Wells (Tr. 166).

In response to further questions, Mr. Henderson stated that apart from his understanding that Mr. Wells was standing on the conveyor when he removed the cribs, from his experience and past observations, he knows that operators lock out the pan line and then get up on the chain and remove the cribs. He also reiterated that when he asked Mr. Wells whether he was on the chain, Mr. Wells did not deny it (Tr. 168-169).

Mr. Hawkins stated that while he decided to recommend the issuance of the safety slip to Mr. Wells on July 29, before doing so he had to get approval. He spoke with the shift foreman and Mick Toth, the longwall coordinator, and they concurred in his decision. The following Monday, August 1, 1983, he asked Mr. Wells to bring his safety committeeman with him to discuss the safety slip, but due to the unavailability of the committeeman, the meeting was delayed until the next day. After meeting with the safety committee, the slip was issued on August 2, 1983 (Tr. 171). Mr. Hawkins believed that the union has not pursued the issuance of the slip any further, and he is unaware of any grievance being filed (Tr. 178).

Gary M. Hartsog, respondent's safety division inspector, testified as to his background and training, and he stated that he holds a B.S. degree in mining engineering from West Virginia University, and will receive his Master's in mining in May. His duties include supervision of safety programs at the three mines under his division's jurisdiction (Tr. 196).

Mr. Hartsog confirmed that he is familiar with the longwall safety practices and procedures at the Federal No. 2 Mine, and he explained the lock out procedures for the longwall. He confirmed that the lock device, once engaged, electrically locks out the pan line and it will not start (Tr. 197). Mr. Hartsog stated that if one were to position himself on the conveyor itself, this would be a violation of company safety practices. He identified a section of the West Virginia Mining Law, page 299, which states "no person shall perform work on the pan line or on the face side of the pan line unless such equipment is de-energized and locked out". In his view, anyone working on the pan line has to first lock out the line (Tr. 200).

Mr. Hartsog believed that reaching over a pan line to remove crib blocks would be an unsafe act, regardless of whether it violates company policy, and this is because "anything can happen". When asked whether Mr. Hawkins' act of removing a crib from a moving pan line was unsafe, Mr. Hartsog stated "no, because there was coal in the pan and this was laying on top of the coal". However, he would still not recommend doing what Mr. Hawkins did (Tr. 203). Based on his knowledge of the safety slip given to Mr. Wells, he believed it was justified (Tr. 204).

On cross-examination, Mr. Hartsog confirmed that he was not present at the August 2 meeting when the safety slip was issued, and he learned about it later that day (Tr. 205). He also confirmed that employees are made aware of company safety policies and procedures (Tr. 206). In response to further questions, Mr. Hartsog identified copies of previous "safety observations" issued to other employees including Mr. Wells, by Mr. Hawkins and other supervisors, and he testified as to what these were all about (Tr. 210-212).

MSHA's Rebuttal

Mr. Wells was called in rebuttal, and he confirmed that he received the safety slip in question on August 2, 1983, during a meeting in the mine foreman's trailer with his safety committeeman and Mr. Hawkins and Mr. Toth. Mr. Wells stated that there was a discussion over the fact that the slip indicated that he was standing on the chain, when in fact he was not (Tr. 232). He then acknowledged that the slip does not indicate that he was on the chain, and he stated that he explained to Mr. Toth nd Mr. Hawkins that he simply reached over it (Tr. 233).

On cross-examination, Mr. Wells stated that he understood that he was being issued a safety slip because he was allegedly working in the face area without locking out the pan line (Tr. 236). He then conceded that he had no notes of the meeting or the incident in question (Tr. 237). He conceded that simply picking some cribs off the top of coal on a moving pan line is not as serious as standing on a pan line without having it locked out (Tr. 247).

Respondent's Rebuttal

Mr. Toth was recalled, and he testified that it was his understanding that the safety slip was issued because Mr. Wells "was in the pan line while taking cribs out". Mr. Toth stated that during the meeting of August 2, 1983, Mr. Wells did not deny that this was the case, and that

his excuse centered around his belief that Mr. Hawkins had removed cribs from a moving pan line, and that this was unsafe (Tr. 253).

On cross-examination, Mr. Toth stated that a State investigation was conducted over the safety slip incident, and it focused on Mr. Wells' assertion that Mr. Hawkins had performed an unsafe act by removing cribs from a moving pan line. He stated that the committeemen initiated the inquiry a few days after August 2, 1983, and no State findings of any violations by Mr. Hawkins were ever made (Tr. 256-262).

Mr. Kanosky was recalled as the Court's witness, and he explained where Mr. Wells was standing when he removed the cribs in question. Mr. Kanosky stated that at no time did he see Mr. Wells standing on the pan line or crossing over it (Tr. 264).

Mr. Hawkins was recalled as the Court's witness, and he confirmed that Mr. Wells did not specifically inform him that he was standing on the pan line when he removed the cribs, and that when asked about it, Mr. Wells did not deny it (Tr. 267). Mr. Hawkins also confirmed that from past experience, he knew where the cribs would have fallen, and that when they are knocked out, one cannot reach them by simply reaching across the pan line to remove them (Tr. 268). He reiterated the conversation with Mr. Wells as follows (Tr. 269):

> THE WITNESS: If I could remember a quote that he said. First he asked me why the pan line started without, or who cleared the, who was the s.o.b. that cleared the pan line without, or started the pan line without clearing it? I told him it had been cleared. He said, "I was taking the crib blocks off of that tail and I almost got several fingers torn off if John Kanosky hadn't been there to turn it off." And, that's when I asked him, "You mean you were up on that tail without having locked it out?"
>
> Then his next statement was, "But, they're supposed to clear that chain before they start it." And, I said, "Danny, it sounds to me like you're trying to talk yourself into an unsafe work slip?" He then said, "Well, you do whatever you think is right." And, that was about the end of the conversation.

