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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DUWAYNE SCHAFER, COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. CENT 85-89-D Glenharold Mine

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Gregory Lange, Esq., Richardson, Blaisdell, Isakson and Lange, Hazen, North Dakota, for Respondents;
Deborah Fohr Levchak, Esq., Office of the General Council, Basin Electrical Power Cooperative, Bismarck, North Dakota, for Respondents.

Before: Judge Lasher

This proceeding was initiated on May 20, 1985, by the filing of a discrimination complaint by William E. Brock, Secretary of Labor, on behalf of DuWayne Schafer (herein "Schafer"). The Secretary's complaint, as twice amended, alleges that Schafer was reprimanded in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (Supp. V., 1981) (herein "the Act") and seeks as a remedy therefor one day's back pay with interest, and correction of Schafer's employment record including removal of the reprimand. In addition, the Secretary prays that a $2,000.00 civil penalty be assessed against Respondent pursuant to Section 110 of the Act.

PRELIMINARY FINDINGS

The preponderant reliable and probative evidence, based on the testimony and documentary evidence received at the formal adversary herein and pleadings, establishes the following:

The Glenharold mine, a large surface coal mine (T. 366), in November, 1984, and at all times material herein, while owned by Respondent Basin Cooperative Services (herein "Basin") was operated, supervised and controlled by Respondent Consolidation Coal Co. (herein "Consolidation"). At the hearing, it was conceded that both Respondents are subject to the Act and the Commission's jurisdiction. Since Consolidation operated, supervised and controlled the mine (T. 286) it was the "operator" at the times pertinent herein, and as the record demonstrates, directly responsible for any violation of the Act by its management personnel which occurred during the period in question.(FOOTNOTE 1) The superintendent of the mine in November, 1984, and at all times material herein was Marvin Suess, an employee of Consolidation (T. 416Ä418).

In November 1984, Schafer, an employee of Consolidation, was a heavy equipment operator (sometimes referred to as a "blade operator"), who regularly operated a Cat. No. 16 Motor Grader, referred to in the record as the "GÄ4". At the times pertinent here, the Glenharold Mine utilized three motor graders ("blades"); the one directly involved in this proceeding was a standby for use when the other 2 were being repaired and is referred to in Respondents's mining jargon as the "GÄ3"; it is similar to that depicted in Exhibit 17 (T. 31Ä34). The GÄ3 has disc brakes and can travel up to speeds of 7Ä8 MPH in fourth gear (T. 123) and 28 MPH in eighth gear.

During the relevant time period the mine was operated around the clock--three 8Ähour shifts; the GÄ3 blade was subject to use each shift.

On November 12, 1984, Schafer's usual GÄ4 blade was being repaired and his assigned task was to operate the GÄ3 grader on the afternoon shift (4 p.m. to midnight) doing reclamation work on the surface ("top") of section 5 of the mine consisting of removing overburden and dumping it in an area shown as the "spoils" area on the depiction marked Exhibit 3ÄA. This required him to operate his diesel-powered grader along a mile-long inclined roadway (T. 45, 59, 191, 401Ä402, 414) between the highwall on the south side of the pit and the spoils area. Other vehicles, such as scrapers, pickups and haulage trucks, were also traveling along the roadway. (T. 36Ä46, 58). It was very dark (T. 46). There was a 4Äblock distance where there were no berms with a 30Äfoot straight-down drop if the blade had gone over the side (T. 55Ä57).

At the beginning of his shift on November 12, Schafer performed his usual safety check of the blade and noticed some lights thereon were not working and that a mirror was missing. He called his foreman, Dean Bray (T. 61, 369) who sent out an electrician who fixed the lights and brought out a mirror which Schafer installed. When the electrician left, Schafer operated the blade for about 3 hours (T. 61, 62) and noticed "the brakes were not holding well" (T. 46, 136). The brakes were getting worse each time he used the brakes, according to Schafer (T. 46Ä47). Schafer described the problem as follows:

> "A. Well you would go to step on the brakes and it would take awhile before they would grab and then it wouldn't stop like it should. Normally if you slam on the brakes, it will stop.
>
> * * * * * * *
>
> A. You should be able to slide the tires on it.
>
> Q. What does that mean?
>
> A. Lock up the brakes so the tires don't go around on it. You should be able to to stop down on the brakes and the tires lock right up, they don't go around.
>
> * * * * * * *
>
> A. Well until the tires stop--from the time you step on the brakes until the tires stop turning, shouldn't be more than one to two seconds.
>
> * * * * * * *
>
> Q. Now on November 12, what were the problems with the brakes that you experienced?
>
> A. They had--I noticed that they were considerably worse, so I run it that way for a part of the shift.
>
> Q. What do you mean by considerably worse, what happened when you stepped on the brakes?
>
> A. It was--the pedal would go to the floor and it was taking considerably longer until they would grab. It was taking approximately five seconds from the time you'd step on the pedal until they would grab, and then you would only coast to a stop, it wouldn't stop it like--you know, or lock up the wheels or anything. It would just kind of coast to a stop.
>
> Q. How far did you go from the time you stepped on the brakes until the time the equipment stopped--how much time?
>
> A. I would say on a flat surface with it warmed up and everything, from the time they would actually start grabbing--it'd be five seconds from the time you'd step

on the brake approximately till they would grab; from the time it would grab until it would stop, a minimum of 20 feet--minimum.

Q. That was on a level surface?

A. Right, in fourth gear, which is approximately seven miles an hour. I don't really know for sure, that's just my guess.

Q. How fast were you traveling on that particular evening?

A. Anywheres from--depending on what type of situation I was in, anywheres from second to fourth gear while I was blading.

Q. And do you have any ideal how many miles per hour that would be?

A. Well like I say, fourth gear I think is approximately seven miles an hour, seven to eight." (T. 47Ä49).

On November 12, Schafer operated the GÄ3 from about 5 p.m. to 8 p.m. during which time the last 4 transmission gears, numbers 5 through 8, became inoperative and a ball joint on the steering axle broke. (T. 62, 137). At approximately 9 p.m. he tagged out the GÄ3 (T. 65, 66 171,; Ex. 8) and took it to the repair shop after calling the shift foreman, Dean Bray and telling him that the transmission was out, that the ball joint had broken and that the brakes needed to be adjusted (T. 65, 138, 139). Bray told him to take it to the shop. At the shop, Schafer reiterated to the shop foreman for that shift, Rich Schneider, the three items which needed repair.

Tagging out equipment is an equipment operator's means of alerting management that the equipment is unsafe (T. 413). Schafer's safety concerns as to the brakes were thus communicated to management personnel both orally and in writing.

At a speed of 7 MPH (approximately the top speed of the GÄ3 with the top 4 gears of the transmission out) the GÄ3 would travel 20Ä40 feet over a 5Äsecond period after the brakes were applied before it would stop in some of the conditions Schafer was operating in on November 12 depending on whether the roadway was flat or inclined (T. 69, 140, 141). Part of the area of roadway Schafer was working was inclined (T. 43Ä45, 58Ä59, 63, 68, 191, 195, 198Ä200).

Consolidation's Tag-out Procedure, reflected in a 2Äpage memorandum from "Mike Quinn" to "all employees" dated January 8, 1981, as a "Safety Topic for the week of January 19, 1981" (Ex. 4), provides as follows:

"PROCEDURE FOR TAGGING OUT DEFECTIVE EQUIPMENT"

In order to insure that defective equipment is not operated and that equipment is not needlessly taken out of service, the following procedure should be followed when placing a "DO NOT OPERATE" tag on a piece of equipment.

1. Any individual can tag out a piece of equipment. However, the individual should know enough about the machine to determine if it is safe.

2. If you place a "DO NOT OPERATE" tag on equipment, you must:

A. Immediately inform your foreman that you have done so.

~1572

B. Write on the tag exactly why it should not be operated.
C. Put your name, the date, and the time on the tag.
D. Turn in a safety maintenance request and note that the equipment has been tagged out of service.

3. To remove a "DO NOT OPERATE" tag:
A. Anyone can remove the tag if the defect has been fixed. It should be noted on the copy of the safety maintenance request sheet that it has been fixed.
B. The tag should not be removed until the defect is fixed or it is determined by one of the following people that the defect does not merit taking the equipment out of service.

1. Safety Director
2. A member of the Safety Committee
3. The individual that placed the tag
4. A Foreman
   a. If a Foreman or the Safety Director removes the tag prior to the repair of the defect, an explanation should be given to the person who tagged the equipment out or a member of the Safety Committee. If there is no mutual agreement that the tag should be removed, the issue shall be considered a Health and Safety Dispute under Article III, Section (O) of the Contract.

C. If the tag is removed prior to repair of the defect, it should be noted why and by whom on the safety maintenance request.

D. In some instances the use of a defective piece of equipment is permissible if it is done under limited circumstances and with an awareness of the defect. If this becomes necessary, the circumstances and precautions taken should be noted. An Example: The brakes don't work on the polecat. It is parked by bucket hardware that needs to be loaded onto the two ton truck. Without moving the truck someone blocks the wheels and used the hoist.

Company policy effective January 19, 1981.

s/ Marvin R. Suess
MARVIN R. SUESS
SUPERINTENDENT

The frontside of the tag (Ex. 8) which Schafer placed on the steering wheel of the GÄ3 at the time provided as follows:

"DANGER
EQUIPMENT NEEDS REPAIR
SIGNED BY S/ DuWayne Schafer
DATED 11Ä12Ä84

The back side of the tag provided:

"DANGER
DO NOT REMOVE THIS TAG

Left steering cylinder has broken ball joint

Brakes need adjusting

SEE OTHER SIDE" (Note: The capitalized wording reflects the standard printed portion of the tag form; lower case is the part filled in by Schafer in his handwriting)

Subsequently, in handwriting, the word "Repaired" was put in by Lee Brown, repair shop foreman, behind the word "ball joint" and behind the word "adjusting" the following note was made: "Miles Dochtor checked out and they seemed safe to him. LB. (FOOTNOTE 2) 11Ä13Ä84"

Miles Dochtor's testing of the brakes was performed on a level surface (T. 338). Miles Dochtor's report back to Lee Brown was that there was a "slight pause" on the brakes, "maybe a couple of seconds or something". He did tell Mr. Brown how fast he had driven the GÄ3. Dochtor indicated he thought the brakes were safe and also that he believed the GÄ3's brakes needed repair (T. 339, 340). Because Brown thought the GÄ3 was needed, he did not then repair the brakes but sent it back out for operation (T. 340), removed the tag and gave it to his supervisor, Merle Anderson (T. 341, 391). According to Mr. Brown it "very seldom" happens that he removes a tag before all repairs are completed (T. 342). In fact, the only tag Brown had even taken off a machine was Schafer's first tag on the GÄ3 (T. 351). This constitutes a change in Respondent's procedures which I find Schafer could not have anticipated.

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After leaving the GÄ3 blade in the shop for repair, Schafer operated a scraper for the rest of his November 12 shift (T. 68, 387).

On the following day, November 13, 1984, Schafer returned to the mine to commence work on the 4 p.m. to midnight shift. The GÄ3 was at the job site and Schafer performed his usual safety check,(FOOTNOTE 3) drove the GÄ3, and "realized that the brakes were the same as they had been the night before." (T. 68, 142). He called the shop foreman for that shift (T. 384), Rich Schneider, on his radio and asked him if there was any plan to repair the brakes. Schneider said that they didn't want to repair it until after repairs on the GÄ4 were completed (T. 68, 477, 478). Schafer asked what happened to the tag he had put on it the night before and Schneider said he knew nothing about it (T. 68Ä70, 111, 146). Schneider didn't say, and Schafer did not know, when the GÄ4's repairs were due to be completed (T. 146). Management did have "plans" to repair the GÄ3's brakes (T. 147, 277) but did not want to make such repairs until after the GÄ4's repairs were completed (T. 68, 86, 365, 384Ä386, 477Ä478, 527Ä528) which was anticipated to be on Wednesday, November 14 (T. 384).

Schafer than called Dean Bray, his foreman, at approximately 4:30 p.m. and asked him to bring him another tag for the blade. Bray said nothing but after a while he came to where Schafer was and asked Schafer to take a pickup and go fuel a light plant. Bray told Schafer he would get him a tag later. Schafer then fueled up the light plant, and found a tag in the pickup which he then, about 5 p.m. (T. 172, 173), put on the GÄ3 blade between 7 p.m. and 8 p.m. (T. 109) Bray asked Schafer if the GÄ3 was in too bad shape to take to the repair yard. Schafer said he could bring it there (a distance of 5 or 6 miles) in slow speed (T. 70Ä72, 389, 390). Bray did not mention opposing putting a tag on the blade at that time (T. 70Ä72) or that it wasn't company policy to put a second tag on the machine (T. 72). When Bray arrived for work on November 13, he did not ask anyone if the blade had been repaired the night before, but "assumed that it had been taken care of or it wouldn't be out there again" (T. 403Ä404).

The tag which Schafer put on the GÄ3 on November 13, 1984 (Ex. 9) was on the same printed tag form as Ex. 8 and provided on the front side:

"DANGER
EQUIPMENT NEEDS REPAIR
SIGNED BY s/ D.M. Schafer
Date 11Ä13Ä84
7:00 p.m. "

~1575

The rear side of the tag provided:

DANGER
DO NOT REMOVE THIS TAG
Brake [sic] do not operate properly
Do not grab right away or hold very well.(FOOTNOTE 4)
SEE OTHER SIDE"

Schafer's reason for putting the second tag on the GÄ3 was that he "felt that it was still as unsafe as it was before to operate and they had done nothing about it to make it any better." (T. 73). Schafer was aware at the time that the tags prevented others from using the equipment (T. 73). If the operator of a blade felt it was unsafe, the method used to alert management was placing a tag on it (T. 413, 458).

At approximately 9 p.m., Schafer took the GÄ3 to the repair shop and went into the "warehouse" where four foreman were sitting having coffee, Rich Schneider, Larry Klinsworth, Dean Bray and Kenny Redka, and told them that the "next time somebody takes that tag off--some foreman takes that tag off, some foreman is going to be in trouble." (T. 76).(FOOTNOTE 5)

At this point in time, no foreman or anyone in management had told Schafer why the brakes had not been repaired, why the tag had been removed, who had removed it (T. 77, 82, 104, 108Ä112, 308Ä310, 341, 358, 359, 463, 476, 477, 506Ä507) or given any explanation other than Schneider's statement to him that they did not want to fix the GÄ3 until the GÄ4's repairs had been finished. (T. 77, 82, 308Ä309, 312, 527). As noted previously, the GÄ3's brakes were scheduled for repairs in "a day or so" thereafter, after the GÄ4 blade came out of the repair shop (T. 308, 312Ä313).

Schafer also had not been advised: (1) that a member of the Safety Committee had reviewed the GÄ3's brakes as required by Article III, Section (i) of the union contract (Ex. 19, T. 81, 82, 409), the pertinent portion of which is set forth subsequent

ly herein. Nor had Schafer been advised (2) that the GÄ3 was safe to operate in particular areas of the mine or under specified conditions (T. 77, 82, 308Ä311, 359, 407, 408, 464, 507).

In this connection it should again be noted that Respondent's own procedure for tagging out Defective Equipment (Ex. 4) provides:

> "The tag should not be removed until the defect is fixed or it is determined by one of the following people that the defect does not merit taking the equipment out of service.
>
> 1. Safety Director
> 2. A member of the Safety Committee
> 3. The individual that placed the tag
> 4. A Foreman
>
> A. If a Foreman or the Safety Director removes the tag prior to the repair of the defect, an explanation should be given to the person who tagged the equipment out or a member of the Safety Committee. If there is no mutual agreement that the tag should be removed, the issue shall be considered a Health and Safety Dispute under Article III, Section (O) of the Contract."
>
> (emphasis added)

After Schafer took the GÄ3 to the shop, he asked Dean Bray who had removed the first tag. Bray said that he wasn't sure, and told Schafer to eat his lunch (T. 407) and they would talk about it after lunch.(FOOTNOTE 6) Bray then discussed the matter with Rich Schneider (T. 408) and "tried to find out just exactly what had happened on graveyard shift when they fixed it the night before" (T. 391). Schneider told him that foreman Lee Brown had removed it and that Brown and Dochtor had "checked it out." Bray then requested Schafer to run the GÄ3 since "there wasn't any real hazard if he was blading and doing his job", and asked him if "he didn't think he could run it for one more shift and then by the next day GÄ4 would have been ready." Schafer refused to operate it. (T. 391, 409). If the GÄ4 had not come out of the repair shop at that point, it was management's "intention" to "continue to use" the GÄ3 (T. 527Ä528).

During the lunch break, and before Bray asked Schafer to run the GÄ3 for one more shift, Bray and Schneider tested the GÄ3's brakes while running the GÄ3 in 4th gear and found that there was

a 2 or 3 second hesitation before the brakes grabbed (T. 392) with the GÄ3 traveling 10 to 20 feet before coming to a stop (T. 393Ä395, 412). Mr. Bray could render no opinion how far the GÄ3 would have traveled after application of the brakes had there been no "hesitation" problem (T. 395). Again, there is no evidence in the record that Schafer was told at any time, that the GÄ3 was considered safe to operate in certain specified areas.

The conversation with Schafer after the lunch break, at approximately 9:30 p.m. (T. 78, 83), was initiated when Mr. Bray came up to Schafer and told him that "Schneider and I looked at that blade and we decided the brakes aren't that bad and so you'll have to run it" (T. 78, 83, 181Ä183). Schafer asked Bray if anyone from the safety committee had looked at the GÄ3, Bray said "no, Rich and I looked at it." Schafer said they needed someone from the safety committee to look at it and that this had been standard procedure in the past (T. 79, 80). Bray told Schafer that he didn't "need any member of the safety committee, that if a foreman tells you that its safe to operate, you have to operate it" (T. 83). Schafer was familiar with the union contract (Ex. 19) as he had been a member of the safety committee for 2Ä3 years and had been chairman of the safety committee for approximately one year. Schafer's understanding of the contract safety procedure was as follows:

> "The procedure was that if the safety committee decided--according to the contract, if the safety committee decided it was okay, you should run it; if you didn't, then you still have the option of calling in MSHA to check it out. If at that point MSHA decided it was safe to run anyway, then you were subject to reprimand. If they decided it was unsafe, then they would have to repair it." (T. 80).

No member of the safety committee was advised or given an explanation by management why the first tag was removed (T. 79Ä82, 84, 409).

At the beginning of Lee Brown's shift on November 14th (at approximately midnight), Schafer conversed with Brown about the GÄ3. This occurred after Schafer's shift on November 13 and after Schafer had put the second tag on the GÄ3. Brown advised Schafer that Miles Dochtor had checked the brakes (after the first tag) and that Miles had said the GÄ3 was safe to operate. Brown had not called a member of the safety committee to check the GÄ3 at this point (T. 347).

When he arrived for work on the midnight to 8 a.m. shift (the shift following Schafer's) on November 14, 1984, Lee Brown noticed the GÄ3 was in the shop again with a tag on it and he and Mark Winn, a pit foreman, both test drove the GÄ3 (T. 343). Both drove the GÄ3 on the haul road but again on flat level surfaces. Neither were safety committee members. There again was "a slight

pause" of "two or three seconds" after the brakes were applied before they stopped the GÄ3, allowing the GÄ3 to travel more than 10 feet (T. 343Ä345). The pause or delay in the brakes grabbing was not a "common" symptom of brake wear (T. 363).

On November 14, after these tests by Brown and Winn, the brakes on the GÄ3 were repaired (T. 348) by replacing all the seals and discs thereon (T. 362). After such repair, the old brakes are thrown away (T. 364). In the case of the GÄ3 some of the brake pads which were removed were seen to have completely worn away (Tr. 365). Mine superintendent Suess was told that the brakes "were worn but they weren't totally out" (T. 531).

Schafer's understanding of the safety procedure was based on Article III, Section (i) of the union contract (Ex. 19) which is entitled "Preservation of Individual Safety Rights" (T. 81). It provides:

> "(1) No employee will be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. When an employee in good faith believes that he is being required to work under such conditions, he shall notify his supervisor of such belief. Unless there is a dispute between the employee and management as to the existence of such condition, steps shall be taken immediately to correct or prevent exposure to such condition utilizing all necessary employees, including the involved employee.
>
> (2) If the existence of such condition is disputed, the employee shall have the right to be relieved from duty on the assignment in dispute. Management shall assign such employee to other available work not involved in the dispute and the employee shall accept such assignment at the higher of the rate of the job from which he is relieved and the rate of the job to which he is assigned. The assignment of such alternative work shall not be used to discriminate against the employee who expresses such belief. If the existence of such condition is disputed, at least one member of the Mine Health and Safety Committee shall review such condition with mine management within four (4) hours to determine whether it exists.
>
> (3) If the dispute involves an issue concerning compliance with federal or state mine safety laws or mandatory health or safety regulations, the appropriate inspection agencies shall be called in immediately and the dispute shall be settled on the basis of the inspectors' findings, with both parties reserving all rights of statutory appeal. Should

> the federal or state inspectors find that the condition complained of requires correction before the employee may return to his job, BCS shall take the corrective action indicated immediately. Upon correction, the complaining employee shall return to his job. If the federal or state inspectors do not find a condition requiring correction, the complaining employee shall return to his job immediately.
>
> (4) For disputes not otherwise settled, a written grievance may be filed, and the dispute shall be referred immediately to arbitration. Should it be determined by an arbitrator that an abnormally unsafe or abnormally unhealthy condition within the meaning of this section existed, the employee shall be paid for all earnings he lost, if any, as a result of his removing himself from his job. In those instances where it has been determined by an arbitrator that an employee did not act in good faith in exercising his rights under the provisions of this Agreement, he shall be subject to appropriate disciplinary action, subject, however, to his right to file and process a grievance.
>
> (5) None of the provisions of this section relating to compensation for employees shall apply where BCS withholds or removes an employee or employees from all or any area of a mine, or where a federal or state inspector orders withdrawal or withholds an employee or employees from all or any area of a mine. However, this section is not intended to waive or impair any right to compensation to which such employees may be entitled under federal or state law, or other provisions of this Agreement.
>
> (6) The provisions of this section shall in no way diminish the duties or powers of the Mine Health and Safety Committee." (Emphasis supplied)

After Schafer finished his lunch on November 13, Bray assigned Schafer to operate a scraper (T. 183) and Schafer did so through the end of the shift. At the end of the shift, another foreman, Mark Wynn, advised Schafer that it was Lee Brown, repair shop foreman (T. 84, 305) for the shift following Schafer's, who had removed the first tag. Schafer then spoke to Lee Brown and asked him what he was doing taking the tag off. Brown told him that he and Miles Dochtor had checked out the GÄ3 and decided it was good enough to run. Brown indicated that the brakes could not be fixed by "adjusting" them and that the brakes had to be taken apart and new discs put in, and that they needed the GÄ3 until the other blade was repaired. Schafer had not seen it occur before that a foreman simply removed a tag and he had not previously seen Respondent's tag-out procedure (Ex. 4) (T. 87, 88, 93, 150, 156) nor had another miner, Edwin Whetham (T. 214). The only procedure Schafer was aware of was Article III, Section (i) of the union contract (T. 95).

The hazards which were posed by operating the GÄ3 with defective brakes in the area where Schafer was working on November 12 and November 13 were persuasively described by the Secretary's witness, Edwin Whetham, a dozer operator who was employed at the mine during the pertinent period and who actually observed (T. 199) the defective condition of the GÄ3's brakes:

> "Q. What would you believe could happen if he wasn't able to stop, what kind of things?
>
> A. Well I think he could have gotten run into with a scraper or if he would have tried to dodge off, he could have went over the edge of the embankment, and if he had tried, rather than stop and back up, tried to pull off the side, he could have went over the edge and down the incline or into a mudhole or whatever.
>
> Q. And what kind of injury could result in going over the incline or--
>
> A. Well he could have got rolled over and he could have got injured pretty good in a roll over sliding down the incline. That's pretty dangerous I would say.
>
> Q. Is it possible he could have been killed?
>
> A. Oh, yeah, it's possible, yeah." (T. 201)

This description of the potential dangers posed by Schafer's continued use of the GÄ3 with its defective brakes are generally supported in the record and consistent with the conditions and terrain in the area where Schafer was assigned to work during the period in question.

On November 14, when Schafer arrived for work, the GÄ3 was being torn apart for repairs and he operated the GÄ4 blade on that date (T. 97, 184, 437Ä439). At the beginning of this shift Rich Schneider and Dean Bray told Schafer that they felt he had not followed procedure shutting the blade down and tagging it out and that he would probably be reprimanded (T. 98, 415). Schafer became aware at this time that on the preceding shift (day shift) on November 14, members of the safety committee had checked out the GÄ3 (T. 98, 434). This, of course, was after his second tag-out (T. 526).

On the evening of November 14, Schafer asked Foremen Bray and Schneider, after they had advised him he was to receive a reprimand, to drive him to the shop so that he could call MSHA. After first refusing, Bray and Schneider relented and drove him to the repair shop, telling him he would have to do it on his own time. Schafer made several calls, and while he was doing so, Mr. Suess arrived and told him it would be on his own time and that he would have to pay for every phone call. When Schafer was unable to reach the MSHA inspector at his home (T. 178) Suess told him he would have to go home to make further phone calls, and to either go back to work or go home. Schafer returned to

work. Subsequently, an hour's time was deducted from his

paycheck for this period, amounting to $16.61 (T. 287), which is the only pay Schafer lost from the entire episode (T. 100Ä103, 177).

On November 15, 1984, Mike Quinn, Respondent's safety director, told Schafer he was to get a letter of reprimand, and shortly thereafter Quinn came back with Marvin Suess and Suess handed Schafer the reprimand (Ex. 11; T. 99Ä100). Although the parties stipulated (T. 287) that the undated reprimand was issued on November 16, the evidence shows it was delivered to him on November 15.

On the morning of November 15, 1984, Schafer posted a copy of Article III(i) of the union Contract on the union bulletin board (T. 479Ä481, 534, 537) (one of three) near the bath house (T. 422) with the following notation which he had written at the bottom thereof (Ex. 12; T. 540):

> "This shows Marv's policy on taking equipment out of service contradicts this section of the contract. His policy is a joke and a scare tactic for those gullible enough to be taken in by it.
> Signed: a miner concerned for safety"

Schafer prepared and posted this document (T. 432Ä433; Ex. 12) after he learned he was to be reprimanded (T. 530, 540), after Mr. Suess had commenced the process of reprimanding him (T. 422, 443, 488, 494, 530, 540), and for the following reason:

> "I wanted to make everybody aware that it's not the way it had been done and it was in violation of past practice and custom and according to the contract; and not to be intimidated by it, because that's all I felt it was, was a way of intimidating everybody and taking away their right to remove themselves from a dangerous situation or shut anything down." (T. 537).

On November 15, 1984, Schafer received the following letter of reprimand (Ex. 11) from Marvin R. Suess, Glenharold Mine Superintendent:

> Mr. DuWayne Schafer
> Box 1253
> Wilton, ND 58579
>
> RE: Tag-out Procedures
>
> DuWayne:
>
> Safety rights of employees and the right to safe working conditions are the highest priority items at Glenharold

Mine, but they must not be abused by either the employees or the employer. Consol and BCS have great respect for tag-out procedures and have always wanted all equipment to be operable and safe, but there comes a time when the operation of equipment could be better, yet not unsafe to operate. If there exists an unsafe condition it should be tagged-out following the company procedures. At that point the employee is saying that the equipment is abnormally hazardous and could cause immediate danger to the operator. No employee shall be discriminated against for utilizing this procedure.

A memo posted on the bulletin board indicated "Marv's policy is a joke"; I'm not real sure what you were referring to since an unsafe piece of equipment has always gotten repaired when it was unsafe to operate or where it was apparent it was dangerous to operate. We have had several cases where an employee tagged-out equipment that was not unsafe to operate and this must stop. Should this continue then all respect for tagged equipment will be lost.

After a complete investigation of GÄ3 Motor Grader, which you tagged-out twice on November 12th and 13th, your local union Safety Committee, Mike Quinn, several additional mechanics, several foremen, and I concluded that GÄ3 was not unsafe to operate. It was explained to you that GÄ3, our spare motor grader, was to be used until GÄ4 was repaired at which time the reclamation blade operators would again operate GÄ4 full-time. The areas in which GÄ3 were to be used were safe areas to operate such a blade.

From our investigation, we have concluded that you have abused our procedure of tagging equipment, and you have failed to follow the guidelines of the BCSÄUMWA Agreement of 1984. You did not act in good faith in exercising your rights and are therefore issued this written reprimand for the aforementioned items.
In order to provide a safe work place I ask that you refrain from misuse of company tag-out procedures, refrain from

posting memos that are false, and abide by the rights provided in the Surface Coal Wage Agreement of 1984 to resolve any problems you may believe exist.

Regretfully submitted,

s/ Marvin R. Suess,
Glenharold Mine Superintendent" (FOOTNOTE 7)

Marvin Suess, in his position as mine superintendent, initiated, drafted, signed and issued the reprimand to Schafer, and was the official in Respondent's management hierarchy primarily and effectively responsible for determining that Schafer should be reprimanded (T. 418, 441Ä446, 499, 508Ä511). The decision to reprimand Schafer was made on November 14, 1984, in the late afternoon (T. 442, 443, 530). Mr. Suess could not say whether it was on November 14 or November 15 that he became

aware of Schafer's "Marv's policy" is a "a joke" notation at the bottom of the copy of ART III of the Union Contract posted on the bulletin board (T. 445; Ex. 12).

Mr. Suess at first conceded that Schafer's first tag-out was proper (T. 425), but only because the steering mechanism was defective (T. 425). Mr. Suess took the position, however, that with respect to the GÄ3's brakes, the first tag-out by Schafer was not in "good faith" (T. 449Ä450). Yet, when the brakes were ultimately removed for repairs Mr. Suess who was present in the repair shop did not examine them closely and professed not to have been curious about their condition (T. 490Ä491). I find this consistent with the discriminatory frame of mind I attribute to Respondent in this matter. The net effect of Respondent's various failures to follow its past practices and tag-out policies in this esposode was, along with its premature initiation of disciplinary action, a provocation to Schafer and a discouragement of his taking a required, protected safety measure.

Mr. Suess took the further position that the second tag-out was improper on the following basis stated at the hearing:

> "Q. Okay. When Mr. Schafer came back on shift on the evening of the 13th, following removal of the first tag, he disputed removal of that tag with his foreman and placed a second tag on it. Was that, in your opinion, proper?
>
> * * * * * * * *
>
> A. I believe he should have then gone through his grievance procedure since management had already made the determination that it was safe to operate. I do not deprive the man of removing himself from that piece of equipment, but by tagging it out, it also did not allow us to utilize anybody else on the piece of equipment" (T. 425Ä426).
>
> (emphasis supplied)

An important follow-up in Mr. Suess's position occurred subsequently in his testimony:

> Q. Okay. When do you think he was not--acting in bad faith--what did he do that you think was in bad faith?
>
> A. In the fact that he ran it from four o'clock until the steering broke before the brakes became an issue. Yet the brakes didn't change at all. And then tagging it the second day, knowing what has been done--what had been inspected. And then also riding that motor grade in that

> fourth gear with the mold board up and the ripper up, to me if the brakes were that bad, it should have never been rode, it should have been towed to the shop. (T. 450).(FOOTNOTE 8)

ULTIMATE FINDINGS, CONCLUSIONS AND DISCUSSION

In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797Ä2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir., 1981)); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817Ä18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936Ä38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195Ä96 (6th Cir.1983); and Donovan v. Stafford Constr. Co., 732 F.2d 954, 958Ä59 (D.C.Cir.1984) (specifically approving the Commission's PasulaÄRobinette test). The Supreme Court has approved the National

Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

The essence of Respondent's defense appears to be that Schafer, on both tagouts, was not in good faith and was unreasonable in his position that the GÄ3's brakes were unsafe, and that the tagouts were thus not "protected activities." Respondent's basis for asserting that Schafer was not in good faith or reasonable relies heavily on the fact that its personnel made checks of the GÄ3 and determined it to be safe for use under restricted conditions and at certain locations. However, the facts that these tests were made and the decisions made by Respondent's management were either (1) not communicated to Schafer or (2) were made after Schafer had attached the second tag on the machine. It is clear also that the joint test that management made with the safety committee was performed after the second tagout (T. 514). Respondent failed to establish that Schafer was told that management felt the GÄ3 was safe to use in certain areas or that he should not use the GÄ3 in inclined areas. Yet Mr. Suess also indicated that "99 times out of 100", management concurred with a miner's assertion that equipment was unsafe (T. 518). Thus, in this episode, Respondent broke a very strong pattern and did not communicate its position or findings to Schafer before his second tagout.

Tagging out equipment believed to be unsafe is a safety activity protected by the Act and required (T. 519). Schafer's belief that the brakes on the GÄ3 were defective and rendered operation of the GÄ3 unsafe on both November 12 and November 13, 1985, was reasonable (T. 503Ä504) in good faith,(FOOTNOTE 9) and calculated to protect himself and other operators using the GÄ3 from safety hazards. This was borne out by various of his actions at the time including demonstrating the defective brakes to a fellow employee and listing such on both tags. That the brakes were actually unsafe is shown by the condition they were found in after their removal, the considerable "pause" in their operation, and the distances the GÄ3 traveled after the brakes were applied. There is no prohibition, express or implied, in Respondent's tag-out procedure, against tagging out equipment believed to be defective more than once. The essence of a proper tag-out is a miner's reasonableness and good faith in believing equipment is unsafe. Indeed, Schafer was obliged to tag-out the GÄ3 since a miner's failure to tag out unsafe equipment subjects his employer to sanctions under the Act for violations of the safety standards (T. 458). Respondent's contentions that Schafer "abused" the

tag-out procedure and thus was not engaged in a protected activity is not established in the record.(FOOTNOTE 10) What is clear, as previously noted, is that Respondent being fully aware of Schafer's safety concerns did not follow its own tagout procedures.

