

CCASE:  
JAMES H. HARMON V. CONSOLIDATION COAL CO.  
DDATE:  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

JAMES H. HARMON,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. WEVA 86-375-D  
MSHA Case No. MORG CD 85-9

CONSOLIDATION COAL COMPANY,  
RESPONDENT

Humphrey No. 7 Mine

DECISION

Appearances: Jeff Harris, Esq., Morgantown, West Virginia,  
for the Complainant;  
Thomas N. McJunkin, Esq., Jackson, Kelly, Holt  
& O'Farrell, Charleston, West Virginia, for  
the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant James H. Harmon 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. Harmon filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and so advised Mr. Harmon by letter dated May 12, 1986. Mr. Harmon then filed a pro se complaint with this Commission, and he subsequently obtained counsel to represent him in this matter. A hearing on the merits of the complaint was held in Morgantown, West Virginia, and the parties appeared and participated fully therein. The respondent filed a posthearing brief. Mr. Harmon's counsel withdrew from the case after the hearing, and did not file a brief. However, I have considered the oral arguments made by Mr. Harmon's counsel during the course of the hearing, as well as the respondent's arguments.

The complainant alleges that he was removed as a member of the mine safety committee by mine management because of his safety concerns and activities as a member of the safety

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committee, and that his removal constitutes discrimination under the Act. The respondent asserts that the complainant was removed from the safety committee because he and the other members "arbitrarily and capriciously" shut down a track haulage area of the mine, and that his removal from the safety committee was in full compliance with the terms of the applicable National Bituminous Coal Wage Agreement of 1984. The respondent states that the complainant's removal from the safety committee was also challenged pursuant to the applicable contractual binding arbitration procedures, and that his removal was upheld. In addition, respondent states that the complainant's state discrimination complaint challenging his removal from the safety committee was rejected after protracted hearings before the West Virginia Coal Mine Safety Board of Appeals.

#### Issues

The principal issue in this case is whether or not the complainant's removal from the mine safety committee by the respondent was discriminatory under section 105(c) of the Act. Additional issues raised by the parties are 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) and 110(a) and (d) 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.

#### Factual Background

Mr. Harmon has been a member of the United Mine Workers of America and an employee of the respondent for approximately 10 years. In May of 1984, he was elected by the local union at the mine to serve on the Mine Health and Safety Committee, an entity which exists at mines covered by the National Bituminous Coal Wage Agreement of 1984 (Wage Agreement) by virtue of Article III(d)(1) of that contract which provides in pertinent part as follows (exhibit RÄ1):

ARTICLE IIIÄHEALTH AND SAFETY

Section (d) Mine Health and Safety Committee

(1) At each mine there shall be a Mine Health and Safety Committee made up of miners employed at the mine who are qualified by mining experience or training and selected by the local union . . . .

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(3) The Mine Health and Safety Committee may inspect any portion of a mine . . . . if the Committee believes conditions found endanger the lives and bodies of the Employees, it shall report its findings and recommendations to the Employer. In those special instances where the Committee believes that an imminent danger exists and the Committee recommends that the Employer remove all Employees from the involved area, The Employer is required to follow the Committee's recommendations and remove the Employees from the involved area immediately . . . .

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(5) If the Mine Health and Safety Committee in closing down an area of the mine acts arbitrarily and capriciously, a member or members of such Committee may be removed from the Committee. An Employer seeking to remove a Committee member shall so notify the affected Committeeman and the other members of the Mine Health and Safety Committee. If the Committee objects to such removal, the matter shall be submitted to and decided by the appropriate panel arbitrator. If the Employer requests removal of the entire Committee, the matter automatically shall be submitted to arbitration and the Committee will continue to serve until the case is submitted to and decided by the arbitrator. A Committee member shall not be suspended or discharged for his official action as a Committee member. (Emphasis added.)

On the morning of December 12, 1984, Mr. Harmon and two other safety committeemen, Mr. Thomas Turpin and Mr. David Laurie, acting in their capacities as safety committeemen, closed a section of the mine's main haulage track line under

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the purported authority of Article III(d)(3) of the Wage Agreement. The area affected was the location of a derailment which had occurred the previous day. On December 14, 1984, mine management exercised its rights under Article III(d)(5) of the Wage Agreement to remove the three committeemen from the safety committee for acting arbitrarily and capriciously in shutting down the track haulage 2 days earlier.

The removal of the safety committeemen was challenged and submitted to binding arbitration pursuant to the terms of the Wage Agreement. On January 28, 1985, Arbitrator Thomas M. Phalen rendered a decision upholding the removal of Mr. Harmon and his co-committeemen from the safety committee.

By a letter dated January 7, 1985 to Mr. Richard Bassick of the Mine Health and Safety Administration, Mr. Harmon, Mr. Turpin, and Mr. Laurie filed a complaint in connection with the incident alleging discrimination under section 105(c) of the Act. By letter of May 12, 1985, MSHA advised the complainants that review of the matter revealed no basis for their complaint.

On January 21, 1985, the three aggrieved committeemen filed another complaint challenging their removal from the safety committee, this time alleging discrimination under state law. After hearings, the West Virginia Board of Mine Safety Appeals rejected the complaint in a decision dated June 17, 1986.

This matter is presently before me on the complaint of Mr. Harmon that his removal from the safety committee constitutes discrimination under section 105(c) of the Act. The two other individuals who were removed from the safety committee with Mr. Harmon have not joined in this complaint.

#### Complainant's Testimony and Evidence

James H. Harmon, the complainant in this case, stated that he has been employed by the respondent for over 10 years, and that he works at the Bowers Portal of the Humphrey No. 7 Mine. He confirmed that he was working the day shift on December 11, 1984, as a pumper, and that he was a member of the mine safety committee, and had been a member since May, 1984. On that day he learned that a derailment accident had occurred, with possible serious injuries to a miner. He learned about the accident by overhearing the mine dispatcher on the radio calling supervisors to make them aware of the accident. Since he was a member of the safety committee, Mr. Harmon wanted to go to the scene of the accident, but

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before doing so, he had to have the permission of his shift foreman so that he could be relieved from his regular duties. He travelled the main track trying to locate his immediate supervisor to excuse him from work to go to the accident scene, and after doing so, he eventually arrived at the scene of the accident approximately an hour and a half later (Tr. 15-23).

Mr. Harmon confirmed that during his tenure as a safety committeeman, he was never refused permission to be excused from work to perform his safety committeeman's duties (Tr. 23). Mr. Harmon conceded that he was not refused permission on December 11, 1984, but questioned why he had to be "passed around," and had to go through so many supervisors to obtain permission to be excused from work to go to the scene of the accident (Tr. 24).

Mr. Harmon stated that when he arrived at the scene of the accident at the Sandstone Portal, he learned that the injured man had been taken out of the mine, and that after walking some distance, he was taken out by jeep and taken to the hospital by ambulance for treatment of his injuries. Mr. Harmon identified the injured miner as Dennis Van Kirk, and he stated that Bowers Portal Superintendent Blaine Myers informed him that Mr. Van Kirk had a hand injury and had been struck by a piece of rock (Tr. 26). Mr. Harmon stated that he observed rock which was about to fall, and some rock falling in the area where the cars had left the track, and clean up work was in progress. Mr. Harmon stated that "everything seemed to be going in order, just some minor things, but they were taken care of" (Tr. 30).

Mr. Harmon stated that he observed four roof arches that were badly damaged in the accident, observed some bad roof, and he described the conditions which he observed. He confirmed that he was concerned about the exposed roof top conditions, gob which had fallen on the track, and he believed that another derailment could occur as equipment was allowed to run through the area. He believed that the bad top conditions had existed prior to the accident, and that the roof had been exposed when the derailment damaged the arches and knocked out the roof cribs and planks (Tr. 32-34). Mr. Harmon stated that the derailed empty cars had been removed, but he was concerned that people were working around the bad top conditions. The gob had been cleaned off the track "pretty fair," but one of the laborers, Joe Pattotta, complained to him that "they're going to try and bring another trip up through." Mr. Harmon was concerned that another trip of cars would be brought through the area, and since cleanup had not

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been finished, and the top was still exposed, and he had no doubt that attempting to bring another trip of cars through would cause another derailment (Tr. 35).

Mr. Harmon stated that Mr. Turpin complained to him that there was a lack of adequate self rescuers available, and not enough transportation to take the men working on the shift out of the mine. Mr. Harmon confirmed that he ascertained that there were sufficient self-rescuers and adequate transportation available, and that Mr. Turpin's complaints were not valid. Mr. Harmon stated that Mr. Turpin was concerned that there was not enough transportation available for the men to leave the mine since it was quitting time and the men wanted to go home (Tr. 37).

Mr. Harmon stated that "Everything was going smooth" and that "they was making an honest attempt to correct the situation. I had no problem with that" (Tr. 38). However, Mr. Harmon said that he was upset when he heard general mine foreman Clarence Amick order Sandstone Portal superintendent George Krynicki to clear the area so that a trip of coal cars could be brought through. Mr. Harmon explained his efforts to prevent additional coal car trips from coming through the accident area as follows (Tr. 39-43):

I requested Blaine to not run no equipment through this area. He asked me if it was dangerous. I repeated back to him, "I request no equipment through this area." He said, "Well, do you feel it is dangerous?" I said, "Yes, I feel it's dangerous." He refused. He said, "Jim, we want to run this trip through here." I said, "No." For the third time I said, "I request that you not run no equipment in here until you get the boards up and arches tied together, so that there ain't going to be anymore accidents. If I have to, I'll use the threat of hanging a danger board." I use that expression of hanging a danger board as a bluff in my mind, because I am not allowed, even as a safety committeeman, to hang a danger board, according to the state law. The only person that can do so is a certified person of the state. Knowing that, I used the threat. I wanted to make my point clear that I wanted the area closed down. He still refused, he said,

"Jimmy, you get out of the area because we're bringing a trip up right now."

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THE WITNESS: Well, I asked him three times. As you have stated, I have been on the Safety Committee, at that point, seven or eight months. We've been on safety runs, estimated ten or twelve safety runs up until that point, that I had participated on. We had shut the areas down throughout the mines for different reasons. Rather, Dave Laurie has, as he is spokesman. He is the chairman of the Safety Committee, and I am under him. We had no problem. He asked to shut this area down long enough to have the problem taken care of. I had to ask him three times. After the first time I was shocked. It just seemed after Mr. Amick gave the orders, something just snapped in Mr. Krynicki and Blaine. They were taking care of the area, I had no problem with that. Then, I was shocked after I asked them the first time, and I was shocked after I asked them the second time, and I asked them the third time, and even using the threat of hanging the danger board.

JUDGE KOUTRAS: Let me ask you this now. If they were taking care of the problem, if it were taken care of there, you had no problem. What was the problem? That you felt that they should have?

THE WITNESS: The top was exposed, sir. There was no roof support over that top.

JUDGE KOUTRAS: Were they aware of that?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did they have some difference of opinion with you as to the condition of the top?

THE WITNESS: They apparently, after the order of Mr. Amick, was going to do what Mr. Amick said.



JUDGE KOUTRAS: Was Mr. Amick there?

THE WITNESS: He was outside using the phone for communications.

JUDGE KOUTRAS: So, Mr. Amick was outside telling them where to run the trip through. Was he aware of the situation and what the conditions were?

THE WITNESS: I don't know if George or Blaine made him aware of the situation.

JUDGE KOUTRAS: Let us assume that they did.

THE WITNESS: If they made him aware of the situation, of the bad top, and he run the coal through anyways.

JUDGE KOUTRAS: No. Let us assume that they told Mr. Amick that the top is not that bad, or whatever. Let us assume that Mr. Krynicki and Mr. Myers felt that the top was all right, contrary to what you felt. And they communicated that to Mr. Amick. Do you think that when Mr. Amick said to run coal, that he took them at their word?

THE WITNESS: I could agree with that, yes.

Mr. Harmon confirmed that on prior occasions when Mr. Laurie requested mine management to shut down an area of the mine until it could be cleaned up, management agreed and had no problem. In the case at hand, Mr. Harmon agreed that there was a difference of opinion as to whether or not the prevailing conditions after the accident warranted the closing of the area (Tr. 44). Mr. Harmon confirmed that after his unsuccessful efforts to have the area closed, he advised Mr. Myers that he was going to call in the Federal and state agencies, and on his way out of the area, he went to the track spur and attempted to contact the motorman who was bringing in a trip at slow speed by radio to make him aware of the situation, and to possibly convince him to invoke his own miner's rights and not bring in the trip (Tr. 45). However, he could not contact the motorman by radio, and by that time the coal trip had gone through the area (Tr. 45).

Mr. Harmon stated that after the coal trip passed through the area, Mr. Turpin, who was the union president, advised him

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that he would contact safety committee chairman David Laurie at his home to advise him of the situation. Mr. Turpin had no authority to act as a safety committeeman at that time on the day shift because he was filling in as the safety committeeman on the midnight shift (Tr. 46). Mr. Laurie could not be located, and Mr. Harmon left the mine and went home to await a call from Mr. Laurie, but he did not call him that day (Tr. 47). Mr. Harmon confirmed that he did not initially call any Federal or state mine officials because he wanted to clear it first with Mr. Laurie. Mr. Harmon also confirmed that he was aware of the fact that he could have called in the mine inspectors on his own, but opted not to do so without first consulting Mr. Laurie (Tr. 49).

Mr. Harmon stated that before leaving the mine, he heard Mr. Krynicki give orders for the oncoming shift to continue doing cleanup work at the accident scene, and Mr. Harmon assumed that additional coal trips would continue to travel through the area (Tr. 50). Although he could have returned to the area on the midnight shift to talk to the miners about any dangerous conditions, and possibly advise them of their individual rights not to work in the area that he considered to be dangerous, Mr. Harmon stated that "that thought never entered my mind." Mr. Harmon stated that his intent was to contact Mr. Laurie so that they could both visit the area to decide what to do. Mr. Harmon confirmed that he did not return to the mine during the next intervening afternoon shift, and was still trying to contact Mr. Laurie. He returned to the mine on the next midnight shift, which was his next sheduled "safety run," and encountered Mr. Laurie at that time (Tr. 53).

Mr. Harmon stated that after making Mr. Laurie aware of the situation, they went to the accident area and observed the work that had been done. Several men were still working in the area, and safety precaution lights had been installed. Most of the arches were not strapped, and Mr. Laurie climbed up and looked at the roof conditions, and agreed with Mr. Harmon's assessment that the roof over the arches was still bad. Mr. Harmon stated that he was concerned that the arches were not completely installed, and since the bad top was still there, he was afraid that if it fell, it would affect the arches. Mr. Laurie was of the opinion that the work could have been completed within an hour or so, and he wanted to close the area down until the work was finished. Company safety escort Ben Strahin advised Mr. Laurie that a coal trip was coming, and it passed through the area. At that point in time, Mr. Turpin and Mr. Harmon advised Mr. Laurie that they would back him up in any decision to

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close the area down, and Mr. Laurie advised Mr. Strahin that "we want to shut this area down until we get the arch work finished." Mr. Strahin replied that he did not have the authority to close the area down, and Mr. Harmon stated that their intent was to request mine management to stop production and shut the area down until the work on the arches could be completed (Tr. 59Ä60). Mr. Harmon explained the procedure for requesting management to close an area down as follows (Tr. 61Ä62):

THE WITNESS: \* \* \* Up until that point we never had a problem. They disputed whether it's a violation, or if it needed to be corrected. But, they always took care of the situation. Because a copy of the safety runs is sent to the district of the union, and one to MSHA, and if necessary, to the state. If a serious situation still exists after we make a request to the company, we inform MSHA or the state that the situation exists, and they come in.

We asked then to close the area down. Ben said, "I don't have the power to do so." He asked him again, in good faith, he wanted the area shut down so that the work could be done and nobody would get hurt. That was what our main concern was, that nobody get hurt. Or a fatality. Ben again said, "I don't have the power to do so." \* \* \*

Mr. Harmon stated that after Mr. Strahin declined to shut the area down, Mr. Laurie requested that foreman Rusty Tingler do so. Mr. Tingler also declined, and after requesting Mr. Strahin to contact Mr. Amick at his home, Mr. Strahin advised them that they would have to go outside to telephone Mr. Amick. Before leaving the area, Mr. Laurie told Mr. Strahin "I want the area shut down, call Amick on the Phone." Mr. Strahin again declined and replied to Mr. Laurie "If you want me to shut that area down you are going to have to put it down on paper." Mr. Laurie then wrote out a statement which he signed along with Mr. Harmon and Mr. Turpin (Tr. 63, exhibit RÄ2), and the statement reads as follows:

I fill (sic) this safety committee is acting in good faith. In that where they had the wreck on day shift they put in four new arches and did not tie them together. We fill (sic) they could vibrate loose and fall since they

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are not tied together. Also we fill (sic) that additional support should be put on top of the arches. Once the arches are tied together we will allow them to start running coal again.

After executing the statement, Mr. Laurie asked Mr. Strahin to call the dispatcher to stop all trips from coming through the area, but Mr. Strahin declined. Mr. Laurie then called the dispatcher himself and requested him to stop all traffic. One trip which was on the way was allowed to pass through, and after it passed through, the dispatcher shut the area down as requested by Mr. Laurie (Tr. 64). Mr. Laurie then called the state and federal mine inspectors. When they arrived, Mr. Harmon, Mr. Laurie, and Mr. Turpin went back to the area with the inspectors, and the conditions had been corrected. Mr. Harmon estimated that it took an hour and a half to perform the work, and he stated that "they called a lot of people up there to correct the situation" (Tr. 68, 73).

Mr. Harmon stated that a safety committeeman had the authority to request management to shut an area of the mine down, and he was of the opinion that as a certified person, Mr. Laurie had the authority to shut an area down under state law (Tr. 70). Mr. Harmon confirmed that management had not given Mr. Laurie permission to shut the area down, nor did management agree that the area should be shut down. He also confirmed that Mr. Laurie called the dispatcher and shut the area down (Tr. 71).

Mr. Harmon stated that while the majority of the corrective work was finished when the inspectors arrived, MSHA Inspector Boleck issued a citation "on strap and some guarding," and the state inspector also issued a citation for a welding violation (Tr. 72-73). The inspectors did not look over the arches to examine the roof conditions as Mr. Laurie had done because the arches were all in place and the inspectors accepted them as roof support and issued no roof violations (Tr. 74). Inspector Boleck asked Mr. Laurie if he was satisfied with the condition of the roof arches, and Mr. Laurie stated that he was. The inspector also agreed, and he permitted the area to be reopened, and everything went back to normal (Tr 75-76).

Mr. Harmon stated that on December 14, 1984, at a regular safety meeting between management and the safety committee, Mr. Amick gave him and Mr. Turpin a letter stating that they acted "arbitrary and conspicuously" and that he wanted them removed from the safety committee (Tr. 75). Mr. Harmon

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asserted that after his removal from the safety committee, he felt that management, through Mr. Krynicki did not like him, assigned him certain uncomfortable job tasks, made disparaging remarks about him, and that the company safety escort would "dog him" during the inspection rounds with inspectors (Tr. 86-90). Prior to his removal from the safety committee, Mr. Harmon had disagreements with management, and he asserted that his shift foreman cursed him several times because he complained to him about certain safety violations and upset him (Tr. 91). Mr. Harmon also stated that Mr. Myers remarked that he spent a lot of time in his office complaining (Tr. 92). Mr. Harmon stated that he felt intimidated by Mr. Myers' statement that he made more complaints than the other safety committeemen, and that Mr. Myers "frowns when I go back to see him about a safety complaint" (Tr. 93). Mr. Harmon confirmed that he could think of no incidents of intimidation prior to his removal from the safety committee (Tr. 94).

When asked by the Court to explain his reasons for filing his complaint, Mr. Harmon responded as follows (Tr. 94-95):

THE WITNESS: I felt like I'm innocent of the situation and that I have been discriminated against though. The main reason why I was removed was because I fought for the miner's rights and stood up, and was back in Blaine's office more, probably, than anybody else. I feel that they, I don't know the right word to say. I filed that because I felt that was the proper way to do things.

JUDGE KOUTRAS: No, but the point is, do you understand the company's theory, and why they removed you and the other two safety committeemen.

THE WITNESS: They said that I am acting arbitrary and conspicuously. I don't

JUDGE KOUTRAS: Capriciously, all right.

THE WITNESS: Yes.

JUDGE KOUTRAS: That is conspicuous too, in that context, but go ahead.

THE WITNESS: But, there was no underhandedness, there was no sneaking around, nothing like that. I just wanted to get the situation

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corrected, and by trying to correct the situation over a safety matter, they removed me off the Safety Committee. Now, we have shut areas down before, and they never tried anything, had us removed over situations of that nature. Even, as I mentioned, when we had to call the federal inspector, Mitchell, up that one time, they never said nothing to us.

JUDGE KOUTRAS: They never said anything?

THE WITNESS: They never tried removing us or nothing like that. What's the difference now?

JUDGE KOUTRAS: On these past incidents, did they ever do things that you felt were harassing or intimidating?

THE WITNESS: No, not really. I don't think so.

And, at (Tr. 97A98):

JUDGE KOUTRAS: Do you think that the company, in this case, that Consolidation removed the three safety committeemen because they called the state and federal people in? Or do you think they removed you for some other reason?

THE WITNESS: I believe they removed us because we shut the area down, as Mr. Amick has stated, that that is the bottleneck of the mines, and by shutting that down, in a sense, close the whole mines down. Even though they can remain working back there.

JUDGE KOUTRAS: I understand that. But, the company took the position that you had no authority to shut it down. That you acted contrary to the wage agreement, and the arbitrator found the company was right on that score. So did the State of West Virginia Board of Appeals, when they reviewed the case. Did they not sustain the company's position that they felt that the committeemen acted outside their authority, by shutting the mine down?

THE WITNESS: That's what they say.

JUDGE KOUTRAS: You do not

THE WITNESS: I don't agree with it.

JUDGE KOUTRAS: Why do you not agree with it?

THE WITNESS: Because, we done everything legal, and normal. Just like the past safety runs, and shut areas down, we done everything.

JUDGE KOUTRAS: But, you never shut them down in the past, have you?

THE WITNESS: Yes, we have. Yes.

JUDGE KOUTRAS: How did you shut it? You mean Mr. Laurie has called up somebody and shut an area down?

THE WITNESS: Yes. We've had other areas shut down, yes sir.

JUDGE KOUTRAS: But, is this with the agreement of management? Did you request management to shut it down, and then they shut it down?

THE WITNESS: Yes.

JUDGE KOUTRAS: Give me an incident where you requested management to shut it down, they did not, and the safety committeemen shut it down anyway.

THE WITNESS: I can't. I don't know of any.

JUDGE KOUTRAS: Never been any, have there?

THE WITNESS: No.

JUDGE KOUTRAS: This is the first one?

THE WITNESS: Yes.

In response to questions from the respondent's counsel, Mr. Harmon stated as follows (Tr. 104-106):

Q. I was wondering, Mr. Harmon, if it is correct; the discrimination that you are seeking here is the removal from the Safety Committee?

A. Yes.

Q. What, in your view, was the reason that you were removed from the Safety Committee? What conduct did you engage in that resulted in that conduct, that response by management, which you believe is discriminatory?

A. I tried to get the situation corrected on dayshift. I even approached, in a sense, used the danger board type threat, to have the situation corrected. And, it was not. We have always asked management in the past to correct things, and they went ahead. But, it seemed that after they got an order. Mr. Blaine Myers and Mr. Krynicki, got the order from Amick to run coal through there anyway, they just went from safe to being unsafe. My next response was to get ahold of Dave Laurie, and have him act upon it.

Q. Excuse me. I probably did not ask the question very clearly. You went through that very well before. Do you believe that you have been removed from the safety committee if the mine had not been shut down by the safety committee?

A. We never had any action brought before us before by shutting the haulage down for other situations.

Q. The question was, do you believe, you alleged you would have not been removed from the Safety Committee, if the mine had not been shut down. The Safety Committee had not closed the mine, would you have been removed from the safety committee, in your view?

A. I don't know.

Q. It is your view that the action that was taken, the removal from the Safety Committee,



was related to your action in closing the mine down, is that correct?

A. Yes.

Q. Have there been other occasions on which you have notified federal or state officials, pursuant to your state or federal mine rights?

A. Like I said, notified Mr. Mitchell one time, on that particular track on the Seven North country.

Q. In those occasions, was anyone removed from the Safety Committee?

A. No.

Q. The major difference here, was that the safety committee acted under Article Three of the contract, to close the mine down?

A. That's what Dave stated, and that's the first time I ever heard him use that phrase, so to speak. He never used that phrase in other situations.

Q. You are aware in the testimony to the state that Mr. Laurie testified that his statement was, it was under Article Three?

A. Yes.

Q. So, is that a fair statement? Under Article Three you were acting to close the mine down?

A. That's what Dave said to Ben Strahin.

Q. What I am trying to get to, that it was your exercise of your rights under the contract, to close the mine down, that resulted in the management's response, which was to remove you from the safety Committee. Is that correct?

A. Yes.

Mr. Harmon confirmed that as a safety committeeman, he made more safety complaints to mine management than did Mr. Laurie or Mr. Turpin, and he estimated that he brought 50 safety violations or complaints to management's attention, and wrote up about 20 section 103(g) inspection requests (Tr. 124). He confirmed that the remedy he is seeking is his reinstatement as a safety committeeman (Tr. 126).

Mr. Harmon confirmed that on one occasion when he had a mine inspector close a track area for an hour or two and issued citations, no action was taken against any of the safety committeemen by management (Tr. 127). On another occasion when he threatened to shutdown the parking lot because of pot holes, management corrected the conditions (Tr. 125).

Mr. Harmon stated that while he considered the conditions at the accident scene to be an imminent danger, "something that could cause a fatality right away," he did not use the phrase "imminent danger" but used "dangerous or hazardous" (Tr. 129). Even so, he conceded that he then went home to await a call from Mr. Laurie, and that 8 hours had passed since he initially viewed the conditions and men were still working there (Tr. 130-131). He also conceded that he travelled through the area and did not warn anyone about any "imminently dangerous" conditions (Tr. 134), and that Mr. Laurie permitted a trip of cars to pass through the area (Tr. 162).

Although Mr. Harmon was of the opinion that under section 103(g) of the Act, a safety committeeman has the authority to shutdown any mine area, he conceded that under that section of the law, he is only authorized to request an immediate inspection of the area by an MSHA inspector, as opposed to shutting the area down himself (Tr. 137-138). When asked why he did not exercise his section 103(g) rights on December 11, Mr. Harmon responded "we were trying to get the work done within the mines, instead of having to go as far as calling a state or federal inspector in there" (Tr. 139). Mr. Harmon acknowledged that at the time he requested Mr. Myers to shut the area down, he did not refer to Article Three of the Wage Agreement, nor did he use the phrase "imminent danger" (Tr. 146).

Mr. Harmon confirmed that other than being removed from the safety committee, he was not removed from his normal job classification, was not discharged, and was not otherwise disciplined (Tr. 163). He also confirmed that his removal from the safety committee was made pursuant to the terms of

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the contract, and that on past occasions when state inspectors were called to the mine by safety committeemen, no action was taken against them by management (Tr. 163-164). Mr. Harmon conceded that in all of the prior instances when he made safety complaints or requested section 103(g) inspections, management reacted favorably to his complaint and took corrective action to his satisfaction and did not harass or intimidate him (Tr. 173-174).

#### Respondent's Testimony and Evidence

Clarence Amick, General Mine Superintendent, testified as to his background and responsibilities. He stated that under the Wage Agreement the mine safety committee has the right to request mine management to shutdown an area of the mine if they determine that an imminent danger exists, and management is obligated to do so (Tr. 184). In the instant case, Mr. Amick stated that any imminent danger which may have existed at the time of the accident at 11:00 a.m., certainly did not exist at 4:00 p.m. when Mr. Myers and Mr. Krynicki spoke with him. Corrective action had been taking place since the accident, and it was safe to proceed with caution through the area at the time the committeemen shut the area down (Tr. 186).

Mr. Amick confirmed that Mr. Harmon and the other safety committeemen were removed pursuant to contract provision Article Three, Section (d)(5) for arbitrarily and capriciously shutting down the area in question. He denied that the removal was in any way connected with the committee calling in the state and federal inspectors, and he confirmed that they had done this in the past on many occasions and were not removed. He stated that in all of his years in mining, he has never before had to remove any members of a mine safety committee (Tr. 187). He was aware of no state or federal law that gives the safety committee the right to close an area of the mine (Tr. 188).

Mr. Amick stated that mine management has never taken any action against any committeemen for bringing safety matters which need to be corrected to its attention, and he confirmed that the committeemen in question did not lose their jobs, and their job classifications were not changed in any way. Once the committeemen were removed, they were allowed to stay on until the arbitrator ruled on their case (Tr. 188-189).

On cross-examination, Mr. Amick confirmed that he sent letters to the safety committeemen in question advising them of their removal, and informing them of the reasons for his

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action (Tr. 190). Mr. Amick believed that Mr. Harmon and the other committeemen used bad judgment, and they had no right to close the area. Mr. Amick stated that he relied on the judgment of Mr. Myers and Mr. Krynicki, who have many years of mining experience, in assessing any hazard or danger which may have existed in the area at the time it was closed down by the safety committee (Tr. 191).

Mr. Amick stated that he treated all three committeemen equally, and since they all signed the statement at the time they closed the area, he believed that it was a collective decision and that they should all be removed from the safety committee (Tr. 193). Mr. Amick stated that he has always encouraged the safety committee to bring things that are wrong to his attention so that corrective action may be taken. However, by shutting down the mine area, the safety committee took charge of directing the work force, which is solely management's prerogative (Tr. 195). At the time the area was closed, no one mentioned any "imminent danger," and since the mine was closed as a result of the accident, and it was physically impossible to move any equipment through the area. It remained closed until his superintendents, Mr. Myers and Mr. Krynicki, "gave me the O.K. that it was safe to proceed through at that time" (Tr. 197). The superintendents are competent, and he relied on their judgment that the area was safe, and no one informed him that Mr. Harmon felt differently until sometime later (Tr. 199).

Mr. Amick confirmed that he made the decision to remove Mr. Harmon and the other committeemen from the safety committee (Tr. 201-202). Although other options were discussed with his staff, it was decided to remove them pursuant to the contract provision in question (Tr. 203). He did not discuss the matter with the affected committeemen because he didn't believe it was necessary, and he believed that their position was clear by the statement which they signed at the time they acted to close the area (Tr. 204).

In response to further questions, Mr. Amick confirmed that the area in question was closed for approximately an hour and forty-five minutes as a result of the action of the committeemen, and the committee had no right to order the dispatcher not to permit further trips through the area (Tr. 207). Mr. Amick stated that he has never faulted Mr. Harmon for any actions he has taken as a safety committeeman, and he confirmed that he has spoken to his staff about some of the incidents of alleged harassment alluded to by Mr. Harmon, and that he does not condone it (Tr. 209).

Mr. Amick stated that his decision to remove Mr. Harmon from the safety committee was not influenced by his prior activities as a member of the committee, and that "the main crux of the problem, was, what happened that night" (Tr. 213). He stated that he has always worked with the safety committees, but could not tolerate the committee's action in shutting down the haulage on the evening in question, and that this is the first time this had ever happened (Tr. 215). He stated further as follows (Tr. 216):

A. They shut the mine down. They did it by directing the work force, and they had no authority to do either one. Even Section Three, that gives him the authority to request that management shut the mine down, and management has to do it, even then they don't shut the mine down. Even when they exercise Article Three, if you'll read it.

Q. That was your consideration then, in terms of removal?

A. Yes.

Q. That was your only consideration?

A. That was my consideration at the time.

Mr. Amick stated that had the committee declared the area to be an imminent danger, the superintendents on the scene, after consultation with him, would have been obligated to close the area. In addition, any individual miner could have exercised his individual rights not to work in the area if he believed he was in danger. If the committee had not acted arbitrarily and capriciously in shutting down the area, he would not have removed them from the safety committee. The committeemen did not declare the area in question an imminent danger. On a prior occasion when the committee called in a federal inspector on the Seven North haulage area, they did not consider it an imminent danger, but no action was taken against them for contacting the inspector (Tr. 219). Mr. Amick stated that the men who were delayed coming out of the mine at the time of the accident were paid time and a half for having to stay over their regular shift (Tr. 220).

Blaine K. Myers, Bowers Portal Superintendent, explained his contacts and discussions with Mr. Harmon at the time of the derailment on December 11, 1984. Mr. Myers confirmed that the individual who was injured did not suffer any lost

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time, and he worked the next day (Tr. 221-222). Mr. Myers stated that he and Mr. Krynicki were at the scene of the derailment looking over the situation and directing the rehabilitation of the area, and the area had been closed until shortly after 4:00 when the first trip was allowed through (Tr. 223). Mr. Harmon was concerned about some spillage, and mentioned no other conditions which he believed to be hazardous. Mr. Myers stated that he asked Mr. Harmon whether he considered the situation to be an imminent danger, and that Mr. Harmon replied, "Well, I'll have the state and federal inspectors here in the morning and we'll see" and left the area (Tr. 225). At that point in time, Mr. Myers stated that the top was not exposed, and that work had been done on the arches, and he climbed up on the arches and he observed no top areas which were not covered with wood (Tr. 226). Mr. Myers further explained as follows (Tr. 227-229):

Q. Now, he testified earlier, that he demanded three times that the area be closed down, because of conditions of the roof which he says was exposed. How do you respond to that?

A. I've got two responses. Number one, it's absolutely untrue. He made no mention of any bad top to me, throughout the day. Number two, when the roof was exposed, the area was shut down. We were in the process of rehabilitating the area, it was shut down. There was nothing done in that area except the rehabilitation work. It's beyond me, to understand where that comment came from.

Q. After he turned and walked away, after you had asked him whether or not there was an imminent danger, what happened?

A. We moved the supply cars into the side track, called the dispatcher and told him that the area was open, and ready for traffic.

Q. Had Mr. Turpin been in the area during the day?

A. Mr. Turpin worked on the rehabilitation work the entire day, yes.

Q. Would he have seen the top during the time it was exposed?

A. Yes, he would have.

Q. Did he, you testified that Mr. Harmon did not, did Mr. Turpin express to you, on the afternoon of the 11th, concerns that there was a dangerous condition, as a result of the condition of the roof?

A. No.

Q. Did that area have to be fire bossed before it was reopened?

A. Yes, it did.

Q. Was it fire bossed?

A. Yes, it was.

Q. Who was the fire boss?

A. Dill Kendall. He's the rank and file pumper who portals at Mt. Morris, who fire bossed that area that day.

Q. Did anybody, during the rehabilitation work, or afterwards, during the haulage, once it was recommenced, suggest that the conditions were unsafe and invoke the rights not to work in the area?

A. No.

Q. Let us go back. After the haulage was started back up, about what time was that?

A. Right at the four o'clock area, a few minutes before, a few minutes after.

Q. Where was Mr. Harmon at this time?

A. At this time he was at Three North Junction waiting for the trip to pass so he could proceed on to Bowers Portal.

Q. Did traffic continue through the evening shift, to your knowledge?

A. Yes, it did.

Q. Throughout that time, were there any complaints regarding the safety of the haulage area?

A. Not to my knowledge.

Mr. Myers confirmed that on December 12, he was aware of the fact that Mr. Amick was going to send Mr. Harmon and the other committeemen letters removing them from the safety committee. Mr. Myers was also aware that Mr. Harmon has contacted federal and state mine officials, and no disciplinary action was taken against him. He confirmed that the action taken against him to remove him from the committee was solely pursuant to the contract (Tr. 230).

On cross-examination, Mr. Myers reiterated that Mr. Harmon made no mention of any bad top, and although the top was exposed at the time of the accident for 3 or 4 hours, repairs were made and the area was rehabilitated. During the rehabilitation work where there was some unsupported roof, the men doing the work were cautioned not to work in those areas or the top was supported. He stated that "we didn't ignore the top. We paid attention to it, and took care of what needed to be taken care of in order to safely rehabilitate the area" (Tr. 233).

Mr. Myers stated that Mr. Harmon works out of his portal, and he was aware of the fact that he was an active committeeman and had made numerous complaints. Mr. Myers confirmed that most of the complaints were made to him, and that the inspectors to whom complaints were made were at his portal. Mr. Myers did not believe that Mr. Harmon was taking his job "too seriously," and he stated that he encouraged him to bring any safety problems to his attention so that they could be taken care of. He stated that he had no bad feelings or resentment towards Mr. Harmon, and that he was not the only one who complained (Tr. 236). Mr. Myers believed that Mr. Harmon was sincere in carrying out his safety committee duties, but believed that he "over-reacted" when he demanded that "we clean up this little pile of spillage there, beside the track" (Tr. 238). He further explained as follows (Tr. 239):

Q. Do you think, in joining as a member of the safety committee, in the closure of that area of the mine after it had already been reopened, was a case of his being mistaken, going overboard, if you will?



A. Well, when he agreed that that area should be shut down, yes, that's going overboard. That's going out of bounds.

Q. You would agree that the committee exercised their Article Three rights, and management's response under the Article was appropriate?

A. Absolutely.

Q. Would that response, in your view, be appropriate regardless of who the individuals involved were?

A. Yes.

#### 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 801 (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 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.

The crux of Mr. Harmon's complaint lies in his belief that the respondent removed him from the mine safety committee in retaliation for his vigorous activities as a member of the safety committee. With regard to the safety committee's unilateral closing down of the haulage section in question on December 12, 1984, the incident which precipitated his removal from the safety committee, Mr. Harmon asserted that the committee had closed down areas of the mine in the past and no action was taken by management to remove them from the safety committee. Under the circumstances, Mr. Harmon concludes that the respondent discriminated against him by removing him from the safety committee, and he implies that he was removed because of his overall safety concerns and activities as a member of the safety committee. Further, although stated in general and nonspecific terms, Mr. Harmon also alleged that the respondent sought to intimidate or harass him prior to his removal because of his activities as a member of the safety committee, and he views his removal from the safety committee as yet another incident of intimidation by mine management.

Mr. Harmon's counsel conceded that Mr. Harmon's allegations of intimidation and harassment prior to his removal from the safety committee, made for the first time during the hearing, were not included as part of his original discrimination complaint (Tr. 113). When asked how Mr. Harmon intended to substantiate these allegations, counsel responded "he has no direct testimony, or anything like that. I guess, he is more, seemingly to me, indicated that it was more of an attitude of just expressions that were made to him, that kind of thing, that indicated to him at the time" (Tr. 144).

The record establishes that Mr. Harmon was an aggressive and active member of the mine safety committee. He alluded to some fifty safety complaints which he filed with mine management, and to the initiation of some 20 section 103(g) inspections which resulted in at least 15 inspection visits to the mine by MSHA inspectors (Tr. 173-174). However, Mr. Harmon conceded that mine management always attended to, and took care of his complaints, and in those instances where he and mine management had differences of opinions as to the existence of any violative conditions, he freely requested section 103(g) inspections by MSHA with no interference by mine management (Tr. 173-174).

Mr. Harmon conceded that prior to his removal from the safety committee, mine management addressed his safety complaints in a manner that was to his satisfaction. He also conceded that he performed his safety committeeman's job unimpeded by mine management, and that he did so with no harassment or intimidation by management (Tr. 174). Although he alluded to certain cursing by a shift foreman, and certain remarks and "frowns" by superintendent Myers over his safety committeeman's duties, Mr. Harmon confirmed that he could think of no incidents of intimidation by mine management prior to his removal from the safety committee (Tr. 94).

Mr. Harmon conceded that in his capacity as a safety committeeman he had occasions to call in state and federal inspectors, and that mine management did nothing to harass or intimidate him (Tr. 94). Mr. Harmon also conceded that management never attempted to remove him from the safety committee as a result of these past incidents (Tr. 95, 105). He also conceded that when past requests for shutting down any mine area were made to mine management, management reacted favorably to the requests and never attempted to remove the safety committeemen for making the requests (Tr. 97-98). Mr. Harmon also confirmed that during his tenure as a committeeman, he was never refused permission to be excused from work to perform his safety committeeman's duties (Tr. 23).

After careful review of the record as a whole, I find no credible testimony or evidence to support any conclusion that Mr. Harmon was harassed, intimidated, or otherwise impeded by mine management in the exercise of his duties as a member of the mine safety committee prior to the time that he was removed from that committee, and his allegations in this regard are rejected. I conclude and find that Mr. Harmon has failed to make out a prima facie case on this aspect of his complaint.

With regard to the concerted action by the safety committee in shutting down the track haulageway, although the record reflects that committee chairman David Laurie actually gave the order to the dispatcher to shutdown the track haulage, and then called in the state and federal mine inspectors, Mr. Harmon and the other member of the safety committee were at the scene, concurred and agreed with the decision to close the area, signed the statement reflecting their joint responsibility for their action, and they all waited for and accompanied the inspectors back to the area after it was closed.

Under the circumstances, I conclude that each of the committeemen, including Mr. Harmon, bear equal individual responsibility and accountability for their collective action in shutting down the area in question.

It is clear that Mr. Harmon had a protected right to serve on the safety committee, and the respondent may not discriminate against him because of his duties as a committeeman. Mr. Harmon had a right to file complaints, request section 103(g) inspections, and inform mine inspectors of conditions which he believed were unsafe, and management is prohibited from interfering with these activities, and may not harass, intimidate, or otherwise unduly impede Mr. Harmon's participation in those activities. However, Mr. Harmon's service as a member of the safety committee does not insulate him from non-discriminatory personnel actions, *UMWA ex rel Billy Dale Wise v. Consolidation Coal Company*, 4 FMSHRC 1307 (July 1982), *aff'd* by the Commission at 6 FMSHRC 1447 (June 1984); *Ronnie R. Ross, et. al v. Monterey Coal Company, et. al.*, 3 FMSHRC 1171 (May 1981).

The facts in this case do not suggest a situation in which Mr. Harmon sought to exercise his own personal right to refuse to work or to walk away from a condition which he believed to be unsafe. Acting in concert with the other two members of the safety committee, Mr. Harmon effectively closed the mine. Mr. Harmon believes that he acted within his committeeman's authority in shutting down the track haulage area, and he disagrees with the two prior determinations which are adverse to his position. Mr. Harmon's belief that he acted properly is based on his assertion that the safety committee had closed the mine before with no adverse reaction from mine management. However, Mr. Harmon could cite no prior instances where the safety committee closed any area of the mine, and he conceded that this had not been done, and admitted that the incident which prompted his removal from the safety committee was the first one (Tr. 97A98).

The respondent's assertion that the Commission lacks jurisdiction with respect to any contractual matters under the Wage Agreement, and has no jurisdiction to restore Mr. Harmon to the safety committee are not well taken. If it can be established that Mr. Harmon's removal from the safety committee was discriminatory, the Commission and its Judges have broad authority under section 105(c) of the Act to order an "appropriate" remedy to abate any violation of that section, *Brock v. Metric Constructors, Inc.*, 766 F.2d 469, 472A73 (11th Cir.1985).

It seems clear to me from the record in this case that Mr. Harmon's removal from the safety committee was prompted by his actions which resulted in the shutting down of the track haulage area in question. It is also clear that the committee's action in calling in state and federal inspectors to inspect the area after they had shut it down had nothing to do with Mr. Harmon's removal from the committee. Mr. Harmon conceded that the respondent removed him from the safety committee because he and the other members closed the track haulage area (Tr. 97). This action by the committee effectively closed the mine and interrupted production. Mr. Harmon also conceded that his removal from the safety committee was made pursuant to the terms of the Wage Agreement, and that he was not otherwise disciplined, and suffered no change in his normal job classification (Tr. 163). Under the circumstances, the critical issue presented is whether or not Mr. Harmon had a protected right to close the track haulageway.

Although Mr. Harmon voiced his displeasure over being "passed around" so many layers of supervisors before finally being permitted to go to the scene of the derailment, I find nothing to suggest that management was deliberately or unduly trying to prevent Mr. Harmon from going there, and he was ultimately allowed to go, and arrived there later than he would have liked. Mr. Harmon confirmed that during his tenure as a committeeman, he was never refused permission to be excused from work to attend to his safety committeeman's duties (Tr. 23). In this regard, I take note of the fact that a safety committeeman may not necessarily need management's permission to absent himself from work to attend to his mine safety committee duties, Local Union 1110 and Robert L. Carney v. Consolidation Coal Company, 1 FMSHRC 338 (May 1979).

It is obvious that Mr. Harmon disagrees with the result of the two prior adverse determinations affirming mine management's action in removing him from the safety committee. Mr. Harmon's disagreement with those decisions lies in his apparent lack of understanding or failure to comprehend why he was not removed from the committee in the past when the safety committee closed certain areas of the mine. However, under the applicable Wage Agreement provision in question, it is clear that the safety committee has no authority to unilaterally close any area of the mine. The committee's authority is limited to making recommendations to mine management that miners be withdrawn in those special instances where the committee believes that an imminent danger exists. Once the committee communicates its belief to mine management that an

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imminently dangerous condition exists in any area of the mine, management is obligated and required to follow the committee's recommendations and remove the miners.

The respondent asserts that it was acting entirely within its rights under the Wage Agreement in removing Mr. Harmon from the safety committee, and that its action was an appropriate and legitimate exercise of its contractual authority and discretion to remove a safety committeeman who exceeded his authority in shutting down an area of the mine, conduct which the respondent views as clearly neither authorized nor protected by section 105 of the Mine Act. In support of its conclusions, the respondent relies on the January 28, 1985, decision of Arbitrator Thomas M. Phelan, and the June 17, 1986, decision of the West Virginia Coal Mine Safety Board of Appeal, denying Mr. Harmon's discrimination complaint under state law (Exhibits RÄ5 and R-11).

In the arbitration proceeding, the arbitrator concluded as follows at page 17 of his decision:

For the reasons stated in the above analysis, I find that there was no imminent danger in the area closed down by the Safety Committee and there was no reasonably based belief on the part of the Committeemen that an imminent danger existed there. The action of the Committeemen was therefore arbitrary and capricious and warrants their removal from the Safety Committee. They shall be removed for the duration of the 1984 National Agreement.

In its decision dismissing Mr. Harmon's state discrimination complaint, the state board concluded in pertinent part as follows in its order dismissing his complaint:

Mr. Kelleman and Mr. Snyder find, by a preponderance of the evidence, that the case presented by the Petitioners did not demonstrate that there was an "imminent danger" under the law which would allow the removal of the men and therefore there was no discrimination involving any Petitioner in this case and deny Petitioner Robert Harmon and Petitioner John David Laurie their request to be placed back on the Mine Safety Committee at the Humphrey Number Seven Mine.

Although I am not bound by the prior decisions of the arbitrator or the state board of appeals, I may nonetheless give deference to an arbitrator's "specialized competence" in interpreting a provision of the controlling Wage Agreement, *Chadrick Casebolt v. Falcon Coal Company, Inc.*, 6 FMSHRC 485, 495 (February 1984); *David Hollis v. Consolidation Coal Company*, 6 FMSHRC 21, 26-27 (January 1984); *Secretary on behalf of 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).

The issue with respect to the existence of any "imminent danger" at the scene of the derailment, and the asserted justification for the safety committee's action in shutting down the haulage area, was painstakingly considered during the two prior proceedings concerning Mr. Harmon's complaints. I have carefully reviewed the voluminous record of those prior proceedings, and I am favorably persuaded as to the correctness of these decisions, particularly with respect to the issue of the existence of any imminent danger.

As pointed out by the respondent at pages 7-8, of its posthearing brief, although Mr. Harmon asserted that the conditions he observed on the afternoon of December 11, 1984, constituted an "imminent danger," he showered, went home, permitted 8 hours to pass, and was aware of the fact that men were working in and travelling through the area, before taking action to close it down. Mr. Harmon himself travelled through the area, the area had been firebossed by the UMWA before haulage was reestablished, and no miners, including Mr. Harmon or the other members of the safety committee, exercised their individual right not to work in the area (Tr. 132-136). Further, the record establishes that traffic was moving through the area while Mr. Harmon was at home, men were working to correct the conditions, and in fact, after the area was ordered closed down by Mr. Laurie, he permitted a trip of coal cars to pass through the area.

Mr. Harmon conceded that he never used the term "imminent danger" during his discussions with Mr. Myers, nor did he use that term in his discussion of the contractual provision with Mr. Myers (Tr. 139, 146). Mr. Amick and Mr. Myers corroborated that neither Mr. Harmon or any other members of the safety committee mentioned anything about any "imminent danger" at the time the committee shut the haulage area down, and I take note of the fact that the joint statement signed by Mr. Harmon and the other two committeemen (exhibit R-2), justifying their action, makes no mention of any "imminent danger."

Under all of the aforementioned circumstances, and on the basis of the entire record as a whole, I conclude and find that it does not support any conclusion of the existence of any imminent danger at the time of the closing of the track haulage area by the safety committee. Since no imminent danger existed, I further conclude and find that the action by the safety committee was unauthorized and contrary to the clear terms of the applicable Wage Agreement provision relied on by the respondent to remove Mr. Harmon from the safety committee, and that Mr. Harmon's participation in that decision was not protected activity. I further find no credible evidence to support any conclusion that the respondent's action in removing Mr. Harmon from the safety committee was motivated in any way by management's desire to punish him, or to otherwise retaliate against him, for his vigorous enforcement activities as a member of the safety committee. I also conclude that the respondent's removal of Mr. Harmon from the safety committee was well within its discretionary managerial rights to direct the workforce and manage its own mine.

#### 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 discrimination by the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras  
Administrative Law Judge