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ALFRED DANIELS V. SOUTHWESTERN CEMENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ALFRED DANIELS,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. LAKE 87-46-DM

v.

SOUTHWESTERN PORTLAND CEMENT
COMPANY,
RESPONDENT

DECISION

Appearances: Mr. William H. Kojola, Kansas City, Kansas,
for Complainant;
John J. Heron, Esq., Dayton, Ohio, for Respondent.

Before: Judge Fauver

Complainant brought this proceeding under section 105(c) of the Federal Mine Safety and Health Act of 1987, 30 C.F.R. 801 et seq., contending that he was suspended without pay because of safety complaints made to Respondent and to the Mine Safety and Health Administration, United States Department of Labor. Respondent contends that he was suspended for insubordination, and not because of safety complaints.

Based upon the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At the time of the hearing, Daniels was a general equipment operator for Southwestern. He had been employed by Southwestern for nine years.
2. At all relevant times, Daniels has been a member of Local Lodge D357, United Cement, Time, Gypsum and Allied Workers Union. The collective bargaining agreement between Southwestern and Local Lodge D357 expired on September 1, 1985. At that time, Southwestern implemented the terms and conditions of its final offer.
3. Southwestern, at all relevant times, has maintained published Plant Rules designed to promote safety and efficiency.

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Category I, Rule No. 2 of the Rules provides that insubordination is a dischargeable offense.

4. At some point after September 1, 1985, Daniels was appointed by the president of Local D357 "to turn in safety complaints" in his work area. Daniels was assigned to the North Annex area of Southwestern's plant "on and off" for about a year before his suspension on October 14, 1986.

5. Employee safety complaints and safety suggestions at Southwestern are normally submitted to Ted Weatherhead, Safety Consultant. Weatherhead investigates the complaint or suggestion and, if he deems it appropriate, he prepares a work order for corrective action. The necessary work to remedy the complaint or suggestion is then completed and the work order returned to Weatherhead with a notation that the work has been completed. If known, the initiating employee is then notified that the work has been completed.

6. The safety suggestion or complaint forms, known as safety inspection reports, may be filed with the Union or Company Safety Committee, or with the respective foreman. The employee does not have to include his or her name on the report. Southwestern's program is designed to encourage safety suggestions or complaints.

7. Since September 1, 1985, approximately 100 safety complaints have been filed at Southwestern's Fairborn plant. Daniels has filed more complaints than any other employee, but numerous other employees have also filed safety complaints and suggestions. Safety complaints are not kept in an employee's personnel file.

8. Many safety complaints by Daniels were responded to and remedied by Southwestern. In August 1986, eight work orders initiated by Daniels were completed by Southwestern.

9. At least 43 additional safety work orders were initiated by 19 other employees of Southwestern between June and September 1986, including 14 work orders initiated by David Gullett, Vice-President of Local D357. In each case, the work requested was completed by Southwestern.

10. There has been no contention or evidence that any other employee of Southwestern has been disciplined or otherwise discriminated against because of the filing of safety complaints or suggestions.

11. Although a new collective bargaining agreement has not been reached, Southwestern and Local D357 have established a

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Joint Safety and Health Committee for the purpose of jointly considering, inspecting, investigating and reviewing health and safety conditions and practices. The Committee also investigates accidents and recommends corrective measures to eliminate unhealthful or unsafe conditions. The Committee meets at least once a month.

12. Daniels has contacted OSHA or MSHA several times concerning perceived safety problems. In August of 1986, Daniels made a safety complaint to OSHA regarding alleged hazards at the North Annex. Daniels' name does not appear on the complaint filed with OSHA.

13. OSHA transferred the above complaint to MSHA. MSHA inspector Tom Kenney conducted an inspection of Southwestern's facility on September 8th, 1986. Four section 104(a) citations were issued during that inspection.

14. On or before December 4, 1986, 14 employees of Southwestern filed a written complaint with MSHA requesting an inspection of Southwestern because of alleged unsafe and hazardous conditions. A copy of this complaint was sent to Gary Leasure, Director of Industrial Relations for Southwestern. A citation was issued by MSHA on December 4, 1986. On December 11, 1986, a Company^ÄUnion Safety Committee meeting was held to discuss and attempt to resolve that citation. None of the employees signing that complaint were disciplined because of filing the complaint.

15. For several months before his suspension, Daniels had worked in the North Mill area of the plant. On October 13, 1986, Daniels returned to the North Annex. Glenn Parker was the foreman in charge of cleaning the silos in the North Annex. Parker had previously worked as a foreman at Southwestern's Odessa, Texas facility. On July 8, 1986, he began working as a shift supervisor in the North Annex, and became the foreman in charge of cleaning the silos in early September. Daniels had not worked for Parker before October 13, 1986, and as of that date Parker was unaware of any safety complaints filed by Daniels.

16. Between 7:00 and 7:30 a.m. on October 13, 1986, Parker assigned Daniels to work with the maintenance crew on the screw conveyor on the north side of the silos. Daniels accepted this assignment without questioning Parker's status as his foreman. Later in the morning, Parker began to discuss an absenteeism problem with a temporary employee, Steve Marshall. Daniels interrupted and erroneously informed Marshall that Marshall did not have anything to worry about and that temporary employees were not subject to the Company's point system for absenteeism.

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17. Later in the morning, Parker again talked with Marshall regarding Marshall's absenteeism. Once again, Daniels intervened and incorrectly informed the employee that the point system did not apply to temporary employees. At this time, Marshall left the area and returned to his job. Parker then approached Daniels and informed him that he wanted to work together with Daniels and "get off to a good start." He did this because Daniels had interfered with Parker's supervising of Marshall. Daniels then told Parker:

A. [By Parker] He let me know that he didn't have to cooperate with me; that he didn't have to work with me; that he was assigned to work for me, not with me. I told him we need to work together, because it will work better that way.

Q. Did he use any profanity to you?

A. Yes, he did.

Q. What did he say?

A. He told me he was an asshole and he was a mother-fucker, and he was all this stuff, and that he didn't have to work with me; and that he would not cooperate with me, and he would fuck with me as much as he could.

Q. What did you do then?

A. I tried to explain the problem that we had and get it straightened out, and I wanted to work things out where we could work together and wouldn't have to be at each other's throat all the time. To no avail, he wasn't accepting it. He brought it up at that time that he didn't know who his supervisor was. We talked rather loudly I would say.
[Tr. 131, 132.]

18. The only other individual present at the time of this conversation was Tom Anderson, who is a bulk loader at Southwestern and a union member. Anderson was on his way to the pump room when he ran into Parker and Daniels. Anderson's testimony and recollection of the conversation between Parker and Daniels is entirely consistent with that of Parker.

19. After this conversation, Parker approached Roy Garman, with Daniels, concerning Daniels's allegation that he did not

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know who his supervisor was. Garman, who was foreman of the pack house and Daniels' previous supervisor, informed Daniels that Daniels was working for Parker.

20. At no time during his heated conversation with Parker did Daniels raise a safety issue with Parker. Parker had no knowledge of Daniels' prior safety complaints. Shortly after their exchange, Daniels threatened Parker with filing an unfair labor practice charge because temporary employees were performing Daniels' job of pumping cement. Parker indicated that he would check on this matter.

21. Parker then met briefly with Gary Leasure, Director of Industrial Relations, and Ted Stute, Plant Manager. Stute told Parker to return Daniels to his job of pumping cement, Parker did so. No unfair labor practice charge was filed about this issue.

22. During his meeting with Leasure and Stute, Parker told Leasure and Stute about Daniels' interference with Parker's supervision of Marshall and Daniels' abusive language towards Parker. Because Leasure and Stute were going to a meeting, Leasure told Parker that they would discuss the matter later that day. Later that day, Leasure asked Parker to think about the events overnight and meet with Leasure the first thing in the morning, on October 14, 1986.

23. At 8:00 a.m. on October 14, 1986, Parker met with Leasure and Garman. Parker described in detail what Daniels had said and done on October 13th. At that time, Leasure prepared a typed statement of the events as described by Parker. Parker indicated that he thought disciplinary action should be taken in accordance with plant rules. Following Parker's comments and Leasure's review of Daniels' personnel file, Leasure made the decision to suspend Daniels pending discharge.

24. On October 14, 1986, at about 9:30 a.m., Daniels was suspended pending discharge pursuant to Category I, Rule No. 2 of Southwestern's Plant Rules specifying insubordination as a dischargeable offense and pursuant to the management rights clause of the implemented contract authorizing discipline for just cause.

25. At the time the decision was made, on October 14, 1986, to suspend Daniels pending discharge, Leasure and Parker were unaware that MSHA's inspection of Southwestern in September was the result of an employee complaint. They were also unaware of any prior safety complaints by Daniels.

26. At the time Daniels was informed of his suspension, he was given a disciplinary form setting forth the reason for the

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discipline. Attached was a typed statement prepared by Leasure, which had been signed by Parker and Anderson. Under "Employee Remarks" Daniels wrote "FYFO," known by employees to mean "fuck your final offer."

27. At the time he was informed of his suspension, Daniels was told to leave company property, but he proceeded to Leasure's office, attempting to use the telephone and creating a disruption. He then slammed the phone on Parker's finger. No disciplinary action was taken as a result of this conduct.

28. On October 15, 1986, Leasure and Stute met with Daniels and the Union Committee concerning Daniels' suspension. Daniels was given the opportunity to present his side of the story. Leasure subsequently interviewed two witnesses identified by Daniels and the Union. These interviews were witnessed by Union representative R. Lykins.

29. At no time during Leasure's meetings with Daniels on October 14 and 15, 1986, did Daniels make any reference to safety complaints, a safety inspection, or MSHA inspection. Leasure, who commenced employment at Southwestern on September 15, 1986, was unaware of any safety complaints by Daniels until this matter was first raised by the Union in the meeting on October 15, 1986.

30. On October 22, 1987, Leasure notified Daniels and James Cantrell, the president of Local D357, that Daniels would be given a 60-day disciplinary layoff as a result of Daniels' violation of the Plant Rules and pursuant to the management rights clause of the implemented contract. Leasure indicated that threats to and intimidation of a foreman would not be tolerated and that Daniels had been previously warned of his poor attitude. The 60-day layoff was the recommendation of Leasure, which was accepted by Plant Manager Stute and Division Vice-President Strautman.

31. Leasure's decision to suspend Daniels for 60 days was based on his finding of insubordination—a plant rule violation and dischargeable offense—and Daniels' prior disciplinary record as contained in Daniels' personnel file.

32. Leasure observed the following items in Daniels' personnel file when he reviewed the file before deciding to suspend him pending discharge:

(a) a June 24, 1986 memorandum from W.H. Strautman, Division Vice-President (Tr. 268), documenting an instance in which Strautman and a potential buyer, while touring the North Annex, found Daniels eating his lunch outside the mill building. When Strautman told

Daniels that he was not permitted to leave his post and should eat inside where he could observe the control panels, Daniels became irritated and stated that he didn't want to eat there. After Strautman again reminded Daniels of his job responsibility, Daniels stated, "It won't do any good; this place is a disaster and never will be anything else." The buyer noted Daniels' "very poor attitude." Strautman indicated that this incident was typical of the attitude displayed by Daniels during Strautman's Uvisits to the North Annex during the past month (RÄ22).

(b) a July 7, 1986 memorandum from Plant Manager Stute to Ken Herr regarding a July 1, 1986, meeting of Stute, Daniels and Dave Gullett regarding Daniels' poor attitude. Daniels was informed that the Company needed his cooperation and would not put up with a poor attitude in the future. Stute also indicated that Daniels would be working with a new foreman and that Stute wanted Daniels to get off to a good start (RÄ23).

(c) an August 18, 1986 memorandum from Lloyd Steinkamp, Daniels' supervisor at the time, detailing Daniels' refusal to obey a work order by Steinkamp on that date. Daniels responded to the order "do what you have to." Daniels was sent home for the day as discipline for this misconduct (Tr. 224, 239; RÄ17).

(d) an August 19, 1986 memorandum from Lloyd Steinkamp regarding an altercation between Daniels and another employee (RÄ18).

33. On October 27, 1986, Daniels filed a charge of discrimination with MSHA. On February 18, 1987, following its investigation of the charge, MSHA found no violation of section 105(c) of the Act.

34. On December 1, 1986, Daniels filed an unfair labor practice charge with the National Labor Relations Board alleging that his suspension was the result of his union activities and the filing of safety complaints. On January 5, 1987, following its investigation of the charge, the NLRB dismissed the charge.

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This dismissal was sustained upon Daniels' appeal to the Office of the General Counsel, NLRB.

DISCUSSION WITH FURTHER FINDINGS

The issue in this proceeding is whether Daniels was discriminatorily suspended, contrary to the provisions of section 105(c) of the Act. (FOOTNOTE 1)

The burdens and allocations of proof under section 105(c) are now well-settled. A complainant bears the initial burden of establishing a prima facie case of discrimination. In this regard, he bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2799 (1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817 (1981). See also: Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1628 (1986). 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 the operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend 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. Smith v. Reco, Inc., 9 FMSHRC 992, 994 (1987); Pasula, 2 FMSHRC at 2799-2800; Robinette,

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3 FMSHRC at 817-18. See also: *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir.1983). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, 3 FMSHRC at 818, n. 20; *Boich*, 719 F.2d at 195-96. Allegations of general unfairness, or inequities in the employment are not sufficient for relief under the Act. *Alexander v. Freeport Gold Co.*, 9 FMSHRC 1112, 1121 (1987) (Judge's decision).

As noted above, an essential element of Daniels' prima facie case is that his suspension was motivated in part by his safety complaints. *Pasula*; *Robinette*. Stated otherwise, a complainant must initially establish some nexus between his protected activity and the adverse action taken against him. A failure to establish such nexus necessarily results in the dismissal of a complaint. See e.g., *Hall*, 8 FMSHRC at 1630; *Cox v. Pammlid Coal Co.*, 9 FMSHRC 435, 524-25 (1987) (ALJ), review denied (April 1987); *Holcomb v. Colony Bay Coal Co.*, 8 FMSHRC 1077, 1080-81 (1986) (ALJ); *Hutchinson v. Ida Carbon Coal Co.*, 7 FMSHRC 2247, 2251 (1985) (ALJ).

In analyzing an operator's motivation with respect to an adverse personnel decision, the Commission has noted that "the operator's knowledge of the miner's activity is probably the single most important aspect of a circumstantial case." Secretary ex rel. *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (1981), rev'd on other grounds sub nom., *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C.Cir.1983). In light of the basic underlying issue of motivation, knowledge by the relevant decision-makers of the miner's protected activity is crucial.

Complainant has not shown by a preponderance of the evidence that his suspension was motivated in any part by protected activity—his safety complaints to the Company or to MSHA. Rather, Respondent has shown by a preponderance of the evidence that Daniels' suspension was motivated only by his insubordinate conduct towards his supervisor, Glenn Parker, and Daniels' prior disciplinary record. In this regard, neither of the two individuals primarily responsible for the suspension, Parker and Gary Leasure, was aware of Daniels' prior safety complaints to the Company or to MSHA when Daniels was suspended pending discharge.

Southwestern has demonstrated by a preponderance of the credible evidence that it would have taken the adverse action against Daniels for the unprotected activity alone—i.e., for Daniels' violation of Southwestern's Plant Rules and management prerogative clause forbidding insubordination and protecting the operator's right to operate its business.

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In the Hall case, supra, the Commission affirmed the Administrative Law Judge's denial of a section 105(c) claim based on the fact that there had been no showing that the adverse actions against the miner were motivated in any part by the miner's protected activity and, accordingly, no establishment of a prima facie case. The Commission noted that:

With respect to Hall's discharge, the judge found that Pendergast [Manager of Industrial Relations] had no knowledge of Hall's protected activity [safety concerns] at the time he prepared the notice of discharge and that he had not consulted with other mine officials prior to terminating Hall [citation omitted]

[8 FMSHRC at 1629.]

Similarly, in Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (1982), Judge Broderick held that the complainant failed to show by a preponderance of the evidence that she was laid off due to her complaint to MSHA (which resulted in the issuance of a citation to the operator). Judge Broderick stated, in pertinent part:

I accept the evidence that the persons responsible for her layoff on May 6, 1981, were unaware of the report to MSHA, the inspection, and the subsequent citation. There is not evidence linking any adverse action against Complainant to her call to MSHA officials. Thus, Complainant has failed to establish the basic requirement for liability under 105(c): a nexus between the adverse action and protected activity under the Mine Act [citations omitted].

[4 FMSHRC at 1166.]

In Johnson v. Eastern Associated Coal Corp., 4 FMSHRC 398, 399 (1982), Judge Melick likewise dismissed the 105(c) complaint where there was not sufficient evidence to prove that the individual who made the decision to discharge the complainant had any knowledge of the complainant's safety complaints. See also: Paugh v. Mettiki Coal Corp., 8 FMSHRC 829, 880Ä81 (1987) (no evidence that safety complaints were discussed in meeting where decision made to discharge miner); Cox v. Pammlid Coal Co., supra, at 519Ä20 (company president had no knowledge of complainant's journal of allegedly unsafe conditions and violations of law); Everett v. Industrial Garnet Extractives, 6 FMSHRC 998, 1001 (1984) (no evidence that foreman who discharged complainant had knowledge of complainant's affidavit alleging safety violations).

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In the case at bar, the evidence demonstrates that Glenn Parker, Daniels' immediate supervisor on October 13, 1986, and Gary Leasure, Director of Industrial Relations, were the individuals ultimately responsible for the 60-day suspension of Daniels. On October 13, 1986, Parker notified Leasure of Daniels' abusive language and insubordinate conduct toward Parker earlier that day. (Tr. 1162-63, 165-66.) On the morning of October 14, 1986, Parker detailed Daniels' actions to Leasure and indicated that he believed disciplinary action should be taken in accordance with the Plant Rules. (Tr. 172, 251.) After Leasure and Parker discussed the matter and Leasure reviewed Daniels' personnel file, the decision was made to suspend Daniels pending discharge. (Tr. 251.) At approximately 9:30 a.m., on October 14, 1986, Daniels was notified of his suspension pending discharge. (Tr. 19, 251; R-19.) Leasure subsequently recommended the decision not to discharge Daniels, but to issue a 60-day suspension. (Tr. 266-67, 316.) A critical point is that, at the time the decision was made to suspend Daniels pending discharge, neither Parker nor Leasure was aware of Daniels' prior safety complaints to the Company or to MSHA.

Parker commenced employment at Southwestern's Fairborn facility on July 8, 1986. Prior to that time, he had worked as a union laborer and foreman at Southwestern Odessa, Texas facility. On July 8, 1986, he began as Shift Supervisor of the North Annex; at the beginning of September 1986, he became the foreman in charge of cleaning the silos in the North Annex. Parker had worked with Daniels on only one occasion before October 13, 1986, when their respective shifts overlapped. Parker indicated that there were no problems at that time. Most significantly, as of October 13 and 14, 1986, Parker was unaware of any safety complaints by Daniels. Daniels' previous supervisor, Lloyd Steinkamp, had not mentioned any safety problems with Daniels. Steinkamp had commenced employment with Southwestern in June 1986, and had supervised Daniels from July 1986 to October 1986. Although Parker had heard that other supervisors had had problems with Daniels' attitude and poor cooperation, Parker had not been informed of any safety grievances or safety complaints by Daniels. Moreover, although he was aware of MSHA's inspection in September 1986, Parker had no knowledge that the inspection was initiated by a complaint. In fact, Parker had no knowledge of Daniels' safety complaints even as of October 22 when the 60-day lay-off was issued.

Gary Leasure, the individual ultimately responsible for the 60-day suspension of Daniels, had no knowledge of any safety complaints by Daniels until after Leasure suspended Daniels pending discharge.

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Leasure commenced his employment with Southwestern as Director of Industrial Relations on September 15, 1986—less than one month before Daniels' suspension. As noted, Leasure met with Parker on the morning of October 14, 1986, regarding Parker's encounter with Daniels the previous day. Parker informed Leasure in detail what had occurred between him and Daniels and recommended disciplinary action against Daniels. At about 9:30 a.m., on October 14, following Parker's detailed explanation of the events of October 13 and Leasure's review of Daniels' personnel file, Leasure suspended him pending discharge for violation of Category 1, Rule No. 2 of the Plant Rules and the management prerogative clause. (Tr. 19, 251; RÄ19.)

Not until the following day, October 15, when Leasure met with Daniels and the Union concerning Daniels' suspension pending discharge, did Daniels' prior safety complaints arise. Until that time, Leasure was unaware of any safety complaints or grievances by Daniels, and was unaware of MSHA's inspection on September 8 and 9.

Although insubordination is a dischargeable offense under Southwestern's Plant Rules, Leasure recommended only that Daniels be suspended for 60 days. This recommendation was accepted by the Plant Manager and Division Vice—President. Thus, even after the Union informed Leasure of Daniels' prior safety complaints, Leasure recommended discipline less severe than that available under the Plant Rules. This conduct does not indicate discrimination.

Another significant factor to be considered in determining whether an adverse employment decision has been motivated in any part by protected activity is the operator's hostility—or lack thereof—toward the protected activity. Chacon, 3 FMSHRC at 2511; Haro v. Magma Copper Co., 4 FMSHRC 1948, 1953 (1982) (Judge's decision), review denied (January 1983).

In Harmon v. Consolidation Coal Co., 9 FMSHRC 549 (1987), the Commission Judge noted, in the course of concluding that the complainant had failed to establish a prima facie case, that management had attended to the complainant's safety complaints. Id. at 573. Likewise, in Brazell v. FMSHRC, 716 F.2d 902 (6th Cir.1983) (unpublished decision, but reproduced at 3 MSHC 1036 (BNA)), the Sixth Circuit, in affirming that the miner had not established a prima facie case of discrimination, noted, inter alia, that the company acted upon the miner's complaint rather than reacting with hostility.

There is abundant evidence that Southwestern has an active safety program designed to encourage safety complaints and

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suggestions and a responsive and cooperative attitude toward them rather than a hostile or retaliatory attitude.

David Gullett, Vice-President and walkaround representative of Local D357, called as a witness by Daniels, indicated that he was unaware of any other employees of Southwestern who have been disciplined or in any way discriminated against because of the filing of safety complaints or grievances. Gullett himself initiated 14 safety work orders in June and July of 1986 (RÄ9B, RÄ9C). Of record are 43 work orders initiated by employees of Southwestern in June through September 1986. In each instance, the work order was completed (RÄ9A, RÄ9B, RÄ9C). Also of record are many other safety grievances initiated by employees other than Daniels. There has been no allegation of any retaliatory or adverse action toward any of these employees.

A written complaint to MSHA was signed by 14 employees of Southwestern (RÄ6). A copy was delivered to Gary Leasure. There has been no adverse action taken against any of the employees signing this complaint as a result of its filing.

As noted, as a matter of practice safety complaints and suggestions are submitted to Southwestern's Safety Consultant, who investigates the complaint or suggestion and prepares an appropriate work order. When corrective work is completed the work order is returned to the Safety Consultant. The safety suggestion slips may be turned into the Union or Company Safety Committee, or to the employee's foreman. The employee does not have to include his or her name on the slip. Southwestern's program is designed to encourage safety suggestions and complaints and to take effective action to improve safety.

Southwestern and Local D357 have established a Joint Safety and Health Committee for the purpose of jointly considering, inspecting, investigating, and reviewing health and safety conditions and practices and investigating accidents, as well as making recommendations to eliminate unhealthful or unsafe conditions. This Committee meets at least once a month and upon request by either the Union or the Company.

I find that there is no evidence that Respondent had a hostile attitude toward the protected activity but, on the contrary, encouraged safety suggestions or complaints and showed a positive attitude toward them.

Apart from the question of whether or not Complainant made a prima facie case of discrimination (and I hold that he did not), I conclude that Southwestern affirmatively proved that it would have suspended him for insubordination alone even if he had never made a safety complaint.

under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.