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ROBERT L. TARVIN V. JIM WALTER RESOURCES
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ROBERT L. TARVIN,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. SE 87-90-D
MSHA Case No. BARB CD 87-23

JIM WALTER RESOURCES, INC.,
RESPONDENT

No. 5 Mine

DECISION

Appearances: Patrick Nakamura, Esq., Birmingham, Alabama,
for the Complainant;
R. Stanley Morrow and Harold Rice, Esqs.,
Jim Walter Resources, Inc., Birmingham,
Alabama, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed with the Commission on May 21, 1987, by the complainant Robert L. Tarvin, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Tarvin 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. Tarvin of this finding by letter of April 17, 1987. Mr. Tarvin then filed a timely complaint with the Commission pro se, but subsequently retained counsel to represent him.

A hearing on the merits of the complaint was held in Birmingham, Alabama, and the parties appeared and participated fully therein. The parties waived the filing of posthearing briefs, but were permitted to present oral arguments on the record in support of their positions. I have considered these arguments in the course of my adjudication of this matter.

In his complaint, Mr. Tarvin asserted that he was removed from his job as a shuttle car operator on a coal producing

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section on February 18, 1987, and replaced by an inside laborer. He alleges that he was removed from the section because he had reported to his foreman 2 days earlier that a ventilation line curtain was 20 feet from the face and had not been advanced while coal was being cut. Mr. Tarvin also stated that some 3 weeks earlier, he told his foreman and his crew that they never checked for methane while mining and did not use their methane monitors, and that since this was the case, there was no need for them to bring their methane monitors if they were not going to use them. Mr. Tarvin also implied that he refused to continue to work because of what he reasonably believed to be a violation of the Act.

Mr. Tarvin's requested relief includes a request for a finding that the respondent discriminated against him by removing him from the section, that he be put back on a coal producing section, and an order prohibiting the respondent from further discriminating against him or harassing him for refusing to do work which he believes to be in violation of the Act.

The respondent filed a timely answer and denied that it has discriminated against Mr. Tarvin. The respondent admitted that the ventilation curtain in question was not installed as required by mandatory safety standard 30 C.F.R. 75.302-1, and stated that it was reinstalled as soon as it came to the attention of the foreman. Respondent admitted further that Mr. Tarvin was moved to another section of the mine, but contended that he was transferred because the area where he was working was "mined out," and that he was having problems coordinating his activities with those of the other equipment operators.

The respondent further asserted that Mr. Tarvin suffered no loss in pay, or any change in his job classification as a shuttle car operator, and that no adverse action has been taken against him. Respondent also stated that the same facts and issues presented in this case were the subject of a grievance filed by Mr. Tarvin under the National Bituminous Coal Wage Agreement of 1984 (Contract), and that the grievance was dismissed when it was determined that the respondent followed correct procedure and was justified in transferring Mr. Tarvin. Respondent concludes that it has not violated section 105(c) of the Act, and contends that this dispute is a contractual matter which has been settled under the terms of the contract.

Issues

The crucial issue in this case is whether or not the complainant's transfer from a coal producing section to a rock

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construction section was motivated in any way by his engaging in any protected safety activity, and whether the transfer was made in retaliation for that activity. Additional issues raised by the parties are 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.

Stipulations

The parties stipulated to the following (Tr. 17Ä18):

1. Complainant is a miner and Respondent is an operator and Complainant's employer as defined by the Federal Mine Safety and Health Act of 1977 (Act).
2. The Administrative Law Judge has jurisdiction to hear this case.
3. Complainant, through his representative, and Respondent, are both signatories to the National Bituminous Coal Wage Agreement of 1984 (Contract) and are bound by the terms and conditions therein.
4. Article 1A, Section (d) of the contract states, inter alia, ". . . the direction of the working force . . . is vested exclusively in the Employer."
5. Article XXIII of the Contract provides for settlement of disputes.
6. Complainant has suffered no loss in pay due to his transfer and is in the same classification as he was prior to this transfer. Complainant continues to work on the same shift.

7. Complainant filed a Discrimination Complaint with the Mine Safety and Health Administration (MSHA). MSHA found that no violation of Section 105(c) of the Act existed.

Bench Ruling Denying the Complainant's Motion for a Continuance

Complainant's counsel telephoned me at my hotel on the afternoon of the day before the scheduled commencement of the hearing. He advised me that he had just been retained by Mr. Tarvin to represent him, and he requested a continuance in order to prepare his case. I advised counsel that his request was denied, but that he would be given an opportunity to re-new his motion on the record after the convening of the hearing, and that I would consider any further arguments after an opportunity to hear further as to why he was not retained by Mr. Tarvin earlier than a day before the hearing.

At the hearing, Mr. Tarvin explained that his late retention of counsel was due to the fact that he had previously believed that his UMWA Union District 20 office would represent him in this matter. Mr. Tarvin confirmed that he contacted the union 3 weeks prior to the hearing, and spoke with one of its representatives. Union representative Thomas Ed Wilson, who was present in the courtroom, confirmed that he had spoken to Mr. Tarvin "about the court case coming up," but that he had not seen any further correspondence on the matter from July until the present. Mr. Wilson stated that he was under the impression that the Department of Labor's Solicitor's Office would represent Mr. Tarvin, and he came to that conclusion because he had not seen any correspondence between Mr. Tarvin and the respondent. Mr. Wilson was aware of the fact that MSHA advised Mr. Tarvin of the fact that it did not believe that a violation had occurred, and that Mr. Tarvin had written to the Commission for further relief. From that point on, Mr. Wilson stated "the next thing I know the case is coming to trial" (Tr. 6Ä9).

Mr. Tarvin acknowledged that he was made aware of the fact that based on MSHA's investigation of his complaint, MSHA was of the opinion that the respondent did not discriminate against him and was not in violation of section 105(c) of the Act, through MSHA's letter of April 17, 1987, informing him of its decision. When asked whether it was his understanding at that time that when he filed his complaint with the Commission he would be proceeding on his own, Mr. Tarvin responded "I still thought the union lawyer was going to be representing me" (Tr. 9). When asked whether he believed that MSHA would

be representing him, Mr. Tarvin responded "I really don't know" (Tr. 10). With regard to his belief that the union would represent him, Mr. Tarvin stated "Well, I thought they would have a lawyer here, you know. If I'd knowed that they wouldn't, I would have got a lawyer of my own, you know" (Tr. 10).

The parties were reminded of the fact that given the presence of counsel, the number of witnesses present, a court reporter, and the time and expense expended in convening the hearing upon more than timely notice to the parties, it was my view that Mr. Tarvin had more than ample time to retain counsel, and the request for a continuance was neither timely or justified, and it was denied (Tr. 10).

I reviewed and discussed Mr. Tarvin's complaint with the parties, including the answer and the defense presented by the respondent. I pointed out that the facts did not appear to be complicated, and that the issue presented was rather basic and simple (Tr. 11-14). Mr. Tarvin's counsel was afforded an opportunity to review the proposed stipulations tendered by the respondent (Tr. 16-19), and he was afforded an opportunity to review the official record with respect to the complaint, and to speak with Mr. Tarvin and his witnesses, who were present, before the taking of any testimony. Counsel was also afforded an opportunity to review MSHA's report of investigation, which was made available by the respondent, and he made a copy of the report for his file (Tr. 82).

In addition to the testimony of Mr. Tarvin, three witnesses were called to testify on his behalf. I take note of the fact that in the course of the hearing, Mr. Tarvin's counsel confirmed that while he has not previously been involved in discrimination cases, he has some knowledge about coal mining, and has been involved in two or three coal cases in the past. He also displayed a keen awareness of the issues presented in this case, and conducted a most effective direct examination of his witnesses, and cross-examination of his adversary witnesses (Tr. 112-113; Tr. 240-250). Although the parties waived the filing of posthearing briefs, they were afforded a full opportunity to state their positions and to give supporting arguments on the record (Tr. 239-251), and I have considered these arguments in the course of my decision of this case. Under all of these circumstances, I cannot conclude that Mr. Tarvin has been prejudiced by my denial of his request for a continuance of the hearing.

Complainant's Testimony and Evidence

Complainant Robert L. Tarvin testified that he has been employed by the respondent for 3 years, and is presently a shuttle car operator. He has never been disciplined for operating the machine dangerously, nor has he been criticized in any manner concerning the operation of the machine. He confirmed that he is a member of a ten-person crew who work together on a particular section. On the evening of February 16, 1987, his crew was assigned to the No. 1 Section, and he was assigned to that crew approximately 6 months earlier (Tr. 19-24).

Mr. Tarvin stated that on the evening of February 16, 1987, while operating a shuttle car at the Number 2 place on the section, he pulled his car in behind a continuous-mining machine which had "gassed out." He explained that the miner automatically shuts down in any area where the methane level reaches 2 percent or more. The place was being cut, and as he looked over his shuttle car, he observed that no ventilation curtain was installed to course the air around the face. He was positioned approximately 10 feet behind the miner machine, and when he observed that the curtain was not up, he backed his machine completely out of the area, informed the miner crew that "they needed to get the curtain up," and he left to summon the section foreman, Gary Allinson. After returning with the foreman, Mr. Allinson looked into the area and instructed the crew to put up some curtain, and Mr. Tarvin stated that he informed Mr. Allinson that no curtain had been up in the 20 foot cut, and that "there was one more shuttle car left on the clean up" (Tr. 27). Mr. Allinson sent the miner helper to obtain some curtain, and he returned with the curtain approximately 8 minutes later and put it up (Tr. 28).

Mr. Tarvin confirmed that although ventilation curtain had been installed on the previous cut, when the miner machine proceeded to cut the next 20 feet, the curtain was not advanced or put up, and when asked why the curtain was not advanced, he responded "the miner crew was trying to cut--they was trying to break a record, you know, each one trying to outdo the other one (Tr. 28).

Mr. Tarvin stated that after the curtain was put up, since it was the end of the work shift, he loaded out one more load of coal, finished cleaning up, and prepared to leave to go home. Before leaving, he informed Mr. Allinson that he would report the matter to the safety committee. Mr. Tarvin confirmed that before leaving the mine that evening, he reported the matter to safety committeeman Robert Glasgow.

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Mr. Glasgow discussed the matter with Mr. Allinson, and "got on his case" about the curtain being down, and Mr. Allinson admitted that the curtain was not up. Mr. Tarvin had no knowledge about any violation being written, nor was he aware of any formal complaint being filed with MSHA over the accident. He simply reported it to the safety committeeman (Tr. 30).

Mr. Tarvin stated that he reported to work the next evening, February 17, but Mr. Allinson was not at work. The following evening, February 18, while in the bath house preparing for work, Mr. Allinson informed him that he was needed on rock crew foreman Scott's crew, and that he was to go with Mr. Scott. Mr. Tarvin explained that rock crew work is done outby the face, and the work includes the construction of overcasts, cribs, loading out rock, and picking up trash, and does not involve coal production. Although he is still classified as a shuttle car operator, and is occasionally used in that capacity on the construction crew to load out rock, Mr. Tarvin preferred to be back on his coal producing crew doing the job that he bid for. When asked why, Mr. Tarvin responded "it just seems like I was taken off because I told them about the safety. I feel like I was discriminated against. I'd rather be in a producing section" (Tr. 35-36).

Mr. Tarvin stated that he was aware of other miners who were transferred to the rock crew for making complaints, and he believed that he was transferred to punish him for making complaints. He confirmed that after he was transferred from the No. 1 Section, he was replaced as a shuttle car operator on that section by an inside laborer, Tommy "Dukey." As a result of this, Mr. Tarvin filed a grievance, and the job was placed for bid. The laborer was removed from the job, and Mr. Eldon Sides successfully bid on the job, and he presently occupies it (Tr. 36-41).

Mr. Tarvin confirmed that prior to his transfer to the rock crew, he had been on Mr. Allinson's crew for approximately 6 months, and that he was originally placed there as a result of a grievance he filed against another foreman, John Kuzio. Mr. Tarvin stated that he was taken off Mr. Kuzio's section after complaining to him that the shuttle car he was operating had no brakes. Mr. Tarvin stated that he filed a grievance, as well as a complaint with MSHA, and that the grievance was arbitrated. However, the case was resolved at the third stage of the grievance, and he was awarded his job back, and placed on Mr. Allinson's crew. Mr. Tarvin claimed that MSHA investigated his complaint, but found no violation, and the respondent's counsel disputed this claim (Tr. 41-43).

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Mr. Tarvin stated that Mr. Allinson was aware of his complaints while working with Mr. Kuzio, but that he had no prior trouble with Mr. Allinson until he was transferred to the rock crew (Tr.44).

Apart from running over cables "once in awhile" while passing another shuttle car, which other operators also do, Mr. Tarvin denied that anyone had ever told him that he was having problems with trailing cables, or that anyone complained about his operation of the shuttle car (Tr. 44-45). Mr. Tarvin confirmed that he had reminded his crew 2 weeks prior to his transfer for the need to check for methane, but they just "laughed it off," and he filed no complaint. He also confirmed that prior to his complaint to Mr. Allinson about the curtain, he had never filed any safety complaints with the safety committee, or with MSHA or state inspectors (Tr. 46-49).

Mr. Tarvin confirmed that he lost no status or pay as a result of his transfer, and is still working the same shift. Assuming he prevails on his complaint, he simply wishes to be put back with his prior crew on a coal producing section (Tr. 50).

On cross-examination, Mr. Tarvin confirmed that while he did not complain to MSHA about the fact that members of his crew were not using their methane monitors to check for methane, he did inform Mr. Allinson about the matter, and after that, the crew used the monitors (Tr. 51-52). Mr. Tarvin conceded that no action was taken against him as a result of his complaint to Mr. Allinson (Tr. 54).

Although Mr. Tarvin contended that the respondent was utilizing untrained and unskilled general laborers as shuttle car operators, he never complained, and he conceded that before becoming a shuttle car operator, he too was a general laborer and was trained as a shuttle car operator. Although he insisted that untrained laborers operate shuttle cars, he stated "I don't know whether they're test trained or not" (Tr. 62).

Mr. Tarvin confirmed that someone classified as a shuttle car operator was working on the rock crew before he was transferred, and that after that person bid off that job, a vacancy resulted. However, he contended that after the vacancy was posted, it was removed, and the job was not awarded to anyone, and he denied that he was transferred to fill that vacancy (Tr. 64-65). He conceded that when he initially bid on a shuttle car job, his bid was for that specific job, rather

than a bid for any particular place in the mine, because the places are always moving. He "guessed" that the respondent had the right to place him in any shuttle car operator's job in the mine, regardless of the working section, as long as he continued to operate a shuttle car. He conceded that the respondent may assign him as a shuttle car operator for "one night," and that the shifting of personnel and job bidding is a contract matter. When asked whether it was true that he does not have to necessarily operate a shuttle car as long as he is working and being paid in his job classification, he responded "I don't know that" (Tr. 66).

Mr. Tarvin contended that although ten shuttle car loads of coal had been loaded out during the course of his shift on the evening of February 16, he first observed that the curtain was not up when he pulled in behind the gassed out mining machine. He explained that his position on the shuttle car placed him on the opposite side of the curtain and he could not see it (Tr. 76). Mr. Tarvin disputed any suggestion that the mine bottom was being graded as it was cut, or that the curtain was installed, but simply down, and he insisted that the curtain was not put up at all (Tr. 77-79). He conceded that since the miner was gassed out, his shuttle car could not have been loaded anyway, and that he did not stop production or refuse to work. He reaffirmed his belief that he was transferred because he complained to Mr. Allinson about the curtain, and that "I was ran off when I told the safety man about it" (Tr. 80). Mr. Tarvin admitted that while the committeeman advised him later in the bath house on February 16, that Mr. Allinson had admitted to him that the curtain was down, he could not remember telling the safety committeeman the next day that he was transferred because of his reporting the fact that coal was being mined without a curtain (Tr. 81).

In response to further questions, Mr. Tarvin stated that he did not speak with committeeman Glasgow the day after he was transferred, could not recall speaking with him after that, and that he could have asked why he was no longer with Mr. Allinson. Mr. Tarvin denied that Mr. Glasgow ever advised him that he was transferred because he had trouble running over cable (Tr. 85).

Mr. Tarvin identified a copy of the grievance that he filed, and while it reflects that it was settled, Mr. Tarvin stated that he did not agree with the settlement disposition (exhibit RÄ3, Tr. 86). Mr. Tarvin's counsel explained that the union has the authority to settle a grievance which is not arbitrated, even though the miner does not agree with that decision (Tr. 87).

Eldon Sides, shuttle car and ram car operator, testified that subsequent to Mr. Tarvin's transfer from the production section to the rock construction section, the vacancy created was put up for bid to replace Mr. Tarvin, and he bid on the job and got it. However, immediately after Mr. Tarvin's transfer, and before the job was posted for bid, a general inside laborer was assigned to the section. Mr. Sides stated that when he got the job, he continued to work on the No. 1 Section for a month or two until the entire crew was moved to the No. 4 Section and began mining there. No other crew replaced the crew that moved from the No. 1 Section, and it remained an idle evening shift, with only an electrician and a service crew there working to prepare the section for the day shift. Although the day shift worked the section, it remained idle during the evening (Tr. 97Ä101).

Mr. Sides confirmed that prior to bidding on the vacancy created by Mr. Tarvin's transfer, he had bid on a shuttle car operator's job vacancy on the rock crew created approximately 2 months before Mr. Tarvin's transfer. The vacancy came about when the rock crew shuttle car operator transferred to another job. However, the respondent withdrew the job bid, and stated that it was posted in error, and that there was no vacancy. As far as he knew, the job was never re-posted for bid, and he simply waited until he bid on Mr. Tarvin's former job on the No. 1 production section (Tr. 106).

On cross-examination, although Mr. Sides contended that MSHA was "involved" in the incident concerning the ventilation curtain which Mr. Tarvin reported, he had no knowledge whether a citation was issued or whether any investigation was conducted (Tr. 107). With regard to the job biddings he testified about, he could furnish no specific details or dates. He confirmed that when anyone bids on a job, they bid the specific job, and not the location of the job, and stated that "you can go anywhere," and "wherever management wants to put you," including the rock project (Tr. 107Ä109). Mr. Sides confirmed that he has never filed any safety complaints (Tr. 120).

Marteen Nichols, testified that he is employed by the respondent as a general inside laborer on the rock crew. He identified the individual who worked on the same rock crew, and who subsequently transferred from the job filled by Mr. Tarvin when he was transferred to the crew, as Ms. Elizabeth Hamner. He explained her duties as follows (Tr. 122Ä123):

A. She was just basically like anyone else that was on the rock crew. If it was rock dusting, we all rock dusted. If it was picking up trash, we picked up trash. If we had rock to be hauled, we hauled rock, she was just like everybody else. The rock crew is just a crew more or less.

Q. Did she operate a shuttle car?

A. If there was a shuttle car that needed to be operated, she would run one -- not a shuttle car, but a ram car.

Q. A ram car?

A. Right. I think the reason she was on the section was because she didn't run a shuttle car. She just ran a ram car.

Q. What's the difference?

A. Well, the ram cars are battery operated. You've got a little more visibility out of them and they're a little bit simpler to operate.

Q. Are there any shuttle car used on the rock crew?

A. If we go to a section that needs rock work that has shuttle cars, we use shuttle cars.

Q. Do you use ram cars more often than shuttle cars?

A. Since they've done away with most of the ram cars we don't. You know, the section that we're on now has ram cars, but that's the first section we've had ram cars for awhile.

Mr. Nichols stated that Ms. Hamner transferred from the rock crew when she bid on a job on the day shift, and he could not remember anyone replacing her immediately. Since there was no other ram car operators to operate the cars after she left, either he or other crew members would operate the ram and shuttle cars as needed. Mr. Nichols confirmed that work on the rock is such "that you might run a shuttle car one day and you might go months and you'll never run one for a month" (Tr. 124). He confirmed that the rock crew is usually

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short-handed, and that miners are sometimes borrowed from the rock section and sent elsewhere to work (Tr. 125). Mr. Nichols stated that several weeks or a month elapsed after Ms. Hamner left the rock crew before Mr. Tarvin arrived, and in the interim, other rock crew members, including laborers, would operate the shuttle cars. It was not unusual for laborers to run cars because they use this opportunity to train on the cars, and then bid for one of those jobs (Tr. 126).

Mr. Nichols could not recall what the rock crew was doing when Mr. Tarvin was first assigned there, and he confirmed that when he worked with Mr. Tarvin at another coal company prior to his present job, Mr. Tarvin never had any problems with his shuttle car cable. Mr. Nichols stated that he worked one night with Mr. Tarvin on Mr. Allinson's production crew and had no problems coordinating the shuttle cars with Mr. Tarvin, nor has he heard of any such problems (Tr. 128-129).

On cross-examination, Mr. Nichols confirmed that he could not recall the dates of Ms. Hamner's departure, and Mr. Tarvin's arrival on the rock crew, but it was possible that Ms. Hamner left on February 15, approximately 4 days prior to Mr. Tarvin's arrival (Tr. 132). Mr. Nichols recalled that when Ms. Hamner bid on the day shift job, she remained on the rock crew for awhile before leaving (Tr. 133).

Michael Gaines, ram car/shuttle car operator, testified that he worked with Mr. Tarvin for 2 or 3 months on the No. 1 production section in February, 1987. Mr. Gaines could recall no problems that Mr. Tarvin ever had with his car or cable during the time he worked with him, nor could he recall foreman Allinson or any other member of management complaining about Mr. Tarvin's operation of his shuttle car (Tr. 137). He could recall no crew members complaining or receiving complaints about the manner in which Mr. Tarvin operated his shuttle car, and he confirmed that cable problems occur when the cars are operating in the same entry and have to pass each other close together (Tr. 136-137).

On cross-examination, with regard to the ventilation curtain, Mr. Gaines stated that he paid little attention to it, and after Mr. Tarvin advised him that it was 20 feet back from the face, Mr. Gaines told him that he would check it on his next trip. Mr. Gaines stated that when he went back, the curtain "may have been down," and "evidently, it was because when I went back, they were working on it" (Tr. 141-142). He estimated that a minute or two passed from the time Mr. Tarvin

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advised him about the curtain, and the time he observed the curtain being put back up, and he could not recall whether the bottom was being graded at that time (Tr. 142).

Mr. Tarvin was recalled, and confirmed that when he advised Mr. Allinson that the curtain was down, approximately 8 minutes transpired before the matter was taken care of, and work resumed after this was done. When asked about the statement in his complaint that Mr. Allinson removed him from the section for "refusing to load a shuttle car while the line curtain was 20 feet outby the working face," Mr. Tarvin confirmed that he never said anything to Mr. Allinson that he would not work while the curtain was down, but simply went to find him and informed him that the curtain was down. Mr. Allinson. Mr. Tarvin stated that "I didn't tell him anything except the curtain needed to be up" (Tr. 150).

Respondent's Testimony and Evidence

Gary Allinson, section foreman, testified that on the evening of February 16, 1987, he was the foreman on the No. 1 Section, and that at 10:00 p.m., he went into the section where the continuous-miner was mining and observed Mr. Tarvin sitting in his almost fully loaded shuttle car. Mr. Tarvin informed him that the ventilation curtain "was down and it was too far back." Mr. Allinson then spoke with the miner operator and helper and they installed a curtain. The miner operator informed him that he was grading some bottom and needed additional clearance which he had forgotten to take earlier. Mr. Allinson stated that no coal production was lost and that "I didn't think it is a very substantial complaint." He denied that he transferred Mr. Tarvin because of the complaint because "I don't have the right to do that," and he also denied that he discussed the incident with management, or that he asked that Mr. Tarvin be transferred or discipline because of the incident (Tr. 151-153).

On cross-examination, Mr. Allinson stated that Mr. Tarvin worked for him for less than 6 months, and when asked why he was transferred, he stated as follows (Tr. 155-157):

A. I don't know exactly why. I have a good idea why. I think it was just because of his track record, as far as his ability to run the

car and the amount of down time we had on him. He was just not that good of a car operator.

* * * * *

THE WITNESS: He would run over his cable. He had a lot of problems with his cable. He was slow. Other members of the section, other union representatives would come to me -- this was on the crew of nine men, and they had complaints about him. Things that I never seen Mr. Tarvin do, the union people coming to me and telling me things that he had done.

Mr. Allinson confirmed that he had never "written up" Mr. Tarvin, and when asked to document his assertion that Mr. Tarvin had problems with his shuttle car cables, he alluded to the daily foreman's production report (P & D report) (Exhibit RÄ2). He explained that the reports simply show the shuttle car "down time," but do not reflect the name of the shuttle car operator, nor do they provide any details concerning any problems with cables (Tr. 157Ä158).

Mr. Allinson stated that in some instances, if a shuttle car operator runs over his cable, this would be grounds for disciplinary action against the operator. He confirmed that he has never disciplined Mr. Tarvin in this regard, and confirmed that Mr. Tarvin continued to operate a shuttle car for him after he had cut cables. He could not provide any specific dates or details concerning the cutting of cables by Mr. Tarvin, and confirmed that in the interest of "team work," he is lenient with his crew, and conceded that he ignored Mr. Tarvin's running over cables (Tr. 160).

Mr. Allinson identified exhibit RÄ2 as a production report filled out by foreman James Hilliard, on the evening shift of February 17, 1987, and it reflects that shuttle car No. 60 was down four times that day, and that shuttle car No. 59 had a "cable in two," but he could not state which car was operated by Mr. Tarvin because "I wasn't there that day" (Tr. 161). He believed that Mr. Gaines operated the No. 59 car, and stated that "Mr. Gaines seldom ever cut a cable" (Tr. 162).

Mr. Allinson stated that Mr. Tarvin "may have" been transferred when the No. 1 Section "mined out," and that "I don't handle that part of it." He confirmed that he was later told by mine foreman Frank Blake that Mr. Tarvin was transferred because the section had "mined out," and that the transfer

took place "a couple of days" after the curtain incident. He explained that the section was "mined out" in that after advancing at six entries, mining stopped, and the area was cleaned up and turned in another direction. All ventilation was being established, four new entries were started, grading work was taking place, and "we stopped the section going." However, they were still in section 1, and the crew continued in that section, Mr. Gaines continued as a shuttle car operator on the section, but Mr. Tarvin was replaced by Wilmer Smith, who is known as "Dukey," a general inside laborer (Tr. 165).

Mr. Allinson confirmed that while he may have informed Mr. Tarvin that he would be going with foreman Scott's rock crew on February 18, he could not recall any conversation with Mr. Tarvin, and he did not discuss it with Mr. Scott. Mr. Allinson explained that he has 15 minutes to "line up" his available crew and has no time to discuss or "bicker" over over who will work on his crew. He further explained that Mr. Blake designates the crew members with "no questions asked," and that at the time of Mr. Tarvin's transfer, he did not discuss the matter with Mr. Blake, that "it happens all the time," and "I can have a different person on my crew every night" (Tr. 167).

Mr. Allinson confirmed that he has nothing to do with the job bidding process, and that his duties do not include posting jobs for bid (Tr. 167). He denied that he was ever disciplined over the curtain incident, and stated that he did not come to work on February 17, the day after that incident, because he had to take his wife to the hospital (Tr. 168).

Mr. Allinson recalled one occasion prior to Mr. Tarvin's transfer when he spoke to him about not bringing his shuttle car up to the continuous miner for loading, and that he told Mr. Tarvin that "he needed to do better," and that Mr. Tarvin responded "I am doing better, I'm doing the best I can" (Tr. 175). Mr. Allinson also stated that Mr. Tarvin frequently cut his car cable, and that it is reported on the production records. Respondent's counsel produced several copies of the production reports for January to March, 1987, and reviewed them. The reports, which were not offered for the record, alluded to the No. 59 and No. 60 shuttle cars, and Mr. Tarvin confirmed that he operated the No. 60 car (Tr. 176). Mr. Allinson stated that Mr. Tarvin ran over and cut the shuttle car cable "approximately every night or every other night in the three or four months that he worked for me" (Tr. 178-179). In one instance, or possibly three or four times, he personally observed Mr. Tarvin cut his cable (Tr. 179, 181).

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When asked whether or not the cutting of cables by Mr. Tarvin is reflected on the reports in question, Mr. Allinson responded "whether it was 59 car or 60 car, I don't know" (Tr. 180). He confirmed that accidents do happen, and that the cable cutting was probably unintentional (Tr. 181). He also confirmed that he never "wrote up" or gave Mr. Tarvin a "work slip" for cutting cable, because he does not make it a practice to write up the crew (Tr. 182). Mr. Allinson agreed that one could not conclude that the shuttle car "down time" as reflected in the reports were attributable to Mr. Tarvin (Tr. 188).

Mr. Allinson stated that he never discussed Mr. Tarvin's work performance with Mr. Blake, and he confirmed that since his transfer, Mr. Tarvin has worked for him as a shuttle car operator on the Number 8 producing section filling in during the regular operator's absence, and that this has occurred three or four times (Tr. 184-185). With regard to Mr. Tarvin's work performance on these occasions, Mr. Allinson stated (Tr. 185):

Q. And you say you are still having problems with him?

A. Oh, worse now than ever. Worse now than ever.

Q. Why worse now than ever.

A. Cables, running over cables, and like I said, I've tried to reason with Mr. Tarvin. I've tried to take him as slow as I can and explain to him what I want him to do, to get off, walk his roadway, look for rocks, look for things, and stay off that cable, but it hasn't worked.

Q. Why don't you just tell Mr. Blake that -- are you required to take a shuttle car operator that you feel is incompetent.

A. I've got no choice in the matter. That's Mr. Blake. Mr. Blake directs the work force and says who goes where. I have no say so about that.

Mr. Allinson stated that Mr. Blake knew nothing about the curtain incident, and did not discuss it with him. Mr. Allinson confirmed that he did discuss the incident with

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the safety committeeman the following morning by telephone and informed him that "we have a problem, let's work it out," but that by the next day, the matter "had ballooned," and Mr. Allinson believed that Mr. Tarvin filed a safety grievance over the curtain being down" (Tr. 190). Mr. Allinson again denied seeking Mr. Tarvin's transfer, and he believed that the safety grievance was probably filed after the transfer, but Mr. Allinson did not know whether it was a safety grievance, or a grievance connected with his transfer (Tr. 191). Mr. Allinson stated that he tried to work the matter out "one-on-one" with the safety committeeman, because "there was not really a big deal about it," and that Mr. Tarvin "wasn't happy with us doing that" (Tr. 191). Mr. Allinson again denied that "he had it in for Mr. Tarvin" and had him transferred for complaining or "making life miserable for him" (Tr. 192).

Henry F. Blake, III, evening shift mine foreman, testified that his duties include all decisions concerning the assignment of miners on his shift, and he confirmed that he made the decision to transfer Mr. Tarvin from the No. 1 section to the rock project. He explained his reasons for the transfer as follows (Tr. 195-196):

Q. Could you tell us why you made that decision?

A. Like I said, I have to go around and observe the different sections. I observed Mr. Tarvin on many occasions on different sections and his manner of work, and I had also been told by several different section foremen that his work wasn't up to par in that he hit other cables. I observed a lot of down time on his equipment.

One of the main reasons I moved him to another project was I had a ram car/shuttle car operator that had bid from the evening shift to the day shift, leaving a vacancy. This person I held for approximately 30 days, which I can hold a person for 30 days before assigning them or releasing them to go to their new job or new shift. In this case, I think her name was Liz Hamner and she went to the day shift.

Mr. Blake could not recall the date that Ms. Hamner left the rock project, but confirmed that it would have been on a Friday, and that Mr. Tarvin would have been transferred the

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next Monday or Tuesday, and within a week. He confirmed that Mr. Tarvin's section reached a point where it was temporarily mined out, and since the section was "turning directions" and ventilation changes needed to be made, the crew was "broken up for a couple of days," and Mr. Scott needed a shuttle car operator. Mr. Blake confirmed that under the contract, he has the authority to move anyone in the mine, and that he moved Mr. Tarvin to fill a vacancy on the rock project. He decided to select Mr. Tarvin because he was aware through his own observations and from the maintenance foreman that Mr. Tarvin was having problems. Since the rock project moves at a slower pace than the producing section, and there are two cars on that project for use by one individual in the event one machine breaks down, he does not have to worry about a machine being down because someone runs over a cable (Tr. 198).

Mr. Blake stated that he was not aware of the ventilation curtain incident which occurred on February 16, and that he first became aware of it the following Wednesday or Thursday, after Mr. Tarvin was transferred. Since he had no knowledge about the incident, Mr. Blake denied that it had anything to do with Mr. Tarvin's transfer (Tr. 200).

On cross-examination, Mr. Blake confirmed that he meets with his section foremen at least once a week to discuss the mining operations, and possible personnel problems. He confirmed that at some point in time he has discussed with Mr. Allinson "everybody on his crew and everybody with everybody at one point in time" (Tr. 204). He was certain that he has discussed shuttle car operations and "down time" with Mr. Allinson, as well as with his maintenance foreman. He confirmed that he did not advise Mr. Allinson that he was transferring Mr. Tarvin from his crew, and did not believe that Mr. Allinson was at work when the crew was moved (Tr. 205). He could not recall specifically discussing with Mr. Allinson the reasons for Mr. Tarvin's transfer.

Mr. Blake confirmed that he reviews and signs the foremen's production reports, and that based on these reviews and his own observations, he made the personnel decision concerning Mr. Tarvin (Tr. 207). Although he did not consider Mr. Tarvin to be "a bad guy at all" or that he was "deficient" or a "bad operator," he stated that "my job is to place the man where I can get the best production with the least amount of hassle from everybody concerned" (Tr. 211). Since he has been in the mine 14 to 15 years, Mr. Blake stated that he was aware of the section "down time" by the reports and his own observations, and that he was aware of this when he decided to move Mr. Tarvin (Tr. 211). With regard to his prior knowledge

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of the ventilation curtain incident, Mr. Blake stated as follows (Tr. 216-217):

THE WITNESS: You -- the bottom line is, did I move Tarvin because of the line curtain? That's what I hear y'all asking me. No, I did not. I moved Mr. Tarvin because I felt like -- and I've stated my reasons. I had no knowledge of the line curtain being back or him reporting it to anyone. I think Gary or either Bob Glasgow, who is a safety committeeman, told me something about it and I cannot be honest in telling you exactly how long it was, but we're going to say three or four days later. That's being as honest as I can be because I can't pinpoint it. Your Honor, that is as honest as I can be. I mean, I can't give you a specific date, but I know it was after the fact of me moving him. That's being as honest as I know how to be with all of you.

When asked why he did not transfer Mr. Tarvin earlier if he were not considered a good shuttle car operator, Mr. Blake stated that he became mine foreman in January, 1987, and had no power to transfer anyone prior to that time (Tr. 219). He reiterated that his opinion of Mr. Tarvin's work is based on his personal knowledge and observations, and that he recently observed Mr. Tarvin run over a miner cable 2 weeks ago because he got too close to the rib with his shuttle car (Tr. 221). Mr. Blake conceded that one cannot conclude from simply reviewing production reports that Mr. Tarvin was specifically responsible for the shuttle car down time noted in the reports (Tr. 221-223). He reiterated that Mr. Allinson had nothing to do with the transfer of Mr. Tarvin (Tr. 224). Mr. Blake stated that the only complaint he was aware of by Mr. Tarvin was a grievance that he filed a year ago because he was transferred by foreman Rick Nichols, but that he was unaware of the details (Tr. 225).

With regard to the grievance filed by Mr. Tarvin after his transfer, (exhibit R-3), Mr. Blake confirmed that although he became aware of it later, he took no part in the grievance (Tr. 228). He explained his knowledge of the grievance as follows at (Tr. 226-227):

A. I'll tell you, the only thing I know, I was on the rock project later on and Mr. Tarvin approached me and I dug this note out of some of my old notes, and he said I would like to

Speak with you, and I said okay, and he was running the shuttle car. He said "what am I doing here?" I said "running the shuttle car." He said "you mean to you've got a GIL on a coal running section and I'm up here." I said "well, what are you doing?" He said "I'm running a shuttle car." I said, "well, you know" -- he said "you're not going to put me back on a section." I said, "no, I don't have any intentions," to the best of my knowledge. I wrote it down after I walked away, and his voice got very high, about three octaves, four octaves, I don't know. He said "you'll see, you'll see, you'll see," and that was work for George Scott running a shuttle car. If he filed a grievance after that, y'all never brought me any grievance and I didn't know about it.

With regard to Mr. Tarvin's assertion that rock project foreman Scott uses a laborer, rather than Mr. Tarvin, when there is a need for shuttle car operator, Mr. Blake stated that he has never seen this done, and that he found it hard to believe. If he was aware of this, he would instruct the foreman to use Mr. Tarvin on the shuttle car. Mr. Blake stated that while it was possible for a foreman on the rock project to use a laborer who knew how to operate a shuttle car instead of Mr. Tarvin, this should not occur "because he's got a bid man there to run the car" (Tr. 231).

When asked who informed Mr. Tarvin of his transfer, Mr. Blake stated as follows (Tr. 232-233):

Q. Who told Mr. Tarvin that he was being transferred, do you know?

A. I think I told Mr. Scott to take him with him that day. That's usually how -- I don't go out and tell the rank and file union people that I'm transferring them here and there. I go to my foremen and line them up with who I want them to take.

Q. Would you have notified Mr. Allinson that Mr. Tarvin was being transferred?

A. I don't think Gary was there.

Q. If he was there would you have notified him?

A. I don't know who I told. I told one of the foremen to take him, or go make the change. That's how I do it.

Q. Could it have been Mr. Allinson?

A. It could have been but I don't remember whether it was Mr. Allinson or Mr. Scott, but I transferred him to Mr. Scott.

Mr. Tarvin was recalled by the Court, and when asked whether he had ever run over a cable with his shuttle car, or had problems with the car which may have caused any down time, as testified to by Mr. Allinson, he responded "maybe once a month or something like that. Not every other night like he said" (Tr. 234). Mr. Tarvin clarified his prior testimony, and stated that he did not mean to imply that when there is shuttle car work to be done on the rock project, that a laborer is assigned that work, rather than him. His complaint is that when there is a need for a substitute shuttle car operator on another section, a laborer from the rock crew is sent to the section, rather than him, and he is used for crib work (Tr. 234). However, he conceded that on at least two occasions since he has been on the rock crew, he has in fact been assigned to Mr. Allinson's production crew as a substitute shuttle car operator (Tr. 235).

Mr. Tarvin stated that in the bathhouse on February 18, 2 days after the curtain incident, Mr. Allinson "told me I wasn't going with him no more, to go with Mr. Scott" (Tr. 236). As he finished dressing, Mr. Scott "came in and told me to go with him" (Tr. 237). Mr. Tarvin confirmed that he did not speak with Mr. Blake at this time, but did speak with him 2 or 3 weeks later when he came to the section. Mr. Tarvin further confirmed that he assumed that Mr. Allinson made the decision to transfer him because "he's the one that came told me I wasn't going with him anymore" (Tr. 237).

Respondent's Arguments

The respondent argues that even assuming that Mr. Tarvin has made a prima facie case that his transfer came about as a result of his complaint about the ventilation curtain, the respondent has completely rebutted this claim, and has shown that Mr. Blake made the decision to transfer Mr. Tarvin for legitimate business reasons, and that he was unaware of the

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curtain incident at the time he made the decision to transfer Mr. Tarvin. The respondent argues further that the dispute which gave rise to the discrimination complaint is a contractual matter which was taken to grievance by Mr. Tarvin, and should not be relitigated in this case (Tr. 239-240).

Complainant's Arguments

The complainant maintains that the purported "business reasons" justification for his transfer are entirely pretextual, and that the respondent's assertions concerning his alleged deficiencies are not documented and have been fabricated. The complainant suggests that although the respondent could have transferred him at any time, it did not do so until after he complained about the curtain, and that "it's too much of a coincidence that it was done two days after" his complaint. Conceding that the respondent took immediate action to correct the curtain condition, the complainant nonetheless believes that the coincidence of the transfer after alleged months of ineptitude with regard to his work, is too much to believe. Complainant suggests that he was transferred either as punishment or retaliation, or because Mr. Allinson did not want him on the section after he complained, and that this was a violation of the Act (Tr. 240-245). The complainant agreed that there is no issue of any "work refusal" in this case, and that when he observed that the curtain down, he immediately summoned his foreman to take care of the problem (Tr. 246-248).

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. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C.Cir.1983).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse

action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Company*, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, supra. See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir.1983); and *Donovan v. Stafford Construction Company*, No. 83-1566 D.C.Cir. (April 20, 1984) (specifically-approving the Commission's *Pasula-Robinette* test). See also *NLRB v. Transportation Management Corporation*, 462 U.S. 393, 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.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (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, 1398-99 (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. Tarvin's Protected Activity

The record in this case establishes that Mr. Tarvin had worked under Mr. Allinson's supervision on the No. 1 producing section as a shuttle car operator for approximately 6 months prior to his transfer to the rock project on or about February 18, 1987. Mr. Tarvin was not a member of the mine safety committee, and I find no credible evidence to suggest that he was a "safety activist," or that he regularly filed safety complaints. Indeed, Mr. Tarvin confirmed that prior to his bringing the ventilation curtain matter to the attention of his foreman, Gary Allinson, on the evening of February 16, 1987, he had not previously filed any safety complaints with mine management, the safety committee, or with any state or Federal mine enforcement agencies. Although Mr. Tarvin stated that approximately 3 weeks prior to his transfer, he mentioned to Mr. Allinson and his crew that they were not using their methane detectors to check for methane in the section, Mr. Tarvin confirmed that he did not report the matter to MSHA, and that after he spoke with Mr. Allinson, the crew began to use their detectors. Further, Mr. Tarvin conceded that his "complaint" in this regard did not result in any action being taken against him, and I find no credible evidentiary basis for concluding that this particular incident had anything to do with Mr. Tarvin's transfer.

The credible evidence in this case establishes that Mr. Tarvin did in fact register and communicate a timely safety complaint to Mr. Allinson, as well as to a member of the mine safety committee, during the end of the working shift on the evening of February 18, 1987. Mr. Tarvin's complaint concerned a ventilation curtain which was not in place, or had not been advanced, to within 10 feet of the working face in an area where coal was being mined, and where Mr. Tarvin was expected to work while operating his shuttle car. I find no credible evidence to establish that Mr. Tarvin reported the matter to any state or Federal inspector, or that any violation was issued to the respondent as a result of the complaint. Further, the record establishes that once the matter was brought to Mr. Allinson's attention, he took immediate action by instructing members of the work crew who were present to install or advance the curtain to the required distance from the face. Although Mr. Tarvin's original complaint statement filed with MSHA on February 18, 1987, suggested that Mr. Tarvin may have refused to work because the ventilation curtain was not located where it should have been, I find no credible evidence to support any such conclusion, and in fact, Mr. Tarvin has conceded that he did not refuse to work because of the absence of the curtain.

I conclude and find that Mr. Tarvin's February 16, 1987, complaint to Mr. Allinson concerning the ventilation curtain is protected activity, and that mine management, including Mr. Allinson, is prohibited from intimidating or harassing Mr. Tarvin, or otherwise retaliating against him because of that complaint. Transferring Mr. Tarvin from one mine section to another, or similar personnel actions taken against him because of any protected activity on his part is a form of retaliatory discrimination which is prohibited by the Act, *Baker v. Interior Board of Mine Operations Appeals*, 595 F.2d 746 (D.C.Cir.1978); *Secretary ex rel Johnny N. Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508 (November 1981), rev'd on other grounds, sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C.Cir.1983).

Respondent's Motivation for Mr. Tarvin's Transfer

The record establishes that Mr. Tarvin has lost no pay or job classification status as a result of his transfer, and he is still on the same work shift (Tr. 50). The relief requested is that he be put back on a producing section (Tr. 50). In my view, the thrust of Mr. Tarvin's complaint lies in his belief that the respondent is not fully utilizing him as a shuttle car operator on the rock section, and has assigned him to do other work, such as rock dusting, building cribs, cleaning up, or installing ventilation curtains. Mr. Tarvin also complains that when the need arises for the services of a shuttle car operator elsewhere in the mine, either by temporary detail or assignment, the respondent assigns a laborer or someone other than Mr. Tarvin to do this work (Tr. 87-90). As a matter of fact, Mr. Tarvin candidly admitted that this is the basis for his complaint (Tr. 92-93).

Mr. Tarvin's assertions that he has not been used as a shuttle car operator in other sections of the mine since his transfer are not accurate. Mr. Allinson testified that since his transfer, Mr. Tarvin has worked for him on the No. 8 producing section on three or four occasions during the absence of the regular shuttle car operator (Tr. 184-185). Mr. Tarvin admitted that on at least two occasions since his transfer to the rock crew, he has worked for Mr. Allinson on a production crew as a substitute shuttle car operator (Tr. 235).

With regard to Mr. Tarvin's work assignments on the rock crew, one of his own witnesses, Marteen Nichols, testified that everyone on the rock crew rock dusted and picked up trash, including Ms. Hammer, who was a shuttle car and ram car operator (Tr. 122, 127).

Mr. Tarvin's transfer from the production section to the rock project was the subject of a contract grievance filed by Mr. Tarvin's union on his behalf (Tr. RÄ3). Although the respondent asserted in its answer to the complaint that the grievance "was denied," the fact is that the grievance was settled and did not go to arbitration.

Mr. Tarvin stated that he disagreed with the settlement of his grievance. However, under the terms of the contract, any settlement of a grievance apparently becomes final, and there is nothing to show that Mr. Tarvin's grievance was taken any further. Mr. Tarvin confirmed that he filed no further grievances. I take particular note of the fact that the grievance form executed by Mr. Tarvin contains no suggestions that his transfer was in any way connected with any safety complaints on his part. As a matter of fact, Mr. Tarvin's grievance appears to be based on an issue of job classification, and the relief requested by Mr. Tarvin is shown as "I'm asking to be retained on my bidded job (R/C operator on running section)." The respondent's position is stated as "Every reasonable effort shall be made to keep an employee at work on the job duties normally and customarily a part of his regular job."

Mr. Tarvin confirmed that at the time of his transfer to the rock section, he did not seek out Mr. Blake to discuss the matter with him, and there is no evidence that Mr. Tarvin lodged any protest with Mr. Blake at that time, or otherwise suggested to Mr. Blake that his certain safety complaint to Mr. Allinson was the reason for his transfer. As a matter of fact, Mr. Blake's testimony, which I find credible, establishes that he had no knowledge of Mr. Tarvin's complaint when he made the decision to transfer him. Further, the unrebutted testimony of Mr. Allinson and Mr. Blake, which I also find credible, establishes that Mr. Blake alone made the decision to transfer Mr. Tarvin, and that Mr. Allinson took no part in that decision.

Mr. Tarvin confirmed that he filed his grievance about a week after his transfer to the rock section on February 18, 1987. I take note of the fact that the grievance form executed by Mr. Tarvin, (exhibit RÄ3), contains a notation "2/25/87. F. Blake" on the line designated "Date of Foreman's Decision." Mr. Blake testified that he had a conversation with Mr. Tarvin subsequent to his transfer during which Mr. Tarvin protested the fact that a laborer was being used on a production section, while he was left on the rock project.

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Mr. Blake advised Mr. Tarvin at that time that he had no intention of transferring him back to a production section, and Mr. Tarvin responded "you'll see, you'll see" (Tr. 226-227). One can reasonably conclude from this that Mr. Tarvin's grievance was prompted by Mr. Blake's refusal to transfer him back to a producing section. As a matter of fact, Mr. Tarvin confirmed that as a result of his grievance, the laborer who had been assigned to the shuttle car job on the No. 1 Section after his transfer, was removed from the job. Mr. Sides subsequently bid on the position and was awarded the job. Mr. Tarvin did not pursue the matter further and filed no more grievances (Tr. 39-40).

With regard to Mr. Tarvin's purported poor work performance, his counsel pointed out that this issue was raised for the first time during the course of the hearing, and that the respondent never informed Mr. Tarvin of any poor work performance, and had never given him any work deficiency notices. Counsel concluded that the alleged poor work record argument advanced by the respondent has been fabricated as a further excuse to justify Mr. Tarvin's discriminatory transfer (Tr. 240-241).

With regard to Mr. Tarvin's alleged poor work performance as a shuttle car operator on the production section, while it is true that the respondent did not specifically detail this as part of its initial answer and defense to the complaint, I take note of the fact that in paragraph four of its answer, the respondent's counsel did state that Mr. Tarvin's transfer came about in part because "he was having problems coordinating his activities with those of the other equipment operators." Although Mr. Tarvin's purported problems with his shuttle car did not result in his being officially disciplined or reprimanded by the respondent, the testimony of Mr. Allinson and Mr. Blake, which I find credible, do support the respondent's contention that Mr. Tarvin has experienced some problems with running over his cable from time-to-time. As a matter of fact, Mr. Tarvin admitted that he had run over cables "once in awhile" (Tr. 44), and that he had experienced problems with his shuttle car which resulted in "down time" "maybe once a month," but not to the degree stated by Mr. Allinson (Tr. 234).

Both Mr. Allinson and Mr. Blake confirmed that they have personally observed Mr. Tarvin frequently running over shuttle car cables, and Mr. Allinson's un rebutted testimony is that he had previously discussed this with Tarvin and informed him that he needed to do better. Mr. Allinson explained that while he was concerned with Mr. Tarvin's performance, he did

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not "write him up" out of concern for continued "team work" among his crew, his lenient attitude towards his crew, and his reluctance to discipline them or to make it a practice to hand out "work slips" for poor performance. Mr. Allinson further explained that since Mr. Blake has the sole authority to assign the work and the crews, he has no say in rejecting a crew member who may be incompetent.

Mr. Blake testified that since he only assumed the evening shift mine foreman's position in January, 1987, he had no prior authority to transfer Mr. Tarvin earlier. Mr. Blake confirmed that his personal observations of Mr. Tarvin running over cables, and the fact that the section had a lot of "down time" because of shuttle car problems which may or may not have been attributable specifically to Mr. Tarvin, was only one part of the reasons for his decision to transfer him.

After careful consideration of the testimony of Mr. Blake and Mr. Allinson, which I find credible, and Mr. Tarvin's own admissions, I cannot conclude that the respondent has concocted or fabricated Mr. Tarvin's problems with his shuttle car as an excuse for his transfer. Indeed, Mr. Blake's credible testimony is that Mr. Tarvin's problems with his shuttle car on a producing section were only a part of the reasons for his decision to transfer Mr. Tarvin, and the fact that the respondent failed to include this as part of its original answer and defense in this case is not particularly significant.

Mr. Tarvin's counsel asserted that the vacancy on the rock crew had existed for some time prior to the transfer, and that other qualified miners were available to fill the vacancy just as easily as Mr. Tarvin (Tr. 102Ä103). Counsel suggested that the respondent had an ample opportunity to transfer Mr. Tarvin to the rock crew prior to his ventilation curtain complaint, and in view of the fact that the respondent has contended that Mr. Tarvin's work as a shuttle car operator on a producing section was less than adequate, the respondent could have legitimately transferred him for that reason, but chose not to do so until he complained to his foreman about the curtain. Under these circumstances, counsel argued that the timing of Mr. Tarvin's transfer, shortly after his complaint to his foreman, raises an inference that his transfer was motivated by his complaint, rather than his alleged poor work performance, and that the respondent's contention that Mr. Tarvin was transferred to an existing and available vacancy on the rock crew because a shuttle car operator was required for work on the rock project is pretextual and simply an excuse for the discriminatory transfer.

Mr. Sides testified that the vacancy on the rock crew created by Ms. Hamner's successful bid on a day shift job, came about approximately a month or two prior to Mr. Tarvin's transfer, and that he (Sides) bid on the job. However, Mr. Sides confirmed that Ms. Hamner's job vacancy on the rock crew was withdrawn by the respondent on the ground that it was posted "in error" and that no jobs were available (Tr. 105, 108). Mr. Sides conceded that when such a vacancy is posted for bid, management may, in its discretion, assign the successful bidder to any place in the mine, including the rock crew, and that one simply bids on the position and not for any particular mine location (Tr. 108). Mr. Sides also confirmed that the posting of a shuttle car job indicates that there are more available jobs than car operators, and that "they needed jobs on the rock crew" (Tr. 110). Mr. Sides confirmed that after Mr. Tarvin was transferred, he (Sides) successfully bid on the job vacancy created by the transfer. Mr. Sides confirmed that Mr. Allinson is no longer his foreman, and he also confirmed that foremen are in fact moved "every now and then" (Tr. 114).

Marteen Nichols, who worked on the rock crew with Ms. Hamner, testified that the rock crew is usually short-handed because personnel are borrowed for other sections (Tr. 125). He could not recall anyone immediately replacing Ms. Hamner after she left the rock crew, and he believed that several weeks, and possibly a month, passed before Mr. Tarvin arrived to replace her (Tr. 125). He later stated that he was unsure of the dates that Mr. Hamner left and Mr. Tarvin arrived, and that "she was gone and then Robert was up there" (Tr. 133). He also recalled that Ms. Hamner's departure from the rock crew after she bid on the day shift job was delayed, but he did not know the reason for this (Tr. 133).

Mr. Blake confirmed that Ms. Hamner's bid on a day shift job resulted in a vacancy for a shuttle car operator on the rock project. He stated that rather than transferring Ms. Hamner immediately, he kept her on the rock crew for approximately 30 days, and subsequently transferred Mr. Tarvin to fill the vacancy. Although he could not recall the specific dates, Mr. Blake stated that following his usual practice, Ms. Hamner would have transferred to the day shift on a Friday, and Mr. Tarvin would have been transferred on a Monday or Tuesday of the following week. Mr. Blake stated that his decision to transfer Mr. Tarvin, rather than someone else, was based on his knowledge of the down time on the producing section, and the fact that Mr. Tarvin had problems with his shuttle car on the producing section. Mr. Blake

further explained that the work on the rock project is at a slower pace than the work on the producing section, and since only one shuttle car is used most of the time on the rock project, there is little chance of the operator running over cables. Further, since a back-up car is usually available on the rock project, in the event one car breaks down, the operator can simply use the other one to continue to "run the rock" (Tr. 196-198). Mr. Blake also confirmed that since he only became the evening shift mine foreman in January, 1987, he lacked the authority to transfer Mr. Tarvin earlier (Tr. 219-220). Since there is only one shuttle car operator on the rock project, he needed someone to fill the vacancy created by Ms. Hamner's bid to a day shift job, and he alone made the decision to fill it by transferring Mr. Tarvin to the position (Tr. 223).

After careful consideration of all of the testimony, I conclude and find that Mr. Blake has provided a plausible and believable explanation as to why Mr. Tarvin was not transferred earlier to the rock project. More to the point, however, is the fact that as the evening shift mine foreman, Mr. Blake had the absolute authority and discretion to assign and transfer his available mine personnel to any section where he believed they could be best utilized. Absent any credible evidence that Mr. Blake's personnel action concerning Mr. Tarvin was in violation of the contract, or that it was otherwise arbitrary, or the result of any disparate treatment of Mr. Tarvin, I cannot conclude that Mr. Blake had any ulterior motive, such as punishment or retaliation in mind when he made the decision to transfer Mr. Tarvin to the rock project.

Mr. Tarvin's counsel also questioned the respondent's assertion that Mr. Tarvin was transferred because the No. 1 Section was "mined out" and that his services were needed on the rock project. The use of the term "mined out" by the respondent in its answer to the complaint does convey the impression that all of available coal on the section had been taken, and that there was no further need for Mr. Tarvin on that section. If this were true, it would lend credence to the respondent's assertion that there was a legitimate reason for Mr. Tarvin's transfer. If not, it would raise an inference that the respondent may have been motivated by reasons other than the section being mined out.

Mr. Tarvin testified that after his transfer, the crew remained on the No. 1 Section (Tr. 32). Mr. Tarvin asserted that after Mr. Sides successfully bid on the vacancy created by his transfer, Mr. Sides continued to work on the section

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for a month and a half, until he and the entire crew were transferred to the No. 4 Section (Tr. 38, 41). Mr. Tarvin did not know why they were transferred (Tr. 41).

Mr. Sides testified that when he bid on the job created by Mr. Tarvin's vacancy on the No. 1 Section, the evening shift was idled and the entire crew was moved and started mining on the No. 4 Section. He confirmed that different shifts are idled from time-to-time, and that after the crew was moved, an electrician and a service crew were left on the No. 1 Section (Tr. 100-101). This lends credence to the following explanation by Mr. Blake as to whether or not the section had been "mined out" (Tr. 197):

A. The section that Robert was working on was temporarily mined out. In other words, it had reached a point it was going to go. Then the crew was all broken up for a couple of days to the best of my memory. Some of them stayed, some of them went here and there, but the section was turning directions. There was ventilation changes to be made, and I needed an operator for Mr. Scott. He didn't have one.

Q. A shuttle car operator?

A. Right. Shuttle car/ram car.

Q. As long as you go in conformity with the contract and don't, of course, discriminate against people because of race, sex, or age, or something like that, can you move a person anywhere in the mine you want to?

A. I certainly can.

Q. Okay. I don't know if I asked you this or if you answered it, but could you tell us why you moved Mr. Tarvin to that position?

A. Mainly there was a vacancy. There was a vacancy created on the rock project.

While it may not be clear precisely when the crew on the No. 1 producing section was moved, or whether the area had been "mined out" in the usual sense of that term, when taken in context, I believe one can conclude from the testimony presented that active mining on the No. 1 producing section evening shift was temporarily discontinued, and that this was not

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a particularly unusual event since sections are idled from time-to-time, and miners are transferred and reassigned on any particular section. Under the circumstances, I cannot conclude that the respondent's use of the term "mined out" was a deliberate attempt to conjure up an after-the fact reason to support Mr. Tarvin's transfer. The record in this case reflects that Mr. Blake had several reasons for his decision to transfer Mr. Tarvin, and the discontinuance of mining on the evening shift was not the sole reason for this action.

Although the timing of Mr. Tarvin's transfer, coming 2 days after he complained to Mr. Allinson about the ventilation curtain, raises an inference that the transfer may have resulted from the complaint, I conclude and find that the respondent has rebutted this presumption by a clear preponderance of the credible evidence adduced in this case.

Mr. Tarvin confirmed that he assumed that Mr. Allinson made the decision to transfer him to the rock crew, and he believed that he did so in retaliation or to punish him for complaining about the ventilation curtain. However, the unrebutted testimony of Mr. Allinson and Mr. Blake, which I find credible, establishes that Mr. Blake alone made the transfer decision, and that Mr. Allinson was not a party to that decision. Mr. Blake's credible testimony also establishes that he was not aware of Mr. Tarvin's safety complaint to Mr. Allinson at the time he made the decision to transfer him. Although Mr. Tarvin testified that he was aware of other miners who were transferred for making safety complaints, there is absolutely no evidence or testimony to support Mr. Tarvin's claim.

I find no evidence in this case to even suggest that Mr. Tarvin has ever been harassed, intimidated, or threatened by mine management because of his work or any work-related safety complaints. In fact, the only evidence of any safety complaints by Mr. Tarvin while in the respondent's employ is the complaint he made about the ventilation curtain on February 16, 1987. With regard to Mr. Tarvin's chastizing of his crew for their alleged failure to use their methane monitor, there is no probative or credible evidence to establish that this particular allegation resulted in any bona fide safety complaint lodged with mine management. Further, that particular incident took place much earlier than Mr. Tarvin's transfer, and he conceded that no action was taken against him for any such "complaint," and he did not believe that it had anything to do with his transfer.

I find no credible evidence to establish any disparate treatment of Mr. Tarvin by the respondent. As stated earlier, Mr. Tarvin's assertion that he is not used as a shuttle car operator while assigned to the rock crew has been rebutted by Mr. Allinson's credible testimony that since his transfer, Mr. Tarvin has been assigned to work as a shuttle car operator for Mr. Allinson on a production section, and Mr. Tarvin himself has admitted that this is the case. Further, the record establishes that Mr. Tarvin is still classified as a shuttle car operator, with the same pay, and on the same work shift, which he enjoyed prior to his transfer. As for Mr. Tarvin's complaint that he is assigned other work on the rock crew, his own witness and fellow crewman on the rock crew confirmed that everyone on the crew, including the shuttle car operator, are assigned other work duties from time-to-time.

I find Mr. Blake's explanation as to the factors which he considered in making his decision to transfer Mr. Tarvin to be reasonable and plausible, and that his decision was motivated by a legitimate managerial concern to assign mine personnel where he best believed they could be utilized as effective and productive members of the available workforce, rather than to discriminate against Mr. Tarvin for complaining to Mr. Allinson about a ventilation curtain which had not been installed or advanced to its proper location. In short, I conclude and find that any inference of discriminatory intent by the respondent in connection with Mr. Tarvin's transfer has been rebutted by the respondent's credible evidence which I believe establishes that the transfer of Mr. Tarvin constituted a reasonable and plausible management business-related decision made by Mr. Blake, the evening shift mine foreman, acting within his clear authority and discretion to manage his own mine personnel. In this regard, I take particular note of the Commission's decision in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982). Citing its Pasula and Chacon decision, the Commission stated in 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."

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 his transfer on or about February 18, 1987, was discriminatory, or motivated by the respondent's intent to retaliate against him, or to

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punish him, for exercising his statutory right to make a safety complaint to his foreman. Accordingly, the complaint IS DISMISSED, and the complainant's requests for relief ARE DENIED.

George A. Koutras
Administrative Law Judge