Respondent, admittedly desirous of keeping the GÄ3 in operation for productivity reasons, took disciplinary (adverse) action against Schafer for his engagement in the protected activity described above. Its belated contention that Schafer should have removed the tag himself after he was advised that management considered the brakes safe (T. 477Ä478) is pretextual. Management personnel removed the tag the night before and no reason having any merit was submitted why it could not have removed the second tag had it chosen to do so.(FOOTNOTE 11) The mine superintendent, who investigated the matter before reprimanding Schafer, did not bother to ascertain Schafer's position (T. 497Ä498), the basis for his belief that the brakes were unsafe, or his state of knowledge, before reprimanding him. The mine superintendent, Mr. Suess, did concede that Schafer "probably" would not have been reprimanded for the allegedly improper unprotected activity of putting the "Marvin's policy is a joke" note on the bulletin board (T. 509Ä510). The record shows, and I have found, that the reprimand process was initiated before Schafer posted the note. Respondent clearly failed to establish that it would have taken the adverse action in any event for Schafer's alleged unprotected activities alone. Rather, in reprimanding Schafer, Respondent appears to have been motivated by Schafer's protected activity in tagging out the GÄ3 and its

patent displeasure in his taking the GÄ3 out of operation before the GÄ4 was out of the repair shop. Accordingly, it is concluded that Respondent failed to establish any rebuttal or affirmative defense afforded under the Act or by precedent. Specifically, it failed to establish by reliable, probative, or convincing evidence that Schafer's tag-out actions were not protected, that the reprimand was in no part motivated by Schafer's two tag-outs, or that it would have reprimanded Schafer for unprotected activities alone. A violation of Section 105(c) of the Act is found to have occurred.

LOSS OF PAY

The Secretary claims that Schafer is entitled to reimbursement of $16.61, representing one hours pay. Schafer was docked for this time-which apparently was used to call fellow employees to get the phone number of an MSHA Inspector on the evening of November 14, 1984--after he was advised he was to receive a reprimand.

The Secretary failed to establish Schafer's entitlement to reimbursement. Very little evidence was adduced on this question. No urgency or necessity for his attempting to call the inspector at this time was shown, nor was it shown why Schafer could not have made the calls on his own time at the conclusion of the shift on the following day. Schafer was advised in advance that he would be charged for the time he was utilizing, but was allowed by his management to take the time to do so.

It is concluded from the thin record on this point, that Schafer's loss of this pay was not an expected or normal result from the discriminatory action of Respondent and an award therefor is denied.

PENALTY ASSESSMENT

As noted above, the violation of section 105(c) of the Act occurred when Respondent Consolidation was the operator of the Glenharold mine. The parties stipulated that there were no previous violations of Section 105(c) during the pertinent 2Äyear period preceding the subject violation (T. 291). I have previously determined that Consolidation is a large mine operator and the parties further stipulated that assessment of a penalty would not adversely affect its ability to continue in business (T. 287). In this matter the concept of prompt abatement of the violation has no specific relevance in view of the Respondent's good faith assertion of the legality of its position, and the complexity of the legal issues involved. Prompt abatement here would amount to the surrender of its right to assert its own position and to a hearing on the merits.

The remaining statutory assessment factors, negligence and gravity, also require some conceptual transposition from the ordinary meanings thereof in matters involving violations of discrete safety and health standards to a discrimination

violation. With respect to the seriousness of the violation, the adverse action taken here against the complaining miner, as in many discrimination cases, could have the effect of discouraging the taking of protected safety activity by other miners in the future. While there is no basis to question the sincerity of Respondent's concern for the viability of its tag-out procedures generally, with respect to the two tag-outs by Schafer here I have concluded that Respondent's response to such was discriminatory. I find no credible basis in the record to conclude that Schafer or other miners were in the past the subject of oppressive measures to discourage safety activities. As evidenced by Schafer's actions themselves, and by the absence of other probative evidence, the instant adverse action was not taken in such a background of intimidation as to dishearten justified, reasonable, and required safety activity of miners in the future. Accordingly only a moderate degree of gravity is attributed to this violation.

The concept of negligence has no direct applicability to this particular matter. The adverse action was taken wilfully and thus the broader idea of the culpability of Respondent's managment in reprimanding Schafer is to be considered. In this connection it is first noted that because there was no showing that an "explanation" was ever given to either Schafer or a safety committeeman concerning the removal of the first tag, and it does not otherwise appear that such was the case, Respondent did not establish that it was in compliance with its own tag-out procedures. While charging Schafer with "abuse" of the tag-out procedure in various respects it appears that if there was any deviation therefrom, it was on the part of Respondent's management. Schafer, who took safety--calculated action in putting the second tag on the GÄ3, had done so without it having been explained to him what had taken place by the repair shop with respect to the first tag the night before. Nevertheless, the mine superintendent, with apparent knowledge of this (T. 463Ä464), proceeded to reprimand him.

Since a member of management, in this case Brown, the repair shop foreman, had taken off the first tag, either he or any other foreman could have taken off the second tag had it wished to do so on the second night, before or after informing Schafer of their testing and determination that the brakes were safe. It was Respondent's management, by not following its own procedures (T. 463Ä464), who thwarted the dispute from going to resolution through the grievance procedure by (1) taking the position that Schafer, not it, should have removed the second tag (T. 477 after being notified of management's determination, and (2) letting it be known to Schafer in advance and nearly immediately that he was to be disciplined. During Schafer's shift on November 13 and after the second tag was placed on the GÄ3, nothing prevented Respondent from following its own procedures by:

(1) removing the second tag as it had done the night before,
(2) advising Schafer that it had checked the brakes and considered them safe, and,
(3) if Schafer persisted in his position that the brakes were unsafe,
(i) advising him that there was a safety dispute, which under both the union contract and the Tagout Procedure, must be resolved through the Contract Grievance Procedure (ART. III(i), and (ii) assigning him to other work.

In reviewing the foregoing and the entire record it is found that Respondent's motivation in the discipline of Schafer was willful and retaliatory. Respondent gave him no audience before taking the action. It allowed no disagreement whatsoever with its determination that the brakes were safe, even though any such determination or belief was never communicated to Schafer as to the first tag-out and--as to the second tag-out--was firmed up by further testing after the second tag was placed on the GÄ3.

After weighing the above assessment considerations, it is concluded that a penalty of $1,000.00 is appropriate.

ORDER

1. The written reprimand of Complainant DeWayne Schafer dated November 16, 1984, shall be removed by both Respondents from his employment records and all references thereto in other of Respondents' records shall be expunged.

2. Respondent Consolidation shall pay the costs and expenses reasonably incurred by Complainant in connection with the institution and prosecution of this proceeding.

3. Counsel are directed to immediately confer and attempt to agree on the amount due under paragraph 2 and, if they can agree, to submit a statement thereof to me within 20 days of the date of this decision. If they cannot agree, Complainant shall, within 30 days of the date of this decision, file a detailed statement of the amount claimed, and Respondent shall submit a reply thereto within 20 days thereafter. This decision shall not be final until I have issued a supplemental decision on the amount due under paragraph 2.

4. Respondent Basic, the current owner and operator of the Glenharold Mine, shall post a copy of this decision on the appropriate bulletin board at the subject mine which is available to all employees for a period of 60 days.

5. Respondent Consolidation shall pay the Secretary a penalty of $1,000.00 within 30 days of the date of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

1 30 U.S.C. 802(d); Consolidation Coal Company v. Secretary (4th Cir., unreported decision; March 13, 1986).

2 The hand written initials of Lee Brown, the repair shop foreman on the next shift, i.e. midnight to 8 a.m. on November 13, 1984 (T. 67, 306). Miles Dochtor was a repair shop mechanic (T. 86, 334). Neither Lee Brown or Dochtor were members of the Safety Committee (T. 85, 86).

3 Employees were required to check their equipment before operating it (T. 418Ä419).

4 The wording of the handwritten part of this tag filled in by Schafer does not reflect that he was aware that the first tag had been removed by management or that management had checked the brakes and found them satisfactory; nor does its tenor show rancor or reflect any knowledge of any events concerning the GÄ3 after he left it at the repair shop the previous evening.

5 This is Schafer's account. According to Dean Bray, the only party to the conversation who testified besides Schafer, Schafer said that if any of the foreman present had removed the tag it "would be" their "ass" (T. 396). On this limited issue I credit Bray's account as being the more likely in view of the overall circumstances and Schafer's emotional state at the time.

6 At this point, according to Mr. Bray, he "had no reason" to believe the condition of the GÄ3's brakes "were any other" than what Schafer told him they were (T. 407Ä408), that is, that the brakes were not safe to operate (T. 408).

7 (a) It should be noted that the phrases "abnormally hazardous" and immediate danger" used by Mr. Suess in the first paragraph of this undated reprimand letter (T. 521Ä523), while possibly recognizable as established mine safety concepts and jargon, appear to invoke the language of Article III, Section (i)(1) of the contract Grievance Procedure (Ex. 19) set forth above. In its landmark Pasula case, infra, the Federal Mine Safety and Health Review Commission noted with respect to what I believe and conclude are analogous and applicable "refusal to work" principles that such contractual language permits refusals to work in only what might be called an "abnormal imminent danger" and declined to construe that Act to limit a miner's refusal to work to only such conditions.
(b) Close analysis of the reprimand letter reveals (a) that its primary thrust is Schafer's alleged "abuse" of the tag-out procedure, and (b) that it fails to precisely describe how Schafer did so (T. 103). Nor does it explain to Schafer how he "failed to follow" the 1984 contract. It can be inferred that the "abuse" Mr. Suess had in mind was generally that Schafer tagged out a piece of equipment that was not unsafe. Significantly, the timing of events, Schafer's knowledge of them, and their interplay with the specific rights of miners under the tag-out procedure and grievance procedure and the requirements thereof applicable to both miners and management was not

delineated. Also, Mr. Suess did not discuss the matter with Schafer before issuing this reprimand (T. 497). There is no evidence that Schafer was ever told why Respondent concluded the GÄ3 was safe to operate, or which "areas" Respondent thought it was safe to operate in. Schafer was told, though, that management wanted to operate the GÄ3 until the GÄ4 was out of the repair shop.
(c) At the hearing, Mr. Suess could not say, assuming arguendo that the only thing Schafer did wrong was abusing the tag-out procedure, whether or not Schafer would have been reprimanded (T. 508Ä510, 478).

8 Mr. Suess's misunderstanding and rationalizing of the sequence in which certain crucial events occurred must be underscored at this juncture: the record is overwhelming that when Schafer put on the second tag he had not been advised that management (Mr. Brown) had determined that the brakes were safe or otherwise informed of management's position. Mr. Suess subsequently conceded that Schafer did not know that management had evaluated the equipment before he put on the second tag (T. 463Ä464, 476Ä477, 507). Further, Mr. Suess was not sure, even at the time of the hearing, whether any Safety Committeeman had been advised of management's determination (T. 464, 477, 507). These facts, among other things, place Respondent in contravention of Section 3(b)(4)(a) of its own TagÄOut Procedure. Even so, Mr. Suess reprimanded Schafer and steadfastly held to the position that Schafer had abused the tag-out procedure, even on the first tag-out with respect to the brakes (T. 449Ä450). While assuming this posture it is significant that Mr. Suess did not undertake to ascertain the brakes' condition after they were removed in the repair shop (T. 491).

9 See Secretary ex rel. Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1524 (1983).

10 Mr. Suess's ipse dixit that Schafer "abused" the tag-out procedure aside, Respondent failed to persuasively show Schafer was proceeding in bad faith in the tag-outs. I infer from the fact that Respondent did limit the GÄ3's use to certain areas that it considered the GÄ3's brakes unsafe for use in other areas. Compounding the essential unreasonableness of its position, there is no evidence that Respondent ever told Schafer he was not to use the GÄ3 in certain areas before the second tag-out.

11 By taking this position, and by failing to recognize that a "dispute" as to safety of the GÄ3 existed, it was Respondent's management which blocked the operation of Art. III, Section (i) of the Union Contract. Thus, the matter was not "reviewed" by management and "at least one member" of the Safety Committee within 4Ähours, as required by the contract. Respondent, instead, let Schafer know with considerable alacrity that he was to be disciplined. From this, its strong desire to keep the GÄ3 in production, its failure to follow its own procedures, the fundamental unfairness in its position vis a vis Schafer, and the transparency of some of its arguments as previously noted, I infer that its motivation was discriminatory. Houser v.

Northwestern Resources, 8 FMSHRC 883 at 886.