In his deposition of March 14, 1984, Larry Henderson testified that he is employed by the respondent as a longwall section foreman at the Federal No. 2 Mine.

He explained the procedures used by mine management to insure that the men comply with all safety rules and regulations, and these include on the job task training, and safety contacts and observations.

Mr. Henderson stated that on January 5, 1983, he was the longwall section foreman on the midnight shift, and that Mr. Wells was a member of his crew on that shift. Mr. Henderson stated that during the course of the shift he made out an employee safety observation of Mr. Wells and he identified exhibit RX-3 as a copy of the record he made of that safety observation. He confirmed that he made this observation notation after observing Mr. Wells crossing the panline while the face conveyor was still running and not locked out.

When asked whether he informed Mr. Wells about what he had done, Mr. Henderson replied as follows (Tr. 10-11):

> Yes, but I'm not--maybe I didn't say it in a way that he could remember. I hollered at him, and told him, you don't cross a panline while it's running, but other than that--that's about it I'd say.

Mr. Henderson believed that he stopped Mr. Wells and told him about crossing the panline, and he explained that had he not stopped him he would not have written "o.k" on the observation slip. He also confirmed that the slip is given to the safety department where it is kept on file.

Mr. Henderson identified exhibit -1, as the respondent's safety policies, rules and practices, and he confirmed that section 11, item 8, prohibits crossing over the face conveyor chain without locking it out. He believed that Mr. Wells violated this rule when he crossed the moving panline on January 5, 1983.

Mr. Henderson identified exhibit -2, as a copy of a portion of the West Virginia mining regulations, and he indicated that section 7.06, prohibits anyone from working on the face side of the panline unless it is deenergized and locked out. He believed that Mr. Wells also violated this provision by crossing over the panline into the face area.

Mr. Henderson stated that it was his understanding that Mr. Hawkins issued Mr. Wells the safety slip in question because Mr. Wells was standing on a moving chain removing crib blocks without locking it out. Mr. Henderson stated that had he observed Mr. Wells standing on a moving panline he would probably issue him a safety slip because it is dangerous.

On cross-examination, Mr. Henderson confirmed that he did not observe Mr. Wells at the time Mr. Hawkins gave him a safety slip, but that he did discuss the matter with Mr. Hawkins. He did not discuss it with Mr. Wells.

Mr. Henderson stated that he has discussed the State and company rules and regulations with his men, and he indicated that all longwall personnel know that they are not to cross a moving panline without locking it out.

Mr. Henderson confirmed that employment safety observation records such as the one filled out for Mr. Wells are not given to the employee or to the safety committee, and they are not notified that such a record has been made of the infraction.

Mr. Henderson stated that that when he observed Mr. Wells cross the moving panline, it was at the end of the shift, and he indicated that Mr. Wells was going to the dinner hole to get his bucket. He stated that he did not pick out Mr. Wells for observation, but simply observed him go up on the inside of the spill pan and jump to the face side of the conveyor panline, a distance of two to three feet. He also stated that he did not issue Mr. Wells a safety slip because "it was probably his first time and * * * he was just needing to be told that it was unsafe, and not to cross the panline" (Tr. 28).

Mr. Henderson could not remember Mr. Wells' response when he told him that it was unsafe to cross the panline. He stated that he "more or less probably hollered at him", and that since it was the end of the shift, Mr. Wells left the mine. He indicated that he was approximately 15 to 20 feet from Mr. Wells when he hollered at him, and that no one else was present.

Findings and Conclusions

Docket No. WEVA 84-4-D

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d. 1211 (3d Cir.1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing

either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, supra. See also Boich v. FMSHR, 719 F.2d 194 (6th Cir.1983); and Donovan v. Stafford Constr. Co., No. 83-1566, D.C.Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corp., --- U.S. ----, 76 L.Ed.2d. 667 (1983).

Protected Activity

In this case, the critical issue presented is whether or not the refusal by the three complainants to perform the so-called "double cutting" on the 7-right longwall section because they believed it was not safe is protected by section 105(c) of the Act. The three complainants assert that their refusal to engage in double cutting prompted their section foreman, Jack E. Hawkins, to retaliate against them by allegedly withholding certain employee benefits and privileges from them. These benefits included (1) working through the usual lunch hour and being paid, and (2) opportunities to stay over between shifts to perform certain job tasks at overtime pay rates. Conversely, the complainants assert that Mr. Hawkins advised them that their refusal to agree to his purported demands to double cut would result in his assigning them work which would cause them to either request transfers to other jobs or quit their employment.

The first question for determination is whether or not the process of double cutting is safe or unsafe. Based on a preponderance of all of the credible testimony and evidence adduced in these proceedings, I cannot conclude that the complainants have established that the double cutting of coal along the 7-right longwall face is per se unsafe. MSHA has produced no credible testimony or evidence to establish that double cutting is either unsafe or violates any laws or mandatory safety standards. As a matter of fact, the record establishes that the respondent has engaged in the process of double cutting for at least six years, and no one, including the complainants and the mine safety committee, have ever complained to MSHA or challenged this method of mining coal. Further, MSHA has produced no evidence to establish that the process of double cutting violates any safety or health standards, and there is no evidence that the respondent has ever been cited for this practice.

