CCASE:
UMWA v. ALGONQUIN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF JAMES W. GRIFFIN, WALTER LEE TRENT, RUFUS WORKMAN, GARY HARVEY, RONALD COLLINS, DONALD BELCHER, RONNY BLANKENSHIP, JIM EARLY, RONALD HARLEY, PAUL EPLIN, ROBERT D. WOODS, BARRY BROWN, JESSIE D. WHEELER, AND THURMAN GOODMAN, COMPLAINANTS	DISCRIMINATION PROCEEDING Docket No. WEVA 84-148-D MSHA Case No. HOPE CD 84-4 Jane Ann No. 31 Mine
v.	
ALGONQUIN COAL COMPANY, CHICKASAW, INC., POWELLTON COMPANY, AND HOWARD CLINE, JR., RESPONDENTS	

DECISION

Appearances: Earl R. Pfeffer, Esq., United Mine Workers of America, Washington, D.C., for Complainants; Daniel D. Dahill, Esq., W. Logan, West Virginia, for Respondents Algonquin Coal Company, Chickasaw, Inc., and Howard Cline, Jr., Charles Q. Gage, Esq., and Larry W. Blalock, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Respondent Powellton Company.

Before: Judge Steffey

Pursuant to an order issued September 11, 1984, a hearing in the above-entitled proceeding was held on October 30, 1984, in Logan, West Virginia, under sections 105(c)(3) and 105(d), 30 U.S.C. 815(c)(3) and 815(d), of the Federal Mine Safety and Health Act of 1977.

Counsel for complainants filed their initial brief on March 6, 1985, and counsel for respondent Powellton Company filed a reply brief on April 9, 1985. Counsel for respondents Algonquin Coal Company, Chickasaw, Inc., and Howard Cline, Jr., elected not to file a brief.

Issues

The parties' briefs raise the following issues:

(1) Did respondents Algonquin Coal Company, Chickasaw, Inc., and Howard Cline, Jr., (Cline) interfere with complainants' statutory rights, in violation of section 105(c)(1) of the Act, when Cline asked them to complain to the Mine Safety and Health Administration (MSHA) of the U.S. Department of Labor about the excessive number of inspections which were being conducted at the Jane Ann No. 31 Mine, considering that the request was associated with a statement that Cline could not continue to operate the mine unless there was a reduction in the number of inspections?

(2) Did Cline discriminate against complainants in violation of section 105(c)(1) of the Act when he laid complainants off on November 8, 1983, considering that all of the lay-off slips gave the reason for the lay-off to be "[c]an't make it due to so many mine inspections."

(3) Can the Powellton Company, as owner of the Jane Ann No. 31 Mine, be held liable for Cline's alleged discriminatory conduct?

Findings of Fact

The preponderance of the evidence and my evaluation of the witnesses' demeanor at the hearing support the following findings of fact.

1. The Jane Ann No. 31 Mine involved in this proceeding is owned by the Powellton Company which, in turn, is owned by a foreign corporation with offices in Lugano, Switzerland. Powellton's executive vice president, Burl Ellison Holbrook, testified on Powellton's behalf (Tr. 231-232). He stated that Powellton was actively engaged in producing coal until October 1981. Powellton ceased to produce coal because it had lost $2,500,000 in trying to operate its own mines. In October 1981, Powellton began to employ independent contractors to produce coal from Powellton's mines (Tr. 233-234).

2. Before Cline contracted to produce coal from the Jane Ann No. 31 Mine, three other companies had tried unsuccessfully to operate the mine. James Griffin, one of the complainants in this proceeding, testified that he had worked for all three of the unsuccessful operators. The first company, Ball Coal Company, started producing coal in February 1982 and quit in September 1982 because its operations were uneconomic (Tr. 49). The mine remained closed until November 15, 1982, when Miracle

Coal Company began operating it. Miracle also found it uneconomic to run the mine and discontinued producing coal in February 1983 (Tr. 51). The mine was reopened by Rite Way Coal Company in March 1983, but that company gave up for economic reasons in May 1983 (Tr. 52).

3. After three companies in a row had found it uneconomic to operate the No. 31 Mine, Powellton's top management gave Holbrook instructions to close the mine, but Cline had worked for Powellton as a mine foreman when Powellton itself was a coal producer (Tr. 176), and Holbrook urged his superior to permit Cline to reopen the mine under the name of Algonquin Coal Company because Cline had a good record when he was one of Powellton's foremen (Tr. 239). Cline had some apprehension about trying to operate the No. 31 Mine in light of the fact that three previous operators had found it uneconomic to do so. Cline, however, believed that he had an advantage over the other operators because he had supervised the panel of miners who had to be employed at the mine under the UMWA Wage Agreement and Cline believed that his previous successful relationship with the miners, who are the complainants in this proceeding, would enable him to produce a larger volume of coal than the other unsuccessful operators had been able to produce and that he would thereby succeed where the other operators had failed (Tr. 214).

4. Powellton is a signatory of the National Bituminous Coal Wage Agreement of 1981 (Exh. A) and requires all of the companies which operate its mines to employ miners from UMWA Local No. 8217. Since the same panel of miners must be used by any of the operators who try to mine coal from the No. 31 Mine, there was a change in top management when Ball, Miracle, and Rite Way, in turn, unsuccessfully tried to operate the mine, but the employees for all three operators were the same miners who constitute the complainants in this proceeding (Tr. 244). Since Powellton and all of its independent contractors are bound by the terms of the Wage Agreement, Powellton requires its operators to provide it with the number of hours worked by each miner so that Powellton can pay the proper amounts into UMWA's welfare funds. Powellton makes the payments and subtracts the payments from the price which it pays to its operators for clean coal. Powellton prefers to make the payments and then deduct the payments from the price it pays its operators for clean coal because UMWA charges 18 percent interest if the payments are late (Tr. 252). Powellton also requires all of its operators to maintain regular health and accident insurance for all their miners (Tr. 237). Powellton, however, stated that it does not interview applicants

for positions with its operators and does not control the operators' work force in any way as to hiring or discharging or disciplining them (Tr. 245).

5. Powellton provided Cline and its other operators with nearly all the mining equipment needed to produce coal, such as a continuous-mining machine, roof-bolting machine, ram cars, scoop, and conveyor belts and drives (Tr. 255). An amount of $1.50 per ton for rental of equipment was deducted from the price paid to the operators for clean coal delivered to its preparation plant. Cline, however, was required to pay for all spare parts and supplies, such as roof bolts, rock dust, and timbers. The operators had to pay for their own engineering, accounting, and respirable-dust services (Tr. 255-256). Cline additionally had to pay the cost of transporting coal from the No. 31 Mine to Powellton's preparation plant (Tr. 258). Cline bought liability insurance from Nationwide (Tr. 217) and stated that he paid a person named Larry Heatherman for taking respirable-dust samples (Tr. 218). As hereinafter explained in finding No. 16, Cline sold his interest in the No. 31 Mine to Chickasaw, Inc. That company also found it uneconomic to produce coal from the No. 31 Mine and ceased its operations while it still owed the complainants about 1 month's wages. All of the miners asked Powellton to pay the wages owed to them by Chickasaw. Powellton granted the request and paid the full amount owed by Chickasaw. Powellton is still carrying those payments on its books as receivables from Chickasaw. The reason Powellton paid complainants the wages owed by Chickasaw is that Powellton interprets Farley v. Zapata Coal Corp., 281 S.E.2d 238 (1981), to mean that the employees of an independent contractor, under Chapter 21, Article 5, Section 4, of the West Virginia Code, may obtain payment from the general contractor of any wages not paid by the independent contractor, including liquidated damages (Tr. 247-249). Powellton asserts, however, that its direct payment of wages to complainants for work performed for Chickasaw in the above-described circumstances should not be interpreted as an indication that it exercises any control over its independent contractors in the way they utilize their employees (Tr. 247).

6. Counsel for complainants presented five witnesses in support of their claim that Cline had discriminated against them in violation of section 105(c)(1) by asking them to complain to MSHA about the excessive number of inspections which were being conducted at the No. 31 Mine. Four of the witnesses were miners who had worked at the No. 31 Mine and the fifth witness was a UMWA international health and safety

representative who had recommended that the miners file with MSHA the complaint which is the subject of this proceeding (Tr. 137). The first witness was James Griffin who was unemployed at the time of the hearing, but who had worked for Cline as a ram-car operator from the time Cline began producing coal from the No. 31 Mine under the name of Algonquin Coal Company in June 1983 until November 8, 1983, when Cline ceased to operate the mine (Tr. 21-22; Exh. 9). Griffin was on the mine safety committee and generally accompanied the inspectors when they made their examinations of the mine (Tr. 22; 70; 207). Griffin stated that an MSHA inspector by the name of John Franco made an inspection at the last of October and the first of November during which he wrote about 25 citations (Tr. 23; Exh. 8). The miners came out of the mine on one occasion because of their concern that Cline had left them in the mine with no means of transportation out of the mine (Tr. 23). After the miners came out of the mine, Griffin stated that Cline told them to take the remainder of the day off with pay and go to the MSHA office and complain about Franco's writing an excessive number of citations. Griffin testified that he heard Cline say, "[i]f we can't get rid of this man, can't get rid of these inspectors, I'm going to have to shut down. I can't stand it" (Tr. 25). When it was subsequently pointed out to Griffin that his statement did not sound as if Cline had threatened him with discharge if he failed to complain about Franco's activities, he changed Cline's statement by testifying that Cline said "[i]f we can't get rid of this guy, we're going to have to shut down. You all have got to help us get rid of this fellow" (Tr. 90).

7. Griffin based his allegation of discrimination on the claim that Cline laid them off on November 8, 1983, then called nine of them back for 1 day's work on November 15, 1983, and called all of them back to work on December 5, 1983, at which time Cline introduced them to four men who operated the No. 31 Mine under the name of Chickasaw, Inc., up to May 2, 1984, when they were again laid off (Tr. 29). Although Griffin testified that Cline introduced them to four men named Aaron Bolan, Charles Halsey, Richard McDorman, and Dave Dickenson who operated the mine under the name of Chickasaw, Inc., he insisted that Cline was still the actual operator of the mine because he had signed job vacancy notices as Chickasaw's superintendent on December 5, 1983, calling them back to work in the No. 31 Mine (Tr. 27; Exh. 1). Griffin stated that Cline was there only on the first day the mine

began to operate under the name of Chickasaw, Inc., and that after the first day, the mine superintendent was Aaron Bolan (Tr. 65). Griffin began working on the night shift about 2 or 3 weeks after Chickasaw began operating the mine and Charles Halsey and Dave Dickenson were the supervisors on the night shift (Tr. 66-67). Griffin also stated that he was aware that Cline had tried to sell his rights to the No. 31 Mine to Homer Hopkins and Bud Smith (Tr. 46; 167). They were the two men who came to the mine with Cline on November 15, 1983, but they left soon after they came, and Cline did not operate the mine thereafter until he called the miners back to work on December 5, 1983, to work for Chickasaw, Inc. (Tr. 47).

8. The second witness presented by complainants' counsel was Ronald Blankenship who was unemployed at the time of the hearing, but who had worked for Cline as the operator of a roof-bolting machine until Cline laid him off on November 8, 1983, by giving him a lay-off slip that gave the reason for the lay-off to be that Cline could not "make it due to so many mine inspections" (Tr. 96; Exh. 9). Blankenship said that Cline had discriminated against them by telling them that they would either have to get rid of the inspectors or they would get laid off (Tr. 95). Blankenship believed that Cline was operating the mine after it resumed producing coal under the name of Chickasaw, Inc., because Cline was present at the mine on the first day and introduced them to three men named Dave Dickenson, Aaron Bolan, and Richard McDorman who said that they owned Chickasaw, Inc. (Tr. 98). Blankenship also stated that Cline offered him $50 to whip Inspector Franco, but he did not take the offer of $50 (Tr. 96). Blankenship additionally testified that he performed good work and that he had worked double shifts "about every day" (Tr. 94). He did not think he would have been asked to work double shifts unless he had been performing good work (Tr. 95). Blankenship's claim that he worked double shifts about every day is not supported by Exhibit 7 which shows that he worked 130 hours in July, 153 in August, 185.5 in September and 161 in October 1983. Each month has at least 20 single shifts, or 160 hours. In order for Blankenship to have worked double shifts "about every day," he would have had to have worked at least 250 or more hours per month. Blankenship conceded on cross-examination that Cline had told them that he "was going to have to shut down" if the miners did not produce more coal (Tr. 98).

9. The third witness presented by complainants' counsel was Paul Eplin who was unemployed at the time of the hearing but who had worked for Cline as a continuous-mining machine operator and roof bolter from July to November 1983 (Tr. 99-100). Eplin stated that he performed his job so well that Cline gave him a double-barreled shotgun as a reward (Tr. 101). After Inspector Franco began writing a lot of citations toward the end of October 1983, Eplin stated that Cline asked them to complain to MSHA about Franco's overzealous inspections (Tr. 102). Eplin called Congressman Rahall's office to complain about inspections and the person to whom he talked asked him if the violations cited by Franco existed. When Eplin replied in the affirmative, the congressman's representative stated that Franco was only doing his job. Eplin claims that he handed the telephone to Cline at that point in the conversation and left the office. Shortly afterwards, they were laid off and the lay-off slip gave as the reason "[c]an't make it due to so many mine inspections" (Tr.103).

