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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
JOSEPH GABOSI,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 86-24-D

Deserado Mine

v.

WESTERN FUELSÄUTAH, INC.,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
Complainant; Richard S. Mandelson, Esq., Baker &
Hostetler, Denver, Colorado, for Respondent.

Before: Judge Morris

This case involves a complaint of discrimination filed by
the Secretary of Labor pursuant to the Federal Mine Safety and
Health Act of 1977, 30 U.S.C. 801 et seq.

The applicable portion of the Mine Act, Section 105(c)(1),
in its pertinent portion, provides as follows:

No person shall discharge or in any other manner
discriminate against . . . or otherwise interfere
with the exercise of the statutory rights of any miner
. . . because such miner . . . has filed or made a
complaint under or relating to this Act, including a
complaint notifying the operator or the operator's
agent, or the representative of the miners . . . of
an alleged danger or safety or health violation . . .
or because such miner . . . has instituted or caused
to be instituted any proceeding under or related to
this Act or has testified or is about to testify in any
such proceedings, or because of the exercise by such
miner . . . on behalf of himself or others of any
statutory right afforded by this Act.

After notice to the parties, a hearing on the merits
commenced in Glenwood Springs, Colorado on March 3, 1987.

The parties filed post-trial briefs.

Applicable Case Law

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir.1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C.Cir.1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393-413 (1983) (approving nearly identical test under National Labor Relations Act).

Complainant's Evidence

Joseph J. Gabossi, Boyd Emmons, Raja P. Upadhyay, Francis J. Kesting, Arthur Cordova and Daniel Ritter testified for complainant.

JOSEPH J. GABOSSİ (sometimes called John Gabossi), started mining in 1964 as a utility man and as a miner's helper on a continuous miner. After a year and a half he moved to California for a different line of work. Two years later he returned to Mid-Continent Resources as a miner operator. He remained for a year and a half. At that point he took a pilot's training course. Thereafter, he started a security service and flew an airplane part time (Tr. 9-11).

In 1971 he returned to Mid-Continent as a miner operator. He was promoted to fire boss, then face boss and later to mine foreman. In 1974 he became the mine superintendent. He remained in this position until 1979. While at Mid-Continent, he received his mine foreman papers. Such papers are issued by the State of Colorado after written and oral examinations. State certification is required to qualify an individual as a mine foreman in Colorado (Tr. 11-15, Ex. C4). A mine superintendent is responsible for all aspects of mining. However, a mine superintendent spends less time underground than a foreman (Tr. 16-18).

Gabossi served as a mine foreman for two years. Thereafter, he worked as a mine superintendent for Black Rock Mining Company

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for a year and a half. After that stint he worked as a mine superintendent and foreman for Western Associated Coal Company.

On October 1, 1982 he was hired by Western FuelsÄUtah ("Western"), as a mine superintendent/foreman for their coal mine in Rangely, Colorado. He was fired by Western on January 30, 1985 (Tr. 9, 16Ä18, 117).

At his initial job interview with Western he learned the company was hiring an underground mine superintendent as well as maintenance and surface superintendents. Gabossi was to have control of all underground operations. During Bootle's term as mine manager he did not have total control but he coordinated activities. At that time Gordon Burnett was the maintenance superintendent and John Trygstad was the surface superintendent.

After he started at Western certain personnel changes occurred. Raja Upadhyay replaced John Bootle as the mine manager. Gabossi had also applied for the position. After being appointed Upadhyay requested assistance and Gabossi helped him. Burnett never went underground. Art Cardova, Gabossi's choice to be maintenance foreman, was hired. In June 1984, Burnett was replaced by A.B. Beasley (Tr. 19). Although Gabossi and Burnett had their "ups and downs", Gabossi and Beasley could not get along. Beasley would not coordinate any underground maintenance activities with him. Changes were made underground without informing him. This caused friction and Gabossi continually talked to Upadhyay about it (Tr. 20, 118Ä121, 155Ä157, 179).

Shortly after Upadhyay started things became very disorganized; major unauthorized ventilation changes were made underground. In June, July and August, 1983 maintenance workers shut fans off while workers were underground; they failed to notify anyone. A methane buildup can occur in these circumstances (Tr. 21, 123, 132, 133, 180).

Gabossi told Upadhyay that maintenance should notify him and coordinate any changes so people wouldn't be hurt. Upadhyay said maintenance wasn't Gabossi's business; he wasn't to bother with it (Tr. 22).

Gabossi was vaguely familiar with Upadhyay's memorandum of June 1983, which discussed the separation of powers between department heads (Tr. 149, 150, 153, Ex. R1). On February 14, 1984 Upadhyay informed Gabossi that there was a definite separation between the departments (Tr. 149Ä152).

In October 1984 Gabossi was told he would have a breakdown mechanic on each production shift. But maintenance at the face would be under Beasley (Tr. 23). As mine foreman and superintendent Gabossi felt it was his responsibility to know who is underground and where they are located. This is especially necessary

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in the event of an evacuation or a disaster (Tr. 23, 24). On weekends maintenance was working without notifying anyone they were in the mine. High voltage changes were also made without notifying anyone. Gabossi told Upadhyay that he should be advised when this occurred but he received the same reply.

Other instances occurred: In October 1984 miners were hurt underground while operating a 913 EIMCOS; four sets of arches were knocked out. It was three or four weeks before repairs were made (Tr. 24, 25, 135). Gabossi complained; Upadhyay responded to the effect that maintenance was Beasley's function. In short, Gabossi should stay out of it. Gabossi was concerned about safety since someone could be hurt due to the delay in making repairs (Tr. 25, 135). On February 14, 1984, Gabossi showed Upadhyay the Colorado statute (FOOTNOTE 1) and requested coordination between the two departments. Gabossi expressed concern that if

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anyone was hurt he could lose his mine foreman papers. The issue of underground coordination was discussed ten to fifteen times. It got to be a headache. Upadhyay did not seem to be willing to work on the problem (Tr. 26, 126).

Upadhyay's interpretation of the statute was that maintenance was none of Gabossi's business. In addition, he was going to check with Jack Kesting and get back with him. Gabossi believes the statute makes the mine foreman responsible for the safety and health of all employees underground (Tr. 128, 129).

Gabossi wanted jurisdiction over breakdown maintenance and coordination between preventative maintenance and production (Tr. 130, 131).

After their initial confrontation on interpreting the statute, Gabossi next confronted Upadhyay on March 6, 1984 (Tr. 153). Gabossi said he couldn't work under these conditions and he offered to resign if the company bought his house. Upadhyay talked him out of it (Tr. 154). Gabossi raised this issue on several other occasions (Tr. 154, 155). He offered to quit two or three times but the offer to quit was not made after November 9 (Tr. 155).

On November 6, 1984, Gabossi called Boyd Emmons, a state mine inspector. He explained the lack of coordination at the mine and the various happenings, including the ventilation problem. He also expressed concern about losing his papers. Emmons advised him that he was responsible for everything underground including health, safety, haulage ways and mechanical. Further, as mine foreman, he had to be informed of activities underground (Tr. 28, 29). Emmons volunteered to talk to Upadhyay but Gabossi requested a confirming letter. The letter was received on November 7th.

On November 9th while Upadhyay was advising him of certain additional responsibilities, Gabossi presented the letter (Tr. 30, 31). Upadhyay became "instantly" mad and a heated discussion followed. Upadhyay told him if he didn't like it he should quit (Tr. 31, Ex. C5). This exchange occurred on a Friday. On Monday afternoon Upadhyay called him to his office. He said he was "madder than hell" because Gabossi had called the State of Colorado. He was also put on probation because he was not getting along with senior staff members. The witness described the conversation in detail (Tr. 35). Gabossi indicated it was the letter that had made Upadhyay mad; further, Gabossi felt the probation bore no relationship to a failure to get along with other staff members (Tr. 34). Upadhyay said the probation would last indefinitely. A letter of reprimand was put in his file (Tr. 35, Ex. C3). The letter of reprimand mainly addresses Gabossi's inability to work harmoniously under the organizational structure. But it states, in part, that "you have repeatedly objected to the idea of maintenance superintendent being responsible for underground maintenance" (Tr. 36, Ex. C3).

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That evening Gabossi called Inspector Emmons. He, in turn, indicated he would talk to Upadhyay; Gabossi declined; it would only make Upadhyay madder. He told Emmons he would try to work it out (Tr. 37). Emmons said he would send another letter to the company outlining the duties of a mine foreman. When Emmons' letter, addressed to Western, was put in Gabossi's mailbox he intercepted it. It was not shown to Upadhyay because he was afraid he would be fired; he was already on probation (Tr. 38, 163, Ex. C9).

In November 1984, Gabossi also talked to Hamlett J. Barry, acting director of the Colorado Division of Mines. He explained the lack of coordination at the mine and indicated he would deny any responsibility if anyone was killed. He agreed when Barry indicated he thought it was a "cover your butt" call (Tr. 41, 42).

Upadhyay was cool between the time Gabossi was put on probation and January 21, 1985. On that date Gabossi brought to his attention that an electrical mechanic was falsifying inspection books. From then until he was discharged on January 30, 1985 there was hardly any communication between the two men (Tr. 42, 43).

From November 12th to January 30th the two men did not argue. There was nothing in that time frame to warrant his termination except for relating to Upadhyay the situation involving the electrical books (Tr. 43). Gabossi was more quiet at staff meetings after being put on probation (Tr. 44).

Gabossi claims he was fired because of his complaints about the ventilation, the EIMCO brakes, the arches, the falsification of the logs and his position as to a foreman's authority as set forth in Emmons' letter. No one was disciplined for the first four incidents although Gabossi had recommended discipline (Tr. 138, 139). He also would have fired the mechanic for falsifying the electrical books (Tr. 139). The miner had admitted the falsification to Gabossi and Art Cordova (Tr. 140, 145). But Upadhyay had not told Gabossi he was going to fire him for mentioning these matters (Tr. 143). Upadhyay did not demonstrate a concern for safety (Tr. 143, 144). At no time did Gabossi file any written complaint with MSHA or with the State of Colorado regulatory body (Tr. 177). Emmons, the state officer, told him he could only investigate if he had a written complaint. He did not file a written complaint because he wanted to work it out with Upadhyay (Tr. 178).

Beasley was still employed at Western when Gabossi was terminated. But about January 28, [1985] Beasley told Gabossi he was leaving for a better job. Gabossi denies that Upadhyay told him that he was being discharged because he had caused him to lose another maintenance superintendent (Tr. 158).

Ritter and Gabossi were discharged on the same day, January 30, 1985. Beasley left January 27th or 28th (Tr. 166, 167).

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On January 30th at the termination meeting, Gabossi was called to the manager's office. Upadhyay wanted him to resign. They discussed the issue of the repurchase of Gabossi's home. A heated argument followed. They discussed different matters including Gabossi's telephone call to the State of Colorado over the separation of departments. Gabossi said it was bad that he "got run off" for showing the letter from the Bureau of Mines. But Gabossi could not remember Upadhyay's reply. The termination letter states, in part, that the company needed "Employees who can act together as a team" (Tr. 45, 46, 160, 161, Ex. C2). Other than for a complimentary memorandum from Kenneth Holum, Upadhyay's supervisor, (in January 1984), there had never been a reference concerning Gabossi's ability to work with other people (Tr. 47, 48, Ex. C6).

In December 1983, in an employee appraisal, Upadhyay indicated Gabossi was doing an excellent job (Tr. 48, 49, Ex. C7). When he left Western Gabossi's annual salary was \$52,000.

On January 21, 1985 two people under Gabossi as well as the mechanic foreman and the rest of the people on the payroll received a 5.8 percent pay raise. Dan Ritter didn't get a raise and Gabossi didn't know if the staff in Washington, D.C. received a raise (Tr. 50, 167-169, Ex. C11).

After he was terminated he was next employed on August 15, 1985 by MidContinent Resources in Carbondale, Colorado (Tr. 9).

A portion of Gabossi's salary with Western included medical and dental insurance. He incurred medical expenses between his termination on January 30, 1985 and his subsequent employment on August 15, 1985. These expenses, in the amount of \$1,313, were not insured (Tr. 54, 55). However, he failed to present any proof that the insurance carrier refused to pay any claims presented in the 30 day period after he was discharged (Tr. 173).

After he was hired, and before he moved to Rangely, Bootle advised him the company would repurchase his house at what he paid for it if he left the company for any reason within three years (Tr. 55, 56, 169-171). Shortly after leaving Western, Bootle confirmed the agreement in writing. The house loan, financed by Western, was immediately due when Gabossi was fired. In order to prevent a foreclosure Gabossi secured a new loan (Tr. 58, 59, 65). The agreement to buy the house was not a condition when he became employed; it arose before he would buy a house in Rangely (Tr. 65). Gabossi would not have purchased a house if Western had not represented they would repurchase it (Tr. 67). He purchased the house for \$119,000 and sold it for \$114,000 (Tr. 68, Ex. C11, C12). His initial loss was \$6,000, i.e., \$120,000 less \$114,000. Additional expenses included fees for an abstract company at \$223.25 and a real estate agent expense at \$2,500. In addition, he paid interest of \$3,015 for the \$60,000 he had borrowed to prevent the foreclosure (Tr. 72, 73, Ex. C11, C12).

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Western had guaranteed the note on the house. When he was terminated Zion Bank automatically started foreclosure (Tr. 73). Gabossi made certain improvements on the property (Ex. C11, C12).

BOYD EMMONS, now retired, was formerly a District Mine Inspector for the State of Colorado. His duties included a broad range of activities relating to coal mines. In 1984 Colorado had enforcement authority over Western only if a written complaint was filed.

The Colorado statute provides for the duties of a mine foreman (Tr. 79-81, 86, 87, 98). Each mine has such a foreman (Tr. 82, 83). The state enforces the statute for the safety of all personnel underground. They seek to eliminate explosions, cave-ins, as well as serious injuries and fatalities (Tr. 84, 85, Ex. C4).

The witness has known Gabossi since 1978.

When the statute refers to "inside workings", it means everything underground. "[i]n full charge" means in charge of everybody and every piece of equipment (Tr. 88). If an explosion occurs it is in the interest of safety to know who is underground. The witness described how safety concerns interface with ventilation and high voltage wiring (Tr. 89).

In October and November 1984, John Gabossi contacted the witness about three times by telephone. He was kind of "hot under the collar" and he wanted to know about what his job was, and he wanted to know about miners going underground.

Emmons quoted him the statute and mailed him a copy (Tr. 90, 91, 105, Ex. C5). Emmons also said he would need a written complaint (none was ever received). Gabossi explained his problem related to people going underground and working on equipment without his knowledge. He also complained about the manner in which equipment, ventilation and gas checks were handled. Emmons told him it was a violation of Colorado law for miners to go underground without notifying him of that fact. Further, in Emmons' opinion, this created safety problems (Tr. 92, 99, 100, 108-111).

About three to five days later Gabossi again called him. This was just after Emmons had written to Western. Emmons had intended that the letter go to Western. When Gabossi learned about the letter he said. "Oh God, I'm dead if they get that" (Tr. 93, 102, 103, Ex. C9). Emmons also offered to go to the mine and talk to Upadhyay, but he did not do so. Gabossi said he would present the law to them (Tr. 94, 104). Emmons told Gabossi he was responsible for everything underground.

In Colorado a foreman's certificate can be revoked and, if so, he would lose his livelihood as a foreman (Tr. 94, 95).

Gabossi could face some kind of disciplinary proceedings if someone went underground without his knowledge (Tr. 96).

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Gabossi had always been honest with the witness. In the inspector's opinion Gabossi is a good, safety conscious miner (Tr. 96, 97).

Emmons had never known of a mine organization where the foreman was not in complete charge of the underground workings (Tr. 112). But he was not aware of any complaints filed by any individual because Western's mine foreman did not have complete jurisdiction (Tr. 116).

RAJA P. UPADHYAY, called as a witness by the Secretary, indicated that he had six months of underground coal mining experience in India (Tr. 187, 188).

Western's organizational structure resulted in people working in the mine who did not report to Gabossi. But if he was on shift either he or his foreman would know the location of all individuals underground. Around March 1984 Gabossi started complaining about the company's reporting structure (Tr. 189, 190). Their conversations became heated and it became a long lingering problem between the two men. On November 9th Gabossi told Upadhyay the organizational structure should be changed or he could lose his foreman papers (Tr. 191). Upadhyay considered that Gabossi's complaint about men being underground without his knowledge was a safety related complaint (Tr. 196).

On November 9th Gabossi presented a letter from the state agency. At the meeting he also said his foreman papers were at stake. The meeting, which was on a Friday, was a "big blowup." The next business day Gabossi received his probationary letter (Tr. 196, 197, Ex. C3). At the Friday meeting Upadhyay learned for the first time that Gabossi had gone to a government agency (Tr. 197, 198). Gabossi was orally placed on probation as of the 13th; he was given a letter on November 12th (Tr. 199).

In September Mr. Kesting, Western's safety director, talked to Upadhyay about the effect of the Colorado statute. He indicated the law gives the mine superintendent or mine foreman the total underground authority (Tr. 200). Upadhyay replied to Kesting that the statute didn't require that maintenance be under Gabossi. Upadhyay did not follow the recommendation of his safety director (Tr. 201, 202).

Gabossi avoided Upadhyay after he was placed on probation. Beasley resigned January 29th; Gabossi was terminated the next day. Beasley's resignation triggered Gabossi's termination as did the "blowup" on the 9th.

It was less than a week before he was terminated that Gabossi told him about the falsification of the MSHA permissibility log book (Tr. 203-205). Before he left Burnett stated that one of the reasons he was leaving was his inability to work with Gabossi. He also said Gabossi was going to "stab" Upadhyay in the back (Tr. 206, 207). Beasley and Gabossi had a dispute over control or coordination of underground maintenance. They

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brought that dispute to Upadhyay on at least one occasion. Upadhyay would tell them to work it out between themselves (Tr. 211).

FRANCIS J. KESTING, a senior staff member, was Western's director of safety and training from May 1982 to February 1985 (Tr. 213). The senior staff consisted of division heads, namely Kesting, John Gabossi and Gordon Burnett, (succeeded by A.B. Beasley). Additional staff members included Mike Weigand (senior engineer), Doug Wilson (purchasing), Dan Ritter (personnel) and Glen Goodworth (accounting).

The production foreman reported to John Gabossi while the maintenance foreman reported to maintenance superintendent Burnett or Beasley. Everyone on the senior staff reported to the mine manager (Tr. 214, 215).

The witness was aware of the division between underground maintenance and underground production. In his opinion, based on a reading of the Colorado statute, the reporting procedure constituted a real safety problem particularly as it related to ventilation and belts (Tr. 216-220, 241). However, Kesting is not a lawyer nor has he researched the legislative history. Upadhyay was willing to discuss Kesting's interpretation of the statutory provisions (Tr. 239, 240, 242). Kesting did not investigate how other coal mines were structured (Tr. 239). Kesting learned by asking questions that Upadhyay had no coal mining experience. He believed the problem between Gabossi and Upadhyay arose from reporting structure at the mine (Tr. 258, 259).

In September or October 1984 Gabossi brought the issue of reporting problem to the attention of the witness. Gabossi was worried about compliance with state law and the possibility of losing his foreman's license (Tr. 220, 221). The witness expressed the view that the failure to coordinate underground activities was a violation of state law. In sum, there should be one person in charge of the active workings in an underground coal mine (Tr. 221, 222).

Kesting discussed the problem with Upadhyay who said he would look into it. Kesting had nothing further to do with the issue (Tr. 223). Kesting was not aware if Upadhyay took any action on his recommendation (Tr. 224, 225).

Kesting observed the professional dispute between Gabossi and Upadhyay concerning underground jurisdiction and other issues. Kesting himself had a dozen or more disputes with Upadhyay. At some Monday morning meetings Gabossi would ask for a clarification of the problem he had with underground maintenance (Tr. 225, 236, 237). Those in attendance at the production meetings included Kesting, Upadhyay, Gabossi, Trygstad and Weigand (Tr. 226, 227). Gabossi was afraid someone would be hurt and he'd forfeit his foreman's papers. Gabossi was the most senior "papered" man on the mine site (Tr. 227).

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Beasley and Gabossi also engaged in a professional dispute concerning underground activities (Tr. 227, 228). The dispute concerned the scheduling of underground maintenance on the equipment and the belt (Tr. 228). A safety problem existed with the underground people reporting to Beasley. The same situation existed when Burnett was maintenance foreman.

During Kesting's tenure as safety director Gabossi requested jurisdiction of the underground breakdown maintenance crew (Tr. 244). One on each crew reported to Gabossi. Also Gabossi didn't want jurisdiction over preventative maintenance; he wanted to know when they were underground (Tr. 245, 246).

Upadhyay was concerned about safety in the mine. He also took an active role in investigating safety (Tr. 246, 247, 249). Upadhyay would say that the mine was going to be run 100 percent "by the book" (Tr. 247). By that he meant no violation was to occur (Tr. 248).

When the safety department made underground inspections the men reported to Gabossi or the foreman in the section (Tr. 249).

Kesting could not recall Gabossi ever complaining about ventilation (Tr. 250).

The safety department investigated the EIMCO brake malfunction incident. The vehicle was red tagged and put in the shop (Tr. 250, 251).

The safety department also determined that the arches should be replaced (Tr. 253).

After Gabossi made him aware of the problem, Kesting investigated the false electrical records. Kesting recommended to Upadhyay that the offending miner be dismissed (Tr. 254, 255). Upadhyay said he would handle it. Kesting thought Beasley's letter of reprimand was inadequate (Tr. 255, 256). He told Upadhyay he disagreed with the discipline (Tr. 257).

Gabossi and Kesting disagreed on many things. Gabossi particularly objected to a mandatory policy requiring safety glasses (Tr. 260, 261). Gabossi and Kesting worked out their problems as they occurred (Tr. 261).

Gabossi, who is a good miner, was concerned that the death of a miner would cause him to lose his foreman's papers (Tr. 262). Further, he has a concern for miner safety.

Upadhyay perceived his problem with Gabossi as a personnel or management prerogative problem. But Gabossi saw it as a safety and legal problem (Tr. 263). In Kesting's opinion it was a safety and regulatory problem (Tr. 264).

During the staff and production meetings or while underground Gabossi was no more insubordinate to Upadhyay than any other man on the staff (Tr. 230, 231). Kesting observed no

behavior that would warrant placing Gabossi on probation or
warrant

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his termination (Tr. 231, 233). Gabossi did not treat Upadhyay with less respect than anyone else on the senior staff (Tr. 232). At production meeting staff members scream, holler and carry on if they don't get what they want (Tr. 233).

When Kesting was hired, John Bootle indicated Western wanted the staff to live in Rangely. Kesting was also told he could build or purchase a house. In addition, if he left within three years Western would buy it back (Tr. 234). In fact, Kesting sold his house before leaving Western, so there was no occasion for the company to buy it back (Tr. 234).

ARTHUR CORDOVA was employed at Western from 1982 to 1985. After starting as a mechanic he was promoted to maintenance foreman in charge of all underground maintenance workers as well as electrical and mechanical repairs (Tr. 268-270). When he first went into maintenance he reported to Gordon Burnett, the maintenance superintendent. When Burnett quit he reported to John Gabossi. Subsequently he reported to maintenance superintendent A.B. Beasley. The maintenance supervisor was in charge of both breakdown and preventative maintenance.

Cordova saw Gabossi every day during inspections and when generally checking the mine (Tr. 270, 271). Cordova originally reported to Gabossi. When Beasley came to Western Cordova was told he would no longer report to Gabossi but only to him (Tr. 271, 272). Gabossi never had control over underground maintenance (Tr. 285).

Cordova holds various papers and has taken safety courses; but Beasley's directive not to deal with Gabossi caused him a safety concern. Cordova followed the directive. When he brought this to the attention of Upadhyay he was told to follow the chain of command and he was not to report to Gabossi (Tr. 273, 274, 281, 282).

Cordova was familiar with the Colorado law. He believed he was not in compliance if he didn't report to Gabossi (Tr. 275, 276).

At the Deserado mine, from the time he started working there, Gabossi ran the mine "to the book" and "whatever the law stated" concerning reporting and repairs (Tr. 276, 277). Cordova considered Gabossi a good miner, foreman and manager. He was also concerned with safety. Gabossi insisted on a good job (Tr. 276-278).

The witness was hired by Dan Ritter, Western's personnel director. Cordova is presently working for Gabossi at Mid-Continent Coal Company and he has worked for him a number of years, beginning in 1975 (Tr. 278, 280).

DANIEL RITTER, a person experienced in management, was employed by Western as Director of Human Resources from October 1981 through January 1985 (Tr. 287).

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Ritter was responsible for hiring the senior staff members, including John Gabossi (Tr. 288).

In Western's reporting structure John Bootle, as the mine manager, was senior. John Gabossi was the mine superintendent. The classic mining structure would have maintenance activity reporting to the mine superintendent (Tr. 289, 290). But he did not know the reporting structure at the Powderhorn Coal Company (Tr. 309).

In Ritter's opinion the failure of the maintenance workers to report to the mine superintendent could adversely affect the safety of an underground miner (Tr. 291-293). Ritter had at least one conversation concerning the company's reporting structure with Upadhyay and his supervisor, Don Deardorff and John Bootle. But he never offered his opinion that Upadhyay was violating the statute (Tr. 294, 310). John Gabossi, as mine foreman, was not in charge of the workings at Western's mine (Tr. 296).

Ritter, who attended only senior staff meetings, never observed any behavior by Gabossi that could be characterized as rude, abusive, insubordinate or in any way out of the ordinary toward Upadhyay. Nor did he warrant any behavior that would warrant placing Gabossi on probation or terminating him. However, Gabossi was not impressed with Upadhyay's knowledge of the underground operations and he made disparaging comments about him out of his presence. (Tr. 297, 298, 310, 311). Gabossi generally attacked Upadhyay on a professional level, not in a personal sense (Tr. 312).

Gabossi was not the only person at Western who took exception to Upadhyay (Tr. 312).

Mr. Gabossi was a good miner and respected by the miners who worked for him. He was safety conscious and considerate of the employees who worked for him (Tr. 299). Fifty percent of the payroll people were at the mine because of Gabossi (Tr. 315).

The professional dispute concerning the company's structure surfaced as soon as Gabossi was hired. Burnett and Gabossi, experienced miners, were not hesitant to say something about the structure. Gabossi and Burnett seemed to be able to work out the problems posed by the structure (Tr. 301). When Beasley was hired he and Gabossi attempted to resolve their differences (Tr. 301, 302). The organization structure did not change between 1981 and 1985 (Tr. 320). Under the structure Upadhyay was in charge. In his absence the mine superintendent or the chief engineer would be in charge (Tr. 321, 322). As a personnel relations officer Ritter felt that the men in those two positions should get along (Tr. 322, 323).

There were discussions with Gabossi, Burnett and Kesting about Western repurchasing at their cost any house they might buy in Rangely (Tr. 302-304, 318). These discussions between Gabossi and Bootle took place in the trailer facilities in Rangely (Tr. 304).

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Terry Fritz, as part of the engineering function, reported to the chief engineer. Gabossi would not have any contact with the surveyors who were on a different reporting ladder and two supervisory levels lower (Tr. 306).

When Beasley terminated he advised Ritter he was going to a better position, a better location and he would earn more money (Tr. 326).

Ritter resigned from Western on January 31, 1985 after being given the option to resign or be fired. Although he was in charge of Gabossi's personnel file he had not seen his probation letter (Tr. 307, 308, Ex. C3).

Western's benefits package provided insurance for its employees for 31 days after a worker is terminated (Tr. 317).

In Ritter's opinion Upadhyay would consider it traitorous if anyone took problems to a regulatory government official instead of taking them up the chain of command (Tr. 326).

Terry Fritz created the expression of "sand-nigger" as a reference to Upadhyay (Tr. 327). Weigand also used the same term in the same reference more than once (Tr. 328). Ritter had no memory of Gabossi using that term (Tr. 329). Beasley and Gabossi remarked about Upadhyay's lack of mining experience (Tr. 329). The witness himself did not use that term (Tr. 330). Upadhyay is a cordial individual who had a concern for safety (Tr. 331).

Respondent's Evidence

Michael Weigand, Terry Fritz, A.B. Beasley and Raja Upadhyay testified for respondent.

MICHAEL J. WEIGAND has been in Western's employ since 1981. He was hired in 1981 as a planning engineer and promoted to chief mining engineer in 1982 (Tr. 345, 346).

Weigand was one supervisory level above Joe Kracum. The latter was the direct supervisor over Fritz and Langford (Tr. 363).

His duties include planning belt lines, ventilation, new construction, roof controls and all aspects of the property. As chief engineer he is in almost daily contact with John Gabossi. He attended weekly staff meetings but not production meetings (Tr. 346, 347). Those under his jurisdiction included the mining engineer as well as lab and environmental technicians (Tr. 347). In the fall of 1984 Weigand became assistant mine manager (Tr. 376).

Surveyors are underground on a daily basis and in contact with Gabossi's people, Sunstrom and Marquez, as well as with Gabossi himself if he was in the section. The workers under Weigand's jurisdiction would work directly with Gabossi. In

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Weigand's view it is abnormal for a constant conflict to exist between operations and the surveying staff (Tr. 348, 349, 364, 365).

Weigand's work with Gabossi involved anything underground. Weigand felt it was necessary to report to Gabossi when he went underground. However, Gabossi did not request such a report when the witness went underground (Tr. 349, 350).

Weigand was not aware of any specific event involving Gabossi but his people complained about how they were treated underground. They complained of verbal abuse as well as complaints about the quality and timing of the work. It became necessary to almost schedule the trips underground on a daily basis just to avoid arguments and complaints. Weigand brought this to Upadhyay's attention on two occasions in 1983 and 1984. Weigand and Gabossi had a couple of shouting matches but normally the two men got along pretty well (Tr. 350, 351, 365, 366, 368). Weigand never observed Gabossi verbally abuse any of the surveyors (Tr. 364, 371).

The basic problem was with the surveyors. Joe Kracum, Weigand's assistant, talked about it. Gabossi made numerous derogatory comments about Upadhyay's decision. The two men had a different philosophy about managing the mine and they had a lot of managerial type disagreements. But Weigand didn't recall Gabossi exploding at Upadhyay at any staff meetings (Tr. 352, 353, 381). Gabossi felt the mine could be better managed; he also felt a lot of Upadhyay's decisions were poor (Tr. 353). In the discussions involving the two men safety was not discussed in particular, only in general. Upadhyay's responses indicated a concern for safety. When it was discussed Upadhyay would state the mine would be run on a safe operating basis (Tr. 353, 354).

At one staff meeting Upadhyay asked the senior staff to keep their vehicles clean so the company could uphold its image in town. Gabossi refused saying he personally would not do that (Tr. 379). In Weigand's view that remark was insubordinate (Tr. 379, 386). On one occasion Gabossi complained about not receiving reports on the construction side but that was none of his business (Tr. 380, 381). In the latter part of 1984 Weigand heard Gabossi slam Upadhyay's office door and as he left he said "that dumb son of a bitch" (Tr. 387).

On June 4, 1984 Weigand received correspondence from Terry Fritz (Tr. 354-356, Ex. R2). They talked; in short, Fritz was leaving because of the verbal abuse and constant complaining by Gabossi (Tr. 358, 359). Fritz was not a malcontent at the mine; however, he was in his relationship with Gabossi (Tr. 368).

Gabossi also complained about the quality of Fritz's work. (FOOTNOTE 2) Weigand would investigate and he found the work had been perform

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ed in a satisfactory fashion (Tr. 359). Weigand conveyed Fritz's conversation to Upadhyay (Tr. 360). Bill Langford, a surveyor working with Fritz, also complained about verbal abuse or problems with Gabossi underground (Tr. 360, 361). Weigand also conveyed this information to Upadhyay. He was concerned he couldn't keep his surveyors (Tr. 361). Weigand's investigation did not disclose any fault about Langford's work.

No one at Western has ever been terminated or disciplined for bringing any safety complaint to Upadhyay's attention (Tr. 362).

Since Gabossi left the company there have been no problems with the surveyors (Tr. 375, 376).

TERRY FRITZ, experienced as a draftsman and trained as a surveyor, was employed by Western in March 1982 (Tr. 389-391). Joe Kracum was Fritz's immediate supervisor. Langford worked with Fritz.

Fritz's duties included mapping the mine, setting sites for entries, surveying surface facilities, checking elevations and establishing bench marks (Tr. 392, 393). In performing his job functions he was underground and interacted with Gabossi, Sundstrom and Marquez (foremen). Fritz primarily dealt with the two foremen. The surveyors were required to set the sites before the shift started. This required him to contact Gabossi and arrange for a foreman to fire boss the area. Usually Gabossi would initially contact the surveyors and advise them they needed sites (Tr. 393, 394, 405).

Fritz would usually contact Gabossi on a daily basis, if he was underground. Their relationship was very stormy; they were unable to establish a working relationship. He said they were not putting in sites correctly or they were hampering production. Gabossi's language was harsh. While profanity is not out of context in a coal mine he referred to them (in the context of their work) as "sons of bitches" and "ass holes". If he requested they do something in a different way they would try, usually unsuccessfully. It seemed they could not do anything to satisfy him.

Gabossi claimed the sites in the belt entry were not properly set. After checking the specifications, a subsequent control survey revealed that the belt was extremely straight (within four seconds). His claim that the belt was not straight was one of Gabossi's constant complaints. Neither Weigand or Kracum said it was a problem. But Operations was concerned that the belt be straight.

In one occurrence the surveyors had secured permission from foreman Sunstrom to set sites as the miners were going to break for lunch. As they started to put in the sites Gabossi appeared. He didn't belittle them and he wasn't abrasive but he told them in no uncertain terms that they were holding up production. When Fritz explained the situation Gabossi became very upset and

stormed off.

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Fritz tried to work out his problems directly with Gabossi. When this was unsuccessful they started going directly to their supervisor, Kracum (Tr. 395, 396, 404-407). Fritz told Kracum they were being harassed, and accused of setting sites that were wrong and told the belt wasn't straight. On checking they found no problems. So they spent a good deal of time verifying something that was already accurate. At times Kracum, Upadhyay and Langford met underground. Gabossi claimed that they had sites off in one entry, also there were no belt spots. They were able to show them that the sites were in line, and that the existing belt spots were marked. Gabossi accepted the explanation (Tr. 396, 397). The surveyors never found that Gabossi's complaints were valid. The complaints by Gabossi were also brought to the attention of Steve Magnuson, Fritz's new supervisor, and Mike Weigand (Tr. 397, 417). Weigand said to relax and calm down; he was satisfied with the work (Tr. 397). The surveyors began to ignore Gabossi and they wouldn't recheck on minor things that they knew they had done. If they did a followup they would tell Magnuson, and to a limited extent, Weigand.

Fritz personally discussed his letter of resignation with Weigand. In the letter he did not mention Gabossi by name but he indicated that more influential factor in his decision to leave was "the constant unwarranted harassment he was subjected to by Operations (Tr. 398, 409, 419, 420, Ex. R2). Fritz got along with other people in Gabossi's department (Tr. 399). Fritz also resigned because he thought Western's wages were inadequate.

About June 4th or 5th Fritz also talked to Upadhyay about the letter. They discussed the harassment, the failure to deal with Gabossi's unreasonable and unwarranted demands, and the fact that this was one of the few mines where they weren't allowed to set sites on shift. This required them to stay late or come early. Survey sites are almost always set during shifts. Other things they discussed concerned setting belt spots a dozen different ways. Gabossi also complained about minor things: the color of the paint and the methods they were using. Upadhyay responded that he knew there were some problems and he was sorry to see Fritz leave (Tr. 400, 410, 412, Ex. R2).

Gabossi complained to Weigand and Kracum about Fritz's work from about two months after Gabossi arrived until he left. Fritz was offended because Gabossi's attacks were without any basis. Fritz considered it just harassment if they were requested to make a change and the change itself did not amount to anything substantial. However, the mine superintendent, and not the engineer, is in charge of an underground mine.

Fritz had no problems with the mine superintendent at his previous mine; there was a cooperative atmosphere (Tr. 402, 412, 414).

A.B. BEASLEY is currently employed as maintenance and surface superintendent for Energy Fuels, an underground coal mine. He worked for Western as maintenance superintendent from June 1964 to January 1985 (Tr. 423, 424).

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When Beasley was interviewed by Western he learned he would be responsible for surface and underground maintenance at the mine (Tr. 425). Gabossi, one of the interviewers, never indicated he would not have control of underground maintenance nor did he discuss his job function (Tr. 426).

Gabossi asked Beasley if he and Upadhyay had discussed underground maintenance. When Beasley response was negative Gabossi suggested he should get his job duties straight (Tr. 427, 428). Beasley then read and attempted to perform his duties as outlined in the company memorandum of June 29, 1983 (Tr. 427-429, Ex. R1).

His duties placed him in daily contact with Gabossi. A definite conflict evolved as Beasley worked in areas that Gabossi considered within his realm of responsibility. Heated arguments or discussions involved the mechanics; however, except for reporting, they didn't have anything to do with the maintenance department. Gabossi was not using the best judgment to get the most out of the maintenance people on the section (Tr. 430, 431). They disagreed over whether the primary job of mechanics underground was to service equipment or to run errands, or stack a bolter or set miner bits. If a miner is idle for any time he should be doing something besides setting miner bits. They also disagreed concerning maintenance operations involving equipment being overhauled or rebuilt. They also disagreed as to whether things were being done in a manner to Gabossi's liking or whether maintenance people were doing things in his job priorities. Gabossi was a hard man to coordinate with (Tr. 431, 445).

Gabossi never accused Beasley of interfering with his job function at the mine other than to the extent that he couldn't mine coal because everything was always down (Tr. 431, 432). Gabossi criticized Beasley's maintenance of the equipment (Tr. 432).

At the beginning of Beasley's employment, he and Gabossi were social friends. At the very end, in nine months, they hardly spoke at work (Tr. 432). On several occasions Upadhyay told him to work it out when he brought it to his attention (Tr. 432, 433, 441). This didn't come about since Gabossi never attempted to meet him half way. Upadhyay demanded that all department heads work together. Upadhyay did not realign any responsibilities in an effort to solve the problem except to assign some mechanics by name (Tr. 433, 443, 444). At times Beasley was upset with Upadhyay because of his inability to coordinate between the departments (Tr. 446).

Beasley suggested to Gabossi how maintenance needs at the mine might be solved. But since he was blocked there was not much room to coordinate (Tr. 447, 448). Beasley sent mechanics underground to do a specific job on an idle piece of equipment if the area had been fire bossed or pre-shifted (Tr. 449-450). Gabossi complained about that (Tr. 450). He wanted Beasley to ask his permission to do anything underground (Tr. 451).

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Beasley could not fault Gabossi's knowledge of mining but he faulted his management style. At the previous hearing of the case he described him as a good foreman. In addition, men will follow him into the mines where he works. Further, there are men who think highly of him in the mining industry (Tr. 451, 452).

Beasley submitted a letter of resignation to Upadhyay on January 29th (Tr. 434; Ex. R4).

Beasley gave Upadhyay his letter of resignation. He was upset because Beasley was leaving. He read the letter and they discussed his new job. Beasley said he didn't need the hassle with Gabossi. About 15 or 20 minutes of the half hour meeting involved a discussion of Gabossi. The letter of resignation does not specifically mention Gabossi; slander is not one of Beasley's strong suits and he didn't want to include that in a letter of resignation. Beasley felt he didn't need the innuendoes and the derogatory remarks (Tr. 436, 437).

There was a subsequent conversation with Upadhyay when he learned Gabossi was leaving the company. Upadhyay inquired if Beasley would reconsider his resignation. Beasley declined and he left February 8th (Tr. 438, 439). Beasley indicated his decision would have been more difficult if Gabossi had been fired earlier (Tr. 438, 439).

RAJA UPADHYAY, a mining engineer, attained a master's degree at the University of Arizona. In 1976 he was hired by Western as a senior mining engineer (Tr. 453, 455).

In June 1983 he replaced John Bootle and assumed the duties of acting mine manager in Rangely. He was familiar with the operations and organizational setup at the mine. Upon arriving he talked to all division heads, including John Gabossi (Tr. 456, 457).

Upadhyay authorized the company's June 29th organizational memorandum (Tr. 458, Ex. R1). The memorandum reiterated the responsibilities for four operating division heads. Gabossi failed to comment when the memorandum was discussed at staff meetings (Tr. 459).

In March 1984 Gabossi asked Upadhyay for total authority of the mine. He would like the maintenance people to report to him. At another meeting, (November 9th) he brought up the possibility of losing his papers. He was concerned about authority; he wanted the breakdown maintenance people to work for him (Tr. 500, 501).

In August 1983 Gabossi discussed with the witness the house buy back arrangement. He also brought up the issue of whether he had total authority of the mine, including maintenance and operations; both had been promised to him. Upadhyay disputed Gabossi's claim; he explained that the organizational setup had

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been as it was since the mine started. Gabossi then said he would leave if the company would buy back his house (Tr. 460). Upadhyay said he didn't want Gabossi to quit but the company wasn't going to buy back his house. This conversation repeated itself with some regularity (Tr. 461).

In March 1984 Gabossi confronted him with the Colorado statute. Upadhyay indicated to him that when it came to safety and health Gabossi had full authority. Gabossi was not satisfied. Upadhyay then checked with Powderhorn Coal Company. That company's structure was setup in the same manner as Western (Tr. 462, 498). When Gabossi brought it up again Upadhyay said the company was abiding by the law. However, he granted that some people did not report to Gabossi. These included the mine manager and the chief mining engineer. At one point he indicated preventative maintenance could report to the maintenance superintendent, but he (Gabossi) wanted the breakdown maintenance under his authority (Tr. 463). Gabossi already had responsibility over the face mechanic. Preventative maintenance occurs underground almost daily. But Gabossi didn't want control over preventative maintenance (Tr. 464). Gabossi didn't say if he was satisfied as a result of this discussion (Tr. 464, 465).

When Upadhyay would occasionally leave the mine site Gabossi would be in charge (Tr. 465). Upadhyay took away this responsibility on October 1, 1984, when Gabossi indicated he didn't want to be his assistant. Gabossi's single reason was that Upadhyay failed to take action when Gabossi reported to him. On the same day Upadhyay prepared a memorandum changing the job (Tr. 466, 467).

About the end of September, Gabossi and Upadhyay were engaged in a conversation regarding Western advancing a cash payment for Art Cordova's disability injury. Gabossi "blew up", got hot, upset and left the office (Tr. 468). At that time, before the first of October, Upadhyay concluded that in view of all of the previous problems with Gabossi he was going to seek approval from his superior (Lloyd) to terminate him (Tr. 469, 510, 511).

Upadhyay carried a handwritten memorandum to his superior, Lloyd Ernst, manager of operations, in Washington. He didn't have it typed because he didn't want anyone at the mine to know about it. Lloyd read the memorandum; Upadhyay was recommending that Gabossi be fired. Lloyd preferred Upadhyay's alternative suggestion. He recommended that Gabossi be directed to work underground all day. It was thought this would create dissatisfaction which might lead to his resignation. On returning to the mine he told Gabossi that he wanted him to spend more time underground (Tr. 471, 502, 530, Ex. R5). Gabossi agreed (Tr. 471, 472).

On November 9th a meeting with Gabossi took place in the change house. Upadhyay was talking to Gabossi about a monitoring system they had installed. Upadhyay indicated it would be Gabossi's responsibility. Gabossi then asked if Western was

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going to buy his house, also he brought up the matter of a pay cut and a bonus. Upadhyay said Western was not going to buy his house (Tr. 472, 473). Gabossi then said Upadhyay was the worst mine manager that he had ever worked for. He further indicated that a caste system didn't work in the United States. Gabossi then handed Upadhyay a folded letter (Emmons letter to Gabossi citing the Colorado statute) (Tr. 473, 474, Ex. C5). Upadhyay replied that the letter didn't say they were doing anything wrong. As Gabossi kept raising his voice Upadhyay became upset and stated he didn't think much of Gabossi. He then left taking the letter with him. He later filed the letter (Tr. 474).

After the meeting on November 9th Upadhyay contacted Lloyd. He advised him things were not working and he requested Lloyd's approval to discharge him. Lloyd said to put him on probation. The next morning Upadhyay put Gabossi on probation until he changed his attitude and became a good employee for Western. The main thing Upadhyay and Gabossi discussed was his failure to work with other people (Tr. 476). The matters verbally discussed were later reduced to writing (Tr. 476, Ex. C3).

Gabossi only questioned a reference in the memorandum about what Upadhyay had heard from "other companies". Upadhyay explained that the "other companies" were the power plant people Gabossi had taken underground. He had complained to them about Western's management, its ability to mine coal and its manager, Upadhyay (Tr. 477, 478).

At a subsequent staff meeting with Gabossi, Beasley and Kesting allegations were made that a mechanic had falsified a record. Upadhyay asked Beasley to investigate the matter. After the investigation Beasley reprimanded the miner by letter. Gabossi wanted to fire him; Upadhyay refused because disciplinary action had already been taken (Tr. 478, 479).

Gabossi brought to Upadhyay's attention the matter of the maintenance people shutting down a fan. On that occasion he directed Beasley to have a mechanic immediately restart the fan.

Upadhyay didn't feel compelled to get back in touch with Gabossi everytime something had been brought to his attention for action.

The ventilation items were investigated, resolved and discussed with Gabossi (Tr. 480, 481).

Concerning the arches: Gabossi said an EIMCO had damaged some arches. Upadhyay immediately went to the area. Both he and Gabossi concluded there was no hazard although a leg had to be fixed. The following day the engineering people investigated (Tr. 482). It was decided the maintenance department would fix it (Tr. 483). The safety department also investigated and concluded there had not been a brake failure on the equipment. No one knows the cause of the accident. The only safety matters

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Gabossi talked about were ventilation, the miner, falsification of records, the arches and the coordination of underground duties (Tr. 483, 484).

When Terry Fritz resigned in June 1984 he told Upadhyay that his letter of resignation referring about "constant and unwarranted harassment" was to only reflect on Gabossi. In later discussing Fritz's resignation, Upadhyay told Gabossi he would have to change his attitude because people were leaving but he didn't mind this one (Tr. 489, 498, Ex. R2).

Upadhyay was totally surprised by Beasley's resignation of January 29, 1985 (Tr. 484, Ex. R4). He related he couldn't work with Gabossi (Tr. 484, 485). In the next couple of minutes Upadhyay decided to recommend Gabossi's termination. Too many people were leaving because of Gabossi's inability to work with them. He wanted to avoid having to rehire after losing another maintenance supervisor (Tr. 485, 486, 505).

In pursuing his decision to terminate Gabossi he learned that Lloyd was hospitalized. He then talked to Lloyd's boss, Ken Holum. The superior was knowledgeable about the situation. Upadhyay described that he had lost another maintenance superintendent. Holum authorized Gabossi's termination. The company attorney, Mr. Mandelson, drafted the termination letter. The next morning Gabossi declined an option to resign and he was fired. Gabossi said "Bullshit". Further, he could not "get away with it" and Upadhyay was the worst mine manager Gabossi had ever worked for (Tr. 485-488, 505, 531).

The department heads continuously complained about Gabossi's performance. During Upadhyay's tenure the engineering department (Mike Weigand) complained they were harassed and not appreciated. The probation letter refers to Gabossi's inability to get along with division heads (Tr. 491, 492). Upadhyay had tried many times to counsel Gabossi.

Neither the witness nor anyone else at the Deserado mine had ever seen Emmons' second letter of November 14 (Tr. 492, 493; Ex. C9). Nor was there ever any conversation concerning the statute (Tr. 493). Nor was he ever contacted by MSHA relative to the statute. The Deserado mine continues to operate under the same organization structure it did on January 30, 1985 (Tr. 493).

The mine has never received any MSHA or state complaints (Tr. 494). The witness's handwritten recommendation that Gabossi be fired was not typed by Upadhyay's secretary. Nor was the document entered in a log. The original was hand carried by the witness to Washington (Tr. 494-497, Ex. R5).

During his tenure Upadhyay never disciplined, terminated or placed any employee on probation for filing a safety complaint (Tr. 535).

Upadhyay is current manager of operations for Western (Tr. 536).

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Francis Kesting, Daniel Ritter and Joseph Gabossi were called as rebuttal witnesses by the Secretary.

FRANCIS KESTING testified that he was told by Burnett that he was leaving because he had another job, also he felt stagnated and didn't think Western's mine was ever going to produce coal (Tr. 539, 540). The power plant was the only company contracting for its coal (Tr. 540).

Upper management at Western, including Upadhyay, would be furious if someone went to a government regulatory agency. Such action would end a person's career (Tr. 541, 542). However, Kesting based his opinion on management at other mines (Tr. 542, 543). In fact, no worker at Western had ever complained to a state regulatory body (Tr. 543).

DANIEL RITTER indicated that Burnett left Western because the mine was static and he had a better future where he was going. Western's only contract was to sell coal to a power plant at Bonanza (Tr. 545, 546).

As Human Relations Director Burnett occasionally came to him with complaints about the inability of he and Gabossi to work under the structure (Tr. 546, 547).

In rebuttal, John Gabossi indicated he didn't treat Fritz differently from any other employee, nor was he harsh with him (Tr. 548).

Gabossi complained to Fritz, as well as Upadhyay, about belt spots put in the ceiling for chain hangers. He, Upadhyay and Deardorff examined the condition. They all agreed it was a poor installation job (Tr. 549). Deardorff was Upadhyay's superior but in engineering and not in production (Tr. 549).

John Sundstrom also had problems with sites underground. The condition described by the witness involved spots and spads. Gabossi concluded Sundstrom's complaint was justified (Tr. 550).

When Fritz resigned Upadhyay told Gabossi that he wasn't very good anyway and it didn't make any difference (Tr. 550, 551).

Gabossi expressed concern to Upadhyay about the arches. It was agreed Beasley was to change the arches immediately (Tr. 551, 552). It was not done immediately. When Gabossi complained Upadhyay said it was Beasley's decision and none of Gabossi's business (Tr. 552).

Upadhyay did not discuss with Gabossi any of the complaints against him made by eight of the nine department heads. The only ones they talked about involved Beasley and possibly the purchasing department (Tr. 553, 555). The on-going complaint with Beasley involved coordinating efforts underground (Tr. 553). Every one had problems with Doug Wilson, the company purchasing agent (Tr. 554).

~1504

Upadhyay did not admonish him about not getting along with division heads prior to receiving the adverse performance report of November 16, 1984 (Tr. 554, 555, 558, Ex C3).

Gabossi only queried Upadhyay about his reference to "other companies" in paragraph 3 of his memorandum (Tr. 555, 556).

Gabossi also disagreed with the analysis of the engineering department that the arches were safe. Until the hearing he hadn't known that the arches had been investigated (Tr. 557).

Discussion

In this case of first impression the facts clearly establish that complainant, Joseph Gabossi, was fired because of his continuing and extensive conflict with mine management over the company's failure to coordinate underground mining activities. This conflict came about because the company's reporting structure placed underground mechanics under the jurisdiction of the maintenance supervisor. Safety concerns arose and Gabossi expressed his opposition to the company's procedures. He further attempted to have management alter its position and to, at least, coordinate such maintenance activities with the mine foreman.

Gabossi believed his authority to either control or at least coordinate with the underground mechanics arose from Section 34-24-101 of the Colorado Revised Statutes. The section, in its pertinent part, provides the certified mine foreman (Gabossi was such a foreman) "shall have full charge of all inside workings and all persons employed therein."

Complainant's tenacity and concern for the safety of the miners are to be complimented.

However, the cornerstone of Section 105(c)(1) is that a miner is engaged in a protected activity when he has "filed or made a complaint under or related to this Act." Four separate references are made in the section to the protection afforded "by this Act".

The legislative history reflects that Congress intended the scope of protected activities be broadly interpreted. But, again the history also shows the Congressional view that such protected activities are within the framework of the federal Act.

The Congressional view is noted in Senate Report No. 95-181. It states in part, that:

The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection under Section 104(f) or the participation in mine inspections under Section 104(e), but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which

are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

The listing of protected rights contained in section 106(c)(1) is intended to be illustrative and not exclusive. The wording of section 106(c) is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section 106(c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

Senate Report No. 181, 95th Cong., 1st Sess. 14 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 623, 624 "Legis.Hist."

Neither the federal Act nor MSHA regulations contain a provision on a mine foreman's duties corresponding to Section 32Ä24Ä101(2), CRS. Accordingly, the complaints lodged herein by the mine foreman could not be an activity "under or related to" the federal Act. In sum, while Gabossi's complaints concerning the company's reporting structure were safety related they were not an activity protected under the federal Act.

There are, however, several instances where Gabossi's activities were protected. These involve the complaints about ventilation, the EIMCO brakes, the arches, his concern about the falsification of electrical logs and finally his contacting the Colorado Division of Mines and his presentation of a letter from the Colorado Bureau of Mines to the mine manager.

The first three items involved a protected activity but the company took no adverse action and, in fact, remedied the problems. The last two items occurred after November 9, 1984. But on October 1, 1984 the mine manager had decided to fire Gabossi. The company had refused him permission at that time. Subsequently, however, when Beasley resigned the manager again sought and secured the company's permission to terminate Gabossi. Beasley's resignation again involved the long standing conflict over the company's reporting system. I conclude that the company was motivated by Gabossi's unprotected activity and would have taken the adverse action for such unprotected activity alone. In short, his unprotected activity, insofar as the federal Act is concerned, was his continual clash with management over the reporting structure.

Evidentiary Ruling

During the hearing the judge sustained respondent's objection and excluded evidence of Burnett's testimony from a prior hearing, heard by Commission Judge John A. Carlson (Tr. 512-520, 527, 531, 552).

The evidence, even if received, would not affect the result in this case, because the principals, Gabossi and Upadhyay, clearly establish the focus of the case. Accordingly, it is not necessary to rule on Complainant's offer of proof.

Conclusions of Law

Based on the entire record and the factual findings made in this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Complainant did not prove he was discriminated against in violation of Section 105(c).
3. Respondent did not discriminate against complainant in violation of the Act.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

The complaint herein is dismissed.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

- 1 The relevant Colorado statute provides as follows:
 34-24-101. Mine foreman's eligibility duties - reciprocity.
- (1) The owner shall employ a certified mine foreman for every mine, except those mines in which no more than three persons including the owner are employed or work underground in which case one man must be at least of the status of a certified shot firer.
 - (2) The mine foreman shall have full charge of all inside workings and of all persons employed therein, in order that all the provisions of articles 20 to 30 of this title, insofar as they relate to his duties, shall be complied with, and so that the regulations prescribed for each class of workmen under his charge shall be carried out in the strictest manner possible.
 - (3)(a) Persons certified as eligible to hold positions of mine foreman, assistant mine foreman, mine electrician, strip pit foreman, assistant strip pit foreman, or fire boss by

authority of any state in the United States producing coal shall be eligible to act in their respective classes in the state of Colorado. Recognition of a certificate from another state shall be given only where such state issuing such certificate shall make eligible for employment in such state all persons holding certificates of competency issued by the board of examiners of Colorado, and if the certificates of competency have been issued after an examination, which in the opinion of the board of examiners of Colorado shall be the practical equivalent of the of the examination provided for in articles 20 to 30 of this title.

(b) When approved by the board of examiners, any person holding a certificate issued by any other state may act in the capacity for which such certificate is issued in any mine in this state only until the next regular examination held by the board of examiners for Colorado certification.

(4) No certified mine foreman, assistant mine foreman, mine electrician, strip pit foreman, assistant strip pit foreman, or fire boss need be employed in mines where no more than three persons, including the owner, are employed or work underground.

Ex. C1

2 In cross examination the witness indicated Gabossi never complained directly to him about the work of Fritz and Langford (Tr. 369, 372).