The record in these proceedings suggests that the principal complaint by the complainants with regard to the issue of double cutting lies in their belief that requiring them to position themselves inby the longwall shearing machine exposed them to high levels of coal dust, which not only violated the applicable mandatory regulatory dust exposure levels, but also threatened their health and safety. In short, the complainants assert that the process of double cutting requires them to work inby the coal cutting shearer, thereby exposing them to dangerous levels of coal dust.

After careful scrutiny of the record, I cannot conclude that the complainants have established that the respondent required them to be inby the coal cutting shearers during the process of double cutting. The complainants have presented no credible evidence to establish that the respondent required anyone to stand inby the coal cutting shearers while performing their chock setter duties. To the contrary, respondent's evidence and testimony, including company policy and safety regulations, mandates that all miners who work on the longwall section position themselves between the shearer cutting drums so as to avoid exposure to any coal dust generated inby the cutting shearers. In addition, the respondent has established that its cutting methods include the use of water sprays and other dust supression devices, and that it has provided appropriate personal dust protection devices such as respirators and dust helmets. Further, aside from a possible isolated citation for non-compliance with the dust standards, MSHA has produced no evidence that the respondent's 7-right longwall section has been out of compliance with the applicable coal dust regulations, nor has it produced any evidence of any citations being issued against the respondent for double cutting.

Having concluded that the process of double cutting coal is not a violation of any law or mandatory safety standard, the next question presented is whether or not the asserted refusal and reluctance by the complainants to double cut coal was reasonable and protected under the Act.

The record here establishes that the double cutting of coal has been engaged in for at least six years, and that at least two working shifts at the mine have engaged in this practice without complaint for at least that long. Absent any proof by the complainants that they were required to position themselves inby the shearers, thereby exposing them to coal dust, I cannot conclude that their complaints are justified or reasonable.

On the facts of this case, I conclude that the complainants may not rely on an unsupported conclusion that they were exposed to dangerous level of coal dust, without establishing through some credible evidence that respondent's double cutting process required them to be inby the coal cutting machine, thereby exposing them to coal dust. Further, the complainants have not rebutted the fact that the respondent's coal suppression measures, including the furnishing of respirators and air helmets, afforded ample protection to any miner required to work on the subject longwall. The complainants would have me believe that any miner who chooses not to wear these protective devices, or who chooses to ignore company policy and regulation by deliberately positioning himself inby the coal cutting shearer, thereby voluntarily exposing himself to dangerous dust levels, should somehow be permitted to avail himself of the protections afforded him under the Act, and to hold the mine operator accountable for these actions. I reject these arguments.

The record here further establishes that once the complainants made their double cutting objections known to mine management, they were not required to double cut. In fact, their particular shift was permitted to continue to single cut coal. While it is true that foreman Hawkins attempted to change their minds by meeting with them and discussing the personal advantages which would inure to them by agreeing to double cutting, taken in context, I find nothing intimidating or illegal in this. Foreman Hawkins' interests were to increase production, and absent any showing that his requests required the complainants to engage in job tasks which were illegal or unsafe, I cannot conclude that his meeting with the complainants and his so-called "options" were discriminatory.

On the facts of this case, I conclude and find that once the complainants declined foreman Hawkins' "options" for double cutting, and once single cutting was in place, Mr. Hawkins had the right to restructure his work force in a manner which he believed was most productive.

The complainants' assertion that Mr. Hawkins withheld certain overtime opportunities from them and that he reassigned them work that caused them to either bid off their jobs or quit their jobs is simply unsupported by any credible evidence or testimony. Respondent has established that once the system of single cutting was instituted on the complainant's shift, there was a legitimate business reason for reassigning certain work tasks, and the complainants' arguments to the contrary are rejected.

With regard to the question of permitting the complainants to continue to work through their lunch hour, with compensation, as they had previously been accustomed to when they were engaging in double cutting, I conclude and find that since mine management has the inherent right to regulate its work force, it could change its policy and require the complainants to take their lunch break and to conform to management's work requirements. This is particularly true in this case where there is absolutely no evidence that Mr. Hawkins' actions violated any labor-management agreement, or that the complainants instituted any grievances or otherwise complained about the issue. It is also true where the record here established that after a short period, Mr. Hawkins recanted his prior position, and permitted the complainants to adjust their lunch hours. Further, on the basis of the record, the complainants had not established that they were treated any differently from anyone else.

In view of the foregoing findings and conclusions, I find that the complainants have failed to establish a prima facie case of discrimination. Accordingly, their complaints are rejected and case Docket No. WEVA 84-4-D IS DISMISSED.

Findings and Conclusions

Docket No. WEVA 84-66-D

This case concerns a complaint by Mr. Wells that Mr. Hawkins discriminated against him by issuing him a safety slip after Mr. Wells complained that a panline chain had started up without prior warning MSHA argues that when Mr. Wells confronted Mr. Hawkins about this incident, Mr. Wells was making a safety complaint and that Mr. Hawkins retaliated by issuing him the slip for assertedly violating company safety policy by standing on the panline or working at the face without first having locked it out. MSHA asserts that even though Mr. Wells did not personally feel that he was in any danger when the panline started up without warning, there could have been other crew members who were in unsafe positions when the chain started without warning.

MSHA argues that the issuance of the safety slip on August 2, 1983, was motivated by Mr. Wells' protected activity, which MSHA claims took place on June 1, 1983, when Mr. Wells filed a previous discrimination complaint, and again on July 29, 1983, when he confronted Mr. Hawkins about the panline starting up without prior warning. In support of its argument that Mr. Hawkins retaliated against Mr. Wells for his prior complaints, MSHA points to the asserted intimidating remarks by Mr. Hawkins to Mr. Wells

when Mr. Wells confronted Mr. Hawkins, the fact that Mr. Hawkins personally did not observe Mr. Wells standing on the panline, and the fact that Mr. Hawkins himself purportedly engaged in the same kind of unsafe activity when he picked some roof timbers off a moving panline without locking it out. MSHA concludes that the respondent has not rebutted its asserted prima facie case by showing that no protected activity occurred, and that the issuance of the safety slip was of a pretexual nature.

With regard to MSHA's first assertion that Mr. Wells did not feel that his safety was jeopardized, if this were in fact the case, then Mr. Wells' asserted "safety complaint" could be construed to be unfounded and unreasonable. In any event, the record in this case belies the assertion by MSHA that Mr. Wells did not believe that his safety was in jeopardy. The record here established that Mr. Wells and Mr. Kanosky claimed that they were "highly disturbed" that the belt had started without a prior audible warning, and I simply do not believe Mr. Wells' claim that he felt that he was safe. His testimony on this issue casts doubts in my mind as to his credibility and consistency. Having viewed Mr. Wells during the course of the hearings in these proceedings, I take particular note of the fact that he has consistently maintained that all of his complaints and confrontations with mine management have been prompted by his asserted fears for his safety.

It seems clear to me from the testimony of Mr. Wells and Mr. Kanosky that they were both disturbed over the fact that the panline had started up without their hearing any advance warning sounded over the mine telephone located at their work station. Mr. Hawkins explained that he heard the headgate operator call a warning over the longwall telephone, and there is no dispute that Mr. Wells and Mr. Kanosky did not hear it. Mr. Hawkins later determined that the telephone at the Wells and Kanosky work station was inoperative, and this fact remains unrebutted.

With regard to MSHA's second point concerning other miners being placed in jeopardy by the sudden starting of the panline chain, I note that MSHA called not one witness to support this conclusion. While Mr. Wells, Mr. Kanosky, and Mr. Foley expressed their safety concerns with regard to someone possibly catching their arms or clothing in a moving panline chain, they apparently were not too concerned about reaching over a moving panline chain without first locking it out.

Mr. Kanosky testified that he and Mr. Wells were working in close proximity to each other at the chain tail, and that Mr. Kanosky was helping Mr. Wells pull in some

shields, putting cribs under the shields, and cleaning up spillage. He admitted that neither he nor Mr. Wells had the chain locked out while performing this work (Tr. 99-100). Mr. Kanosky also admitted that when the chain started up, neither he nor Mr. Wells activated the lock out or stop switch to stop the chain (Tr. 100). When asked whether he too reached over the panline, Mr. Kanosky responded that "I don't know for sure whether I did" (Tr. 104).

In response to certain bench questions, Mr. Kanosky stated that if he had to cross over the chain to do some work at the face, he would lock out the chain. However, if he simply had to reach over the chain to retrieve some material, he would not. When asked whether anyone could get hurt by reaching over a chain without first locking it out, he replied "not the way he (Wells) did it." Based on Mr. Kanosky's concessions that someone could get hurt by reaching over an unsecured chain which suddenly started up without warning (Tr. 111-112), I frankly fail to comprehend the inconsistent distinctions drawn by Mr. Kanosky.

Mr. Kanosky's testimony reflects that both he and Mr. Wells were performing the same work at the panline, that they both failed to lock out the chain, that they both complained to Mr. Hawkins about the chain starting up without warning, and that Mr. Hawkins may have had knowledge of their prior complaints. Yet, on these facts, Mr. Kanosky was not issued a safety slip. It seems to me that had Mr. Hawkins' motivation in issuing the slip to Mr. Wells was to retaliate against him for prior comlaints, he would also have issued one to Mr. Kanosky.

Mr. Hawkins' alleged "intimidating" remarks to the effect that "what f..... ing difference does it make," in response to the complaint by Mr. Wells that he did not hear the audible warning that the panline was starting up, must be taken in context. Mr. Hawkins testified that he heard the headgate operator make the audible announcement, and it seems reasonable to me that at that time that he assumed that everyone else along the panline heard it. Further, it also seems reasonable to me that Mr. Hawkins believed that all miners would comply with company policy and lock out the chain before performing work at or near the panline. I believe Mr. Hawkins' testimony concerning his version of this event, and taken in context, I cannot conclude that his asserted remark was intimidating. Given the circumstances and background concerning the confrontational work relationship which obviously existed betwen Mr. Hawkins and the complainants, I believe that the remarks attributed to Mr. Hawkins, which he denies, would be natural and expected.

A copy of the so-called "safety slip" is a matter of record in this case (Exhibit RX-1). It appears to be a company form captioned VERBAL NOTICE OF, with two options for checking by the person who issues it. The first option is labeled "Improper Action", and the second states "Safety Instruction". The document reflects that it was issued by Mr. Hawkins to Mr. Wells, and it states that Mr. Wells was given a verbal notice of a violation for "working in the face area without having the panline locked out electrically". The "explanation" portion of the form is filled and states the following:

> On 7/29 at about 3:30 a.m., Danny Wells was removing crib blocks from around the tail drive when the conveyor was started. The man admitted not having the stop switch off as per company policy.

The testimony concerning the actual issuance of the safety slip in question is most confusing. Mr. Hawkins stated that he intended to issue such a slip on Friday, July 29, 1983, the day that Mr. Wells confronted him about the panline chain starting up. Mr. Hawkins then determined that he had to consult with his superiors before finalizing the issuance of the slip, and that after such consultation, and further contact with the union safety committee, the slip was issued on August 2, 1983. However, Mr. Hawkins stated that the slip was not given to Mr. Wells, but that he showed it to him (Tr. 166, 167). Mr. Hawkins also explained the slip was only a record of the verbal warning given to Mr. Wells (Tr. 166). When called in rebuttal, Mr. Wells confirmed that he received the slip during a meeting with union and management representatives present on August 2, 1983.

When asked whether he had filed a grievance over the issuance of the safety slip, Mr. Wells responded that "I went every step that there was, on this safety slip, and in the negligence of our district, nothing came of it" (Tr. 84). He then explained that his union met with mine management about the matter, and that while he spoke with his safety committee and the union's district office, he heard nothing further about the matter (Tr. 85). MSHA's counsel had no knowledge of the union grievance procedures in such matters, but was of the opinion that any appeal rights inuring to Mr. Wells concerning the issue had not been finalized (Tr. 86). Respondent's counsel disagreed, and he indicated that to his knowledge Mr. Wells has no pending grievance on the question of the issuance of the safety slip (Tr. 178). Mr. Hawkins stated that to his knowledge, the union has dropped the matter, and that he has never been asked for any input into any grievance by Mr. Wells (Tr. 178).

In my view, the fact that Mr. Hawkins did not actually see Mr. Wells standing on the panline when the chain was started is not particularly critical. It seems clear to me that Mr. Hawkins issued the safety slip on the assumption that Mr. Wells was standing on the panline without having activated the lock out switch. Mr. Hawkins' assumption was based on his testimony that Mr. Wells did not deny that he was standing on the panline when Mr. Hawkins asked him if this were in fact the case. In addition, Mr. Hawkins' assumption was based further on his prior knowledge and experience that miners do stand on such panlines when retrieving fallen roof cribs, as well as on his understanding as to the location of the fallen cribs, as well as Mr. Wells' explanation as to where he was located when he was performing the work.

Mr. Wells conceded that he did not lock out the panline before attempting to retrieve the cribs. Having viewed Mr. Hawkins during the course of the hearings, I find him to be a credible witness, and I believe his version surrounding the events in question. I believe that when Mr. Wells confronted Mr. Hawkins, he did so with the intent of provoking him into yet another confrontation over safety. While it may be true that Mr. Wells' complaint could be construed to be a safety complaint, one can conclude from the record in this case that any time Mr. Wells spoke with Mr. Hawkins, it could be construed to be a complaint. I believe Mr. Hawkins' assertion that when he asked Mr. Wells whether he had been standing on the panline when it suddenly started up without warning, Mr. Wells said nothing and did not deny it. Considering the fact that Mr. Wells did not impress me as an individual who would back away from any opportunity to confront Mr. Hawkins on a safety matter, it seems strange to me that Mr. Wells would not respond or deny that he was standing on the panline when he was removing the fallen cribs. Rather than denying it, which I believe any reasonable person would do, Mr. Wells simply exclaimed to Mr. Hawkins that he should "do what you have to do". Mr. Hawkins accomodated him by subsequently issuing him a safety slip, and Mr. Wells now belatedly cries "foul".

The critical question in this case is whether or not the record supports the respondent's contention that the safety slip issued to Mr. Wells was justified. MSHA's position is that it was not. Further, MSHA is of the view that the safety slip was issued to Mr. Wells in retaliation of prior safety and discrimination complaints. After careful review and scrutiny of the record here, I cannot conclude that the safety slip, or verbal warning, issued by Mr. Hawkins to Mr. Wells, was discriminatory or retaliatory. I conclude that Mr. Wells violated company policy by failing

to lock out the panline before performing work around the panline chain. In my view, the question of whether Mr. Wells was actually standing on the panline, or performing work in close proximity to the panline, is not critical. What is critical is the state of mind of Mr. Hawkins at the time he issued the verbal warning.

Having carefully considered MSHA's arguments in support of its theory of this case, I conclude that it is based on hindsight and inferences drawn from unsupported conclusions as to what may have motivated Mr. Hawkins in issuing the safety slip. Considering the on-going and continuous confrontations between the complainants in these proceedings and Mr. Hawkins with regard to the question of double cutting, it seems obvious to me that any decisions made by Mr. Hawkins were met with immediate claims that he was discriminating against the complainants.

Based on a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that Mr. Hawkins had a reasonable belief that Mr. Wells exposed himself to possible injury and harm when he proceeded to remove the roof cribs in question without locking out the panline chain. I further conclude and find that while it is clear that Mr. Wells performed work on the panline without locking out the chain, Mr. Hawkins also believed that Mr. Wells was also standing on the panline when he performed the work, and that when Mr. Wells did not deny it, Mr. Hawkins was justified in issuing Mr. Wells a verbal warning. I further find and conclude that MSHA has failed to establish a prima facie case of discrimination. Accordingly, the complaint in Docket No. WEVA 84-66-D, IS DISMISSED.

Findings and Conclusions

Docket No. WEVA 84-33-D

This case concerns a complaint by Mr. Ribel that he was discriminated against when the respondent suspended him, with intent to discharge, for allegedly "sabotaging" mine property, namely, the No. 32 telephone located on the longwall section. MSHA argues that Mr. Ribel was "set up" by mine management, that he did not sabotage the phone, and that his suspension and subsequent discharge came about as a result of his prior discrimination and safety complaints. Conversely, the respondent argues that Mr. Ribel's discharge was bona fide

and totally unrelated to his prior complaints, and that after arbitration under the applicable management-labor agreement, his discharge was sustained by an arbitrator.

In the context of a discrimination proceeding adjudicated under section 105(c) of the Act, an arbitrator's finding that disciplinary action under the applicable 1981 Wage Agreement was warranted, is not binding on me in this proceeding. Once the complainant establishes a prima facie case of discrimination, the burden is then on the respondent to affirmatively defend that the alleged retaliatory action (suspension with intent to discharge), was also motivated by unprotected activity (intentionally cutting the phone wire), and that the action taken against the complainant would have been taken for the unprotected activity alone. The crucial question in this case is whether or not the respondent has carried its burden of proving by a preponderance of all of the credible testimony and evidence of record that Mr. Ribel did in fact cut the wire in question, and that by doing so he engaged in unprotected activity which warranted the action taken against him.

The instant discrimination case was heard de novo, and I am bound to render my decision in accordance with the facts and evidence adduced in the discrimination hearings before me. As correctly suggested by MSHA in its brief, the question of good cause for the discharge of a miner under the wage agreement may not be determined upon the same criteria which are in issue under the Mine Act.

In their post-hearing briefs, the parties recognize and concede that I may consider the weight to be given the arbitrator's decision in connection with Mr. Ribel's grievance under the wage agreement. That grievance concerned the respondent's suspension of Mr. Ribel, with intent to discharge him, for purportedly destroying or "sabotaging" the No. 32 telephone by allegedly cutting a wire a hawk-bill knife. The sole factual question before the arbitrator was whether or not the respondent established that Mr. Ribel had in fact cut the telephone wire in question, and if so, whether this act justified his discharge for cause. The arbitrator answered both questions in the affirmative and sustained the discharge.

Respondent states that with the exception of Mr. Norwich, the witnesses called to testify on behalf of Mr. Ribel at the arbitration hearing were the identical witnesses called to testify on Mr. Ribel's behalf in these proceedings (Ribel, Kanosky, Wells, Reeseman, Toothman, Hayes). Likewise, respondent states that with the exception of Mr. Luketic, who handled the arbitration case, the witnesses called on behalf of the respondent in these proceedings were also witnesses at the arbitration hearing (Hawkins, Toth, Peduti).

Respondent argues that since MSHA has presented no new pertinent evidence or testimony in these proceedings that was not before the arbitrator, the fact that Mr. Ribel lost his arbitration case is no basis upon which to urge me not to consider the arbitrator's findings. Respondent suggests that because of the arbitrator's "special expertise" regarding mining practices and the common law of the shop, the arbitrator's decision would be helpful to me in this matter, and that I should accord it great weight.

MSHA argues that the standards under which the arbitrator decided Mr. Ribel's grievance failed to take into account the applicable discrimination law under the Mine Act, and that issues such as the prior discrimination against Mr. Ribel for engaging in protected activity under the Mine Act, and the fact that he had filed complaints, were not addressed by the arbitrator. MSHA argues that facts developed in the instant proceeding (such as Mr. Toth's access to the damaged phone), were not addressed by the arbitrator, and that the arbitrator's reconstruction of the facts is deplete of a substantial amount of the evidence presented during the hearings before me.

MSHA concludes that the record in these proceedings does not contain sufficient evidence to affirmatively show that Mr. Ribel engaged in the unprotected activity (cutting the phone wire), which the respondent has asserted as its defense in this case. Additionally, MSHA maintains that the "chilling" atmosphere which mine management created on the midnight shift of August 5, 1983, refutes the respondent's affirmative defense.

I have reviewed the arbitration decision issued by the arbitrator, Lewis R. Amis on August 22, 1983 (exhibit RX-5). That decision reflects that the respondent took the position that its evidence conclusively proved that Mr. Ribel cut the phone wire in question, and that since this act constituted a willful destruction of company property, his discharge was warranted. Conversely, the Union argued that since no one actually witnessed Mr. Ribel actually cut the wire, there was sufficient doubt as to his guilt, and that this precluded any finding that he was responsible for cutting the wire.

In his decision rendered on August 22, 1983, the arbitrator affirmed a prior decision which he rendered on August 13, 1983, and which he served on the parties by a mailgram. In that decision, the arbitrator ruled as follows:

> The evidence, though circumstantial, is clear and convincing. On C shift August 5, 1983 #32 telephone on Section 7 right longwall was sabotaged. The only person with the opportunity and the means to perform the act was the grievant. Sabotage is a dischargeable offense, and in this case the penalty is warranted. Hence, I must sustain the grievant's discharge. The grievance is denied.

In support of his conclusion that Mr. Ribel cut the wire in question, the arbitrator made the following findings and conclusions in his August 22, 1983, written decision:

> 1. The facts in this case lead to the inescapable conclusion that the grievant is guilty as charged. Very simply put, the wire in phone 32 was cut in a way that suggests that a knife was used; the grievant had a knife; and he was the only person on the section with an opportunity to cut the wire.
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> 2. While Ribel and Toothman were checking the phones on the section, no one else was there, the rest of the crew and Toth being at the dinner hole. Then, when Toth arrived on the section, he was the only person there in addition to the other two. At all relevant times he was on the section, Toth was either in the presence of Toothman, Toothman and Ribel, or of the shearmen Reesman and McCormick as they approached the shear after leaving the meeting. On the other hand, on two occasions Ribel was alone at or near phone 32: first when he made the initial check with Toothman--and reported that the phone was paging properly--and next when Toth sent him from the tail of the

> section back to the head to check the phones again. Either time he might have cut the wire in question. In any event, neither Toth nor Toothman had any such opportunity, and they are the only other possible candidates.
>
> 3. The time frame in this case is very narrow. According to the B shift foreman, phone 32 was operating at the end of his shift. According to Toothman and to Ribel the phone was still operating during their initial check. It was only from the time that Ribel first checked phone 32 until the time Toth discovered that it was not paging that anyone could have tampered with it. The only one with the opportunity was Ribel.
>
> 4. The Union also argues that because the evidence in this case is circumstantial, it is somehow lacking in validity. Circumstantial evidence, however, is sometimes the clearest and best guide to a discovery of the true facts of the matter at hand. In this case, a rational reconstruction of events leading back from the discovery of the cut wire in phone 32 and again up to that point leaves no reasonable doubt that the grievant cut the wire. Thus, the circumstantial evidence for his guilt can be said to be clear and convincing. To find otherwise would be to admit a belief that the wire severed itself, and that I am not prepared to do.

I take particular note of the fact that nowhere in the arbitrator's decision is the question of any prior safety complaints by Mr. Ribel mentioned. The decision is devoid of any consideration of the ongoing disputes which had taken place between Mr. Ribel and Mr. Hawkins over the issue of double cutting, and the decision is silent with respect to the prior discrimination complaints filed by Mr. Ribel. While it may be true that these prior complaints focused on a continuing confrontation between Mr. Ribel and Mr. Hawkins, the record supports a conclusion that Mr. Toth was not totally oblivious to these complaints. As a matter of fact, as the respondent's overall longwall corrdinator responsible for production, including supervisory authority over Mr. Hawkins, Mr. Toth had a direct interest in these complaints since they obviously impacted on production, and ultimately resulted in the midnight shift being permitted to single cut, with a resulting diminishment of production.

Notwithstanding any denials to the contrary, I believe that Mr. Toth knew that Mr. Ribel was one of the individuals who were causing "problems" and filing complaints over safety

questions. Given this background, Mr. Toth's motivations and state of mine with respect to the incident which resulted in Mr. Ribel's discharge is a critical question not addressed by the arbitrator. While it may be argued that the safety issues were not pertinent to the arbitrator's decision concerning "good cause" for Mr. Ribel's discharge, they are critical and relevant to any determination made under the applicable discrimination criteria pursuant to section 105(c) of the Act.

Given the apparent jurisdiction of the arbitrator to consider only the "good cause" criteria under the wage agreement for determining whether mine management had reasonable grounds for discharging Mr. Ribel, the conclusion is inescapable that the safety complaints which preceded the discharge, and which obviously were "lurking in the background," were not addressed or considered by the arbitrator. His decision was based on a circumstantial case that Mr. Ribel cut the wires, with absolutely no consideration given to the alleged retaliatory aspects of the case, and no consideration was given to the past discrimination complaints made by Mr. Ribel which arguably may have supported his subsequent assertions that he was singled out and "set up" for the discharge. While it may be true that given all of these facts, the arbitrator may have reached the same conclusion, it is just as likely as not that the result may have been different. In these circumstances, I have given the arbitrator's findings and decision little weight, and will look to the evidence and testimony presented during the hearings before me in order to determine whether or not the respondent has established with any degree of reasonable certainty that Mr. Ribel did in fact sabotage the telephone in question.

The arbitrator found that at all times while on the section, Mr. Toth was in the presence of Toothman, Toothman and Ribel, or of the Shearmen Reeseman and McCormick. Mr. Toothman testified that at one point in time, after speaking with Mr. Ribel over the #89 telephone, Mr. Toth instructed him to proceed to the tail end of the longwall to check out the other phones and that Mr. Toth went in the opposite direction towards the headgate for a distance of some 20 shields, and that he was distracted and lost sight of him. Since Mr. Toothman and Mr. Toth were at the #89 telephone station when they proceeded in opposite directions, Mr. Toth would have been between the #32 and #70 telephones when Mr. Toothman lost sight of him. Thus, contrary to the arbitrator's findings, based on Mr. Toothman's testimony before me, I cannot conclude that Mr. Toth was at all times in the presence of one or more of the other individuals. As a matter of fact, Mr. Toothman testified that shortly after losing sight of Mr. Toth, and while on his way back towards the headgate, he was summoned to the #32 phone by Mr. Toth, and at that point in time Mr. Toth showed Mr. Toothman the wire which had been cut.

Although Mr. Toothman testified that he never observed Mr. Toth tamper with the #32 phone, and that Mr. Toth may have been 100 feet ahead of him while they both proceeded to the headgate at different intervals, Mr. Toothman also confirmed that it took him only a minute to remove the telephone cover once he arrived at the #32 phone station. Given the fact that Mr. Toothman lost sight of Mr. Toth after he passed the #70 telephone station, and given the fact that it was Mr. Toth who called Mr. Toothman to the #32 to open the phone cover, I conclude that Mr. Toth had ready access to the #32 telephone, unobserved by Mr. Toothman.

Insofar as Mr. Reeseman is concerned, he testified that when he first observed Mr. Toth on the longwall section, he (Reeseman), was standing at the #11 shield and that he observed Mr. Toth walking towards him, and that Mr. Toth was between the #18 and #32 telephones. At that point in time, Mr. Toth had already passed by the #32 telephone walking towards Mr. Reeseman. Mr. Reeseman testified that Mr. Toth then went to the #32 telephone, picked it up, and asked Reeseman whether it was paging. When Reeseman replied that it was not paging, Mr. Toth requested that a mechanic be dispatched to the phone to check it out. Mr. Reeseman then dispatched a trainee mechanic (Fowley) to the #32 phone station, and Reeseman went about his business and did not observe the #32 telephone being opened. Thus, contrary to the arbitrator's finding, on the basis of the record before me, it seems clear that Mr. Toth was not at all times within the presence of Mr. Reeseman.

Shearman McCormick and trainee mechanic Fowley did not testify in the hearings in these proceedings. Although Mr. Hayes testified, he apparently had no information concerning the circumstances surrounding the #32 telephone incident.

The arbitrator also found that while Ribel and Toothman were checking the phones on the section, no one else was there, and that the rest of the crew and Toth were in the dinner hole. This finding is contrary to the testimony before me. That testimony supports a conclusion that after the meeting in the dinner hole, Mr. Toth and Mr. Reeseman were on the section, and Mr. Hawkins confirmed that he too was there while Ribel and Toothman were checking the telephones.

Given the aforementioned findings and conclusions, I cannot accept the arbitrator's "inescapable conclusion" that the "clear and convincing circumstantial evidence" supports a conclusion that Mr. Ribel cut the telephone wire in question. While I conclude and find that the respondent has established through credible expert testimony that the wire

was cut, I cannot conclude that the respondent has established that Mr. Ribel is the guilty party. To the contrary, I conclude and find that at least one or more individuals (Toth, Hawkins, Reeseman) were on the section at the time of the incident in question, and that they had access to the telephone and had as much opportunity to cut the phone wire as did Mr. Ribel. In short, I reject the notion that strong circumstantial evidence points only to Mr. Ribel as the culprit, and I conclude that there is reasonable doubt as to his guilt.

Since I have concluded that the respondent has failed to establish that Mr. Ribel cut the telephone wire in question, the respondent's defense that Mr. Ribel was engaged in unprotected activity must necessarily fail. Further, since I have previously concluded that there was animus on the part of Mr. Hawkins and Mr. Toth towards Mr. Ribel because of his prior safety complaints, it is just as likely as not that Mr. Ribel's assertions that he "was set-up" has a ring of truth about it. Although it may be true that a strong circumstantial case may support a discharge of a miner for sabotaging company property, on the evidence and testimony before me I cannot conclude that the respondent has made out such a case. Under the circumstances, I conclude and find that respondent has not established any reason for Mr. Ribel's discharge, and that it has not rebutted Mr. Ribel's prima facie case.

In view of the foregoing findings and conclusions, I conclude that the respondent violated section 105(c)(1) when it discharged Mr. Ribel for purportedly damaging a longwall telephone. Accordingly, MSHA's complaint on behalf of Mr. Ribel IS SUSTAINED.

In compliance with a previously issued Order of Temporary Reinstatement, January 4, 1984, the respondent, with Mr. Ribel's concurrence, agreed to continue him on the payroll, with all employee benefits, without actually returning him to work, pending my adjudication of his discrimination complaint.

Although MSHA's initial complaints filed on behalf of the complainants in these proceedings requested an order assessing civil penalties against the respondent for its asserted violations of section 105(c) of the Act, I take note of the fact that the hearings in Mr. Ribel's case took place prior to the promulgation of the Commission's amended Rule 29 CFR 2700.42, which requires MSHA to follow certain procedures in seeking civil penalty assessments in cases of this kind, 49 Fed.Reg. 5751, February 15, 1984. I also take note of the fact that MSHA did not reassert its request for an assessment of any civil penalty in this case, and did not discuss the issue in its post-hearing submissions.

In view of the foregoing, I have no basis for assessing a civil penalty against the respondent at this time. However, MSHA is free to initiate a separate proceeding against the respondent in accordance with the applicable Commission rules.

ORDER

1. Respondent IS ORDERED to reinstate Mr. Ribel to his former or equivalent position at the mine in question, with all of his seniority rights and other benefits intact, at the current prevailing wages and fringe benefits.

2. Respondent IS ORDERED to pay Mr. Ribel all back pay, including any fringe benefits, during the time he was off the payroll, from the date of his discharge on August 5, 1983, to the date he was actually "economically reinstated" in compliance with the temporary reinstatement order of January 4, 1984, with interest computed in accordance with the Commission's decision and formula in Bailey v. Arkansas-Carbona Co. & Weller, 3 MSHC 1152 (Dec. 1983).

3. Respondent IS ORDERED to expunge any references to Mr. Ribel's discharge from its applicable personnel records concerning Mr. Ribel.

Full compliance with this Order is to be made within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge