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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
GEORGE A. JONES,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 85-131-DM
MD 85-11

Dee Gold Mine

v.

DEE GOLD MINING COMPANY,
RESPONDENT

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the
Solicitor, U.S. Department of Labor,
San Francisco, California, for Complainant;
Jay W. Luther, Esq., Chickering & Gregory,
San Francisco, California, for Respondent.

Before: Judge Lasher

This proceeding involves a discrimination complaint brought by the Secretary of Labor on behalf of George A. Jones (herein "Complainant"). The Secretary's complaint, as amended, alleges that Complainant was discharged (laid off) for engaging in protected safety activities in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (1982). (FOOTNOTE 1)

The Secretary contends that Complainant Jones, a maintenance employee in Respondent's ball mill at the time of his discharge, was terminated because of protected safety activities occurring primarily in the last month of his employment. Respondent contends that as a result of a "Feasibility Capital Cost Study" (herein referred to as the Kilburn Report) a reduction-in-force (herein RIF and layoff) was called for and planned, and Complainant, because of inferior work performance ("slow workmanship", "productivity" and other problems) was one of two

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employees who were properly laid off in the RIF to bring the mill maintenance crew down from a complement of 6 employees to 4 as called for by the Kilburn Report (IIIÄT. 25Ä32).

Untimely Filing of the Secretary's Complaint. In raising this threshold issue, Respondent contends that there was "a delay of 5 months beyond the statutory maximum."

A chronology of most pertinent events was the subject of a stipulation between the parties (Court Ex. 1; IÄT. 42Ä45). Based thereon and other evidence the following sequence is found to have occurred.

October 11, 1984 Complainant was terminated (IÄT. 45)

October 12, 1984 Complainant filed "an informal complaint" with MSHA. Although not critical to this issue, I find that this filing complies with the 60 day filing requirement for individual miners contained in section 105(c) of the Act, even though such complaint is not filed on a particular standard form provided by the Secretary of Labor. November 13, 1984 Complainant filed a "formal complaint" with MSHA on an MSHA form. December 5, 1984 The Secretary (MSHA) commenced its investigation of the complaint. April 24, 1985 The Secretary's written determination that a violation occurred was issued. July 1, 1985 The Secretary's Complaint was filedÄaccording to the date stamp thereof in the official Commission file folder. The parties' stipulation that such was filed on or about June 25, 1985, is rejected in view of the more precise information reflected in the file.

It is clear that Complainant Jones was prompt with the filing of his complaint with the Secretary. Respondent's bone of contention is the Secretary's delay. In Secretary v. 4ÄÄ Coal Company, Inc., 8 FMSHRC 905 (1986), the Commission delineated the various obligations of the Secretary in processing discrimination complaints:

"The Mine Act requires the Secretary to proceed with expedition in investigating and prosecuting a miner's discrimination complaint. The Secretary is required to act within the following time frames: (1) The investigation of a miner's complaint "shall commence within 15 days" of receipt of the miner's complaint (30 U.S.C. 815(c)(2)); (2) the

Secretary "shall notify" the miner, in writing, of his determination as to whether a violation of section 105(c)(1) of the Mine Act has occurred "[w]ithin 90 days" of receipt of the miner's complaint (30 U.S.C. 815(c)(3)); and (3) if the Secretary determines that there has been a violation of the Act, "he shall immediately file a complaint with the Commission." 30 U.S.C. 815(c)(2). (Emphasis added throughout.) Finally, section 105(c)(3) of the Act specifically states, "Proceedings under this section shall be expedited by the Secretary and the Commission." 30 U.S.C. 815(c)(3).

While the language of section 105(c) leaves no doubt that Congress intended these directives to be followed by the Secretary, the pertinent legislative history nevertheless indicates that these time frames are not jurisdictional "

Related passages of legislative history make equally clear, however, that Congress was well aware of the due process problems that may be caused by the prosecution of stale claims. See Legis.Hist. at 624 (discussion of 60-day time limit for the filing of miner's discrimination complaint with the Secretary). The fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend against the claim.

Accordingly, we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission "immediately" thereafter—i.e., within 30 days of his determination that a violation of section 105(c)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay.

"Applying these principles to the present record, there is no question that the Secretary seriously delayed in filing the complaint. Nevertheless, the record before the judge did not establish that the Secretary's delay prejudiced 4AA. In the absence of this requisite foundation, the judge erred in granting 4AA's motion to dismiss."

Respondent's basis for dismissal of the complaint is set forth at pages 38 and 39 of its post-hearing brief:

"In a great many cases, a delay of 5 months beyond the statutory maximum would not cause prejudice. This case, however, is different because of the critical nature of precise times.

Thus, among the facts that have been helpful to Dee Gold's defense have been the time of the decision to layoff Mr. Jones;

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the times at which certain incidents, particularly the hydrostroke feeder and AR incidents were committed by Mr. Jones in relation to the time that Mr. Nameth was placed in charge of mill maintenance; the time at which it was decided that layoffs would occur at all; the time at which the ball mill was in the process of being repaired; (to a minor extent) the time at which Mr. Nameth announced at the meeting of October 9 that layoffs were to occur; and the dates upon which the events in the Jensen memorandum took place. These are likely to be contested in one fashion or another in the Government's brief, due to the occasionally ambiguous and uncertain testimony of various witnesses on the subject of precise dates, or timing. Where all the pertinent dates in a case occur in a relatively short period, it is much easier for prejudice to occur, and Respondent would submit that it has occurred in this case. Had this Complaint been brought 4 to 6 months earlier, recollections could have been more quickly canvassed, and a better record prepared."

It is concluded that Respondent has not established that the Secretary's delay prejudicially deprived it of a meaningful opportunity to defend itself in this matter. There is no allegation of any specific prejudice it sustained in pretrial preparation or in the trial of this matter. The general allegation that the memory of witnesses may have been impaired by the delay is insufficient to meet the burden of establishing a material legal prejudice; there is no articulation of the process by which Respondent was prejudiced. It is also noted that the delay of approximately 5 1/2 months here is significantly less than that involved in *4AA Coal Company, Inc., supra*. There being no basis in argument or in the record to conclude that Respondent was materially prejudiced, its contention that the complaint should be dismissed for untimely filing is rejected. It should finally be mentioned that (1) a considerable portion of the time which elapsed between the allegedly discriminatory act and trial was accounted for by the extensive pre-trial procedures and settlement negotiations engaged in by the parties, and (2) Respondent, as will be shown within, on the day it laid off Complainant was put on notice of possible litigation and began taking steps to prepare therefor (See Exs. JÄ2 and JÄ3).