10. Eplin testified that coal production declined in September and October as compared with the tonnage produced in July and August, but he said that the decline in production was caused by break downs of the continuous-mining machines and ram cars (Tr. 103-104). Eplin's statement that the ram cars broke down frequently is contrary to Griffin's testimony which indicates that the ram cars were dependable and that they seldom were out of service except for the purpose of getting their batteries charged (Tr. 63). Eplin stated that they produced all the coal they could on good days when the equipment did not break down, but he agreed that Cline told them he was going to have to shut down if they did not produce more coal than they did (Tr. 107; 112).

11. The fourth witness called by complainants' counsel was Robert Woods who worked for Cline as an electrician from June to November 1983. He repaired equipment which he described as being subject to "continuous breakdowns" (Tr. 113). In his opinion, more production time was lost as a result of breakdowns with the equipment than was lost from inspections (Tr. 114), but he also stated that "[u]sually when an inspector is there, you didn't get to do very much work" (Tr. 117). Woods had worked in coal mines for 20 years and he stated that there were more inspections at Cline's mine than at other mines where he has worked (Tr. 118). Woods said that Cline had complained about lack of production

from the first month he operated the mine until the day he ceased to operate it and that Cline additionally complained about a lot of inspections (Tr. 116). Woods stated that Cline did not ask him personally to complain about the large number of inspections being made at the mine, but that he was present on one occasion when Cline asked a group of the miners to complain. At that time he advised Cline not to make complaints to MSHA because it would do no good and might cause MSHA to order even more inspections than were already being conducted (Tr. 120).

12. Woods had a practice of marking on a calendar each day (1) the hours he worked, (2) the cuts of coal made by the continuous-mining machine, and (3) the breakdowns of equipment if 2 hours or more were required for repairs to be made (Tr. 118). A copy of Woods' calendar for the months of September, October, and November 1983 was introduced as Exhibit 12 (Tr. 151). Woods stated that a cut of coal amounted roughly to 40 tons and that he had compared his figures with the actual production information kept by Cline and that his cuts of coal were close to actual production (Tr. 149). Examination of Woods' calendar shows that he either exaggerated the number of times that the equipment broke down or failed to write on the calendar the times when breakdowns occurred, because his calendar shows only one breakdown of the continuous-mining machine for the entire month of September and that breakdown occurred on a Saturday when no coal was produced (Exh. 12). During the month of October, Woods showed one breakdown of the continuous-mining machine on October 4 and another one on October 12. Despite the breakdowns on those days, Woods indicated that five cuts or 200 tons of coal were produced on October 4 and 6 cuts or 240 tons of coal were produced on October 12. Woods shows one breakdown of the continuous-mining machine during the month of November, but the mine produced very little coal that month and was closed on November 8, 1983. One or two breakdowns of equipment each month does not support Woods' claim that constant breakdowns of equipment were responsible for the miners' failure to produce enough coal to make it profitable to operate the No. 31 Mine.

13. On the other hand, Woods' calendar is remarkably close in indicating the actual raw coal production of the mine. If one multiplies the number of cuts of coal shown on the calendar for each day's production by 40 tons, the result totals 3,820 tons of raw coal for the month of September and 3,938 tons of coal for the month of October. The actual tons of raw coal shown in Exhibit 14 for the

months of September and October are 3,685 and 3,887, respectively. Therefore, Woods' estimates of the raw coal produced for the months of September and October were only 135 and 51 tons, respectively, larger than the actual production for those two months. The fact that Woods was as accurate as he was in estimating production leads me to conclude that his calendar was also accurate in indicating the number of major breakdowns of equipment. In any event, the entries in his calendar do not support his claim that equipment breakdowns were primarily responsible for the No. 31 Mine's history of low coal production.

14. The fifth and final witness presented by counsel for complainants was Richard Cooper who is employed by UMWA as an international health and safety representative whose main duties are prevention of mine accidents and illnesses and assisting miners in exercising their rights under the Act (Tr. 135-136). Cooper testified that two of the complainants in this proceeding (Griffin and Trent) came to his office in December 1983 and told him that they had been discharged because they refused "to get rid of a federal inspector at the mine" (Tr. 137). Cooper was convinced that they had grounds for filing a complaint under section 105(c) of the Act and suggested that they do so. They filed a complaint that same day with MSHA (Tr. 137). The complaint is signed by the same 14 miners who brought the complaint involved in this proceeding (Exh. 5).

15. Finding Nos. 2 through 5 above provide some of the facts pertaining to Cline's operation of the Jane Ann No. 31 Mine, but Cline supplied additional facts when he testified in support of his defense to the complainants' charge that he violated section 105(c)(1) of the Act when he allegedly laid them off on November 8, 1983, for their failure to complain to MSHA about the excessive number of inspections which were being made at the No. 31 Mine. It was not apparent from the questions asked by Cline's attorney that any effort had been made to provide Cline with a defense in terms of the Commission's discrimination decisions. Therefore, Cline's defense rests on his claim that he laid the complainants off on November 8, 1983, solely for the economic reason that he had already lost $71,000 from trying to operate the No. 31 Mine at the time he laid the complainants off and that he simply could not continue to operate at a loss (Tr. 174). Cline stated that his loss of $71,000 had been reduced to $41,000 by virtue of the fact that two men named Homer Hopkins and Bud Smith offered him $50,000 for transferring his interest in the No. 31 Mine to them (Tr. 167). They paid him $30,000

down and left after trying to operate the mine for 2 hours. Cline stated that they preferred to lose the $30,000 down payment rather than try to operate the mine with the "radical" crew of miners who had to be used under Cline's contract with Powellton (Tr. 210). Cline defined the word "radical" to be that the miners are strictly union in their attitude and want to be "the head honcho. If it don't go their way, it don't go. Management don't have no control" (Tr. 211). Witness Griffin disagreed with Cline's explanation as to the reason Hopkins and Smith left the mine. In his opinion, they refused to take over the mine because it was in poor condition (Tr. 27).

16. After Cline had failed to sell his interest in the No. 31 Mine to Hopkins and Smith, the four men previously referred to in finding No. 7 (Aaron Bolan, Richard McDorman, Dave Dickenson, and Charles Halsey) offered Cline $15,000 for his interest in the mine provided he would (1) form a new corporation, (2) obtain a new contract with Powellton providing for them to operate the mine in the name of the newly formed corporation, (3) introduce them to the complainants in this proceeding who would necessarily be the miners they would have to use in operating the mine, (4) provide the necessary notification to MSHA of the change in operators, and (5) transfer all the stock in the newly formed corporation to them (Tr. 169-172). An agreement signed on December 2, 1983, by Cline, Bolan, and McDorman, provides for Cline to be paid $5,000 in cash at the time the agreement was executed and for Boland and McDorman to pay Cline $1.75 for each ton of clean coal sold to Powellton. The stated purpose of the payment of $15,000 was to purchase Cline's interest in a continuous-mining machine which Cline had obtained with his own funds for use at the No. 31 Mine (Exh. 13). Under the agreement, if Bolan and McDorman failed to pay the remaining amount of $10,000, the continuous-mining machine would continue to belong to Cline.

17. Cline's testimony shows that some aspects of the agreement were subsequently changed. The payment of $1.75 per ton was assigned to Bolan and McDorman in return for their paying off some funds advanced to Cline by Powellton (Tr. 171). Cline claimed that Bolan and McDorman never did pay the remaining $10,000 which they owed him and that he did not know their whereabouts but would like to find them in order to collect the $10,000 which they still owe him (Tr. 173). Unless the terms of the agreement described above were changed in a way not explained by Cline, he is not entitled to the remaining $10,000 because the agreement

clearly specified that if they failed to pay the remaining amount of $10,000, all interest in the continuous-mining machine on which Cline had made a down payment would revert to Cline (Exh. 13). Since Cline testified that he gave the continuous-mining machine back "to the guy" he bought it from (Tr. 193), he received full title in the continuous-mining machine when Boland and McDorman failed to pay the remaining $10,000, and Bolan and McDorman do not owe Cline anything under the terms of the agreement which is Exhibit 13 in this proceeding.

18. Cline attributed 80 percent of his inability to operate the No. 31 Mine economically to the work force he was required to use under his contract with Powellton and 20 percent to interruption in production caused by MSHA inspections (Tr. 177; 192). Cline said that MSHA inspectors normally talk to all the miners for 30 minutes and then they ask for the safety committeeman to accompany them on their inspections. They may thereafter spend 2 hours in the mine office before they go underground and Cline has to allow the mine committeeman to spend that same amount of time doing nothing (Tr. 178-179). Cline said that Griffin accompanied the inspectors 95 percent of the time and that meant that Griffin's ram car was idle all the time the inspector was present at the mine (Tr. 180). Cline conceded that there were three ram cars and three ram car operators, but he said that he did not hire the third ram-car operator purely as a replacement for persons who were absent on a given day. Cline claimed that he could use three ram cars 90 percent of the time and that production necessarily suffered when Griffin was with an inspector instead of operating his ram car (Tr. 207). Cline's statement that he was able to use three ram cars 90 percent of the time might be somewhat inconsistent with his claim that the miners did not produce much coal, if it were not for the fact that when a continuous-mining machine is operating, it is efficient to have enough rams cars also operating to enable coal to be taken without delay from the continuous-mining machine. Since long hauling distances were involved, use of three ram cars reduced the intervals between round trips from the face to the dumping point (Tr. 147). Of course, the miners' testimony was inconsistent about the availability of ram cars because Eplin stated that the ram cars broke down frequently, while Griffin said that the ram cars were dependable and seldom were out of service except for the purpose of getting their batteries charged (Tr. 63; 103-104).

19. Cline's statement that production of coal suffered when MSHA inspectors were at the mine is supported by the

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record. Exhibits 7 and 8 show the days on which inspectors were at the mine and Exhibit 14 shows the number of tons of clean coal delivered to the preparation plant on those days, as follows:

Inspections	Inspector's Name	Clean Coal (Tons)
June 15	Hinchman	The first 3 weeks of Cline's
June 15	Oliver	operations were devoted to
June 20	Hinchman	cleaning up a roof fall and
June 22	Uhl	preparing the mine for produc-
June 23	Uhl	tion; therefore, no coal was
June 28	Uhl	produced (Tr. 56).
July 11	Franco	184
July 26	Oliver	226
September 20	Oliver	65
September 21	Oliver	63
September 21	Summers	
September 22	Oliver	109
September 22	Summers	
September 23	Summers	121
October 4	Franco	154
October 7	Toler	90
October 12	Toler	121
October 13	Toler	66
October 14	Toler	253
October 20	Summers	143
October 24	Summers	103
October 26	Franco	189
October 27	Franco	2
October 28	Franco	102
November 1	Franco	62
November 2	Franco	9
November 3	Franco	30
November 4	Summers	0
		2,092

2,092 tons / 20 inspection days = 104.6 tons per inspection day.

Exhibit 7 shows the actual number of hours for which Cline paid the 14 complainants during the months of July, August, September, and October. He paid them for 1,851.5 hours in July, 2,201.75 hours in August, 2,640.25 hours in September, and 2,397.50 hours in October. If one divides the hours worked by 14 and then by 8, the result will be the number of days on which Cline paid the miners for producing the tons of clean coal delivered at Powellton's preparation plant, as indicated in Exhibit 14. The average daily production is shown in the tabulation below:

July: 3,133.34 tons / 16.5 days = 189.9 tons average daily production.
Aug.: 3,424.60 tons / 19.5 days = 175.6 tons average daily production.
Sep.: 2,872.89 tons / 23.5 days = 122.3 tons average daily production.
Oct.: 3,023.95 tons / 21.4 days = 141.3 tons average daily production.

Total for 4 months: 629.1 / 4 = 157.3 tons average daily production.

The above calculations show that Cline produced a daily average of 157 tons of clean coal, but his average daily production when inspectors were at the mine amounted to only 105 tons per day.

20. The preponderance of the evidence also supports Cline's statement that he lost in the neighborhood of $71,000 as a result of operating the No. 31 Mine from July to November 8, 1983 (Tr. 174). The loss was reduced to $41,000, of course, by the payment of $30,000 to Cline by Hopkins and Smith when those two men undertook to take over the mine on November 15, 1983, and then changed their mind after operating the mine for only 2 hours (Tr. 167-168; 213; 227). There is attached to the end of this decision an Appendix A in which I show by use of uncontroverted facts in the record that Cline lost a total of at least $62,235 for the period from July to November 1983 as a result of his unsuccessful operation of the No. 31 Mine. Cline made no effort whatsoever to prove his losses and if counsel for complainants had not introduced Exhibit 7 containing the number of hours worked by the miners at the No. 31 Mine and the amounts charged by Powellton for services rendered to Cline, it would not have been possible to find in the record any corroborating support for Cline's claim that he lost $71,000. While my calculations in Appendix A do not prove losses greater than $62,235, I am confident that his losses were greater than the amount shown in Appendix A because the record does not reflect for certain the salaries Cline paid to his foremen or all of the fees he paid for engineering, respirable-dust, and accounting services, or the premiums he paid for $1,000,000 of liability insurance, or the amount he paid for having coal transported to the preparation plant, among other things.

21. The statement (Tr. 29) by witness Griffin that, so far as he knew, Cline had not abated any of the 24 violations cited by Inspector Franco when the miners were recalled to work for

Chickasaw, is not supported by the record. Exhibit 8 in this proceeding was introduced by complainants' attorney and that exhibit shows that 17 of the alleged violations were abated by Cline by November 3, 1983, or within 1 or 2 days after they were cited. The remaining seven violations were abated by Chickasaw after the inspector had granted extensions of time within which to abate the alleged violations. The extensions stated that "The operating officials of this mine have recently changed, therefore additional time is needed." Moreover, the extensions of time were served on Aaron Bolan as superintendent of Chickasaw. Consequently, the inspector knew that Cline was not acting as Chickasaw's superintendent at the time he issued extensions of time on December 15, 1983, with respect to Citation Nos. 2145371, 2273564, 2273571, and 2273570. It should also be noted that Inspector Franco issued Safeguard Notices 2145372 and 2273508 on October 27 and November 1, 1983, respectively. Therefore, Cline was cited during Franco's quarterly (or AAA) inspection for 24 actual violations and was advised that his mine would henceforth be required to comply with sections 75.1403-6(b)(3) and 75.1403-10(i). Neither of the safeguard notices was considered by the inspector to be "significant and substantial." (FOOTNOTE.1) Ten of the 24 citations were not considered to be significant and substantial (Exh. 8).

CONSIDERATION OF PARTIES' ARGUMENTS

Complainants' Procedural Contentions

Refusal of Cline's Counsel To Answer Complainants' Interrogatories

Complainants' brief (pp. 20-21) notes that Cline's defense in this proceeding is that the miners were nonproductive, that he was losing money, and that Federal inspections made it unprofitable for him to stay in business. As my finding Nos. 19

and 20 above indicate, Cline's defense is supported by the preponderance of the evidence. Complainants, however, argue that I should not give consideration to any of Cline's testimony because his counsel failed to respond to complainants' interrogatories and, for that reason, complainants were subject to an element of surprise at the hearing and were deprived of an opportunity to prepare rebuttal to Cline's testimony.

I must, at the outset of my consideration of complainants' arguments, reject any claim by complainants that "they were deprived of an opportunity to prepare rebuttal to Cline's testimony" (Br., p. 21). The following excerpt from the transcript shows that I did not deprive complainants of any opportunity to present rebuttal evidence (Tr. 267):

> MR. GAGE: The Powellton Company has no further witnesses.
>
> JUDGE STEFFEY: Have you any rebuttal, Mr. Pfeffer?
>
> MR. PFEFFER: No, I do not. We'll rest on the testimony.

Complainants did not advise me at the hearing that they were going to "rest on the testimony" of all the witnesses except Cline and they did not file a motion after the hearing requesting that they be given an opportunity to present rebuttal testimony. It is manifestly improper for them to file a brief more than 4 months after the hearing was held and argue that they "were deprived of an opportunity to prepare rebuttal to Cline's testimony."

Complainants' brief (p. 22) further argues that "it would have been proper for the ALJ to preclude the offending parties from offering proof at the hearing" because of the failure of Cline's counsel to answer complainants' interrogatories. They also argue that it would be appropriate for the judge to grant them relief pursuant to Rule 37 of the Federal Rules of Civil Procedure. While Rule 37 provides for imposition of various sanctions when a party fails to reply to interrogatories, those sanctions have to be applied in light of the factual situation which exists in any given case. I gave consideration to holding Cline in default in this proceeding, but complainants rendered that course of action unproductive by joining Powellton as a party respondent. If I had held Cline in default for failure to answer complainants' interrogatories, I would still

have had to deal with the fact that complainants have at no time receded from their claim that Powellton, as the owner of the No. 31 Mine, is liable for Cline's acts as an independent contractor who operated the No. 31 Mine.

Since Powellton's counsel have acted in an exemplary fashion in this proceeding by replying to complainants' interrogatories and by answering all of their many motions, there is no way that Powellton could be defaulted. If I had defaulted Cline, complainants would still have had to proceed against Powellton, and their burden of proof would in no way have been diminished if I had held Cline to be in default. Moreover, Powellton would have had a right to a hearing and would have had a right to call Cline as a witness in its own defense. If Powellton had called Cline as a witness, I would have had to have allowed him to testify and Powellton would have had a right to have relied upon his testimony in exercising its own defense.

An additional reason for denying complainants' request that I either default Cline or ignore his testimony, is that complainants inadvertently proved the validity of Cline's defense by introducing as a part of their direct case some materials obtained from MSHA under the Freedom of Information Act (Tr. 120-134). I am aware of no procedural rule which requires a judge to ignore evidence presented by one party in support of its case if that same evidence also happens to prove the other party's case, particularly if the party introducing the damaging evidence states in support of its admission that it is being offered because it "can help in the determination of the merits of the parties" (Tr. 125). The point is that even if I were to ignore all of Cline's testimony, as complainants request, the evidence they obtained from MSHA pertaining to MSHA's investigation of complainants' allegations in this proceeding would, nevertheless, prove all of Cline's defenses, that is, that he could not produce enough coal to make it profitable to operate the No. 31 Mine and that MSHA's inspections, irrespective of any salutary benefits they may have had, did have the effect of reducing the amount of coal produced at his mine (Finding Nos. 19 and 20 above).

For the reasons given above, there is no merit whatsoever to complainants' arguments that I should decline to give any weight to Cline's testimony in this proceeding.

The Quality of Cline's Legal Representation

There is merit to complainants' contentions about the unresponsive way that Mr. Dahill represented Cline in this proceeding. My procedural orders in this case show that Mr. Dahill initially refused to accept certified mail until I finally had him served by a United States Marshal. Thereafter, he did sign return receipts showing that he had received orders, but, aside from the answer originally filed in this proceeding, Mr. Dahill neved did submit any subsequent pleadings showing that he had even read the orders which I mailed to him.

Mr. Dahill's failure to respond to any of my orders caused me to be somewhat surprised when he actually appeared at the hearing. The reason he gave at the hearing for failing to reply to complainants' interrogatories was that he believes the complaint in this case is "ludicrous" because it was filed by men who would not work hard enough to make the mine profitable and who were paid for every minute of work they did do (Tr. 15;18). Mr. Dahill also described an emotional problem associated with the death of his mother (Tr. 18) and also explained that he was representing a client in Austria which has required him to travel extensively (Tr. 19).

The reasons given by Mr. Dahill for his inaction do not justify his failure to fulfill his obligations as an attorney. As I pointed out at the hearing, we have to take all complaints very seriously (Tr. 20) and he should not have let his personal opinion as to the merits of the complaint or his obligations to another client, cause him to neglect Cline's interest in this proceeding by failing to reply to complainants' interrogatories and by failing to state a position with respect to complainants' motion to add Cline as an individual respondent. In the future, I hope that Mr. Dahill will decline to represent clients in our proceedings unless he is certain that he will have the time to perform all of the duties which are associated with signing his name as an attorney at the bottom of an answer or other pleading.

Complainants' Brief Misstates the Facts

The "Facts" given on pages one through five of complainants' brief are not supported by the preponderance of the evidence. The first egregious errors are on pages 2 and 16 of complainants' brief where it is stated that Cline's average daily production of clean coal for the months of July and August amounted to

208.89 and 214.04 tons, respectively. The figure of 208.89 was derived by dividing the total clean coal tonnage of 3,133.34 for July, as given in Exhibit 14, by 15 producing days. Complainants used "15" producing days despite the fact that counsel for both Powellton and Cline had pointed out during the hearing that the days shown on Exhibit 14 for deliveries of coal to Powellton's preparation plant may not be equated with actual working days at Cline's No. 31 Mine (Tr. 202-205).

The only reason that complainants refer to Cline's average daily production is for the purpose of arguing that his operation of the No. 31 Mine was profitable. Cline had to pay the miners for each hour worked, but only received reimbursement for each ton of clean coal delivered to the preparation plant. Therefore, it is manifestly misleading to compute average daily production by dividing the total clean coal production by days of deliveries of coal at the plant, rather than by the number of days on which Cline paid his miners to produce that coal.

As shown in finding No. 19 above, Cline's average daily production of clean coal was 189.9 tons for July and 175.6 tons for August. Cline averaged 157 tons of clean coal for the four months of July, August, September, and October. At no time did he produce a daily average of 208.89 tons of clean coal as alleged by complainants on page 2 of their brief. Powellton's brief (p. 5) appropriately calls attention to the errors in complainants' calculation of Cline's average daily production of clean coal and also arrives at an average daily production of 157 tons of clean coal for the months of July through October. Powellton's calculations for the individual months are different from the ones I have given in finding No. 19 because Powellton did not use the actual hours the miners worked for the 4 months involved.

The second paragraph on page 2 of complainants' brief claims that Cline was pleased with the miners' work despite the fact that Cline testified that the primary reason that he could not operate the No. 31 Mine profitably was the failure of the miners to perform their jobs as they should have (Tr. 175-177; 183). Cline specifically stated that he could not consider opening another coal mine in West Virginia, but that he might try to open one in Virginia or Kentucky. When it was pointed out to Cline that mines in Virginia and Kentucky would be subject to MSHA inspections, about which he also complained, just as they are in West Virginia, he stated, "I know, but they don't have the labor. They have non-union. The men [in Virginia and Kentucky] will go out and work, put in a day's work for a day's pay" (Tr. 122).

The third paragraph on page 2 of complainants' brief claims that Cline's production demands could not be met by the miners because of equipment breakdowns. As I have shown in finding No. 12 above, the miners' reliance on equipment breakdowns to explain Cline's low production is not supported by the record to the extent that there is any specific information available to show the days on which equipment was actually broken down. As also noted in finding No. 10 above, the miners themselves were not consistent in stating which types of equipment were breaking down.

It is true, as complainants state on page 3 of their brief, that Cline complained about the large number of inspections being conducted at the No. 31 Mine, but it is also true, as shown in finding No. 19 above, that MSHA did conduct a lot of inspections at Cline's mine and it is a fact that Cline's average daily production did decline considerably on the days when the mine was being inspected. Complainants allege on page 3 of their brief that Cline did not want to spend time and resources abating violations, but it is a fact, as shown in finding No. 21 above, that Cline did abate the vast majority of the alleged violations within 1 or 2 days after they were cited and within the time given by the inspector for abatement.

Complainants allege facts on page 4 of their brief about Cline's being the owner of Chickasaw, Inc., just as if the record does not contain testimony and exhibits which show the facts to be exactly to the contrary, as I have pointed out in finding Nos. 7, 16, 17, and 21 above.

Powellton's Counterstatement of Facts

Powellton's brief (pp. 3-8) contains a relatively full statement of the facts which is slightly biased in Cline's favor, as one might expect, but which is accurate in that the counterstatement is supported by the references given to the record and which acknowledges the inconsistencies between some of Cline's statements and those of complainants.

Howard Cline, Jr., Is Properly Named as a Respondent

When the complaint in this proceeding was first filed, it did not name Howard Cline, Jr., as a respondent. Thereafter, I permitted complainants to amend the complaint to name Howard Cline, Jr., as a respondent because section 105(c)(1) of the Act provides that "[n]o person shall discharge or in any manner discriminate against or cause to be

discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner" and section 3(f) of the Act states that a " "person' means any individual, partnership, association, corporation, firm, subsidiary of a corporation; or other organization." Cline admittedly formed both Algonquin Coal Company and Chickasaw, Inc., and acted as president of both companies when they were initially formed. Although Cline transferred all the stock in Chickasaw, Inc., to four men immediately after that corporation was formed, he still owns the admittedly defunct Algonquin Coal Company. Additionally, he personally made all the discriminatory statements and took all the discriminatory action which is alleged by complainants in this proceeding.

Section 105(c)(3) provides that "[v]iolations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(c)." In other words, if a person is found to have violated section 105(c)(1) of the Act, he is subject to the civil penalty provisions of the Act. Section 110(a) provides that "[t]he operator of a coal or other mine * * * shall be assessed a civil penalty" for any violation of the Act. Section 3(d) states that " "operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

Since Cline was operating, leasing, and controlling a coal mine and was, according to Powellton, an independent contractor, he is clearly a "person" within the meaning of section 105(c)(1) who may be held accountable for his actions with respect to the complainants who were the miners employed by him at the No. 31 Mine.

I declined to make Cline an individual respondent in this proceeding until after his counsel had signed a return receipt showing that he had received an order indicating that there was a motion before me to name Cline as an individual respondent. As I have previously indicated above, Cline's attorney did not oppose the grant of that motion or object in any way to the naming of Cline as an individual respondent in this proceeding.

According to Cline, Algonquin has no assets and Cline stated that he would pay anyone $500 just to assume the liabilities still owed by Algonquin (Tr. 196). Cline, of course, never acted as the apparent owner of Chickasaw, Inc.,

for more than a few days (Tr. 170). Consequently, for all practical purposes, the discrimination complaint in this proceeding is against Howard Cline. For that reason, I have referred only to Cline in most instances throughout this decision because, if my decision is reversed by the Commission, complainants' only hope of receiving an award of back pay will be dependent upon the ability of Cline to pay the amount they seek. Cline testified that he has no money and could not even pay a civil penalty of $1,000 if that much were to be assessed (Tr. 228). On the other hand, Powellton's witness stated that Cline owned a supply company (Tr. 238). I have rarely found a respondent in a civil penalty case to be unable to pay civil penalties in the absence of presentation of documentary proof in the form of Federal tax returns and other evidence, such as, profit and loss statements. Therefore, I cannot find on the basis of Cline's allegations of inability to pay penalties that he is personally unable to pay civil penalties or back pay if that should happen to be the ultimate result, on appeal, of the filing of the complaint in this proceeding.

Complainants' Contention that Howard Cline Violated Section 105(c)(1) by Asking Complainants To Complain to MSHA About Excessive Inspection Activity

Complainants argue in two steps that Cline violated section 105(c)(1) of the Act. Their brief (pp. 7-11) first contends that Cline violated section 105(c)(1) by interfering with the miners' right to have the No. 31 Mine inspected when Cline asked them to complain to MSHA about the excessive number of inspections which Cline believed MSHA was making at his mine. Their brief (pp. 11-15) then argues that Cline violated section 105(c)(1) by laying the miners off for 1 month because they did not comply with Cline's request that they complain to MSHA about the excessive number of inspections which Cline believed were being made at his mine. I shall first consider whether merely asking miners to complain to MSHA about what is believed to be excessive inspection activity is a violation of section 105(c)(1).(FOOTNOTE.2)

The Commission has routinely set forth in each of its discrimination decisions the principles which should be used in determining whether a discrimination complaint should be granted. In Jack E. Gravely v. Ranger Fuel Corp., 6 FMSHRC 799, 802 (1984), the Commission stated those principles as follows:

> Under the analytical guidelines we established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir.1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., --- U.S. ----, 76 L.Ed 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983) (specifically approving the Commission's Pasula-Robinette test).

Complainants' first argument (Br. 7-11) is that when Cline asked the miners to make an effort to stop MSHA's enforcement action by stating that "[i]f we can't get rid of this man, can't get rid of these inspectors, I'm going to have to shut down. I can't stand it" (Tr. 25), he necessarily violated section 105(c)(1) because he was asking the miners to give up their right to have the mine inspected on a regular basis and he was giving them a message that if they failed to stop the inspections, they would be out of a job. Complainants conclude their first argument in the following words (Br. 11):

> If the Commission does not declare that this "subtle" threat is a violation of the Act, it will be an invitation to all coal operators, especially the small subcontractors, to let their employees know that their insistence upon MSHA inspections may result in layoffs. The chilling effect of this message, particularly with respect to section 103(g) actions, could have a devastating impact on the ability of the Agency to enforce the Act. Thus, even if an operator has a legitimate business reason for shutting down operations, he may not, in any fashion, suggest to his employees that MSHA leniency and non-enforcement could preserve their jobs. In these unfortunate economic times, such threats could frequently lead to an abandonment of the principles and objectives of the Act. Consequently, the Commission should not tolerate them.

Complainants' counsel conceded at the hearing that he had brought "a novel action" (Tr. 160) and his brief shows that to be the case because he does not refer to a single Commission decision in support of his claim that Cline violated section 105(c)(1) of the Act when he asked his employees to complain to MSHA about the excessive number of inspections which Cline believed were being made at his mine. The first requirement of the two-pronged discriminatory test which I have quoted above from the Commission's Gravely case is that a finding must be made that miners have "engaged in protected activity." The only protected activity in which complainants claim to have engaged is their refusal to complain to MSHA about the excessive inspection activity which Cline believed was being conducted at his mine. Since section 105(c)(1) prohibits any "person" from interfering with a miner's "exercise of * * * statutory rights * * * afforded by" the

Act, complainants contend that Cline interfered with the exercise of their statutory rights in violation of section 105(c)(1) by asking them to complain about the inspections which are guaranteed to them by section 103(a) of the Act.

While section 103(a) provides a statutory right to "frequent inspections" of coal mines, Cline believed that MSHA's inspection activity at his mine far exceeded the number of inspections which are guaranteed by section 103(a). Finding No. 19 above shows the dates on which MSHA inspectors were present at Cline's mine. The inspectors were there for 6 days in June, 2 days in July, no days in August, 6 days in September, 10 days in October, and the first 4 days of November prior to the closing of the mine on November 8, 1983.

Exhibit 8 shows that Inspector Franco wrote a total of 24 citations and two safeguard notices on October 26, 27, and 28 and November 1, 2, and 3, 1983, during a quarterly, or "AAA," inspection. Those citations alleged that Cline had failed to: (1) provide an operative panic bar on a tractor, (2) anchor in a proper manner a railroad switch on the surface, (3) place a lifting jack on a personnel carrier, (4) make the miners wear the self-rescuers which Cline had provided for them, (5) insulate a splice in a telephone wire on the surface, (6) provide a derail device at the end of the track on the surface, (7) repair a hole in the fence surrounding a transformer located on the surface, (8) show that he had the mine rescue capability required by section 49.1, (9) provide a fitting where a cable entered the frame of a welding machine on the surface, (10) guard an opening in the deck of a scoop, (11) countersign the preshift books, (12) provide an adequate check-in and -out system, (13) provide an operative brake for the roof-bolting machine, (14) correct a sloughing condition around some previously installed roof bolts, (15) hang a trailing cable where it could not be run over by mobile equipment, (16) correct a defective parking brake on a tractor, (17) maintain a guard on the conveyor belt drive in proper position, (18) keep the doors on the power center closed and in good repair, (19) provide proper amount of first-aid equipment, (20) store first-aid equipment in proper containers, (21) remove grease and coal which had accumulated on the continuous-mining machine up to 3/4 of 1 inch in depth, (22) show on the mine map the most recent places mined, (23) show on mine map the places which Cline expected to mine in the future, and (24) mark the intake airway properly.

Cline abated 17 of the above-described violations on or before November 3, 1983, and the inspector did not return to the mine until November 8, 1983, at which time he found that Cline had closed the mine. The inspector extended the time for correcting the remaining alleged violations and those were necessarily abated by the four men who owned Chickasaw (Exh. 8). Therefore, the allegation in complainants' brief (p. 13) that Cline resumed operating the mine under the name of Chickasaw, Inc., "without correcting any of the violations which had been cited by Mr. Franco" [Emphasis in original], is not supported by Exhibit 8 which clearly shows that Cline had abated 17 of the 24 alleged violations by November 3, 1983, which was 1 month prior to the time when the mine was reopened under the name of Chickasaw, Inc. Complainants introduced Exhibit 8 and it is disturbing to have a brief filed before me which makes allegations which their own exhibit shows to be untrue.

Examination of the above-described violations cited by Inspector Franco in October and November shows that they range from nonserious to moderately serious and, as indicated in finding No. 21 above, the inspector rated 10 of the alleged violations as not being significant and substantial. Although Inspector Franco did not inspect the mine on November 4, another inspector was at the mine on that day. The only day when Cline's mine was not inspected between October 26 and November 4 was October 31. During those 7 working days, Cline's average daily production of clean coal averaged only 56.2 tons of coal (Finding No. 19 above). It was during that period of time that Cline requested the complainants to complain to MSHA about the excessive inspections which he believed were occurring at his mine (Tr. 102). Cline had been working in mines as a section foreman prior to the time that he opened his own mine and was familiar with the types of inspections which are normally made by MSHA (Tr. 176; 238).

His testimony shows that he believed that Inspector Franco was jealous of the fact that Cline, who is a relatively young man, was operating a mine because Inspector Franco had told Cline that he had tried to operate a mine before becoming an inspector and had failed to be successful at it. Cline, therefore, sincerely believed that Inspector Franco was "harassing" him by writing the 24 citations which are described

above. I have had many civil penalty cases assigned to me in which relatively nonserious violations were alleged of the same types which were cited by Inspector Franco in October and November and I cannot find on the basis of the record in this proceeding that Inspector Franco was harassing Cline or deliberately trying to force him out of business, but the record does show that Cline's mine was subjected to a large number of inspections during October and the first week of November and the evidence certainly shows why Cline believed that MSHA was deliberately harassing him by sending as many inspectors to his mine as it did during the months of October and November (Finding No. 19 above).

The discussion above of the facts in the record show that if complainants engaged in any protected activity, it would have to be a refusal by them to complain about the excessive inspections which Cline believed were being made at his mine. Two of the four complainants who testified in this case, however, do not claim to have engaged in that protected activity because Eplin stated that he had called Congressman Rahall's office to find out "why we're getting so many inspectors" (Tr. 102). Therefore, Eplin can hardly claim that he exercised his right to have the mine inspected frequently because he made a call to his congressman to protest the inspections. Witness Woods stated that Cline had not directly asked him to run off the inspectors, but that he had been present one day when Cline said to a group of miners "[b]oys, why don't you take the rest of the day off and go down and complain about the mine inspector?" Woods testified that he told Cline "[i]t wouldn't do any good * * * if you did that, they'd just bring more up" (Tr. 119-120).

Woods also testified that he had worked as a miner for 20 years and that there were more inspections at Cline's mine than there were at other mines where he has worked (Tr. 118). Consequently, it appears that both Woods and Eplin agreed with Cline that there had been a greater than normal number of inspections at Cline's mine. While it is undoubtedly correct, as complainants allege, that they are entitled to have frequent inspections of the mine made by MSHA, there is nothing in the record to show that Cline objected to normal MSHA inspection activity. His request that the miners help him obtain some relief to the inspections was made only after the frequency of the inspections had reached what he termed to be deliberate harassment (Tr. 220).

It is also difficult to find that an operator is precluded by section 105(c)(1) of the Act from complaining about what he sincerely believes to be excessive inspections and harassment by MSHA inspectors. As indicated in finding No. 18 above, Cline believed that his inability to operate the mine economically was 80 percent the result of complainants' failure to put in a day's work for a day's pay (Tr. 221) and 20 percent the result of excessive inspections by MSHA. Section 105(d) of the Act gives an operator the right "to contest" the issuance of citations and orders and the proposed assessment of civil penalties. Clearly, Cline could have stated to the miners that he was going to file notices of contest to the citations issued by Inspector Franco and that if his protests did not bring about a decrease in the frequency of inspections, he was going to close the mine because he could not have production interrupted to the extent that the inspector's mine examinations were causing. Yet there would be a clear implication in such a statement that the miners would lose their jobs if MSHA continued to inspect the mine as frequently as it was being inspected in October and November 1983.

It appears to me that Cline's request of the miners to complain to MSHA about the excessive inspections was little more than understandable griping about conditions over which he had no control. Cline's attorney stated that he had personally gone to MSHA, in Cline's behalf, to complain about the excessive inspections and that he had asked MSHA if it was that agency's intention to force Cline out of business (Tr. 10). Although MSHA's reply was in the negative, the record shows that there was no reduction in the number of inspections made at Cline's mine.

The record shows that the primary reason Cline believed he could operate the No. 31 Mine profitably, despite the fact that three previous operators had been unable to do so, was that he had previously worked with complainants in the capacity of both a union miner and as their section foreman and had what he thought was a good working relationship with them and he thought that they would "pull" for him and produce coal in sufficient quantities to make his operation profitable (Finding No. 2 above; Tr. 176; 214). In such circumstances, Cline's working relationship with complainants was on a much more informal level than would normally exist

between a mine owner and his employees. I have had numerous hearings involving testimony by whole crews of miners and I have noted that they have a tendency to banter their supervisors in a fashion which is often described as camaraderie and which is often associated with the existence of high morale. Witness Woods stated that Cline told them from the time the mine opened to the time it closed that they were not producing enough coal to make the operation profitable (Tr. 116), but Cline testified that he simply could not get the miners to realize that he had to have increased production in order to continue operating. Cline stated that the miners just believed that if he went out of business, someone else would take over the mine and operate it or Powellton would resume direct operation of the mine (Tr. 183).

In the circumstances described above, Cline believed that he could frankly discuss his problems with the miners. Therefore, it is not surprising that he would have enlisted their cooperation in an attempt to have them assist him in obtaining a reduction in the excessive inspection activity which even some of the complainants agreed was being conducted. In the kind of exchange which I have observed between miners and their supervisors, it is entirely possible that Cline may have jokingly told Blankenship that he would give him $50 to whip Inspector Franco, although Cline denies that he made such a suggestion (Tr. 96; 180). I believe that Cline is too intelligent and knowledgeable to have seriously made such a suggestion and I believe that Blankenship knew that Cline was kidding if the matter was ever discussed.

In fact, I believe that this entire complaint arose after the miners finally realized that no one could operate the No. 31 Mine profitably. After being out of work for a period of time, they then went to their UMWA representative and told him that they were discharged because they refused "to get rid of a federal inspector at the mine" (Tr. 137). When Griffin testified at the hearing, however, his testimony clearly shows that all Cline really said to them was that if they could not help him get Inspector Franco to stop making so many inspections, that he was going to have to close down because he could not operate the mine economically with the frequent inspections which Franco was conducting (Tr. 88-90). That is entirely different from the statement made to Cooper to the effect that Cline discharged them because they would not get rid of an MSHA inspector.

As I have previously indicated above, Inspector Franco wrote 24 citations between October 26 and November 3, 1983, and during that time, Cline's average production declined to a mere trickle of 56.2 average daily tons of clean coal, whereas his contract with Powellton provided for him to produce a minimum quantity of 250 tons of clean coal per day (Exh. C, p. 8). It is clear that Cline was stating nothing but the truth when he told his miners that if Inspector Franco's frequent inspections could not be reduced, he would have to close down (Finding Nos. 19 and 20 above).

The extended discussion above brings me back to the place I started, namely, that the only protected activity in which complainants could possibly have been engaged was declining to complain to MSHA about the frequency of the inspections which were being conducted at the No. 31 Mine. While that is hardly the type of protected activity which comes within the plain language of section 105(c)(1), such as making a safety complaint, it must still be considered to be contrary to the spirit of section 105(c)(1) for an operator to ask his miners to complain to MSHA about the very kind of activity which the Act was intended to accomplish. A miner should not, as complainants argue, be asked to request a curtailment in inspection activity even if there is evidence showing that the frequency of inspections is greater than would normally be expected at a small mine like the one here involved.

The finding above, that complainants engaged in a protected activity when they declined to complain to MSHA about what Cline believed to be excessive inspections, is only one part of the two-step discrimination test which must be met under the Commission's guidelines hereinbefore quoted from the Gravely case. The other part of the test is that a complainant must also show by a preponderance of the evidence "that some adverse action against him was motivated in any part by that protected activity." The complainants have clearly failed to establish by a preponderance of the evidence that any adverse action was taken against them because they refused to complain to MSHA about Inspector Franco's frequent examinations of the mine.

The strongest evidence which complainants were able to adduce in support of their claim that they were laid off because of their refusal to complain to MSHA is that in each of the lay-off slips given to each of the complainants, Cline gave as the reason for the lay-off "[c]an't make it

due to so many mine inspections" (Exh. 9; Finding No. 8 above). Complainants argue that Cline's use of mine inspections as the sole reason given for laying them off shows that he wanted to make it clear to them that their refusal to complain to MSHA was causing them to be laid off. As I have already discussed at length above, the preponderance of the evidence does show that Cline needed more than an average of the 157 tons of clean coal per day which the mine had been producing during its 4 months of operation to be profitable (Finding Nos. 19 and 20 above). Cline's contract with Powellton required him to produce a minimum quantity of 250 tons of clean coal per day (Exh. C, p. 8). Powellton's witness testified that he knew just from looking at Cline's production records that he could not remain in business and that Cline did not need to tell him that he was going to have to close the mine (Tr. 260).

The record provides ample facts to support Cline's claim that he had lost $71,000 in operating the mine prior to the time when he closed it on November 8, 1983 (Finding No. 20 above). Despite Cline's need to produce more than 157 tons of clean coal to make it economic to operate the No. 31 Mine, Cline's average daily production dropped to only 56.2 tons of clean coal per day during the period from October 26 to November 3, 1983, when Inspector Franco was making his quarterly, or "AAA," inspection of Cline's mine (Finding No. 19 above). Regardless of the safety and health benefits which may have been associated with the inspector's protracted examination of Cline's mine, the fact remains that his poorest production had occurred during the 2 weeks preceding his closing of the mine and that poor production had occurred while Inspector Franco was making his inspection. In such circumstances, Cline simply stated the truth in his lay-off slips when he said that he was laying the miners off because he could not "make it due to so many mine inspections" (Exh. 9).

Complainants state in their brief (p. 8):

> The Union concedes that an operator may go out of business if he does not want to invest the capital and resources necessary to run the mine safely. Thus it is not a violation of the Act if an operator says to his employees that he has gone out of business because he cannot afford to comply with the provisions of the Act.

The preponderance of the evidence, as indicated above, does show that Cline was forced to discontinue operations because of low coal production, but the evidence also shows that Cline did not close the mine because of any unwillingness to invest in necessary equipment or correct violations cited by MSHA. Cline rented one continuous-mining machine from Powellton, but he purchased a second machine with his own funds in an effort to stay in business (Tr. 183; 193). Cline also invested in the spare parts and other materials which were required to correct the violations cited by MSHA (Finding No. 21 above). Cline stated that he offered to pay the miners 2 hours overtime if they would produce eight cuts, or 320 tons of raw coal each day, but he said that the miners only produced that much coal two or three times (Tr. 175). Woods' Exhibit 12 shows that the miners produced eight cuts of coal three times in September and once in October. The miners even produced 10 cuts of coal on October 5, 1983. Therefore, as Cline stated, it was possible to produce eight cuts of coal during a single working shift, but the miners failed to do so. As finding No. 12 indicates, complainants' Exhibit 12 fails to support complainants' argument that the low production in the mine was caused by constant breakdowns of the equipment.

Regardless of the reason, the preponderance of the evidence shows that Cline was unable to produce enough coal in the No. 31 Mine to make his operation profitable and he was forced to close the mine for the sole reason that he was unable to sell enough clean coal to Powellton to make it economic for him to continue to produce coal at the No. 31 Mine. Therefore, complainants failed to prove a prima facie case of discrimination because they were unable to establish that Cline took any adverse action against them because of their protected activity of refusing to complain to MSHA about the numerous inspections which MSHA was conducting at Cline's No. 31 Mine.

Complainants' Contention that Howard Cline Violated Section 105(c)(1) of the Act When He Laid Them Off because they Refused To Complain to MSHA about the Frequency of Inspections at the No. 31 Mine

Complainants' brief (pp. 11-15) makes essentially the same arguments in support of its claim that Cline violated section 105(c)(1) when he laid the complainants off on November 8, 1983, which were made in the previous portion of their brief which claims that Cline violated section 105(c)(1) when he asked the complainants to complain to MSHA about the numerous

inspections which were being conducted at the mine. The only difference between the first argument and the one now under consideration is that complainants now argue that Cline had made it unmistakably clear to them by writing on their lay-off slips that he could not "make it due to so many mine inspections" that they had been laid off for refusing to complain about MSHA inspections, rather than for economic reasons.

The gist of complainants' argument is contained in the following paragraph from page 14 of their brief:

> No operator should be permitted to idle his employees because they want their mine inspected. While the law cannot compel an operator to stay in business, in cases such as this, where the operator reopens the same mine, with the same equipment, the same employees, the same superintendent, and the same, unabated violations, it is clear that he never really went out of business. Rather, he shut down his operations as a signal to his employees that enforcement of the Act could have a detrimental effect on their livelihood.

In order for me to agree that the record supports the contentions made in the paragraph quoted above, I would have to ignore most of the exhibits presented by both parties and about half of the testimony because the preponderance of the evidence simply does not support complainants' argument that they were laid off because of their refusal to complain to MSHA about inspections being made at the No. 31 Mine.

I have already demonstrated from the record in the preceding portion of this decision that complainants were laid off solely for economic reasons. Additionally, Cline testified that he called some of the miners back on November 15, 1983, because he thought he had sold the mine to two men named Hopkins and Smith, but that they left after trying to operate the mine for only 2 hours and sacrified a $30,000 down payment rather than try to operate the mine with the crew of miners who necessarily had to be used at the mine under any contract which a new operator had to sign with Powellton (Finding No. 15 above). Complainants' witness Griffin knew that Cline was trying to sell the mine to Hopkins and Smith and agreed that they had come to the mine on November 15, 1983, and tried to operate the mine for just one morning (Tr. 46). While Griffin claimed that they refused to take over the mine because they found it in poor condition, rather than because complainants were

"radical" miners as Cline claimed, it is certain that the preponderance of the evidence shows that Cline was trying to sell the mine to another operator prior to the time that he called complainants back to work on December 5, 1983 (Finding No. 15 above).

The above incident is entirely ignored by complainants and it greatly erodes their argument that Cline laid the miners off for a month solely to discipline them for refusing to complain to MSHA about frequent inspections. The incident with Hopkins and Smith shows that Cline was trying to sell the mine at the time he laid complainants off. If he had been successful in selling it to Hopkins and Smith, complainants would have been rehired by Hopkins and Smith on November 15, or just 1 week after they had been laid off on November 8, 1983.

Another fact which complainants ignore in arguing that Cline laid them off for a month and then rehired them with no changes in the operation is that their Exhibit 13 shows that Cline was trying to sell his personally owned continuous-mining machine to the four men who began operating the mine in the name of Chickasaw, Inc. They did not pay Cline the full amount of $15,000 required under their contract with Cline and Cline gave the continuous-mining machine back to the man from whom he had purchased it in the first place (Tr. 193). Therefore, Chickasaw was not, as complainants contend, operating with all the same equipment which Cline had been using when he laid them off.

The complainants' contention that Cline operated under the name of Chickasaw, Inc., is not supported by complainants' own Exhibit 8 because that exhibit contains at least four subsequent action sheets written by Inspector Franco on December 15, 1983, showing that he recognized that the "[t]he operating officials of this mine have recently changed." The inspector's subsequent action sheets also reflect that Inspector Franco recognized Aaron Bolan to be the superintendent of the No. 31 Mine--not Howard Cline, as contended by complainants.

As I have pointed out several times, complainants also misrepresent the facts when they argue that Cline reopened the No. 31 Mine in the name of Chickasaw, Inc., with the same unabated violations which had been cited by Inspector Franco (Finding No. 21 above). Finally, complainants have been

unable to rebut Cline's contention that he formed Chickasaw, Inc., for the sole purpose of being able to sell his interest in the No. 31 Mine to the four men named Aaron Bolan, Charles Halsey, Richard McDorman, and Dave Dickenson. Complainants themselves admitted that those four individuals owned Chickasaw, Inc., and operated the mine after it reopened under the name of Chickasaw, Inc. (Tr. 47; 65; 67; 98).

Counsel for complainants stated at the hearing that "to a large extent, our case rests upon establishing that Algonquin and Chickasaw were basically alter egos, that it was the same man operating the mine" (Tr. 123-124). The preponderance of the evidence shows that complainants failed to establish that Cline operated and owned Chickasaw, Inc., after complainants were recalled on December 5, 1983 (Finding Nos. 16 and 21 above).

I find that complainants' second contention to the effect that Cline laid them off on November 8, 1983, and rehired them on December 5, 1983, to discipline them for refusing to complain to MSHA about the frequency of inspections at the No. 31 Mine must be rejected for the reasons given in this portion of my decision and also for the reasons given in the previous portion of my decision which demonstrated from the preponderance of the evidence in this proceeding that complainants were laid off solely for economic reasons, rather than for their refusal to complain to MSHA about the frequency of inspections at the No. 31 Mine.

The discussion above of complainants' arguments shows that they have failed to prove a prima facie case of discrimination under the two-pronged test which I quoted from the Commission's Gravely decision at the outset of my consideration of complainants' arguments. They did establish the first part of the test by showing that they were engaged in a protected activity when they refused to complain to MSHA about the excessive number of inspections which Cline believed were being conducted at his mine, but they failed to establish the second part of the test by proving that Cline laid them off or took any adverse action against them solely because of their refusal to complain to MSHA as he had requested them to do.

Complainants' Contention that Howard Cline Failed To Present Credible Testimony that Complainants Were Discharged for Legitimate Business Reasons

Since I have found that complainants failed to establish a prima facie case of discrimination, it is technically unnecessary for me to consider their arguments to the effect that Cline failed to present credible testimony in support of his claim that he had laid complainants off for legitimate business reasons. In this instance, however, it is essential that I discuss their challenges to Cline's credibility because I have based some of my findings as to Cline's inability to operate the No. 31 Mine economically on Cline's testimony. Moreover, complainants, on pages 15 through 20 of their brief, have made arguments which are either incorrect or which misstate the facts. It is essential that those erroneous statements be corrected.

Complainants begin their arguments against Cline's credibility by conceding that Cline was always seeking to have them produce more coal than they were mining, but they claim that Cline never threatened to close the mine because of low production. They then argue that if Cline had laid complainants off because of their low production, he would have included that as a reason for laying them off when he wrote the lay-off slips which only say that he could not "make it due to so many mine inspections" (Br. 15-16).

I have already considered the above contentions and have shown in finding Nos. 19 and 20 that Cline produced only 157 tons of clean coal on an average daily basis and produced only 105 tons of clean coal on an average daily basis when inspectors were present at the mine. Cline produced only 56 tons of coal on an average daily basis during the 6 days when Inspector Franco wrote 24 citations and two safeguard notices (Finding No. 19 above). Since Inspector Franco's inspection ended just 4 days before Cline laid complainants off and closed his mine, there was no way for him to separate low production in his mind from his belief that his mine was being subjected to so many inspections that he had concluded that MSHA was out to drive him out of business through harassment (Tr. 220-221). Consequently, if Cline's mental condition is properly understood at the time he wrote the lay-off slips, his statement that he could not "make it due to so many mine inspections" means that he could not operate the mine economically because the inspections had reduced his average daily output of clean coal to 56 tons.

Although some of complainants testified that Cline had commended them for their work on a few occasions, his testimony in this proceeding about the poor quality of their work is supported by the preponderance of the evidence. Witness Woods' Exhibit 12 fails to support complainants' contention that breakdowns in equipment caused the mine's low production (Finding No. 12 above). Finding No. 20 above shows that Cline was losing a great deal of money every month because of low production. Powellton's contract with Cline shows that he was required to produce a daily minimum quantity of 250 tons of clean coal, but he produced an average of only 157 tons during the 4 full months that he was able to operate the mine (Finding No. 19 above). Powellton's witness stated that he knew from looking at the production records that Cline could not continue in business with the low production he was getting from the mine (Tr. 260).

Complainants' brief (p. 16) begins its direct attack on Cline's credibility by asserting that the record does not support Cline's statement that his production from the No. 31 Mine averaged only 150 tons of clean coal per day. Complainants contend, instead, that his average daily production for the months of July and August show an average of 208.89 and 214.04 tons, respectively. I have already shown in finding No. 19 above and in my discussion on page 18 of this decision that complainants have totally misstated and misused Exhibit 14 in arriving at the erroneous average daily production figures relied upon in their brief. As shown in finding No. 19 above, Cline's average daily production for the 4 months during which he operated the No. 31 Mine was 157 tons of clean coal. Therefore, Cline's testimony to the effect that his average production was "about" 150 tons (Tr. 174) is only 7 tons less than the actual calculations show the production to be. I do not believe that his use of a figure which is off by 7 tons is so far from the facts as to support a conclusion that his testimony must be dismissed for lack of credibility as contended by complainants.

Complainants' brief (p. 17, n. 9) claims that Cline "became entangled in his own forest of lies" when he stated at one point in the hearing that he needed 225 to 250 tons of clean coal to break even (Tr. 175) and later testified that he needed only 200 to 240 tons of clean coal (Tr. 182). While Cline did use a slightly different range of production tonnage at page 182 from the tonnage given at page 174, Cline was answering a different question on page 182 because his counsel had asked him how much coal he could expect the

No. 31 Mine to produce and Cline had stated that it should produce between 250 and 300 tons of raw coal per day. His counsel then asked him what that amounted to in clean coal and Cline correctly reduced the figures by 20 percent to allow for "rejects" and stated that the figures would be 200 and 240 on a clean-coal basis. At a still later point in his testimony, Cline was again asked about the tonnage of clean coal which would be required for him to remain in business and he again stated the figures which he had first given in his direct testimony, that is, from 225 to 250 (Tr. 219). Cline's slight inconsistency in clean coal tonnage, when considered in light of the questions asked, can hardly support a finding that Cline "became entangled in his own forest of lies," as contended by complainants.

Complainants' brief (p. 17) contends that Cline "was probably making a sizeable profit" during the months of September and October 1983. They base that claim on assumptions that Cline was selling Powellton 150 tons of clean coal per day for which Powellton was paying him $25.20 per ton and a belief that Cline's labor costs could be calculated by multiplying 8 hours by the miners' hourly rate of $26.14, including all fringe benefits for hospitalization, pensions, etc. Using the above figures, complainants' brief states that Cline was being paid $3,780.00 per day (150 tons x $25.20 = $3,780.00) for the coal he delivered to Powellton's preparation plant. Complainants then allege that Cline's cost of wages for 14 miners was $2,593.92 ($26.14 x 8 hours = $209.12 x 14 miners = $2,927.68) per day. [NOTE: The correct amount is $2,927.68, but complainants' brief uses an incorrect figure of $2,593.92 which is $333.76 less than the actual cost of labor even if one uses complainants' assumptions and basic hourly rate.] Complainants then subtract the erroneous wage amount of $2,593.92 from the amount Cline is getting paid for clean coal of $3,780.00 and arrive at a result of $1,186.08 as an amount which complainants say was mostly "pure profit" (Br. 18).

When complainants' alleged "pure profit" of $1,186.08 is reduced by an additional $333.76 to correct complainants' error in calculating the daily wage costs, Cline's alleged daily profit is reduced to $852.32. The alleged profit of $852.32, even after correction, is still greatly overstated because it fails to allow any amount for cost of such items as roof bolts, rock dust, timbers, ventilation curtains,

spare parts, engineering services, respirable-dust services, accounting services, telephone, liability insurance premiums, the cost to Cline of having his coal transported from the mine to Powellton's preparation plant, and the cost to Cline of hiring three foremen which Cline used to supervise the 14 miners whose total wage cost has been computed to be $2,927.68 per day.

If the miners were getting the equivalent of $209.12 per day in wages and fringe benefits, three foremen ought to be paid at least $200 per day or $600 in total salaries. The investigator's report in Exhibit 7 states that Cline was employing three foremen.

The accounting sheets in Exhibit 7 show that Cline incurred $15,515 in September and $15,791 in October for materials, supplies, spare parts, and telephone services. Cline incurred $475 in September and $1,230 in October for respirable-dust sampling and other professional services, and had to pay an unknown amount for the 135 and 144 truck-loads of coal in September and October, respectively, involved in transporting his coal from the mine to the plant. No amount needs to be added for the cost of equipment rental ($1.50 per ton) or electricity (30 cents per ton) because complainants deducted those charges by subtracting $1.80 per ton from Powellton's payment of $27.00 per ton for clean coal. Although Cline had to pay wages and salaries for more days in September and October than the 19 and 20 days, respectively, assumed by complainants in determining the quantity of clean coal which Cline sold to Powellton during those months, I shall use a 20-day month for the purpose of estimating a daily cost for the items complainants ignored in claiming that Cline was making about $1,186.08 each day in "pure profit."

A calculation of Cline's minimum daily loss from operating the No. 31 Mine can be computed as follows, using complainants' clean coal production of 150 tons per day and their daily hourly wage rate of $26.14:

$3,780.00--Daily clean coal receipts ($25.20 per ton x 150 = $3,780)

2,927.68--Daily wages paid to 14 miners ($26.14 x 8 hours x 14 = $2,927.68)

600.00--Daily salaries for three foremen ($200 x 3 = $600)

750.00--Daily cost for materials, supplies, spare parts, telephone ($15,000 / 20 = $750)

42.00--Daily cost of engineering and respirable-dust services ($475 + $1,230 = $1,705 / 2 = $853 / 20 = $42)

150.00--Daily cost for $1,000,000 of liability insurance $3,000 / 20 = $150)

0.00--Unknown amount for transporting coal from mine to preparation plant

$ (689.68)--LOSS per day incurred by Cline as a result of operating the No. 31 Mine

Complainants' brief (pp. 18-19) lists nine items which are relied upon as support for their claim that Cline's testimony is not credible. The first contention is that Cline claimed to have sold all his interest in Chickasaw, but they say that the agreement (Exh. 13) which he signed with the purchasers retained for Cline a reversionary interest in the company. They say that Cline's explanation (Tr. 195) that he had that provision inserted into the agreement to make the sale appear to be more attractive to the purchasers is nonsensical. The provision to which complainants refer states that "[i]n the event the parties of the second part wish to quit mining as a further consideration to Howard W. Cline agree to transfer to the said Howard W. Cline all the stock in Chickasaw, Inc., if the said Howard W. Cline so requests" (Exh. 13, p. 2).

When complainants' counsel asked Cline about the meaning of the so-called reversionary clause, he stated that "[t]here's no way" he would have taken back Chickasaw, Inc. (Tr. 191) and he explained subsequently that when a person is trying to sell something, "you've got to make it sound interesting and attractive" and he said he had that provision inserted in the contract so that the purchasers would think that he was selling something that he would like to reacquire if the purchasers failed to go through with their part of the bargain (Tr. 195). He further stated unequivocally that he had not asked for the stock to be returned and that if he had regained Chickasaw, Inc., he would only have received "a lot of debts."

I disagree with complainants' contention that Cline's explanation of the reason for having the aforesaid provision inserted in his contract with the purchasers is "nonsensical." Cline received only a down payment of $5,000 with another $10,000 to be paid subsequently, along with payment by purchasers of $1.75 per ton of clean coal to be produced from the mine. I doubt if any of the complainants would transfer his title to an auto valued at $5,000 upon my giving

him a down payment of $1,000, without providing that he has a right to have the title and auto returned to him if I should fail to pay the remaining $4,000. Failure of a seller to indicate an interest in regaining an object sold with only a down payment having been made would be interpreted by the purchaser as an indication that the object is not worth any more than the down payment. In this instance, Cline's interest in the mine was not worth more than the down payment. Actually the down payment was made in order for the purchasers to acquire a continuous-mining machine owned by Cline, but Cline made it appear that he was still interested in the mine by inserting a provision that he could request a return of the stock in Chickasaw, Inc., if the purchasers failed to perform their part of the agreement. That can hardly be considered to be a "nonsensical" provision.

The circumstances which complainants give in support of their second attack on Cline's credibility begin with an assertion that Cline claims to have retained no interest in Chickasaw's operations after December 2, 1983, but thereafter Cline filed a Legal Identity Report with MSHA dated December 5, 1983, showing that Chickasaw was the operator of the No. 31 Mine and that Cline was its president (Exh. 11). It is also claimed that Cline signed job-posting slips on December 5, 1983, showing the jobs open at the No. 31 Mine and indicating that Cline was Chickasaw's superintendent (Exh. 1).

There is nothing inconsistent about the occurrence of the above-described transactions. First, there is no basis for complainants' contention that Cline claimed to have retained no interest in Chickasaw after December 2, 1983. What clearly happened was that Cline signed an agreement on December 2, 1983, in which he agreed to transfer all stock in Chickasaw to the men who subsequently operated the No. 31 Mine in the name of Chickasaw, Inc. That agreement required Cline to obtain a new operating agreement with Powellton and provided that, once signed, the new agreement would be attached to the agreement signed on December 2, 1983. The agreement between Powellton and Chickasaw was subsequently signed on December 5, 1983 (Exh. D), and the Legal Identity Report was also submitted to MSHA on December 5, 1983 (Exh. 11). It should be noted that December 2, 1983, was a Friday and that the next working day was Monday, December 5, 1983. Therefore, it is understandable that Cline would not have been able to perform all the requirements in the contract on December 2, 1983, when the contract was signed. Cline testified that, as a condition of the sale

to the new prospective operators of the No. 31 Mine, he had to form a new corporation, obtain a new operating contract with Powellton, and perform some other routine functions so as to put them in a position of being able to operate the mine (Finding No. 16 above).

There is nothing in the record to show that Cline failed, as claimed, to transfer all the stock in Chickasaw, Inc., to the purchasers named in the agreement signed on December 2, 1983. At least four of the subsequent action sheets written by Inspector Franco on December 15, 1983, show that the inspector recognized that new persons had taken over the operation of the No. 31 Mine and that Aaron Bolan, one of the purchasers named in the agreement of December 2, 1983, was then superintendent of the No. 31 Mine (Exh. 8). The above discussion shows that there is no merit to complainants' contentions that Cline continued to hold an interest in Chickasaw after he had transferred the stock to the men who purchased Cline's interest in the No. 31 Mine.

The third incident used by complainants to attack Cline's credibility is their contention that Cline claims to have purchased a Lee Norse continuous-mining machine for $175,000 (Tr. 182), but that he never did pay for it and returned it to the seller (Tr. 193). Cline did not say, as complainants contend, that he paid $175,000 for a Lee Norse. He said that they cost $175,000 (Tr. 183) and that he made a down payment on it and "gave it back to the guy" he bought it from (Tr. 193).

No one asked any additional questions about the Lee Norse which Cline obtained for use at the No. 31 Mine, but it is fairly safe to conclude from his statement that he gave it back to the "guy" he bought it from, that it was a used machine which was not worth nearly as much as the $175,000 price which was elicited from Cline by his counsel (Tr. 183). Moreover, as I have already explained in finding No. 16 above, Cline tried to sell the Lee Norse for $15,000 to the men who began operating the mine in the name of Chickasaw, Inc., but was unable to do so because they never did pay him anything after making the required $5,000 down payment at the time they began to operate the mine. If Cline had not actually brought a Lee Norse on to mine property, there would have been no reason for him to provide for its sale to the men who began operating the mine in the name of Chickasaw. Additionally, it should be noted that complainants' witness Eplin testified that Cline brought another continuous -mining machine into the mine and that he tried to mine coal

with the substitute machine at any time the one rented from Powellton was out of order, but that the substitute machine never did perform well and that Cline eventually took it out of the mine (Tr. 104). Thus, complainants' own witness' testimony corroborates my conclusion that Cline had purchased a used machine which was probably not worth more than the $15,000 which he tried to get for it from the men who began operating the mine under the name of Chickasaw. In any event, I find nothing in the record which shows that Cline's credibility was greatly damaged because of his statement that he made a down payment on a Lee Norse continuous-mining machine and than gave it back to the person from whom he had obtained it.

The fourth incident which complainants list as a factor in attacking Cline's credibility is that he claims that some potential buyers failed to follow through on an intended purchase of Cline's interest in the No. 31 Mine when they encountered the "radical" work force at the mine. They had offered Cline $50,000 for his interest and had made a down payment of $30,000. They forfeited the $30,000 down payment and left the mine rather than operate it with complainants as the required work force (Tr. 168; 210). I have already provided a summarization of this incident in finding No. 15 above. Complainants' own witness Griffin testified that he was aware of the fact that Cline had tried to sell the mine to two men named Hopkins and Smith and that they left after trying to operate the mine for only a half day. About the only difference between Griffin's testimony and Cline's as to the aborted operation of the mine by Hopkins and Smith is that Griffin said they gave up because of the condition in which they found the mine, whereas Cline said they left because of the caliber of the work force.

It should be noted that Cline would not have had to mention the $30,000 down payment which he received from Hopkins and Smith or their forfeiture of the down payment. The fact that he did mention the down payment and the fact that he voluntarily stated that their payment had offset his $71,000 loss in operating the No. 31 Mine all tend to support his claim that the incident occurred. Just because complainants say that Hopkins and Smith acted "mysteriously" is not a sound basis for finding that Cline's testimony should be discounted for lack of credibility.

The fifth reason given by complainants in support of their argument that Cline's testimony is incredible is a repetition of their contention that Cline gave inconsistent quantities of clean coal when asked about the amount of coal which had to be produced in order for the mine to be profitable. I have already shown the lack of merit in that contention on pages 36 and 37 above and no further comments are required to support a rejection of that argument as a basis for finding Cline's testimony to be lacking in credibility.

The sixth contention made by complainants in support of their attack on Cline's credibility is that Cline testified that there were inspectors at the mine for 3 days each week (Tr. 180), but that Woods' Exhibit 12 shows that production declined because of inspections on only 2 days in September and 2 days in October. Finding Nos. 11 and 19 show beyond any doubt that Cline's mine was the subject of numerous inspections by MSHA. Finding No. 19 shows that there were inspectors at Cline's mine on 3 days in the week of June 20, for 4 days in the week of September 19, for 3 days in the week of October 10, for 4 days during the week of October 24, and for 4 days during the week of November 1. That finding also shows that Cline's average production declined to an average of 105 tons of clean coal for the days on which inspectors were at the mine and declined to an average of only 56 tons of coal per day during the 6 days when Inspector Franco made his inspection at the end of October and beginning of November. There is certainly nothing about Cline's statement as to there having been inspectors at his mine for 3 days each week which requires that I make a finding that his credibility is to be doubted.

The seventh reason given by complainants for doubting Cline's credibility is that he testified he is out of money, unable to pay any kind of civil penalty, and yet is contemplating a return to mining coal in Kentucky or Virginia (Tr. 221; 228-230). As I have already indicated on page 21 of this decision, Cline failed to prove with documentary evidence that he is unable to pay civil penalties, but failure of a witness to present documentary proof is not a sufficient shortcoming to support a finding that his credibility has been destroyed. As I have previously indicated, Powellton's witness stated that Cline, at one time owned a supply company (Tr. 238) and Cline himself stated that he would pay $500 to anyone who would take the defunct Algonquin Coal Company off his hands (Tr. 196). Cline also stated

that just a few days before the hearing, he had paid Powellton $900 which Algonquin still owed Powellton (Tr. 196). Those statements are obviously inconsistent with Cline's claim that he is unable to pay a civil penalty and that if I were to order him to pay a civil penalty of $1,000, the effort to pay that much would force him into bankruptcy (Tr. 229). A further indication of Cline's inconsistency about his financial condition is that Cline stated that he had bought the Lee Norse mining machine with his own funds rather than with Algonquin's funds (Tr. 193). Therefore, complainants have a meritorious point when they argue that Cline was less than convincing about his actual financial condition.

On the other hand, the record shows that Cline is sophisticated in the area of forming corporate enterprises for the purpose of achieving his various goals. It is entirely possible that Cline has no personal funds and that the money he does advance for various purposes comes from a corporate enterprise through which he operates his supply business, assuming he still owns that sort of business. Also, as complainants have correctly noted, Cline invested very little of his own capital in operating the No. 31 Mine under the name of Algonquin Coal Company. Powellton even agreed to pay Cline $12,000 to enable him to prepare the mine for active coal production (Exh. B). Therefore, it would appear to be possible for Cline to find a mine owner, like Powellton, who would finance an undertaking by Cline to open a mine in Kentucky or Virginia. If he could find such a firm, he could open a mine without having any funds, as an individual, to invest in opening the new mine.

I did not personally press Cline to produce documentary evidence at the hearing to support his claim that he cannot pay civil penalties because it is the operator's burden to prove that he cannot pay civil penalties if he takes that position (Tr. 228). As I have pointed out above, Cline may be truthfully stating that he has no funds, as an individual, to pay civil penalties and may, despite that fact, still be able to acquire funds through some corporate enterprise which he controls. If the aforesaid mental reservations were employed to justify the inconsistent statements he made about having no money, I would have to find that he was disingenuous in dealing with questions regarding his financial condition.

The eight point made by complainants in support of their attack on Cline's credibility is that Cline testified that he generally ran all three ram cars when coal was being produced (Tr. 207-208). Complainants then point out that when one considers the production levels at the mine and the fact that each ram car could deliver 100 to 120 tons per day to the tailpiece, there would rarely be a time when all three cars would be required (Tr. 60). Complainants' eighth point is either made without a clear understanding of the way a mine is operated or with the hope that the judge does not know how a mine is operated. All discussions about the use of ram cars have to begin with the assumption that the continuous-mining machine is operating. When that machine is operating, the goal is to move coal away from it as fast as it is produced. Therefore, even if the continuous-mining machine does not operate but 1 hour in a single day, Cline would prefer to have the three ram cars taking the coal away from the machine so that there is little delay between the time one car is filled with coal and the next one moves up to be filled. The testimony also shows that long haulage distances existed between the location of the face equipment and the tailpiece (Tr. 147). Thus, three ram cars would easily be needed in order to keep the continuous-mining machine operating at an efficient rate of production. Consequently, the mere fact that a single ram car may be able to deliver 120 tons to the tailpiece in an entire day is not the same as having the ability to take coal from the continuous-mining machine as fast as it is cut at the face. Witness Griffin was a ram-car operator and was also the miner who most frequently accompanied inspectors pursuant to section 103(f) of the Act (Tr. 70; 207). He testified that only two ram cars were used at times even if no inspectors were at the mine, but he was unable to say how much his acting as the person to accompany inspectors interfered with production by reducing the ram-car operators to two instead of three (Tr. 72).

Cline rather convincingly proved his point with respect to his use of three ram cars by pointing out that he would not hire a third ram car operator (at a cost of $26.14 per hour, according to complainants' brief, p. 17) if he did not have a need to operate three ram cars 90 percent of the time (Tr. 207). The evidence, therefore, does not support complainants' argument that Cline's testimony about use of three ram cars served to erode his credibility.

The ninth and final point which complainants use as a basis to attack Cline's credibility is that while Cline primarily attributed his failure to be able to operate the mine profitably to his having to use an unsatisfactory labor force, he gave as his only reason for laying off complainants that he could not "make it due to so many mine inspections" (Exh. 9; Tr. 177). I have repeatedly dealt with this same argument by pointing out that in Cline's mind, the production which he lost when the miners failed to produce coal because of the presence of inspectors made him feel that inspections and low production were such simultaneous occurrences, that stating the existence of inspectors was the same as stating that he could not operate because of low production (Finding No. 19 above).

I have reviewed above in some detail the nine reasons given by complainants for their allegation that Cline's inconsistent statements require that a finding be made to the effect that his testimony cannot be accepted as credible. My discussion shows that the preponderance of the evidence supports Cline's statements in all areas except his failure to be fully candid about his financial condition. I can appreciate a person's unwillingness to produce his tax returns and provide other documents which show his exact financial condition. Cline failed to prove that he cannot pay civil penalties, but his failure in that limited area of evidence is not a sufficient defect in his overall performance as a witness to support a finding that his entire testimony must be discounted for lack of credibility.

The last paragraph of complainants' brief (p. 20) under their argument to the effect that Cline failed to give legitimate business reasons for laying complainants off on November 8, 1983, consists of a continuous, uninterrupted misstatement of the evidence in this proceeding. My decision has already taken each of the allegations made in that paragraph and has shown that not a single statement made in that paragraph is supported by the preponderance of the evidence. Lest complainants think for a moment that those statements are acceptable to me, I shall repeat that the evidence does not support their claim that Cline resumed operating the No. 31 Mine on December 5, 1983, under the name of Chickasaw, Inc. The record shows unequivocally that Chickasaw was operated by four men and that all Cline did was form that corporation as one of the conditions for his

being able to extricate himself from having to continue operating an uneconomic enterprise which had already cost him a considerable amount of money (Finding Nos. 7, 8, 12, 15-20 above).

It is contrary to the entire record for complainants to assert that there was no shortage of persons waiting for the chance to operate the No. 31 Mine at the time Chickasaw, Inc., went out of business owing the miners back wages which were paid by Powellton (Finding No. 5 above). Complainants' own witness Griffin testified that prior to Cline's failure to be able to operate the No. 31 Mine profitably, three other companies had failed for economic reasons (Finding No. 2 above). Powellton's witness testified that his superior had even told him not to sign a contract with any more companies allowing them to operate the No. 31 Mine, but that he made an exception in Cline's case because of Cline's previous good record for being able to get along with the miners who would have to be used to operate the mine under the UMWA Wage Agreement (Finding No. 3 above).

The fact that the complainants who testified in this proceeding were unemployed at the time the hearing was held shows that the No. 31 Mine is no longer "an ideal setting," as complainants contend, for an individual to open a coal mine (Tr. 21; 93; 99). The preponderance of the evidence shows beyond any doubt that Cline could not economically operate the No. 31 Mine and would have had to lay off all the complainants for that reason even if complainants had not refused to complain to MSHA about the numerous inspections which were being made at the mine (Finding Nos. 1-3, 5, 12, 15-20).

It should be noted that I have not made many references to the brief filed by Powellton's attorneys in this proceeding. My lack of references to Powellton's brief results from my having found that most of Powellton's arguments are supported by the record. It is unnecessary for me to extend this lengthy decision by discussing arguments with which I am in general agreement. Powellton's brief (p. 13, n. 9) does, however, raise one objection which requires some consideration. Powellton's brief there refers to Attachment A in complainants' brief. Attachment A consists of a tabulation showing the overall cost of employing a miner under the UMWA Wage Agreement if one includes all fringe benefits.

Powellton objects to my giving any consideration to Attachment A because it was not offered in evidence at the hearing. While it is true, as Powellton argues, that Attachment A was not offered in evidence at the hearing, the calculations in Attachment A were based on the Wage Agreement which is Exhibit A in this proceeding. Powellton's witness demonstrated a thorough understanding of Exhibit A and I am confident that if complainants had misapplied the Wage Agreement in calculating the cost of hiring UMWA miners, Powellton's attorneys would have been able to show in a rebuttal exhibit of their own that the factors used by complainants in their Attachment A are incorrect.

I have examined Attachment A in some detail and I have shown in Appendix A to this decision that complainants used a higher basic hourly rate than is supported by the testimony or Exhibit A and I made that change in calculating the losses incurred by Cline in operating the No. 31 Mine. As a matter of fact, it appears that Cline benefits from my use of the information given by complainants in Attachment A more than complainants do. I believe it is preferable to consider all contentions of the parties on the merits rather than to reject them on technical grounds. Since my consideration of Attachment A on its merits has had results which support all of Powellton's arguments, Powellton can hardly claim that my consideration of Attachment A has been prejudicial to it in any way. Therefore, Powellton's objection to my consideration of Attachment A is overruled.

Complainants' Argument that Powellton, as Owner of the No. 31 Mine, Is Strictly Liable for All Violations of the Act Committed by Powellton's Independent Contractors

Complainants rely upon a line of Commission and court decisions (FOOTNOTE.3) pertaining to the liability of mine owners for

violations committed by their independent contractors to assert in their brief (pp. 22-23) that Powellton is liable for any violation of section 105(c)(1) which may have been committed by Cline, Algonquin, or Chickasaw. In my prehearing order issued April 19, 1984, in this proceeding, I noted that it might be possible to hold Powellton liable for violations of section 105(c) by its independent contractors and I tentatively denied Powellton's motion to dismiss at that time pending my giving complainants an opportunity to prove that the relationship between Powellton and its independent contractors warranted application of the cases on which complainants rely.

Powellton renewed its motion to dismiss after I issued the prehearing order and complainants filed a reply in opposition to the grant of Powellton's motion. Copies of the contracts between Powellton and Chickasaw were submitted by the parties in support of their opposing positions. I issued an order on August 7, 1984, in which I reviewed in detail the contracts between Powellton and its independent contractors and concluded that Algonquin and Chickasaw were acting as mere agents for Powellton and that Powellton should be held to be liable for any violation of section 105(c)(1) pending the receipt of evidence by the parties at the hearing which was scheduled by the order denying Powellton's motion to dismiss it as a party to this proceeding. Therefore, Powellton correctly points out in its brief (p. 16) that I have never held in this proceeding that Powellton is liable for violations of section 105(c)(1) which may be committed by its independent contractors.

The remainder of Powellton's brief (pp. 17-20) demonstrates by references to the testimony of witnesses Holbrook and Cline that its contracts with Algonquin and Chickasaw, when properly understood, do not create an agency relationship between Powellton and Algonquin or Chickasaw.

It is true, as complainants contend, that the court in the Cyprus case held that mine owners are strictly liable for the actions of independent contractors and further stated that:

> The Secretary [of Labor] presents sound policy reasons for holding owners liable for violations committed by independent contractors. For one thing, the owner is generally in continuous control of conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If the Secretary could not cite the

> owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work. The Secretary should be able to cite either the independent contractor or the owner depending on the circumstances. [Emphasis in original.]

644 F.2d at 1119.

At the outset of this discussion of complainants' contentions that Powellton be held liable for any violation of section 105(c)(1) which might be committed by its independent contractors, it should be noted that the Commission and the courts, in the cases relied upon by complainants, were not dealing with the type of violation which is here involved. The owners of the mines in those cases were the actual operators of the mines in terms of extracting materials from the earth and they had hired independent contractors to do isolated construction acts, such as digging a tunnel to assess talc deposits, or constructing a ventilation shaft. The violations involved were failures to comply with specific mandatory health and safety standards cited by Federal mine inspectors.

The violation at issue in this case involves a mine owner (Powellton) which no longer actively produces coal (Finding No. 1 above). Powellton, therefore, is outside the normal factual conditions which have existed in the cases which have come before the Commission and the courts, in that no Federal inspector has issued a citation charging that Powellton violated a mandatory safety standard while operating a mine at which an independent contractor has been hired for the limited purpose of performing a specific construction project.

Therefore, in the instant proceeding, complainants are performing the function which would ordinarily be carried out by a Federal mine inspector in that they are alleging the violation of the Act which is being used as a basis for claiming that Powellton, as well as its independent contractor, is liable for the violation of section 105(c)(1) here involved. Moreover, complainants introduced evidence showing that Federal mine inspectors have conducted numerous inspections of the No. 31 Mine here involved and have issued many citations which name the independent contractor as the "operator" of the No. 31 Mine. Consequently, it is somewhat

difficult to fit a discrimination case into the framework of existing law which holds that mine operators are liable for the acts of their independent contractors because, under the Secretary's regulations, the independent contractors in this case (Cline, Algonquin, and Chickasaw) are the actual production-operators of the No. 31 Mine.

A further complication which arises when one tries to apply the existing case law governing citation of production-operators for violations committed by independent contractors is that the 1977 Act extended the definition of an operator to include independent contractors and the Secretary has developed regulations (30 C.F.R. 45-1-45.6) which control to a large extent the question of whether a mine owner should be cited for violations by independent contractors. Section 45.2(c) of those regulations defines an independent contractor as "any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine." Section 57.2(d) defines a production-operator as "any owner, lessee, or other person who operates, controls or supervises a coal or other mine."

While it is true that Algonquin and Chickasaw necessarily performed services and construction at Powellton's No. 31 Mine, the contracts show that Powellton wanted its coal "mined" and that Algonquin and Chickasaw desired "to mine such coal" and deliver it to Powellton's preparation plant (Exhs. C and D, p. 1). On the other hand, Powellton, Algonquin, Chickasaw, and Cline all fit into the definition of production-operator in section 45.2(d) because each of them can be considered to be an "owner, lessee, or other person who operates, controls or supervises a coal or other mine."

The primary reason that complainants included Powellton as a respondent in their action is that they feared that Cline might not be financially able to pay the back wages they seek if a violation of section 105(c)(1) should be proven.

Although the above discussion shows that a discrimination case is not really adaptable to the law and regulations pertaining to citing operators for independent contractors' violations, I shall try to evaluate complainants' arguments in light of the Secretary's regulations and the most recent Commission decision on the subject. In its decision in Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871 (1984), the

Commission held that the Secretary improperly cited a production-operator for a violation committed by the independent contractor. The Commission referred to the criteria which the Secretary had established to govern the citing of operators for independent contractors' violations. The Secretary expressed those criteria as follows:

> as a general rule, a production-operator may be cited for a violation involving an independent contractor: (1) when the production-operator has contributed by either an act or omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement.

6 FMSHRC at 1873.

The violation alleged in this proceeding is that Cline laid complainants off in violation of section 105(c)(1) because complainants had refused to comply with his request that they complain to MSHA about the excessive number of inspections which Cline believed were being conducted at the No. 31 Mine. Assuming, arguendo, that complainants had been able to prove that a violation occurred, it is clear that Powellton did nothing by way of omission or commission which could justify Powellton's being cited for the violation under the Secretary's guidelines quoted above. The contracts (Exhs. C and D) show that Powellton requires its independent contractors to hire complainants as the work force in the No. 31 Mine and requires them to comply with all safe mining procedures. Powellton requires its independent contractors to report the hours worked by its employees so that Powellton can submit payments to UMWA's pension funds at the proper times and thereafter bill its independent contractors for those payments. Powellton agreed to pay Cline $12,000 so that he could prepare the mine for safe operation. Powellton requires its independent contractors to procure accident and health insurance from a carrier approved by Powellton. It is difficult to imagine any act which Powellton could take to assure that the miners

are provided with safe and healthful working conditions which Powellton did not provide for in its contracts with Algonquin and Chickasaw.

Powellton does not come within the second criterion quoted above because Powellton could not have contributed to the continued existence of the alleged violation inasmuch as Powellton agreed to sign a new contract so that another operator could have taken over the No. 31 Mine on November 15, 1983, just 1 week after Cline had laid off complainants, if Cline's prospective successor had not left the mine after trying to operate the mine for only a half day (Finding No. 15 above). Powellton did sign a new contract with Chickasaw so that the miners could be called back to work on December 5, 1983. Therefore, Powellton did all that it could have done to assure that the miners would be given jobs as soon as any operator could be found by Cline to take over operation of the No. 31 Mine.

Powellton cannot be held to be liable as a production-operator under the fourth criterion quoted above because Powellton did not hire any of the miners who worked for Cline, Algonquin, or Chickasaw and did not in any way supervise them, discipline them, or have anything to do with their having been laid off (Finding No. 5 above).

The above analysis of the facts in this proceeding under the criteria expressed by the Secretary for determining when a production-operator should be cited for violations committed by its independent contractor show that a Federal inspector would not be able to establish a basis for citing Powellton for the violation of section 105(c)(1) alleged by complainants in this proceeding.

It should also be noted that Powellton does not come within the purview of the factors quoted above from the court's decision in the Cyprus case. The court referred to the fact that an owner or production-operator has "continuous control" of conditions at the "entire" mine and is the entity best able to maintain healthful and safe conditions at its mine. Powellton specified in its contracts that its independent contractors were required to comply with all safety and health standards. Powellton did not inspect the mine (Tr. 218) and therefore did not exercise "continuous control" over the "entire" mine as would be the case if Powellton could properly be categorized as a

"production-operator" as that term is used when a Federal inspector is trying to determine whether a production-operator should be cited for an independent contractor's violations.

Complainants also seek to make Powellton liable for the alleged violation of section 105(c)(1) alleged in this case by citing Judge Broderick's decision in UMWA v. Pine Tree Coal Co., 7 FMSHRC 236, 240 (1985), in which Judge Broderick stated that "[b]y analogy [to some of the cases cited on page 48 above] the owner may be held strictly liable to pay compensation to miners idled by a withdrawal order, even though the owner is not the employer of the miners." Complainants' reliance on Judge Broderick's decision is misplaced because in the Pine Tree case, the owner of the mine supervised the independent contractor's activities with respect to mining projections and mine mapping and the owner specifically advised the independent contractor to continue mining into a questionable area which turned out to be a gas well. Judge Broderick believed that the owner could be cited as well as the independent contractor because the conditions giving rise to issuance of the withdrawal order in that case "were the responsibility of the owner" (7 FMSHRC at 240).

As I have already noted in this decision, Powellton required Cline and its other independent contractors to hire an engineer, but it was the independent contractors' responsibility to prepare their own mine maps and perform their own mining projections (Exh. C, p. 5; Tr. 265). The fact that Inspector Franco issued Citation Nos. 2273570 and 2273571 on November 2, 1983, alleging that Algonquin had failed to show mining projections and the date of recent mining activity on the mine map shows that the inspector did not believe that Powellton, as the production-operator, was liable for such violations. Of course, as I have already noted above, Cline, Algonquin, and Chickasaw are production-operators and the contracts between Powellton and its independent contractors do not create the type of relationship which is normally subject to the law governing the citing of production-operators for violations by their independent contractors.

The concluding argument which complainants' brief (p. 25) makes in support of their contention that Powellton should be held strictly liable for Cline's alleged violation of section 105(c)(1) is that:

> justice would be well served by a Commission ruling which signalsto Powellton and other large lessors of coal mines that they havean obligation to ensure that the parties to whom they sub-lease exhibit a genuine concern for safety and have sufficient capital to make a diligent effort to comply with the Act.

I agree that "justice" would be served by holding Powellton liable for Cline's alleged violation if the facts in this case did show that Cline was running his mine without making any effort to comply with the health and safety standards, if Powellton's contracts with its independent contractors did show Powellton to be in actual control of its independent contractors' work force, and if the violation of section 105(c)(1) alleged in this case could be shown to be an action over which Powellton had any control. Not one of the aforesaid conditions, however, exists in this case.

As I have already indicated on page 24 of this decision, Inspector Franco's 24 citations issued during the last quarterly inspection do not reveal the types of highly serious violations which would have endangered complainants' safety and health to a significant degree. They were mostly routine violations which are normally cited by Federal inspectors during quarterly inspections. The violations were cited between October 26 and November 3, 1983. Although Cline closed his mine on November 8, 1983, he had abated 17 of the 24 alleged violations by November 3 before closing the mine. Therefore, his prompt action in abating the alleged violations is not the type of response to the citing of violations which would be expected of an operator who is completely indifferent about safety and who strives to operate by failing to purchase the necessary supplies and equipment. Moreover, the accounting sheets in Exhibit 7 show that Cline paid Powellton about $15,000 per month for supplies, parts, and professional services for the 4 full months of July through October before the mine was closed on November 8, 1983. Those amounts do not indicate that Cline was failing to expend enough money to keep the mine operating in a safe condition.

Finding Nos. 3 through 5 above show that Powellton expects its independent contractors to comply with all safety and health regulations and takes the initiative to see that all payments are made to UMWA's pension funds in a timely manner. Nothing in this record would support a finding that

Powellton has fallen short of its obligations to see that its independent contractors produce coal in a manner which will provide the miners with safe and healthful working conditions.

A final point should be made about holding Powellton liable for Cline's alleged violation. The uncontroverted evidence shows that Powellton did not at any time ever take any kind of action to hire, discipline, or discharge any of the miners employed by Cline. The violation alleged by complainants is not one which is susceptible to a routine claim that a production-operator is liable for its independent contractors' violations because it consists of a claim that Cline laid off complainants because they refused to complain to MSHA about the excessive inspections which Cline believed were being made at the No. 31 Mine. That is a violation which is unique and which would not occur simply as a direct result of a production-operator's failure to assure that a mine is operated under safe and healthful conditions. A production-operator would have to be intimately aware of an independent contractor's personal relationship with its employees before it could be established that the production-operator knew that an independent contractor was asking its employees to complain to MSHA about the numerous inspections which were being made at the independent contractor's mine. No complainant has charged that Powellton had anything to do with Cline's alleged violation or that Powellton had any reason to know that Cline had ever requested the miners to complain to MSHA about an excessive number of inspections.

It is possible that a discrimination case could be filed which would justify a finding that a production-operator ought to be held liable for an independent contractor's violation of section 105(c)(1), but I do not believe that the record in this proceeding can be interpreted to warrant a finding that Powellton should be held liable for the violation of section 105(c)(1) alleged by complainants in this proceeding.

As I understand Powellton's request in the concluding paragraph of its brief (p. 20), it does not request that it be dismissed as a party if I find that no respondent committed any acts sufficient to establish a violation of section 105(c)(1). Since my decision shows that no violation of section 105(c)(1) was proven by complainants, the entire complaint will hereinafter be dismissed.

WHEREFORE, it is ordered:

The complaint filed on March 19, 1984, in Docket No. WEVA 84-148-D is dismissed for failure to prove that a violation of section 105(c)(1) of the Act occurred.

Richard C. Steffey
Administrative Law Judge

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FOOTNOTES START HERE:-

~Footnote_one

1 In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard.

~Footnote_two

2 Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

~Footnote_three

3 Republic Steel Corp., 1 FMSHRC 5 (1979); Kaiser Coal Corp., 1 FMSHRC 343 (1979); Consolidation Coal Co., 1 FMSHRC 347 (1979); Old Ben Coal Co., 1 FMSHRC 1480 (1979); Monterey Coal Co., 1 FMSHRC 1781 (1979); Republic Steel Corp. v. Interior Bd. of Mine Op.App., 581 F.2d 868 (D.C.Cir.1978) Cyprus Industrial

Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir.1981); Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir.1981); and Phillips Uranium Corp., 4 FMSHRC 549 (1982).

Appendix A

LOSSES INCURRED BY CLINE AS A RESULT OFOPERATING JANE ANN NO. 31 MINE FROM JULY TO NOVEMBER 1983

Explanation of Calculations

Figures in Column 2 are the actual amounts which Powellton paid Cline for clean coal before deducting for equipment rental, electrical power, etc., as shown in Exhibit 7.

Figures in Column 3 are the amounts deducted by Powellton for the items listed. Powellton also deducted for amounts paid to UMWA for welfare funds, but I have deleted those deductions because they have been transferred to the amount charged for wages and other fringe benefits as shown in Column 4.

Figures in Column 4 are based on a per-hour cost of $25.69 for each hour worked by the UMWA miners hired by Cline. The hourly rate from Exhibit A, page 178, of $13.715 is used instead of the hourly rate of $14.165 shown in Attachment A of complainants' brief. I have used a base rate of $13.715 because that amounts to $109.72 per 8-hour shift, whereas the figure of $14.165 used in complainants' brief is $113.32 per 8-hour shift. None of the miners claimed to be making more than $110 per day (Exh. 7, Investigator's Report, p. 5; Tr. 79). The hours worked by the miners each month are given in Exhibit 7. Therefore, the figures in Column 4 were obtained as follows: 1,851 hours for July x $25.69 = $47,552; 2,202 hours for August x $25.69 = $56,569; 2,636 hours for September x $25.69 = $67,719; 2,406 hours for October x $25.69 = $61,810; and 646 hours for November x $25.69 = $16,595.

Figures in Column 5 are estimated salaries for three foremen. The estimate is based on an annual salary of $36,000, or $3,000 per month for each foreman. It is my understanding that section foremen are generally paid about $45,000 per year, but I have used $36,000 to be conservative. The Investigator's Report, page 5, in Exhibit 7 states that Cline used three foremen.

The amounts shown in Column 6 provide for Cline's purchase of $1,000,000 in liability insurance which Cline is required to provide under the contract between him and Powellton (Exh. C, p. 13; Tr. 217).

The figures in Column 7 are the amounts charged Cline for such services as engineering, respirable-dust sampling, and accounting services. Cline stated that he paid Larry Heatherman for doing the respirable-dust sampling and Powellton deducted for work done by Larry Heatherman and for work done by Dale Porter. I assume that Dale Porter was an engineer, but he might have been an accountant. In any event, Cline paid the amounts shown for their services as indicated in Column 7.

The amounts shown in Column 8 are the results obtained when the gross income in Column 2 is reduced by the costs reflected in all of the other columns.