

CCASE:
EDDIE JOHNSON V. SCOTTS BRANCH MINE
DDATE:
19871102
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

EDDIE D. JOHNSON,
COMPLAINANT

v.

SCOTTS BRANCH MINE,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 87-26-D
MSHA Case No. PIKE CD 86-16

Scotts Branch Mine

DECISION

Appearances: Mr. James Boyd, International Representative,
UMWA, District 30, Pikeville, Kentucky, for
the Complainant;
Mr. Edward N. Hall, Robinson & McElwee,
Lexington, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed on November 12, 1986, by the complainant Eddie D. Johnson pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Johnson filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and following an investigation of his complaint, MSHA made a determination that a violation of section 105(c) had not occurred, and informed Mr. Johnson of this finding by letter of October 16, 1986. Mr. Johnson then filed a timely complaint with the Commission pro se, but subsequently retained the United Mine Workers of America (UMWA), District 30, to represent him in connection with his complaint. A hearing on the merits of the complaint was held in Pikeville, Kentucky, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and the arguments presented therein have been considered by me in the adjudication of this matter. I have also considered the arguments advanced by the parties during the course of the hearing, as well as the testimony presented in the depositions of the complainant, which are a matter of the record herein.

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The complainant contends that he was transferred from a coal producing section (first right) of the mine where he was employed as a continuous-miner operator, and also served as a member of the mine safety committee, to a construction section in retaliation for withdrawing himself from unsafe places and for making complaints about certain unsafe conditions on the first right section. He also contends that mine management has harassed and intimidated him for making safety complaints, and for exercising his rights as a safety committeeman, and that mine management is still harassing him and interfering with his rights as a committeeman. Complainant's initial requested relief was to be transferred back to his job on the first right producing section, and an order prohibiting the respondent from further subjecting him to harassment because of his safety concerns and activities as a member of the safety committee.

The respondent filed a timely answer to the complaint, and it denies that it has discriminated against the complainant or harassed him because of his safety complaints and his activities as a member of the safety committee. The respondent asserts that the complainant's transfer from a coal producing section to a construction section was part of an overall work force realignment which took place on June 2, 1986, and that the realignment was the result of a management decision to realign its work force to increase production on its working sections, including the first right section, in preparation for the installation of a longwall mining machine. Respondent contends that even assuming that the realignment and transfer of the complainant could have been motivated in part by protected activity, which it denies, it nonetheless had a legitimate right and concern for increasing production on the complainant's section in order to retain its production schedule for the installation of the longwall mining machine. The respondent points out that although the complainant was admittedly transferred from a producing section to a construction crew as a continuous-miner operator, he was retained within his same union job classification as a miner operator, for the same working shift, and with the same rate of pay.

The record in this case establishes that since the filing of the complaint, and subsequent to the realignment of June 2, 1986, the first right producing section has been mined out and no longer exists. The complainant has conceded that any requested relief with respect to his return to that section is no longer available to him (Tr. 105). The record also establishes that the complainant is still gainfully employed by the respondent as a faceman on the longwall coal producing section, that he successfully bid on that job subsequent to the

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realignment in question, and that he is still functioning as an active member of the mine safety committee (Tr. 106).

The complainant concedes that assuming a finding is made by me that the respondent discriminated against him in violation of section 105(c), the only available remedy, aside from such a finding, would be an order directing the respondent to cease and desist from any further discrimination or acts of harassment against him. Further, during the course of the hearing the complainant's representative indicated that the complainant also seeks an award of monetary costs and expenses incident to the complaint and the hearing, including lost wages for the witnesses who appeared and testified on his behalf (Tr. 107-109).

Issues

The critical issues in this case is whether or not the complainant's realignment and transfer from a producing section to a construction section was prompted or motivated in any way by his engaging in protected safety activity, whether the transfer was in retaliation for those safety activities, and whether or not the respondent harassed, or continues to harass, the complainant for those activities. Additional issues raised by the parties are identified and disposed of in the course of my adjudication of this case.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. 2700.1, et seq.
Pretrial and Bench Rulings

Respondent's pretrial motions for summary dismissal of the complaint on the ground that the complainant's complaint, when considered in conjunction with his pretrial depositions, did not establish a viable complaint of discrimination, particularly in light of the respondent's offer to reinstate the complainant to the coal producing section from which he was transferred (which was rejected by the complainant), and his admission that he did not consider his transfer as a form of management "punishment" WERE DENIED.

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During opening statements at the hearing, respondent's counsel renewed his motion for summary judgment and dismissal of the complaint. In support of his oral motion, counsel stated that since the complainant successfully bid on a job as a longwall faceman on a coal producing section, and since the first right section has been mined out, his requested relief to be transferred back to the first right producing section is moot. Counsel pointed out that the complainant suffered no loss of pay or job status as a result of the transfer, and that he is still functioning as a member of the mine safety committee. Counsel further pointed out that in his pretrial depositions, the complainant admitted that mine management never indicated to him that he was being transferred because of his safety complaints, and that "the only thing the court could doÄ Äat least the only thing that seems plausibleÄ Äwould be just to say that the company discriminated against this individual" (Tr. 19Ä22).

Complainant's representative agreed that the first right section no longer exists. He stated that he intended to establish that the complainant was discriminated against, and that at the time he bid on the longwall faceman's job, the respondent "used discriminatory actions against him to keep him from getting the job," and that the mine manager stated that the realignment, which resulted in the complainant's transfer, was motivated by "chicken shit complaints." Complainant's representative further asserted that Mr. Johnson's transfer was made by management to keep him off the new longwall section because management considered him to be a "troublesome" safety committeeman (Tr. 28Ä30).

After consideration of the arguments presented on the record, the respondent's renewed motion for summary judgment and dismissal of the complaint was DENIED (Tr. 34). The parties agreed to incorporate by reference the deposition testimony of the complainant's pretrial depositions (Tr. 37).

At the close of the complainant's case presentation, the respondent renewed its motion for summary judgment and dismissal of the complaint (Tr. 109). The motion was again DENIED (Tr. 114, Vol. II).

Complainant's Testimony and Evidence

Burt Melton, Electrician and Chairman of the mine committee, testified that on May 27 or 28, 1986, he attended

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a union-management meeting concerning the proposed realignment, and that when he returned to work the next Monday, June 2, 1986, the proposed realignment was not the same in that Mr. Johnny Damron, the union vice-president, Mr. Russell Ratliff, chairman of the safety committee, and Mr. Johnson were all taken off the first right section and assigned to the construction crew. Mr. Melton believed that none of these individuals were originally scheduled to be realigned as shown in the original posted realignment, and he believed that management had agreed not to move them off the production section (Tr. 41-44).

Mr. Melton stated that during a meeting with Mine Manager Herbert "Tubby" Kinder, on Monday, June 2, he asked Mr. Kinder why he had taken Mr. Damron off the production section, and Mr. Kinder responded "because they had made too many chicken shit complaints and the production was not what it should be up there" (Tr. 45). Mr. Melton confirmed that he also participated in a meeting with management 2 weeks later and Mr. Kinder stated that Mr. Johnson, Mr. Damron, and Mr. Ratliff had been realigned because "the section was not producing the way it should." Mr. Melton stated that Mr. Kinder again mentioned complaints, and while he did not specifically mention "safety complaints," Mr. Melton assumed and speculated that this is what Mr. Kinder had in mind (Tr. 48). Mr. Melton confirmed that he was involved in a grievance proceeding concerning Mr. Johnson's bid for a longwall faceman's job in March, 1987, and that Mr. Johnson was awarded the job (Tr. 48, exhibit C-1).

On cross-examination, Mr. Melton confirmed that he first learned about the realignment of Mr. Johnson, Mr. Ratliff, and Mr. Damron on Monday, June 2, and that based on a prior realignment list which he had seen, these individuals were not scheduled to be affected. Mr. Melton stated that he usually represents all employees on behalf of the union in such realignments, and Mr. John Hodges, the respondent's personnel director, represents the company (Tr. 58). Mr. Melton confirmed that when Mr. Hodges showed him the first list, Mr. Hodges did advise him that it was subject to change (Tr. 59-60). Mr. Melton identified exhibit R-7 as a list similar to the one he saw, but indicated that it was not the "original list" (Tr. 57).

Mr. Melton confirmed that the realignment was made in preparation of the installation of a longwall panel but that certain problems delayed the installation, setting it up, and that the realignment "mostly concerned producing coal on that panel" (Tr. 60). Mr. Melton also confirmed that management

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was concerned about production on the third shift right panel, and that he had discussed this with James Ratliff, the assistant mine manager who no longer works for the respondent, in an attempt to resolve what management perceived to be a production problem on that section. Mr. Melton stated that Mr. Ratliff advised him that the senior men would be retained on the production section, and that less senior men would be realigned to the construction crew. Since Mr. Johnson, Mr. Ratliff, and Mr. Damron did not sign off the production section voluntarily, Mr. Melton was surprised to learn that they had been realigned (Tr. 60-64).

Mr. Melton confirmed that mine management had discussed with him a request that men work on Saturday to catch up with the work, and that discussions regarding production on the section had taken place for several weeks prior to the realignment of June 2 (Tr. 69). Thirty-five to 40 men on three shifts were affected by the realignment, and all of the men, except for Mr. Johnson, Mr. Ratliff, and Mr. Damron "were pacified and everything was fine so far as they were concerned" (Tr. 75).

Mr. Melton stated that Mr. Damron, Mr. Ratliff, and Mr. Johnson all filed discrimination complaints with MSHA, but that Mr. Damron and Mr. Ratliff settled their dispute when the respondent agreed to put them back on the production section and the complaints were not further pursued (Tr. 76). Respondent's counsel confirmed that the two cases were settled and that the terms of the settlements were identical to the one offered Mr. Johnson, which he refused (Tr. 77, exhibit R-9).

Mr. James Boyd, confirmed that no grievance was filed with respect to the realignment, and that management was informed of the union's decision to proceed with a section 105(c) discrimination complaint instead. Mr. Boyd stated that the union decided against a grievance because of the cost involved and its belief that it would have received an adverse ruling (Tr. 80). The union believed it could prove discrimination (Tr. 80).

Mr. Melton stated that when he first learned about the realignment on May 27 or 28, and posted a list, Mr. Damron, Mr. Ratliff, and Mr. Jackson were shown as being retained in their jobs on the production section, and he dealt with their cases because they were the only ones who complained to him about the subsequent realignment on June 2 in which they were realigned off the production section to the construction crew (Tr. 82). Mr. Melton confirmed that all three individuals in

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question retained their pay and job classifications, and that the action taken by the respondent in this regard was legal (Tr. 84). Mr. Melton stated that he assumed and speculated that management "reached out to Damron, Johnson and Ratliff and proposed to switch them off one section to another because of the safety problems," and that is why the union decided not to file discrimination complaints (Tr. 85-86).

Mr. Melton stated that he decided to opt for the filing of discrimination complaints with respect to the realignment of Mr. Damron, Mr. Johnson, and Mr. Ratliff because he could think of no legitimate reason why management would seek to realign the men in question. He stated that Mr. Ratliff "had several safety complaints," but he had no first knowledge that Mr. Damron ever caused any "safety problems" for management, although Mr. Damron has advised him that he has had "run-ins with his foreman" (Tr. 87). Mr. Melton confirmed that while he has had disagreements with his foreman, none were related to safety matters (Tr. 88). He also confirmed that he has never observed any safety complaints at the mine and that he does not work on a section where coal is produced (Tr. 89). However, he has been involved in "safety issues" that others have complained about in his capacity as an alternative safety committeeman, but he was not affected by the realignment (Tr. 90).

Mr. Melton confirmed that the only other safety committeeman affected by the realignment was Mr. A.B. Thacker, but he lacked enough seniority to maintain his job. Mr. Melton also confirmed that after the realignment, his conclusion that Mr. Johnson, Mr. Damron, and Mr. Ratliff "were left out to dry by management because of their safety activities" was based on Mr. Kinder's statement about the "chicken shit complaints" (Tr. 92). Mr. Melton stated that he never discussed Mr. Kinder's statement with him (Tr. 93). However, when Mr. Boyd met with Mr. Kinder to discuss the reasons from the realignment, Mr. Kinder stated "If I put them back, you will make me put them back," and that Mr. Boyd advised Mr. Kinder that a section 105(c) discrimination complaint would be filed (Tr. 94).

Mr. Melton denied that he was attempting to "put mine management in its place," and he stated that his concern was trying to find out why management realigned Mr. Johnson, Mr. Damron, and Mr. Ratliff in the first place, and that management never gave him any legitimate reasons for their action in this regard (Tr. 95). Mr. Melton confirmed that in a statement which he gave to an MSHA investigator during the

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investigation of Mr. Johnson's complaint he told the investigator that Mr. Hodges did advise him that the first realignment list which he saw on May 27 or 28 was "spur of the moment thing and that there could be a change" (Tr. 97). Mr. Melton had no independent recollection that Mr. Hodges told him that the list was subject to change by General Mine Foreman Charles Morley or Second Shift Foreman Otis Slone, but if he so testifies, Mr. Melton could not say he would be lying (Tr. 97). Mr. Melton confirmed that Mr. Donny Saunders, the day shift continuous miner operator placed on the first right section after the realignment was senior in job classification to Mr. Johnson (Tr. 97-98), but that it would have been customary for Mr. Saunders to have taken the lesser seniority miner operator's job on the second shift when he was transferred from the day shift (Tr. 102).

Mr. Melton stated that as a result of the realignment, Mr. Johnson contacted the union because he believed that he had "been put upon" by management, and that after mine manager Kinder indicated that he would not put Mr. Johnson back on his production section unless he was forced to, the union decided to file a section 105(c) discrimination complaint. Mr. Melton stated that during discussions with Mr. Kinder he was informed of the union's belief that Mr. Johnson was realigned because of his safety complaints. Mr. Melton also stated that in the past, Mr. Johnson had advised him that he "felt like he had had trouble with management," especially with Mr. Slone on the evening shift, and that Mr. Johnson had informed him of this "a year and a half ago, I guess." Mr. Melton stated that Mr. Russell Ratliff also informed him of a complaint he had made about water on the track, and that he did so "I guess it had to be a year and a half ago." However, he could recall Mr. Damron making no such complaints. Mr. Melton confirmed that the union and Mr. Johnson decided to file a discrimination complaint because Mr. Johnson felt that he was realigned because of his safety complaints (Tr. 105-111).

Denver Thacker, roof bolter operator, testified that in November, 1986, during job bids on the longwall panel, section boss Glen Matheny offered to put him on a shift paying time-and-one-half if he would put his name back on the bid list for a longwall job that Mr. Johnson had bid on. Mr. Thacker stated that Mr. Matheny told him that he had discussed this with the "old man," namely Mr. Kinder. Mr. Thacker stated that he had taken his name off the bid because of some gas in the panel, and that Mr. Matheny explained that he wanted him to get the job because "if the wrong man got up there, that he could knock us all out of the job" (Tr. 118). Although

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Mr. Matheny gave no specific reasons for offering him the inducement of a time and one-half shift, Mr. Thacker speculated that Mr. Matheny did not want Mr. Johnson to get the job because "they did not want a safety manÄ Åor him in particular up there on the longwall" (Tr. 118). Although Mr. Matheny did not specifically mention Mr. Johnson, Mr. Thacker stated that "I just took it he meant Eddie" (Tr. 118).

Mr. Thacker stated that he removed his name from the job bid because "I knowed Eddie could take better care of it than I could. He knows more about safety business," and "I just know I had knocked him out of the job. That is the reason I took my name off" (Tr. 119Ä120). Mr. Thacker confirmed that he testified in the arbitration proceeding in December 1986, concerning the job bid in question (Tr. 123).

Ricky Varner, roof bolter operator, stated that in December, 1986, he was working on a bolting machine with Mr. Thacker, and that Mr. Matheny came to the working place to speak with Mr. Thacker. After their conversation, Mr. Thacker told him that Mr. Matheny stated to him that he "was wanting him to sign the longwall job to beat Eddie out of it" (Tr. 126). Mr. Varner stated that Mr. Thacker told him that Mr. Matheny had stated that "one man could ruin the whole thing up there," but that he did not identify "the one man" (Tr. 127). Mr. Varner stated that Mr. Thacker also told him that Mr. Matheny spoke to him again the next day and offered him a Saturday shift if he would take the longwall job (Tr. 128). Mr. Varner stated that in response to a question by Mr. Thacker as to why the respondent would ask him (Thacker) to bid on the job, Mr. Varner told Mr. Thacker that because of gas on the section, the respondent did not want Mr. Johnson there because it thought Mr. Johnson would shut the section down (Tr. 129).

Mr. Varner was of the opinion that the respondent tried to persuade Mr. Thacker to bid on the longwall job to keep Mr. Johnson off that section because he would take care of safety problems. Mr. Varner stated that he has shut his bolter down because of methane on his section, and called it to the attention of management. Although he has been realigned in the past, he did not believe that this was done because of his complaints about methane. He was not part of the June 2 realignment involving Mr. Johnson (Tr. 132).

Mitchell Mullins, head drive man, testified that in April, 1986, he overheard section foreman Randy Smith call out on a mine phone to shift foreman Otis Slone and inform him that the men in the section wanted to exercise their

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individual safety rights to be on the outby side before a shot was fired (Tr. 144). Mr. Mullins did not know whether the men proceeded outby before the shot was fired because he was too far away to even hear the shot (Tr. 145).

Representative Boyd introduced a copy of a grievance which was filed over this shot firing incident (Tr. 145; exhibit CÄ2). Respondent's counsel stated that the grievance was settled in order to avoid calling in Federal and state inspectors to determine whether the shot was accomplished in accordance with the regulations, and to avoid further interruption to production (Tr. 147). He took the position that the shot was legal, and the parties agreed that MSHA was not called in to resolve the matter (Tr. 148). Mr. Boyd confirmed that the shot was fired 1,000 feet outby where the men were working on the section, but took the position that the men were not given the opportunity to be outby and that Mr. Slone went ahead and fired the shot before the men had an opportunity to be outby. Mr. Boyd confirmed that the grievance was filed during the next shift and that no section 103(g) inspection was requested (Tr. 151), and that no safeguard notices were ever issued covering the shot (Tr. 155).

Mr. Mullins confirmed that he had no independent knowledge about the details of the shot, did not hear it, did not know whether the men actually left the mine, and that he did not leave. When asked whether he had any personal knowledge as to what this case is all about, Mr. Mullins responded "the harassment and trouble Otis Slone and the company has given Eddie on his job classification, if he is qualified to do the job or not or who is better qualified they want in there besides him." Mr. Mullins confirmed that he has no personal knowledge of any harassment of Mr. Johnson (Tr. 162).

Donald Robinson, general laborer, was called to testify as to his knowledge of an incident of January 8, 1986, referred to by Mr. Johnson in his complaint. Mr. Johnson stated that he filed a safety grievance over the alleged failure by shift foreman Otis Slone to follow a pillar plan.

Mr. Boyd stated that this incident is part of "a pattern of discrimination charges and of acts that have been committed against Mr. Johnson by the company" (Tr. 166). Mr. Boyd asserted that Mr. Slone tried to get Mr. Johnson to cut the left-hand side after the right-hand side had already been cut, but that this was not done and "they finally pulled away from it and went to another block. They backed up, timbered it off and started mining again" (Tr. 167). Mr. Boyd conceded that Mr. Johnson exercised his safety rights, refused to cut the

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pillar, and withdrew himself. However, he was not assigned other work, and the crew simply backed out, set timbers, and continued mining in another area (Tr. 169). Mr. Boyd implied that Mr. Slone attempted to have Mr. Johnson cut a pillar which would have been in violation of the pillar plan (Tr. 169). Mr. Boyd suggested that Mr. Johnson "took a lot of ribbing" over that incident (Tr. 170).

Mr. Robinson stated that he recalled the incident and he confirmed that he and the rest of the crew exercised their safety rights and withdrew from the pillar area. However, he stated that Mr. Slone did not insist that the pillar be mined after they withdrew and that he could not recall "no big hassle" over the incident (Tr. 171).

On cross-examination, Mr. Robinson stated that Mr. Slone simply asked the crew to mine the pillar, but they believed it was unsafe and chose not to. The crew withdrew, and the area was timbered, and mining continued in another area (Tr. 174).

Lynville E. Johnson, general laborer, was called to testify about an incident which occurred during December, 1985 to January 1986, during which section foreman Earl Matheny asked Mr. Johnson to take some coal cuts from an area which Mr. Johnson believed was unsafe. Mr. Slone was called in, and was mad, and both Mr. Matheny and Mr. Slone stated that Mr. Johnson did not want to work (Tr. 176). Mr. Johnson stated that Mr. Slone stated "God damn it. Eddie don't want to work no way" (Tr. 177).

Mr. Boyd stated that this incident is another example of a section foreman asking men to do work in an area which they believed was unsafe (Tr. 189). Mr. Boyd also alluded to a rock fall which covered up a continuous-mining machine (Tr. 187).

On cross-examination, Mr. Johnson alluded to another work force realignment which occurred during December, 1985, and respondent's counsel asserted that this realignment resulted in a union grievance, but that the arbitrator rejected any notion that the realignment resulted from any safety complaints (Tr. 181).

Since it appeared that the men exercised their safety rights and withdrew from areas which they believed to be unsafe, Mr. Boyd was asked to explain the relevance of these incidents to Mr. Johnson's complaint of discrimination. He responded "I am trying to show the integrity of the mine

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foreman, Otis Slone, and things he will do and the actions he has took" (Tr. 190). Mr. Boyd stated that he did not believe that Mr. Slone was involved in the realignment decision made by management that is in issue in this case (Tr. 190).

Jerry D. Hicks, continuous miner operator, was called to testify about an incident concerning the use of 5-foot glue for 6-foot roof bolts. Mr. Hicks stated that this occurred approximately 2 years ago, and after concluding that the use of 5-foot of glue for 6-foot bolts may have been unsafe, Mr. Johnson asked Mr. Slone to send a "safety man" in to make a determination. Mr. Slone came into the section and asked Mr. Hicks whether the use of the glue was safe. Mr. Hicks stated that he was of the opinion that additional "spot bolting" with 4-foot bolts, using 4-foot of glue, would make the area safe. Mr. Slone asked Mr. Johnson for his opinion, and Mr. Johnson told Mr. Slone that he was not qualified to make the decision and asked Mr. Slone "to have someone with a little more authority come in and check it out." No safety man was called in, but Mr. Slone proceeded to spot bolt with 4-foot bolts. Mr. Hicks confirmed that since it could not be determined how many breaks had been bolted with 5-foot glue, spot bolting was done for two breaks "to make sure they got it all" (Tr. 195-197).

Mr. Hicks stated that Mr. Slone "was wanting us to run coal" and asked each crew member whether it was safe to continue mining with the area bolted with 5-foot of glue. Mr. Hicks stated that the section "was awful low on production" and that Mr. Slone informed the crew that "he thought we ought to pick it up a little" (Tr. 197).

Mr. Hicks testified to an incident which occurred in September of 1985, when the men on the section were questioned in the mine office about low production on one evening. After listening to the explanations, foreman Charles Morley concluded that the low production resulted from "unsatisfactory work all the way across the board" and that everyone on the shift was given a warning. However, Mr. Eddie Johnson was given an unsatisfactory work slip (Tr. 198). Mr. Hicks recalled that on one Saturday evening shift Mr. Slone made a statement that Mr. Johnson "was trying to slow things down," but he could not recall whether it was the same evening when the warnings were given out. He also stated that Mr. Slone "may not have been talking totally to Eddie. He might have been talking to all of us. I really can't remember. It has been a long time" (Tr. 201).

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Mr. Hicks identified the foreman in charge during the spot bolting-glue incident as Miles Robinson. He stated that Mr. Robinson was fired shortly after the spot bolting was done, and was replaced by foreman Randy Smith (Tr. 203). Although Mr. Robinson would make air readings and gas checks, Mr. Hicks stated that "he wasn't real thrilled about it," and that Mr. Smith would "shake his head and go ahead and take it" (Tr. 204).

Mr. Hicks stated that when he and Mr. Eddie Johnson had an equipment break down with their mining machine, Mr. Slone seemed to question Mr. Johnson more, and would say little to him, and that Mr. Smith would not say much about it (Tr. 205). Mr. Hicks stated that Mr. Slone told the men to cut out the "sweetie (coffee) breaks" and would sometimes get after the crew for waiting around for him to instruct them as to their work duties (Tr. 206).

On cross-examination, Mr. Hicks stated that it was perfectly appropriate for someone other than the shift foreman to fireboss the section before energizing the equipment, and that the spot bolting which took place came about as a result of the complaints concerning the glue (Tr. 211). Mr. Hicks confirmed that he heard "rumors" that Mr. Eddie Johnson received an unsatisfactory work slip because he had previously received a verbal warning (Tr. 212).

Tommy Tackett, electrician, was called to testify about an incident concerning a continuous-mining machine being worked on by Mr. Slone. Mr. Slone was working under the head of the miner attempting to replace a conveyor chain, and the miner head was supported by a scoop bucket rather than being adequately blocked or otherwise supported with wooden crib blocks. When Mr. Johnson observed Mr. Slone under the miner head, he told him that "it didn't look very safe," and that Mr. Slone replied to Mr. Johnson "If you got anything to say about this, Eddie, we will talk about it tomorrow. All you are wanting to do is hold up production" (Tr. 223). Mr. Tackett stated that the power was not disconnected, and in his opinion, Mr. Slone was engaged in an unsafe practice (Tr. 223-226). Mr. Boyd confirmed that the incident was not reported to MSHA, and no violation was issued (Tr. 233).

Mr. Tackett confirmed that he has worked in the mine for 7 years, and he indicated that during this time period Mr. Johnson was reluctant to work under roof conditions which he believed were bad and needed additional support and a section foreman would take the opposite view and try to convince

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him or the crew that the roof was sound and work should continue (Tr. 234-236). Mr. Tackett stated that on one occasion he and foreman Randy Smith had a difference of opinion as to whether a roof area was sound. Mr. Smith thought the roof was sound and suggested that he continue bolting. Mr. Tackett refused, and after retreating from the area, the roof fell (Tr. 239). Mr. Tackett conceded that any time he and a foreman disagree as to whether work can proceed safely, he has exercised his safety rights to withdraw, and the foreman would assign him to some other work (Tr. 239).

Mr. Tackett stated that on one occasion 2 months before the realignment, bad top was encountered at the feeder and Mr. Slone was called in to look at the area. Mr. Slone assured the crew that the feeder top would be taken care of on the next shift, and assigned the crew to work on the top in the intake. The feeder top was not corrected by the next shift, and Mr. Tackett's crew had to correct the condition when they next went to work (Tr. 241-242).

Mr. Tackett testified about the incident concerning inadequate glue which was used in conjunction with resin roof bolts. Mr. Tackett confirmed that Mr. Slone was called into the section, and disagreed with Mr. Johnson's assessment that anything was wrong, and indicated that work should proceed. After arguments, Mr. Slone agreed to spot bolt the area, and assigned the crew to other work shoveling the belt (Tr. 244).

Mr. Tackett alluded to another incident in which Mr. Johnson complained to foreman Randy Smith about a missing handle on a continuous-mining machine fire suppression device, and after giving the respondent 24 hours to repair the device, it was repaired (Tr. 245). Mr. Tackett stated that he had previously reported the condition, but that it was not taken care of until Mr. Johnson complained (Tr. 248). Mr. Tackett also alluded to another incident in which Mr. Johnson asked him to calibrate a methane monitor on a continuous-mining machine, and that he did it. However, he indicated that materials were not always readily available on the section to do the calibration (Tr. 249). Mr. Boyd conceded that in this instance, the calibration was done and that the necessary materials was "probably there" (Tr. 255).

Mr. Tackett stated that anytime there was a safety problem or complaint on the section Mr. Slone would come in and always inquired of Mr. Johnson as to the problem (Tr. 257), and that this occurred at times when Mr. Johnson was not the safety committeeman (Tr. 258). Mr. Boyd suggested that this occurred because Mr. Slone may have thought that

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Mr. Johnson was the spokesman for the men on the section (Tr. 259).

A.B. Thacker, continuous miner operator, and president of Local Union 2264, confirmed that he worked on the first right section with Mr. Johnson as a miner helper for approximately 6 months in 1984 and 1985. Mr. Thacker stated that there were safety complaints on first right "from the day it started from Eddie Johnson and the whole crew," and that the complaints dealt with "bad roof, methane gas. It was just that way all the time." Mr. Thacker confirmed that he was realigned on June 2, 1986, to the "hootowl" shift, but subsequently signed back to the evening shift (Tr. 266-267).

Mr. Thacker alluded to the feeder bad roof condition incident, and stated that after the condition was reported to the section boss, the men withdrew from the area and foremen Slone and Herald Mullins were summoned to the area, and they asked Mr. Johnson about the problem. Mr. Slone checked the roof test holes and agreed that the top was bad and assigned the men to other work. Although Mr. Slone assured the men that the roof condition would be subsequently taken care of, Mr. Tackett contended that this was not done and that the next shift did some work under the bad top (Tr. 270).

When asked about any "threatening statements" by Mr. Slone to Mr. Johnson over safety complaints, Mr. Thacker mentioned the incident concerning Mr. Slone doing some work under a continuous miner head which was propped up by a scoop bucket. Mr. Thacker described the encounter between Mr. Slone and Mr. Johnson as follows (Tr. 271-272):

* * * And Eddie asked them "to the best of my remembrance right now, he asked them, he said, "Do you all feel that this is a safe way to work on that miner? Don't you think you should put a crib under it to protect yourself?"

That kind of got Otis peed off. He got back. He come up in Eddie's face. He told Eddie, He said, "I want to know who you think you are and what gave you the right to tell me and the mechanic that we are doing our job unsafe." He said, "I have worked in the mines a long time. I've never gotten nobody hurt; ain't going to get hurt."

And I told Otis then myself, I said, "Otis, he is a safety representative for

United Mine Workers in this Local and he has got a right to ask that boy is he doing his job safe if he feels he is not. As a matter of fact, I think he ought to write you and Tommy Tackett both up for working in an unsafe condition."

And Otis, he got all over him. He just kept on. And then I told him, I said, "If you have got anything to say, we should wait till we get outside." And Otis more or less, he said, "yeah, we will take it up tomorrow evening." But it never was mentioned no more that I know of.

Mr. Thacker was of the opinion that Mr. Slone engaged in an imminently dangerous unsafe practice and violated the law by working under the miner head. Although he and Mr. Johnson observed him doing the work, Mr. Thacker admitted that no union safety committee complaint was filed, no imminent danger complaint or order was issued, no one complained about it, no one reported the matter to MSHA, the matter was not reported to mine superintendent Kinder, and no violation was ever issued (Tr. 274-276). Mr. Thacker stated further that Mr. Slone took the position that he was not in any danger and stated "I have been mining a long time before you fellows ever got here" (Tr. 276).

Mr. Thacker stated that when he worked with Mr. Johnson on the first right section in 1984 and 1985, Mr. Johnson made one or two safety complaints every day about the roof and ventilation problems (Tr. 276-277). Mr. Thacker stated that he was present many times when Mr. Johnson requested foreman Randy Smith to take air readings, and after doing so, Mr. Slone would appear on the section and would argue about the amount of air on the section. Mr. Thacker also stated that when Mr. Johnson asked Mr. Smith about the "mean air velocity," Mr. Smith would reply that "he didn't know what it meant" (Tr. 279).

Russell Ratliff, roof bolter, confirmed that he was realigned on June 2, 1986, from the first right section to the construction section (Tr. 283, 298). He stated that when he worked on that section for a period of approximately 8 months he often exercised his safety rights and made safety complaints to his section foreman Jerry Bentley, and that "the biggest part of the time, he wouldn't agree with me" (Tr. 285). Mr. Ratliff estimated that he made approximately "a couple of dozen" complaints, and in those instances where

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Mr. Bentley disagreed with him, Mr. Bentley would call mine foreman Charles Morley and safety committeeman Charles Cantrell to the section to discuss the matters (Tr. 287).

Mr. Ratliff confirmed that when he complained to Mr. Bentley, he sometimes agreed with him, and sometimes disagreed with him, but that Mr. Bentley did take corrective action (Tr. 288). Mr. Ratliff also confirmed that after discussions with mine management and union safety committeeman about his complaints "we would work out a corrective means of fixing the roof conditions like putting collars up and cribs where it was needed" (Tr. 290). Mr. Ratliff stated that he never exercised his right to "walk off" the section because of his safety complaints and always waited for the arrival of mine management and a safety committeeman to resolve the question (Tr. 291). He confirmed that in those instances where disagreement still existed, Federal or state inspectors were called in (Tr. 292-293).

Mr. Ratliff stated that he was present during a union-management meeting concerning the June 2, 1986, realignment and that mine superintendent Kinder made a statement to him that he would not be put back on the first right section "because of our chicken shit complaints. That was his words" (Tr. 294). Mr. Ratliff further stated that Mr. Kinder also stated that "if he put me back on the section, he would be made to put me back" (Tr. 295).

Mr. Ratliff confirmed that he filed a section 105(c) discrimination complaint, and that the respondent settled the matter by putting him back on the first right section, and this was the only remedy that he sought (Tr. 295). When asked for his opinion as to why he was initially realigned off the section, Mr. Ratliff stated "I guess, you know, where we had so many problems and I would act on them. You know, where I was a roof bolter man, you know, the condition was extreme. That is the worst top I ever worked in" (Tr. 296). Mr. Ratliff confirmed that he lost no pay as a result of the realignment and worked the same shift and the same number of hours. He stated that he wanted to stay on the first right section because he knew the roof conditions and "I feel like I can take care of the men that was on the section better than anyone else could." He confirmed that he was not a safety committeeman at that time, but subsequently became one on June 11, 1986 (Tr. 298-299; 305).

Mr. Ratliff stated that he believed he was initially realigned because of his safety complaints, but conceded that other miners who were also working on his section, and who

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made safety complaints, were not affected by the realignment (Tr. 307). In response to further questions in this regard, Mr. Ratliff stated as follows (Tr. 307-308):

Q. Did you have any clues as to why that was? Had anybody ever threatened you, called you out or showed anger toward you?

A. The statement Tubby Kinder made, the mine manager, was proof enough to me.

Q. When was that?

A. In that meeting.

Q. I am talking about before this happened. Now, prior to this, had Mr. Kinder ever come to you and said, "Listen, what are you trying to do calling all the feds in, calling all the state people in. You are filing complaints left and right and most of these are chicken shit," as you put it? Or I mean as he put it. Did this sort of thing happen before the realignment?

A. No.

Q. Did Mr. Kinder explain what he meant about his comment? Did he indicate to you what kind of complaints he had in mind?

A. No, he did not. I guess it was all complaints in general.

Q. Excuse me?

A. All the complaints in general.

Johnny Damron, longwall shearer operator, and union vice-president, testified that prior to the realignment he worked on the first right section for 6 months as a miner operator. He recalled one safety complaint he made concerning some unbolted roof places, and other complaints which were made by the roof bolters. The complaints were made to section foreman Jerry Bentley, and Mr. Damron stated that Mr. Bentley "always took the attitude, you know, we were trying to slow production" (Tr. 316). Mr. Damron stated that Mr. Bentley would get mad when a union safety committeeman was called into the section in response to the complaints,

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and if the complaint was taken care of "it stopped at that point" (Tr. 316).

Mr. Damron could not recall any instances when a Federal inspector came to the section to inspect the roof, but did recall one occasion when a state inspector came in to look at a roof fall (Tr. 317). Mr. Damron stated that on one occasion when he questioned the adequacy of the ventilation on the section, Mr. Bentley "just took the attitude he didn't see it as a serious problem or something" (Tr. 317). On another occasion, when a scoop man refused to go under bad top, mine foreman Charles Morley was called to the section, and he assigned him and a mechanic to set collars and timbers and Mr. Morley "sat there and made smart remarks" (Tr. 318).

Mr. Damron recalled a meeting at which he was present along with Mr. Johnson, Mr. Ratliff, Mr. Boyd, Mr. Melton, and mine management personnel concerning the June 2, 1986, realignment. Mr. Damron stated that Mr. Kinder was informed that he, Mr. Johnson, and Mr. Ratliff believed that they were discriminated against because of their safety complaints. When asked about Mr. Kinder's responses, Mr. Damron stated "I can't recall exactly what he said, but he said there have been a lot of chicken shit complaints up there" (Tr. 319). Mr. Kinder specifically referred to a complaint about a trolley wire that came in contact with the mantrip, and Mr. Damron confirmed that the men refused to go under the wire and tried to get the foreman to move the track. Mr. Damron could not recall how that dispute was resolved, and stated that the section foreman "would try to get something to get back at you" (Tr. 320).

Mr. Damron stated that an initial realignment sheet did not reflect that he was being realigned, and when he found out on June 2, that he was to be realigned, he filed a discrimination complaint, but subsequently settled it when he was put back on his original section (Tr. 320-321). He believed that the company tried "to get back at him" by attempting to realign him (Tr. 322). Mr. Damron stated that roof bolter Russell Ratliff also made complaints, but that other than himself, Mr. Johnson, and Mr. Ratliff, he knows of no other complaining miners who were realigned (Tr. 324).

Mr. Damron had no knowledge that foreman Bentley had anything to do with his realignment, and Mr. Boyd confirmed that Mr. Bentley himself was also realigned (Tr. 327). Mr. Damron confirmed that production on his section was low, but he attributed it to bad top conditions (Tr. 326). Mr. Damron has no knowledge as to the number of complaints made by Mr. Ratliff on the section (Tr. 329). Mr. Damron

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confirmed that at least 17 men were relocated to other shifts as a result of the 382 section closing down on June 2, 1986 (Tr. 330).

Mr. Damron stated that no management person ever instructed him to go out under unsupported roof to work, and that when bad top was encountered the men had to withdraw from the area "and that is why I felt we were harassed was because you have to go in and set extra support" (Tr. 334).

Mr. Damron claimed that during the 2 years he served as a safety committeeman, mine management, namely former assistant mine manager James Ratliff, was unhappy because of his safety complaints. When asked when this occurred, Mr. Damron replied "it has been some years back," but he could not recall seeking out the mine superintendent or anyone else higher in management than Mr. Ratliff to complain about the purported treatment accorded him by Mr. Ratliff (Tr. 343-344).

Complainant Eddie D. Johnson confirmed that he is presently employed by the respondent as a faceman on the longwall, and that prior to June 2, 1986, he was employed as a continuous-miner operator on the first right section (Tr. 13). Mr. Johnson's testimony included references to the safety complaints referred to in his discrimination complaint, as well as in prior depositions, which have been incorporated by reference in these proceedings. Mr. Johnson confirmed that a week or so before the realignment of June 2, 1986, he complained to section foreman Randy Smith about a missing handle on a fire suppression device and some bad top in the section. Mr. Johnson also confirmed that approximately 4 or 5 weeks before the realignment, he also complained to Mr. Smith about a methane buildup, and that he also had complained on prior occasions about additional levels of methane on the section. Mr. Johnson stated that Mr. Smith on occasion became angry with him over the complaints, and he confirmed that he did not complain to MSHA or the safety committee.

Mr. Johnson confirmed his prior statements made in his depositions that Mr. Smith had no knowledge of the impending realignment of June 2, 1986, and made no statements to him indicating that his realignment had anything to do with his complaints. However, Mr. Johnson was of the opinion that Mr. Smith "has an influence on realignments" (Tr. 20). Mr. Johnson also confirmed that in each instance when he complained to Mr. Smith, his complaints were addressed and the conditions complained of were corrected, or he was assigned to other work. Mr. Johnson also confirmed that

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foreman Otis Slone was not present during these complaints made to Mr. Smith (Tr. 17Å35; 45).

Mr. Johnson confirmed that approximately 1 month before the realignment he complained to Mr. Smith about respirable dust which was coming back on the continuous miner operator, and the need for more ventilation and water sprays. In this instance, the water sprays were checked and repaired, the adequacy of ventilation curtains was reviewed, and the complaint was taken care of by Mr. Smith within 35 minutes, and he said nothing to Mr. Johnson which would lead him to believe that he would be transferred for complaining (Tr. 41Å43).

With regard to the incident concerning Mr. Slone's working under the miner head, Mr. Johnson stated that Mr. Slone became angry with him when he confronted him about the matter, and Mr. Johnson conceded that he may have provoked Mr. Slone (Tr. 51Å52). Mr. Johnson confirmed that when he received an unsatisfactory work slip on September 28, 1985, he was not a member of the safety committee. Although conceding that the slip was issued because management believed he was "goofing off" and not doing his work, Mr. Johnson believed that it was indicative of management's attitude toward him because "they don't like me for what I stand for" (Tr. 66), and he viewed it as a continued form of harassment. Mr. Johnson confirmed that the incident was resolved after he filed a grievance and the matter was settled (Tr. 60Å70). Mr. Johnson denied that he ever received any verbal warnings about his work prior to the issuance of the slip in question, but admitted that he and Mr. Slone "had talked several times" about equipment problems, coal production, and "about my work" (Tr. 72Å73).

Mr. Johnson also testified about the incident concerning a premature shot which resulted in a grievance being filed, and he stated that after the shot was fired, Mr. Slone accused him of trying to slow down production (Tr. 74Å82). He went on to testify about other complaints and confirmed that while he believed he was resented and not liked by management, management nonetheless addressed his complaints and took corrective action (Tr. 84Å101). Mr. Johnson also believed that management had no legitimate right or reason for the realignment, and that it was done as a convenient way to get him off the producing section (Tr. 102Å103).

Respondent's Testimony and Evidence

General Mine Foreman Charles Morley testified as to the circumstances surrounding the work force realignment which

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took place on June 2, 1986. Mr. Morley confirmed that there have been several realignments during his tenure as mine foreman, and with regard to the June 2 realignment he stated that in preparation of that personnel action, Mr. John Hodges, respondent's supervisor of human resources (personnel director), prepared a list of mine personnel according to their union job classifications, and that this was given to him for the purpose of determining the composition and establishment of particular work crews which would be effected by the realignment.

Mr. Morley stated that the realignment came about in order to establish a crew to increase production so as to speed up the advancing of the first right section in anticipation of the completion of the installation of the longwall system. Mr. Morley stated that the decision to purchase the longwall system was made in approximately, 1985, that the decision was communicated to the union, and that the advancement of the first right section in anticipation of the longwall had been the topic of many discussions. The scheduled date for the longwall installation was September, 1986, and it was imperative that the first right and second sections be driven up and connected before the longwall could be installed and made operational (Tr. 116-122).

Mr. Morley confirmed that the respondent hired three consultants for the planning of the longwall installation, and that certain projections, including production and roof control problems, had to be addressed. He confirmed that production on the first right section had fallen behind, and he testified as to certain production data compiled on the sections (Tr. 122-127, exhibit R-1). He stated that production on the first and second right longwall sections was lower in comparison to production on the other sections (Tr. 130). Mr. Morley confirmed that the second right section had a three-entry system, and that the second right section began as a five-entry system, and then dropped to a four-entry system within the past 2 months. Although one would expect better production from a five-entry system, this was not the case (Tr. 131). Mr. Morley identified exhibit R-11 as a representation of mine production for all working sections, as of May, 1986, a month before the realignment, and he confirmed that it indicates lower cumulative coal production figures for the first and second right sections (Tr. 145).

Mr. Morley confirmed that the initial realignment list prepared by Mr. Hodges was not final, and that it was subject to his (Morley's) review and consideration, and that in compiling the crews, he would take into consideration the

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personalities and work habits of the personnel to insure a good mix of people who could get along with each other (Tr. 129). He confirmed that in order to improve production, he determined that there should be a different mix of people on the first right section for both the day and second shifts, and this was discussed with Otis Slone, the second shift foreman, and changes were made not only for Mr. Johnson's shift, but also included the second right section. Mr. Morley denied any discriminatory intent in the shift changes, and he stated that they were made in order to pick up production and to get the mine back on schedule (Tr. 131-132). After further discussions with Mr. Slone and assistant mine manager Jim Ratliff, the realignment changes were made, effective June 2, 1986, and they are reflected on exhibit R-7 (Tr. 133-135). Mr. Morley confirmed that he had no idea what happened to the initial list compiled by Mr. Hodges (Tr. 137), and stated that it contained only names and occupations (Tr. 137, 144). He further explained the realignment information which appears on exhibit R-7, and confirmed that after making the necessary adjustments and changes, he returned it to Mr. Hodges who finally prepared it to show who would be on the sections in question (Tr. 144-145).

Mr. Morley confirmed that as continuous miner operators, Mr. Damron and Mr. Johnson filled critical positions with respect to the advancement of their sections in anticipation of the installation of the longwall system, and in his opinion their work performance was less than adequate. Mr. Morley was of the opinion that many union people were afraid that the longwall system would cost them jobs, when in fact it kept them working (Tr. 150). He confirmed that at the time of the realignment, the development of the first right section was at least one-third away from its final completion, and was at least 2 months behind in its anticipated completion (Tr. 153).

Mr. Morley conceded that Mr. Johnson's safety complaints caused delays in the anticipated completion of the first right section, and he believed that many of the roof control complaints were invalid. However, he insisted that all of Mr. Johnson's complaints were addressed, and if management agreed that they were legitimate, corrective action would be taken. Mr. Morley agreed that a safety committeeman has the right and obligation to make safety complaints, and he confirmed that Mr. Johnson never came directly to him with his complaints, and that they were usually made to section foremen Otis Slone and Randy Smith, or safety director Jerry Ratliff. Mr. Morley also confirmed that he never went into the section to look into the complaints, and that this responsibility was delegated to the section foremen (Tr. 153-156).

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Mr. Morley confirmed that any information he had with respect to any frivolous or invalid complaints by Mr. Johnson would have come from the section foremen, and he stated that Mr. Slone believed that Mr. Johnson was slowing down the section by cutting slow, and that both Mr. Slone and Mr. Smith "couldn't get things going the way they should" (Tr. 157). Mr. Morley further confirmed that he was aware of this at the time of the realignment, and that he considered the fact that "the section is not moving like it should be and production is not like it should be" at the time he made his realignment decisions (Tr. 158).

Mr. Morley confirmed that he personally checked on some roof safety complaints made by Mr. Russell Ratliff, and that he did so in the company of safety committeeman Charles Cantrell, and at times they differed on the merits of the complaints, and in those cases where the roof was bad, corrective action was always taken (Tr. 161). Mr. Morley was not personally aware of any safety complaints made by Mr. Damron, and he confirmed that many times, he had no knowledge as to who was complaining (Tr. 162).

Mr. Morley denied that he ever harassed Mr. Damron with regard to the placement of roof cribs, and he confirmed that a complaint about a man trip trolley wire was corrected as soon as it came to his attention (Tr. 166-168). Mr. Morley denied that he ever contemplated moving or realigning Mr. Johnson because of any safety complaints, and it made no difference to him who worked on the sections as long as he was satisfied that he had a good mix of personnel to get the job done. He confirmed that union personnel, as well as section foremen, were moved during the realignment in an effort to "get a better chemistry or something going up there and get production going" (Tr. 169).

Mr. Morley stated that after the realignment, production "picked up some," but that subsequent problems and bad top conditions, including a roof fall, delayed matters further. With regard to the results of the realignment, Mr. Morley stated "I don't know if it accomplished a whole lot. It picked up some." However, he indicated that the intent of the realignment was aimed at an effort to pick up production (Tr. 172).

On cross-examination, Mr. Morley stated that he considered Mr. Slone to be a "pretty good" foreman, and he denied any personal knowledge of Mr. Slone ever committing any

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unsafe acts (Tr. 180). He answered certain hypothetical questions concerning the incident involving Mr. Slone's work under the continuous miner head, including roof control violations and complaints on the section (Tr. 180-194).

Mr. Morley confirmed that he discussed the realignments made on the second shift with Mr. Slone, and that he and Mr. Slone made the decisions in that regard. Mr. Morley could not recall speaking with Mr. Ratliff with regard to the day shift realignments, and indicated that he (Morley) would have made the decisions alone in the absence of Mr. Ratliff (Tr. 195).

Mr. Morley stated that he was not present at any meeting held by the union with Mr. Hodges on May 28, or 29, 1986, and that any decision regarding job classifications would have been made by Mr. Hodges (Tr. 195-196). During the course of a colloquy with the parties, respondent's counsel indicated that the realignment shown on exhibit R-6 reflects the line-up prior to the actual effective date of the realignment, and that exhibit R-7 reflects the line-up after the realignment became effective on June 2, 1986. Complainant's representative Boyd contended that exhibit R-6 was presented to the union mine committee by mine management at the mine on either May 27 or 28, 1986, and the committee was informed that "This realignment will go into effect June 2nd" (Tr. 198). Respondent's counsel disagreed (Tr. 198). Mr. Boyd stated that R-6 was the list posted on the mine bulletin board, and Mr. Hall insisted that the list which was posted was similar to R-6, and that it cannot be located (Tr. 200).

Mr. Morley stated that exhibit R-6 was similar to R-7, and he confirmed that he was not aware that R-6 was given to the union committee by Mr. Hodges. Mr. Morley suggested that Mr. Hodges would have given the union such a list in order to let them know who was in any job classification, but he confirmed that Mr. Hodges could not align the particular crews, and that this was done by him (Morley) (Tr. 199).

Mr. Morley stated that his decision to realign Mr. Johnson, Mr. Damron, and Mr. Ratliff was made on Friday, May 30, 1987, and that Mr. Slone was present. Mr. Morley then advised Mr. Hodges as to his realignment decision, and Mr. Hodges compiled the realignment list shown on exhibit R-7 (Tr. 200), and he explained what was reflected on that list (Tr. 206-214).

Mr. Morley confirmed that during his discussions with Mr. Slone prior to the realignment, Mr. Slone advised him that

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the miner operators should be changed because he believed this was necessary in order to increase production. At no time did Mr. Slone mention any safety complaints, and he did not mention that the complaints may have been slowing down production (Tr. 215).

Mr. Morley could not recall attending any meeting with members of the mine committee and mine management subsequent to the realignment, but that he was aware that such a meeting took place through "talk." Mr. Morley stated that he had to attend to his business of running the mine, rather than attending meetings concerning labor-management contractual matters (Tr. 219). Mr. Morley did recall being present at a meeting at which Mr. Boyd and Mr. Kinder were present when Mr. Boyd advised Mr. Kinder that a discrimination complaint would be filed, and he recalled Mr. Kinder commenting to Mr. Boyd to file the complaint "if he felt that way" (Tr. 220). Mr. Morley denied hearing Mr. Kinder make any statement to the effect that the realignment came about "because he was tired of the chicken shit complaints" (Tr. 221). Mr. Morley confirmed that Mr. Kinder did state that the realignment would be made in order to try and speed up production and the mining advance rate on the first right section so that the longwall could be set up (Tr. 222). Mr. Morley stated that Mr. Johnson, Mr. Damron, and Mr. Ratliff never indicated to him that they believed they were being realigned because of their safety complaints (Tr. 222).

During the course of the hearing, complainant's representative Boyd asserted that the only three employees affected by the realignment whose job classifications were not changed, but nonetheless realigned on their shift, were Mr. Johnson, Mr. Ratliff, and Mr. Damron. However, Mr. Boyd conceded that all three suffered no changes in their job classifications as a result of the realignment, and suffered no loss in pay. They were simply moved to different mine locations (Tr. 223-225). Mr. Boyd further contended that everyone else shown on the realignment lists (exhibits R-6 and R-7) remained within their job classifications and same work locations. However, he subsequently conceded that everyone from the section as shown on the lists were affected by the realignment, and either had their job classifications changed or were physically assigned to other locations in the mine (Tr. 225-228).

Mr. Morley testified as to the work being performed by the construction crew on the construction section after the realignment, and he confirmed that hazardous conditions could be encountered anywhere in the mine, including the construction area, and he could not state that the construction area

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exposed miners to more hazards than on a producing section (Tr. 239).

Mr. Morley again denied that Mr. Johnson was moved to the construction section because of his safety complaints, and he confirmed that Mr. Johnson has filed safety complaints since the realignment and that "we try to take care of them as quick as we can" (Tr. 242). Mr. Morley denied that he has ever harassed Mr. Johnson, and he confirmed that Mr. Johnson is still serving as a safety committeeman. Mr. Morley denied any knowledge of any offers made to anyone to bid on a job for which Mr. Johnson had bid (Tr. 243).

Gary Puckett, respondent's office supervisor, confirmed that part of his duties include the tabulation and maintenance of certain mine production records. Mr. Puckett confirmed that he was familiar with the production records as reflected by exhibits RÄ1, RÄ2, and RÄ11, and he explained the data reflected therein (Tr. 253Ä258). He confirmed that the differences in production could be caused by adverse roof conditions or other factors not reflected in the production information, and that any differences in production with regard to the first and second right sections, as reflected in the data, may not be conclusive unless one knows or takes into account the prevailing mining conditions in those sections (Tr. 259).

Mr. Puckett testified as to certain daily carload production data maintained in his notebooks, and respondent's counsel confirmed that this data does not take into account any prevailing conditions on the sections. Based on his review of the production information as recorded in his books, Mr. Puckett concluded that for the period February 28, 1986, to May 30, 1986, the first right section had less than half of the production as compared with all the other sections noted (Tr. 260Ä261). For the period June 2, 1986, to July 30, 1986, the data reflects that mine production did not pick up (Tr. 261Ä265).

Jerry Ratliff, mine safety director, confirmed that he has worked at the mine 10 years, and he stated that he has daily contact with the mine safety committee, and that he can work with Mr. Johnson, who makes safety complaints on a regular basis. Mr. Ratliff confirmed that he has no reason to believe that mine management was motivated to realign the work force in order to punish Mr. Johnson for making safety complaints, and he was never at any meetings or heard any discussions among management that Mr. Johnson was realigned because of his complaints (Tr. 266Ä268, 273).

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With regard to an incident in which Mr. Slone fired a shot to clear hanging draw rock from the roof, Mr. Ratliff stated that when Mr. Johnson brought this to his attention, he (Ratliff) called the state and Federal regulatory agencies to determine whether any laws may have been violated. He confirmed that there was no violation in this instance (Tr. 269), and he assumed that what Mr. Slone did was correct (Tr. 270).

Mr. Ratliff confirmed that Mr. Johnson regularly calls to his attention mine conditions which he observes on his shift, including any violations, and that he addresses these matters and takes Mr. Johnson to the appropriate mine production or maintenance departments to ascertain the facts "so they get something done about it" (Tr. 279, 282). Mr. Ratliff stated further that he has never refused any safety complaints from Mr. Johnson or any other miner, nor has he ever refused to immediately communicate any such complaints to the appropriate mine departments (Tr. 293). He also confirmed that he has many times personally taken Mr. Johnson to the places he complained about, and while he sometimes disagrees with Mr. Johnson's assessment of the situation, he and Mr. Johnson resolved the matters (Tr. 294).

Mr. Ratliff stated that he had no knowledge concerning Mr. Denver Thacker's allegation that a section foreman tried to bribe another employee to bid on a job that Mr. Johnson had bid on, and Mr. Ratliff confirmed that he had some reservations about Mr. Thacker's credibility, and he explained why (Tr. 298-302).

Mr. Ratliff confirmed that he had nothing to do with the realignment in question, was in no way connected with that decision, and that Mr. Morley and Mr. Slone never consulted with him in this regard (Tr. 311). Mr. Ratliff discounts any "conspiracy theory" that the realignment was in some way designed to isolate Mr. Johnson as a safety committeeman, and he stated as follows in this regard (Tr. 312):

A. * * * I have personally not had any problems with Eddie other than "heck, we're going to disagree on things. But I've never sat in" "I've spent a lot of my time with Charles Morley, Herbert Kinder, Otis Slone, Gerald Mullins. I've never heard anybody say, "hey, we're going to screw Eddie and move him because of a safety complaint." I've never heard that.

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Otis Slone testified that he has worked in underground mines for 34 years, has served as a second shift foreman at the mine for over 10 1/2 years, and has known Mr. Johnson most of his life "since he was a kid" (Tr. 313). Mr. Slone confirmed that he participated in the determination as to the make-up of the work crews in connection with the June 2, 1986, realignment, and that he discussed the matter with Mr. Morley as is the usual practice during such realignments. Mr. Slone stated that he absolutely did not suggest to Mr. Morley that Mr. Johnson should be reassigned because of his safety complaints, and indicated that he has worked closely with Mr. Johnson since he became a safety committeeman. Mr. Slone was of the opinion that some of the complaints made by Mr. Johnson were not legitimate, and he confirmed that at times during their discussion on safety matters they became heated and he became upset with Mr. Johnson (Tr. 317).

Mr. Slone stated that on a day-to-day basis, the first right section was "way behind" in production, and that the realignment was made in an effort to increase production. Mr. Johnson's safety complaints had nothing to do with that decision, and safety complaints were made by individuals other than Mr. Johnson (Tr. 318).

Mr. Slone testified as to the circumstances under which he fired the shot which has been testified to in this case, and he confirmed that no violation of any safety law resulted from the manner in which he conducted that shot (Tr. 318-323). He also testified about the incident in which he performed work under a continuous miner head, and concluded that it was not unsafe (Tr. 326-328).

Mr. Slone testified as to the circumstances surrounding his issuance of an "unsatisfactory work slip" to Mr. Johnson sometime in 1985, and indicated that the entire production crew was taken out of the mine so that he could talk to them about production and his belief that they "were all laying down." A day or two later, he spoke with Mr. Johnson and issued the slip, and he did so because he believed that Mr. Johnson was "goofing off." He confirmed that he had previously spoken to Mr. Johnson at least one time about not doing his job (Tr. 331). Mr. Slone confirmed that he has stated from time-to-time that "Eddie Johnson just doesn't want to work anywhere," and that he made that statement to Mr. Johnson on at least one occasion (Tr. 335).

Mr. Slone confirmed that he recommended that Mr. Johnson be moved off the first right section, but denied that he made any recommendations with respect to Russell Ratliff, who

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worked on a different shift. Mr. Slone confirmed that Mr. Johnson has made quite a few safety complaints, and has been "a burr in his saddle." Mr. Slone further confirmed that if Mr. Johnson observes something on his section that needs to be done, he will contact him and he will then go into the section to take care of the problem. Mr. Slone stated that "sometimes I may not take care of all he wants done, but we work on it" (Tr. 355).

Mr. Slone confirmed his belief that Mr. Johnson has made quite a few so-called "chicken shit complaints," and he cited several examples (Tr. 357). He also confirmed that coal production picked up "very little" after the realignment, and he attributed this to bad top and draw rock conditions encountered in the section (Tr. 357).

Randy Smith, stated that he has served as a section foreman in the mine for approximately 2 years, and that he has 16 years of mining experience. He confirmed that he was Mr. Johnson's foreman on the first right section for approximately 9 months prior to the June 2, 1986, realignment. He also confirmed that he had many occasions to discuss mining conditions and safety matters with Mr. Johnson and that at times he disagreed with Mr. Johnson's evaluation of the mining conditions. Attempts were always made to resolve any differences, and Mr. Smith indicated that if he could not resolve them "I would always contact the mine foreman" (Tr. 361).

Mr. Smith stated that he has discussed Mr. Johnson's work and slow production with him, as well as with his entire crew, and that he was receptive to Mr. Johnson's complaints in his attempts to address them and take corrective action. Conceding that he may have sometimes overlooked some complaints which he characterized as "little" or "nothing," Mr. Smith confirmed that "we would take care of them as we could" (Tr. 363).

Mr. Smith stated that at no time did he ever suggest to Mr. Slone or Mr. Morley that Mr. Johnson should be transferred to some other section because of his safety complaints, or because he "was a problem." Mr. Smith stated that "me and Eddie had between ourselves" "I thought we done all right about working them out between us" (Tr. 364). Mr. Smith stated that he holds no animosity towards Mr. Johnson and he confirmed that Mr. Johnson no longer works with him (Tr. 366).

Mr. Smith denied that Mr. Slone ever indicated to him directly or indirectly that "if we had Eddie off the section,

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we could do better" (Tr. 371-372). Mr. Slone did mention that he and Mr. Johnson sometimes had differences of opinion about roof conditions, and he confirmed that production continued "about the same" after Mr. Johnson left the section because the conditions worsened (Tr. 372).

Glen Matheny, section foreman, stated that at one time he served as president of the local union at another mining operation. He denied that he was sent to speak with Denver Thacker about re-bidding for a job as a faceman on the longwall machine in order to insure that Mr. Johnson would not be afforded an opportunity to take that job. He also denied that he had ever offered anyone an opportunity to work a shift and a half to re-bid the job that Mr. Johnson desired, or that he had any discussions with anyone which could be interpreted that such an offer was made (Tr. 374-375).

Mr. Matheny had no idea as to why Mr. Thacker would make up "this big story." Mr. Matheny further stated that he is familiar with the union contract, and he confirmed that once Mr. Thacker had removed himself for consideration for the faceman's job, it was not possible under the contract to re-bid for that job, and that this would be prohibited under the contract. Mr. Matheny confirmed that he had Mr. Thacker take his name off the bid for the faceman's job in the first place because he discussed the matter with him and advised him that he wished to keep him on the section as a roof bolter operator since pillaring work was anticipated (Tr. 377-378). He confirmed that Mr. Thacker remained on the section as a roof bolter (Tr. 378).

Mr. Matheny denied that he ever took Mr. Thacker aside underground at his working place in the presence of Mr. Varney to speak with him, and indicated that "I've never had anything to say to Denver that I wouldn't have to say to Rick," and that they were both roof bolters. Mr. Matheny also denied that he spoke with Mr. Thacker in the bath house about re-bidding for the faceman's job (Tr. 379). Mr. Matheny stated that there is no truth in any statement by Mr. Thacker that he (Matheny) told Mr. Thacker that any offer to re-bid the faceman's job had been "cleared by the old man," namely mine manager "Tubby" Kinder (Tr. 381).

Herbert E. "tubby" Kinder, testified that he has served as mine manager for approximately 3 years and has been involved in mining for 47 years. He stated that he did not participate to any great extent in the realignment of June 2, 1986, and that the realignment was the general mine foreman's responsibility. Mr. Kinder confirmed that mine production

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was down on the first right section and that he discussed this with Mr. Morley, but did not indicate to him that "the mix of people needed to be changed or looked at." Mr. Kinder denied that he ever indicated to anyone that Mr. Johnson should be transferred to another section because he had made safety complaints or because he was a safety committeeman (Tr. 386).

Mr. Kinder stated that Mr. Hodges takes care of personnel grievances, and with respect to Mr. Russell Ratliff, he confirmed that he had been suspended with intent to discharge on two occasions because of absenteeism (Tr. 387).

Mr. Kinder denied that he ever instructed Glen Matheny or anyone else to bribe Denver Thacker to re-bid a longwall job so that Mr. Johnson would not get it. Mr. Kinder stated that while he might know Mr. Thacker, he could not recall who he is (Tr. 390). Mr. Kinder could not recall any realignment list which may have been posted in the bathhouse on May 29, 30, and June 2, 1986, and he confirmed that Mr. Hodges handles such matters (Tr. 398).

Mr. Kinder recalled meeting Mr. Melton, Mr. Damron, Mr. Hodges, and safety committeeman Charles Cantrell in the hallway outside the mine foreman's office after the realignment on June 2, 1986, and he confirmed that he did make the comment that "I was tired of those chicken shit complaints" (Tr. 385, 399). He also recalled a subsequent meeting 2 weeks later with members of the union when the realignment was discussed, and that Mr. Johnson, Mr. Damron, and Mr. Ratliff stated that they believed they were realigned because of their safety complaints. Mr. Kinder denied stating that before putting these individuals back on their sections "somebody will make me do it." He did recall remarking that "everything you do at Scotts Branch, if you ask somebody to do something, was discrimination or harassment" (Tr. 400).

Mr. Kinder confirmed that he made the decision that a realignment was necessary, and did so in order to provide a third shift made up of personnel from the other two shifts to speed up the advance rate on the two sections. Mr. Kinder denied that he had anything to do with the details of the realignment regarding actual shift or job selections, and he confirmed that these details were left to Mr. Hodges and the shift and mine foreman. Mr. Kinder denied that any management personnel ever discussed with him that Mr. Johnson or Mr. Ratliff would be realigned "to keep the old man happy," and that he never discussed such a matter with anyone (Tr. 403-404).

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John E. Hodges, respondent's Supervisor of Human Resources, testified that he has been so employed since 1980, and that prior to this time, he served as chairman of a UMWA mine committee and a field representative for District 19. Mr. Hodges stated that the decision to install the longwall was made in early 1985, and a longwall coordinator was hired in August of that year. The decision was communicated to the union in approximately June, 1985. On March 27, 1986, he discussed with the union the need to increase production on the first and right panels, and asked it to speak to its membership about working the first and right panels on Saturdays so as to speed up the advance of those panels for the installation of the longwall (Tr. 409-410). Another meeting was held on May 1, 1986, and the union was advised that unless it agreed to work the two panels on Saturdays, the entire 382 working section would be eliminated in order to put another crew on the third shift to operate the first and second right panels. However, the membership would not agree (Tr. 411).

Mr. Hodges stated that 35 to 40 people were affected by shift changes and reassignments resulting from the June 2, 1986, realignment, and the elimination of the 382 section affected the job classifications of 18 people (Tr. 412). Mr. Hodges confirmed that he gave mine committee chairman Melton a list similar to exhibit R-7 to let him know who was going to be realigned, but that he made it clear to Mr. Melton there may be some changes as to the placement of personnel because he (Hodges) had not spoken to Mr. Slone or Mr. Morley at the time he gave Mr. Melton the list (Tr. 414).

Mr. Hodges confirmed that he lacks the authority to make actual crew assignments, and that in past alignments and realignments sufficient time was allowed so that he could communicate the assignment of personnel to Mr. Melton. However, in the case of the June 2, 1986, realignment, he did not have enough advance notice, and made that clear to Mr. Melton when he gave him the list. He also made it clear to Mr. Melton that the list was subject to change because he had not met with Mr. Morley or Mr. Slone (Tr. 414, 416).

Mr. Hodges indicated that he first learned about the final decision to make the realignment on May 28, 1986, when Mine Manager Kinder and Frank McGuire, Division Manager of Mines, informed him of their decision to eliminate the 382 section and put a crew on the third shift. They informed him that they would need 10 miner operators, and informed him of the positions which had to be eliminated and others which

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needed to be filled. Mr. Kinder explained that he then prepared some sheets similar to RÄ7, "slotting" the necessary positions, but that he did not make the actual crew assignments. Mr. Hodges denied that he delivered exhibit RÄ6 to Mr. Melton before the crew selections were made by the production people, and respondent's counsel pointed out that this was the case because the 382 section was still shown on that list (Tr. 416). Mr. Hodges confirmed that the RÄ6 list is his work product, but that it was prepared by his secretary at his direction. He confirmed that he did give Mr. Melton another list similar to RÄ6 and that Mr. Melton put it up on the mine bulletin board (Tr. 417).

Mr. Melton confirmed that the "lists" he put up on the bulletin board in the bathhouse were roughly eight or nine sheets of paper which he taped individually on the board to inform the men in the event they were affected by the realignment. Mr. Melton confirmed that the list was torn down by the bathhouse man, and he did not keep a copy. Mr. Hodges was not sure that he saw the list posted on the board, and he explained that following his normal procedure, after such lists are finalized, and any problems concerning reassignments are resolved, he makes out a final list which he personally posts on the board (Tr. 420).

Mr. Hodges stated that he gave lists similar to the ones he gave to Mr. Melton to Mr. Slone and to Mr. Morley, and that the only thing he attempted to do was to list personnel in their proper job titles. Mr. Morley and Mr. Slone made the actual crew assignments because he (Hodges) had no authority to make those assignments (Tr. 421). Mr. Hodges denied that Mr. Morley ever said anything to him about an assignment for Mr. Johnson or that he wanted to get rid of him (Tr. 421).

Mr. Hodges confirmed that he did object to Mr. Morley's original placement of Mr. Ratliff on the fourth left section working with foreman Paul Fouts, because they had a prior personality "run-in," and Mr. Ratliff received a 15Äday suspension for refusing to obey orders and threatening and abusing Mr. Fouts. Mr. Hodges confirmed further that Mr. Ratliff had previously received another suspension for threatening another supervisor and himself, and was also suspended for absenteeism. As a result of these incidents, and after several meetings with him, Mr. Ratliff was given "a last chance agreement" (exhibit RÄ12), and Mr. Hodges did not consider him to be a credible individual (Tr. 426Ä428).

Mr. Hodges identified exhibit RÄ5, as a part of the realignment sheets showing how various people were affected

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by the realignment (Tr. 429, 431). He confirmed that at least 16 hourly employees on the 382 section were affected by the realignment, and that most of them stayed in the same job title (Tr. 432). Mr. Hodges denied that Mr. Johnson, Mr. Ratliff, and Mr. Damron were the only three people, other than the 382 section, that were moved from their jobs on their shift (Tr. 433), and referring to exhibits RÄ6 and RÄ7, he named several (Tr. 433Ä434).

Mr. Hodges confirmed that he met with Mr. Melton on May 28 or 29, 1986, during a "24/48 hour meeting" and gave him a list of the personnel who would be moved out of their job classifications, and he explained the purpose of the meeting (Tr. 447Ä449).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. HeclaÄDay Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510Ä2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C.Cir.1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983); and Donovan v. Stafford Construction Company, No. 83Ä1566 D.C.Cir. (April 20, 1984) (specifically-approving the Commission's PasulaÄRobinette test). See also NLRB v. Transportation Management Corporation, ÄÄÄ U.S. ÄÄÄÄ, 76 L. ed. 2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

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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, 2510Ä11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C.Cir.1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398Ä99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir.1965):

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

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

Mr. Johnson's Protected Activities

It is clear that Mr. Johnson enjoys a statutory right to serve on the mine safety committee, and the respondent may not discriminate against him because of his safety duties as a committeeman. Mr. Johnson also has a right to file safety complaints, request MSHA to perform section 103(g) safety inspections, to inform state or Federal mine inspectors of conditions which he believes are hazardous, and to complain or inform mine management of mine conditions which he believes present hazards to himself or to his fellow miners. Mr. Johnson's safety complaints and related duties incident to his service as a safety committeeman are protected activities which may not be the motivation by mine management for any adverse action against him. Further, management is prohibited from interfering with Mr. Johnson's protected safety activities, and it may not harass, intimidate, or otherwise unduly impede his participation in those activities. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786

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(October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C.Cir.1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir.1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

The record in this case establishes that Mr. Johnson frequently made safety complaints to his section foremen about mine conditions which he believed constituted hazardous conditions or violations of certain mandatory standards. As a matter of fact respondent's safety director Jerry Ratliff confirmed that Mr. Johnson has made safety complaints to him on a regular basis in his capacity as a member of the safety committee, and that Mr. Johnson rather routinely brings to his attention mining conditions on his shift which he believes are either questionable, hazardous, or violations. The record also establishes that the complaints often resulted in a foreman being called to Mr. Johnson's section to discuss the conditions, and that they sometimes had heated discussions or differences of opinions as to whether or not the conditions were in fact hazardous or not in compliance with the applicable safety regulations.

The record also establishes that Mr. Johnson has filed union safety and other job-related grievances against the respondent during his employment, some of which went to formal arbitration, and others which were settled by the parties pursuant to the labor-management agreement (Exhibits CÄ1, CÄ2, CÄ4, CÄ5, CÄ11, RÄ3, RÄ4).

Although there is no direct evidence that Mr. Johnson made any specific complaints to any MSHA or state mine inspectors, the testimony presented on his behalf, as well as his deposition, suggests that on occasions, MSHA inspectors may have been called to the mine to resolve safety questions or "disputes" resulting from Mr. Johnson's safety involvement with the union and/or the mine safety committee. Some of Mr. Johnson's complaints to management resulted in refusals by Mr. Johnson or his crew to work in the areas deemed by

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them to be hazardous, thereby necessitating their reassignment to other work while management addressed their safety concerns.

In view of the foregoing, I conclude and find that Mr. Johnson has established that both in his capacity as a miner, and as a member of the mine safety committee, he made and communicated safety complaints to mine management prior to the June 2, 1986, realignment which resulted in his transfer from a producing section to a construction section. Further, under all of these circumstances, it seems clear to me that Mr. Johnson's safety complaints and safety-related activities in bringing these complaints to the attention of management in his capacity as a miner or safety committeeman are protected activities under section 105(c) of the Act, and that the respondent is prohibited from retaliating against Mr. Johnson for making the complaints.

Management's Alleged Harassment and Intimidation of Mr. Johnson

Mr. Johnson's original complaint makes no mention of any specific instances of harassment or intimidation by management because of his safety complaints. Mr. Johnson's pretrial depositions of January 16, and June 9, 1987, are also devoid of any credible references concerning instances or acts of management harassment or intimidation toward Mr. Johnson because of his safety activities. Quite the contrary. The record in this case, including past grievances filed by Mr. Johnson on safety and non-safety matters, reflects that he was a rather active and combative safety committeeman who did not shy away from confrontations with his supervisors over safety issues. As a matter of fact, after the realignment, Mr. Johnson continued, and still continues, to function as a viable safety committeeman on a coal producing section, and he still brings his safety concerns and complaints to the attention of the mine safety director.

The record in this case establishes that in each instance when Mr. Johnson or other safety committeemen brought their safety complaints or concerns to the attention of their foremen, they and their fellow miners were allowed to withdraw from the affected areas and were assigned other work while management ultimately addressed their concerns and took corrective action. While it may be true that in some instances, management disagreed with Mr. Johnson's safety assessments and opinions and the discussions may have been rather heated, I find no credible basis for concluding that management ignored Mr. Johnson's complaints or retaliated against him because of

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his complaints. While it may also be true that some foremen may have initially attempted to convince a working crew that certain conditions were not unsafe and suggested that they should continue working, the issues were either resolved through further involvement of management and the safety committee, or the miners were allowed to withdraw and were assigned other work. I find no credible evidence that miners were ever forced or coerced to work under unsafe conditions.

In his deposition of January 16, 1987, Mr. Johnson conceded that he did not consider his realignment transfer to be a form of "punishment" because of his safety complaints (Tr. 13). In his June 9, 1987, deposition, Mr. Johnson confirmed that no one from management has ever made any statements to him, or suggested to anyone else, that his transfer resulted from his safety complaints (Tr. 55). Mr. Johnson alluded to a complaint concerning roof bolts which he made to safety director Jerry Ratliff, and indicated that Mr. Ratliff expressed some dissatisfaction with his filing a grievance. Mr. Johnson conceded that Mr. Ratliff never abused him verbally, and never threatened him because of his complaints, but that he did give him some "dirty or hateful looks" (Tr. 87-89).

Mr. Ratliff's un rebutted testimony, which I find credible, reflects that while he and Mr. Johnson sometimes had differences of opinion over the substance and merits of Mr. Johnson's complaints, Mr. Ratliff always addressed them in any effort to take corrective action, and that Mr. Johnson still brings safety matters to Mr. Ratliff's attention in his capacity as a safety committeeman. Further, Mr. Ratliff's un rebutted testimony establishes that he had nothing to do with the realignment, and took no part in that decision.

In his deposition of June 9, Mr. Johnson alluded to a complaint he made to section foreman Randy Smith concerning a bad roof condition. While he asserted that Mr. Smith had a "bad attitude" against him, Mr. Johnson confirmed that Mr. Smith allowed him to withdraw his mining machine from the bad top area and assigned him to work in another area until the roof conditions were subsequently corrected. Conceding that Mr. Smith disagreed with his safety assessment of the bad top, Mr. Johnson confirmed that Mr. Smith displayed no anger towards him, did nothing to suggest that "he would get back to him," or in any manner suggested that he would transfer him because of his complaint (Tr. 26-27).

With regard to his encounter with foreman Otis Slone when Mr. Johnson confronted Mr. Slone and questioned the

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wisdom of his working under the ripper head of a mining machine, Mr. Johnson stated in his deposition that Mr. Slone displayed his anger towards him. However, he conceded that neither Mr. Slone, Mr. Ratliff, or Mr. Gerald Mullins ever threatened him, or in any manner indicated that they would transfer him because of this complaint (Tr. 52-53). As a matter of fact, during the course of the hearing, Mr. Johnson admitted that he may have provoked Mr. Slone during this encounter (Tr. 51-52). Mr. Johnson also admitted that he too is prone to anger and that he sometimes loses his temper when dealing with his foremen (Tr. 33).

Mr. Johnson alluded to his 1985 receipt of an "unsatisfactory work slip" from Mr. Slone as an example of past harassment. The record shows that when the slip was issued Mr. Johnson was not a safety committeeman, and that the slip was issued because Mr. Slone believed that Mr. Johnson was "goofing off" and that he and his entire work crew were slowing down production. Mr. Johnson filed a grievance, and it was subsequently withdrawn after Mr. Johnson showed improvement in his work (Exhibits C-11, C-12). Mr. Slone testified that Mr. Johnson had previously been warned about his work, and Mr. Johnson denied that was the case, but did admit that Mr. Slone had previously "talked to him" about his work performance. Upon review and consideration of the facts surrounding this "work slip" incident, I cannot conclude that the slip was issued by Mr. Slone to harass Mr. Johnson.

During the course of the hearing, when pressed for details concerning any acts of harassment, threats, or hostility exhibited by management towards him, Mr. Johnson responded with his conclusory beliefs that management did not like him "for what I stand for" (Tr. 66), and that it displayed resentment, anger, and rejection because of his safety concerns (Tr. 95-96). Mr. Johnson stated that "nine times out of ten, with myself, you end up with a big argument" over his safety complaints (Tr. 93-94). Notwithstanding these beliefs of resentment by management, Mr. Johnson conceded that it nonetheless addressed his safety complaints and took appropriate corrective action (Tr. 84-101).

Although not specifically pleaded as incidents of alleged management acts of harassment, during the course of the hearing Mr. Johnson and Mr. Boyd implied that management's harassment of Mr. Johnson resulted in, or forced Mr. Johnson to file formal safety and other grievances. A discussion of these grievances follows.

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In a prior grievance arbitrated in August, 1985, in connection with a job posting issue, the arbitrator noted that when Mr. Johnson expressed fear in operating his mining machine in a pillar section to which he was being transferred, the respondent accommodated his concerns and reassigned him elsewhere. The arbitrator found that by virtue of a company favor, rather than a contractual right, Mr. Johnson was transferred from normal work of which he had a fear to temporary duties while awaiting an appropriate opening to which he could be assigned on a permanent basis (Arbitration Decision, pg. 7, exhibit RÄ4).

In a grievance filed on January 15, 1984, Mr. Johnson protested his assignment to a "floater job" after the respondent assigned an employee junior to him as a permanent equipment operator while Mr. Johnson was designated a "floater." Mr. Johnson contended that his assignment as a "floater" was made in retaliation for safety complaints he had lodged. The arbitrator rejected this contention and found no evidence of retaliation by management because of Mr. Johnson's safety complaints (exhibit RÄ3, pg. 5). Citing numerous instances where Mr. Johnson was reassigned during January and February, 1984, the arbitrator further found no evidence of a pattern of abuse and concluded that management acted within its contractual authority in making the reassignments (pgs. 11Ä13).

After consideration of all of the testimony and evidence adduced in this case, I find no probative or credible evidence to support Mr. Johnson's assertions that mine management harassed or intimidated him because of his complaints or the exercise of any protected safety rights incident to his service as a safety committeeman, and Mr. Johnson's assertions in this regard ARE REJECTED.

Mine Management's Motivation for the Realignment of June 2, 1986

In my view, the thrust of Mr. Johnson's complaint is the claim that shift foreman Charles Morley and mine foreman Otis Slone exhibited a disregard for safety through their "attitude" towards him as the safety committeeman, and by their efforts to transfer him from a producing section to a nonproducing construction area, thereby effectively restricting the area of the mine where he could effectively function as a safety committeeman on behalf of his fellow miners who looked to him as their leader.

In support of the claimed discrimination in this case, Mr. Johnson believes that Mr. Morley and Mr. Slone, the two

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key principals who made the realignment decision with respect to the make-up of the newly aligned work crews, aided and abetted by other key management officials, conspired to transfer Mr. Johnson in order to isolate him and to restrict his safety activities.

In his posthearing brief, and in further reliance on his claims of past and ongoing discrimination, Mr. Johnson's representative Boyd points to the fact that after the realignment, production on the longwall section showed no improvement, and that this does not support the respondent's assertion that the realignment was prompted out of management's concern for production. Mr. Boyd further relies on the testimony of Mr. Thacker and Mr. Varner in support of his argument that mine management, through Mr. Matheny, and with the "blessing" of mine manager Kinder, attempted to "bribe" Mr. Thacker to bid on the longwall faceman's job with an offer of extra shift work, in order to prevent Mr. Johnson from getting the job. Conceding the fact that this purported "bribe" came well after the realignment, Mr. Boyd concludes that this was simply another discriminatory management attempt to prevent Mr. Johnson from effectively functioning as a safety committeeman. Finally, Mr. Boyd points to the statement by Mr. Kinder after the realignment, that the realignment was the result of "too many chicken shit complaints," in support of his conclusion that the realignment was retaliatory.

Mr. Kinder's statement must be taken in context. Mr. Melton testified that during one meeting with Mr. Kinder and the union concerning the realignment, and in response to a question from Mr. Melton as to why Mr. Damron was realigned, Mr. Kinder responded "because they had made too many chicken complaints and the production was not what it should be up there" (Tr. 45). In a subsequent meeting with Mr. Kinder, and in response to a question from Mr. Melton as to why Mr. Johnson, Mr. Damron, and Mr. Ratliff had been realigned, Mr. Melton testified that Mr. Kinder responded "because the section was not producing the way it should" (Tr. 48). Mr. Melton admitted that at no time did Mr. Kinder mention safety complaints, and he conceded that he simply assumed and speculated that Mr. Kinder had in mind safety complaints (Tr. 48). Further, there is absolutely no testimony or evidence that Mr. Kinder ever mentioned safety complaints as the basis for the realignment.

Mr. Russell Ratliff confirmed that at the time of the realignment, he was not a safety committeeman, and while he was of the opinion that his prior safety complaints resulted in his realignment, he conceded that other miners who made

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safety complaints were not affected by the realignment. Mr. Ratliff also confirmed that at no time prior to the realignment did Mr. Kinder ever mention anything to him about making any "chicken shit complaints," and when asked about the types of complaints Mr. Kinder may have had in mind when he made his statement, Mr. Ratliff replied "all the complaints in general."

Mr. Damron, who also serves as union vice-president, stated that he heard Mr. Kinder's comment, but indicated that "I can't recall exactly what he said, but he said there have been a lot of chicken shit complaints up there." Mr. Damron confirmed that other miners also made complaints, but he could think of no other complaining miners who were realigned, and he confirmed that 17 others were relocated to other work shifts as a result of the section closing down and the realignment.

The record in this case shows that both prior to, and after the realignment, the union met with management to discuss the proposed realignment. The record also shows that management's concern to increase production on the first and second right sections in anticipation of placing the longwall section in production prompted it to seek help from the union by having the men agree to work extra shifts on Saturdays, but that this suggestion was rejected by the union. Mr. Kinder testified that he made the decision that the realignment was necessary in order to add a third shift composed of personnel from the other two shifts in order to speed up the production rate of those sections in preparation for the longwall.

Mr. Kinder testified that he had nothing to do with the selection or make-up of the realigned crews, that such decisions are made by Mr. Hodges and the respective foremen, and he denied that he ever discussed the particular make-up of the crews with his foremen or Mr. Hodges. Having viewed Mr. Kinder during his testimony at the hearing, he impressed me as a candid and straightforward individual, and I find him to be a credible witness. Given the fact that the initial purchase of the longwall, and the anticipated realignment, was the subject of much debate among management and the union, and given the obvious past and ongoing tensions that existed and still exists between management and the union over past grievances, complaints, and controversies as reflected by the record in this case, I am convinced that Mr. Kinder, as the mine manager responsible for the overall operation of the mine, found himself frustrated over his attempts to solve his production problems. In this setting, I am further convinced that Mr. Kinder's statement concerning

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"chicken complaints," which was made in conjunction with his stated concerns over the lagging production rate of the two sections which were driving towards completion in anticipation of the longwall, and which was made subsequent to the realignment in a rather off-handed fashion, was the result of his legitimate concern and frustration over production, rather than any concern over past safety complaints.

I conclude and find that Mr. Kinder's decision to implement the work force realignment in question was well within his management prerogative, and that his decision in this regard was prompted by his intent to attempt to increase production rather than to isolate Mr. Johnson as a safety committeeman, or to otherwise retaliate against him for his activities as a safety committeeman.

The record in this case establishes that the realignment affected miners other than Mr. Johnson, and that rank-and-file miners, as well as foreman were moved. Miners other than Mr. Johnson were moved from their jobs on the second shift production section to the construction section, and the entire 382 working section was eliminated. Mr. Melton conceded that at least 25 to 40 miners were affected by the realignment; Mr. Damron believed that at least 17 miners were relocated to other shifts as a result of the elimination of the former producing section; and Mr. Boyd conceded that miners working with Mr. Johnson on the second shift producing section were affected by the realignment. Given these circumstances, and the fact that Mr. Johnson is still serving as a safety committeeman, with no loss of pay or other job rights on the same work shift, I find it most difficult to believe that mine management would have conspired to engineer the realignment simply to restrict Mr. Johnson's safety activities. I find no credible evidence of any disparate treatment of Mr. Johnson.

Mr. Boyd argued that as a result of the realignment, everyone else affected with the exception of Mr. Johnson, Mr. Ratliff, and Mr. Damron, were realigned by seniority and job classification. Mr. Boyd took contradictory positions on this issue during the hearing. On the one hand, he insisted that the realignment was illegal because seniority was not followed, and he asserted that the union had prevailed in prior grievances on the issues of realignment, job classification, and seniority rights. On the other hand, Mr. Boyd confirmed that there was no requirement for seniority and job classification considerations during such realignments. Mr. Boyd was invited to present further arguments in his post-hearing brief with regard to these issues, as well as the

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contractual implications of the realignment, but he did not do so.

Mr. Hodges confirmed that the respondent need not consider seniority when making work force realignments, and that numerous arbitration decisions have sustained management's prerogative to make job assignments (Tr. 441-442). Respondent's counsel introduced two such arbitration decisions, (exhibits R-3 and R-4), and he indicated that one such case (R-3), concerned the precise issue as to whether the respondent may align by seniority, and that the arbitrator rejected Mr. Johnson's contentions that he was realigned because of his safety complaints (Tr. 441-442).

Mr. Melton confirmed that Mr. A.B. Thacker, was the only other safety committeeman affected by the realignment. Yet, there is no suggestion that Mr. Thacker believed his realignment resulted from his service as a safety committeeman. Mr. Melton explained that Mr. Thacker lacked enough seniority to maintain his job after the realignment. One may conclude from this that the Union's position with respect to the realignment, focused on the seniority rights of those affected, rather than on any safety complaints. Further support for this conclusion may also be found in the position taken by Mr. Johnson's representative Boyd with respect to the merits of the realignment. Although he first indicated that there was no requirement that seniority be followed in the realignment, he insisted that the entire realignment was illegal because the respondent failed to follow the applicable contractual seniority and job classification requirements. Given this position, I find it rather strange that the union failed to file a grievance challenging the purported illegality of the realignment.

In his posthearing brief, Mr. Boyd suggested that coal production on the first right section was low because of adverse roof conditions, and that subsequent to the realignment, production did not pick up. While this may be true, I am not convinced that production was consistently low on the section because of roof conditions. Although the respondent stipulated that shortly before and after the realignment, the top in the first right section was bad (Tr. 139), the record reflects that management's concern for lagging production had been a long-standing concern for at least a year or so prior to the realignment, and it was out of this concern that Mr. Slone took the entire crew out of the mine in 1985 at the time he gave Mr. Johnson an unsatisfactory work slip.

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Miner operator Jerry Hicks, who worked on Mr. Johnson's section, confirmed that the section "was awful low on production," and that Mr. Slone spoke to the crew about picking up their production rate. He also confirmed that Mr. Slone mentioned eliminating the coffee breaks, and would sometimes admonish the crew about "waiting around" for their work instructions.

Mine foreman Morley's un rebutted testimony was that the first right section was at least 2 months behind its anticipated completion, and that at the time he realigned the crews, production was not moving like it should have (Tr. 153-156). Section foreman Slone testified that the production on the section was "way behind" on a day-to-day basis (Tr. 318).

Mr. Damron confirmed that production was low on his section, and he too attributed it to the roof conditions (Tr. 326). However, he confirmed that he only made one complaint about the roof conditions, and that this occurred several weeks before the realignment (Tr. 328).

Although Mr. Melton initially indicated that he could find no legitimate reason for the realignment, he subsequently conceded that it was made in preparation for the longwall, that management was concerned with production, and that he had discussed management's concern over the low production on the advancing section with management several weeks before the realignment, including management's request for Saturday work by the crew to pick up their production rate in anticipation of the longwall installation. I find nothing in Mr. Melton's testimony to suggest that low production was the result of adverse roof conditions. While it is true that Mr. Melton did not work on a producing section and may not have been aware of any adverse roof conditions, I find it hard to believe that in his capacity as chairman of the mine committee, he would not have been aware of any consistently bad top conditions or complaints from miners in this regard.

In response to a hypothetical bench question as to whether or not mine management, believing that Mr. Johnson, Mr. Damron, and Mr. Ratliff were "non-producers," could legally and contractually reassign them to a non-producing section, Mr. Melton responded in the affirmative so long they were retained in their job classification at the same rate of pay. In Mr. Johnson's case, Mr. Melton conceded that Mr. Johnson was realigned with his pay and job classification intact, on the same work shift, and that he still remained a safety committeeman (Tr. 83-84).

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I have carefully reviewed the testimony of the miners who testified in this case, and while it was true that adverse roof conditions were encountered from time-to-time, I find nothing to suggest that such conditions prevailed for any long period of time, or that any such adverse roof conditions regularly impacted to any great degree on the low production rate or low advance rate which was of concern to management.

The testimony of mine management personnel Hodges, Kinder, Morley, and Slone, which I find credible, corroborates management's production concerns, and reflects management's concern that the production on the first right section needed to be addressed and speeded up so as to insure its timely completion and connection with the anticipated longwall. I conclude and find that the realignment of June 2, 1986, resulted from management's legitimate concern that the production needed to be improved, and that in deciding to proceed with the realignment, management was motivated by its intentions to increase the rate of speed at which the production section was advancing, rather than to attempt to isolate any safety committeemen because of their complaints.

With regard to the actual implementation of the realignment and the role played by Mr. Slone and Mr. Morley in the selection and assignment of the crews, the record establishes that they alone made the crew selections on Friday, May 30, 1986, and Mr. Boyd confirmed that they had the authority to make such decisions (Tr. 451). Mr. Hodges testified that when he gave Mr. Melton the list, it was not a list showing the actual realigned work force, and that he informed Mr. Melton that the list was subject to changes after Mr. Slone and Mr. Morley reviewed it for the purpose of "slotting" employees into their realigned positions. Mr. Melton admitted that Mr. Hodges advised him in advance of the actual realignment that the list was subject to change. Although the list in question no longer exists and was apparently destroyed after Mr. Melton posted it, I accept as credible and plausible Mr. Hodges' explanation with regard to his role in the realignment, including the use of the personnel data and "lists" reflected by exhibits RÅ5 through RÅ7).

All of the management individuals who were either directly or indirectly involved in the realignment (Hodges, Morley, Slone), testified that no effort was made to assign Mr. Johnson to the construction crew because of his safety complaints or service as a safety committeeman. Mr. Kinder testified that he made his realignment decision without regard to personalities, did not discuss the make-up of the crews with Mr. Slone or Mr. Morley, and that his realignment decision was in no way

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motivated by any desire to get rid of Mr. Johnson. Likewise, section foreman Randy Smith denied that he ever spoke with Mr. Slone about transferring Mr. Johnson, or that he harbored any animosity toward Mr. Johnson, or sought to retaliate against him because of his safety complaints. Safety Director Jerry Ratliff, who has had, and continues to have, regular contact with Mr.

who has had, and continues to have, regular contact with Mr. Johnson, testified that he was unaware of any discussions or suggestions that Mr. Johnson be transferred to the construction section because of his safety complaints, or that mine management sought to punish Mr. Johnson for his safety complaints.

Although it is true that Mr. Morley and Mr. Slone were aware of Mr. Johnson's past safety complaints at the time they made up the realigned work crews, they both denied that Mr. Johnson's safety activities influenced them, or played any part in their decision to transfer him to the construction section. The record reflects that both Mr. Morley and Mr. Slone had in the past, experienced differences of opinions with Mr. Johnson's asserted safety concerns and complaints. Mr. Slone readily admitted that some of his discussions with Mr. Johnson were "heated" and that he became upset over some of Mr. Johnson's complaints which Mr. Slone believed were invalid. Likewise, Mr. Morley considered some of Mr. Johnson's complaints to be invalid, and he conceded that Mr. Johnson's complaints did cause delays in production. Given these circumstances, and notwithstanding Mr. Morley's and Mr. Slone's denials to the contrary, there is an inference that Mr. Johnson's safety activities did influence Mr. Morley and Mr. Slone in their collective decision to transfer Mr. Johnson to the construction section. Nevertheless, if it can be shown by a preponderance of the evidence that the decision by Mr. Morley and Mr. Slone with respect to the make-up of the work crews was motivated by their legitimate concern to increase production, the motivational factor behind management's initial decision for the need of a realignment, any inference of discriminatory intent may be successfully rebutted.

Mr. Morley testified that his primary concern in assigning miners to particular work crews was to insure a good mix of productive people who could work together harmoniously in order to achieve mine management's production objectives. Mr. Morley candidly conceded that he considered the personalities and work habits of all available personnel, concluded that there should be a different mix of people, including foremen, in order to improve production, and that he freely discussed this with Mr. Slone. With regard to the slotting of Mr. Johnson, as well as Mr. Damron, Mr. Morley believed

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that their past work performance was less than adequate. Mr. Morley further believed that the continuous miner positions in the realigned section would be most critical to any attempts to increase production and he concluded that those positions which had previously been occupied by Mr. Johnson and Mr. Damron should be filled by someone else on the newly created production section.

Mr. Morley stated that Mr. Slone shared his view with respect to the past work performance of Mr. Johnson, and in fact it was Mr. Slone who suggested that changes should be made in the crew assignment of continuous miner operators, and it was Mr. Slone who informed Mr. Morley that Mr. Johnson was a slow machine operator and that he and section foreman Smith had problems keeping Mr. Johnson's section moving at a pace to suit him. Further, as indicated earlier, Mr. Slone had previously warned and spoken to Mr. Johnson about his work, issued him an unsatisfactory work slip, and had made previous statements to Mr. Johnson that he did not want to work. Mr. Morley was directly involved in the prior warning to Mr. Johnson, and miner operator Jerry Hicks corroborated the fact that Mr. Morley believed that the low production on the section was the result of unsatisfactory work by the entire crew, and that Mr. Morley gave them all a warning in this regard. Mr. Slone confirmed that he recommended to Mr. Morley that Mr. Johnson be moved off the first right section, and he corroborated the fact that he discussed the make-up of the crews with Mr. Morley.

Mr. Morley asserted that his decision with respect to his desire to obtain a different mix or personalities on the newly aligned work crews was equally applied to personnel on the second right section shift, as well as Mr. Johnson's shift, and that foremen, as well as union personnel were moved in his attempts to "get a better chemistry or something going up there and get production going" (Tr. 169). Conceding that production did not substantially increase after the realignment, Mr. Morley insisted that his intent in making up the particular work crews was aimed at increasing production.

I conclude and find that Mr. Morley and Mr. Slone were simply carrying out their management responsibilities in implementing the realignment decision made by Mr. Kinder. There is nothing to suggest that Mr. Morley or Mr. Slone initiated the realignment or made any suggestions to Mr. Kinder that a realignment was necessary in order to isolate Mr. Johnson. As a matter of fact, Mr. Boyd conceded that he had no reason to believe that Mr. Slone had anything to do with the initial realignment decision (Tr. 190).

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Having viewed Mr. Morley and Mr. Slone during their testimony at the hearing, I find them to be credible individuals. I find no credible basis for concluding that Mr. Johnson was treated any differently from other miners with respect to the selections and decisions made by Mr. Morley and Mr. Slone in realigning the available work force. The record clearly establishes that one entire section was abolished, and that foremen as well rank-and-file miners, including other miners on Mr. Johnson's shift, were affected by realignment, and that some miners who had complained about safety were not realigned. Mr. Melton confirmed that with the exception of Mr. Johnson, Mr. Ratliff, and Mr. Damron, the remaining miners affected by the realignment were "pacified and everything was fine as far as they were concerned" (Tr. 75).

With regard to the purported "adverse" decision by management to realign the work force, I take note of the Commission's decision in *Bradley v. Belva Coal Company*, 4 FMSHRC 982 (June 1982). Citing its *Pasula* and *Chacon* decisions, the Commission stated in pertinent part as follows at 4 FMSHRC 993: "* * * 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."

I conclude and find that Mr. Morley and Mr. Slone acted well within their managerial and discretionary authority in deciding upon which particular personnel at their disposal would be transferred or realigned. Acting within their authority as managers, they were free to make judgments and decisions with respect to the relative work performance levels of the available personnel, including any personality traits or work habits which they believed were required to assure that a productive and harmonious group of workers were available to achieve management's production objectives.

I find Mr. Morley's explanation as to the factors which he and Mr. Slone chose to follow in making their crew selections to be reasonable and plausible, and that their selection decisions were motivated by their good faith intentions to attempt to increase production in anticipation of the longwall, rather than to discriminate against Mr. Johnson or to isolate him for his safety complaints or his activities as a safety committeeman. I reject Mr. Johnson's assumptions and conclusions that management somehow conspired to realign him out of retaliation for his safety activities. Mr. Johnson's service as a safety committeeman does not insulate him from legitimate managerial business-related non-discriminatory

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personnel actions, UMWA ex rel Billy Dale Wise v. Consolidation Coal Company, 4 FMSHRC 1307 (July 1982), aff'd by the Commission at 6 FMSHRC 1447 (June 1984); Ronnie R. Ross, et. al v. Monterey Coal Company, et. al., 3 FMSHRC 1171 (May 1981).

With regard to the issue raised for the first time at the hearing by the union concerning an alleged "bribe" by management as an indication of its purported attempt to keep Mr. Johnson off of the producing longwall section, I take note of the fact that this alleged incident occurred well after the realignment, and there is absolutely no evidence to suggest that Mr. Morley or Mr. Slone were involved in that alleged incident.

The issue concerning the bidding for the longwall faceman's job which Mr. Johnson now occupies was the subject of arbitration. The record establishes that after a formal arbitration hearing held on February 18, 1987, Mr. Johnson was awarded the job (exhibit CÄ1). In that proceeding, Mr. Hodges and Mr. Matheny appeared on behalf of management, and Mr. Melton, Mr. Johnson, Mr. Thacker, and Mr. Varney appeared on behalf of Mr. Johnson.

The union's position with respect to Mr. Johnson's grievance, as reflected by the arbitrator's decision, was that the respondent was attempting to circumvent the contract and not award the job to Mr. Johnson because he was a safety committeeman. In sustaining Mr. Johnson's grievance and awarding him the job, the arbitrator based his decision on a finding that the respondent failed to follow established company policy prohibiting anyone but the actual job bidder from adding or deleting a bidder's name from the bid sheet. The arbitrator rejected the claim that the respondent attempted to bypass Mr. Johnson because he was a safety committeeman. In doing so, the arbitrator found that there was no evidence which even suggested that this was the case (exhibit CÄ1, pg. 5).

Although I am not bound by decisions of arbitrators, I may nonetheless give deference to an arbitrator's "specialized competence" in interpreting a provision of any applicable labor-management agreements. Chadrick Casebolt v. Falcon Coal Company, Inc., 6 FMSHRC 485, 495 (February 1984); David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 26Ä27 (January 1984); Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3d Cir.1981).

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I take particular note of the arbitrator's comments at page four of his decision that a full and complete hearing was conducted and that the parties had an ample opportunity to present evidence in support of their claims. I note the arbitrator's comment that the union's assertion that Mr. Johnson was bypassed because he was a committeeman was made in closing arguments, and his conclusion that the union submitted no evidence to even suggest that Mr. Johnson's status as a safety committeeman had anything to do with the job bid in question.

Neither party presented any posthearing discussion with regard to the prior arbitration hearing. The respondent simply characterized the alleged "bribe" as an "incredible" pretextual fabrication by the union to discredit management. The complainant simply concludes that the arbitrator's ruling that the bid made by the employee in competition with Mr. Johnson was too late, and that a foreman could not add a bidder's name on the job bid, "shows true signs of discrimination on the company's part."

In this case, Mr. Thacker's testimony is devoid of any credible statements to indicate or even suggest that at the time Mr. Matheny may have discussed the job bids with him, Mr. Matheny said anything directly or indirectly that would lead Mr. Thacker to conclude that Mr. Matheny made any job overtures to him with the intent to isolate or get rid of Mr. Johnson. Mr. Thacker admitted that his belief that Mr. Matheny did not want Mr. Johnson to get the longwall faceman's job was based on speculation, and that Mr. Matheny did not mention Mr. Johnson by name.

Mr. Varner first testified that Mr. Thacker told him that Mr. Matheny wanted him to bid for the faceman's job in order "to beat Eddie out of it." He later stated that Mr. Thacker indicated to him that Mr. Matheny did not identify Mr. Johnson as the individual who he was trying to keep out of the section. Thus, Mr. Varner not only contradicts himself, but he contradicts Mr. Thacker's testimony that Mr. Johnson did not mention Mr. Johnson's name at all.

Mr. Varner also testified that it was he who suggested to Mr. Thacker that Mr. Matheny was trying to keep Mr. Johnson off the section for fear he would shut it down because of methane. Mr. Varner confirmed that he made the suggestion in response to an injury from Mr. Thacker as why anyone would ask him to bid for the job. This also contradicts Mr. Thacker's statement indicating that it was he who told Mr. Varner that Mr. Matheny wanted to get Mr. Johnson off the section.

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After careful consideration of the testimony of Mr. Thacker and Mr. Varner, which I conclude is contradictory, and lacking in credibility, and taking into consideration the arbitrator's finding with respect to the merits of the alleged "bribe," I reject the complainant's assertion that Mr. Matheny, or anyone else, made an offer to Mr. Thacker with the intent to exclude Mr. Johnson from the longwall section in order to prevent him from functioning as a safety committeeman or to prevent him from making complaints.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish that the realignment of June 2, 1986, was in any way discriminatory, or was motivated by the respondent's intent to prevent him from exercising any protected rights with respect to his employment as a miner or in his capacity as a member of the safety committee. Even had the complainant established a prima facie case, I conclude that it was clearly rebutted by the respondent's credible evidence which established that the realignment constituted a reasonable and plausible business-related and non-discriminatory effort by management to increase production in order to facilitate and expedite the installation of the longwall. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief, including costs, ARE DENIED.

George A. Koutras
Administrative Law Judge