General Matters

Respondent, Dee Gold Mining Company, was at all material times a Nevada partnership engaged in gold and silver mining (IIIÄT. 61).

Complainant, age 34 at the time of hearing, commenced employment with Respondent on March 26, 1984 (Ex. RÄ2), as a mill maintenance mechanic (IÄT. 69, 73, 75). His immediate supervisor was Allen "Al" Jensen, mill maintenance foreman (IÄT. 70). Some of Complainant's basic duties were repair, fabrication, welding, pipefitting, crusher repair and pump repair (IÄT. 77, 82). Various of these duties were performed on or about mills near the mine which separated the gold ore from waste material.

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Complainant was laid off at the end of his day shift on the afternoon of Friday October 11, 1984, the last day of his work week (IÄT. 105, 106; IIIÄT. 114Ä116, 156). Thus, the total term of Complainant's employment with Respondent was less than seven months.

Sometime in May or June of 1984 Complainant received a written evaluation from Al Jensen rating him as excellent in every category (IÄT. 80Ä81). (FOOTNOTE 2) He received no other ratings prior to his layoff.

While Complainant's work performance was commendable in the beginning, it thereafter deteriorated. A decline in his speed and attitude was noted by his immediate supervisor, Jensen, following management's refusal to grant the mill maintenance crew's request for a raise (IIIÄT. 132Ä134).

With respect to Complainant's attitude, Jensen testified that: "he would throw things, get a little bit angry about not having something to work with." Jensen also noted that Complainant complained about changes in the work schedule about this time, since he was building a house and that his hours began to drop. The records on overtime show that the high point on Complainant's overtime occurred in July, with 40 hours of overtime, and dropped to half that in both August and September. (See Exhibit RÄ2.) By contrast, during the same period Ingle worked 66 hours of overtime in July, 56 hours of overtime in August and 71 hours of overtime in September.

Mr. Jensen, following Complainant's termination, and in accordance with usual procedures, filled out a Dee Gold standard Payroll Change Notice Form, Joint Exhibit 1, which reflected his views on Complainant's ability as of the date that he filled it out, October 16, 1984. Complainant's "conduct" and "production" were listed as "poor," while his "initiative" was listed as only "fair." There were no "excellents" in the rating.

In the summer of 1984, the mill maintenance crew (FOOTNOTE 3) consisted of Complainant, Wayne Overholser, Joseph P. Timko, Dick Eisenbarth, Mike Ingle and Mitch Geyer. All but Geyer were "mill maintenance mechanics". The sixth mill maintenance employee, mechanic Wayne Overholser, worked for only part of the summer of 1984, before he transferred to the truck shop around September 1, 1984 (IIÄT. 21, 88, 122Ä124, 136Ä138; IIIÄT. 15, 42-43, 66). Another employee, Kenneth Kohles, was promoted to and began working in mill maintenance, on or about September 1, 1984 (Ex.

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JÄ8) before the layoffs (IIÄT. 110, 152; IIIÄT. 44, 65, 163Ä167). (FOOTNOTE 4)

Dick Eisenbarth and Joseph Timko were hired subsequent to ComplainantÄTimko in June and Eisenbarth in July 1984 (IÄT. 82). Ingles was hired before ComplainantÄon October 26, 1983 (IIÄT. 79); Geyer was hired before Complainant alsoÄon February 6, 1984, but as a "helper" or laborer (IIÄT. 122); Geyer became a mill maintenance employee in August 1984 (IIÄT. 125). Timko commenced his employment with Respondent on June 11, 1984. Mr. Timko was elected mill maintenance safety representative (spokesman) sometime during the period JulyÄSeptember 1984 (IÄT. 124Ä126; IIÄT. 141). Certain of Respondent's management was aware he held this position (IÄT. 125Ä126). Mr. Timko was laid off on October 9, 1984 (IIIÄT. 109) shortly after a meeting on the same dateÄwhich was called to discuss complaints (including safety complaints)Äwas conducted with the mill maintenance crew by mill superintendent Steve Nameth. (FOOTNOTE 5) Mr. Timko, like Complainant, testified that he understood when he was hired that it was to be a permanent position (IÄT. 122). Crew member Mike Ingle who was favored over Complainant and Timko in the RIF, however, was told when he was hired that there might be a layoff "after things were going" (IIÄT. 99) and that Jensen told him he was "afraid to hire too many people because of the layoffs" (IIÄT. 99).

Protected Activities

At some indeterminate time prior to the start-up of the mill in September 1984, Complainant registered a verbal complaint to his immediate foreman, Al Jensen, concerning not having a grinding shield. Jensen replied that he would "put some on order" (IÄT. 78).

Complainant also complained (1) to Larry Turner, Safety Director, and Al Jensen, that he needed a respirator since he was working with cyanide acid and gasses (IÄT. 79, 86Ä87) on or about September 25, 1984 (IÄT. 87), and (2) about an acid plate (IÄT. 88Ä89).

Complainant engaged in various activities which Respondent was aware of in connection with his dissatisfaction with

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Respondent's so-called "lockout" procedure at the ball mill.
Complainant initially appraised this problem as follows:

"A The first time that I was informed that they had an emergency and Al Jensen said you've got to go into the mill and fix a liner. I said fine, where do you want me to put my lock on the motor? Al said well, we can't lock the motor out and I said why is that. He said they don't want to lock out the motor and you can lock out the air clutch but I didn't like the way to find the ball mill to lock out the air clutch as opposed to the locking out the motors. If the chair for a person who is working in the mill and air motor is still running there is a possibility the clutch could engage by itself, by outside means and the mill would turn.

Q. And what would happen if anyone was in the mill?

A. The person would be dead.

Q. What would kill him?

A. Fifty or sixty tons of steel balls that would crush him to death.

Q. What did Al Jensen say when you told him you thought the mill should be locked out?

A. He said he had to do what he was told.

Q. Who did he say told him that?

A. Nameth."
(IAT. 89-90).

Thereafter, on or about September 25, 1984, Complainant engaged in a conversation with Wayne Dillon, a safety representative of the State of Nevada who had been conducting a safety class at the mine, and Larry Turner, Respondent's Safety Director, in which Complainant asked Dillon if Respondent's mechanical lockout procedure was in compliance with State or MSHA regulations. Complainant's account of this conversation follows:

"Q. And what did Mr. Dillon say?

A. He said absolutely not.

Q. What did Mr. Turner say?

A. Turner didn't say anything.

Q. Did you make any complaints to Mr. Turner about the lock out procedure?

A. I told Mr. Turner Mr. Dillon is right here standing beside you and he said the mechanical lock out or air

clutch lock out is not acceptable.

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Q. What did Mr. Turner say in response to that?

A. He was dumbfounded; didn't say anything."
(IÄT. 91; IIÄT. 24Ä29).

Prior to October 1, 1984, Mr. Turner told Complainant that Bob Morley, an MSHA investigator said it was "okay for Dee Gold to have a mechanical lock out on the ball mill's air clutch." (IÄT. 92). After this, on October 1, Complainant went to MSHA's Reno, Nevada office and discussed the matter with Joe Frazier, supervisor of mine inspectors, who Complainant understood was Morley's "boss." Frazier, according to Complainant, stated:

"He said it was unacceptable to MSHA to have a mechanical lock out only the air clutch. He said it was a violation of standards. He read me the quotation in the regulation that all energized equipment will be de-energized before any worker will work on that equipment."

(IÄT. 93; See also IIÄT. 30)

On Wednesday morning, October 3, 1984, Complainant advised Mr. Turner that "a mechanical lock out was not acceptable to the Reno office." Mr. Turner indicated that he would look into it when he got the time (IÄT. 94, IIÄT. 32). Both on October 4 and October 5 Complainant asked Turner if he had called Reno and Turner hadn't (IIÄT. 33). Complainant advised Joe Timko, the miners' elected mill maintenance safety representative, that he would not go into the ball mill under existing conditions (IÄT. 95Ä96). He also confirmed to Al Jensen that he would not enter the ball mill (IÄT. 97). This constitutes a refusal to work because of an asserted unsafe condition.

Complainant gave this account of a final safety complaint which occurred on the morning of October 11, 1984, the afternoon of which he was laid off:

"Q. Between the time of the Timko lay off and your lay off did you make any safety complaints?

A. Yes, I did.

Q. When did you make any complaints?

A. I think I believe it was Thursday morning, the day I was fired.

Q. When were you fired?

A. I was fired that afternoon.

Q. What was the nature of your complaint?

A. First thing in the morning Al Jensen told me to move my welding table approximately ten feet to one side. I objected immediately.

Q. What was the basis for your objection?

A. Well it was a collection area. The floor had one foot rise of concrete and would collect water and slurry. I would have to be on the sump pump side of slurry side which was a danger of electrocution was always very dangerous.

Q. Who did you say you made a complaint too?

A. Al Jensen. He said this was what Steve Nameth wanted and this is what he is going to get.

Q. Who informed you of your lay off on the eleventh?

A. No one actually informed me of my lay off.

Q. How did you learn about it?

A. Al Jensen had me do an emergency pipefitting job. He set a pipefitting job where I had to put a water line into the feed chute of the rod mill. When I was all done with this job I went back to put time on my time card and my time card was not in the slot. I went to Al Jensen and said, well, where is my time card. I asked and he said I could tell you in an hour and I asked him if I was laid off.

Q. What did you then?

A. I went into Steve Nameth's office.

Q. What did you say to him?

A. Said I am the least productive employee? He said I am.

Q. What did you say?

A. I said I am going to fight it even with my record and evaluations I have in my record I am still not the least productive employee.

Q. Did you say on what basis?

A. No. I just said I am going to fight it." (FOOTNOTE 6)
(IAT. 106-107)

It is thus clear in the record and found here that Complainant engaged in various safety activities which in the abstract were of a nature sufficient to invoke the protection of the Act. Respondent for the most part concedes, and the record

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in any event establishes, that Respondent's management were aware of these various activities prior to Complainant's layoff on October 11, 1984.

The record, however, also shows that none of Complainant's safety complaints were received by his foreman or other of management's personnel with overt resentment, hostility or other discernible angry or anti-safety reaction. Also, during the summer of 1984, all the mill maintenance crew members were making complaints (IÄT. 157; IIÄT. 56, 88, 128, 149). No one seemed to be making more complaints than any other (IIÄT. 88, 128, 140, 149). Furthermore, all of the mill maintenance crew refused to enter the ball mill with the motor running (IIÄT. 141, 157, 161).

The October 9 Meeting.

After a rumor circulated that Mill Superintendent Steven J. Nameth was to issue a company policy that the air clutch lock out would be sufficient and all employees would abide by such policy (IÄT. 97, 98), Complainant told Timko that "we should have a meeting" with Arthur J. Schwandt, General Manager for the project and Nameth's supervisor (IÄT. 98). Other maintenance employees asked Al Jensen for such a meeting (IIÄT. 89).

The meeting was held sometime between 9 a.m. and 11:30 a.m. in Steve Nameth's office (IÄT. 99, 141; IIIÄT. 101). The mill maintenance crew at that time consisted of Complainant, Joseph P. Timko, Dick Eisenbarth, Mike Ingle, Mitch Geyer and as previously noted, Kenneth Kohles (IÄT. 99, 103, 141-142; IIÄT. 88, 162; IIIÄT. 65, 166-167).

Joseph Timko, the safety representative, considered calling a meeting with Al Schwandt but did not do so after he learned of the "very close" friendship between Schwandt and Nameth (IÄT. 136-137). The meeting in any event was called by Nameth after he was told by foreman Al Jensen that the men wanted a meeting with Schwandt to discuss "complaints" (IIÄT. 98-100; IIIÄT. 99, 102). Nameth reported the request to Schwandt who told Nameth "he was busy" and told Nameth to conduct the meeting (IIIÄT. 100).

The meeting was held in Nameth's office (IIIÄT. 101) and was attended by Nameth, Al Jensen, Complainant, Timko, Ingle and Eisenbarth. Mitch Geyer and Kohles did not attend the meeting (IIÄT. 129; IIIÄT. 100).

At the beginning of the meeting, Complainant said something to the effect that the men would like Art Schwandt present at the meeting (IIÄT. 91; IIIÄT. 135) and Steve Nameth indicated that Schwandt would not be present but that he (Nameth) would give Schwandt all the pertinent information from the meeting. Nameth then opened up the discussion and Timko raised the subject of pay raises (IIÄT. 36-37). Thereafter, work procedures and non-safety subject matters were brought up and discussed (IÄT. 100; IIÄT. 37-42, 90; IIIÄT. 77).

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Thereafter, either Complainant or Timko, probably Complainant, raised the question of the lockout procedure (IIÄT. 90; IIIÄT. 135).

Those in attendance at this meeting gave differing accounts of it at the hearing. With the exception of Complainant, most of their remembrances of it were sketchy, sometimes remarkably contradictory, and for the most part lacking in detail. Other than Complainant's version the most inclusive account—with one inaccuracy as to when the "lockout" discussion occurred—was that of Nameth:

"The way I remember it, Jones started to speak. I interrupted and said I have an announcement to make. I said we were going to have a lay off that week. Somebody spoke up and said, who is going to be laid off. I said the least productive employee. They wanted names or somebody said who and I don't think I mentioned the name. Then Jones started complaining about various things in the mill. I'll see if I can remember some of them. He complained about wage rates, he complained about work schedules, he complained about a job he had done in the rock mill making some kind of complaint. If I had done it his way we could have made it in four days but my way took 16 days. He complained about the use of the thickness of hard plates we were using for wear plates and of course he complained about the ball mill and rock mill lockout procedure. Before he got to that, Jones—not Jones, I'm sorry—Mr. Timko spoke up rebuking Jones and saying what's all this about. I thought we were going to talk about lockout procedures and well then, Jones started talking about lockout procedure. He said it was not safe. It was inadequate. We checked with Bob Morley and Bob Morley said it was safe and we were legal. Jones then pulled out a card, I've been to see Bob Morley's boss. He mentioned the man's name, I think some district director and I think his name was Frazier and Frazier said it is not acceptable. I said I don't know anything about that. It was Bob Morley who said it was acceptable. Jones said here's his card, call him right now and I said I would look into it. He said—kept repeating, call him right now, call him right now. He kept repeating and I said if you have nothing further we better go back to work and the meeting broke up about that time.

Q. Do you recall anything else about that meeting? Let me withdraw that question. Was there a specific number of people as being identified as people who would be laid off at the meeting?

A. No.

Q. I couldn't quite hear when you were speaking and did you say it was going to be the least productive

employee or least productive employees going to be laid
off?

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A. It was plural.

Q. Did the lay off in fact take place that day?

A. Yes.

Q. Who was laid off that day?

A. Joe Timko.

Q. Was anybody laid off later that week?

A. Yes, George Jones was laid off two days later.

Q. Why was it Timko was laid off first and then Jones?

A. Well, the work Jones was on was not critical to the operation of the plant. Jones was working on a pipeline that was critical." (IIIÄT. 77Ä79).

Nameth's version of the October 9 meeting is at variance with the accounts of all others as to the time when he made the announcement that there would be layoffs. According to Nameth, he interrupted Complainant at the beginning of the meeting to say he had an announcement to make, i.e., that there would be a layoff. Nameth's rendition appears faulty in this one respect and I find that the layoff announcement did occur after the "lockout" discussion (IÄT. 103; IIIÄT. 155). Nevertheless, in all other respects, Nameth's recollection of the October 9 meeting appears more lucid and detailed than the others and not being in great variance from Complainant's version it is accepted.

Before the "lockout" discussion, two other safety matters were discussed, "face shields" and "hooks welded on a handrail" (IÄT. 100Ä101; IIIÄT. 136). It is clear, however, that subjects other than safety matters were also brought up, such as pay raises, wage rates, work schedules, and work matters such as plate welds, etc. (IIÄT. 36, 38Ä42; IIIÄT. 103, 136).

As noted above it appears that Complainant brought up the lockout procedure issue, saying it was not safe. Nameth replied that MSHA Inspector Bob Morley had said Respondent's lockout method was safe at which point Complainant produced a business card from his pocket and said he had gone to Morley's bossÄFrazierÄwho said it was not safe. Nameth said he was not aware of that (IIIÄT. 103Ä104). Complainant said "here's his card, call him right now." Nameth said he would look into it and Complainant kept repeating "Here's his card, call him right now." According to Nameth, Respondent's safety director thereafter contacted Frazier and after some procedural processing MSHA determined Respondent's method was unsafe and that Respondent had to lock out the motor (IIIÄT. 104Ä105).

Following the meeting, Nameth reported to Schwandt. Nameth testified:

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"A. Immediately after the meeting I went to Mr. Schwandt's office and I stated that we could not terminate these people now as we had previously planned and he said why not and I said because they have gone to MSHA.

Q. What was said then?

A. He said we had planned to lay these people off before they went to MSHA so let's go ahead with the reduction in force." (IIIÄT.89).

Schwandt confirmed Nameth's account of this conversation (IIIÄT. 36).

On October 9 after discussing the matter with Schwandt, Nameth checked with Al Jensen to "find out what jobs Jones and Timko were on". Nameth determined that Timko's job was not critical to the operation to be completed that day and that the job Complainant Jones was on was critical. He decided to let Timko go that day and to let Complainant go at the end of his work week on October 11 (IIIÄT. 110, 116).

Later in the afternoon of October 9, 1984, Nameth told Jensen that Timko was to be terminated that day. Nameth was not present when Timko was told by Jensen he was to be laid off (IIIÄT. 109Ä114).

Following the layoffs (IIIÄT. 139Ä140), Nameth asked Jensen to prepare a memorandum (Ex. JÄ2) with respect to Jones and Timko which Nameth testified "was intended to be seen by myself and Mr. Schwandt in case we had problems as we are having right now" (IIIÄT. 80) and in anticipation of future litigation (IIIÄT. 95). Schwandt also asked Nameth to prepare such a memo to describe the incidents that led Nameth to believe Complainant Jones and Timko should be discharged (Ex. JÄ3; IIIÄT. 80Ä81).

Respondent's Position.

Prior to the opening of the mine an engineering firm (Kilburn) prepared an authentication of Respondent's preliminary capital and operating budgets entitled the Kilburn Feasibility Capital Cost Study and, as previously noted, referred to herein as the Kilburn Report (IIIÄT. 23).

Excerpts from this Report were introduced into evidence as Ex. RÄ1. Such reflect that a total crew of four, 2 mill maintenance mechanics and two helpers, were contemplated as the "proper number" for the mill when its construction was completed and it came under "operating conditions." (IIIÄT. 23Ä25, 135) More mill maintenance employees were needed and hired during the period prior to the time the mill began operating (IIIÄT. 26, 31) in approximately September 1984 (IÄT. 76).

Sometime around the end of August 1984, shortly after the time Steve Nameth took over the supervision of the mill

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maintenance function, the Mine General Manager, Arthur J. Schwandt, discussed with him the size of the mill maintenance crew with the conclusion that the crew size should be four with the possibility that they might get by with less and that two should be laid off (IIIÄT. 26Ä29, 30, 31Ä34, 42, 90). In a meeting in mid-September between Schwandt and Nameth it was decided that Timko and Complainant would be the ones who would be laid off in the reduction-in-force (IIIÄT. 29, 31Ä33, 34, 47), the time of which would be contingent on the mill's "operation" and was anticipated to be "around" the first week of October 1984 (IIIÄT. 48, 50Ä51). (FOOTNOTE 7) Al Jensen was in agreement that Timko and Complainant were the two who should be laid off (IIIÄT. 80).

In this connection, Jensen, who himself had been laid off and was not employed by Respondent at the time of the hearing, testified:

"Q. In your view who were the least productive workers of the group at the time of his determination?

A. I had three, George Jones, Joe Timko and Mike Ingle.

Q. In ranking among those three who would you have laid off?

A. If I had to do it because George and Joe because Mike Ingle was senior of the two.

Q. Now, inÄwhy was it you regarded Mr. Jones as one of the least productive in the unit?

A. I think it had to do a lotÄseemed like he slowed down, you couldn't prove this but it seemed like he had slowed down an awful lot in his work; his temperament had been very, very badÄcussing, throwing things around.

Q. What was the reason that you gave him a poor conduct in the general payroll change notice form?

A. Temper.

Q. Jones?

A. Oh, Jones. It was temper, getting mad at any little thing." (emphasis added) (IIIÄT. 138)

After he took charge of the mill maintenance crew in August 1984, Mill Superintendent Nameth told the foreman, Al Jensen, to tell the crew that "we were overstaffed and we were going to have to cut two or three people off." He also told Jensen to "keep a

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close eye" so that they would get "rid of the least productive people". (IIIÄT. 67). (FOOTNOTE 8) Around the time Overholser transferred out of the mill maintenance crew (September 1, 1984), Jensen was asked by the crew about the transfer and they told him they had "a lot of work". Jensen told them that he "had been told we already still have too many people now." (IIIÄT. 134, 148). Complainant Jones was present at this time (IIIÄT. 134Ä135).

The decision to terminate Complainant as one of the two to be laid off in the reduction-in-force was made by Mill Superintendent Nameth with the approval of General Manager Arthur J. Schwandt, in late August 1984 (IIIÄT. 90, 96, 117Ä119, 122Ä124, 156). The actual date it was determined that Complainant would be laid off on October 11, 1984, was October 9, 1984 (IIIÄT. 122). At the time of the layoffs of Complainant and Timko on October 9 and 11, 1984, respectively, Mr. Nameth was the person in management's hierarchy who effectively decided to hire, discharge and layoff employees in the mill maintenance unit (IIIÄT. 60, 96).

In his testimony, Nameth described at length the reasons for laying off Complainant Jones (and Timko) and the process by which this decision was reached as follows:

"A. The AR plate where Jones put in more than was necessary?

A. Yes.

Q. That would have been about the twenty-seventh or twenty-eighth of August.

Q. How important was that particular incident to you in reaching a conclusion?

A. The importance was that it was becoming apparent that Jones wouldn't follow instructions. Also important in the fact he wasted a lot of expensive AR plate.

Q. When did the incident with the two by four pieces occur?

A. Sometime in July, early August.

Q. And how did you hear about that?

A. The carpenter involved told me about it. The carpenter was working for me. I believe at the time Jones was probably reporting to Bernie Carter through Jensen.

Q. Were you in a position at that point to take any disciplinary action?

A. I didn't. I found out about it a day or so after it happened." (IIIÄT. 85Ä86).

"A. He was apparently deliberately slowing down. He was slow getting to the job. He always complained about stuff he had to work with." (IIIÄT. 87).

"Did you have authority to reduce the force on your own authority?

A. Probably, I am sure I would have discussed it with Mr. Schwandt.

Q. Did you discuss it with Mr. Schwandt?

A. Yes, I did.

Q. When was that?

A. The function was turned over to me on the twenty-fifth. The following Monday would have been the twenty-seventh and I wouldÄI'm sure I would have met with him on the twenty-seventh.

Q. What was said during that meeting?

A. I mentioned the fact that we had too many people in that department and told him of the other operations that I had been on. He mentioned that there was some kind of study by Kilburn that indicated we were supposed to have four mechanics after the operation started up.

Q. Were any people discussed as candidates for a reduction in force?

A. Yes.

Q. Who was discussed?

A. Joe Timko and George Jones.

Q. What was said about them by each of you?

A. I mentioned the fact they looked like they were

dragging their feet. They weren't giving us an honest days work.

There were several incidents which showed this. I think the AI had an incident with George Jones on the cone crusher discharge chute where I told Al Jensen to put the discharge chute with no instructions (sic) because we were going to encounter a lot of clay and the chute should be without obstructions. George put the plate in there with protective obstructions and to protect the bolt heads. Somebody had to go back in there and cut them out. That added a lot of time to that job.

Q. Did you mention this to Mr. Schwandt?

A. I don't remember whether I did or not.

Q. I am just trying to find out what you mentioned to him during this meeting?

A. One of the things I mentioned to him, I could see crackers put in the plant, put in the chutes. They didn't put in wear plates and we had an incident with George Jones where what he was instructed to do was braze resistant plates. It's expensive. He had instructions to put in the hard plate to a certain length and he exceeded that and wanted it his own way AI don't understand that level and when I questioned George doesn't know to follow instructions. He likes to do things his own way.

Q. Did you tell that to Mr. Schwandt?

A. Yes, I did.

Q. Did you tell anything else to Mr. Schwandt concerning these two employees or either of them in this meeting you've just described?

A. You are talking about the meeting of the twenty-seventh?

Q. I am talking about the meeting of the week of August twenty-seventh.

A. Actual incidents, no, with the exception of the fact that both Jones and Timko were very slow getting away from the tool room. Where most of the other mechanics would be off in 10 or 15 minutes to their jobs, Jones and Timko very often would be there 30-35 minutes after we started the shift.

Q. Now, did Mr. Schwandt have anything to say with respect to either of those employees?

A. I think Mr. Schwandt made some comments about Joe Timko's work. I don't think he said anything about Mr. Jones.

Q. Do you recall whether he mentioned any particular

Incidents with Timko?

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A. He mentioned it everytime he noticed Mr. Timko that he wasÄI don't remember his exact words, but he wasÄbut that he was moving in slow motion.

Q. Do you recall whether he said anything else on some particular incident?

A. No, it was a long time back.

Q. Was there any decision made at that time to have a reduction in force? How did the meeting conclude?

A. There was no question at that time we were going to have a reduction in force. We had made a tentative decision that it would be Jones and Timko but I decided I would watch both of them and see if there was any change in attitude and behavior.

Q. There were no incidents that occurred that week with Mr. Jones?

A. Yes, there was an incident of the hydrostroke cylinder. Mr. Jones and Mr. Timko were both assigned to remove the hydrostroke cylinder because it had malfunctioned. We had to take it apart to where it had malfunctioned. It took Jones and Timko about eight hours to remove that and replace it. I felt that was much too long a time.

Q. Was that reported to Mr. Schwandt at anytime during the week?

A. Sometime during the week, yes. I think it wasÄmay have been Mr. Schwandt had walked by that job that particular day and observed some of it.

Q. And who was involved inÄwith that particular job?

A. Mr. Jones and Mr. Timko. Somebody said that Mike Ingle was there part of the time, but I don't recall seeing him.

(IIIÄT. 68Ä72)

Q. Did you have any subsequent meetings with Mr. Schwandt on the subject of the reduction in force?

A. Yes.

Q. When?

A. Sometime during the week of September 16th or 17. I believe 16thÄearly in the week.

Q. What was said during that meeting?

A. I walked in his office and told him I wanted to reduce these guys, let these guys go now.

Q. What did Mr. Schwandt say?

A. Mr. Schwandt said we still have a lot of work to do; don't cut your nose off to spite your face. Let's wait a few more weeks.

Q. Had there been any event that took place other than the hydrostroke cylinder that had brought you to that conclusion or what was it?

A. In the case of Mr. Jones I'm sorry, Mr. Timko, had done a job on me number four conveyor belt skirting. He had fabricated the skirting, it was all wrong, had to be redone. That was sometime during that period.

Q. What about Mr. Jones, did anything happen to him other than the hydrostroke cylinder incident?

A. No specific things I can remember except for the fact I observed them apparently working at a slow pace, getting away from the tool room late, having coffee breaks."

(IIIÄT. 68Ä73; See also IIIÄT. 117Ä118).

On cross-examination, Mr. Nameth reiterated his reasons for selecting Complainant and Timko as the two mill maintenance employees who should be laid off, and pointed out that his decision was made before the "lockout" matter arose:

Q. " as of the twenty-seventh, what in Mr. Jones conduct led you to conclude that he would be a candidate for favor to be reduced in force?

A. His general conduct about dragging his feet, taking a long time to leave the tool room to go to his job, the cone crusher charge chute incident that I describedÄthat was some of it.

Q. Now, how did you observe his general conduct the fact that it took him a long time to leave the tool shed? Were you standing there watching?

A. Their starting time was 6:30. I would come up to the mill area about that time. I noticed other mechanics were off on their jobs and Timko and Jones were still in that area gathering up tools, getting ready to beÄto go to a job.

Q. You didn't say anything to him?

A. I would deal with him through Mr. Jensen. I would complain to Mr. Jensen about it.

Q. Now you as of the twenty-seventh felt Mr. Jones' performance was unacceptable; is that correct?

A. Yes.

Q. You didn't feel it incumbent upon yourself to give him a chance to improve himself?

A. Before I took over from Bernie Carter, since I was going to have responsibility of that plant, I was out in the field quite often where Jones and Timko were working. I observed their work habits at that time but I wasn't directly responsible for them at that time. I formed conclusions. Even at that time I had suspicions, yes. I talked to Al about their performance and their performance did not improve from the day I took over. It seemed to get worse but it wasn't all that good up until that time.

Q. When did you learn that Mr. Jones had refused to enter the ball mill under the lockout procedure that you had instituted?

A. You look for an exact date?

Q. Approximately?

A. It would have been about the twentieth or twenty-first of September.

Q. And this was after you had already formed the conclusion that he would definitely be terminated?

A. I would think so, yes. (IIIÄT. 90Ä94).

Q. I believe you mentioned something about a two by four that Mr. Jones had thrown on the floor?

A. No, it wasn't one two by fourÄa carpenter was working at a table. He had cut a number of two by fours for a job that he was doing and Mr. Jones came along and asked him if he could have one or some of the two by fours and the carpenter said no, I need all that I've got. Mr. Jones in a fit of temper swept everything off the table.

Q. And did this help you to reach a conclusion that he should be terminated?

A. It didn't help Jones case any. (IIIÄT. 97)

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Q. There was other evidence of Mr. Jones sweeping two by fours on the floor?

A. No. There were other reports of Mr. Jones not being able to get along with some of the other people around there.

Q. Second hand reports?

A. Yes.

Q. But you never checked those out did you?

A. No, I didn't. (IIIÄT. 98).

CONCLUSIONS AND DISCUSSION

The Discrimination Formula.

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797Ä2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir., 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817Ä18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmatively defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936Ä38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195Ä96 (6th Cir.1983); Donovan v. Stafford Const., Co., 732 F.2d 954, 958Ä59 (D.C.Cir.1984) (specifically approving the Commission's PasulaÄRobinette test); and Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

In terms of the required prima facie case in discrimination, Complainant clearly established the first elements thereof, i.e. that he had engaged in protected safety activities and that Respondent's management was aware thereof prior to the time he was laid off.

Discriminatory Motivation

The first of the two salient issues posed here are whether the adverse action (layoff) taken by Respondent against Complainant was "in any part" motivated by Complainant's

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tected activities. Respondent contends that it was not so motivated in either laying off two of the mill maintenance crew or in selecting Complainant as one of the two to be laid off.

Respondent's second line of defense, the affirmative defense provided under the Commission's discrimination formula, then frames the second issue: Assuming arguendo that Respondent was in part motivated by Complainant's protected activities, was it also motivated by his unprotected activities and would it in any event have laid him off for his unprotected activities alone.

Under the 1977 Mine Safety Act, discriminatory motivation is not to be presumed but must be proved. *Simpson v. Kenta Energy, Inc. and Jackson*, 8 FMSHRC 1034, 1040 (1986). Complainant, in order to carry the burden of establishing discriminatory motivation, seeks to have an inference thereof drawn from various circumstantial factors. From gleaning and organizing these points from this difficult record and briefs, several are set out and discussed below. It is noted that three of these factors—which are found to lack significant merit—are listed in the amended complaint and constitute part of the foundation for Complainant's theory of discrimination.

(a) The Secretary argues that Complainant and Timko were shown in the record and characterized by Jensen (IIIÄT. 150) as the two biggest "complainers" and that these were the same two Respondent selected to lay off.

I construe this characterization by Jensen to at least include safety complaints as well as other work-related non-safety complaints. Nevertheless, various other factors take the edge off this particular argument. The other members of the mill maintenance crew also complained of safety and other matters, also refused to enter the ball mill to do repair work unless the motor was locked out, specifically complained about the lock out procedure, and had arguments ("discussions") with Nameth.

As far as Timko was concerned, Nameth denied (IIIÄT. 127), and it was not otherwise established, that he had knowledge that Timko had been elected the crew's "safety representative." I thus draw no carry-over inference that had it been established that Timko was discriminated against, such discriminatory intent should be attributed to Respondent's purposes in also laying off Complainant. It is noted (1) that the Secretary's discrimination case on behalf of Timko was settled and not litigated and (2) that the record in this matter does not independently contain sufficient evidence from which a determination can be made whether or not Timko was discriminated against, or more specifically, whether or not Respondent was discriminatorily motivated in laying off Timko.

Respondent credibly established good and sufficient reasons related to the work performance of Complainant for picking him to be one of the two to be laid off in accordance with the Kilburn

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Report's staffing plan after the construction phase was completed and the mill was operating.

(b) In the Amended Complaint, Complainant alleges that Nameth became irritable at the October 9 meeting after the "lock out" problem was raised and after it became apparent that Complainant had gone to the MSHA office in Reno and complained about Respondent's lock out procedure.

Nameth's demeanor at this meeting was the subject of numerous descriptions, conflicting even among Complainant's own witnesses, one of whom said that Nameth was irritable even when he came into the meeting (IIÄT. 90). After careful scrutiny of the record, I find no credible, probative evidence that Nameth's demeanor at the October 9 meeting was any different than his customary demeanor which the crew members described in such terms as "belligerent", "hostile," "irritable", "angry," etc. (IÄT. 81, 90, 93, 134, 151). I find no reliable evidence and I am unable to conclude that any irritability shown by Nameth during the October 9 meeting was traceable to or a reaction to the lock out discussion or the expression of safety complaints. The record demonstrates there is both consistency and reliability in (1) Respondent's position and the testimony of its various witnesses that the layoff decision was made between Schwandt and Nameth some two to three weeks prior to this meeting, and (2) the bases established by Respondent (heretofore discussed) for the layoff of two crew members and Complainant and Timko in particular.

(c) Another factor urged by Complainant for inferring discriminatory motivation is that there was no "advance notice" announcement, communication or other specific notification to the employees at any time that their employment was to be temporary or that there would be a layoff at a future time (Complainant's brief, p. 22).

Based on prior findings, I conclude that this contention has no merit and should not be considered part of any basis for inferring discriminatory motivation. Although Complainant testified that he was not advised at the time of hiring that the position was temporary, Ingle was so advised. Geyer testified that there was a layoff rumor going around which is consistent with Nameth's testimony that he told Jensen to tell the crew that a cut of two or three mill maintenance employees would have to be made. It is also consistent with Jensen's testimony that he told the crew that he "had been told that we already still have too many people." I do infer from this evidence that the crew was aware that a layoff was coming prior to the October 9 meeting in view of the small size of the crew and their poignant sensitivity to employment concerns shown in the record.

(d) Complainant alleges: "As justifications for the alleged early decision to terminate Jones and Timko, Nameth complained that Jones had wasted a lot of expensive AR plate and that Jones and Timko were slow in getting away from the tool room. In fact,

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Nameth complained that Jones and Timko would often remain from 30 to 35 minutes after the start of the shift (IIIÄT. 70). Both of these complaints involved the wasting of company assets (either money or time). It must be remembered that Jones and Timko, although marked for termination as of the end of August, were to remain on the job until sometime in October. It is inconceivable that a manager could observe employees wasting half an hour at the start of the shift, consider it important enough to be a factor in a decision to terminate the employees, and never complain or take any steps to see that it did not continue for the next six weeks of their employment." (Complainant's Brief p. 18).

As with many of Complainant's assertions, I find little merit in this contention. Nameth's failure to take direct disciplinary or corrective action himself is consistent with Respondent's intention of laying off employees in the near term. Also Nameth testified that he was "sure" that he expressed a complaint through Jensen about Complainant's and Timko's tardiness (IIIÄT. 30, 91, 93). It is also apparent that shortly thereafter in mid-September, Nameth asked Schwandt to trigger the layoff immediately (IIIÄT. 73). According to Nameth, whose testimony I find generally persuasive and reliable, Schwandt replied: " we still have a lot of work to do; don't cut your nose to spite your face. Let's wait a few more weeks." (IIIÄT. 73).

Had Complainant and Timko been punitively discharged for "wasting" company "time and money", this argument would have more strength. However, with a layoff planned in the foreseeable future, Nameth's actions are not inconsistent with Respondent's general position, nor are they seen as demonstrating a discriminatory frame-of-mind. By contrast, Complainant's work performance here is seen as providing a business justification for respondent's decision to select him for the layoff.

(e) Complainant argues that various work and staffing decisions by Respondent were not "consistent with a business need to reduce the number of maintenance employees." Various of these points which are frequently general and not particularly probative to begin with, are that:

(i) Kenny Kohles, an inexperienced 19-year old who had been hired as a janitor in May 1984, was promoted to the mill maintenance crew around September 1:

(ii) After the layoffs, the crew members who remained were required to work considerable overtime;

(iii) An outside contractor (Western General Contractors) was brought in to do maintenance work which could have been performed by employees of Dee Gold;

(iv) Complainant and Timko were the only two workers laid off in 1984.

The record reflects that Respondent did get by with two less mill maintenance employees after the layoffs and after the mill

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began operating; that the complement of 6 crew members prior to the mill start-up was reduced in accordance with Respondent's Kilburn Report staffing plan (IIIÄT. 25, 27, 32) which was conceived before Complainant (and Timko) were hired; that Kohles was brought in to replace Overholser who requested a transfer out of the crew because of "friction" and that such replacement kept the size of the crew constant until such time as the layoff was called for. Kohles, according to Schwandt, was a "very hard working young fellow" (IIIÄT. 43) and was "proficient in heavy equipment operation" (IIIÄT. 65).

Respondent also credibly explained that the reduction in its mill maintenance force was called for even though there was no reduction in other sections of the mine, and that such was due to the fact that "we had more people than we had budgeted for" (IIIÄT. 62). Respondent then established that it was "cheaper to pay a premium for" overtime than to have extra workers due to the cost of fringe benefits, such as health benefits (IIIÄT. 40, 41), and that the work performed by Western General Contractors was within the framework of its contract and not a diversion of work from the mill maintenance crew (IIÄT. 153; IIIÄT. 37Ä39).

(f) Complainant contends the after-the-fact written statements of Jensen (Ex. JÄ2) and Nameth (Ex. JÄ3) were prepared as part of a pretextual business justification for the layoff of Complainant and Timko. Here Complainant contends (Complainant's Brief, p. 24):

It is only after the (October 9) meeting, after the terminations and after Jones informs Nameth that he is going to fight his termination, that Jensen is instructed to write anything negative he can think of relating to the employment history of Jones and Timko. Likewise, the self-serving memorandum from Nameth to Schwandt only occurs after Jones informs Nameth that he is going to fight. This is almost a classic scenario of an ex post facto attempt to fabricate a factual justification for a prohibited action already taken."

There is no contentionÄin this argumentÄthat any of the deficiencies of Complainant and Timko contained in the written statements of Jensen and Nameth did not occur. The point sought to be made is that such were fabricated and after-the-fact of the layoffs and thus should be the basis for an inference of discriminatory intent of animus. The response to this contention appearing at page 14 of Respondent's brief is found to have merit.

"JÄ2 was not a routine document, rather one prepared for the purposes of the litigation. Specifically, it was prepared by Mr. Jensen pursuant to Mr. Nameth's request to list all of the problems that he, Jensen, had experienced with Messrs. Jones and Timko.

Mr. Schwandt asked Mr. Nameth to prepare, and to have Mr. Jensen prepare, memoranda justifying Mr. Jones' termination. This memorandum was intended entirely for the internal purposes of Deere Gold, and was not intended for distribution to third parties. The only reason the Government obtained it was because it asked for it in its discovery and it was dutifully produced. There is no suggestion in the record that the memorandum was relied upon by any parties in terminating Mr. Jones (although some of the incidents recounted in it are pertinent); indeed, it is perfectly plain that it was made following his termination."

I find nothing irregular, suspicious, or nefarious in the fact that Respondent attempted to make a record for its own purposes after the layoffs in anticipation of future litigation (IIIÄT. 54Ä57). Respondent effected no pretense that such statements were prepared prior to the layoffs. This contention is rejected.

At page 16 of its brief, Complainant expresses a related concern:

"There is no dispute that management was aware of Jones' safety complaints during the month of September. If, in fact, they had decided in September to terminate Jones and were, in fact, fearful of "repercussions" would it have not been logical to prepare these memoranda at the time the decision was made and while Jones was still employed? The timing of these memoranda is additional evidence that the allegations contained therein were pretextual justifications for decisions made in October which had nothing to do with ability or productivity."

The record firmly establishes that all members of the mill maintenance crew had expressed safety and other complaints during the summer of 1984 and were apparently not reluctant in doing so. It appearsÄand the probative evidence establishesÄthat Respondent had acquired real reason to anticipate litigation following both the October 9 meeting and the "I'll fight it" conversation between Nameth and Complainant after Complainant was laid off on October 11, 1984. The fact that Respondent did not "document" Complainant's deficiencies earlier is not illogical but it is consistent with the position Respondent has taken in this matter that Complainant was laid off in a longÄanticipated reduction-in-force, and was not punitively discharged for unsatisfactory work performance or other reasons. An inference that the timing of the obtaining of the Jensen and Nameth statements is indicative of "pretextual justifications" will not be drawn.

(g) As part of the mosaic from which Complainant urges the inference of discriminatory motivation be drawn, Complainant points out that approximately three months after he was hired, Complainant Jones received a written evaluation rating him

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"excellent" in all categories and he received no subsequent ratings or reprimands until his discharge.

Respondent credibly established and I have hereinabove found that Complainant's performance deteriorated thereafter in various respects. Respondent's evidence in this respect is reliable and persuasive and its determination to select Complainant for layoff is found to be reasonably attributable-by virtue of the preponderant probative evidence-to the justifications asserted and not to Complainant's protected activities.

(h) The most questionable circumstances raised by Complainant arose out of the October 9 meeting and from which Complainant maintains that the timing of the layoff announcements reflects anti-safety or retaliatory animus. Thus:

- a. the meeting was called for the purpose of discussing complaints, including safety complaints;
- b. safety complaints were indeed expressed at the meeting, including the "lock out" problem, and;
- c. after such, and Complainant's revelation that he had reported the lock out problem to MSHA, Nameth announced the layoffs;

(d) Nameth incorrectly testified that he announced the layoffs before the lock out issue and Complainant's revelation were brought up.

Respondent, however, credibly established that it had previously planned the layoffs to take place around the time the October (FOOTNOTE 9) meeting was held. Also, as previously shown, Complainant's belief and contention that Respondent had not previously planned, had no justification for, and had made no prior indication to the crew as to, the reduction in crew size was shown to be in error. Further, the quality of this record does not provide any reliable or persuasive basis to conclude (a) Nameth showed irritability at the meeting, or (b) even assuming that he did, that it was a reaction traceable to the voicing of any safety complaint or complaints.

Respondent, on the other hand, persuasively established that the layoffs were planned long before Complainant was hired and that there existed good and sufficient reason for the selection of Complainant for the reduction.⁹ In addition, as previously shown, various of the bases for Complainant's assertion of discriminatory motivation, tenuous to begin with, did not stand up well under scrutiny.

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In reaching the conclusion that the Secretary failed to establish that Complainant's layoff was discriminatorily motivated, consideration has been given to the fact that the record is barren with respect to ancillary or background factors which would reflect a disposition on the part of Respondent's management personnel, singularly or collectively, to engage in such conduct. A prior history of, or contemporary action indicating, antagonism or hostile reaction to the expression of safety complaints was not demonstrated. There was no evidence of retaliation against other employees who had expressed safety complaints either in the mill maintenance crew or other departments.

The record in this proceeding contains no admissions or other statements, oral or written, from the management personnel involved indicating an anti-safety reporting animus. Indeed, the record reflects that none of the employees were threatened or subjected to retaliation for expressing safety concerns or, in connection with the lock out issue, for not working inside the ball mill.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709 F.2d (D.C.Cir.1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398 (June 1984). The present record contains no direct evidence that Respondent was illegally motivated, nor does it support a reasonable inference of discriminatory intent.

Ultimate Conclusions.

It is concluded that Respondent's motivation in selecting Complainant for layoff was for his several unprotected activities and the business justifications asserted by its management personnel, Schwandt, Nameth and Jensen, and that such decision was justified. It is further found that the adverse action complained of (layoff) was not in part discriminatorily motivated. Thus, the Secretary failed to establish a prima facie case of discrimination under Section 105(c) of the Act.

Even assuming arguendo that it were established by a preponderance of the evidence that Complainant's discharge was motivated in part by his protected activities, Respondent showed by a clear preponderance of the reliable, probative evidence that it was motivated by Complainant's unprotected activities and that it would have taken the adverse action in any event for such. See Gravely v. Ranger Fuel Corp., 6 FMSHRC 799 (1984).

Ingle conceded he was told when he was hired that there might be layoffs after things got "going" (IIAT. 99). These two evidentiary items lend support to Respondent's position.

~FOOTNOTE_NINE

9 In Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982) the Commission pointed out: "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."