CCASE:
CONNIE MULLINS V. CLINCHFIELD COAL
DDATE:
19891003
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CONNIE MULLINS, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. 89-18-D
v.	MSHA Case No. NORT CD 88-8
CLINCHFIELD COAL COMPANY, RESPONDENT	Splashdam Mine

DECISION

Appearances: Jerry O. Talton, Esq., Front Royal, Virginia, for the Complainant;
W. Challen Walling, Esq., Penn, Stuart, Eskridge & Jones, Bristol, Virginia, and Hilary K. Johnson, Esq., Clinchfield Coal Company, Lebanon, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Connie Mullins against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. Mr. Mullins filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and by letter dated October 28, 1988, he was advised by MSHA that after review of the information gathered during its investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred. Subsequently, on November 30, 1988, Mr. Mullins filed his complaint with the Commission.

The complainant contends that the respondent discriminated against him when it suspended him from his laborer's job, and subsequently discharged him on May 16, 1988, out of retaliation for his engaging in certain safety activities protected by the Act, and the respondent denies that it discriminated against the complainant. A hearing was held in Kingsport, Tennessee, and the parties filed posthearing arguments which I have considered in the course of my adjudication of this matter.

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.

Issues

The issues presented in this case are as follows:

1. Whether the complainant's suspension and subsequent discharge was motivated by the respondent's intent to harass him, or to retaliate against him, because of his insistence that ventilation checks be made when machinery was moved from location to location, and because of his reporting of an alleged safety violation to an MSHA inspector.

2. Whether the respondent's suspension and discharge of the complainant for failing to adhere to a "last chance agreement," in connection with the respondent's chronic and excessive absenteeism policy, was pretextual.

3. Whether the application of the respondent's absenteeism policy and program was discriminatory.

Additional issues raised by the parties are identified and disposed of in the course of this decision.

Stipulations

The parties stipulated to the admissibility of all documents marked and received in evidence as Joint Exhibits 1 through 21 (Tr. 7). The parties stipulated that Mr. Mullins was suspended, and subsequently discharged on or about May 15, 1988 (Tr. 48-49). They agreed that at the time of the suspension and discharge Mr. Mullins was earning $15.56 per hour for a normal 40-hour work week.

The respondent agreed that the Commission and the presiding judge have jurisdiction in this matter, and that the respondent's underground Splashdam Mine, where Mr. Mullins was employed, is subject to the Act (Tr. 52, 68).

The respondent stipulated that it does not disagree that in March, 1988, MSHA Inspector Charlie Reese issued a citation

related to two missing roof bolts which were pointed out to him by Mr. Mullins (Tr. 39-41).

The parties stipulated that exhibits JE-6 through JE-13, consisting of certain mine management records concerning Mr. Mullins' past absences, accurately reflect what is stated in these documents (Tr. 95).

The parties also stipulated that at the time of the hearing in this case, there was no union/management contract, and that a strike which began on April 5, 1989, was still in effect. Although the mine was in operation, no union personnel were working at the mine (Tr. 196-197).

Discussion

During opening arguments at the hearing, complainant's counsel asserted that Mr. Mullins' discharge was in part, if not primarily, due to an intent by the respondent to retaliate against him for engaging in protected activities. Counsel asserted that Mr. Mullins was part of a union "inside campaign" to require the respondent to comply with the mine ventilation regulations and that he was one of the principal individuals at the mine who insisted that ventilation checks be made on all occasions when mining machinery was moved from location to location. Counsel concluded that as a result of this protected activity, Mr. Mullins was discharged (Tr. 8-9). Counsel asserted further that shortly before the discharge, Mr. Mullins reported a safety violation to an MSHA inspector, which resulted in the issuance of a citation, and that the respondent had knowledge of this report by Mr. Mullins, and retaliated against him by discharging him (Tr. 9).

With regard to the respondent's defense that it discharged Mr. Mullins pursuant to its chronic and excessive absenteeism program, counsel asserted that the respondent's policy and program is discriminatory per se, is not in writing, and allows the respondent to discharge employees for excused absenteeism related to injuries and accidents, and as applied to Mr. Mullins, the policy provides a pretextual means or method for respondent to retaliate or terminate "problem" employees because of their union or safety activities (Tr. 10).

With regard to Mr. Mullins' prior contention that his failure to report for work on April 14 and 21, 1988, was based on his belief that to report for work on those days would have constituted a safety threat to himself and his fellow workers because he was on medication, counsel asserted that he would not pursue this issue for "strategic reasons," and would not contend that this "work refusal" by Mr. Mullins was protected activity which would provide a claim for relief pursuant to section 105(c) of

the Act (Tr. 11-12). When asked whether he intended to withdraw this issue, counsel responded as follows at (Tr. 18):

> MR. TALTON: Well, I don't want to dilute my case, and I'm going to stick with my original position. We're not going to contend that the unsafe personal condition of Connie Mullins was a -- that that was grounds for a protected activity in this case. We're premising our contention of harassment-discrimination upon the grounds previously set forth, Your Honor.

Respondent's counsel asserted that the action taken by the respondent against Mr. Mullins was proper and nondiscriminatory, and that even assuming that Mr. Mullins engaged in protected activity, the respondent would have suspended and discharged him anyway for his nonprotected activity. With regard to the withdrawal of Mr. Mullins' "work refusal" claim based on a medical condition, counsel pointed out that this was the only issue raised by Mr. Mullins when he filed his initial discrimination complaint with MSHA on July 13, 1988 (Joint Exhibit-1), and since he has withdrawn it, counsel moved for a dismissal of this case (Tr. 14).

In response to the motion to dismiss, I pointed out to respondent's counsel that in his pro se complaint filed with the Commission, Mr. Mullins raised the issue relative to his safety activities concerning ventilation checks, and his reporting of an alleged safety violation to an MSHA inspector, and claimed that the actions taken by the respondent were based on these protected activities. I also pointed out that the complaint also raised the issue of an alleged "pretextual" discharge based on a "last chance agreement" entered into by Mr. Mullins and the respondent with respect to his asserted absenteeism, and that all of these claims were sufficiently viable issues for at least a prima facie case of discrimination. Under the circumstances, the motion to dismiss was denied from the bench (Tr. 13-17).

Complainant's Testimony and Evidence

Connie D. Mullins testified that he worked for the respondent for 13-years prior to his discharge, and served as a miner helper for approximately a year. He confirmed that he has been a member of the UMWA Local 7170 since 1975, but has held no office. He also confirmed that upon the expiration of the BCOA Labor-Management contract on January 31, 1988, his union local requested him, as well as other miners, to initiate an "inside campaign" at the respondent's mine to insure that all work performed was done to the letter of the law. He explained that miners were expected to "work to the law" to insure that all mine safety laws were enforced.

Mr. Mullins stated that as a result of the union "inside campaign," he began to insist that air ventilation checks be made during his work shift in each area where coal was cut, and that his insistence that this be done began in February, 1988. He believed that a ventilation air reading was required to be made at each new cut of coal.

Mr. Mullins stated that in April, 1988, approximately 1 to 2 weeks before his discharge, he asked his foreman Cleebern Newberry to take an air reading after he had finished a coal cut. Mr. Newberry responded to his request and took an air reading. Mr. Mullins stated that another coal cut was taken and he asked Mr. Newberry to take another air reading, and he again responded and took the reading. Mr. Mullins stated that he continued to request that additional ventilation air readings be made after each cut of coal for the rest of the evening, and that Mr. Newberry responded and made the checks. Mr. Mullins stated that he continued to request ventilation checks at least three to five times during each of his succeeding work shifts, and that there were no coal cuts made when he did not insist on a ventilation check (Tr. 20-33).

Mr. Mullins stated that sometime in March of 1988, he observed that two roof bolts were missing from a roof area and that he reported this to his foreman Grady Colley. Mr. Colley told him that he would take care of the condition, and 2 or 3 days later when no corrective action was taken, Mr. Mullins reported the condition a second time to Mr. Colley, but nothing was done about it. Mr. Mullins stated that he then reported the two missing roof bolts to MSHA Inspector Charles Reese who happened to be underground conducting an inspection, and that he took the inspector to the area and showed him where the bolts were missing (Tr. 33-35).

Mr. Mullins also alluded to a "wide place" which had been cut, but he was not certain whether a violation was issued for this condition. He confirmed that after the missing roof bolt citation was issued, Mr. Colley assigned him to abate the condition and to set timbers and crib blocks to support the roof. Mr. Mullins believed that the missing roof bolts presented a hazard and danger of draw rock falling, and that the wide cut also presented this same danger. He confirmed that eight or nine other men were available to abate the condition, but that Mr. Colley assigned him to this task (Tr. 41-47).

Mr. Mullins confirmed that he did not discuss the ventilation checks with management prior to his discharge, other than to request that they be made (Tr. 48). He confirmed that on one occasion when he requested Mr. Newberry to make an air reading, Mr. Newberry informed him that since the ventilation curtain was moving, there was enough air. However, Mr. Newberry proceeded to make the check as he requested (Tr. 28-30).

Mr. Mullins stated that he has not been employed since his discharge on May 15, 1988, and he confirmed that he has not looked for work in any union or non-union mines. He also confirmed that he has looked for work near his place of residence, Clintwood, Virginia, and has made work inquiries at a local repair shop, Exxon Service station, a farm store, and the S & J Tire Store. He stated that he received 6 months of unemployment payments, and that his name is on a job roster maintained by the State of Virginia Employment Commission (Tr. 53-55).

Mr. Mullins stated that he was "somewhat familiar" with the respondent's chronic absenteeism policy, but has never seen it in writing, and to his knowledge, the respondent has never posted it at the mine. He confirmed that the BCOA contract covers this subject, and he believed that absences where doctor's slips are produced by an employee are treated as excused absences. He identified exhibits JE-15 and JE-16 as a doctor's excuse and dental appointment notice covering the 2 days he did not report for work on April 14 and 21, 1988. He stated that he gave them to his foreman or the mine superintendent upon his return to work, but he did not recall specifically who he gave them to (Tr. 56-61).

Mr. Mullins confirmed that he filed a grievance and arbitration action in connection with his suspension and discharge but did not prevail in these actions (Tr. 63).

On cross-examination, Mr. Mullins confirmed that his union began a strike at the mine on April 5, 1989, and that upon the expiration of his unemployment benefits, he received union strike benefit payments of $200 a week, and received these benefits before the actual start of the strike (Tr. 63-67).

Mr. Mullins confirmed that prior to his discharge he worked the evening shift from 4:00 p.m. to 12:00 p.m. He also confirmed that Mr. Colley was his foreman until a week or so prior to his discharge, that Mr. Newberry was his foreman immediately prior to his discharge, and that he had only worked for Mr. Newberry for approximately a week prior to his discharge. He confirmed that he got along well with Mr. Colley, and that he had shown no animosity towards him (Tr. 69-70).

Mr. Mullins stated that prior to the start of the union "inside campaign," he did not request ventilation checks at each coal cut interval. He confirmed that on each occasion when he requested a ventilation check, Mr. Newberry agreed and made the check. Mr. Mullins assumed that in each instance, adequate air ventilation was available, and he could recall no instances where the ventilation checks made by Mr. Newberry indicated less than adequate air ventilation in the areas which were tested. Mr. Mullins stated that on one occasion where the ventilation air

curtains "were blowing," Mr. Newberry was of the opinion that a ventilation reading was not needed (Tr. 71-73).

With regard to the reported roof bolt condition which resulted in a citation being issued to the respondent, Mr. Mullins stated that the bolts had been cut off or "sheared off" after they had been installed, but he had no knowledge as to how this may have occurred (Tr. 79). Mr. Mullins confirmed that Mr. Colley informed him that he would correct the condition, but he could not recall precisely when he informed Mr. Colley of the condition because he could not recall when he first noticed it. Mr. Mullins stated that after 2 or 3 days passed, the bolts were not fixed, and he again asked Mr. Colley about it, and he replied that he would take care of it. Mr. Mullins could not recall how soon after this he informed the inspector of the condition, but confirmed that a citation was issued, and the condition was corrected and abated (Tr. 81-82).

With regard to his assignment by Mr. Colley to correct and abate the cited roof bolt condition, Mr. Mullins confirmed that he was qualified to do this work in a safe manner. He also confirmed that the roof bolt and crib work which he performed to abate the condition was work which he had normally performed in the past (Tr. 82-83).

Mr. Mullins stated that he could not state for sure that Mr. Colley assigned him to do the aforementioned abatement work to punish him for reporting the condition. Mr. Mullins confirmed that Mr. Colley never told him that he was wrong in reporting the condition to the inspector, and that Mr. Colley was not angry with him, and did not act, or otherwise indicate, that he held it against him for reporting the matter. Mr. Mullins also confirmed that he got along well with Mr. Colley and that Mr. Colley never expressed any personal animosity towards him (Tr. 84-85).

Mr. Mullins denied that he has had a problem with absenteeism, but admitted that he had been counseled by mine management about absenteeism on many occasions (Tr. 94). He conceded that mine management expressed their concern to him about his absences from work during the past 3-years prior to his discharge, and that he had meetings and discussions with his foreman Colley and assistant mine superintendent William Seik about these absences.

Mr. Mullins confirmed that at no time during his meetings and discussions with Mr. Seik or Mr. Colley concerning his work absences was the subject of safety ever discussed. Mr. Mullins also confirmed that he was aware of the fact that he would be in "serious trouble" if he had two consecutive AWOL absences on his record, and that he was aware that miners have been discharged for such an offense (Tr. 96-97).

Mr. Mullins confirmed that he missed 2 consecutive days of work in January, 1988, and he confirmed that exhibit JE-5 reflects that he was charged with being AWOL on January 15 and 16, 1988, when he failed to produce "doctor slips" for these absences (Tr. 97-100).

Mr. Mullins confirmed that he was summoned to a meeting with Mr. Seik and Mine Superintendent Barry Compton on January 18, 1988, to discuss his absenteeism, and that he attended the meeting with his union committeeman William Powers. Mr. Mullins estimated that the meeting lasted 1 hour, and he confirmed that he signed the document detailing what transpired during the meeting (exhibit JE-14).

Mr. Mullins confirmed that he discussed no safety matters with Mr. Seik or Mr. Compton during their meeting. Mr. Mullins acknowledged that as a result of the meeting, he knew that if he had any further work absences during the ensuing 180 days which exceeded the mine average for absences that he would be "in trouble." However, he believed that these absences would have to be AWOL absences rather than absences involving sick days (Tr. 101-120).

With regard to his absence of April 14, 1988, when he visited a dentist, Mr. Mullins stated that his dental visit was at 3:30 p.m., and that he was scheduled to be at work at 4:00 p.m. He confirmed that he did not call in to report that he would be absent, and although the dentist's office opened at 9:00 a.m., he called the dentist earlier in the day, and was told that 3:30 p.m. was the only time available to see the dentist. Mr. Mullins stated that while other dentists may have been available to him he did not call them because the dentist he went to was his family dentist.

With regard to his doctor's appointment of April 21, 1988, Mr. Mullins confirmed that he stayed off work on April 20, and 21, and does not recall calling in to report that he would be absent from work. He confirmed that he has had sinus problems in the past and has worked on these occasions. He also confirmed that he never informed Mr. Compton that he was too sick to perform his work safely, and that he did not communicate any safety concerns concerning his sinus condition to his foremen. Mr. Mullins further confirmed that he never informed Mr. Seik or Mr. Compton that his foremen Colley and Newberry were discriminating against him (Tr. 120-133).

In response to further questions, Mr. Mullins referred to his attendance records (exhibit JE-5), and he explained the days he was absent and the codes used on these records (Tr. 138-142). He stated that no one ever told him that the two days coded as "AWOL" on his records, April 14, and 21, 1988, were in fact AWOL's, and he indicated that he was granted "sick days" for

those absences (Tr. 143). He also stated that no one ever told him or warned him that these two particular absences were going to be used to terminate him (Tr. 158).

Upon review of his last chance agreement, (exhibit JE-14), Mr. Mullins stated that when he left the meeting with management concerning this agreement, he did not believe that he had made any promises (Tr. 160-162). However, he conceded that management made it clear to him that he must stay within the mine average for non-allowed absences for the next 180 days, and that he believed non-allowed absences meant AWOL's or nonexcused absences. He stated further that under the applicable 1984 labor-management wage agreement, he was not aware of any non-allowed absenteeism other than AWOL's (Tr. 163). Mr. Mullins also stated that as of April, 1988, it was his understanding that all that was necessary for allowed sick leave was a doctor's slip, and no one ever told him that anything else was necessary, or that sick leave was not included as an allowed absence pursuant to his last change agreement (Tr. 166).

Mr. Mullins confirmed his understanding that the mine average of non-allowable absences were those days not allowed under the wage agreement, and that under that agreement, vacation days, bereavement days, and birthdays, for which he may excused or be paid triple time if he works, are different days off, and that the mine average only covers days not allowed under the agreement (Tr. 168).

In response to further questions, Mr. Mullins stated that he believed that foreman Colley was present when he pointed out the sheared roof bolts to the MSHA Inspector. He was not sure whether Mr. Colley was present when he met with Mr. Compton and Mr. Seik about his absenteeism, and he confirmed that he got along with Mr. Colley and that Mr. Colley never said anything to him about speaking with the inspector (Tr. 172).

Mr. Mullins stated that he believed the respondent suspended and discharged him because "it costs them so much time" to take ventilation readings and "the violations cost the company money" (Tr. 172). He confirmed that he said nothing to the inspector about ventilation readings, and that any time he insisted on taking air readings, the respondent always complied and never refused him (Tr. 173). He confirmed that in some instances, the air was insufficient, and curtains would have to be put up (Tr. 174). He confirmed that prior to the expiration of the union contract with the respondent, he did not make it a practice to insist on ventilation checks, but he always made sure there was enough air. He confirmed that he began insisting on ventilation checks "because our union leaders told us to make the company work to the letter of the law. So that's what I was engaged in." He further stated that "we was hoping to get a contract without a

strike. And we was hoping to put pressure on through that way" (Tr. 175-176).

Mr. Mullins confirmed that the only time management ever said anything to him about his insistence on making air checks was the one occasion when foreman Newberry disagreed with him and told him that since there was air movement on the line curtain, the ventilation was sufficient. He further confirmed that Mr. Newberry never complained or resisted his requests for air checks, and that this was never mentioned during any management meetings concerning his absences (Tr. 177).

Mr. Mullins confirmed that the union effort to "work to the letter of the law" was a concerted effort by all union miners at the mine, and he knew of no one else who was suspended or fired for this activity (Tr. 179). Mr. Mullins confirmed that he was aware of at least two miners who asked for ventilation checks on his working section, but he could not state how often this was done (Tr. 182). He stated that based on his observations, the only time management made ventilation checks was when an inspector was on the section, but that he did not complain about this "unless it was real bad." He confirmed that he began "doing something about it" only after January 31, 1988, because he was instructed to do so by his union, and he admitted that he engaged "in a little chain pulling on management" (Tr. 188).

Mr. Mullins stated that he saw no preshift examination air readings, but conceded that company policy requires such readings and that they "could have been made" (Tr. 192). He also confirmed that he would not always be present in the places where these readings would have been made (Tr. 192). He confirmed that when he complained about inadequate air, it was taken care of within a reasonable time soon after it was discovered (Tr. 195).

Barry N. Compton, general mine superintendent, confirmed that he was familiar with the respondent's absenteeism policy, and that an AWOL is not an excused absence. He also confirmed that any employee missing two consecutive work days on AWOL is subject to termination. He stated that an "S" code on an employment record means a suspension, and that an "X" code signifies sick leave in cases where an employee has not brought in a doctor's excuse verifying his absence from work. In some circumstances, even though an employee has a doctor's excuse, he may still be considered AWOL where the absences are chronic or the employee has failed to adhere to a last chance agreement. He identified employee Mike Puckett as an individual who was suspended with intent to discharge for being sick when no AWOL was involved. He explained that this action was taken pursuant to the respondent's chronic and excessive absentee policy, and that Mr. Puckett had several AWOL's and absences not allowed under the contract (Tr. 198-202).

Mr. Compton also identified employee Bobby Brannan as an individual who was terminated in 1986 or 1987, after being suspended with intent to discharge under the same policy, and he indicated that Mr. Brannan's absences included sick days and AWOL's over a period of time (Tr. 203). He confirmed that these discharges resulted from a combination of reasons, and that no one has been discharged for simply being sick (Tr. 204).

Mr. Compton conceded that but for Mr. Mullins' absences on April 14 and April 20, 1988, he would not have been discharged, and he stated that "those two days were involved in the fact that he didn't live up to the agreement," i.e., the last chance agreement of January 18, 1988 (Tr. 204-205). Mr. Compton stated that the agreement was discussed with Mr. Mullins and that he understood its conditions (Tr. 205).

Mr. Compton stated that neither he or his foreman grant employees time off from work when they are sick, and that "we just keep the records" of an employee's contractual and non-contractual absences under the applicable personnel codes reflected in their records. He confirmed that he has the authority to suspend an employee with intent to discharge, and to make a determination as to whether or not an employee's sickness is grounds for discharge (Tr. 206). He confirmed that in Mr. Mullins' case, management considered his absences of April 14, and 20, to be less than excused, and that this resulted in his being over the mine average pursuant to the formula used for determining employee absence rates (Tr. 207).

Mr. Compton explained that pursuant to the union contract, an employee is allowed 5 days of sick leave or personal business, which is coded P on his attendance records. If an employee calls in sick five times, the respondent accepts this. If he does not call in to report that he is sick, as required by the contract, he is given an AWOL. If he continues to take sick leave for more than his allotted 5 days, and it becomes a habit or trend, i.e., calling in sick on Fridays or Mondays on "long weekends," his absences are coded X on the attendance roster and he is counseled. If an employee who has been charged with an AWOL for not calling in returns to work and submits a doctor's excuse for the absence, the AWOL is changed to an X code on his records, and he confirmed that this is what is reflected quite often in Mr. Mullins' leave records (Tr. 211-215). He confirmed that when Mr. Mullins visited his dentist on April 14, he was initially marked AWOL, but when he brought in his doctor's appointment slip, his record was changed from AWOL to X for that day (Tr. 215).

Mr. Compton stated that an employee who has three AWOLS in a 30-day period, or six AWOL's in a 180-period, is coded as an "irregular worker." In his opinion, Mr. Mullins' failure to call in before taking a sick day on April 14, was an AWOL, and that

his record was coded X to indicate that he had not called in. He confirmed that after an employee has used up his 5 days of allotted sick leave, and then misses more work time and brings in doctor's excuses, he is not paid for these absences, and his absence is treated as not allowed, and it is counted against his overall absences. The reason it is considered as not allowed is because it is separate and apart from the approximately 40 days of contractual leave days which are afforded employees (Tr. 219).

Mr. Compton stated that Mr. Mullins was discharged for his failure to adhere to the last chance agreement. He explained that the chronic absenteeism policy was only used as a standard to be followed by Mr. Mullins, and that he was under this policy plan and had been counseled under this plan (Tr. 233). He explained further as follows at (Tr. 234-237):

> [W]e use the standard of the chronic and excessive plan because he was in that plan under the counseling sessions. He understood what the nonallowable days were under the contract, he understood what it meant to stay within the mine average. That's why that standard was used.
>
> He wasn't discharged because his failure to -- because of the chronic and excessive plan, but because of the fact that the standards that were set up in this last chance agreement which it spells out, the agreement, we gave up the right to discharge him under Article 22(I). He gave up the fact that -- in turn for not being discharged, that he would abide by this agreement, he would stay within the nonallowable absenteeism average for 180 days. He knew what it meant to be in that, because he was in the C & E policy -- chronic and excessive policy by the fact that he had been in the counseling. That's why I referred to the chronic and excessive plan, only as a standard for him to go by, and which he agreed to do.
>
> BY MR. TALTON:
>
> Q. Why don't you excuse people from work who have doctor's slips? Are you telling us you don't?
>
> A. In what instance?
>
> JUDGE KOUTRAS: Why didn't you excuse Mr. Mullins in this case?
>
> THE WITNESS: By the fact that he had already used up his five paid days and it was a non allowable day that was calculated in --

~1960

JUDGE KOUTRAS: Why did you consider it now allowable?

THE WITNESS: Because he had certain amount of days within the contract -- 40-some days to take for those purposes, and anything above and beyond that --

JUDGE KOUTRAS: Is not allowed?

THE WITNESS: Is not allowed.

JUDGE KOUTRAS: Not withstanding whether they bring in a doctor's excuse or not, is that right?

THE WITNESS: Yes.

JUDGE KOUTRAS: Doctor's slip or not?

THE WITNESS: But one thing --

MR. TALTON: He's answered.

THE WITNESS: I don't know how much you want me to run on here or not, but anyhow, you know, we take into consideration the amount of days they take above and beyond the contract, we take into consideration the history, you know, and I take into consideration Connie's history, the fact that he had been under the -- you know, he had had absentee problems for the last several years, and he had a trend of missing on Mondays and Fridays, and trends of long weekends. Those are where those unexcused absences play a big part. I don't know of anybody that's just missed two days sick and brought in a doctor's excuse that's ever been discharged * * *.

And, at (Tr. 239-240):

JUDGE KOUTRAS: My understanding of this agreement, Counsel, is, he characterizes an agreement for 180 days from the date of this agreement, you shall not have any nonallowable days of absences, and if you do, you violated this agreement. Is that --

THE WITNESS: Above the mine average.

JUDGE KOUTRAS: In other words, if he had only had one day nonallowable, if it didn't bring him over the average, are you telling me you wouldn't have suspended and fired him?

THE WITNESS: No, sir.

JUDGE KOUTRAS: But the two days brought him up, right?

THE WITNESS: Right.

JUDGE KOUTRAS: And you applied the formula to the standard, and you came out with a suspension with intent to discharge? Is that what you're telling me?

THE WITNESS: The counseling sessions, this has all been explained to him several times before.

Mr. Compton explained further that missing work because he was under a doctor's care are not allowable absences because Mr. Mullins executed a last chance agreement, had undergone counseling, and he was subject to discharge if he exceeded the mine average for absences (Tr. 243). He confirmed that the 2 days of AWOL chargeable to Mr. Mullins caused him to breach his agreement, and that pursuant to Article 22(I) of the wage agreement, he had the authority to suspend him with intent to discharge (Tr. 251). Mr. Compton stated that he could have fired Mr. Mullins on January 18, 1988, and would have had good grounds for doing so (Tr. 252). He confirmed that the decision to discharge Mr. Mullins for violating his agreement was a joint decision made with mine superintendent Bill Seik (Tr. 254). Mr. Compton stated that he also spoke with Mike Cutlip, human services department, and advised him that Mr. Mullins was under a last chance agreement, and had exceeded the mine average for absences (Tr. 255-256).

Mr. Compton confirmed that while other employees may miss more than their allotted days of sick leave, and may not be discharged for this, they are not under a last chance agreement as was Mr. Mullins (Tr. 257-258). He explained the respondent's absenteeism policy as follows at (Tr. 260-262):

JUDGE KOUTRAS: Please, Mr. Compton, tell me what a chronic and excessive absenteeism program is?

THE WITNESS: Okay.

JUDGE KOUTRAS: Who's the program administrator?

THE WITNESS: I guess I administrate the program at our operations.

JUDGE KOUTRAS: And what is it?

THE WITNESS: Okay. We orally communicated the policy to the work force through communication meetings, and if an employee doesn't ever get above the mine average then they have no other reason to bring them into them and counsel them, as in Mr. Mullins' case, which he had

> been counseled since 1984, ever since the policy came into effect.
>
> Each time someone gets above the mine average, and they get chronic and excessive in the fact that -- like I said, that for instance, they have a habit of just getting sick on Monday and Friday. You know, flu when it hits me, it don't just hit me Monday and Friday.
>
> JUDGE KOUTRAS: All right.
>
> THE WITNESS: Before long weekends, or they have a history of continually being sick or whatever that may be --
>
> JUDGE KOUTRAS: Then they go into this program.
>
> THE WITNESS: They come into this program, they are orally counseled. They are counseled until they get to -- in trying to rehabilitate these people. We make them aware that they have an absentee program, that they are constantly above the mine average --
>
> Q. Is this all documented, the warnings that are given --
>
> A. When we orally counsel someone, generally it is put down in written form, which I think that has been submitted as evidence.

Mr. Compton reviewed some of Mr. Mullins' absences, and gave several examples of his discussions and counseling with him concerning his absences (Tr. 262-263). He characterized the last chance agreement executed by Mr. Mullins as a "warning," as well as an agreement on his part, and he indicated that such agreements are rare, but nonetheless enforceable among the workforce (Tr. 266-267). He stated that Mr. Mullins has been counseled about his absences since 1982, and that his situation was handled on its merits (Tr. 271-273).

Mr. Compton confirmed that he became aware of the union's "inside campaign" in approximately the middle of 1988, and believed that it involved "slow down the work force," "slow down production of the mine, sabotage equipment, whatever" (Tr. 281). Mr. Compton stated that he did not know whether ventilation checks were made at every cut of coal because he is not constantly in the mine. He stated that the law does not require such a check at each cut, but that preshift and onshift examinations are made and recorded in the fire boss books as required by the law (Tr. 282). He explained the mine production figures (Tr. 283-285).

Mr. Compton confirmed that his foremen are required to conduct ventilation checks when they have some doubt that the air in any place is insufficient, and that if a ventilation curtain is blowing against the rib "you pretty well know you got enough ventilation" (Tr. 293). He also indicated that air readings may be taken before a miner machine reaches a working place and that this does not entail any "lost down time" (Tr. 293). He also confirmed that he has advised his foremen that they are expected to make ventilation checks to insure the proper volume of air in the working place (Tr. 297-298).

Mr. Compton stated that in approximately April or May, 1988, foreman Cleveland Newberry mentioned that Mr. Mullins had requested him to take two or three air readings one evening, and that Mr. Newberry confirmed that he had taken the readings and had sufficient volume of air. Mr. Compton stated further that he instructed Mr. Newberry to comply with Mr. Mullins' requests to take air readings, to insure that all ventilation curtains are maintained, and that the proper volume of air is maintained at the faces. He also advised Mr. Newberry that he could establish the proper volume of air before the miner machine arrives at an area so that it can begin cutting coal upon its arrival. Mr. Compton believed that this discussion with Mr. Newberry took place after Mr. Mullins missed work on April 14 and 21, and he indicated that this is the only discussion he had with Mr. Newberry concerning this matter (Tr. 300).

Mr. Compton stated that Mr. Mullins was not discharged prior to May 16, 1988, because it takes 2 weeks after the end of the month for him to receive the computer print-out record concerning leave (Tr. 301). He believed that he received the leave information concerning Mr. Mullins during the week of April 9 (Tr. 301).

Mr. Compton stated that he had no knowledge of any citation received by the respondent in March or April, 1988, concerning sheared off roof bolts on Mr. Mullins' section, and that he had no conversations with anyone concerning any violation reports filed by Mr. Mullins with any federal inspectors (Tr. 302). Mr. Compton stated that he was not concerned that Mr. Mullins' insistence on making ventilation checks may have resulted in a 15-minute production delay (Tr. 304). He reiterated that he advised Mr. Newberry that he could make his ventilation checks as the miner machine is travelling from one location to another "so when he comes into the place, he's automatically got his air," and also to avoid unnecessary production delays (Tr. 307-309).

Mr. Compton reiterated that in January of 1988, he believed he had a right to discharge Mr. Mullins for two consecutive days of AWOL, but that he gave up this right when he entered into the last chance agreement with Mr. Mullins, and Mr. Mullins gave up his right to file a grievance when he signed the agreement (Tr. 315). Mr. Compton confirmed that he discharged Mr. Mullins for

failing to live up to his agreement, and because his past history of absenteeism reflected that he had an absenteeism problem (Tr. 316). He confirmed that he spoke with Mr. Mullins with his union representative present, and made it clear to him that if he violated the last chance agreement he would be "in deep trouble," and he believed that Mr. Mullins understood this (Tr. 318). Although Mr. Mullins' absenteeism improved in February and March, it exceeded the mine average in April, and he then suspended Mr. Mullins with intent to discharge him, and informed him of his decision in his office. Mr. Seik and Mr. Mullins' union committeeman Billy Powers were present when he advised Mr. Mullins of his action, and neither Mr. Mullins or Mr. Powers said anything about mine safety or safety discrimination at that time (Tr. 319).

Mr. Compton stated that Mr. Mullins has never complained to him about any hazards in the mine, and never complained that he was being treated differently because of the exercise of any of his safety rights. He confirmed that Mr. Mullins never said anything to him about requesting his foreman to make ventilation checks, and that he was unaware that Mr. Mullins may have pointed out any safety infractions to an MSHA inspector (Tr. 332). Mr. Compton denied that he suspended and discharged Mr. Mullins out of retaliation for any of these activities (Tr. 334).

William R. Seik, mine superintendent, confirmed that he "played a role" in the decision to discharge Mr. Mullins. He confirmed that he was aware of the fact that a citation was issued in March or April, 1988, to the respondent because of two sheared roof bolts in the mine, but denied that he was aware of the fact that Mr. Mullins had reported this condition to a federal inspector, or that Mr. Mullins had been assigned to correct the condition. Mr. Seik also denied that he was aware of Mr. Mullins' role in requesting ventilation checks every time a different cut of coal was made on the section (Tr. 357-358).

Mr. Seik confirmed that the only conversation he had with foreman Brady Colley about the citation concerned Mr. Mullins leaving his miner helper's position to show the inspector where the roof bolts in question were located. Mr. Seik stated that he advised Mr. colley that "he was to keep Connie on his job, and that Connie would not leave his job without permission" (Tr. 358). Mr. Seik stated that it was his understanding that Mr. Mullins did not request permission to go with the inspector and simply "went on his own." Since Mr. Colley was the foreman in charge, Mr. Mullins should have asked for his permission before leaving his job. Mr. Seik confirmed that he was aware of the fact that a citation was issued because he reviewed a copy of it which was left on his desk by a company safety inspector. He learned "after the fact" that Mr. Mullins had some involvement in the issuance of the citation, and he knew about this at the time the decision was made to discharge him on May 16, 1988. However,

he had no conversation at any time with Mr. Colley concerning Mr. Mullins' requests for ventilation checks (Tr. 359-360).

Mr. Seik stated that the only discussion he had with Mr. Compton concerning Mr. Mullins involved Mr. Mullins' past absenteeism record, and that he said nothing to Mr. Compton about the roof bolt citation. Mr. Seik confirmed that he had counseled Mr. Mullins many times about his absenteeism, and that his record in this regard was reviewed on its own merit and it was not a "snap decision" (Tr. 365-366).

On cross-examination, Mr. Seik stated that while he discussed the matter of suspension and discharge with Mr. Compton, the final decision was Mr. Compton's (Tr. 366). Mr. Seik stated that Mr. Mullins could have been discharged in January, 1988, for the two consecutive AWOL's which resulted in the last chance agreement, but that Mr. Mullins was "given a break" at that time (Tr. 366-367).

Mr. Seik stated that he had no complaint about Mr. Mullins telling the inspector about the roof bolts, and that this did not bother him. He acknowledged Mr. Mullins' right to report any safety violations, and stated that he held no grudge against Mr. Mullins for reporting the condition (Tr. 368). He stated that Mr. Mullins should have been aware of the fact that he simply cannot leave his job without advising his foreman, and that anyone may make a safety complaint, and that other miners have done so and not been fired. Miners are free to make safety complaints to management and to their safety committee (Tr. 369-370).

Mr. Seik confirmed that Mr. Mullins has never made any safety complaints to him, and has never advised him that he believed he was being treated differently because of the exercise of any of his safety rights. He denied that the issuance of the citation had anything to do with his involvement in the discharge of Mr. Mullins, and he believed that the monetary fine for the citation was $20 (Tr. 371).

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, _____ U.S. ___, 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.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. 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.

As stated earlier, Mr. Mullins has abandoned his earlier claim that he was discharged because of his refusal to work because he had a good faith belief that certain medication he was taking for a sinus condition would have endangered himself and his fellow miners. Accordingly, I have made no findings or conclusions with respect to this abandoned claim and theory of his case, and have confined my findings and conclusions to Mr. Mullins' claim that his suspension and subsequent discharge were motivated by mine management's intent to harass him, or to retaliate against him, because of his insistence that certain ventilation checks be made, and because of his alleged reporting of a safety violation to an MSHA inspector.

Mr. Mullins' Protected Activity

It is clear that Mr. Mullins enjoys a statutory right to voice his concern about safety matters or to make safety complaints to mine management or a mine inspector without fear of retribution or harassment by management. Management is prohibited from interfering with such activities and may not harass, intimidate, or otherwise impede a miner's participation in these kinds of activities. Secretary of Labor ex rel. 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), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra.

With regard to the ventilation air checks, Mr. Mullins confirmed that prior to the union "work to the letter" campaign, he had not requested or insisted that checks be made each time a cut of coal was made. He testified that he began insisting on ventilation air readings in February, 1988, after being instructed to do so by his local union, and he admitted that this

was done to put pressure on the respondent in connection with labor and management's contract negotiations.

Mr. Mullins confirmed that on each occasion when he requested that ventilation checks be made, his foreman responded and made the checks. On one occasion when the foreman disagreed that a ventilation check was necessary, he nonetheless complied with Mr. Mullins' request and took an air reading. Mr. Mullins confirmed that with the exception of this disagreement on the need for a check, his foreman never complained or resisted his requests for air readings. Mr. Mullins also confirmed that he got along well with foreman Colley and that his foreman had no animosity towards him. Mr. Mullins conceded that on each occasion when he requested a ventilation check, mine management always complied with his requests and never refused him.

Mr. Mullins testified that in each instance when he requested a ventilation air reading, he assumed that adequate air was available, and he could recall no instance where the air reading taken by his foreman indicated less than adequate air in the areas tested. Mr. Mullins confirmed that company policy required preshift air readings, that he was not always present at the place where air readings were made, and that when he complained about inadequate air ventilation, it was always taken care of by management within a reasonable time.

Mr. Mullins confirmed that he was not the only miner who insisted that management operate the mine "to the letter of the law" as part of the union campaign. He also conceded that no one from management said anything to him about this campaign, no one was mad at him, and that no other miner was suspended or discharged during this time.

With regard to his complaint to the MSHA inspector about two missing roof bolts, Mr. Mullins confirmed that foreman Colley was not angry with him for informing the inspector about the condition, and said nothing, or did anything, that would lead him to believe that Mr. Colley held it against him for reporting the matter to the inspector. Mr. Mullins also confirmed that the subject of safety was never discussed during his meetings with Mr. Colley, Mr. Seik, and Mr. Compton concerning his absenteeism, and he confirmed that he got along well with Mr. Colley. Although Mr. Colley assigned Mr. Mullins to abate the cited roof bolt violation, Mr. Mullins could not state for certain that Mr. Colley assigned him this task in order to punish him for reporting the condition. Mr. Mullins implied that this was the case when he testified that other miners were available to abate the condition, but Mr. Colley selected him for this job. Mr. Mullins conceded that he was qualified to do the abatement work in connection with the roof bolt condition in a safe manner, that he did so, and that abatement work of this kind was work which he had normally done in the past.

Mine Superintendent Seik testified that he was aware of the fact that a violation was issued in March or April, 1988, because of two sheared off roof bolts, but he denied that he was aware of the fact that Mr. Mullins had reported the condition to the inspector, at the time the violation was issued, or that Mr. Mullins had been assigned to abate the condition. Mr. Seik conceded that he learned about Mr. Mullins' "involvement in the issuance of the citation" after the violation was issued, and that he was aware of this when he and Mr. Compton made the decision to discharge Mr. Mullins on May 16, 1988. Mr. Seik also denied that had ever discussed Mr. Mullins' ventilation check requests with Mr. Colley, or that he discussed the roof bolt citation with Mr. Compton.

Mr. Seik acknowledged Mr. Mullins' right to make safety complaints, and he confirmed that other miners have done so and have not been discharged. Mr. Seik also acknowledged that when he learned that Mr. Mullins had left his job without the foreman's permission to show the inspector the roof bolt condition, he informed foreman Colley that Mr. Mullins should not simply leave his job without telling him. Mr. Seik stated that the fact that Mr. Mullins informed the inspector about the condition did not bother him, and that he held no grudge against Mr. Mullins for doing so. Mr. Seik also stated that Mr. Mullins had never made any safety complaints to him, and never advised him that he believed he was being treated differently from other miners because of the exercise of his safety rights.

General Mine Superintendent Compton testified that he was aware of the union's "inside campaign," and he confirmed that when foreman Newberry informed him in April or May, 1988, that Mr. Mullins requested him to make ventilation checks two or three times one evening, he instructed Mr. Newberry to comply and to insure that adequate ventilation was established. Mr. Compton denied any knowledge of the citation concerning the roof bolts, and he confirmed that he had no discussion with anyone concerning Mr. Mullins' reporting of any safety violations to the inspector. Mr. Compton confirmed that Mr. Mullins never said anything to him about requesting his foreman to make ventilation checks, that he was unaware that Mr. Mullins may have pointed out any safety infractions to the inspector, and he denied that he suspended or discharged Mr. Mullins out of retaliation for these activities.

After careful consideration of all of the testimony and evidence adduced in this case, I find no probative or credible evidence of any harassment, intimidation, or retaliation by mine management as a result of Mr. Mullins' insistence on the making of ventilation checks or his complaint to the inspector. I reject Mr. Mullins' suggestion that he was assigned to abate the roof bolt condition out of retribution for his making the complaint, and I find no credible basis for concluding that his

foreman assigned him this task to punish him for making the complaint. Mr. Mullins conceded that he was qualified and able to do this job safely, that such abatement work was something that he would normally do as part of his job, that he gotten along well with his foreman, and that his foreman who assigned him the task displayed no displeasure or animosity towards him when he assigned him the abatement work.

The record establishes that mine management responded in a positive way to Mr. Mullins' requests for ventilation checks, and Mr. Mullins conceded that management always complied with his requests, including the one time that he and his foreman disagreed as to the need for a check. I take note of the fact that although other miners were involved in the "work to the law" campaign, they were not disciplined or otherwise interfered with in any way because of these activities.

The record establishes that Mr. Mullins' ventilation concerns were never discussed or mentioned during the meetings between Mr. Mullins and mine management, concerning his attendance record, and there is no evidence that Mr. Mullins ever made any safety complaints to Mr. Seik or to Mr. Compton, the two individuals who made the decision to suspend and discharge him. There is also no evidence that Mr. Mullins ever informed Mr. Seik or Mr. Compton that he believed he was being put upon because of his insistence in making daily ventilation checks, and Mr. Mullins himself conceded that mine management responded promptly to his requests, and that his foremen displayed no animosity towards him. He also conceded that his foreman did not appear angry with him for complaining to the inspector about the roof bolt condition, and I find no evidence of any harassment or disparate treatment of Mr. Mullins by his foremen because of his complaint to the inspector or his insistence that ventilation checks be made.

The record reflects that Mr. Mullins was suspended and discharged on May 16, 1988. Mr. Mullins suggested that his requests to foreman Newberry to take air readings 1 or 2 weeks in April before his discharge, prompted his suspension and discharge. However, Mr. Mullins' confirmed his insistence on making ventilation checks began as early as February, 1988, yet no action was ever taken against him, and there is no evidence that Mr. Newberry was in any way connected with the decision to discharge him.

The record also reflects that Mr. Mullins' complaint to the inspector concerning the roof bolt condition was made sometime in March, 1988, 2 months before his discharge. Mr. Mullins confirmed that foreman Colley displayed no animosity towards him for calling the condition to the attention of the inspector, that he got along well with Mr. Colley, and that Mr. Colley never harassed him or treated him badly. There is also no evidence

that Mr. Colley had nothing to do with the decision to discharge Mr. Mullins.

The evidence establishes that at the time the decision was made to suspend and discharge Mr. Mullins, Mr. Seik was aware of the fact that Mr. Mullins spoke with the inspector about the roof bolt violation, and that Mr. Compton was aware of the fact that Mr. Mullins had requested daily ventilation checks. However, Mr. Seik denied that he ever discussed the roof bolt violation with Mr. Compton, and Mr. Compton denied any knowledge of the violation or Mr. Mullins' conversation with the inspector. The record reflects that Mr. Mullins never complained to Mr. Seik or Mr. Compton about safety matters, and there is no evidence that Mr. Seik or Mr. Compton harbored any ill will towards Mr. Mullins because of his safety concerns. Based on the evidence adduced in this case, I conclude and find that any concerns that Mr. Seik and Mr. Compton may have had with regard to Mr. Mullins focused on his work attendance and not on his safety related activities.

Although Mr. Seik's and Mr. Compton's awareness of Mr. Mullins insistence on making ventilation checks, and his contact with the MSHA inspector who issued the roof bolt violation raises an inference that their decision to suspend and discharge Mr. Mullins may have been tainted or influenced by Mr. Mullins' safety related activities, having viewed Mr. Compton and Mr. Seik during the course of their testimony, I find them to be credible witnesses, and I believe their denials that the decision to suspend and discharge Mr. Mullins had anything to do with his safety related activities, or that this decision on their part was motivated or made to retaliate against Mr. Mullins for insisting on ventilation checks or bringing the roof bolt condition to the attention of the inspector. In short, I conclude and find that any inference of discriminatory intent by the respondent in connection with Mr. Mullins' suspension and discharge has been rebutted by the respondent's credible evidence which I believe establishes that Mr. Mullins was suspended and discharged because of his poor work attendance record and absenteeism.

The Respondent's Motivation for the Suspension and Discharge of Mr. Mullins.

In his posthearing brief, Mr. Mullins' counsel asserts that Mr. Mullins' report of a safety violation to a Federal mine inspector is protected activity under the Act. Counsel also asserts that Mr. Mullins' insistence that ventilation checks be made every time the continuous miner was moved was reasonably calculated to apprise him of information essential to a determination as to whether or not the respondent was in compliance with the federal laws mandating adequate ventilation, and was part and parcel of his right to a safe work environment and of

his right to notify a federal inspector of an unsafe condition should the ventilation be deficient.

The focus of counsel's argument is in on the "last chance agreement" executed by Mr. Mullins. Counsel disagrees with the respondent's contention that the agreement gave the respondent the right to terminate Mr. Mullins, and that he would have been terminated even had he not engaged in the activities of reporting an unsafe condition to a federal inspector and insisting upon repetitive ventilation readings on every occasion that the miner was moved.

In support of his argument concerning the agreement in question, counsel takes the position that the document identified as the agreement contained no agreement by Mr. Mullins to do anything, and in the absence of some express promise by Mr. Mullins to do or not do a certain act, there was no contract. Counsel notes that the agreement did not state that Mr. Mullins would be terminated if his absenteeism rate exceeded the mine average, but simply stated that ". . . further disciplinary action up to and including discharge will be taken." Counsel concludes that this left it up to the respondent to decide what action was appropriate given the nature of the absence and the surrounding circumstances.

Counsel asserts that the unfair and harsh nature of the respondent's absenteeism policy is apparent in this case, and the fact that it is not a written policy indicates that it is particularly susceptible to arbitrary application. Counsel argues that it is not probable that the respondent's decision to discharge Mr. Mullins, the most severe action available, was not motivated to any significant extent by his protected safety activities. Counsel submits that this case is not one of happenstance or coincidence, and that it is a case of "enemy action" by an employer who determined that Mr. Mullins' exercise of protected activities was an annoyance and a nuisance. Counsel concludes that the facts in this case supports the contention that Mr. Mullins was discharged because of the fact that "he was at war" with the respondent over safety issues, and to assume otherwise is unreasonable.

I believe that the thrust of Mr. Mullins' complaint lies in his dispute with the respondent's leave and absenteeism policy, the legality of the last chance agreement, and Mr. Mullins' belief that the agreement and absenteeism policy is patently unfair and arbitrary, and has been used by the respondent as a pretext to support his suspension and discharge for engaging in protected activity. The record establishes that Mr. Mullins filed a grievance on these issues and proceeded to arbitration. In a written decision issued on October 12, 1988, the arbitrator denied his claims and ruled against him (Joint Exhibit 20). As a result of this unfavorable decision, Mr. Mullins, by and through

his UMWA union, filed an unfair labor practice charge against the respondent with the NLRB, and it was likewise denied after the NLRB declined to issue a complaint (Joint Exhibit 21).

Although I am not bound by decisions of arbitrators, I may nonetheless give deference to an arbitrator's "specialized competence" in interpreting 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, 26-27 (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).

I take note of the fact that the union's position before the arbitrator with respect to the last chance agreement was that "The company is discriminating against the Grievant for his union activities at the mine. The Grievant is being prosecuted to the fullest for no other reason." (Pg. 6, arbitrator's decision). The arbitrator found that the last chance agreement was valid and reasonable on its face, that the respondent treated Mr. Mullins fairly and properly, that there was no disparate treatment of Mr. Mullins, and he rejected the claim that the respondent's action was tainted by unlawful animus. The arbitrator concluded that there was no reasonable basis for him to conclude that the motivation of the respondent in discharging Mr. Mullins was something other than the proven fact that he violated the terms of his agreement with respect to absenteeism.

I also take note of the fact that at the time Mr. Mullins initiated his grievance on May 24, 1988, his sole contention was that he was unjustly discharged by the company's absentee policy (Joint Exhibit 18). The Union's position before the arbitrator does not include a claim that Mr. Mullins' safety activities prompted his discharge, and although the arbitrator's decision makes reference to testimony by Mr. Mullins during the arbitration hearing that he had arguments with his foreman Colley over safety issues in connection with adequate air at the face, the arbitrator concluded that the evidence "did not establish a causal relationship between the safety issues raised by the Grievant and his supervisor and action taken by the General Mine Superintendent for his failure to come to work often enough," and that the superintendent "acted to enforce an attendance settlement agreement which was fairly arrived at and which was not ambiguous" (Pgs. 13, 14, arbitrator's decision).

I also take note of the NLRB's decision not to initiate an unfair labor practice case against the respondent, and the NLRB's conclusion that its investigation failed to establish that the respondent was unlawfully motivated in discharging Mr. Mullins, and that the evidence adduced by the NLRB established that

Mr. Mullins discharge "was with cause, i.e., poor attendance" (See NLRB letter of November 25, 1988, Joint Exhibit 21).

The respondent's absentee policy, including the use of last chance agreements, has been previously litigated before the Commission in a discrimination proceeding heard and decided by Judge Weisberger on February 1, 1989. In Lindia Sue Frye v. Pittston Coal Group/Clinchfield Coal Company, 11 FMSHRC 187 (February 1989), the complaining miner asserted that she was discharged for making safety complaints and for refusing to work under conditions which she believed were unsafe. Judge Weisberger's decision reflects that the miner was counseled with respect to her absentee rate, and that a proposal was made by the respondent in that case to suspend and discharge her due to excessive absenteeism. However, she avoided this action by executing a last chance agreement that she would not exceed the mine absentee rate in any month in the next 12 months. When she failed to keep her agreement and exceeded the absentee rate some 2 months after the agreement was made, she was suspended and discharged. Judge Weisberger dismissed her complaint after concluding and finding that the sole reason for the discharge was excessive absenteeism, that the discharge was not motivated in any part by any protected activities, and that the action taken by the respondent was clearly a prerogative of management.

The evidence in the instant case establishes that Mr. Mullins has undergone counseling concerning his absenteeism periodically since 1982 (Joint Exhibits 6 through 15). Although he stated that he was "somewhat familiar" with the respondent's absenteeism policy, and that it is not reduced to writing or posted on the mine bulletin board, I am not convinced that he was ignorant of the policy or did not understand it. Mr. Mullins admitted that he had been counseled by mine management on many occasions concerning his absenteeism, that management had expressed their concern to him in this regard during the past 3-year prior to his discharge, and that he had meetings with his foreman and mine management concerning his work attendance record.

Mr. Compton testified that he could have fired Mr. Mullins in January, 1988, for two consecutive days of AWOL, but did not do so because the respondent and Mr. Mullins executed the last chance agreement. At the time the agreement was executed on January 18, 1988, Mr. Mullins admitted that he knew he was in serious trouble, and that miners have been discharged for two consecutive days of AWOL. Immediately prior to the AWOL days of January 15 and 16, 1988, he was talked to by foreman Colley and superintendent Seik about missing work (Joint Exhibit 13). After returning to work on January 18, 1988, Mr. Mullins was summoned to Mr. Compton's office for a meeting with Mr. Compton and Mr. Seik, and he appeared with his union representative to discuss his absenteeism.

Mr. Mullins admitted that he was under the impression at the meeting with Mr. Seik and Mr. Compton that the respondent was ready to take some disciplinary action against him, and that he was aware of the fact that the respondent could have fired him for being AWOL but was going to give him a last chance (Tr. 103-104). A memorandum of that meeting, which is signed by Mr. Mullins, reflects that he was informed that he would not be suspended or discharged for his AWOL's, but that due to his excessive absenteeism, he was further informed that he must stay within the mine average of unallowed absences, and that if he did not, he would be subject to further disciplinary action, including a discharge (Joint Exhibit 14).

Although Mr. Mullins claimed that he did not believe that he had made any promises concerning his absenteeism to management when he left the meeting with Mr. Seik and Mr. Compton, he admitted that "he got the message," and understood that if he missed anymore days from work within the ensuing 180 days, he would be discharged (Tr. 108). Mr. Mullins' claim that he understood "non-allowed absences" to mean only AWOL's or nonexcused absences, and that the mine average absenteeism formula used by the respondent only pertained to absences not allowed under the labor/management contract, is rejected. I find no credible evidence to suggest or support any conclusion that Mr. Mullins was confused or unsure about the respondent's method for calculating a mine absentee average for purposes of its counseling program. The documentary evidence detailing Mr. Mullins' past counseling sessions concerning his absences from work all make reference to this policy, including references to absentee averages, and assurances by Mr. Mullins that "he would get his rate down," that "he understood the absentee plan . . . and would try to improve," and "do better in the future" (Joint Exhibits 9, 11, 12, 13).

Superintendent Compton testified that under the respondent's chronic and absentee policy, absences due to illness documented by a doctor's excuse may still be considered AWOL absences in the case of employees who have chronic absentee records or who have failed to adhere to last chance agreements. He cited at least two employees who were suspended with intent to discharge for violations of the respondent's policy under circumstances similar to Mr. Mullins' case, and confirmed that no one has ever been discharged simply because of being sick, but because of a combination of absences. Mr. Compton stated that the last chance agreement was discussed with Mr. Mullins and that he understood its conditions.

Mr. Compton conceded that but for Mr. Mullins' absences on April 14 and 20, 1988, which placed him over the mine average, he would not have been discharged. After careful review of Mr. Compton's explanation of the respondent's absentee policy,

including the method used for calculating an employee's average rate of absences, I find it to be plausible and reasonable and I cannot conclude that it was applied arbitrarily in Mr. Mullins' case. I further conclude and find that Mr. Mullins understood the respondent's policy and ground rules concerning absenteeism, and his assertions to the contrary are rejected.

On the basis of the record in this case, I conclude and find that Mr. Mullins had been subjected to repeated counselling concerning his absences, that the respondent had shown leniency towards him by not discharging him earlier, and that he entered into the last chance agreement knowing the risks and implications if he failed to adhere to the agreement. His failure to do so resulted in his suspension and discharge, and I conclude that the respondent's action in this regard constituted a reasonable exercise of its managerial authority over its workforce. I further conclude and find that the reason for Mr. Mullins' discharge was his failure to live up to his last chance agreement with the respondent, and that the respondent's motivation in discharging him had nothing to do with his insistence on making ventilation checks or informing the inspector about a roof-bolt condition. As stated by the Commission in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982), citing its Pasula and Chacon decisions, supra, "* * * 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." On the facts presented in Mr. Mullins' case, I conclude and find that the respondent's stated reason for discharging Mr. Mullins is both credible and reasonable in the circumstances presented.

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 Mr. Mullins has failed to establish that the respondent has discriminated against him or has otherwise harassed him or retaliated against him because of the exercise of any protected rights on his part. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge