

CCASE:
ALFRED H. COX V. PAMMLID COAL CO.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ALFRED H. COX,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. WEVA 86-73-D
MSHA Case No. MORG CD 85-18

PAMMLID COAL COMPANY,
RESPONDENT

No. 5 Mine

DECISION

Appearances: Paul R. Stone, Esq., Charleston,
West Virginia, for the Complainant;
William C. Garrett, Esq., Garrett & Van
Nostrand, Webster Springs, West Virginia, and
Laura E. Beverage, Esq., Jackson, Kelly, Holt
& O'Farrell, Charleston, West Virginia, for
the Respondent.
Rebecca Betts, Esq., King, Betts & Allen,
Charleston, West Virginia, for Carson Jackson
and Rodney Blankenship (respondent's president
and vice-president).

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Alfred H. Cox against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Cox filed his initial complaint on June 11, 1985, with the Secretary of Labor, Mine Safety and Health Administration (MSHA), claiming that his discharge from his job as a scoop operator on or about May 11, 1985, was based on his "safety concerns" at the mine. In several subsequent statements submitted to MSHA in support of his complaint, Mr. Cox further alleged that he was discharged for making safety complaints to mine management concerning certain alleged unsafe mine conditions which he assertedly documented in a personal log or notebook. In addition, during the course of the hearing, Mr. Cox alleged that his discharge was also prompted by certain alleged complaints that he made to MSHA inspectors. Following an investigation

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of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and notified Mr. Cox of this finding by letter dated November 7, 1985. Mr. Cox then filed his pro se complaint with this Commission on December 6, 1985. The matter was assigned to former Judge Joseph Kennedy for adjudication, but was subsequently reassigned to me upon Judge Kennedy's retirement.

The respondent filed a timely answer to the complaint and denied that it discriminated against Mr. Cox in violation of section 105(c) of the Act. As an affirmative defense, the respondent asserted that Mr. Cox was discharged for insubordination, and in support of its defense asserted that in a decision of the West Virginia Department of Employment Security, dated May 29, 1985, in connection with Mr. Cox's application for unemployment benefits, Mr. Cox reportedly stated that the reason he was fired was for unsatisfactory service, and not because of his alleged complaints about unsafe mine practices. In a subsequently filed pleading in response to a pretrial order issued by Judge Kennedy, the respondent asserted that Mr. Cox was discharged for unsatisfactory service after making certain threats to the respondent's President Carson Jackson during a telephone conversation of May 11, 1985, and to one Neal Pleasants, Jr., Senior Vice-President for Brooks Run Coal Company, during a second telephone conversation that same day. The alleged threats concerned Mr. Cox's purported assertions that he would call the "Labor Board" and "Union" in to stop the men from working at the mine and that he would shut the mine down.

A hearing was held in Charleston, West Virginia, on October 28-29, 1986, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and the arguments presented have been fully considered in the course of my adjudication of this matter.

Issue

The critical issue in this case is whether Mr. Cox's termination by the respondent was prompted in any way by his engaging in protected activity, or whether it was the result of unsatisfactory services or other legitimate reasons as claimed by the respondent. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

The respondent's motion to quash a subpoena duces tecum served on two of the respondent's operating officers for the production of certain records was denied, and the respondent produced copies of the requested documents for the complainant's examination, including a mine map, an MSHA record of a battery explosion, fire boss records, and records of reported roof falls (Tr. 6A12, 10-28-86). The parties also stipulated to the admissibility of Mr. Cox's deposition, taken on May 28, 1986 (Tr. 13). In addition, the posthearing deposition of Mr. Carson Jackson, respondent's president and general mine superintendent, was submitted and admitted as part of the record.

The complainant's subpoena for the testimony of MSHA Inspector John G. Tyler, was withdrawn after the parties agreed to stipulate to his testimony were he to appear as a witness in this case (Stipulation, Joint Exhibit JEÄ1), (Tr. 5, 10-28-86). The complainant subpoenaed MSHA Inspector Joey Adkins, and he appeared and testified.

Complainant's Testimony and Evidence

In support of his case, the complainant subpoenaed eight present employees of the respondent, including Mr. Carson Jackson, respondent's president and general mine superintendent, and Mr. Rodney Blankenship, respondent's vice-president, and general mine and section foreman. Respondent also subpoenaed two MSHA inspectors, and one testified. The parties agreed to stipulate to the testimony of the other inspector.

Wayne Lee, Cutting Machine Operator, confirmed that roof falls have occurred in the mine, but "we done what we could" to support the roof by installing longer bolts and cribs. At times, when the roof bolts were found to be too far from the face, company management took corrective action by installing more bolts and cribs where necessary (Tr. 20, 28Ä29). Mr. Lee could supply no details as to the roof falls, nor could he recall any of the details of the reported roof falls made by

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the respondent (Tr. 18, 37). The roof conditions were discussed by the miners among themselves, including Mr. Cox, and with company management. However, Mr. Lee never heard Mr. Cox discuss any roof conditions with Mr. Jackson or Mr. Blankenship, and he did not know whether Mr. Cox complained to management about any roof conditions. Mr. Lee stated that there were "differences of opinion" as to the existing roof conditions (Tr. 34-37).

Mr. Lee stated that on one occasion, when a miner complained to Mr. Jackson about the roof bolts being too far back from the face, and after he (Lee) confirmed that this was the case, Mr. Jackson assured them that he would take care of the condition, and after 2 or 3 days, the condition was corrected. Mr. Lee explained that while the roof bolter would install two rows of roof bolts, the roof-control plan required additional support at the discretion of management if they were required to make the place safe. If any miners believed that the roof bolting was inadequate, they would discuss it among themselves and would try to correct it, and Mr. Lee was aware of several occasions when Mr. Jackson required the roof bolter to go back and rebolt an area. Mr. Lee asserted that there were occasions when Mr. Jackson was not aware of the roof conditions, but that "maybe he was, I don't know" (Tr. 39-43).

Mr. Lee confirmed that powder and caps were hauled in the mine on equipment and left there together, rather than being left in the explosives magazine, and that this was a common practice until 2 or 3 weeks before the hearing in this case. Although he denied that he ever engaged in such a practice, Mr. Lee named three shot firers and drillers who he claimed did (Tr. 21). Mr. Lee explained that leaving the powder and caps on the drill machine or other equipment made it easier on the miners because it would save them time going back and forth from the magazine. Mr. Lee believed that management was aware of this practice, because the powder and caps were in full view of anyone in the area, and no attempts were made to conceal the practice. He was sure that Foreman Blankenship was aware of the practice, and Mr. Lee knew of no complaints to management about it (Tr. 44-45).

Mr. Lee stated that ventilation curtains were often rolled up rather than being kept down, and that this was a common mine practice. He explained that leaving them up made it easier on the equipment operators who were tearing them down, and it made the mining cycle go faster. Mr. Lee believed that management was aware of the practice (Tr. 24).

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Mr. Lee testified about a battery explosion incident involving Mr. Cox which occurred sometime in 1984 or 1985, and another similar incident involving another miner, but could not recall all of the details. However, he believed that the incident involving Mr. Cox was caused by lack of adequate battery ventilation, and Mr. Cox's failure to turn off the battery charger power when he plugged in the battery. This caused an arc which set off the explosion (Tr. 37-38).

Mr. Lee confirmed that he has shut off his personal dust sampling device in order to obtain a "good sample," and that this was a common practice for him. However, he was not aware of any MSHA violations ever being issued because the respondent exceeded the applicable MSHA dust standards (Tr. 31-33).

Mr. Lee stated that he was aware that Mr. Cox was keeping a personal notebook, but never saw any of the entries until he was given an opportunity to review the book during MSHA's investigation of Mr. Cox's complaint. He had no independent personal knowledge of any of the incidents recorded by Mr. Cox in the book (Tr. 48-54). Mr. Lee stated that he never complained to any MSHA inspectors about the practices in question, and that he has never been threatened by mine management (Tr. 27).

On cross-examination, Mr. Lee asserted that bad roof conditions can exist anywhere in the mine, and that he does what he can to protect himself and his fellow miners. He confirmed that the respondent uses roof bolts longer than those required by the roof-control plan, and also installs support straps and plates in some places (Tr. 58-59). On one occasion, management decided to leave longer coal pillars rather than taking all of the available coal, and this helped to support the roof. Although falls have occurred around belts and in some face areas, no men or equipment were involved. Although it is not done on a regular basis, Mr. Blankenship has discussed the roof plan with miners (Tr. 60-62). Mr. Lee confirmed that he never heard Mr. Cox complain to management about roof or dust conditions, and that the miners simply discussed it among themselves (Tr. 65).

Mr. Lee stated that the respondent rock dusts on a regular basis, and that the water sprays on his machine are operable. When they are not, the respondent takes the appropriate action to repair them and makes an effort "to go along with me on water to keep the dust down" (Tr. 65-66).

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Mr. Lee stated that Mr. Cox himself has kept powder and caps on his drilling machine, and he never heard anyone from mine management approving of this practice (Tr. 63). He has heard Mr. Blankenship tell people to keep the ventilation curtains rolled up (Tr. 64-65). When miner Cogar complained to Mr. Cox about the powder and caps, Mr. Cox responded that the company "was doing things wrong too" (Tr. 73).

Mr. Lee stated that company policy dictates that all roof bolting be done in sequence and that Mr. Cox himself has bolted out of sequence, and Mr. Lee was present when management advised Mr. Cox of the requirement that bolting be done in sequence (Tr. 70). On one occasion when miner Alva Cogar complained to management about the bolting being out of sequence, Mr. Jackson took care of the problem and Mr. Cogar still works at the mine (Tr. 68-69).

Mr. Lee confirmed that Mr. Blankenship has shut off his (Lee's) personal dust sampler, and he has heard that this was done with other samplers (Tr. 77-78). However, no one has ever complained to MSHA about the practice (Tr. 78-79). Further, Mr. Lee has never heard Mr. Cox state that he would take any of his complaints to MSHA or other mine agencies (Tr. 76). Mr. Lee stated that Mr. Jackson does what he can "for the most part" to run a safe mine, and that he can communicate with Mr. Jackson and Mr. Blankenship (Tr. 68).

When asked why miners were not concerned about the dust samplers being shut off, Mr. Lee stated "it ain't that we don't care; its that we've got to make a living" and without decent dust samples, inspectors would always be there and shut the mine down for noncompliance and there would be no work (Tr. 79-80).

James Ramsey, Jr., roof bolter operator, stated that he was aware of roof falls between October, 1984 and May, 1985, but could not state how often they occurred. He does what he has to do to insure adequate roof support, and if longer bolts are needed he installs them. He would report bad top to his foreman, and was always instructed to install longer bolts or cribs. Mine management has never instructed him to work under bad top, and has never ignored him when he reported bad top to his foreman or to Mr. Blankenship. On occasion, when he (Ramsey) believed that more could be done to support the roof, he never advised his foreman about this, nor did he complain to Mr. Blankenship (Tr. 81, 95-99).

Mr. Ramsey stated that he was aware of drillers keeping powder and caps on their machines, but no one ever complained,

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and the practice has since stopped. He was also aware of ventilation curtains being rolled up, and a battery explosion involving Mr. Cox, but he knew no details since he was not there when it happened, and he and Mr. Cox worked on different shifts (Tr. 81Ä84, 89, 106).

Mr. Ramsey confirmed that he has shut off his own personal dust sampler, but was not aware of anyone else doing it or Mr. Blankenship's involvement. When asked why he shut his off, Mr. Ramsey responded that "he just did" (Tr. 94). Mr. Ramsey stated that he has never complained to MSHA about any of these practices, and when asked why, he responded that he wants "to go along with everybody" (Tr. 92).

On cross-examination, Mr. Ramsey remembered two roof falls on a belt, and he confirmed that management installed cribs and canopies over the belts, took steps to support the roof, and explained the roof control procedures to the miners (Tr. 102Ä103). In response to further questions, he confirmed that he has roof bolted out of sequence, but did not make a practice of it. He uses his own judgment in roof control after taking into account the prevailing conditions, and he never told management about bolting out of sequence and "just did it." He admitted that he took it upon himself to bolt out of sequence, and on occasions when Mr. Blankenship and Mr. Jackson observed him doing it, they instructed him to do it the proper way. Mr. Ramsey stated further that he bolted out of sequence only twice in the past 6 months, and that he did so because he believed it was safer, and not as a short cut (Tr. 110Ä115).

Mr. Ramsey stated that ventilation curtains were rolled up because it increases production and made it easier on the crew. Although dust increases from this practice, the face areas are rock dusted every evening, and no excessive levels of methane have ever been detected in the mine (Tr. 103Ä105). He thought there "may be trouble" with management if he didn't go along with the curtains being rolled up, but did not know what management's reaction would be if he rolled them down. He was aware of his right to make complaints to MSHA, but never did, and never saw a need to do so (Tr. 108Ä109).

Mr. Ramsey stated that he is not afraid of Mr. Blankenship and has told him about adverse roof conditions when they were encountered (Tr. 108). He confirmed that he observed miner Alva Cogar with powder and caps on his drill machine (Tr. 107).

Roger Groves, electrician, stated that he was aware of roof falls in the mine, and they resulted from broken roof or areas where it was hard to hold. However, he believed the roof was bolted according to the approved roof-control plan (Tr. 127). He did report one bad top condition to Mr. Jackson, but mining continued in the area for a week (Tr. 131). He was aware of rolled up ventilation curtains, and believed that this was the rule rather than the exception (Tr. 128). He has "heard talk" about dust samplers being turned off, but could not recall any details (Tr. 129). He was also aware of the battery explosion incident involving Mr. Cox (Tr. 130). Mr. Groves stated that he never made any safety complaints to MSHA, and has no knowledge that Mr. Cox did (Tr. 132).

On cross-examination, Mr. Groves confirmed that he was responsible for the maintenance of the mining equipment, and that the respondent's policy is to keep all equipment in good operating condition. He does what is necessary to keep the equipment in good repair and proper operating condition. The ATRS and water sprays on the cutting machines were kept in good condition, and Mr. Blankenship frequently discussed the roof-control plan with the men, usually in the morning. Mr. Groves stated that he never observed any evidence that the respondent did anything to endanger miners under unsupported roof, or that the roof was not supported according to the approved plan (Tr. 135-139).

Mr. Groves stated that during his 5 years of employment at the mine, he complained once about bad top. The roof had dropped in a roadway away from the face and the weight was pulling thru the bolts and half-headers. After he reported this to Mr. Jackson, mining continued for a week, but Mr. Jackson took care of the condition in time, and he was not antagonistic because he had complained. Mr. Groves stated further that Mr. Jackson and Mr. Blankenship never left him with the impression that if he made safety complaints, his job would be in jeopardy, and he recalled a meeting at which Mr. Jackson stated that he would rather shut the mine down than have someone injured (Tr. 144-146).

With regard to the battery explosion incident, Mr. Groves was of the opinion that it was caused by a gas buildup under the lids. Although the lids are vented, they were kept closed. He could not state whether Mr. Cox was aware of the fact that the lids and vents should be opened for adequate ventilation, and when he plugged in the battery with the charger connected,

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an arc resulted. It's possible that Mr. Cox forgot to deenergize the charger, and that this caused the arcing (Tr. 142-144).

In response to further questions, Mr. Groves stated that while he never observed Mr. Jackson or Mr. Blankenship present when powder and caps were on the equipment, since they were in and out of the section, and were the bosses, he assumed that they knew of the practice, but he never discussed it with them, nor did he bring it to their attention (Tr. 148-150). Mr. Groves confirmed that he is a certified shot firer, and that he observed powder and caps on equipment, rather than stored in a box. Keeping the powder and caps on the equipment made it easier on the shot firer (Tr. 152-153).

Mr. Groves was aware of the Holmes Safety Group sponsored by the respondent, and he has seen notices posted informing the men about meetings. He denied that he was concerned about his job or the mine shutting down if he complained, and he could not recall Mr. Cox ever complaining to Mr. Jackson or Mr. Blankenship about any safety matters. He also stated that Mr. Cox never told him that he had made any complaints (Tr. 154-157).

Aaron Bender, coal drill operator and shot firer, confirmed that he worked with Mr. Cox on the same shift when he was first employed, and then went to the evening shift in 1984. Mr. Bender was aware of some roof falls because of bad top, and the top would fall above the roof supports (Tr. 163, 175). Mr. Bender admitted that he has kept powder and caps on his drill because it makes his work easier and faster. He was also aware of multiple powder bags or boxes being carried about, and admitted that he had done this and was aware of the fact that it is a violation. He denied any knowledge of any uncertified persons drilling or shooting. He was aware that ventilation curtains were not always maintained within 10 feet of the face and in the down position, and admitted that he did not always keep the curtains down because it slowed him down. He has helped roof bolters and they always bolted in sequence, and he was not aware of any roof bolting being done out of sequence (Tr. 164-168).

On cross-examination, Mr. Bender stated that he was familiar with the roof-control plan and has helped out on roof support. He stated that the roof-control plan was followed "pretty well, as close as we could," and that cribs or larger bolts were set if the roof "started working." There were never occasions when nothing was done to attempt to keep the roof intact, and when he pointed out adverse roof

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conditions to his foreman Dave Young, Mr. Young always cautioned him to watch the roof and to rebolt it when it was safe to do so. There were instances of roof falls in places which had been bolted, but this did not occur every day or every week. However, additional support was always installed in these areas, and he believed it was adequate. Additional support would be installed in those instances when he reported adverse conditions to Mr. Young (Tr. 177-180).

Mr. Bender stated that the respondent provides bags for carrying powder, and it is his understanding that he can carry enough in the bags to shoot three or four places. He also knew that he was not to keep the powder and caps on his drill, but he did so anyway because it made his work easier and saved him time because he did not have to walk back and forth from the powder magazine (Tr. 182).

Mr. Bender explained that the ventilation curtains were kept rolled up to preclude knocking them down with equipment. If they are knocked down, the equipment operator is supposed to stop and put it back up, but many times he did not stop after knocking down a curtain, and usually, no one observed him. On one occasion, Mr. Young observed him tear down a curtain but did not stop him or order him to put it back up (Tr. 184-186).

Mr. Bender stated that he never complained about the curtains being knocked down, but "us workers used to talk to each other about it." He also stated that he was not concerned about knocking down curtains because "you probably wouldn't run coal if you went by every law that you had to go by" (Tr. 186-187). Mr. Bender stated that he was not aware of anyone complaining to management about safety concerns, and he never complained to Mr. Jackson about safety or about any dissatisfaction with his job. Mr. Bender confirmed that anytime he believed something was not safe, he discussed it with his foreman (Tr. 189-190).

Steve Mullins, scoop operator, testified that he was aware of roof falls in the mine, but they were not frequent occurrences, and he recalled one or two a year in the 5 years he has worked at the mine. He was aware of powder and caps kept on equipment, and believed that it was a commonplace occurrence. He engaged in the practice because it made his work easier, and he never believed he was in any danger. Foreman Blankenship has sent him for powder and caps, and Mr. Mullins would bring it in and place it on the drill. Mr. Mullins was of the opinion that Mr. Blankenship was aware

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of the practice because "he was there all day and so he'd have to have seen it" (Tr. 195, 201).

On cross-examination, Mr. Mullins stated that he has served as a substitute section boss, and has also served as a shot firer. He has cleaned up debris after a roof fall, and confirmed that adequate steps were taken to resecure any roof fall areas, and that headers, cribs, and canopies have been installed in these areas. He believed that most places where falls occurred were too high for the bolter to reach. He conceded that keeping powder and caps on his scoop was not a smart thing to do, and he would never have done it if he believed he were in any danger (Tr. 211).

Michael R. Poole, formerly employed by the respondent as a bratticeman, confirmed that Mr. Cox is his uncle and helped him get his job. Mr. Poole stated that he was fired by the respondent for failing to appear for work on Saturday, May 11, 1985, and that he had worked for the respondent as a bratticeman for 3 years prior to his termination. Mr. Poole stated that during May 1984 to May 1985, the mine experienced eight roof falls in the working area. He also stated that the ventilation was not kept up to par, and that the only time it was is when an inspector was present for an inspection every 6 months (Tr. 218-219). Curtains were rolled up and nailed to roof headers, and at times no curtains were installed unless an inspector was on his way into the mine. However, the permanent brattices and stoppings were installed and maintained properly (Tr. 222, 245).

Mr. Poole confirmed that powder and caps were frequently kept on machinery underground and he named five management individuals who he claimed knew about this practice, including Mr. Jackson and Mr. Blankenship (Tr. 219). Mr. Poole stated that on occasion, he operated the coal drill and helped shot firer Alva Cogar, and Mr. Jackson and Mr. Blankenship would walk in and see the powder and caps on the machine (Tr. 210).

Mr. Poole stated that he never wore any dust sampler, but they were made available to other miners. Although he never personally heard Mr. Blankenship order anyone to deactivate a sampler, two of his fellow workers told him Mr. Blankenship told them to turn off their samplers, and Mr. Poole stated that he observed samplers in a box on a rectifier and that they remained there during the entire shift (Tr. 223-225).

Mr. Poole stated that on one occasion during his last year on the job he complained to Mr. Blankenship about the practice of keeping powder and caps on the equipment when the top was bad, and that he often told Mr. Jackson's son Kit about the ventilation and float coal dust. Mr. Poole stated that he complained to Kit Jackson, and knew that he would tell his father about it (Tr. 232). Mr. Poole stated that on one occasion, Mr. Cox told Mr. Blankenship that the next time an inspector was in the mine, he (Cox) "would have a talk with him," and a week later Mr. Cox was fired (Tr. 233).

When asked whether he or the other men had ever threatened to go to an inspector with his complaints, Mr. Poole responded as follows (Tr. 233):

A. I think we've all discussed it at one time or another, yes, but later, right before we got fired, within a month or two months, maybe, before we got fired, I even told Kit that I might go and try to get the union in there to get it straightened out. And I'm sure that he went back and told Carson and Rodney.

A. I'm sure, while we was gathered around, you know, eating lunch or something, that a few of them has mentioned such things as bad top and things like that, but most of them was scared they was going to lose their jobs and they wouldn't ever threaten the company as far as going to the mine inspectors or anything because they was all afraid of losing their job.
JUDGE KOUTRAS: Did they ever talk about doing it?
THE WITNESS: A lot of them a lot of times, quite often, they'd say somebody needs to do something about it, you know. As a matter of fact, Alva Cogar, he's the one—he runs the coal drill, and he was always complaining that something was needing done, too.

Mr. Poole stated that although he is not a certified shot firer, he was required to shoot coal in the absence of the regular shot firer, and that he did so at Mr. Blankenship's

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direction (Tr. 238-239). He also stated that he shot coal while a trainee, but was not sure who directed him to do it. However, he believed that foreman Euhl Damron and Mr. Blankenship knew about it, and that Mr. Blankenship assigned him to help the coal driller and the firer (Tr. 240). Mr. Poole stated that there were occasions when Mr. Blankenship would leave the section, or would be late in arriving, and no foreman would be present, or he would assign scoop operator Steve Mullins to be in charge (Tr. 242).

On cross-examination, Mr. Poole stated that after Mr. Cox received a telephone call at his home from Mr. Jackson on Saturday morning, May 11, 1985, Mr. Cox informed him that Mr. Jackson fired him for not reporting to work that day. Mr. Poole confirmed that Mr. Jackson was the person who initially hired him, that Mr. Jackson is the person who decides when employees are required to work, and that he (Poole) was told by his foreman that he was scheduled to work that particular Saturday (Tr. 247). However, Mr. Poole also stated that he was led to believe from Mr. Blankenship that he did not have to work that day (Tr. 248). Mr. Poole denied that either he or Mr. Cox attempted to convince other miners not to report for work that day (Tr. 249). Mr. Poole confirmed that because of certain personal problems with his spouse, he was staying at Mr. Cox's house and was sleeping when Mr. Jackson called, and he did not hear the telephone conversation.

Mr. Poole stated that he and Mr. Cox went to the mine on Monday, May 13, 1985, and he did not understand that he had been fired until everyone else went into the mine. He and Mr. Cox were summoned to the office by Mr. Jackson, and Mr. Jackson handed them their paychecks and termination notices, and the notices stated that they were fired for "services unsatisfactory" (Tr. 251).

Mr. Poole confirmed that prior to his discharge, he had been late for work "a few times," and had two unexcused absences because of personal problems, and had been warned by Mr. Jackson and Mr. Blankenship that his absences would not be tolerated in the future. Mr. Poole denied that he was ever given a written warning about his absences, but admitted that Mr. Jackson or Mr. Blankenship had given him "a slip of paper" which recorded the dates of his unexcused absences and days that he was late for work. Mr. Poole stated that when he received this, he went to Mr. Jackson's home and informed him that he would understand it if Mr. Jackson fired him for his absences and tardiness, but that Mr. Jackson simply told him not to miss anymore work "if I could help it" (Tr. 252).

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Mr. Poole confirmed that he filed a discrimination complaint with MSHA after he was fired, and later received a letter advising him of MSHA's findings that the respondent had not violated the law and that his case would not be pursued further. Mr. Poole stated that he moved out of state and did not pursue the matter further (Tr. 253-254; 270-271).

With regard to his assertion that roof falls had occurred in virtually every entry during the period immediately before his discharge of May 11, 1985, Mr. Poole stated that the only evidence he has of this allegation is his word and the word of Mr. Cox, and "if a couple of the other guys hadn't left, their word" (Tr. 254). He further explained as follows at (Tr. 255-257):

Q. As far as you know, when the roof falls occurred were reports of the roof falls made to the proper governmental officials?

A. As far as I know, no. As far as I know, they may have reported every one of them.

Q. You don't know.

A. As far as knowing, no, sir, I don't.

Q. Did the investigators come while you were there and investigate the areas where the falls occurred?

A. I think one time there was a mine inspector came and investigated.

Q. When the falls were occurring, was Mr. Jackson doing anything? Was he investigating it himself?

A. He looked at a few of them, I do know that, but I was pretty well busy the times I was there.

Q. The point I'm getting at is this: did the company you testified you were concerned and worried about the condition of the roof. Was the company management also concerned about the roof?

A. I would say they was worried to where they didn't want their roadways blocked. They're

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pretty well used to it. They've been underground twenty or thirty years, you know and it's just normal; you hear popping and cracking, you know. You get used to it and you don't really worry that much about it.

Q. Are you saying they had more knowledge about the condition of the roof than you did? Do you admit that?

A. I'm saying more experience.

Q. In dealing with roof conditions?

A. Right.

Q. And were you aware that the company took steps to support the roof in the areas that they were having trouble with the roof?

A. Not all of them, but in a lot of them, yes.

Q. You admit that the company took extra added steps to ensure a supported roof?

A. In a few places, yes. Not everywhere, though.

Q. Did you point out bad roof areas to anyone in management that they ignored?

A. Yes.

Q. They ignored it?

A. Yes.

Q. They did nothing?

A. Right.

Q. All right. Can you give me specific instances?

A. Like, most of the time we'd eat on the rectifier. Probably two weeks before we was fired, three weeks before we was fired, me, Kit, Rodney, probably Steve Mullins and my

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uncle was sitting on the rectifier, and Wayne Lee came up there and I pointed out to Wayne, Kit and all of them the way that that rib was cutting—they call it cutting but the top just keeps falling out in small pieces, and, you know, it's hard telling how much of it will fall out. And No. 5 entry, that was the only roadway going to the face passable by scoops or any big machinery. Wayne Lee looked at it two or three times with me; my uncle looked at it with me; Kit has looked at it with me and I showed them—normally, when you have so much pressure on a bolt, the plate—you have a half header above the bolt--the half header, so much weight will come against it, it will squeeze plumb in two and an end will even fall off. But these particular ones, the bolt head itself was ripping the plate and pulling the head of the bolt through the plate. That's how much weight was on them.

Mr. Poole confirmed that the permanent stoppings were usually constructed and maintained in compliance with the law, and that when he shot coal as a trainee he never did it without being supervised, but he was not sure whether the person who supervised him was a certified shot firer. With respect to his shot firing after his training was over, Mr. Poole stated that he was still not a certified shot firer, and while Mr. Blankenship may have at times been present, he was not under his direct supervision (Tr. 260).

With regard to his complaints about the coal dust, Mr. Poole confirmed that he made no direct complaints to mine management but that he "would be talking about it" (Tr. 262). He stated that management agreed with him "a lot of times," and conceded that he rock dusted the affected areas, and that the maintenance shift also rock-dusted in order to keep the dust down. Mr. Poole believed that rock dusting was done 75-85 percent on his shift as well as on the maintenance shift (Tr. 263).

Mr. Poole agreed that his shift and the third shift kept the brattice cloth within 10 feet of the face, but disagreed that this was always done (Tr. 264). He explained further as follows (Tr. 264-265):

JUDGE KOUTRAS: Let me ask you this: what if I were to tell you hypothetically that six

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miners testified in this case that the curtain was always hung up in the right locations, but it was rolled up. It was hung, but it was rolled up, and that way, it interfered with ventilation. Do you disagree with that? Are you saying it was never hung up in the right place?

THE WITNESS: No, no, that's not what I'mÄa lot of times it would be hung up in the right place and rolled up. But I would say at least forty percent of the time, especially if, like Monday, Tuesday and Wednesday a mine inspector came and he finishedÄI think it's called a general inspectionÄfor two weeks, probably, there wouldn't be hardly any curtain put up.

JUDGE KOUTRAS: At all?

THE WITNESS: We'd go something like two breaks before any curtain would be put up againÄa lot of times. I'm not saying all the time or every time; I'm saying a lot of times.

With regard to his asserted "complaints" to mine management, Mr. Poole stated as follows (Tr. 265Ä268):

Q. Now, you said earlier you made complaints to management or you talked with management about the float dust. And you talked about the rock dust; you talked about the curtains. Did you make any other complaints to management?

A. Yes. The more the top got bad the more everybody complained, more or less, but all of us would discuss the top getting worse, possibly falling on the drill and blowing us all up. There was a lot of people talking about it.

Q. That's fine. A lot of people were getting concerned about the driller hauling shot and caps on his drill as the roof got worse, and that would be getting close to the time that you were discharged. Is that correct?

A. Right.

Q. Who are you talking about when you say a lot of people?

A. I would say just about everybody that was an employee on the day shift: Roger Groves, Steve Mullins, Wayne Lee, Alva Cogar, me, my uncle.

Q. Were these conversations you had among yourselves or were these conversations you also had with members of management?

A. Not all the time, but a lot of times, management would be there, too, yes.

Q. Let's talk about that. Alva Cogar, Mr. Groves, Mr. Mullins, Mr. Lee, your uncle, yourself—did you say any more?

A. We wouldn't all be there at one time, don't get me wrong. Three or four of us would talk about it at lunch, and three or four of us would talk about it when we was taking a break or something.

Q. When you'd talk about it and management would be present, what would be management's response?

A. A lot of times they wouldn't even comment on it.

Q. Did they ever disagree that you can recall, about this driller hauling powder on his machine?

A. As far as I can recall, no, but like I said, most of the time they wouldn't have any comment on the subject.

Q. Besides complaining about the float dust and complaining about the powder and caps on the drill, were there any other complaints that either you or your uncle or other members made to management?

A. I can't think of any at this time.

Q. Let's talk about those complaints now, a minute. What was the nature of the complaints? How would they be made to someone from management?

A. How would they be made?

Q. How would you make the complaint? What form or in what form were they made?

A. Somebody needs to do something about the dust. Somebody needs to get the ventilation right so that this float dust will be taken out of here. Different things, different ways like that.

When asked whether he had ever made any safe complaints to any Federal or state inspectors, Mr. Poole testified as follows at (Tr. 269):

Q. Did you ever make a complaint about these two areas or any other safety concern that you had in the mine to an investigator from the federal government or state government? To an inspector?

A. I went to Mr. Tyler's house. He's a federal mine inspector. I went along with my uncle, and we discussed what was going on at the mine. And he told us a couple of steps to take.

Q. And did you take those steps?

A. We tried to take them and then we was fired, yes. I don't remember if we got fired right before we started the procedures or what, but we did try to take the steps.

Q. The question I'm asking you is, did you contact anyone from MSHA the right person from MSHA prior to your discharge?

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A. I don't think prior to my discharge; I'm not for sure.

Q. You didn't then.

A. I don't think so.

Q. And after your discharge, you did. Is that right?

A. Yes.

With regard to his visit to the home of MSHA Inspector Tyler when Mr. Cox purportedly complained to him about safety violations, Mr. Poole stated that he also complained to Mr. Tyler (Tr. 275). Mr. Poole confirmed that this was the only time he went to see Mr. Tyler, and that he was aware of the MSHA publication informing him that he could complain to any MSHA inspector, and he assumed that seeing Mr. Tyler was adequate (Tr. 277). Mr. Poole stated that Mr. Cox had previously gone to Inspector Tyler's home during the summer of 1984, in response to an ad that Mr. Tyler had placed concerning some automative parts for a Subaru which he wanted to sell. Mr. Poole explained that his visit to Mr. Tyler's home came 3 months later when Mr. Cox again visited Mr. Tyler, and he was with him at that time (Tr. 278-279). Mr. Poole stated that the second visit was "just the other day" (Tr. 280). As far as he knew, no one from mine management knew about the first visit to Mr. Tyler's home (Tr. 280).

Mr. Poole stated as follows at (Tr. 272-273):

Q. Do you know of any instances where, prior to your discharge, employees were discharged or punished because they made complaints about safety?

A. I can't think of any right off, no.

Q. Did you ever hear Mr. Jackson, the president of the company, make any such claims? That he would lay off or fire or punish anyone because they were concerned about safety?

A. No.

Q. And it's a fact that you knew Mr. Jackson was the boss?

A. Yes.

Q. And he was the one that hired and fired the men?

A. Yes.

Q. And your purpose was to get your job back by trying to get Brooks Run to interfere with the management decision of Mr. Jackson. Is that correct?

A. Yes.

Q. Sir?

A. Maybe not to interfere, but to talk to him and maybe ask him about getting it back, things such as this, not really to interfere with it.

Q. Well, what hold did you and your uncle hold over Brooks Run to get them to get Mr. Jackson to change his mind and give you your job back? Weren't some threats made?

A. Not really threats; just my uncle told him that we were going to the MSHA office and see if there wasn't something could be done about it.

Q. Didn't he also tell him that they weren't going to run no more coal and they were going to shut the mine down and have a walkout, work stoppage? Isn't that a fact, Mr. Poole?

A. Not to my knowledge, no.

Q. Not to your knowledge.

A. No.

Q. You're saying that your uncle did not tell Mr. Pleasants over the phone—all you could hear was your uncle's part of the conversation—that you'd better get his nephew's job back or he was going to have a work stoppage and stop running coal on that mountain?

A. No.

Q. And he didn't mention anything about there was going to be trouble up there if you didn't get your job back.

A. My uncle told Mr. Pleasants that he had trouble in one of his mines; that his nephew had been fired--referring about me--and that he was going to have trouble up there if something wasn't done.

Q. And the trouble you mean is what we're doing today. Is that right? Because you didn't get your job back.

A. Probably so, yes.

With regard to Mr. Cox's telephone call of May 11, 1985, to Mr. Neil Pleasants, a business associate of Mr. Jackson, and the person to whom the respondent sells its coal, Mr. Poole confirmed that he heard one-side of the conversation, and he confirmed that he heard Mr. Cox tell Mr. Pleasants that he was planning to go to a federal mine inspector and complain about violations at the Pammlid Mine. Although he was not sure, Mr. Poole believed that Mr. Cox also mentioned that he would go to the "labor board" with his complaints (Tr. 274-275).

Mr. Poole identified Mr. Pleasants as the "head honcho" at the Brooks Run Mine, and he believed that Mr. Pleasants had the authority to shut the respondent's mine down until "any problems were taken care of" (Tr. 281). Mr. Poole stated that after Mr. Cox informed him that he had been fired, he (Poole) asked him to call Mr. Pleasants. Mr. Poole stated that he did not wish to call Mr. Pleasants because he (Poole) was "kind of hot headed" and did not know how to communicate with people, and believed that Mr. Cox could serve as his "mediator" (Tr. 282).

Mitchell Nash, scoop operator, confirmed that he was aware of a roof fall on the belt because of bad top and inadequate support. He was also aware that ventilation curtains were rolled up most of the time, and stated that the only time they were down was when an inspector was in the mine. He explained a battery explosion incident in which he was involved, and stated that while the ventilation was adequate, a gas build-up under the battery which had been idle for 2 days caused an explosion sparked by an arc when he plugged in the battery. Had the battery lids been lifted, he did not

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believe an explosion would have occurred, and he was not instructed to lift them prior to the incident. After the incident, Mr. Jackson instructed him to open the lids for ventilation (Tr. 6Ä10).

Mr. Nash was not aware of anyone turning off dust samplers, but was aware of powder and caps on equipment, and that he did it "to bring up production." He confirmed that the practice has since stopped. He was not aware of any miners complaining to management or MSHA, and Mr. Cox never spoke to him about complaining or threatening to make safety complaints to state or federal mine authorities. He stated that neither Mr. Blankenship or Mr. Jackson ever instructed him to store powder and caps on equipment, nor did they imply that this should be done (Tr. 11Ä18).

On cross-examination, Mr. Nash stated that when the battery explosion occurred, Mr. Blankenship wanted him to go to the hospital but that he (Nash) said he was "all right" and wanted to return to work. Mr. Blankenship told Mr. Jackson to file an accident report, and while Mr. Jackson was reluctant to do it at first, he did report the incident. Mr. Nash went to the hospital and was checked by a doctor who gave him aspirin and he was sent home. He had no follow-up care and returned to work, and he identified exhibit RÄ1 as the accident report of May 17, 1985, relating to the incident (Tr. 23Ä27).

Mr. Nash stated that the roof fall he mentioned could have been prevented because the roof was dribbling, and the foreman knew it was weak. However, it fell over a weekend when no one was in the mine, and it covered half of the belt feeder. After the fall, Mr. Blankenship began watching the roof closer and longer roof bolts were used for support. Mr. Nash did not know whether MSHA inspected the fall area. He confirmed that a state roof inspector has discussed roof conditions with the miners, and that his foreman and Mr. Blankenship discussed the roof plan with him and instructed him to check the roof bolt test holes (Tr. 29Ä35).

Mr. Nash stated that he took it upon himself to keep powder and caps on the equipment because it made his work easier, and no one from management suggested that he do so to speed up production. He has torn down ventilation curtains with his equipment, and has stopped to replace them only if an inspector were present. Stopping to replace curtains slows his work down. The curtains were always rolled up when an inspector was not present, and he never complained to management or any inspector about the practice. Since he is

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paid by the hour, he is not concerned about production (Tr. 35-41), nor is he concerned about his job if he were to complain (Tr. 53).

Mr. Nash stated that when he was hired by Mr. Jackson, he was told that he would be required to work some overtime. He confirmed that Mr. Jackson is responsible for hiring, firing, and salaries, and that everyone knows it. He stated that when he was hired he went to the office of the Brooks Run Coal Company to inquire as to whether he would be paid or given the day off on his birthday, and when Mr. Jackson found out about it he called a meeting of the men and told them that he runs the mine and that Brooks Run did not. Mr. Jackson also advised the men that if anyone contacted Brooks Run asking about Mr. Jackson's mine, he would fire them. Mr. Nash confirmed that "Mr. Jackson makes no bones about who runs the mine" (Tr. 44-46).

In response to further questions, Mr. Nash stated that he went to Brooks Run because he assumed they operated the respondent's mine, and that when he was looking for a job he went to Brooks Run, and they sent him to Mr. Jackson (Tr. 48).

Joey Adkins, testified that he is an MSHA inspector assigned to the Mt. Hope District Four Office, and he confirmed that his office does not have enforcement jurisdiction of mines in Webster County. He confirmed that Mr. Cox visited him before his discharge and expressed some concerns about the safety conditions at the mine where he was then working. Mr. Adkins could not specifically state when the visit occurred, and he stated that Mr. Cox did not identify the mine in question. He stated that Mr. Cox complained about the hauling of explosives on electrical equipment, poor mine ventilation, and some roof problems (Tr. 112).

Mr. Adkins stated that carrying or storing explosives on equipment is a violation of the law, and it could be an imminent danger. Mr. Cox also complained about the lack of line curtains and indicated that mine ventilation was poor. Mr. Adkins stated that the question as to whether this would be a violation would depend on the applicable approved mine ventilation plan. If he were to find a ventilation curtain rolled up in a mine which he inspects it would be a violation (Tr. 115). He explained further that Mr. Cox stated that the mine had "bad roof" and said something about a "double linear." Mr. Adkins stated that "anytime you go through those, you've got a bad top anyway," but this condition is not of itself a violation, unless it is not taken care of.

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The condition is corrected by roof bolting, cribbing, timbering, strapping, or "whatever is necessary." The condition could be a violation of section 75.200, but he did not see any of the reported roof conditions (Tr. 116). If a miner went under unsupported roof, this would be a violation of section 75.200 (Tr. 117).

Mr. Adkins stated that he has observed rolled up ventilation curtains which are kept out of the way in some mines which he has inspected, and he confirmed that he has issued a citation for such a condition (Tr. 118-119). He was of the opinion that rolling up curtains and then rolling them down is a bad practice because air would not be sweeping the face to dispel methane, and he is aware of no ventilation plans in his office that allow this practice (Tr. 120).

Mr. Adkins stated that additional roof support such as cribs would be required if the top is pulling through the bolts and plates, and if the roof is taking weight and is not supported and "it's popping the plates off," this would be a violation (Tr. 120-121).

Mr. Adkins stated that after discussing Mr. Cox's complaints with him, he advised Mr. Cox to file a section 103(g) complaint so that MSHA could look into the matter or to put the complaint in writing and give it to the MSHA inspector who inspects the mine (Tr. 121). Since Mr. Cox told him that the mine was near Summersville, Mr. Adkins advised him to go to the MSHA office in Summersville to lodge his complaint, and that they would help him out (Tr. 126).

Mr. Adkins confirmed that exhibit C-6, is an MSHA publication entitled in part "A Guide to Miner's Rights and Responsibilities," and stated that while he was not familiar with it, he may have seen it or "looked at it one time" (Tr. 122). Mr. Adkins stated that there is no particular MSHA "form" to fill out for filing a section 103(g) complaint, but it needs to be in some written form, and he simply advised Mr. Cox to file it, and did not discuss the matter with anyone else at that time (Tr. 128). Mr. Adkins confirmed that Mr. Cox came to see him a second time after he was discharged, and advised him that he was filing a discrimination complaint and would probably subpoena him if he needed him (Tr. 129). Mr. Adkins stated that after this second visit, he spoke with MSHA special investigator Leighton Farley about the matter (Tr. 129).

Mr. Adkins explained the procedure for taking personal dust samples, and he stated that once he puts a sampler on a

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miner, he may or may not follow him around and observe him during the shift, but in any case, he would remain at the mine. The sampler is required to be checked during the first 2 hours and last hour of the sampling period. Although not required to do so, Mr. Adkins checks the sampler at least two or three additional times during the day (Tr. 130-132).

Mr. Adkins stated that shooting more than one place at a time may or may not be a violation, and that this would depend on the approved mine plan. With regards to any ATRS roof control requirement, he stated that MSHA does not require such a system, but if it is required by a state plan, the mine operator must keep them in a safe operational condition, but that this too would depend on a particular approved roof-control plan (Tr. 132-133). He also stated that MSHA only requires that a section foreman "run his place every two hours," and that a foreman cannot be with his crew every minute they are underground. If a shift is over at 5:00, a foreman can leave at 3:30 as long as he's inspected the section within the last 2 hours (Tr. 134).

On cross-examination, Mr. Adkins confirmed that he has known Mr. Cox since he was a child, and that he lives 3 miles from him. He does not socialize with Mr. Cox, and Mr. Adkins confirmed that everyone in the community knows that he is a Federal mine inspector. Mr. Adkins stated that he first learned about Mr. Cox's complaints when he spoke with him over the CB radio, and he told Mr. Cox to come to his home to speak to him about the matter. Mr. Adkins could not state precisely when this occurred, and that a day or so later Mr. Cox came to see him. Mr. Adkins confirmed that he took notes during his discussion with Mr. Cox, and Mr. Adkins did not believe that Mr. Cox was complaining to him, but simply wanted to know what he could do about it because he knew he was an inspector (Tr. 137). Mr. Adkins confirmed that he told Mr. Cox that transporting explosives on equipment was a violation. With regard to Mr. Cox's statements that the "ventilation wasn't being kept up," that "it was poor," and that "curtains weren't kept up," Mr. Adkins stated that he would have to inspect the mine before he could determine any violations of the ventilation plan, and that he explained this to Mr. Cox (Tr. 139-140).

With regard to Mr. Cox's complaint about "bad top," Mr. Adkins reiterated that "bad top" is not a violation, unless it is ignored and not taken care of, and that Mr. Cox was of the opinion that the roof needed more support (Tr. 141). Mr. Adkins confirmed that he cannot determine whether

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a roof is adequately supported without conducting an inspection (Tr. 141). The same is true for ventilation curtains. He would have to look at the ventilation plan and inspect the mine before he could conclude that there were any violations (Tr. 142).

Mr. Adkins stated that after discussing the need for Mr. Cox to file a section 103(g) complaint, he was confident that Mr. Cox understood him. Mr. Adkins confirmed that a complaint could have been filed with any MSHA office (Tr. 144). Mr. Adkins confirmed that he did not advise Mr. Cox that he could file such a complaint with him, but did advise him to stop by MSHA's Summersville office because it was convenient to him (Tr. 144). Mr. Adkins also stated that Mr. Cox advised him that he spoke to the inspectors at the mine, "but couldn't get anything out of those guys," and that he advised Mr. Cox about the "hot line" and that the Summersville office could give him the telephone number (Tr. 146).

Mr. Adkins stated that after Mr. Cox's first visit, he did not call him again about any safety complaints, and that during the period between the two visits, Mr. Adkins did not discuss Mr. Cox's visit with anyone (Tr. 148). However, he did mention it to Inspector Leighton in his office after Mr. Cox's discharge, and he did so because Mr. Cox advised him that he may subpoena him (Tr. 149).

Mr. Adkins confirmed that in the event Mr. Cox had filed a section 103(g) complaint with him, he would have had to turn it in. He reiterated that he simply told Mr. Cox of the need to file such a complaint, and advised him that it had to be in writing. He did not, however, quote the section 103(g) statutory provision to Mr. Cox (Tr. 151).

NOTE: The complainant subpoenaed the attendance of Mr. Rodney Blankenship as an adverse witness for testimony in this case. In view of the testimony of the witnesses regarding certain alleged illegal mine practices implicating Mr. Blankenship, respondent's counsel advised him to seek additional counsel to advise him of his rights against self-incrimination and possible criminal liability for those alleged practices. Mr. Blankenship retained counsel to represent him in this matter, and counsel entered her appearance on his behalf (Tr. 161-162; October 29, 1986). In response to certain questions, and on advice of counsel, Mr. Blankenship declined to answer, and pleaded his Fifth Amendment right not to incriminate himself. His objections are noted below.

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Rodney Blankenship, confirmed that he is employed by the respondent as a section foreman and general mine foreman. He is a one-sixth owner of the mine and serves as respondent's vice-president. Mr. Blankenship confirmed that he was Mr. Cox's supervisor on the first shift, which worked from 7:00 a.m. to 3:00 p.m., and that he is responsible for the logging of some MSHA and state mine reports, including onshift and fire boss reports, but denied that he was responsible for any dust sample reports (Tr. 165).

In response to questions as to whether anyone, including Mr. Cox, had ever made any complaints to him about any safety violations in the mine during 1984 and up to mid-May, 1985, Mr. Blankenship declined to answer (Tr. 165-166). He also declined to answer whether anyone ever reported or threatened to report, any mine safety violations to MSHA or state mining officials (Tr. 166-169). Mr. Blankenship was then proffered as a witness for the respondent.

Mr. Blankenship confirmed that Mr. Carson Jackson is the respondent's president, and in that capacity, he makes all of the decisions with respect to the hiring and firing of mine personnel, hours of work, and work and shift assignments. Mr. Blankenship stated that at one time in 1984, Mr. Cox worked as a roof bolter on his section, but was transferred to another job at Mr. Jackson's direction. Mr. Blankenship confirmed that at the time this decision was made, two jobs were open, and he gave Mr. Cox a choice as to which job he would prefer. Mr. Cox informed him that he would prefer a scoop operator's job because it was an easier job, and Mr. Blankenship assigned him to that job, with Mr. Jackson's concurrence (Tr. 171-172). Mr. Blankenship explained that Mr. Cox's transfer to the scoop operator's job was the result of a suggestion by an MSHA inspector (Tr. 172).

Mr. Blankenship stated that during the time Mr. Cox worked for him, Mr. Cox was "vocal and loud," made threats, and Mr. Blankenship considered him to be "a bully." Mr. Cox complained about working on Saturdays, as did other miners. Mr. Blankenship stated that Mr. Cox "threatened to whip me in front of the other men," and that this occurred at the time he was transferred from roof bolter to scoop operator (Tr. 175). Mr. Cox was upset and unhappy over the transfer because he believed his work was being questioned, and Mr. Blankenship stated that the transfer had nothing to do with his work (Tr. 175).

Mr. Blankenship stated that on the Monday prior to Saturday, May 11, 1985, all mine personnel were notified that

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they were required to work that Saturday. Mr. Jackson made the decision, and Mr. Blankenship informed the crew of this decision. Mr. Cox informed him that he was the coach of his son's little league baseball team and that he could no longer work on Saturdays because he had to be with the team. Mr. Blankenship denied that he gave Mr. Cox permission to be off that Saturday, and stated that he did not have the authority to give him the day off. Mr. Blankenship could not recall specifically giving Mr. Cox any instructions as to what to do about his desire to be off on Saturdays, but confirmed that his general advice in such a situation was to instruct a crew member to "take it up with Carson Jackson," and that his decision would prevail (Tr. 176-177).

With regard to any permission given to Mr. Poole that he did not have to work on Saturday, Mr. Blankenship stated that in view of the fact that Mr. Poole had missed so much work time, he warned him countless times that he would be discharged for not working. Mr. Poole advised him that he was not going to work on Saturday, May 11, 1985, and Mr. Blankenship stated to Mr. Poole that "I didn't want to hear it," that he did not make those decisions, and that he expected him to work that day. Mr. Blankenship stated that he was not aware that Mr. Poole was not going to work until he failed to show up for work that day (Tr. 177). Mr. Blankenship confirmed that he did not give Mr. Poole permission to be off that day (Tr. 178). Had he given him permission to be off, Mr. Blankenship would have so informed Mr. Jackson, and Mr. Poole would not have been fired (Tr. 179).

Mr. Blankenship stated that apart from his absenteeism record, Mr. Poole was a good worker, and that he liked him, and still does. His only complaint about Mr. Poole was his irregular work habits, and he warned him many times about it. Mr. Blankenship stated that he and Mr. Jackson warned Mr. Poole that he would be discharged if he missed another day of work, and that Mr. Jackson prepared a written warning for Mr. Blankenship to give to Mr. Poole (Tr. 180).

Mr. Blankenship stated that in addition to Mr. Poole and Mr. Cox, the only other person who did not work on Saturday, May 11, was Mr. Wayne Lee. Mr. Jackson gave Mr. Lee permission to be off, and Mr. Jackson's brother-in-law worked in his place (Tr. 180). Mr. Blankenship stated that he was not a party to the telephone conversation between Mr. Jackson and Mr. Cox on Saturday morning, May 11, 1985. He confirmed that Mr. Jackson consulted with him before placing the call, and informed him that he was going to fire Mr. Poole because of

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his irregular work and Mr. Blankenship concurred in that decision. Mr. Blankenship confirmed that the sole reason for Mr. Poole's discharge was "because he wouldn't work" and had missed so many days and was late for work. He confirmed that Mr. Poole was having marital problems, and that he took this into consideration (Tr. 182).

Mr. Blankenship stated that when Mr. Cox failed to come to work on Saturday, May 11, 1985, Mr. Jackson filled in for him and ran the scoop that day. Mr. Blankenship heard about the telephone call from Mr. Pleasants to Mr. Jackson, but had gone home and was not a party to that conversation (Tr. 183). He learned of Mr. Cox's discharge from Mr. Jackson later that day when Mr. Cox telephoned him at his home asking for a meeting with the six mine owners. Mr. Blankenship stated that he informed Mr. Cox that he did not know he had been fired, but would try to find out what happened, and Mr. Cox never called back (Tr. 184).

Mr. Blankenship stated that after Mr. Cox called him, he spoke with Mr. Jackson later that Saturday evening, and Mr. Jackson informed him that Mr. Cox had called Mr. Pleasants and "made some threats as far as our company, and he'd discharged him" (Tr. 185). Mr. Blankenship confirmed that Mr. Jackson had previously advised his personnel that Brooks Run Coal Company is independent from the respondent's company and had nothing to do with its management. Mr. Jackson also told his personnel that if anyone contacted or complained to Brooks Run about wages or other company matters, he would discharge them (Tr. 185). Mr. Blankenship stated that everyone, including Mr. Poole and Mr. Cox knew about Mr. Jackson's policy, and the fact that he, and not Brooks Run, made company policy for the respondent (Tr. 186).

Mr. Blankenship stated that he was at the mine when Mr. Poole and Mr. Cox came to the mine on Monday, May 13, 1985. They were in the lamphouse getting dressed, and he told Mr. Cox "to get his coveralls on and let's go to work and he said he was fired. And I just put my clothes on and he went out" (Tr. 186). Mr. Blankenship stated that he thought "maybe it might blow over," but that the decision of Mr. Jackson to discharge Mr. Cox apparently stood and that he was going to enforce it (Tr. 187). Mr. Blankenship denied that he had any input into the decision to fire Mr. Cox, and that the decision was solely that of Mr. Jackson. When asked the reason given by Jackson for firing Mr. Cox, Mr. Blankenship responded as follows (Tr. 187-188):

THE WITNESS: He told me that Pete Cox had^Äwas going to--called Neil Pleasants, Brooks Run Coal Company, and was going to shut down their operations and our operations, and he fired him for trying to take over the mines.

JUDGE KOUTRAS: How was he going to do that? Do you have any idea how Mr. Cox planned to shut the mine down?

THE WITNESS: No, I don't. All I'm telling you is what Mr. Jackson told me.

Mr. Cox's counsel declined to ask Mr. Blankenship any further questions (Tr. 188).

NOTE: The complainant subpoenaed the attendance of Mr. Carson Jackson as an adverse witness for testimony in this case. In view of the testimony of the witnesses regarding certain alleged illegal mine practices implicating Mr. Jackson, respondent's counsel advised him to seek additional counsel to advise him of his rights against self-incrimination and possible criminal liability for those alleged practices. Mr. Jackson retained counsel to represent him in this matter, and counsel entered her appearance on his behalf (Tr. 188^Ä189; October 29, 1986). In response to certain questions, and on advice of counsel, Mr. Jackson declined to answer, and pleaded his Fifth Amendment right not to incriminate himself. His objections are noted below.

Carson Jackson confirmed that he is part owner of the mine and serves as the general mine superintendent, as well as president of the company. He confirmed that he is ultimately responsible for reviewing and counter-signing most official mine reports and documents, including dust sample reports (Tr. 189^Ä199).

When asked about his knowledge concerning the alleged mine practices testified to by the prior witnesses, Mr. Jackson declined to answer (Tr. 201). Mr. Jackson denied any knowledge of miners other than Mr. Cox either making complaints to MSHA or threatening to do so (Tr. 202). With regard to Mr. Cox, he confirmed that he never heard Mr. Cox threaten to go to MSHA about anything in the mine while he was employed there (Tr. 201). He confirmed that none of his employees ever complained to him about any mine safety violations during 1984 and up to mid^Ä1985 (Tr. 203). Mr. Jackson stated that he is not in the mine at all times, and if any complaints were made he might not hear all of them (Tr. 205).

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Mr. Jackson stated that Mr. Cox has upset him at times when he would arrive late for work, and that "quite a few times" they have exchanged words, and even cursed each other (Tr. 205-206). Mr. Cox also upset him "a few times" when "he's tried to tell me how to run the mines, that people didn't have to work on Saturdays" (Tr. 207).

Mr. Jackson identified exhibit CÄ7 as a copy of the termination notice given to Mr. Cox, and he confirmed that he changed the discharge date on the form from May 13, 1985 to May 11, 1985, and that he did so because "I either had to do that or get him to knock my brains out." He also confirmed that the reason for Mr. Cox's discharge as shown on the form is "service unsatisfactory" (Tr. 201-208). Mr. Jackson stated that he actually fired Mr. Cox on Monday, May 13, 1985, and that when he called him at his home on Saturday, May 11, 1985, he only fired his nephew Mr. Poole. Mr. Jackson further explained that he changed the date to Saturday because Mr. Cox demanded that he do so, and that the date made no difference to him (Jackson) (Tr. 208-211). When asked when he decided to fire Mr. Cox, Mr. Jackson responded as follows (Tr. 211-213):

A. I decided to fire him when he called Neil Pleasants. I run the scoop the day that this fellow was off. I didn't get outside until about three o'clock. And after the threats and stuff that he made over the telephone, I toldÄ

Q. About the labor board and that sort of stuff?

A. Stopping the minesÄgoing to throw a picket line up around the mines.

Q. It was after the telephone call, then, to Neil Pleasants, that you decided to fire him?

A. I decided to fire him right then.

Q. Did Neil Pleasants communicate the content of that telephone call on Saturday, May 11, 1985, to you, just before you decided to fire Cox?

A. Yes.

Q. You say you're doing it after the telephone call. Pleasants, then, must have called you. Is that correct?

A. I decided it during the telephone call.

Q. I mean, as a result of the telephone call. You weren't on a conference call. Pleasants had to call you and tell you that Cox had called him?

A. That's right.

Q. And made some threats about closing the mine down, going to the labor board and such as that?

A. He was going to cause a lot of trouble.

Q. Did he say something about the labor board?

A. He was going to throw a picket line up around there. He said he was going to go to all the agencies.

Q. In other words, the mine enforcement agencies, like MSHA?

A. I don't know what he meant by that. But when he said a picket line, I knew what it was.

Q. He said he was going to the agencies. Is that right? Is that what you just said?

A. Yes, he was going to the agencies.

On cross-examination, Mr. Jackson stated that when he was upset with Mr. Cox he may have warned him, but he never threatened, reprimanded, or punished him in any way so as to effect his job security at the mine. Mr. Jackson did, however, warn Mr. Cox about his future with the company because of his frequent tardiness and his complaints about how Mr. Jackson was running the mine (Tr. 214). Mr. Jackson stated that Mr. Cox threatened "to whip his ass" several times, and that this would upset him. Mr. Jackson stated that he received information that other members of management and other workers were similarly threatened by Mr. Cox, and

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that he (Jackson) had no similar problems with any of the other men (Tr. 215).

Mr. Jackson confirmed that he did not protest the unemployment claims filed by Mr. Poole and Mr. Cox after their discharge, and Mr. Jackson confirmed that he told Mr. Cox that he was tired of Mr. Cox trying to run the mine (Tr. 216). Mr. Jackson denied that Mr. Cox's discharge had anything to do with any safety complaints, and that the decision to fire Mr. Cox was his alone, and neither Mr. Blankenship or any of the other mine owners had nothing to do with it (Tr. 217).

Mr. Jackson stated that at no time during his employment did Mr. Cox or any other miner ask to review the mine fire boss records, or any records required to be kept by Mr. Blankenship (Tr. 218). Mr. Jackson expressed doubt that Mr. Cox could have asked to see those records without his being aware of it (Tr. 219).

In response to further questions, Mr. Jackson stated that while work was required to be done on Saturdays, he did not like Saturday work because he had to pay time and a half. However, Mr. Cox and Mr. Poole did not like to work on Saturdays, and Mr. Cox attempted to influence his crew not to work on Saturdays. He did this by letting it be known that he had gone to the "labor board" and there was nothing Mr. Jackson could do about working on Saturdays, and that the men could leave. Mr. Jackson stated that Mr. Cox said "you can lay off, you can be off, there's nothing he can about it" (Tr. 223). When asked whether Mr. Cox had ever made that statement to him, Mr. Jackson replied "He didn't tell me nothing. He would tell it someplace where he knew I would get hold of it" (Tr. 223).

Mr. Jackson stated that when he first hired Mr. Cox, he informed him about Saturday work, and that Mr. Cox advised him that "I'll work on Saturday, Sunday, 16 hours a day anytime you want." Mr. Cox also stated to him "anytime you don't like my work or anything, you just tell me, you won't have to discharge me, just tell me and you'll never see me no more" (Tr. 223). When asked whether Mr. Cox ever refused to work on Saturday, Mr. Jackson replied "he didn't refuse, he always had something to do" (Tr. 224). When asked why he did not fire Mr. Cox when he threatened him, Mr. Jackson replied "He was a good worker. I tried every way in the world to get along with him. Mr. Cox is moody. He'll get better for a week or two, then he's hell for a while" (Tr. 224).

In view of the unavailability of Mr. Jackson's private counsel, the parties agreed that Mr. Jackson could be deposed posthearing, and Mr. Jackson's posthearing deposition was taken and filed as part of the record in this case. Mr. Jackson testified as to his background and experience and confirmed that he is a certified mine foreman. He confirmed that Mr. Cox and Mr. Poole were the only two miners ever discharged, but that others had been laid off as a result of a reduction in force (Tr. 7). Mr. Jackson reiterated that when he first hired Mr. Cox he informed him that Saturday work may be required, and Mr. Cox agreed that he would work if called upon to do so. Mr. Jackson also confirmed that Mr. Cox was desperate for a job when he hired him. Mr. Jackson stated that Mr. Cox's starting pay was \$100 a shift, and time-and-one half for work over 8 hours. All miners were paid the same regardless of their job classification, and whatever he instructed them to do was their job (Tr. 10).

Mr. Jackson stated that Mr. Cox was first hired as a bratticeman, and when a roof bolter quit, he assigned Mr. Cox to a roof bolter's job. Mr. Jackson later decided to take him off the roof bolter's job after a discussion with MSHA inspectors, and Mr. Cox was assigned to do brattice work. However, Mr. Blankenship asked him to assign Mr. Cox to a scoop because his back was bothering him and lifting brattice blocks was hurting him. Mr. Jackson stated that he accommodated Mr. Cox and allowed him to work as a scoop operator (Tr. 11).

Mr. Jackson stated that he considered Mr. Cox to be a good worker, but "if you tell him to do something he don't always do it the way you want him to" (Tr. 12). Mr. Jackson also stated that Mr. Cox has always had a problem in taking orders and that he resented authority (Tr. 12). After he was taken off the roof bolter, Mr. Cox resented doing what was asked of him, and didn't want to work overtime. Although Saturday work was considered a regular work day and Mr. Jackson was not required to pay overtime pay, he always paid the men at the overtime rate, but Mr. Cox resented working on Saturday even though very few Saturdays were scheduled as a work day (Tr. 13). Mr. Jackson stated that he hired Mr. Poole after Mr. Cox asked him to give him a job (Tr. 14).

Mr. Jackson confirmed that he had problems with Mr. Poole's work attendance and that he warned him about it at least three or four times before he finally fired him (Tr. 15). Mr. Jackson identified a copy of the mine's attendance records beginning in February, 1984, through June, 1984, and May, 1985, and he confirmed that Mr. Cox and Mr. Poole did

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not work Saturday, May 11, 1985, and were terminated the following week (Tr. 19, deposition exhibit No. 1). Mr. Jackson confirmed that he excused Mr. Poole from work when he had a death in his wife's family, and advanced him money to purchase an airline ticket for his wife (Tr. 20).

Mr. Jackson confirmed that Mr. Cox was late for work several times, and his policy is to allow employees who are late to work rather than go home. He warned Mr. Cox about being late. Mr. Jackson stated that he had "kind of a feeling" that Mr. Cox was the cause of Mr. Poole's absence on May 11, but that he did not know that they were not going to work that day. Mr. Jackson "had some feedback" that none of the men would work that day, and that Mr. Blankenship told him that Mr. Cox was telling the men that since he and Mr. Poole were not going to work, the rest of the men didn't either (Tr. 23).

Mr. Jackson stated that he did not give Mr. Cox permission not to work on Saturday, May 11, and that he did not ask him for such permission. Except for one miner who had permission to be off, and who was replaced by someone else, all employees except Mr. Cox and Mr. Poole reported for work. He called Mr. Cox because he had to arrange for replacements if he were not coming to work (Tr. 23-24). Mr. Jackson explained further as follows (Tr. 25-26):

Q. So it's your testimony then that Cox and Poole did not ask you for permission to be off that Saturday but Mr. Blankenship told you that they didn't want to work, probably wouldn't come out to work, and they were trying to get the other men not to come out to work?

A. Yes. They told me that Mr. Cox said there was no more Saturday work as far as he was concerned. So that encouraged me to be just a little bit strict on this. I just thought well, it looked like this was deliberate and I'll just let Mr. Poole go.

Q. If he didn't show up?

A. Yes.

Q. And then you were going to deal with Mr. Cox in some other manner?

A. Well, I was going to give him a warning. It takes you a year, unless somebody misses a whole lot of work, before you can go through the steps discharging somebody for irregular work.

Q. You had documented Mr. Poole missing work. Is that correct?

A. Yes.

Q. And that's shown in Exhibit 1 here?

A. Yes.

Q. The point is you had decided that if Mr. Poole didn't show up you were going to discharge him for missing another day?

A. Yes.

Q. After he had been warned?

A. Yes. I told him so.

Q. But you did not plan on discharging Mr. Cox if he missed work?

A. No.

Q. But you had given him warning?

A. I would have.

Q. Had you not fired him?

A. Yes.

Mr. Jackson explained the operation of the Holmes Safety Counsel, and confirmed that it is sponsored by the respondent and that its purpose is to afford an opportunity to the miners to discuss various mine safety matters. Meetings are held once a week in the evenings, and announcements are posted and miners are encouraged to attend. The meetings are not held on company time, and the miners are not paid to attend. Mr. Cox has never attended a meeting (Tr. 28-29).

Mr. Jackson confirmed that he reprimanded Mr. Nash for going to the Brooks Run Coal Company with another miner to

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ask about time off or pay for his birthday. Mr. Jackson explained that Brooks Run holds the mineral rights and that the respondent simply mines the coal and sells it to Brooks Run. Mr. Jackson stated that he met with his miners and made it clear to them that they were not to go to Brooks Run, and told them that Brooks Run has nothing to do with the management of his mine. Mr. Jackson was certain that Mr. Cox was at this meeting since he was on the payroll. Mr. Jackson is the only mine owner who ordinarily deals with Brooks Run through Mr. Pleasants (Tr. 31).

Mr. Jackson stated that when he spoke with Mr. Cox over the telephone Saturday morning, May 11, 1985, he did not fire him, did not intend to fire him, nor had he made any decision to fire him. Up to that point in time Mr. Cox had never said anything to him about speaking with MSHA Inspectors Adkins or Tyler, or any other inspectors, and Mr. Cox said nothing to him about going to any inspectors (Tr. 32).

Mr. Jackson confirmed that he called Mr. Pleasants from the mine office later in the day after speaking with Mr. Cox. Up to that point, he had not discussed Mr. Cox's and Mr. Poole's failure to show up for work with any of his mine co-owners (Tr. 33). Mr. Jackson explained his telephone conversation with Mr. Pleasants as follows (Tr. 33-38):

A. Well, we called him and he said what's going on up there. And I said nothing. And he said how many people did you fire. I said I fired one. He said well, there was a fellow called me and told me that Brooks Run had trouble and that he was more or less fearing about a work stoppage. And I said well, who was that. He said he didn't give me his name. I said well, what did he say. And he started repeating what he'd said.

Q. Well, what did he tell you had been said?

A. He said something about his son had little league ballgame that day and he had to be home with him to manage that little league team. I said well, I've fired two. I said that was Mr. Cox.

Q. You knew it was Mr. Cox that called Mr. Pleasants?

A. We had already went over that morning when I was talking.

Q. About his son playing in a baseball game?

A. Yes.

Q. So it was the only employee it possibly could have been?

A. Yes.

Q. And that's when you told Mr. Pleasants well, I fired two?

A. Yes. Then, you know, he went on to tell meÄhe said do you reckon the men will strike on you or go home, quit work. I said I don't think so. He said well, do you reckon he'll cause you any trouble. I said I'm sure he will.

Q. What did you mean by that?

A. Well, any way that he couldÄI told him--I said the Labor Board, according to him, he's told me at least twenty times the Labor Board will eat me up.

MR. STONE: Who is he?

THE WITNESS: Mr. Cox.

BY MR. GARRETT:

Q. Go ahead.

A. He told me that morning that the Labor Board would eat me up.

Q. Was he ever more specific with his threat to you than the Labor Board would eat you up?

A. No. He just more or less said well, you can't do that. That morning he told me that Kit Jackson missed more work than Mike did.

Q. And that you couldn't fire a man for missing work on Saturdays?

A. Yes.

Q. Did he tell you that?

A. Yes, he did.

Q. That you couldn't make men work on Saturdays if they didn't want to?

A. That's right.

Q. And in that context he said if you try it the Labor Board will eat you up?

A. Yes, the Labor Board would eat me up.

Q. Do you know who he was referring to when he used the word Labor Board?

A. No, I didn't. In fact I didn't even know who the Labor Board was or anything.

Q. Did you even care who the Labor Board was?

A. No, I couldn't care less. I just knew someone was going to eat me up.

Q. Did you take his threats then seriously?

A. I didn't when I talked to him that morning. Now he mayÄI knew what he said to Neil.

MR. STONE: You're talking about the morning of May 11th?

THE WITNESS: That's right.

BY MR. GARRETT:

Q. Did Mr. Pleasants also tell you he had made threats of going to federal agencies or going to agencies or something?

A. Yes.

Q. Did he tell you that after you'd decided already to fire him?

A. Yes. In my mind I had fired him. I told him I'd fired him before

Q. Did it make any difference if he made any threats at all about doing anything to you?

A. No, it didn't make any difference.

Q. Did that have any part to play in whether you made a decision to fire him or not to fire him?

A. No. It had no

Q. Did you care if he was going to go to MSHA about anything that went on in that mine?

A. He told me that morning he would

Q. So did that matter making that threat to you?

A. No, sir.

Q. It didn't have any impact at all about you requiring the men to work on Saturday?

A. No.

Q. Did Mr. Pleasants ask you then if he was worried about putting out a work stoppage or pickets or trying to pull the men out?

A. Yes. That was Mr. Pleasants' main concern and he threatened with the union throwing up the picket line. His brother-in-law was president of some local down there. But there's got to be a breaking point somewhere, the way I felt. And I felt like no matter what he does to me or how he does it or what else he's got to go.

A. No.

Q. Did Mr. Pleasants ask you then if he was worried about putting out a work stoppage or pickets or trying to pull the men out?

A. No.

Q. Did Mr. Pleasants ask you then if he was worried about putting out a work stoppage or pickets or trying to pull the men out?

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A. Yes. That was Mr. Pleasants' main concern and he threatened with the union throwing up the picket line. His brother-in-law was president of some local down there. But there's got to be a breaking point somewhere, the way I felt. And I felt like no matter what he does to me or how he does it or what else he's got to go.

Q. So you were notÄyou did not decide to fire him as a retaliation or punishment for threatening to go to the Mine Safety and Health Administration?

A. No, that had nothing to do with it, nothing at all.

Q. In fact if you were afraid of him going to MSHA what would have been your course to follow? Would it have been not to fire him?

A. If I was afraid of it I guess I would be afraid to fire him.

Mr. Jackson stated that he met with Mr. Cox and Mr. Poole at the mine on Monday, May 13, 1985, and told them that he was discharging them. Both of the termination notices stated "unsatisfactory service" as the reason for the discharge, and Mr. Jackson explained to Mr. Cox that he was being fired for "trying to take over management of the mine," and that Mr. Poole was told he was being fired for "irregular work." Mr. Jackson explained further that Mr. Cox was "trying to encourage the people to miss work telling people there wasn't nothing I could do about it. There's several different things, just like him threatening to put up a picket line" (Tr. 39). Mr. Jackson also stated that Mr. Cox's calling Mr. Pleasants was "the last straw" (Tr. 39). He further explained as follows (Tr. 40Ä41):

Q. When you say management of the mine, that had nothing to do with making complaints about safety?

A. No. That's every man's right. He can withdraw himself from the mines. They've got a hotline they can call and get them down there. They don't have to turn in their name or anything else if they want a federal mine inspector in.

Q. Well, so it's every man's right to expect the mine to operate within the law.

A. Yes.

Q. Do you acknowledge that?

A. Yes.

Q. And that had nothing to do with your decision to fire Mr. Cox?

A. No.

Mr. Jackson confirmed that Mr. Cox never asked to review the fire boss books, dust sampling books, or other records kept in the mine office (Tr. 41). He also confirmed that he holds safety meetings and annual training sessions for miners and that he has participated in the training. Mr. Jackson stated that miners are advised of their right to talk to Federal inspectors and he had no doubt that Mr. Cox knew his rights at the time he was discharged (Tr. 42).

On cross-examination, Mr. Jackson confirmed that all of his coal orders are sold to the Brooks Run Mining Company (Tr. 44). He confirmed that he advised the men about not going to Brooks Run with their problems either in 1980 or 1981, "when we first started the mine up," but he could not recall the specific date (Tr. 47). Since the incident concerning Mr. Nash, no one else ever went to Brooks Run or to Mr. Pleasants about any complaints (Tr. 50).

The parties stipulated to the testimony of MSHA Inspector John G. Tyler, and they agreed that if called, Mr. Tyler's testimony would be as follows:

1. John Tyler is a surface coal mine inspector with the Federal Coal Mine Health and Safety Administration. He has no underground experience. He has worked out of the Summersville, West Virginia field office since 1982. He is not familiar with Pammlid Coal Company.

2. Mr. Tyler became acquainted with Mr. Cox when Mr. Cox answered an advertisement to buy Subaru car parts from Mr. Tyler. Mr. Cox came to Mr. Tyler's home which is about six miles from Mr. Cox' home, inspected the parts, and purchased them. During the course of conversation, they exchanged information concerning what each did for a living. This occurred in Summer, 1984.

3. Approximately three months later, Mr. Cox came to Mr. Tyler's home and related information concerning alleged conditions in

his workplace. Mr. Tyler could not recall the exact nature of the complaints, but is relatively certain that Mr. Cox related information about hauling caps and powder on pieces of equipment. He is not certain about any other information related by Mr. Cox. Mr. Tyler did not offer comment with respect to the validity of any information offered by Mr. Cox.

4. During the course of the conversation with Mr. Cox, Mr. Tyler explained to Mr. Cox that he is a surface mine inspector. Mr. Tyler told Mr. Cox that the Summersville field office did not have jurisdiction over the geographical area in which the mine where Mr. Cox worked was located. Mr. Tyler explained to Mr. Cox that the appropriate field office was in Clarksburg, West Virginia, or Bridgeport, West Virginia and that the district office for the area is in Morgantown, West Virginia. Mr. Tyler subsequently verified with his then supervisor, Clyde Perry, that he had given Mr. Cox correct and appropriate information and advice. Mr. Perry agreed with Mr. Tyler. Mr. Tyler did not contact anyone else with respect to his conversation with Mr. Cox, including anyone with Pammlid Coal Company or any other inspector. Mr. Tyler did not even recall the name of the company until he was contacted by Mr. Cox and told sometime during the week of October 13, 1986, that he would be subpoenaed.

5. Mr. Tyler never saw Mr. Cox again or heard from him after the initial conversation took place until shortly after Mr. Cox was discharged, when Mr. Cox again came to Mr. Tyler's home. Mr. Tyler again recommended that Mr. Cox go to the proper district office if he had any complaint. Mr. Tyler even suggested that Mr. Cox go to the Mt. Hope MSHA district office since it was near Mr. Cox's home in Oak Hill, West Virginia.

6. Mr. Tyler took no notes during any conversation with Mr. Cox and cannot remember specific dates on which they occurred, nor did he offer any opinion or have an opinion

whether any information Mr. Cox related had merit.

Complainant Alfred H. Cox, testified as to his background and experience, and he explained that by "Labor Board," he had in mind the Mine Safety and Health Administration (Tr. 5). Mr. Cox identified exhibit CÄ4, as a personal notebook he kept on certain mine conditions, and he testified as to some of the entries he made in the book, as well as to certain entries made on the mine fire boss records, exhibit CÄ8 (Tr. 5-26). He also testified about the battery explosion incident which occurred on October 5, 1984 (Tr. 26Ä37).

Mr. Cox stated that he made few complaints to Mr. Jackson because "he flew off the handle", but that he did complain many times to his section foreman Rodney Blankenship. Mr. Cox stated that he complained about the roof in the number five entry taking weight and pulling through the plates, and about powder and caps kept on the drill. He also complained to Mr. Jackson's son, Kit, and he believed that he was part of mine management (Tr. 38). On one occasion shortly before his discharge, Mr. Cox said that he advised Mr. Blankenship that he intended to talk to an MSHA inspector the next time one was in the mine, and that Mr. Blankenship told him that while he could not be fired for doing this, "we could always have a layoff and never call you back" (Tr. 39). Mr. Cox stated that he obtained an MSHA pamphlet discussing miners' rights on May 13, 1985, from MSHA's Clarksburg Office (Tr. 41). Mr. Cox conceded that he was aware of his right to complain to any MSHA inspector before he obtained the pamphlet (Tr. 44Ä45).

In further reference to any safety complaints to mine management, Mr. Cox stated as follows (Tr. 85Ä87):

JUDGE KOUTRAS: All the men sit around talking and threatening to blow the whistle on this mine operator and call the feds in, right?

THE WITNESS: They didn't all threaten to. They was unsatisfied with the way things was running, but they didn't have enough guts to stand up and say anything to Carson Jackson about it.

JUDGE KOUTRAS: What are you getting from all that? What are they saying? What are they trying to tell me by all that?

THE WITNESS: The conversations I had with them and still have with a lot of my co-workers is that they need their jobs. Several of them said, well, more or less, to get by, to have a job. They didn't directly come out and say that

JUDGE KOUTRAS: Well, isn't it a fact that nobody ever directly complained to Mr. Jackson about safety?

THE WITNESS: I have on very rare occasions.

JUDGE KOUTRAS: Directly to Mr. Jackson.

THE WITNESS: Directly to Mr. Jackson. Mr. Blankenship, like I say, is the one that was my section foreman. He was there most of the time.

JUDGE KOUTRAS: And you would complain to him?

THE WITNESS: And I would complain to him.

Mr. Cox confirmed that he spoke with MSHA Inspectors Tyler and Adkins before his termination, and he confirmed that Mr. Adkins advised him to file a section 103(g) complaint with MSHA's Summersville Office. Mr. Cox stated that he did not show his notebook to Mr. Tyler or Mr. Adkins because he intended to tell them about the violations in the mine (Tr. 51).

Mr. Cox stated that Mr. Jackson threatened to fire him in June, 1984, because he would not work on a Saturday when he had to bale hay. Although he was not fired, he was taken off the roof bolter and assigned to run the scoop. Mr. Cox stated that he then informed Mr. Blankenship that "the mines is going to be run in compliance with the law," and that Mr. Blankenship replied "you know we can't run coal like that" and "don't do something to make me have to fire you" (Tr. 59). Mr. Cox then had some words with Mr. Jackson about being taken off the roof bolter, and while he did not specifically tell Mr. Jackson that he was going to turn him in for the way he was operating the mine, Mr. Cox stated that this was his intention (Tr. 59). Mr. Jackson then explained that he took Mr. Cox off the roof bolter after discussing the mine accident rate with an MSHA inspector, and Mr. Cox confirmed that he had four roof bolting related accidents (Tr. 61).

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Although Mr. Jackson intended to "issue him a slip" for unsatisfactory service, he changed his mind and told him to go back to work (Tr. 64).

Mr. Cox confirmed that after he was taken off the bolter, he was assigned to build stoppings, and was then assigned to loading coal with the scoop. He confirmed that the ventilation curtains were rolled up at that time and that he did not roll them down because he wanted to keep his job (Tr. 68). Mr. Cox believed that he was taken off the roof bolter because he refused to work on Saturday, and that Mr. Jackson did this to "spite" him. He conceded that it was possible that Mr. Jackson took him off that job because of his discussions with the MSHA inspector over his accidents (Tr. 71).

Mr. Cox stated that Mr. Jackson and Mr. Blankenship have never told him that his services were unsatisfactory, and he confirmed that Mr. Jackson admonished him for riding the belt out of the mine. He could not recall Mr. Jackson warning him about working under unsupported roof (Tr. 73-74).

Mr. Cox stated that he agreed with all of the testimony by his fellow miners with regard to the violations which they testified to during the course of the hearing (Tr. 77). He explained the circumstances concerning his refusal to work on Saturday, May 11, 1985, and confirmed that he did not work because he had to coach his son's little league baseball team (Tr. 81-84).

Mr. Cox confirmed that he received a telephone call at his home from Mr. Jackson on Saturday morning, May 11, 1985, and he explained the conversation as follows (Tr. 95-96):

On May 11th at approximately three minutes after seven, I received a phone call from Mr. Carson Jackson. He asked me why that I wasn't working today. I told him, I said, well, you know, I've talked to Rodney about it already. I said I've got a Little League game today; I'm the coach. And he said, where's Mike. I said he's in bed asleep. He said, well you tell him to come in and pick up his time. I'm tired of him laying off. And I said, well, Carson, you know that ain't right. I said Kit, your own son has missed more work than he has. And he said Kit is part owner of the mine. He can do what the hell he wants to. And I said, yes, anything that the company wants to do is just fine, if it's for their

own personal whatever. I said, but if it's to help the men any, if it's something that the men need, then to heck with it. And he said, well that's the way it is, and if you don't like it then you can come and pick up your time, too. And I said, well, if that's the way you feel, or I'm sorry that's the way you feel or something to that effect. And he hung up the telephone.

Mr. Cox stated that after his conversation with Mr. Jackson, it was not clear to him whether he had been fired, and that he first learned that he was fired when he was handed his termination slip by Mr. Jackson on Monday, May 13, 1985 (Tr. 97). Mr. Cox stated that Mr. Poole asked him to call Mr. Pleasants after his Saturday morning conversation with Mr. Jackson, and that he informed Mr. Pleasants that he had trouble at one of his mines. Mr. Cox stated that he asked Mr. Pleasants to speak to Mr. Jackson to see whether Mr. Poole could retain his job. Mr. Cox stated that he also told Mr. Pleasants that if something wasn't done "we was going to the Mine Safety and Health Administration, to the Department of Labor." Mr. Cox stated that he informed Mr. Pleasants that he was planning to go to MSHA anyway "about the way the mines was run. He knew it was run out of compliance with the law" (Tr. 99). Mr. Cox denied that he mentioned any picket line to Mr. Pleasants (Tr. 100).

Mr. Cox stated that it was clear to him that Mr. Jackson fired Mr. Poole on Saturday, May 11, 1985, and when asked to explain why he asked Mr. Jackson to change the date of the discharges from May 13 to May 11, Mr. Cox stated that "It's immaterial as far as I'm concerned. I'm fired" (Tr. 103). Mr. Cox stated that he went to the mine on Monday, May 13, with the intention of going to work, and that Mr. Poole simply rode with him and would have dropped him off and returned to pick him up after work. However, Mr. Jackson asked to see both of them, and handed them their termination notices. Mr. Cox stated that when he asked Mr. Jackson to explain "unsatisfactory service," Mr. Jackson replied "you're trying to run the God damn mines" (Tr. 107).

On cross-examination, Mr. Cox confirmed that he understood that Mr. Jackson was the person who hired and fired employees, and that when Mr. Jackson hired him he advised him that there would be times when overtime Saturday work would be required (Tr. 119-121). Mr. Cox confirmed that Mr. Jackson allowed him to trade shifts with another employee so he could

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keep a doctor's appointment, and that he "respected him for it" (Tr. 122).

Mr. Cox confirmed that between January and May, 1985, Mr. Poole was having an attendance problem at the mine, and that because of certain marital problems, Mr. Poole moved in with him (Tr. 123). Mr. Cox stated that early in the week of May 11, 1985, he was told that he would have to work on Saturday, May 11, and while he told Mr. Blankenship that he couldn't work that day, Mr. Cox conceded that it was his intent not to work. Mr. Cox confirmed that he did not work on other Saturdays, and that Mr. Jackson did not give him permission to be off on May 11 (Tr. 124-125). Mr. Cox stated that he did not ask Mr. Jackson about being off because he believed that Mr. Blankenship led him to believe that he could be off (Tr. 127). However, Mr. Cox later stated that when he informed Mr. Blankenship on Friday, May 10, that he was not going to work on Saturday, Mr. Blankenship replied "I've done talked to you about it. I don't want to hear anything about it" (Tr. 131). When asked whether he had advised any other employees that they did not have to work on that Saturday, Mr. Cox replied as follows (Tr. 128-129):

Q. During the course of that week, Mr. Cox, did you tell other men that you weren't going to work on Saturday—other men on your section? I'm not talking about management employees.

A. Yes, I did tell them that I wasn't going to be working Saturday. After I'd talked to Rodney.

Q. Did you tell any other employees that they didn't have to work on Saturday either?

A. Well, there was a bunch of employees complained about having to work on Saturday and stuff, and I did tell them that you know, if you didn't want to work, don't come in, you know. As simple as that. You want to work or either you don't. If you had a reason for not coming in—

Q. Did you tell them that there wasn't anything the company could do to them about not working on Saturday because of the labor board?

A. No, ma'am, I did not.

JUDGE KOUTRAS: Why would you tell other people that they didn't have to come to work on Saturday? Why was that your concern?

THE WITNESS: It wasn't myÄthey complain on the section, they've got to work Saturday, they've got other things they want to do, and I just simply said, well, if you've got other things that you want to do, just don't come in to work. You know.

Mr. Cox confirmed that he disagreed with Mr. Jackson's decision to fire Mr. Poole, and told him so. Mr. Cox also confirmed that he got the impression from his telephone conversation with Mr. Jackson that he (Jackson) was fed up with Mr. Poole, but did not believe he was fed up over Mr. Poole's absences. Mr. Cox was of the opinion that Mr. Jackson found an opportunity to get rid of Mr. Poole because of his complaints over the conditions in the mine (Tr. 136Ä139).

Mr. Cox confirmed that the purpose of his call to Mr. Pleasants on May 11, 1985, was to attempt to get Mr. Pleasants to influence Mr. Jackson to rehire Mr. Poole. Mr. Cox stated that he did not call Mr. Jackson because he (Jackson) was "hot headed" and Mr. Cox believed that he would definitely be fired if he called him (Tr. 147Ä148).

Mr. Cox confirmed that when he called Mr. Pleasants on May 11, he told him that "there would be trouble in one of his mines," and that there would be trouble at Brooks Run Mine if Mr. Poole were discharged (Tr. 149Ä150). Mr. Cox stated that he did not identify himself to Mr. Pleasants when he placed the call because "it was still up in the air whether I had a job or not," and he was afraid that his job would be in jeopardy for making the call (Tr. 158Ä159). Mr. Cox also stated that another reason for not identifying himself was that "if something wasn't straightened out, I was going to go to MSHA," and that he told Mr. Pleasants that he was thinking about going to MSHA before the telephone conversation. Mr. Cox explained that if Mr. Poole was not given his job back, he and Mr. Poole were going to go to MSHA. When asked whether he would have gone to MSHA if Mr. Poole were given his job back, Mr. Cox replied "not right at that time" (Tr. 161).

Mr. Cox confirmed that he also called Mr. Blankenship on May 11, 1985, and asked him whether or not all of the mine owners had collaborated to fire Mr. Poole, and that Mr. Blankenship informed him that they had not, and that the decision was made by Mr. Jackson alone. Mr. Cox confirmed that he called Mr. Blankenship because he always considered him to be a friend and was curious as to whether he had spoken with Mr. Jackson (Tr. 164). Mr. Cox confirmed that when he asked Mr. Jackson for an explanation as to the meaning of his "unsatisfactory service," Mr. Jackson replied "You're trying to run the God damn mines," but did not elaborate further (Tr. 166, 168).

Mr. Cox examined copies of certain roof bolting accident report forms for January 16, and May 16, 1984, and December 14, and August 9, 1983, in which he was involved (exhibit RÄ3, Tr. 177). Mr. Cox stated that he has no reason to doubt that he was taken off the roof bolter in 1984, because an MSHA Inspector suggested to Mr. Jackson that this be done (Tr. 178). He conceded that he was upset because Mr. Jackson did not initially explain his decision to take him off the roof bolter, but that he later accepted the decision (Tr. 179Ä180). Mr. Cox confirmed that when he was assigned to the scoop, he informed Mr. Jackson that he would operate it in compliance with the law (Tr. 180), and he conceded that "a lot of times" he did not operate the roof-bolter machine in compliance with the law (Tr. 180). Mr. Cox conceded that all times during his employment at the mine, he never refused to operate a piece of equipment because of any safety considerations, and that he voluntarily operated his scoop with the ventilation curtains rolled up "like everybody else" (Tr. 181Ä182).

Mr. Cox confirmed that there have been lay offs at the mine for a week or so out of the month and for one 3Ämonth period, because of production quotas, and that he has been laid off and called back to work for these reasons. He knows of no one who was laid off and not called back because they made safety complaints (Tr. 183Ä184).

With regard to his complaint to Mr. Blankenship about bad roof conditions, Mr. Cox explained that Mr. Blankenship may have told Mr. Poole that "we was going through a double linear." Mr. Cox confirmed that he did not know what a "double linear" was until it was explained to him by an MSHA inspector in the Morgantown Office after he was terminated (Tr. 186). He also confirmed that most of his complaints about dust and the powder and caps on the coal drill were made to Mr. Blankenship more than once (Tr. 187). He also complained to Kit Jackson, and he believed that he would tell

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his father Carson about them (Tr. 187). Mr. Cox also confirmed that he complained while riding out of the mine on the mantrip with Kit Jackson and other miners (Tr. 191). He also confirmed that he complained to Carson Jackson about the dust caused by the ventilation curtains being rolled up, but that Mr. Jackson did not respond (Tr. 192).

With regard to the use of the ATRS system on the roof bolter, Mr. Cox confirmed that he would use it when he encountered loose rock, and there were times when he did not use it. Any decision as to the use of the ATRS was his, and he did not seek Mr. Blankenship's advice in this regard. Mr. Cox confirmed that most of the time he used a Galis 320 bolter which was not equipped with an ATRS system (Tr. 193-194).

Mr. Cox admitted that he stored caps and powder on his drill, and while no one directed him to do it, he still complained to Mr. Blankenship about the practice (Tr. 197-198). Mr. Cox also admitted that Mr. Jackson had warned him about riding the belt out of the mine, and that he tried to ride it out again after he was warned, but someone shut the belt off, and he had to walk out of the mine (Tr. 198). Mr. Cox denied that he was ever warned about operating his scoop with any part of his body out from under the canopy, and he could not recall being told by Mr. Jackson not to bolt off cycle. However, Mr. Cox confirmed that Mr. Blankenship told him on one occasion not to roof bolt out of sequence, but he could not recall whether he bolted out of sequence after that time (Tr. 200).

Mr. Cox confirmed that he made entries in his personal notebook for approximately 2 weeks from August 18 to September 4, 1984, and he confirmed that he never showed it to any inspector or to anyone from mine management. He stated that he kept the book so that he could use it as a threat to "implicate them before the Mine Safety and Health Administration," and in the event management found out that he was keeping the book and tried to fire him (Tr. 205). Mr. Cox confirmed that he never told Carson Jackson that he was keeping the book, but did tell his son Kit, and he thought that he also told Mr. Blankenship. He also stated that he "might have" intended that by telling Kit Jackson about the book, he would inform his father about it (Tr. 205).

Mr. Cox confirmed that at no time during his employment at the mine did he ever go to any mine inspector who inspected the mine about his complaints (Tr. 208). He confirmed that he was first acquainted with Inspector Tyler when he went to his home during the summer of 1984 to buy a car engine from him.

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Mr. Cox also confirmed that Mr. Tyler advised him that he was not an underground inspector, and advised him where he could file any complaint (Tr. 209). He also understood Inspector Adkins' instructions as to where to file any complaint (Tr. 210). Mr. Cox explained that he did not follow up on the advice given him by the inspectors to file his complaint with the appropriate MSHA office because he did not believe he would get a "fair shake" from MSHA inspectors. He explained further that when MSHA inspectors come to the mine, it takes them 2 or 3 hours before they go underground, and that once underground, they are not in the mine very long (Tr. 211-214). Mr. Cox also believed that Mr. Tyler and Mr. Adkins would be more concerned about his complaints and pass them on to the appropriate MSHA office (Tr. 217-218).

Mr. Cox confirmed that when he was laid off after the mine production was in, Mr. Jackson gave him "low earnings slips" so that he could draw unemployment. Mr. Cox also confirmed that the respondent sponsored his daughter in a beauty contest and donated money so that she could participate in the pageant (Tr. 222). He also confirmed that there were some Saturdays when he was not required to work (Tr. 223).

Michael Poole was called in rebuttal, and he stated that during Mr. Cox's telephone conversation of May 11, 1985, with Mr. Pleasants, he heard Mr. Cox tell Mr. Pleasants that since he (Pleasants) has been in the respondent's mine and has observed how it was run, "if something wasn't done that we was going to the labor board" (Tr. 332). Mr. Poole stated further that Mr. Cox stated "If something wasn't done somebody was going to get killed in that mine and my uncle and I was going to the Department of Labor board, MSHA, or whatever it is . . . whatever we had to do in order to get the mine back within the specifications of the law" (Tr. 333).

Mr. Poole stated that he and Mr. Cox were going to the Labor Board or to "governmental authority" regardless of whether they were fired, and that he and Mr. Cox had made plans to do so because their complaints to management were being ignored (Tr. 333-334). In response to further questions, Mr. Poole confirmed that his initial request that Mr. Cox call Mr. Pleasants was made in order to convince Mr. Pleasants to tell him that Mr. Jackson was running an unsafe mine, and that if Mr. Jackson had not called Mr. Cox on May 11, he (Poole) would not have thought to call Mr. Pleasants to complain about safety or to express his concern about anyone getting killed in the mine (Tr. 336). Mr. Poole conceded that he knew that Mr. Jackson ran his

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mine, but thought that Mr. Pleasants had the authority to speak to Mr. Jackson on his behalf (Tr. 338).

Respondent's Testimony and Evidence

Alva Cogar, drill operator and shot firer, confirmed that he worked on the same shift with Mr. Cox during the last 3 years, and prior to that he worked the night shift. He confirmed that powder and caps were stored on his equipment during mining, and that all of the drillers engaged in this practice, including Mr. Cox. Mr. Cogar stated that he would find powder and caps on the drill machine at the end of Mr. Cox's shift (Tr. 61-65). He engaged in the practice because it made his job easier, and it was not done at the respondent's direction (Tr. 71).

Mr. Cogar confirmed that he has encountered bad top in the mine, but stated that it was worse in other mines that he has worked. He stated that during the first 4 or 5 months of 1985, when bad top was encountered, extra long bolts and cribs were used, and Mr. Blankenship would have the affected areas rebolted and would instruct him to watch the roof. Loose coal would be barred down and proper roof bolting procedures were followed. In addition, bad top would be cribbed and dangered off (Tr. 66-70). The section boss would review the roof-control plan every day before starting work underground, and Mr. Jackson talked to the men about safety and cautioned them to be careful of bad top (Tr. 74-76).

Mr. Cogar stated that he has observed Mr. Cox operate the scoop with his feet up on the canopy, and he has "heard talk among the crew" that Mr. Cox was taken off the roof bolter because he was bolting the wrong way and management became concerned for his safety (Tr. 72-73). Although he has never observed Mr. Cox walk out under unsupported roof, he believed that Mr. Jackson caught Mr. Cox doing this, and also cautioned him about riding the belt out of the mine (Tr. 76-78).

Mr. Cogar confirmed that when he was first hired by Mr. Jackson he was told that Saturday work would be required. He stated that everyone complains about Saturday work, including Mr. Cox. He has heard Mr. Cox state that he would "jack Jackson's jaw" and would "whip the man fired him." Mr. Cogar believed that Mr. Cox was kidding when he made these statements, but he could offer no other explanation as to why they were made (Tr. 82-83, 99). Mr. Cogar stated that he is not reluctant to speak to mine management about mine conditions,

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is not afraid of losing his job, and he never heard management state that anyone could quit if they did not like the working conditions (Tr. 84-85). He also confirmed that he has observed mine inspectors in the mine after roof falls (Tr. 85).

On cross-examination, Mr. Cogar confirmed that ventilation curtains were rolled up, and that he "took shortcuts." Although Mr. Jackson and Mr. Blankenship did not order that the curtains be rolled up, Mr. Cogar believed they were aware of the practice because they were on the section all of the time (Tr. 87). He confirmed that Mr. Blankenship did order the curtains to be rolled up and out of the way so that they would not be torn down by equipment, but that this was always after an inspector had left the section (Tr. 92). Mr. Cogar stated that he had adequate water on his machine to keep the dust down, but that the curtains were up more often than down during the start of his shift (Tr. 90-91).

Mr. Cogar stated that he overheard Mr. Cox state that he could not work on Saturday, May 11, 1985, because he had a ball game, but does not know whether he informed management that he could not work. Mr. Cogar believed that everyone except Mr. Cox and Mr. Poole worked on that Saturday (Tr. 90, 93).

Mr. Cogar confirmed that he has shot more than one place at a time, but did not believe that this was a violation. He stated that he has never shot under unsupported roof, except for a corner where the roof bolter could not reach, but he would be no further than 30 inches from unsupported roof (Tr. 92). He confirmed that Mr. Blankenship has instructed him to shoot three places at one time (Tr. 99). He also confirmed that there were occasions when his hand-held methane detector would not work, but that he would borrow another one from his foreman (Tr. 95).

Mr. Cogar stated that he has heard Mr. Cox complain about the lack of brakes on the mantrip they were riding, and that Kit Jackson was present on some of these occasions. At times, Mr. Blankenship was aware of the lack of brakes, but they would either be repaired on a subsequent shift, or another mantrip would be used. Management always repaired his equipment when needed, but at times the brakes on the mantrip would not be repaired on the next shift (Tr. 100-102).

Mr. Cogar stated that he never complained to Mr. Jackson or Mr. Blankenship about safety, and did not know whether Mr. Cox did. He confirmed that he "jawboned" with his fellow

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miners about dust, powder and caps on equipment, and walking under unsupported roof. Mr. Cogar stated that Mr. Cox mentioned these conditions to him, and that the miners complained to each other about these conditions (Tr. 103-105). Mr. Cogar stated that since Kit Jackson rode the mantrips with the men, he believed that the complaints would be taken to Carson Jackson by Kit Jackson and he believed the two Jacksons would discuss them with each other (Tr. 109-110).

Donnie Crum, belt man, testified that he worked the first shift and was primarily responsible for maintaining the belt system. He confirmed that a roof fall occurred on the No. 4 belt, but he did not know when. He recalled seeing Mr. Cox operating his scoop with his legs outside of the protective canopy on more than one occasion (Tr. 228). He also confirmed that Mr. Jackson warned the men about riding the belt out of the mine, and that he told them he would fire them if he caught them. Mr. Jackson shut the belt down and became upset when he found that some of the men were not on the mantrip coming out of the mine. Mr. Cox had not used the mantrip when he (Crum) rode it out of the mine (Tr. 225-229).

Mr. Crum confirmed that his foreman Blankenship or Mr. Jackson would hold safety meetings in the lamphouse "once or twice a week, or maybe once every two weeks" (Tr. 230). Mr. Jackson discussed and stressed safety with the men, and advised them that they were to keep their minds on their job. Mr. Crum stated that he has never had any difficulty in discussing mine problems with Mr. Jackson or Mr. Blankenship, and they were responsive to his concerns about the roof or anything that needed to be repaired (Tr. 231).

Mr. Crum confirmed that he worked on the Saturday that Mr. Poole and Mr. Cox did not show up for work, and that he had been told earlier that he would have to work that day. Mr. Crum stated that he understood that work was required on Saturdays, and knew this when he was first hired. Mr. Crum stated that Mr. Cox told him he was not going to work on that particular Saturday, and that Mr. Cox told him "if they tried to make me work Saturday, he said the labor board would take care of it" and that "the company couldn't do anything about it" (Tr. 233).

Mr. Crum stated that dust samples are taken on the belt, and that Kit Jackson "sets the pump" and is in charge of that procedure. Mr. Crum knew of "no talk among the crew" that the dust pump does not run all day and that it is tampered with (Tr. 234). Mr. Crum confirmed that he is the son-in-law of Euhl Damron, a part owner of the mine (Tr. 234).

On cross-examination, Mr. Crum stated that Mr. Cox told him that the men did not have to work on Saturday sometime during the week, and he assumed that Mr. Cox believed that the Department of Labor had some sort of requirement that men did not have to work on Saturdays (Tr. 236).

In response to further questions, Mr. Crum confirmed that he was aware of ventilation curtains being rolled up and that "it was difficult to rock dust around them." With the curtains rolled up, more dust was present, and he was aware of powder or explosives transported and stored on drills. However, he never complained to anyone about these conditions, and he never heard Mr. Cox make any complaints, nor did he ever discuss any safety concerns with him. Mr. Crum stated that Mr. Cox "had a playful way," but "didn't act like a bully" (Tr. 238). He confirmed that at times, Mr. Cox "kidded around a lot," but that he did hear him tell Mr. Jackson's son, Kit, that "if he ever fired him, he'd whip his ass" (Tr. 242). Mr. Crum could not say whether Mr. Cox was serious or just "fooling around." He simply heard him make the statement (Tr. 242).

Mr. Crum stated that Mr. Cox complained about wage increases, and once told him that he should make the company buy a "golf cart" for Mr. Crum to ride on while examining the belt (Tr. 239). Mr. Crum confirmed that there are no ventilation problems on his belt system, and that it is inspected and is in compliance (Tr. 241).

David Huffman, third shift (midnight) electrician, stated that his shift is responsible for hanging curtains, rock dusting, moving the water line, and roof bolting. He confirmed that he works for an excellent foreman, and that curtains are hung and the water line is extended for the cutting machine and drill sprayers. He confirmed that the curtain must be kept within 10 feet of the face, but that it is rolled up. Rock dusting is done on a regular basis every night, and it is seldom not finished (Tr. 247).

Mr. Huffman stated that he never had any dealings with Mr. Cox because they work on different shifts. Mr. Huffman stated that he was in the mine office on Saturday morning, May 11, 1985, after his shift was over, and he overheard Mr. Jackson on the telephone. He heard Mr. Jackson tell the person on the other end of the line to "tell Michael Poole not to come back to work, just to come pick up his time because he don't have a job here any more" (Tr. 249). Mr. Jackson was not mad or cursing, and spoke in a normal

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tone of voice. Mr. Huffman did not know who was on the phone with Mr. Jackson (Tr. 249).

On cross-examination, Mr. Huffman stated that the curtains were rolled up "in order to work in the places," and that he is the only person working in the face area. However, roof bolting is also being done, and the curtains are moved up for the men to use at the face (Tr. 252). Mr. Huffman believed the ventilation to be adequate and that there was enough air, and he had no complaint with the ventilation (Tr. 253).

Robert Massey, purchasing agent, stated that he works in the mine office and never goes underground. He confirmed that his duties include the maintenance of records such as purchase orders, citations, accident reports, roof falls, inspection reports, fire boss reports. Kit Jackson takes care of the dust sample reports. Mr. Massey stated that at no time has any miner or Mr. Cox asked to review any of these reports (Tr. 256).

Mr. Massey confirmed that Mr. Jackson is the "boss," and that he made it clear to him that he was expected to work on Saturday if it is required. Mr. Massey confirmed that he was in the mine office on Saturday, May 11, 1985, when Mr. Poole and Mr. Cox failed to report for work, and that Mr. Jackson asked him to call them at their home. Mr. Massey placed the call to Mr. Cox and handed the phone to Mr. Jackson. He heard Mr. Jackson tell Mr. Cox "to tell Mike not to come out to work Monday, just to come out to pick up his time." Mr. Massey stated that Mr. Cox and Mr. Jackson "crosswords for a while," and he heard Mr. Jackson tell Mr. Cox "if you want an order for your time, too, you can come in Monday and pick it up." Mr. Jackson then hung up the phone (Tr. 259). Mr. Jackson then went underground, and Mr. Massey stayed in the office.

Mr. Massey stated that at approximately the noon hour on that same Saturday, he received a telephone call from Mr. Pleasants, and that he wanted to talk to Mr. Jackson. Mr. Massey took the message, and gave it to Mr. Jackson when he came out of the mine. Mr. Massey stepped out of the office and did not hear the conversation (Tr. 261).

Mr. Massey identified exhibit CÄ2(e) and (f) as MSHA accident report forms, and he confirmed that he filled them out and submitted them, and that the information on the forms would normally come from Mr. Jackson. He identified the reported incidents as roof falls, and confirmed that an MSHA

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inspector usually comes to inspect the area where the falls occur, and that Mr. Jackson goes with him. He confirmed that these incidents occurred before Mr. Cox was fired, and stated that as long as he has been employed at the mine he is not aware of any MSHA citations being issued because of the reported roof falls in question (Tr. 263).

Mr. Massey confirmed that he has filed MSHA accident reports when it was not necessary to do so, and he confirmed that MSHA had advised him that "band aid" incidents need not be reported, and that only lost time injuries are required to be reported (Tr. 264). He confirmed that he has filed accident reports for minor injuries, including the reported battery incident involving Mr. Cox, and no citations ever resulted from these reported incidents. Citations have been issued, but not for the reported roof falls and accidents (Tr. 265-266).

Mr. Massey stated that shortly after going to work with the respondent in June, 1984, there was a conference in the mine office between MSHA Inspector Bob Wilmoth and Mr. Jackson about Mr. Cox and his duties as a roof bolter. According to the inspector, 50 percent of the reported mine accident frequency rate involved Mr. Cox. Although he did not hear it specifically, Mr. Massey believed that the inspector recommended to Mr. Jackson that Mr. Cox be taken off the roof bolter. Although Mr. Massey was further aware that Mr. Jackson spoke to Mr. Cox about the matter, he left the office and did not hear the discussion (Tr. 269).

On cross-examination, Mr. Massey confirmed that Mr. Jackson told him that Mr. Cox was involved in 50 percent of the reported accidents. Mr. Massey confirmed that he would call underground to advise the crew that an inspector was coming underground but that he has never worked in the mine (Tr. 270). He also confirmed that MSHA inspected the reported roof fall areas during April, 1985, and that no citations were issued as a result of those incidents (Tr. 271). Mr. Massey was aware of citations for unguarded belts and lack of protective rubber mats in the shop (Tr. 273). Copies of all citations are posted on the bulletin board and are kept there until the next inspection (Tr. 277).

Bobby Carpenter, roof bolter operator, testified that he worked with Mr. Cox on the roof-bolting machine. He stated that Mr. Blankenship reviews the roof-control plan with the bolters everyday, and explains the bolting sequence. He confirmed that he and Mr. Cox have bolted out of sequence, and that on more than one occasion Mr. Jackson and Mr. Blankenship

have "chewed them out" about bolting out of sequence (Tr. 254-258). Mr. Carpenter also confirmed that bad top has been encountered in the mine "off and on," but that management has corrected the conditions by using longer bolts to make it safe, and has never ignored the condition (Tr. 258).

Mr. Carpenter stated that he does not believe he "would be in trouble" if he made safety complaints to management, and confirmed that he has often discussed mine conditions with Mr. Blankenship, and that "he always said correct it, . . . make it safe for us to work" (Tr. 259). Mr. Carpenter stated that Mr. Cox did not "have to good an attitude" toward management, and that he has heard him say he would "whip Carson." Mr. Carpenter believed that Mr. Cox might have been kidding but sometimes he may have been serious.

Mr. Carpenter stated that he gets along with Mr. Jackson, and that Mr. Jackson has never threatened or cursed him. Mr. Carpenter never heard Mr. Cox complain to management about safety, but has heard him talk to the crew about it (Tr. 261). Mr. Carpenter stated that Mr. Blankenship has advised the crew that they could roll the ventilation curtains down if they needed more air, and Mr. Carpenter did not believe he "would be in hot water" if he did so. The roof bolter operator is responsible for using the ATRS which is on the machine, and Mr. Cox used it on occasion when bad top was encountered. The ATRS has always been maintained properly (Tr. 263).

On cross-examination, Mr. Carpenter identified exhibit CÄ9 as a prior statement which he gave to the MSHA investigator during the investigation of Mr. Cox's complaint, and he confirmed that he stated that Mr. Cox "did a lot of hollering" to Mr. Blankenship and Mr. Jackson, and that Mr. Cox "complained several times." Mr. Carpenter stated that Mr. Cox "had a lot of complaints about different things," and that he heard him talk about air at the face and the ventilation curtains being rolled up. He also understood that Mr. Cox spoke about powder and caps on equipment, but did not hear him make such statements. Mr. Carpenter also confirmed his prior statement that on one occasion when Mr. Jackson threatened to fire Mr. Cox, Mr. Cox told Mr. Jackson that "they would run the mine according to the law." Mr. Carpenter construed this to mean that the mine should run without any safety violations (Tr. 264). Mr. Carpenter also confirmed his prior statement that everyone on the day shift knew that Mr. Cox was keeping "a book" on mine safety violations (Tr. 265).

Mr. Carpenter stated that he heard Mr. Cox state that he did not like Saturday work, but never heard him complain about

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his pay. When asked what Mr. Cox's complaints were about, Mr. Carpenter stated "odds and ends. He was always complaining about a lot of things . . . to some extent a lot of it did have to do with health and safety." Mr. Carpenter also confirmed that some of the complaints were about how the mine was being managed, and management decisions not necessarily related to safety (Tr. 268-269).

Mr. Carpenter did not know what prompted Mr. Jackson's prior threat to fire Mr. Cox, but he confirmed that Mr. Jackson had warned Mr. Cox about riding the belt out of the mine after being told by Mr. Jackson that he should not do so (Tr. 269). Mr. Carpenter confirmed that on one occasion, while riding the mantrip, he heard Mr. Blankenship tell Mr. Cox "don't do anything to make me fire you" (Tr. 271).

William J. Griffin, roof bolter, testified that he has been off the job for a year due to a non-work related condition, but that he is still employed by the respondent. He confirmed that sometime in June, 1984, he traded shifts with Mr. Cox for 2 weeks, and that they were both working as roof bolters at the time. At that time, MSHA inspectors were conducting roof control inspections of the mine, and he heard an inspector recommend to Mr. Jackson that Mr. Cox be taken off the roof bolter, but did not know why (Tr. 275). After that time, Mr. Cox operated a scoop, and Mr. Griffin stayed on the bolter (Tr. 276).

Mr. Griffin confirmed that he worked on Saturday, May 11, 1985, but that Mr. Cox did not, and they had no conversation about not working that day (Tr. 277). Mr. Griffin confirmed that the ATRS systems sometimes does not work, but that repairs are usually made within two shifts (Tr. 279). He has never known the system to be down for weeks at a time. Mr. Griffin never heard Mr. Cox complain to management about safety, but he (Griffin) has discussed safety matters with Mr. Jackson and Mr. Blankenship, and they always checked it out and took corrective action (Tr. 279-280). Mr. Jackson was "all the time saying something about safety." On one occasion, Mr. Jackson told the men "to look out for their accident rate or he was going to shut the mine down," and that he was upset over a lot of minor injuries (Tr. 281-282). Mr. Griffin confirmed that working on Saturdays was a condition of employment, and that he worked a lot of overtime on Saturdays, and that Mr. Cox called him a "company suck" for doing so (Tr. 284).

In response to further questions, Mr. Griffin confirmed that when he complained to Mr. Blankenship about roof cracks,

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he would inform Mr. Jackson, and longer bolts or cribs would then be installed (Tr. 285). Mr. Griffin confirmed that powder and caps were kept on the drill, and that ventilation curtains were rolled up (Tr. 288).

Johnny Stafford, outside man, testified that he is married to the sister of Kit Jackson's wife. He stated that he had "a run in" with Mr. Cox in the lamphouse after Mr. Cox threw his shoes off a bench during a shift change. He stated that Mr. Cox threatened "to kick my butt," and challenged him to a fight (Tr. 292). Nothing came of the threat, but Mr. Stafford stated that Mr. Cox often made remarks to him about sleeping on the job and that he was loud (Tr. 293).

Neil J. Pleasants stated that he is the senior vice-president of the Brooks Run Coal Company. He confirmed that his company does not mine coal, but does operate a preparation plant, and has six contractors who mine coal on lands leased by the company. He confirmed that the respondent has a contract to mine coal on one of the leases, and to deliver the coal to the plant at a fixed contractual price. The respondent is responsible for hiring and firing its miners, and fixing wages. The Brooks Run engineering department does fix the spads and direction of mining underground to assure itself that mining is being conducted in accordance with the mine plan, and does have an input as to whether mining should be discontinued or abandoned, and does have the authority to fix or limit mine production (Tr. 299-300). However, Brooks Run has no control over any management decisions made by the respondent, nor does it dictate any Saturday work. Brooks Run simply asks the respondent for so much coal, and "it's left up to them how they work to do it" (Tr. 301).

Mr. Pleasants stated that he received a telephone call on the morning of May 11, 1985, from an individual who he later determined was Mr. Cox. He never previously met Mr. Cox or Mr. Poole, and Mr. Cox did not give his name when he spoke with him. Mr. Pleasants stated that Mr. Cox told him that "there was some trouble at our mine." Mr. Cox also informed him that Mr. Jackson was forcing the men to work on Saturday, and that Mr. Cox did not think this was right. Mr. Cox also informed him he was involved with little league baseball and needed to be off on Saturdays, and that Mr. Jackson was going to discharge someone for missing work. Mr. Pleasants believed that Mr. Cox was concerned because he and Mr. Poole were in trouble for not working on Saturday, and that Mr. Cox called him to see if he could do something about it. Mr. Pleasants informed Mr. Cox that he would call Mr. Jackson, and he was concerned because Mr. Cox indicated that he could cause

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Mr. Jackson some trouble if he didn't take them back. Mr. Pleasants was also concerned because he was not sure of the kind of trouble Mr. Cox had in mind, and he speculated that it may involve miners walking off the job or refusing to work (Tr. 302-305).

Mr. Pleasants stated that Mr. Cox also informed him that he did not believe that the labor law required him to work on Saturday against his will, and that he also mentioned "something about making complaints." In this regard, Mr. Pleasants stated as follows (Tr. 306-307):

Q. Did he mention anything about making complaints to anyone?

A. That he had made them or would make them?

Q. Would make them.

A. Yes, he said something about making complaints—he would complain to the—well maybe to the labor regulators to—he talked about maybe going to some of the enforcement agencies and making some complaints also.

Q. Did he tell you what the nature of the complaints would be?

A. I can't remember that he told me anything specifically. He may have but I can't remember.

Q. Did he say he was going to do that regardless of what Mr. Jackson did? Or did he tie it to a threat if he didn't get a job back?

A. To me, as I remember, he didn't say either way. I guess I kind of got the indication that maybe he, if things didn't work out to suit him, that he didn't get his job back, that he would go. He didn't say either way he'd go or wouldn't go if he didn't.

Q. He said he might go?

A. Yes.

Mr. Pleasants reviewed a copy of a memorandum of June 18, 1985, which he prepared in connection with his telephone conversation with Mr. Cox on May 11, 1985, and he indicated that in referring to Mr. Jackson, Mr. Cox stated "that old man has pushed me as far as I'm going to be pushed" (exhibit CÄ11; Tr. 308). Mr. Pleasants stated that he was not concerned about Mr. Cox going to any "regulatory agencies" because he knew that regular inspections of the mines are always done, and that under the contract with the respondent, Mr. Jackson is required to operate the mine in accordance with the law. Mr. Pleasants stated that his primary concern was whether or not Mr. Cox's belief that he should not be required to work on Saturdays would escalate into a work stoppage and possibly affect other nearby mines (Tr. 309).

Mr. Pleasants confirmed that he telephoned Mr. Jackson after speaking with Mr. Cox, but Mr. Jackson was underground and returned his call later in the afternoon. In response to questions about his conversation with Mr. Jackson, Mr. Pleasants stated as follows (Tr. 310Ä314):

Q. Do you recall that conversation with Mr. Jackson?

A. Well, again, not word for word, but I remember when he called me back I asked him what was going on at the mines. Had he fired some people? How many people had he fired that day? Or what kind of problems he was having at his mine.

Q. What did he say?

A. He said that, yes, he had discharged one man, and he may have got a little bit worried about it. He got a little excited or a little worried about maybe losing the work force. And he said, tell me what the problem is. So I told him that a man had called me. I didn't know who the man was, but he said he was upset about having to work on Saturday, and that I guess maybe it was his nephew that had been discharged and he felt maybe he was too. And I told him about the fellow coaching little league. And from that Carson said, well, he knew who it was. He could tell me who it was.

Q. What else did he tell you?

A. He said then I discharged one man, but now there will be two.

Q. When he said this was this before you had told Carson Jackson the complaints that Mr. Cox had made known to you?

A. I believe it was, because I think I just now told you what I said to Carson before then.

Q. That he said he was upset about working Saturdays.

A. Yes.

Q. And he was upset about his nephew being fired?

A. Right.

Q. And then that's when he told you he'd figured out who it was, and Mr. Jackson said, well, I fired two?

A. Right.

Q. Did you go on to tell Mr. Jackson after that the other things that Mr. Cox had told you?

A. Pretty much so, yes. I told him well I asked him about the other men.

THE WITNESS: Well I went on to ask Carson then if the rest of his men were upset, or if he thought because he had discharged these two men that they would get upset, and possibly that we'd have a work stoppage. And I did go on to tell him that

BY MR. GARRETT:

Q. Did you discuss that with Mr. Jackson?

A. Yes, sir.

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Q. And did he what did he tell you about the possibility of a work stoppage?

A. Well he said he didn't believe so. But he said, I feel I have to take this action anyway. And of course it's his mine.

Q. It was his decision?

A. It was his decision.

Q. Now after that what all did you all talk about, if anything?

A. Well I'm trying to think what else he said. I went on to tell him that Cox I didn't know who it was, but the fellow that called me had said he would try to cause him some trouble, I thought, from the remarks that he had made there.

Q. If he got fired he'd cause him some trouble?

A. Yes.

Q. And did you tell him what Mr. Cox had said, what kind of trouble he'd cause him?

A. Yes. He said he would of course cause him trouble with the men, because he felt some of the other people felt that way, so he'd go to the agencies to the regulatory agencies and try to cause him some trouble that way. I kind of got the idea anyway he'd cause some trouble.

Mr. Pleasants stated that Mr. Jackson explained to him that he had fired Mr. Poole because he missed work and that he had previously warned him that he would be fired if he missed the next scheduled work shift. Mr. Pleasants further stated that Mr. Jackson advised him that he was going to fire Mr. Cox "because he had come to me making a complaint, and he felt by doing that he was going over his head and managing that mine and coming to somebody else to make a complaint, somebody that maybe he thought he could get Carson in trouble with" (Tr. 315).

Mr. Pleasants confirmed that Mr. Poole and Mr. Cox came to his office on Monday, May 13, 1985, after they had been fired, and Mr. Pleasants believed that they expected him to intercede in their behalf with Mr. Jackson. Mr. Pleasants could not recall whether Mr. Cox said anything about what get his job back, but after reviewing his memorandum he confirmed the accuracy of his prior statement indicating that Mr. Cox told him that "they were going to take this matter to the Labor Board and regulatory agencies. " Mr. Pleasants also confirmed that on Saturday, May 11, 1985, Mr. Cox told him that if he was discharged he was going to cause trouble by going to the agencies (Tr. 317).

On cross-examination, Mr. Pleasants confirmed that his recollection of his telephone conversation with Mr. Cox was better as of the date of his memorandum than it was during his hearing testimony. Mr. Pleasants testified further as to the sequence of his conversation with Mr. Jackson vis-a-vis his prior conversation with Mr. Cox, and he explained as follows (Tr. 320):

Q. Would it be perhaps the same sequence in which you relayed this conversation from Cox to you to Mr. Jackson? Would that be a fair conclusion that the same sequence in which you were told this would be the same sequence that you relayed this to Mr. Jackson?

A. The way IÄwhat I related to Mr. Jackson first was I asked him what was going on at the mines. Then I told him that a fellow had called me, worried about his nephew's job, also a little worried about his own job, and that he played little league ball and couldn't be there on Saturday. And at that time Mr. Jackson stopped me and told me that he was now firing two people.

In response to further questions, Mr. Pleasants confirmed that any adverse ruling against the respondent in this case will not affect its coal supply to Brooks Run, but the threat of a work stoppage would be a legitimate business concern of his company, and that he had this concern on May 11, 1985 (Tr. 325Ä326). Mr. Pleasants also indicated his concern for mine safety, and he did not believe in mining coal using "shortcuts," and that to do so is not cost effective (Tr. 327).

Complainant's Arguments

In his posthearing brief, complainant's counsel asserts that the evidence in this case establishes numerous instances of mine safety violations on the part of the respondent, and that they provide an ample predecate or base to support a conclusion that Mr. Cox would have justifiably reported these violations to mine management as well as to the appropriate mine enforcement agencies. Counsel also asserts that there is testimony by Mr. Cox and others, that Mr. Cox reported safety violations to mine management officials, and that within a week or two prior to his discharge on May 13, 1985, Mr. Cox threatened to his foreman, Rodney Blankenship, to talk to the next MSHA mine inspector to come into the mine. Counsel also cites the November 4, 1986, deposition of respondent's president, Carson Jackson, at transcript page 35, where counsel claims that Mr. Jackson admitted that Mr. Cox threatened at least twenty times to go to MSHA.

Counsel points out further that prior to his discharge, Mr. Cox had "taken the steps of complaining" to two different MSHA inspectors about certain mine safety violations, and that the final nexus regarding his protected activity occurred on Saturday, May 11, 1985, when Mr. Cox communicated his threat "to go to the agencies" to Mr. Neil Pleasants, a business associate of Mr. Jackson. Counsel argues that this threat was communicated to Mr. Jackson by Mr. Pleasants during a telephone conversation following Mr. Cox's call to Mr. Pleasants, and that the decision by Mr. Jackson to discharge Mr. Cox was made after Mr. Pleasants advised Mr. Jackson of Mr. Cox's threats "to go to the agencies." Counsel rejects any notion that Mr. Jackson decided to discharge Mr. Cox before it was made known to him by Mr. Pleasants that Mr. Cox had threatened "to go to the agencies," and argues that the sequence of events as communicated by Mr. Pleasants to Mr. Jackson, and as documented by Mr. Pleasants in his prior statement of June 1985, more accurately reflects that Mr. Jackson decided to discharge Mr. Cox after the phone call from Mr. Pleasants, and after Mr. Pleasants informed Mr. Jackson of Mr. Cox's threats to "go to the agencies."

In addition to Mr. Cox's purported safety complaints to mine management, and his threats to "go to the agencies," as communicated by Mr. Pleasants to Mr. Jackson, counsel asserts that Mr. Cox was a particularly vociferous individual in respect to voicing his views on safety matters, and that one witness called by the respondent during the hearing, Bobby Carpenter, testified that at one time Mr. Jackson threatened to fire Mr. Cox, and on another occasion, he overheard

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Mr. Blankenship tell Mr. Cox "don't do anything to make me fire you."

Counsel asserts that even though Mr. Cox's initial motivation for his telephone call to Mr. Pleasants on Saturday, May 11, 1985, may have been to help save his nephew's (Michael Poole) job, Mr. Cox unequivocally told Mr. Pleasants that he was going to complain to "MSHA," the "agencies," or the "labor board." Counsel asserts that once these threats were communicated to Mr. Jackson, they formed the basis for Mr. Jackson's decision to discharge Mr. Cox, and coupled with Mr. Cox's prior complaints and threats to discharge him some 2 weeks before his actual discharge, was the motivating reason for his discharge, and that but for these threats Mr. Cox would not have been fired. Counsel concludes that all of the foregoing series of events, including Mr. Cox's antecedent threats to talk to an MSHA inspector, his reporting of safety complaints to his foreman Rodney Blankenship within the last 2 weeks of his employment with the respondent, and the final transmission to Mr. Jackson of Mr. Cox's threats to go to the mine enforcement authorities, more than meet the threshold requirement of "protected activity" under the Act.

Counsel does not concede that this is a "mixed motive" case. Assuming that it is, counsel concludes that the respondent has not established that it would have discharged Mr. Cox in any event for any unprotected activities alone, and that it has failed to meet the test enunciated by the Pasula line of cases. Counsel concludes further that Mr. Cox has established that he was discharged, not for the contradictory diverse reasons advanced by the respondent, but because of protected activity within the meaning of section 105(c) of the Act.

Respondent's Arguments

In its defense, the respondent states that while it had no complaints concerning Mr. Cox's work as a roof bolter operator during 1984, he was involved in four accidents during the course of the year while operating the bolter, and that he was taken off the bolter and given a different work assignment because of these repeated accidents. Respondent asserts that after missing a regularly scheduled Saturday work day in June, 1984, and his removal as a roof bolt operator, Mr. Cox became disenchanted with Mr. Jackson's management of the mine. Respondent asserts that Mr. Cox made no secret of his belief that the "labor board" would not condone management's Saturday work requirement, and that he attempted to incite other miners not to work on Saturdays, and made statements that he would "whip" Mr. Jackson or any other member of management who

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attempted to discharge him. As examples of Mr. Cox's resentment of authority, respondent states that Mr. Cox continued to ride the belt out of the mine after being warned by Mr. Jackson not to, and challenged management's authority to reassign him after he was taken off the roof bolter.

The respondent points out that although Mr. Cox professed a keen interest in alleged safety violations, and went so far as to record the believed violations in a journal for 2 weeks commencing on Saturday, August 18, 1984, he never showed it to management. Further, although Mr. Cox had two informal discussions with MSHA inspectors who advised him of his rights and of the appropriate procedure for filing a complaint, Mr. Cox never filed a complaint with MSHA. Mr. Cox also failed to participate in a company sponsored safety program because he would not be paid overtime, and by his own admission, rarely, if ever, made any safety complaints to Mr. Jackson.

The respondent states that Saturday, May 11, 1985, was a regularly scheduled work day, and that both Mr. Poole and Mr. Cox were aware of this, and they were not excused from working by management, nor did they discuss their intention not to appear for work with Mr. Jackson. After telephoning Mr. Cox on the morning of Saturday, May 11, 1985, to ascertain whether he and Mr. Poole were coming to work, Mr. Jackson was informed by Mr. Cox that Mr. Poole did not intend to work that day. Mr. Jackson then advised Mr. Cox to inform Mr. Poole that he was discharged because of his absenteeism and to come to the mine on Monday, May 13, 1985, "to pick up his time." When Mr. Cox became argumentative and challenged the propriety of the discharge of Mr. Poole, Mr. Jackson advised Mr. Cox that it was his decision to make, and that if Mr. Cox was not satisfied with the decision, he should also "pick up his time."

Respondent states that despite the fact that all of its employees, including Mr. Cox, had been advised that the management of the Brooks Run Coal Company was separate from the management of the respondent's mine and were warned not to discuss management decisions with officials of Brooks Run, Mr. Cox decided on May 11, 1985, to contact Mr. Neal Pleasants, the vice-president of Brooks Run, concerning Mr. Poole's discharge, and did so to enlist his assistance in influencing Mr. Jackson to reconsider his decision to discharge Mr. Poole. Realizing that Mr. Jackson would not appreciate this contact, Mr. Cox did not identify himself to Mr. Pleasants, and he advised Mr. Pleasants that there would be "trouble" at his mine if Mr. Poole was not reinstated. Mr. Cox also complained to Mr. Pleasants about the respondent's decisions requiring Saturday work, threatened to go to the "labor board," generally

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discussed the dissatisfaction of the workforce at the respondent's mine, and also discussed his intention "to go to the agencies" (presumably MSHA) about the way Mr. Jackson ran his mine.

Respondent asserts that after receiving the call from Mr. Cox, Mr. Pleasants became concerned about the threat to the Brooks Run operations, and he believed that the "trouble" referred to by Mr. Cox would be a work stoppage at Brooks Run's contractors' mines which supplied coal to its preparation plant. For this reason, Mr. Pleasants called Mr. Jackson to inquire about the matter. Upon learning of the phone call to Mr. Pleasants, Mr. Jackson decided to discharge Mr. Cox, and that his decision was without input from any other management officials. Thereafter, on the morning of May 13, 1985, Mr. Jackson summoned Mr. Poole and Mr. Cox to his office and gave them their discharge slips. Mr. Jackson explained to Mr. Poole that he was discharged for excessive absenteeism, and he explained to Mr. Cox that he was discharged for trying to take over the management of the respondent's mine.

Respondent maintains that on the facts of this case, Mr. Cox has not demonstrated a prima facie case, much less carried his ultimate burden of proof that he was discharged for protected activities. Even assuming that Mr. Cox has established a prima facie case, the respondent asserts that Mr. Cox has failed to establish that he was discharged for protected activity rather than a legitimate business purpose, i.e., insubordinate and offensive conduct which culminated in his attempt to interfere with the decision to discharge Mr. Poole.

Respondent asserts that Mr. Cox was discharged for interfering with mine management's decisions to discharge Mr. Poole and to schedule work on Saturday which was made a condition of employment at the mine. Respondent also maintains that Mr. Cox had a history of poor work attitude and resentment of authority, and that the reason for his discharge has been consistently maintained and established by the respondent.

Respondent suggests that Mr. Cox has had a difficult time in deciding precisely what the protected activity was that he engaged in that formed the basis of his claims of alleged discrimination. With regard to any communicated safety complaints by Mr. Cox, a requirement enunciated by the Commission in *Simpson v. Kenta Energy, Inc.*, 8 FMSHRC 1034 (July 1986), the respondent takes the position that Mr. Cox has a serious problem with this aspect of his case. Respondent points out

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that while Mr. Cox produced a journal of alleged safety violations maintained for a 2-week period in 1984, he failed to establish that he ever shared the information with mine management or mine inspectors. Similarly, although Mr. Cox was advised of his rights to file safety complaints with MSHA, he failed to carry out his threat to do so and gave no indication that he intended to do so. With regard to his asserted complaints to his section foreman Rodney Blankenship, concerning a variety of alleged unsafe conditions involving roof control, ventilation, and explosives, the respondent concludes that the weight of the credible evidence establishes that Mr. Cox did not overtly make specific complaints to Mr. Blankenship or to Mr. Jackson, and that he himself engaged freely in the alleged unsafe practices of which he complained.

Respondent asserts that Mr. Cox expressed many of his safety concerns defacto, and that they cannot form a nexus between his discharge and his alleged protected activity, *Cantrell v. Gilbert Industrial*, 4 FMSHRC 1164 (June 1982). As an example, respondent points out that Mr. Cox alleged for the first time during the hearing that certain preshift and onshift reports were improperly kept and that dust records were allegedly incorrect or altered. However, he never reviewed these records prior to his discharge and never reviewed the mine bulletin board for the posting of MSHA enforcement action prior to his discharge.

Respondent asserts that it would appear that anytime a complaint may have been raised by Mr. Cox, it was in the context of a threat resulting from his own dissatisfaction with a management decision involving unprotected activity (i.e., his removal from the roof-bolting machine; the discharge of Mr. Poole; the requirement to work on Saturdays). Mr. Cox's intention to expose alleged violative conditions was always expressed in conditional terms, and respondent concludes that Mr. Cox could be persuaded not to complain if managerial decisions involving unprotected activity could be altered to suit Mr. Cox. Respondent further concludes that Mr. Cox's admitted and repeated participation in the alleged violative conduct belies any true concern on his part for mine safety. Respondent further concludes that an employee attempting to demonstrate a discriminatory motive must show that he at least intended to notify appropriate authorities. *Baker v. North American Coal Company*, 8 IBMA 164 (1977). Assuming Mr. Cox had any intention, it could only be interference with decisions concerning unprotected activity, which ultimately led to his discharge.

Even assuming that Mr. Cox linked some protected activity with his discharge, the respondent maintains that his discharge was motivated by unprotected activity and would have taken place regardless. Certainly, the repeated demonstration of a poor work attitude, such as the general hostility toward management, contempt for Saturday work assignments, coupled with the refusal to work on Saturdays, and attempts to incite others not to work on Saturdays, are sufficient reasons alone to discharge an employee. *Klimczak v. General Crushed Stone Company*, 5 FMSHRC 684 (April 1983), *aff'd sub. nom.* 732 F.2d 142 (2d Cir.1984) (miner failed to make out a prima facie case of discrimination where the record indicated his discharge resulted from a series of unexcused absences and a poor work attitude including refusal to work on Saturdays); *Walter A. Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8 (January 1984), (although prima facie case was made out, the miner's discharge was proper because it was also motivated by the employee's insubordinate conduct and attitude problem which resulted after his removal from the operation of a bulldozer and his reassignment to a different position).

Respondent argues that the evidence in this case establishes that Mr. Cox's attitude problem and resentment of authority grew after his removal from the roof bolter in 1984, and that this resentment manifested itself in a variety of ways, which Mr. Cox maintains were related to protected activity under section 105(c) of the Act. However, respondent points out that Mr. Cox's blatant defiance of Mr. Jackson's specific warning that Mr. Cox's comments concerning Mr. Poole's discharge on May 11, 1985, were not welcome, and Mr. Cox's call to Mr. Pleasants with the sole intention of interfering with Mr. Jackson's decision to discharge Poole for excessive absenteeism, goes beyond any form of protected activity under section 105. Mr. Cox's conduct in contacting Mr. Pleasants was so offensive and disruptive that Mr. Jackson was left with no other course but to discharge Mr. Cox. Mr. Cox's alleged protection in undertaking this action by calling Mr. Pleasants rests on the slim reed of the fortuitous mentioning of "going to the agencies" (presumably MSHA) regarding the way Mr. Jackson's mine was run. However, the primary gist of Mr. Cox's conversation, as understood by Mr. Pleasants, and as conveyed by him to Mr. Jackson, was to threaten a work stoppage at Brooks Run's contract mines of which the respondent is one.

Respondent cites a case decided under the National Labor Relations Act which it believes is similar to the one at bar involving a threatening call made by an employee to a business associate of his employer. The first Circuit held that "an

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employee's conduct may be so offensive, disruptive, or destructive of the employer's business as to go beyond the protection of Section 7, [of the NLRA] even if the goals of the conduct are within the protection of Section 7." Keosaian v. National Labor Relations Board, 630 F.2d 36, 38 (1st Cir.1980). In Keosaian, an employee's conduct in unilaterally telephoning his employer's bank, representing himself as an attorney for a proposed credit union, telling the bank's attorney that his employer had engaged in misrepresentations, and threatening legal action went well beyond the boundary of protected activity under the NLRA. In other words, the threatening call was grounds for discharge even if less offensive conduct by the employee in furtherance of engaging in protected activity would have been protected.

Respondent concludes that on the facts of his case, Mr. Cox cannot even claim that the purpose of his phone call to Mr. Pleasants was aimed at furthering any protected activity. Rather, his conduct was disruptive, offensive, and in contravention of a direct order, and as such, was a permissible basis for discharge, particularly when viewed in the context of his poor work attitude and contempt for authority. Certainly the prior warnings not to engage in such conduct provide indication of the fact that the discharge of Mr. Cox was related to unprotected activity alone. See, Bradley v. Belva Coal Co., 4 FMSHRC 982 (Rev.Comm.1982). Respondent further concludes that it is not the function of the trier of fact to pass upon the wisdom or fairness of the basis for the prior warning. It is the trier of fact's responsibility only to determine if the employee violated the warning and his action in doing so motivated his discharge.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C.Cir.1983). The operator may rebut the prima facie case by showing either

that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Company*, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, supra. See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir.1983); and *Donovan v. Stafford Construction Company*, No. 83-1566 D.C.Cir. (April 20, 1984) (specifically-approving the Commission's *Pasula*-*Robinette* test). See also *NLRB v. Transportation Management Corporation*, --- U.S. ---, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub. nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C.Cir.1983); *Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir.1965):

It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In *Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Mr. Cox's Protected Activity

Section 105(c)(1) prohibits a mine operator from discharging a miner, or otherwise discriminating against him for making safety complaints to MSHA or to mine management. That section also prohibits a mine operator from discriminating against a miner, or otherwise interfering with any of his statutory rights under the Act. A miner is protected against any retaliatory action by the respondent because of any safety complaints he may have made to MSHA or to mine management. He is also protected against retaliation for exercising his section 103(g) right to request an inspection of the mine by MSHA when he has reasonable grounds to believe that violations exist in the mine. Further, I believe that section 105(c)(1) is broad enough to protect a miner against retaliation for threatening to contact or inform mine enforcement agencies about perceived safety violations in the mine.

It is clear that a miner has an absolute right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746

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(D.C.Cir.1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir.1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984). The fact that a mine operator addresses a miner's safety concerns or complaints, and which are later determined not constitute violations, or the fact that the complaining miner filed no safety complaints with any governmental enforcement agencies, does not remove the Act's protection from any preceding complaints, Sammons v. Mine Services Company, supra, at 6 FMSHRC 1396-97.

In this case, Mr. Cox claims that his safety complaints to mine management, coupled with his threats to go to MSHA or to other governmental "agencies" with his complaints, were the motivating factors which prompted Mr. Jackson to discharge him on May 13, 1985. While it is clear from the record that Mr. Cox never filed any safety complaints with MSHA or any state mining inspectors prior to his discharge, although he was advised to do during conversations with two MSHA inspectors, and that he never disclosed the contents of a safety journal he was keeping some 8 months before his discharge, Mr. Cox claims that shortly before his discharge he intended to file safety complaints with MSHA. He also claims that he had always intended to file such complaints but simply did not know the procedure for doing so. In order to address these issues, a review of Mr. Cox's purported safety complaints, and the alleged safety violations which he claims were rampant in the mine, all of which he claims served as a basis for his discharge, is in order.

The evidence in this case establishes that miners were engaged in unsafe practices during the time that Mr. Cox was employed at the mine, and that mine management may have been aware of them. Some of these practices, if proved, would constitute violations of MSHA's mandatory safety standards, and possibly, state mining laws. For example, the admissions and testimony of several miners reflects that powder and caps were stored and kept on equipment rather than in the required storage magazines, ventilation curtains which were required to be in the down position to control the air flow and dust were kept rolled up and out of the way during mining, and respirable dust sampling devices may have been turned off or tampered with. However, the record also establishes that Mr. Cox himself freely engaged in some of these practices long before he was discharged. The record establishes that Mr. Cox operated his scoop with the ventilation curtains

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rolled up, stored powder and caps on his roof-bolting machine, failed to always use his ATRS system, rode the belt out of the mine after being warned by Mr. Jackson not to do so, and was admonished at least once by his foreman not to bolt out of sequence or work under unsupported roof.

Although Mr. Cox alluded to certain violations concerning the roof bolter ATRS system, no evidence was forthcoming to establish any violations, or that mine management was involved in any unsafe practices concerning the ATRS. As a matter of fact, Mr. Cox conceded that the ATRS was used at his discretion, depending on the roof conditions, and I can only conclude that any failure to use that system when roof conditions may have warranted it was the result of Mr. Cox's personal decision not to use it.

With regard to Mr. Cox's assertions concerning the preshift and onshift books, his allegations that they contained erroneous entries and did not accurately reflect mine violations, made for the first time at the hearing, are unsubstantiated. As a matter of fact, although he had a right to do so, Mr. Cox never reviewed those mine records prior to his discharge, and during the hearing he presented no credible evidence to support any violations for erroneous or illegal entries.

In his original complaint, Mr. Cox asserted that Mr. Jackson "got rid of any miners who stood up for their safety rights." However, no evidence was forthcoming to even suggest that any miners were ever fired or disciplined by mine management for making safety complaints or "standing up for their safety rights." As a matter of fact, Mr. Jackson's testimony that Mr. Poole and Mr. Cox were the only two miners that he has ever fired at the mine stands un rebutted.

With regard to Mr. Cox's allegations concerning unsafe roof conditions, Mr. Poole testified that roof falls occurred in virtually every entry during the period immediately prior to his discharge. However, Mr. Poole could offer nothing further to substantiate his statement, and he had no knowledge as to whether any of the falls were reported by mine management to MSHA or to any state officials. When asked to be specific about any unsafe roof conditions, Mr. Poole referred to a "double linear," and to an area near a rectifier in the No. 5 entry, which he believed had some loose rock. Mr. Cox could offer no specific information with respect to any roof violations, and his testimony, as well as that of Mr. Poole is general and nonspecific, and no evidence was forthcoming with

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respect to any roof control violations or unsafe roof conditions either immediately prior to Mr. Cox's discharge or in the past.

Practically all of the witnesses who testified in this case alluded to "bad top" or "adverse roof conditions" to one degree or another in the mine. However, I find no evidence of any consistently bad top or unsafe roof conditions, nor do I find any basis for concluding that the respondent totally ignored the roof conditions or received any violations or citations for roof control violations. All of the witnesses called by Mr. Cox confirmed that mine management addressed their roof concerns by either installing longer roof bolts, or constructing cribs and belt canopies in certain areas where roof falls had occurred. Cutting machine operator Wayne Lee confirmed that roof conditions were freely discussed among the miners and Mr. Jackson and Mr. Blankenship, and that corrective action was always taken, albeit on one occasion, 2 or 3 days passed before a roof condition was corrected. Mr. Lee indicated that in certain instances when bad top was encountered, Mr. Jackson ordered additional roof bolting and rebolting, and also instructed that more coal pillars be left to support the roof. Mr. Lee also confirmed that Mr. Blankenship discussed the roof-control plan with his crew.

Roof bolter operator Ramsey confirmed that anytime he reported bad top conditions to his foreman, the foreman would instruct him to install longer bolts or cribs. On two occasions where there were roof falls on a belt, management took steps to support the area with cribs and canopies, and instructed the men as to the proper roof control procedures. On several occasions when he was observed bolting out of sequence, both Mr. Jackson and foreman Blankenship instructed him to do it the proper way.

Coal drill operator Aaron Bender testified that management never left adverse roof conditions unattended, and that his foreman always addressed his concerns when bad top was encountered by ordering the installation of longer bolts and cautioning him to watch the roof, and to rebolt any adverse roof areas.

Scoop operator Steve Mullins testified that steps were taken to resecure any areas where falls had occurred, and that cribs, headers, and canopies were installed in fall areas to secure the roof.

Mr. Poole himself conceded that management took steps to support the roof in "a lot of the areas," took extra steps to

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insure supported roof "in a few places," and while he alleged that some of his complaints about adverse roof conditions were ignored, the only specific information he had to offer was that discussed earlier.

The miners called by the respondent consistently testified that adverse roof conditions called to the attention of mine management were always addressed and corrective action was taken to support the roof. Respondent produced copies of reported roof falls which occurred in the mine on April 4, 10, 19, and May 7, 1985, and none of them involved any injury or damage to equipment (Exhibits CÄ2(a), (b), (c), (d)). These falls were reported to MSHA, and they were investigated (exhibits CÄ2(e), (f), (g)). However, there is no evidence that any citations or violations were ever issued, and this fact was corroborated by Mr. Robert Massey, the responsible company official who maintains the mine records.

The only instance of record of any failure by management to promptly address any adverse roof condition was supplied by electrician Roger Groves, who testified for Mr. Cox. Mr. Groves testified that in the 5 years he has worked in the mine, he had one occasion to complain about bad top where the roof had dropped in a roadway and was taking weight. After he called the condition to Mr. Jackson's attention, Mr. Groves stated that mining continued for about a week before corrective action was taken. However, Mr. Groves could supply no further details about this incident, and he confirmed that the roof was otherwise always bolted in accordance with the roof-control plan, and that foreman Blankenship frequently discussed the plan with the miners. Mr. Groves also confirmed that he saw no evidence that management ever did anything to endanger miners under unsupported roof.

The record establishes that at no time during his employment at the mine did Mr. Cox formally complain to any mine inspector about any purported unsafe conditions in the mine. Although he claimed he never had an opportunity to do so because someone from mine management was always present, Mr. Cox never availed himself of the opportunity to use the MSHA "hotline," even though he was aware that he could do so. Further, although he spoke with two MSHA inspectors prior to his discharge about his safety concerns and the manner in which Mr. Jackson was running the mine, at no time did Mr. Cox follow their suggestions that he file a safety complaint with the appropriate MSHA office.

Most of the miners who testified in this case confirmed that they often discussed mine conditions among themselves,

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and that Mr. Cox was included in these group discussions. Eight miners testified that they either never heard Mr. Cox specifically or overtly complain to mine management, or they had no knowledge of such complaints. None of them were aware of any safety complaints by Mr. Cox to state or Federal mine safety officials, and only one miner was aware that Mr. Cox was keeping a journal of purported mine violations.

Although roof bolter Bobby Carpenter testified that he never heard Mr. Cox complain to management about safety, he acknowledged that in a prior statement given to MSHA during its investigation of Mr. Cox's complaint, he stated that Mr. Cox "did a lot of hollering" to Mr. Jackson and foreman Blankenship, and that Mr. Cox "was always complaining about a lot of things . . . to some extent a lot of it did have to do with health and safety." Mr. Carpenter also confirmed that Mr. Cox talked about "air at the face and the ventilation curtains being rolled up" Mr. Carpenter also confirmed that Mr. Cox also complained about how the mine was being managed, questioned management decisions not necessarily related to safety, and the fact that he did not like Saturday work.

Mr. Cox testified that while he did complain to Mr. Jackson about his safety concerns, these complaints were "few" and "rare." Mr. Cox stated that most of his complaints were made to Mr. Blankenship, his foreman and part owner of the mine, and that the complaints concerned the roof taking weight in the No. 5 entry, and the fact that powder and caps were kept on equipment. Mr. Blankenship declined to testify as to whether Mr. Cox or anyone else had ever made safety complaints to him. Mr. Jackson denied that miners other than Mr. Cox ever directly complained to him, and he confirmed that in the event complaints were made, he probably would not hear all of them.

After careful consideration of all of the testimony and evidence adduced in this case, I conclude and find that Mr. Cox has established that he made safety complaints to mine management prior to his discharge on May 13, 1985. I believe Mr. Cox's assertions that he complained to his section foreman Blankenship about the bad top, the ventilation curtains being rolled up, and the practice of storing powder and caps on the equipment. I also believe that Mr. Cox has established that he made similar complaints when he spoke with two MSHA inspectors prior to his discharge. All of these complaints, albeit made informally during conversations with mine management and the inspectors, constitutes protected activity under section 105(c) of the Act, and the respondent

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is prohibited from retaliating against Mr. Cox for making the complaints.

With regard to Mr. Cox's alleged threats to go to MSHA or to any other mine enforcement agencies with his complaints prior to his discharge, there is a difference of opinion among the parties as to whether those threats were safety related, or whether they were made in connection with Mr. Jackson's discharge of Mr. Poole and the respondent's Saturday work requirement policy. If Mr. Cox can establish that his threats were safety related, they were protected activity, and the respondent would be prohibited from retaliating against Mr. Cox for those threats. A discussion of these issues appears later in this decision.

Mr. Jackson's Motivation for Mr. Cox's Discharge

The evidence in this case establishes that the respondent operates a small, non-union mine, and it is undisputed that as its president, Mr. Jackson exercised practically autonomous authority to hire, fire, and discipline the work force, and that he fixed company policy with respect to work assignments and other personnel matters. The evidence also establishes that the only management official involved in the decision to discharge Mr. Cox was Mr. Jackson. Mr. Cox has not rebutted the fact that Mr. Jackson acted alone in making that decision, nor has he rebutted the fact that all employees were aware of the fact that notwithstanding the presence of other co-owners who worked the mine, Mr. Jackson was "the boss."

The record establishes that both Mr. Jackson and Mr. Cox are men of limited educational backgrounds. Further, after viewing them on the stand during the course of the 3 days of hearing in this case, they impressed me as strong-willed personalities who do not shy away from making their respective points of view known to the court or to trial counsel who represented them. During the course of the hearing, Mr. Jackson was quick to personally respond to Mr. Cox's counsel's suggestion that he may have been under the influence of tranquilizers during his testimony, or that he was not telling the truth (Tr. 203-205). Likewise, Mr. Cox displayed a similar temperament in responding to some questions from the court, and during certain periods of cross-examination testing his credibility. In short, they impressed me as two individuals, who given the right conditions, are prone to anger, and would not hesitate to become argumentative in their efforts to persuade each other as to the correctness of their respective

positions. Under the circumstances, I find credible the testimony in this case that although Mr. Cox and Mr. Jackson generally got along with each other, they were both prone to losing their temper, and at times cursed each other and otherwise took out their anger and frustrations on each other.

Although the record indicated some prior differences between Mr. Cox and Mr. Jackson, I cannot conclude that there is any evidence to support any overt hostility or animus by mine management towards Mr. Cox, or any disparate treatment of Mr. Cox because of his asserted safety concerns. To the contrary, I conclude that Mr. Jackson exhibited a high level of tolerance towards Mr. Poole and Mr. Cox. Mr. Jackson hired Mr. Cox when he was out of work, and he subsequently hired Mr. Cox's nephew Michael Poole after Mr. Cox asked Mr. Jackson to give him a job. The respondent advanced Mr. Poole money when he was in need after a death in his wife's family, and also sponsored Mr. Cox's daughter in a beauty contest with a monetary donation. During a lay-off period, Mr. Jackson accommodated Mr. Cox through certain earnings statements to enable him to draw unemployment, and took him back after the lay-off. Mr. Jackson also allowed him to change shifts to meet a doctor's appointment. Although Saturday work was treated as a regularly scheduled work day by management, it nonetheless compensated miners for Saturday work by paying them premium pay.

The record establishes that between February, 1984 and May, 1985, Mr. Poole had an absenteeism problem, and he was warned on several occasions that he would be discharged if his attendance did not improve. Although both Mr. Poole and Mr. Cox were aware of the fact that occasional Saturday and overtime work were conditions of employment, they nonetheless voiced their displeasure over Saturday work, and made it known to management and their fellow miners that they did not like to work on Saturdays. Mr. Cox went further and advised several of his fellow miners that they did not have to work on Saturdays if they didn't want to.

Although Mr. Jackson considered Mr. Cox to be a good worker, he had several encounters with him over certain work assignments, and had to speak to him on several occasions about certain unsafe practices. On one occasion, after warning Mr. Cox not to ride the belt out of the mine, Mr. Cox continued to ride the belt, and Mr. Jackson had to resort to shutting down the belt, forcing Mr. Cox to walk out of the mine. On other occasions, either Mr. Jackson or Mr. Blankenship warned Mr. Cox about working under unsupported roof and bolting out of sequence. On yet another occasion when Mr. Cox failed to show

up on a scheduled Saturday work day, and was taken off a roof bolter at the suggestion of an MSHA inspector because he had been involved in four roof bolt accidents, Mr. Cox became upset to the point where Mr. Jackson threatened to give him an "unsatisfactory work slip," only to recant and allowed him to return to work. As a matter of fact, after this incident, Mr. Cox was reassigned to work building stoppings. However, out of consideration for his back condition, Mr. Blankenship, whom Mr. Cox considered his friend, interceded on his behalf and transferred him to work on a scoop, and Mr. Jackson agreed to the transfer.

In his original complaint filed with MSHA, Mr. Cox admitted that he and Mr. Jackson "had been at odds before because of the way the mine run." Bobby Carpenter testified that Mr. Cox "did a lot of hollering" to Mr. Jackson and to Mr. Blankenship, and that Mr. Cox complained about how the mine was being managed, and about management decisions that were unrelated to safety (Tr. 269). Foreman Blankenship testified that he considered Mr. Cox to be "a bully," and that Mr. Cox had at one time "threatened to whip me in front of the other men" (Tr. 157). Johnny Stafford testified that on one occasion, Mr. Cox "threatened to kick my butt," and challenged him to a fight (Tr. 292). Mr. Jackson testified that he warned Mr. Cox about his tardiness to work and his complaints about how Mr. Jackson was managing the mine. Mr. Jackson confirmed that Mr. Cox was the only employee who caused him problems, and that Mr. Cox's threats "to whip his ass" upset him. Mr. Jackson also confirmed that while he considered Mr. Cox to be a good worker, Mr. Cox had problems in taking orders, did things the way he wanted to, resented authority, and that after the incident in June 1984 when he was taken off the roof bolter, Mr. Cox resented doing what was asked of him, and resisted any Saturday work. Yet, given all of these prior incidents which I believe would give mine management reasonable pause to reflect as to whether or not Mr. Cox should continue in its employ, Mr. Jackson did not fire Mr. Cox.

In his initial complaint filed with MSHA, Mr. Cox made a statement that Mr. Jackson "tried to fire me on June of 1984 because of safety in the mines." Mr. Cox also asserted that miners have been laid off because of their safety complaints. However, during the hearing, Mr. Cox admitted that Mr. Jackson's purported attempts to fire him amounted to Mr. Jackson's intent to give Mr. Cox an "unsatisfactory work" slip for not working on a scheduled Saturday, and because of Mr. Cox's protests after being taken off the roof bolter. Mr. Cox admitted that Mr. Jackson's proposed disciplinary action resulted from Mr. Cox's refusal to work on Saturday

because he had to bale hay. Mr. Cox further admitted during the hearing that he knew of no miner who was ever laid off and not called back to work because of any safety complaints made to management (Tr. 183-184). Thus, Mr. Cox's testimony during the hearing belies his prior complaint statements that Mr. Jackson threatened to fire him for safety reasons, and that miners have been laid off for making safety complaints, and raises a serious question as to his credibility.

The aforementioned June 1984 incident took place approximately 8 months before Mr. Cox's discharge. It was at that time that Mr. Cox purportedly made the statement to Mr. Jackson that "we are going to run the mine the way the law says," and when foreman Blankenship purportedly told Mr. Cox "don't do anything to make me fire you." I cannot conclude that the purported statement by Mr. Cox was a threat to complain to MSHA, nor can I conclude that Mr. Blankenship's purported response amounted to a threat to fire Mr. Cox for any threats to go to MSHA. The June 1984 incident resulted from Mr. Cox's refusal to work on a Saturday when he had other things to do, and his removal from the roof bolter at the suggestion of an MSHA inspector because he was "accident prone." Mr. Cox was angry because he first believed Mr. Jackson took him off the bolter to punish him for not working on Saturday, and Mr. Jackson was angry because Mr. Cox would not work and because an MSHA inspector had to speak to him about his accident frequency rate involving Mr. Cox's work as a bolter. Although Mr. Jackson assigned Mr. Cox to work on stoppings, a job requiring much physical labor, he recanted after foreman Blankenship interceded on his behalf, and out of consideration for Mr. Cox's back condition, Mr. Jackson assigned him to a scoop. Given all of these circumstances, I conclude that the June 1984 incident had nothing to do with Mr. Cox's safety concerns or complaints.

After the June 1984 incident, Mr. Cox began keeping a journal in which he made entries concerning mine conditions which he believed were unsafe and in violation of the law. The journal was kept for only 2 weeks, beginning in mid-August through September 2, 1984, some 8 months before Mr. Cox's discharge. Mr. Cox testified that he kept the journal at home and intended to use it as "insurance" in the event of any future adverse action against him. However, Mr. Cox admitted that he never showed the journal to anyone, including the MSHA inspectors to whom he spoke, and there is absolutely no evidence that Mr. Jackson or anyone else in management ever knew about the journal. Although Mr. Cox testified that he mentioned the journal to Mr. Jackson's son, Kit, and that he "might have intended" for the son to tell his father, I doubt

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that Mr. Cox would disclose his "insurance," which he kept at home, at a time when his job was not in jeopardy. Given the lack of any credible evidence or inference that Mr. Jackson knew about the journal or Mr. Cox's visits with the inspectors, I conclude and find that these events played no role in Mr. Jackson's decision to discharge Mr. Cox.

Mr. Cox admitted that he told some of his fellow miners that they did not have to work on Saturdays. Although he denied telling them that the company could do nothing about it because of the "labor board," Mr. Cox further admitted that he told the miners "if you've got other things that you want to do, just don't come in to work" (Tr. 128-129). Donnie Crum testified that Mr. Cox told him that he was not going to work on Saturday, May 11, 1985, and that if the respondent forced him to, "the labor board would take care of it and the company couldn't do anything about it" (Tr. 233). William Griffin testified that he worked a lot of overtime on Saturdays, and that Mr. Cox called him a "company suck" for doing so (Tr. 284). I find all of this testimony to be credible, and it lends credence and support to Mr. Jackson's assertions that Mr. Cox was trying to undermine his authority with respect to his policy concerning Saturday work requirements.

During his direct testimony, Mr. Cox confirmed that Mr. Jackson told him on Saturday, May 11, 1985, that he was tired of Mr. Poole "laying off" the job, and that Mr. Cox was to inform Mr. Poole to come in and "pick up his time." Mr. Cox also confirmed that he placed the call to Mr. Pleasants in an attempt to get Mr. Poole's job back. At that point in time, I am convinced that Mr. Cox knew that Mr. Jackson had discharged Mr. Poole because of his absenteeism, and I so find. On cross-examination, however, Mr. Cox stated that he was not under the impression that Mr. Jackson "was fed up" with Mr. Poole over his absences, and he believed that Mr. Jackson found an opportunity to get rid of Mr. Poole because of his safety complaints. I find Mr. Cox's impression of his conversations with Mr. Jackson to be contradictory, and find nothing in the record to support Mr. Cox's opinion that Mr. Poole was fired for any reason other than an absenteeism problem for which he was warned many times by Mr. Jackson.

Mr. Cox admitted that he disagreed with Mr. Jackson's decision to fire his nephew, and that he told him so during their conversation on Saturday, May 11, 1985. During that conversation, Mr. Cox questioned Mr. Jackson's treatment of Mr. Poole, and made some comments about the attendance record of Mr. Jackson's son, Kit. This provoked Mr. Jackson to the point where he informed Mr. Cox that if he were unhappy with

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his decision to fire his nephew, he too could "pick up his time." At that point in time, I believe one could reasonably conclude that Mr. Jackson was in a mood to fire Mr. Cox along with his nephew, subject only to Mr. Cox's following through with Mr. Jackson's comment that he could "pick up his time."

I have carefully reviewed all of Mr. Cox's statements made to MSHA after his discharge and during the investigation of his complaint, and nowhere do I find any statements by Mr. Cox that he ever threatened to go to the "Labor Board" or any other mine enforcement agencies, that he ever intended to do so, or that he ever told anyone in mine management about any such purported threats. Mr. Poole's prior statements likewise contain no such information. The only prior statement by Mr. Cox raising any inference of a threat to go to MSHA is his assertion that "during April 1985" he told Mr. Blankenship that he was going to speak to an MSHA inspector on his next visit to the mine about the roof conditions. However, there is no evidence that Mr. Jackson knew about this statement, and I cannot conclude that it had anything to do with Mr. Cox's discharge.

At page four of his brief, Mr. Cox's counsel finds it "significant" that in his deposition of November 4, 1986, Mr. Jackson implied that Mr. Cox had threatened 20 times to go to MSHA. I have carefully reviewed Mr. Jackson's testimony in that deposition and cannot conclude or infer that Mr. Cox threatened to go to MSHA. Mr. Jackson testified that Mr. Cox threatened to go to the "Labor Board" about his discharge of Mr. Poole, and that Mr. Cox told him that he could not require anyone to work on Saturday if they did not want to, and that he could not fire Mr. Poole for refusing to work on Saturday. Mr. Jackson further testified that it was in this context that Mr. Cox threatened that the "Labor Board will eat me up," and Mr. Jackson further testified that he had no idea who Mr. Cox was talking about when he used the term "Labor Board" (Tr. 35-38). I find Mr. Jackson's testimony to be credible, and I conclude that Mr. Cox's prior threats to go to the "Labor Board" concerned matters unrelated to any safety concerns on his part.

I find that the respondent's policy prohibiting its employees from contacting the Brooks Run Coal Company on managerial decisions and policies made by the respondent was well known among the workforce, including Mr. Cox. Mr. Jackson had previously warned the workforce that any further contacts with Brooks Run would be viewed by him as an effort to question or undermine his operational authority to run his own mine and would be considered a dischargeable offense. Mr. Cox admitted

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that at the time he placed the call to Mr. Pleasants on May 11, 1985, he did not identify himself to Mr. Pleasants out of fear that his job would be jeopardized for placing the call (Tr. 159). This supports my conclusion that Mr. Cox was aware of the policy and that he was concerned that his violation of this policy could cost him his job.

The crux of Mr. Cox's case lies in the telephone call he placed to Mr. Pleasants on Saturday, May 11, 1985, after a heated telephone exchange with Mr. Jackson over the discharge of Mr. Poole. At that time, Mr. Cox said nothing to Mr. Jackson about going to MSHA or "to the agencies" about any of his complaints, or about Mr. Jackson's discharge of Mr. Poole. Mr. Jackson came close to discharging Mr. Cox at that point in time, but did not do so. However, Mr. Jackson told Mr. Cox in no uncertain terms that if he (Cox) were not satisfied with his decision to fire Mr. Poole, that he too could "pick up his time." Had Mr. Cox taken up the offer and "picked up his time," I believe one could reasonably conclude that Mr. Jackson also fired Mr. Cox for questioning his decision to fire Mr. Poole, and for questioning his Saturday work policy.

Mr. Cox's assertions that he and Mr. Poole had always intended to go to MSHA and to other appropriate mine enforcement agencies are rejected as self-serving declarations made by Mr. Cox after he found himself out of a job. When called in rebuttal at the hearing after testifying on direct, and after Mr. Cox's testimony, Mr. Poole asserted that he and Mr. Cox had always intended to go to the "labor board or the governmental agencies" regardless of whether or not they were discharged. When asked whether he would have gone to MSHA if Mr. Poole were given his job back, Mr. Cox relied "not right at that time" (Tr. 161). This raises serious doubts in my mind that but for his discharge, Mr. Cox ever intended to file any complaints with MSHA or anyone else.

Mr. Cox admitted that he placed the call to Mr. Pleasants in order to attempt to influence him to intercede with Mr. Jackson and save his nephew's job. Mr. Cox also admitted that he told Mr. Pleasants that there would be trouble at his mine if Mr. Poole were discharged (Tr. 158). Mr. Poole conceded that Mr. Cox placed the call to Mr. Pleasants in an effort to convince Mr. Pleasants to intercede with Mr. Jackson over his discharge. Mr. Poole confirmed that Mr. Cox told Mr. Pleasants that there would be trouble at his mine if something was not done about getting Mr. Poole's job back (Tr. 282-283).

Mr. Pleasants expressed serious concerns over Mr. Cox's threats of trouble at his mine, as well as the other mines which supplied coal to Brooks Run, and his concerns were over what he viewed to be threats of labor trouble by Mr. Cox over the discharge of Mr. Poole and the respondent's Saturday work policy. Although Mr. Cox and Mr. Poole denied that Mr. Cox made any statements to Mr. Pleasants which may have led Mr. Pleasants to conclude that Mr. Cox was threatening a possible work stoppage at the mines supplying coal to Brooks Run, I simply do not believe them. Given the background of Mr. Cox's reluctance to work on Saturdays, his prior threats to take that issue to the "labor board," and his prior corroborated statements to other miners that they did not have to work on Saturdays and that management could do nothing to force them to work, I find Mr. Pleasant's version of his conversation with Mr. Cox to be credible.

I conclude that Mr. Cox's telephone call to Mr. Pleasants had nothing to do with any safety concerns on the part of Mr. Cox or Mr. Poole. The call was clearly made in an attempt to influence Mr. Pleasants to intercede on behalf of Mr. Poole and to pressure Mr. Jackson to rescind his discharge of Mr. Poole. Mr. Cox's threats of trouble at the mines which supplied coal to Brooks Run, and his threats to "go to the agencies" if Mr. Poole were not given his job back, were not made by Mr. Cox out of any safety concern. I conclude and find that Mr. Cox's telephone contact with Mr. Pleasants, and his threats in connection with Mr. Poole's discharge and the respondent's Saturday work policy, were clearly in violation of Mr. Jackson's policy that no one was to contact Brooks Run questioning managerial policy decisions made by the respondent, and constituted unprotected activity for which Mr. Cox could be justifiably dismissed.

Mr. Pleasants testified that when he advised Mr. Jackson of Mr. Cox's telephone call, Mr. Jackson confirmed that he had fired Mr. Poole because of his absenteeism. When Mr. Pleasants advised Mr. Jackson that the caller had also complained that the respondent's Saturday work policy was interfering with his little league coaching duties, Mr. Jackson immediately recognized that the caller had been Mr. Cox and stated to Mr. Pleasants that "I discharged one man, but now there will be two." Mr. Jackson explained to Mr. Pleasants that he was discharging Mr. Cox for "going over his head" with his complaints to Mr. Pleasants. I believe that Mr. Jackson made the decision to discharge Mr. Cox as soon as he learned that it was Mr. Cox who had placed the call to Mr. Pleasants, and that he did so because of that contact, and not because of any threats by Mr. Cox to "go to the agencies" with any safety complaints. I

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believe that Mr. Jackson was fed up with Mr. Cox and Mr. Poole, and that Mr. Cox's call to Mr. Pleasants, which came shortly after Mr. Jackson's call to Mr. Cox in which they exchanged heated words over Mr. Poole's discharge, and the Saturday work policy, was simply too much for Mr. Jackson to tolerate, and he reacted swiftly by making the decision to fire Mr. Cox.

The complainant's arguments that Mr. Jackson decided to fire Mr. Cox only after being informed by Mr. Pleasants of Mr. Cox's threats "to go to the agencies" with his complaints of unsafe practices in the respondent's mine are rejected. I have reviewed Mr. Pleasants prior memorandum of June 18, 1985, documenting his telephone conversation with Mr. Cox, and find nothing inconsistent with Mr. Pleasants' testimony during the hearing. The memorandum is not a verbatim record of the conversation in question, and it was prepared over a month after the call. I believe the memorandum is a simply record of the call, and I cannot conclude that it supports any inference that Mr. Jackson decided to fire Mr. Cox after being advised of Mr. Cox's threats "to go to the agencies." Given Mr. Jackson's frustration with Mr. Cox and Mr. Poole because of their failure to work on Saturday, Mr. Jackson's prior exchange with Mr. Cox over the discharge of Mr. Poole, and Mr. Cox's telephone contact with Mr. Pleasants, I believe Mr. Jackson's testimony that Mr. Cox's threats to go to the agencies or to MSHA had nothing to do with his decision to fire Mr. Cox.

I find Mr. Jackson's version as to why he discharged Mr. Cox to be credible. I further conclude and find that Mr. Jackson was justified in discharging Mr. Cox for attempting to undermine and interfere with his authority with respect to the Saturday work policy, his decision to discharge Mr. Poole, and Mr. Cox's violation of company policy with respect to contacts with the Brooks Run Coal Company. I further conclude and find that each of these occurrences, taken as a whole, constituted "unsatisfactory service," and support Mr. Cox's discharge.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a prima facie case of

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discrimination on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge