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

TERRY FOWLER, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. PENN 88-267-D MSHA Case No. PITT CD 88-19
ATLAS SERVICES CORPORATION, RESPONDENT	Nemacolin Mine

ROGER D. BROADWATER, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. PENN 88-281-D MSHA Case No. PITT CD 88-20
ATLAS SERVICES CORPORATION, RESPONDENT	Nemacolin Mine

DECISIONS

Appearances: Thomas Whitney Rodd, Esq., and James B. Zimarowski, Esq., Morgantown, West Virginia, for the Complainants;  
Robert L. Ceisler, Esq., and Thomas A. Lonich, Esq., CEISLER RICHMAN SMITH, Washington, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern discrimination complaints filed by the complainants against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainants filed their initial complaints with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and were advised by MSHA that after review of the information gathered during the investigation of their complaints, MSHA determined that violations of section 105(c) had not occurred. The complainants then filed their complaints with the Commission, and hearings were held in Washington, Pennsylvania. The parties filed posthearing arguments which I have considered in the course of my adjudication of these matters.

The record reflects that the Nemacolin Mine was at one time an active producing mine, and that it was operated by the LTV

Steel Corporation. The respondent was an independent contractor performing contract services at the mine incident to its dismantling and sealing, and the mine was still under the ownership of the LTV Steel Corporation while this work was being performed. Complainant Terry Fowler alleges that he was terminated from his employment with the respondent for reporting safety violations to mine management and to MSHA and state mine inspectors. Complainant Roger D. Broadwater alleges that he was terminated from his employment for speaking with an MSHA inspector who was at the mine site conducting an investigation into an alleged safety violation.

#### 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 these proceedings are (1) whether the complainants engaged in any safety activities protected by the Act, and if so, (2) whether the respondent retaliated against them by terminating their employment for engaging in such activities. Additional issues raised by the parties are identified and discussed in the course of these decisions.

#### Complainants' Testimony and Evidence

James Vavrek, testified that he worked at the Nemaquin Mine for 12 years as a continuous-miner operator, repairman, and electrician, and also served as a union safety walkaround and committeeman. He confirmed that the mine ceased operating in August, 1986, because it was "basically mined out." After he was laid off, he was hired by the respondent in March, 1987, as part of several crews working to seal the underground shafts and the slope. He worked as a general laborer, and in April, 1988, was appointed the safety director because of his knowledge of the mine safety rules. He confirmed that he would report safety violations to project superintendent Jay McDowell and job superintendent Bill Parshall, but primarily to Mr. Parshall (Tr. 17-27).

Mr. Vavrek stated that he was appointed safety director the day after a Federal inspector came to the mine and issued some "(d) orders" shutting down the job site at the slope. Prior to this inspection, Mr. Fowler had registered "certain observations

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and complaints about problems on the slope" to "Arty," an individual who he believed was a foreman. Mr. Vavrek stated that Mr. Fowler also mentioned these problems to him before he became the safety director, and to Ben Jordan, a laborer who was not part of management (Tr. 33).

Mr. Vavrek identified the "problems" referred to by Mr. Fowler as "illegal" lights on the slope which were not enclosed in glass, the use of a gasoline chain saw and cement cutter inside the slope, and the smoking of cigarettes by job superintendent William Parshall. Mr. Vavrek identified "Arty" and "Kenny" as Art Brienza and Ken Laida, and he stated that these individuals came to the slope area with daily work orders and told the workers what work was needed to be done on the slope (Tr. 36). Mr. Vavrek did not know whether Mr. Parshall was also advised of these complaints (Tr. 35).

Mr. Vavrek stated that employees would bring "safety issues" to him, and that Mr. Fowler also brought safety complaints to his attention. He confirmed that he previously worked with Mr. Fowler at the Nemaacolin Mine "off and on" for 2 or 3 years, and he considered him to be a very good worker while employed at the mine and with the respondent. He stated that Mr. Fowler never had a safety or mine management grievance filed against him, and that he would rate Mr. Fowler as "extremely high" as a foreman who paid attention to safety questions (Tr. 43).

Mr. Vavrek stated that in April and May, 1988, Mr. Fowler complained to him about people being transported in a bucket with oxygen and acetylene tanks which were not fastened or tied off. Mr. Vavrek stated that he told Mr. Parshall about these complaints and informed him that if the violations persisted and were not corrected, there was a risk that an inspector would issue a violation if he were in the mine and observed the conditions (Tr. 46-47).

Mr. Vavrek stated that Mr. Fowler also complained about a contractor blasting and shooting while the blaster was 25 feet away, the failure to tie down acetylene torches while they were in use or stored, the lack of fire extinguishers at the places where welding was taking place, and the hauling of unsecured acetylene tanks in pickup trucks. Mr. Vavrek stated that these complaints were brought to his attention, and to the attention of Mr. Parshall (Tr. 47-49). He also stated that Mr. Fowler complained that he was not being permitted to make his gas checks in accordance with the mine sealing plan (Tr. 50-51).

Mr. Vavrek stated that Mr. Fowler's complaint about Mr. Parshall smoking underground was made to him and to Art Brienza, and that his complaint about the use of gasoline tools underground was made to him, to Mr. Brienza, and to Mr. Jordan (Tr. 49, 51). Mr. Fowler also complained on a few occasions

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about the handling of asbestos which was being thrown down off the side of the building and permitted to lay on the ground, and the lack of self-contained self-rescuers underground while work was being performed at the slope (Tr. 51, 54).

Mr. Vavrek stated that Mr. Fowler regularly brought up safety matters, and that Mr. Parshall was more aware of the complaints than Mr. McDowell because Mr. Parshall was at the slope area where the work was being performed, and Mr. McDowell remained at the office (Tr. 54).

Mr. Vavrek stated that he told Mr. Parshall about Mr. Fowler bringing up these safety matters on "a few occasions" (Tr. 55). Mr. Vavrek stated that in April, 1988, Federal inspectors James Conrad, Cliff Spangler, and Robert Newhouse were in the slope area and called the miners out after issuing an imminent danger order. Mr. Fowler was talking to Inspector Conrad about hunting, and Mr. McDowell told Mr. Vavrek that he did not want Mr. Fowler talking to the inspector. Mr. Vavrek did not know why Mr. McDowell singled out Mr. Fowler (Tr. 55-58).

Mr. Vavrek stated that it was his impression that Mr. Brienza and Mr. Laida were foremen, that everyone went to them for orders "quite a bit," that Mr. Brienza and Mr. Laida "came down and told what was to be done," and if there were any questions "we would go to Art or Ken" (Tr. 60). If Mr. Brienza or Mr. Laida needed direction, they would go to Mr. Parshall, and Mr. Parshall was on the slope "sometimes" (Tr. 60).

Mr. Vavrek stated that approximately 3 days before Mr. Fowler was terminated he (Vavrek) was with Inspector Spangler and Mr. Fowler informed them that he had not made a gas check at the slope work area and that "they were not following the plans." Mr. Vavrek explained that Mr. Fowler was the only person working for the respondent who was qualified to make the required gas checks prior to the start of any work in the slope (Tr. 61).

Mr. Vavrek stated that after speaking with Mr. Fowler, he (Vavrek) and Inspector Spangler spoke with Mr. John Hoelle, an engineer who drafted the MSHA approved mine sealing plan. Mr. Vavrek believed that the plan required a qualified person to preshift the shaft work areas, and that the plan was not being followed (Tr. 63). Mr. Vavrek stated that he and Inspector Spangler then spoke with Mr. McDowell in his office, and after reviewing the mine fire boss book, Mr. Spangler found that it was not signed. Mr. Vavrek stated that Inspector Spangler commented that "Terry approached us and said that the plan was not being followed" (Tr. 63).

Mr. Vavrek stated that after Mr. Spangler informed Mr. McDowell that the plan was not being followed, Mr. McDowell "was pretty upset. He swore a little bit," and referred to

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Mr. Fowler as a "fat roly-poly" (Tr. 64). Mr. Vavrek stated that this encounter with Mr. McDowell occurred the day prior to Mr. Fowler's lay-off, and that he (Vavrek) continued in the respondent's employ for another 4 months or so until August, 1988 (Tr. 65).

Mr. Vavrek stated that the day following Mr. Fowler's departure, the job was shutdown by a state inspector because there was no qualified or certified person to preshift the work. The respondent then contacted LTV Mine Superintendent Art Jones to come and preshift the job. Mr. Vavrek stated that the state inspector called him and asked if he were certified, and Mr. Vavrek told him that he was not. Mr. Vavrek stated further that Mr. Fowler was the only person on the job who was qualified to legally preshift the work, and that a day or so later, the respondent hired someone else who had the "papers" to do the morning preshifting, and the work then resumed (Tr. 66).

Mr. Vavrek stated that sometime in May or June, 1988, after Mr. Fowler's termination, Mr. Parshall told him that Mr. Fowler "would never get a job at Meadow Run if he had anything to do with it" (Tr. 66). He explained that Meadow Run was a new mine which had opened up and was hiring (Tr. 66). Mr. Vavrek stated that Mr. Fowler was "the main person" bringing safety matters to the attention of respondent's management, and that 2 days later the Federal inspectors came in and shut the slope down. Mr. Vavrek believed that Mr. Parshall or Mr. McDowell had knowledge of Mr. Fowler bringing up the safety issues 2 days before the slope was closed because Mr. Fowler brought these matters to Mr. Brienza, and he in turn would go to the office and report what was going on (Tr. 68).

Mr. Vavrek also believed that Mr. Fowler was the "main man" who brought the safety matters to the MSHA inspectors because Mr. Fowler told him and Inspector Conrad about the slope conditions. Mr. Vavrek stated that the inspectors had received a phone call, and he believed that Mr. Fowler had made the call. Mr. Vavrek denied that he had made the call, and confirmed that he was not the safety director or involved with the safety committee prior to the time the slope was closed down (Tr. 70).

Mr. Vavrek confirmed that he did not know for a fact that Mr. Brienza told Mr. McDowell and Mr. Parshall about Mr. Fowler's complaints, and that he did not know whether Mr. Fowler went directly to Mr. Parshall or Mr. McDowell with his complaints. Mr. Vavrek stated that Mr. Fowler went through Mr. Brienza with his complaints "because he thought, just like everyone else, thought he was a foreman" (Tr. 71).

Mr. Vavrek stated that in June, 1988, the respondent and several other contractors were involved in the demolition of surface structures which housed electrical transformers or panel

boxes which were labeled to indicate that the equipment contained PCB's. An allegation was made that the respondent was dumping these transformers down a shaft which was being sealed, and MSHA conducted an investigation of the matter. Mr. Vavrek stated that the day prior to Mr. Broadwater's discharge, he "heard" that the transformers were dumped down the shaft, but that he was not on the job when this purportedly occurred and "just heard talk about it." He stated that he heard about it from Mr. Broadwater, Homer Nicholson, and Bob Vance, and that Mr. Broadwater told him that "he saw them dumping" (Tr. 77). He explained that Mr. Broadwater told him about the dumping while they were having lunch and that he was upset about it. The next day, the inspectors came to the mine (Tr. 74-78).

Mr. Vavrek stated that the inspectors spoke to a number of people about the purported dumping, including Mr. Broadwater, but they did not speak to him (Vavrek) about the matter. Mr. Vavrek stated that Mr. Broadwater told him that he had called the inspectors (Tr. 81).

On cross-examination, Mr. Vavrek confirmed that Mr. McDowell placed him in charge of safety matters on the project because of his safety experience, and that it was his job to remedy safety violations. He also confirmed that MSHA inspectors receive safety complaints in confidence and are not permitted to reveal the names of individuals who complain. He believed that Inspector Spangler violated confidentiality by telling Mr. McDowell that Mr. Fowler had brought the matter concerning the preshift gas check to his attention (Tr. 85).

Mr. Vavrek identified the mine preshift examination book, and stated that he checked the book and found that no gas checks were recorded in the book for the 2 days before Mr. Fowler was terminated on May 23, 1988 (Tr. 87). He stated that he checked the book to determine whether Mr. Fowler had made gas checks while "burning" was going on, and he could not find any onshift book that one would sign to verify that gas checks were made under state law (Tr. 90-91). He explained that no entries were made concerning the gas checks because Mr. Fowler did not examine the area (Tr. 93). He believed that anytime Mr. Fowler makes a preshift or onshift examination, it must be noted in the book (Tr. 94).

Mr. Vavrek stated that Mr. Fowler told him that Mr. Parshall would contact him when he was needed to make his examinations and would then send him to the areas which needed to be examined. He confirmed that the book entry reflects that Mr. Fowler examined the number one shaft on May 17, 1988 (Tr. 96). Mr. Vavrek further confirmed that state law required anyone in Mr. Fowler's position to inspect a shaft before any burning is done, and he assumed that Mr. Fowler knew the law (Tr. 97).

Mr. Vavrek confirmed that he specifically told Mr. Brienza about the gasoline cement cutter and chain, the lights on the slope, and smoking underground, but that he did not speak to Mr. McDowell or Mr. Parshall about these matters even though they were on the job every day, and no one stopped him from speaking with them. He explained that he spoke with Mr. Brienza because he believed he was a foreman (Tr. 99-100).

Mr. Vavrek stated that when he received complaints from Mr. Fowler he either told Mr. Parshall about them or corrected the problem himself. He confirmed that when he complained to Mr. Parshall about safety violations, Mr. Parshall would at times have them corrected, and at times would not. Mr. Vavrek stated that when Mr. Parshall did nothing, he (Vavrek) also did nothing. Mr. Vavrek confirmed that he told Mr. McDowell about a few complaints, and when he told him about the need for fire extinguishers, Mr. McDowell would take them out and put them on the equipment (Tr. 104).

Mr. Vavrek confirmed that when he was laid off in August, 1988, Mr. Parshall and Mr. McDowell knew that he had made safety complaints. He confirmed that he did not file any discrimination claim because he asked to be laid off. He explained that he found another job and requested to be laid off and "couldn't see someone else getting laid off" (Tr. 105). He confirmed that in August, 1988, the respondent's job at the mine "was running down" and people were being laid off. He confirmed that lay-offs were taking place from March through June, 1988, but denied that the work had slowed down (Tr. 105). He confirmed that he knew that the respondent had subcontracted part of the shaft sealing work to another contractor, but denied that this reduced the need for laborers or employees (Tr. 106).

Mr. Vavrek stated that he could only recall John Bair and Dave Knisely being laid off (Tr. 107). He then confirmed that employee James Lowther was laid off, and that employee Frank Pavlovich got another job (Tr. 108). After the layoffs, additional people were hired to do the same work, but he did not know how many were hired (Tr. 114).

Mr. Vavrek confirmed that in a statement made to MSHA Inspector John Savine during his investigation of the discrimination complaints he told Mr. Savine that he was not sure that Mr. Brienza and Mr. Laida were "bosses or management men," that he is still not sure that they were in fact foremen, and that all he knew was that they came in with work orders (Tr. 111-112).

Mr. Vavrek confirmed that Mr. Broadwater never made any safety complaints to him. He also confirmed that "he heard" that MSHA found no evidence that any transformers were in fact dumped down the shaft, and he denied any knowledge that an inventory



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made of the transformers revealed that only one transformer was missing (Tr. 118-119).

Mr. Vavrek confirmed that Mr. Broadwater told him that he had complained to MSHA about the transformers (Tr. 119). He also confirmed that he did not tell Mr. McDowell or Mr. Parshall about Mr. Broadwater's statement to him (Tr. 120). He also confirmed that he did not tell Mr. Savine about Mr. Broadwater's statement because he did not know about it at the time he was interviewed by Mr. Savine, and Mr. Broadwater told him about the transformers after he had spoken to Mr. Savine (Tr. 121).

Terry L. Fowler testified with respect to his employment at the Nemacolin Mine, and confirmed that he held several foreman's positions, including underground shift foreman supervising 120 underground miners. He confirmed that he holds certifications from the State of Pennsylvania as an underground assistant mine foreman, and that he is certified to make methane gas tests and air readings. He confirmed that he had a good work record at Nemacolin and never had any disciplinary problems (Tr. 125). He identified a letter of recommendation dated June 15, 1983, from the superintendent of the Nemacolin Mine (Tr. 126).

Mr. Fowler confirmed that he has worked for Jedco Minerals at the Ocean Five Mine since October 31, 1988, as a section foreman, and that he was unemployed for a few months after he was terminated by the respondent, except for "odds and ends jobs" doing road and contract work tearing down buildings (Tr. 127, exhibits C-1 and C-2).

Mr. Fowler confirmed that he was laid off by Nemacolin because the mine shutdown, and that Mr. McDowell hired him after confirming that he had fire boss and assistant mine foreman's papers. He confirmed that he started work on approximately February 17, 1988, as an underground fire boss and laborer and was paid approximately \$8 an hour (Tr. 130). He described his fire boss duties, and confirmed that management would inform him where the work was taking place, and that he would make his preshift examination before work began in the shafts and slope. He confirmed that there were four shafts, the slope, and surface buildings and ponds, and a tipple. After completing his preshift examinations, he performed his laborer's work (Tr. 131). Mr. Parshall would inform him where the work was taking place, and Mr. McDowell was present in the office when he went there to receive his assignments from Mr. Parshall (Tr. 132).

Mr. Fowler stated that his work assignments conducting the required tests took him to different shafts, two of which are six or seven miles apart. He always entered his inspections in the mine books after he completed them, and would then receive his work assignments from Mr. Parshall, and on occasion from Mr. McDowell (Tr. 134). He described the work which he did at

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the slope and shafts, including the "burning" or cutting of metal with acetylene torches (Tr. 134-136).

Mr. Fowler stated that after observing violations around the shaft, he informed Mr. Parshall about a compressor, the use of a gasoline powered grinder and power saw, Mr. Parshall smoking underground, and the presence of uncertified and untrained people underground. He explained that Mr. Brienza and Mr. Laida walked down the shaft slope for a few hundred feet without a flame safety light or spotter and without permission to enter the mine. He also expressed his concern about self-rescuers, backup horns on vehicles, the improper hauling of oxygen and acetylene tanks, and fire extinguishers. Mr. Fowler stated that he raised these concerns when he was working in the slope in late March and early April, 1988, and before Mr. Vavrek became the safety director (Tr. 138). He stated that he spoke to Mr. Parshall about these matters and "mentioned a few" to Mr. McDowell. Mr. Fowler stated that he advised Mr. Parshall about the violations and informed him that the inspectors would "write them up" and that he (Parshall) should take care of them. He also stated that Mr. Parshall said "I know" when he called these matters to his attention (Tr. 138).

Mr. Fowler stated that he informed Mr. Parshall and Mr. McDowell about the slope violations 2 days before the inspectors came in and issued violations closing down the slope (Tr. 140). Most of the violations were brought to the attention of Mr. Parshall, and "a few" were brought to Mr. McDowell's attention, but nothing was done to correct the conditions (Tr. 141).

Mr. Fowler confirmed that he telephoned MSHA inspector James Conrad at his home and told him about the violations and informed him that he was the fire boss and wanted him to do something about it and have the violations corrected. Mr. Fowler stated that he called Mr. Conrad the day before the inspectors came to the mine, and he requested that his name not be divulged (Tr. 143). Mr. Fowler stated that he also complained about a nonpermissible cable running down the slope where he was working, and uncovered light bulbs (Tr. 143).

Mr. Fowler confirmed that he did not enter the violations he complained about in the mine books because the conditions did not exist when he made his examinations. He asserted that the violations occurred during the shift after the completion of his examination. He further explained as follows at (Tr. 148-149):

Q. You did bring it to the attention of management on numerous occasions that there were problems even though you didn't enter it in the book. Is that right?

A. Yes, sir.

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Q. Is there any other reason you did not enter these hazardous conditions into the book?

A. I just didn't want to see the company have it inspected by the inspectors and give them a bad name and write violations. It's bad practice.

Q. After you had done that numerous times, you say, you called the federal inspectors. Is that right?

A. Yes, sir.

Q. And they came out and they inspected the slope and they shut it down.

A. Yes, sir.

Q. Are you aware of the specific things they were written up for right now?

A. Yes, sir.

Q. What is your recollection?

A. All the violations I talked about.

Mr. Fowler believed that the slope was shutdown for 1 day, and that following this, Mr. Vavrek was appointed as safety director (Tr. 150). The parties agreed that the slope was shutdown on or about March 24 or 25, 1988, and that exhibit C-3, are the copies of the citations issued by the MSHA inspectors (Tr. 153). Mr. Fowler confirmed that the violations which were issued were those that he previously discussed with Mr. Parshall and Mr. McDowell 2 days earlier. He stated that he called Inspector Conrad because management was not taking any action to correct the violations, and he identified the other MSHA inspectors who came to the mine as Cliff Spangler and Robert Newhouse (Tr. 154).

Mr. Fowler stated that following the shutdown of the slope by the MSHA inspectors, he informed Mr. Parshall and Mr. McDowell that the company truck he was driving was not being inspected and that they replied "so" (Tr. 155). He also found out that "stuff" was being dumped down the shaft, and no certified person was examining the shaft. He asked the state and Federal inspectors about the matter, and they confirmed that if any work is done around the shafts they were required to be inspected by a certified person. Since he was the only certified person at the mine site, and he did not inspect the shaft when the material was dumped, Mr. Fowler concluded that the required shaft inspection had not been conducted. He reported this to Mr. Vavrek in the presence of Inspector Spangler, and Mr. Vavrek told Mr. Fowler that he would check on it. Mr. Fowler stated that he called

state mine inspector Raoul Vincinelli that same evening and informed him that the respondent did not allow him to conduct his shaft inspections, and that Mr. Vincinelli told him he would speak to management (Tr. 156-160). Mr. Fowler called Mr. Vavrek at his home and Mr. Vavrek told him that Mr. McDowell had referred to him (Fowler) as "a wimp or fat boy or something." Mr. Fowler did not tell Mr. Parshall that work was being conducted at the shaft without anyone inspecting it, but that a State and Federal inspector told Mr. Parshall to make sure that he (Fowler) makes his tests (Tr. 159-160). Mr. Fowler stated that he was terminated 1 day later after these events occurred (Tr. 160).

Mr. Fowler stated that Mr. Parshall spoke with him at the end of his work shift and informed him that "I'm going to have to let you go" for "lack of work." Mr. Fowler stated that he said nothing and left the site. He then called Mr. Vincinelli that day or evening and informed him that management had lied to him and had no certified people working for them. The next day, Mr. Vincinelli went to the site and shut the job down. Mr. Fowler stated that following this shutdown, it was his understanding that the methane checks were made by Mine Superintendent Art Jones (Tr. 163-164).

In response to a question as to whether Mr. Parshall or Mr. McDowell ever expressed any displeasure with his safety activities, Mr. Fowler stated that Mr. Parshall questioned his whereabouts when he was gone for 4-1/2 hours making methane checks where holes were being drilled and shot. Mr. Fowler stated that he informed Mr. Parshall that he could contact the State or Federal inspectors to verify what he was doing, and asked Mr. Parshall not to interfere with his methane testing (Tr. 167).

Mr. Fowler stated that Mr. McDowell questioned him about some comments he purportedly made to the mine owner, and indicated that he (Fowler) had made the owner mad (Tr. 167). The next day, Mr. Parshall and Mr. McDowell argued with him about his reporting late for work, and when Mr. Fowler asked them whether there was "a problem" and did not want to be harassed, Mr. McDowell stated "well, I've been getting too many 800 phone calls" (Tr. 168). Mr. Fowler took this to mean that someone had called an inspector, and that Mr. McDowell believed he had called the inspectors (Tr. 169).

Mr. Fowler stated that he did not know the mine owner, but offered to speak with him. However, Mr. McDowell stated "that is not a good idea" and that "the owner could get real tough." Mr. McDowell stated that he did not like to be threatened, and Mr. Fowler stated "I don't either, Jay" (Tr. 169). Mr. Fowler stated he wanted to speak with the owner because he had never spoken to him and wanted to find out why he was mad (Tr. 170).

Mr. Fowler stated that on one occasion when a safety meeting was supposed to be held, Mr. McDowell commented that "he was not going to be a safety nut on no job" (Tr. 171). Mr. Fowler stated that management never criticized his job performance. He stated that he called the Federal inspectors because management was not doing anything about the violations, and since he had to sign the fire boss books, he was concerned that management would blame him, and that Mr. Parshall and Mr. McDowell "did not know the laws" (Tr. 172).

Mr. Fowler stated that Mr. Brienza and Mr. Laida rode to work with Mr. Parshall and they talked on the job about someone calling the MSHA inspectors. Mr. Fowler stated that they stated that Mr. Parshall and Mr. McDowell were mad because someone was calling the MSHA inspectors and they wanted to know who it was. Mr. Fowler stated that he wanted everyone to know about the conditions that he complained about, and he believed that Mr. Brienza and Mr. Laida "would run to management and tell them everything" (Tr. 173).

Mr. Fowler stated that he did not resent Mr. Brienza and Mr. Laida giving him work assignments and had "no ax to grind with them." He stated that Mr. Brienza and Mr. Laida "both told me they was company." He also stated that he received his daily work assignments from Mr. Brienza, Mr. Laida, and Mr. Parshall, and that he would find out about his daily work assignments when he went to work (Tr. 176).

On cross-examination, Mr. Fowler stated that approximately 3 days after he was hired by the respondent he began making complaints about safety violations, and that he made them intermittently from February 20 to May 22, 1988. He confirmed that he knew that Mr. Parshall was the superintendent and that Mr. McDowell was the project manager, and that they would be the logical people to complain to (Tr. 178-181).

Mr. Fowler reviewed a copy of his 12-page statement given to MSHA Inspector John Savine in connection with his complaint, and stated that although "he may have left something out," his statements were true (Tr. 183). Mr. Fowler stated that he told Mr. Parshall and Mr. McDowell about all of the complaints which are referred to in his statement to Mr. Savine (Tr. 189). He conceded that he did not tell Mr. Savine that he had spoken to Mr. McDowell and Mr. Parshall about these complaints, and stated that he told Mr. Savine that "I went to management. Management is Jay and Bill" (Tr. 188). In response to a comment by respondent's counsel that his statement made to Mr. Savine does not include any assertion that he specifically told Mr. Parshall or Mr. McDowell about his complaints, Mr. Fowler responded "I told you I left things out" (Tr. 189).

Mr. Fowler confirmed that he was a member of the United Steelworkers Local 3403, and that the local represented the respondent's employees on the job at the mine. He confirmed that the President of the local, Tom Simon, filed a grievance on his behalf regarding his termination. Mr. Fowler confirmed that he told Mr. Simon that "I got laid off or discharged or fired, whatever you want to call it, and they hired a guy in my place" (Tr. 190-195). Mr. Fowler confirmed that his grievance was not pursued because it was not timely filed (Tr. 211).

Mr. Fowler identified the mine examiner's book, and he confirmed that in his capacity as the examiner he was supposed to make entries concerning mine conditions, gas tests, and any safety violations. In response to questions concerning certain entries he made in this book, Mr. Fowler conceded that without exception, each of the shafts and slope which he examined on the days shown in the book were all noted by him to be safe (Tr. 195-198, exhibit R-1). Mr. Fowler explained that these areas "were safe at the time" he inspected them and that the violations that he complained about took place during the shifts and that the areas noted in the book "was safe every day except the few days I told management about." He further conceded that there are no entries in the book that do not say "safe" in his own handwriting for every examination noted in the book (Tr. 199). Mr. Fowler confirmed that no one ever told him not to write up any violations in the book (Tr. 201).

In response to further questions, Mr. Fowler stated that he believed that Mr. Brienza and Mr. Laida were foremen because they told him they were "company" and not "union" (Tr. 208). He stated that neither Mr. Brienza, Mr. Laida, Mr. Parshall, or Mr. McDowell were authorized to go underground unescorted because they were not certified under Pennsylvania State law and had no underground training (Tr. 208-210).

Mr. Fowler stated that Mr. Brienza and Mr. Laida made comments that "the inspectors are here. Fowler must have called the inspectors," and that they made the statements "quite a few times." He also stated that he personally observed Mr. Brienza and Mr. Laida riding in a vehicle with Mr. Parshall (Tr. 213-214).

Mr. Fowler stated that one may assume that any violations which may have occurred during a work shift were corrected in 1 day if he found the area safe during his next daily preshift inspection (Tr. 218). He stated that "most of the time" his safety complaints were ignored and that is why he called the Federal inspectors. In response to certain bench questions with respect to whether he ever went to Mr. McDowell or Mr. Parshall with his complaints of violations, Mr. Fowler stated as follows (Tr. 218-220):

Q. The point I'm making is were these complaints that were just altogether ignored or were they taken care of?

A. Most of the time they were ignored. That is why I called.

Q. Most of the time they were ignored.

A. That is why I called the Federal inspector.

Q. How were they ignored?

A. They weren't taken care of.

Q. Did you ever go to Mr. McDowell or Mr. Parshall, who were the powers to be at the mine?

A. I told Bill and I told Jay about a few.

Q. Which ones?

A. Which ones?

Q. Do you remember which ones you told them about?

A. I can't remember. They didn't want to correspond or help out, so I said I would have to go to an inspector to get something done.

Q. You told them that.

A. Yes.

Q. On how many occasions did you tell them that you had to go to the inspector?

A. I told Jay -- excuse me. I told Bill if he interfered with my tests, with my examinations, that I would go to the Federal and State inspectors. I told Bill this.

Q. I'm taking about the conditions that you say they didn't take care of. Did you tell them about conditions that --

A. I told them about -- we had conditions. And they did nothing. They gave me dirty looks and started treating me --

Q. Do you know whether they took care of them?

A. Some they did and some they didn't.

Mr. Fowler denied that he ever heard Mr. Brienza state that he was "union," denied that he ever cursed Mr. Brienza or had a fight with him, or that he ever told Mr. Laida that he wanted to be laid off because he had another job (Tr. 221-224).

John R. Bair testified that he was formerly employed by the respondent as a laborer for approximately 6 weeks beginning on March 3, 1988. He stated that some oil spilled out of a transformer one day and he requested Mr. Vavrek to have him tested for possible PCB exposure. Mr. Vavrek told him that he would ask management about it, and Mr. McDowell came to him later and cursed him and told him that if he had any problems he should come to management. Mr. Bair stated that he also asked Mr. McDowell for the identity of his union president so that he could file a request to be tested for PCB exposure, and that Mr. McDowell cursed him. Mr. Bair stated that Mr. McDowell never responded to his testing request or for the identity of his union president. Mr. Bair claimed that he never received a union card, that no one knew what union they belonged to, and that he could not find the information (Tr. 227-231).

Mr. Bair stated that after his encounter with Mr. McDowell, Mr. Parshall told him that he would assign him to "burn cable" on the hoist house tower, but then left him standing in the rain for 3 hours without a further work assignment after he told Mr. Parshall that he would not climb the tower because it was too high and he feared for his life (Tr. 234). The next day, Mr. Parshall told him he was laying him off because there was a shortage of work. Mr. Bair stated he was actually laid off the following day and was not called back to the job (Tr. 235). He confirmed that Mr. McDowell had initially hired him for the job (Tr. 238). Mr. Bair denied that he was still mad at Mr. McDowell, but was mad at the company because of the treatment he received (Tr. 247).

Roger Broadwater testified that he worked for the respondent from approximately the middle of March, 1988 until June 1, 1988, and that he was hired by Mr. McDowell to work as a bulldozer operator. He stated that he has never been fired from a job for poor work and has never been the subject of any disciplinary actions (Tr. 250-252).

Mr. Broadwater described his work duties, including laborer's work, and cutting metal with a torch. He stated that his work assignments were primarily made by Mr. Parshall, and that Mr. Brienza and Mr. Laida would also inform him where he was needed to work on any given day (Tr. 252-255).

Mr. Broadwater stated that he was concerned about unsafe work practices such as the lack of fire extinguishers, unsecured



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oxygen and acetylene bottles, the use of a Cherry picker with a broken front stabilizer, and a man cage being hauled around without a safety rig (Tr. 255). He stated that he mentioned these conditions to Mr. Parshall, and he believed that he spoke to Mr. McDowell about the oxygen and acetylene bottles when he first started work (Tr. 256).

Mr. Broadwater stated that he observed two transformers being pushed down a skip shaft by a highlift operated by Mr. Laida, and that Mr. Parshall and others were present when this occurred. Mr. Broadwater stated that he did not know whether the transformers contained any PCB's, but that he was upset because contaminants, oils, and flammable, combustible, and corrosive materials were not allowed to be put down the shafts (Tr. 258-261). After arriving home that same day he called Mr. Fowler and told him about the transformers being pushed down the shaft and Mr. Fowler had a friend of his, John Cox, call him back. Mr. Broadwater told Mr. Cox what he observed, and Mr. Fowler called the MSHA inspectors, and they came to the mine the next day (Tr. 264).

Mr. Broadwater stated that when he returned to work the day after speaking with Mr. Fowler, the inspectors were at the mine and wanted to know if anyone knew anything about the transformers being dumped down the shaft. Mr. Broadwater stated that he feared for his job and said nothing directly to the inspectors, but he did take Inspector Newhouse's phone number and told him that he would call him that evening (Tr. 266). At the end of the shift Mr. Parshall told him that four laborers were no longer needed and that he was one of them. Mr. Broadwater stated that he was laid off at the end of the day and that Mr. Parshall told him to find another job (Tr. 267). Mr. Broadwater stated that he had no opportunity to call or speak with Mr. Newhouse, but that he subsequently went to see him and filed his discrimination complaint with him (Tr. 268).

Mr. Broadwater believed that there was still "plenty of work" to be done when he was laid off, and that he was the only one laid off that day. He did not know whether the other three laborers mentioned by Mr. Parshall were subsequently laid off (Tr. 270).

Mr. Broadwater stated that when the inspectors were at the mine speaking with people about the transformers being pushed down the shaft he told four individuals what he had observed and that he was going to be telling the inspectors about it (Tr. 273). He believed he was laid off because he called the inspectors to look into the matter (Tr. 273).

On cross-examination, Mr. Broadwater stated that he believed that management knew that he had complained about the transformers being pushed down the shaft because they "probably must

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have had a snitch." He could not identify the "snitch" because "I don't have a crystal ball." Mr. Broadwater confirmed that he did not say anything to management about the transformers (Tr. 275).

With regard to his complaint about the Cherry picker with a broken stabilizer being used to hoist men in a man cage, Mr. Broadwater confirmed that in a prior statement given to MSHA Special Investigator John Savine, he stated that "This cage was not used to hoist men, to the best of my knowledge." When asked to explain this contradiction, Mr. Broadwater stated that "I must have remembered something else," "I don't know if its a matter of time lapse," and "maybe I don't know" (Tr. 277-278).

Mr. Broadwater confirmed that in his prior statement to Mr. Savine he stated that he asked Mr. Parshall that "it looked like the job was slowing down and if there were going to be any layoffs" and that Mr. Parshall assured him that employees would not be laid off because there was a lot of work to do in the preparation plant (Tr. 282).

Mr. Broadwater acknowledged that he had several different jobs with the respondent but denied that he was ever taken off a job because he could not perform satisfactorily. He also acknowledged that Mr. Parshall gave him "an ear beating" when he backed up a backhoe and it caught some powerlines and broke down an old rotted telephone pole (Tr. 285).

Mr. Broadwater stated that he and the other miners who were interviewed by the MSHA inspectors concerning the transformers were all interviewed in private, and that there were no witnesses present during the interviews (Tr. 287). He confirmed that Mr. Fowler advised him of his right to file his discrimination complaint, but that he did not file a grievance over his layoff. When asked why he had not filed a grievance, he stated "I don't know why I didn't. Because there is no union representative on the job" (Tr. 291). He confirmed that his union dues were "checked off" and sent to the Steelworkers Union but that he had no union card, and only received one after he was laid off (Tr. 292). He confirmed that other people were hired after Mr. Bair and Mr. Knisely were laid off to do the same work, and it was his impression that they were not laid off because of a lack of work (Tr. 295).

Homer W. Nicholson testified that he was hired by Mr. McDowell as a laborer on March 1, 1988, and worked at the project in question for 3-1/2 months. He testified with respect to his knowledge concerning the transformers which were allegedly dumped down the mine shaft and explained what had occurred (Tr. 296-305). With regard to this incident, Mr. Nicholson stated that during the dinner hour one evening Mr. Broadwater stated that he was going to call the federal or state people about the

transformers, and he could only recall one other individual who was present at this time, and he identified him as Roger "Hobby" Vance. The following day, the Federal inspectors showed up at the site, and prior to their arrival, Mr. Brienza and Mr. Laida asked him not to say anything about the transformers. He stated that "he thought" that Mr. Laida and Mr. Brienza were foreman but that he did not know (Tr. 306). He confirmed that when he was interviewed by the inspectors about the transformers he told them that he did not see any transformers go down the shaft and that "once I load them, they're not my problem no more" (Tr. 306).

Mr. Nicholson confirmed that after the transformer incident, which he believed occurred on May 31, 1988, he continued to work for the respondent at the mine until approximately June 15, 1988, and then obtained a job at another mine with another "branch" of the respondent (Tr. 308). He confirmed that he heard the argument between Mr. Bair and Mr. McDowell, but could not hear any of the details because he was "downstairs." Although he had no personal knowledge of any safety problems at the site, he "heard" from others that burning was being done without the use of any fans, but that Mr. McDowell had him "fix up a fan for them" (Tr. 309).

On cross-examination, Mr. Nicholson testified further about his involvement with the transformers in question, and he confirmed that he visited Mr. McDowell's office many times (Tr. 309-313). He confirmed that there was a bulletin board in the office and that he has seen some "papers" posted on the wall concerning the union. Although Mr. Nicholson could not read in any detail a copy of a union agreement produced by the respondent's counsel because he did not have his glasses, he identified the name of the Local Union 1474 of the United States Steel-workers of America printed on the document, and stated that it could have been the document posted on the wall (Tr. 316-318).

In response to a question as to whether he ever told anyone in "management" that Mr. Broadwater complained about the transformers, Mr. Nicholson responded "Not in management, not unless it was Arty and Kenny, and they say they wasn't in management now" (Tr. 318). Mr. Nicholson stated further that when he began work for the respondent he thought that Mr. Brienza and Mr. Laida were foremen, but that they informed him that they were not (Tr. 319). Mr. Nicholson confirmed that Mr. Broadwater told him that he was going to make a complaint, and that he had heard that Mr. Robert Vance told Mr. Brienza that Mr. Broadwater "was going to tell on them" (Tr. 320).

David D. Knisely, testified that he was hired by Mr. McDowell as a skilled laborer and worked for the respondent for 10 days during the middle of April, 1988. He worked at "burning metal and stuff, steel, then stacking it on the truck or whatever, just labor work." He stated that on one occasion when

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he was working with Mr. Broadwater and Mr. Bair, he asked Mr. Vavrek to find out if there was a union representative or steward on the job, and Mr. Broadwater inquired about the presence of any PCB's in the transformer banks in the building where they were working at. Shortly thereafter Mr. McDowell and Mr. Parshall came to the building while they were tearing it down and wanted to know whether there was a problem, and they used a few curse words. They also stated that they were to come to them if they had any questions, and Mr. Bair did most of the talking. Words were exchanged, and after Mr. Bair asked Mr. McDowell about the union steward and the PCB's, Mr. McDowell stated that he would find out about it. The next day, he and Mr. Bair went to the office to find out if Mr. McDowell had any answers to their questions, and Mr. McDowell informed them not to worry about the union because it would take 60 days for them to be in. When Mr. Bair asked to be tested for PCB's, Mr. Knisely stated that "I forgot what happened after that. It's been awhile" (Tr. 326).

Mr. Knisely stated that on the day that he and Mr. Bair went to see Mr. McDowell in his office, Mr. Parshall spoke with him later in the afternoon and informed him that he was laid off because of a lack of work, and that was his last day on the job. Although he had no personal knowledge whether there were any new hires after his layoff, Mr. Knisely stated that it was his understanding that there were (Tr. 326). Mr. Knisely stated that Mr. Broadwater and Mr. Fowler then advised him that he had "a good case if I filed 105(c)." He confirmed that he filed a complaint but was informed by MSHA by letter that his case had been "dropped" and he elected not to pursue it further and found other work in July (Tr. 327).

On cross-examination, Mr. Knisely stated that he and Mr. Bair asked Mr. McDowell about the union, and that Mr. McDowell was upset because they spoke to Mr. Vavrek first and did not come to him with their questions about the union. He confirmed that Mr. McDowell eventually "got to finding out about the union" but "ranted and raved about not coming to him first" (Tr. 330). Mr. Knisely confirmed that he had visited Mr. McDowell's office and recalled seeing "something about the retirement and health care" posted on the bulletin board, and that something about the union was also possibly posted, but he did not recall. Mr. Knisely stated further that Mr. McDowell was upset "mostly" with Mr. Bair, but was not pleased with him either because "I guess he didn't want nobody talking about the union" (Tr. 334). He confirmed that he had no first hand knowledge about the transformer question (Tr. 337).

Edward K. Locy, stated that he worked for the respondent as a heavy equipment operator from March 14 to approximately August 10, 1988, and later became an acting foreman. He stated that sometime in June or July, 1988, Mr. Parshall told him to start work early before the usual starting time of 7:00 a.m., and

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that following Mr. Parshall's instructions, he dumped five or six plastic barrels of acid down a shaft after breaking them up with a dozer so they would not float. He stated that Mr. Parshall told him that Mr. Phil Stout, the respondent's owner, happened to see Mr. Fowler "doing something one day" and commented that "he didn't like the M-F'ers look, get rid of him," and that this occurred the day before Mr. Fowler left the job (Tr. 342).

In response to a question concerning his opinion of Mr. Fowler as a worker and safety conscious person, Mr. Locy responded "I can't really say that much about him . . . . I actually don't know the man. But he was always doing the job when I was around him" (Tr. 343). With regard to his opinion of Mr. Broadwater, Mr. Locy stated "Well, I know him. But personally associating with him, going to his house or something like that, no, I've never been there" (Tr. 343).

#### Respondent's Testimony and Evidence

Armand "Arty" Brienza testified that he was employed by the respondent during April through June, 1988, at the mine site in question as a carpenter and that Mr. Fowler and Mr. Broadwater were his co-workers. He confirmed that the work being performed by the respondent was a "union job," and that he and the other employees belonged to the United Steelworkers union at that time. He also confirmed that Mr. Kenny Laida worked for the respondent as a cement finisher and also belonged to the union, and that he and Mr. Laida were not foremen or bosses and were not part of management.

Mr. Brienza denied that he and Mr. Laida ever went into any of the work areas at the site with "work orders of the day" for any individual or group of employees to follow. Mr. Brienza explained that part of his work was to seal bore holes which were located within a 10-mile radius of the mine, and that he would generally have laborers helping him. The men were assigned to him by Mr. Parshall and he (Brienza) had nothing to do with selecting them. In view of the fact that he was a carpenter and needed to have materials available to him, he would instruct the laborers assigned to him to bring the materials to the work locations and that this was a normal practice "in the trade." He believed that this probably explains why others may have believed that he and Mr. Laida were foremen or a part of management. He further stated that he and his crew of two laborers would travel around in a dump truck used to haul the materials for sealing the bore holes, and that he would instruct the laborers as to where to take or place the materials needed for the job. He confirmed that once the laborers were assigned to him by Mr. Parshall, they were under his (Brienza's) control while they were in the field working with him, and that Mr. Fowler and Mr. Broadwater were never assigned to him to do any of the bore hole work (Tr. 354-360).

Mr. Brienza confirmed that the only time he gave any work orders to Mr. Fowler and Mr. Broadwater was during the work to seal off the slope, and on these occasions he would instruct them to bring in materials, do the "chipping out," carry blocks, or do anything else that was necessary, and that these orders were no different than was customary "in the trade." He believed that Mr. Fowler and Mr. Broadwater should have realized that craftsmen such as a carpenter or cement finisher could tell a laborer to "bring me this or that," and that although an experienced miner or construction person might believe that a carpenter was management or a boss or foreman "he ought to know" (Tr. 361).

Mr. Brienza stated that Mr. Fowler never treated him as a boss or foreman or part of management, that he used foul language while they talked and worked together while "kidding around," and that on one occasion they engaged in an altercation, but then shook hands. He further stated that he and Mr. Fowler worked "as a crew" together doing slope work for 6 to 8 weeks (Tr. 363). Mr. Brienza stated that Mr. Parshall and Mr. McDowell never worked "in the hole" with the men, and that the men did not talk to them like they did with him and treated them differently. There was no question that the men knew that Mr. Parshall was the superintendent and that Mr. McDowell was the project manager (Tr. 364).

Mr. Brienza stated that Mr. Fowler and Mr. Broadwater never made any safety complaints to him, but that he did hear Mr. Fowler mention or complain about the lights and use of a generator in the shaft, and fire extinguishers. These comments were made in "general conversation," and Mr. Brienza denied that he ever reported them to Mr. Parshall or Mr. McDowell. Mr. Brienza explained that he did not believe it was his responsibility to inform management about these matters, and since Mr. Fowler had more mine experience and knew the safety regulations, "he should have went and done more complaining to somebody else beside me" (Tr. 366).

On cross-examination, Mr. Brienza confirmed that he "heard talk" about transformers being dumped down a shaft, but that he had left the site four times on the day in question and had no personal knowledge about this purported incident (Tr. 368). Although he initially stated that he was "fire-bossing," and had "a card" allowing him to make methane checks, he later clarified his testimony and stated that he was not a fire boss, and was only certified to make methane tests on the surface (Tr. 371).

Mr. Brienza confirmed that he rode to work with Mr. Parshall in his vehicle because it was a trip of 37 miles one way and he had the opportunity to get a ride to work every day (Tr. 379). He confirmed that he still works for the respondent as a carpenter, does not act as a foreman, and is not presently a member

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of the union (Tr. 380). He did not believe that it was reasonable for anyone to believe that he was the conduit between Mr. Parshall and the work force "because Mr. Parshall came down every morning and he gave the orders to everybody, what they had to do down there" (Tr. 381). He denied that he ever acted as a foreman, and stated that he was a carpenter who worked part of the time doing slope and bore hole work, and that there were days when he worked and labored with the men on different jobs (Tr. 382).

Mr. Brienza confirmed that he had no training "in the mining area," and that he and Mr. Laida took it upon themselves to go to the slope bottom to retrieve some copper material and that he knew this was illegal or improper and that Mr. Fowler told him so (Tr. 384). Mr. Brienza stated that he never received a union card, and that Mr. McDowell told him that Mr. Laida was the shop steward (Tr. 384). He also stated that the work which he performed around the bore holes took place after Mr. Fowler was terminated, and he conceded that this work would not be relevant to Mr. Fowler's perception that he was a foreman (Tr. 390).

Mr. Brienza confirmed that Mr. Fowler pointed out problems in the workplace on more than one occasion in his presence, and that he did so "as a group. In the hole talking, yes, he mentioned different things" (Tr. 391). Mr. Brienza denied that Mr. McDowell or Mr. Parshall were present during these discussions, and he had no knowledge that Mr. Fowler or Mr. Broadwater ever went directly to Mr. McDowell or Mr. Parshall with any safety complaints (Tr. 392). He believed that Mr. Parshall was concerned about the safety of the employees (Tr. 393). When asked why he did not communicate Mr. Fowler's safety concerns to Mr. Parshall, Mr. Brienza replied "Because I figured Mr. Fowler, he has a complaint, let him go. He complained down in the hole to all of us" (Tr. 395). Mr. Brienza confirmed that Mr. Fowler complained about fire extinguishers, lights, and self-rescuers, and that one of the reasons he was hired was because he was experienced in these matters. Mr. Brienza stated that all of these items in the slope was "new to me," and that as a carpenter he usually worked on the surface (Tr. 397).

Mr. Brienza denied any knowledge of Mr. Fowler's calling any federal inspectors. He confirmed that he was aware that the inspectors came to the site on March 24, 1988, and "writing up a bunch of stuff," and that he had no reason to dispute Mr. Fowler's claim that he called in the inspectors (Tr. 399). He confirmed that Mr. Fowler had worked in the mine, and that he was the only person who had knowledge about the mining laws and regulations (Tr. 405).

Mr. Brienza confirmed that he was at the mine when the slope was shutdown by the inspectors, but he was not interviewed and did not believe that he spoke with Inspectors Newhouse or

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Spangler. He did not know who the inspectors spoke with, and never heard Mr. McDowell or Mr. Parshall say anything to Mr. Fowler suggesting that he should not speak to any federal inspectors (Tr. 407).

William Parshall testified that he was formerly employed in 1988 by the respondent as the job superintendent at the Nemaquin Mine, and that he and Mr. McDowell managed the project. He stated that Mr. Laida and Mr. Brienza were in no way part of management and that he never authorized them "to carry orders of the day to the men on the site." He confirmed that 14 to 16 men worked at the site, and that he would make the work assignments on a daily basis and directed all of the work orders (Tr. 410). He confirmed that Mr. Fowler and Mr. Broadwater worked for him (Tr. 411).

Mr. Parshall denied that Mr. Fowler or Mr. Broadwater ever made any safety complaints to him, and stated that the only time he found out that any complaints had been made was when the MSHA inspectors came to the site and shut the job down. He stated that "they shut the job down until I cleaned everything up that they wrote up, that I had that was improper" (Tr. 412). He confirmed that he never found out who may have complained, but that he was curious and asked Inspector Newhouse about it. Mr. Newhouse informed him that a complaint may be filed by using a toll free number to call MSHA in Washington, and that the source of any complaint is confidential and could not be revealed. Mr. Parshall stated that he had no knowledge that Mr. Fowler or Mr. Broadwater made any safety complaints about the area which was shutdown (Tr. 412).

Mr. Parshall denied that Mr. Fowler or Mr. Broadwater were fired because they made safety complaints. He stated that they were laid off. The decision to lay off Mr. Fowler was a joint decision made with Mr. McDowell. Mr. Fowler was laid off because the company was catching up with the work, had subcontracted work to another contractor, and he knew that he was going to reduce his work force. He laid Mr. Fowler off because he was the least qualified to do the work and he did not consider him to be a satisfactory employee. He stated that Mr. Fowler "walked around and talked to people instead of doing his work," was not a "production worker," was not an "energetic worker," and did not give him "eight hours work for eight hours pay" (Tr. 415). Although Mr. Fowler did what he was told, "it wasn't no expediency" and "it was just moping around and stop and talk to people. Things like that" (Tr. 415). Four or five other employees were laid off 2 or 3 weeks before Mr. Fowler, and others were laid off after Mr. Fowler (Tr. 416-417).

Mr. Parshall confirmed that at the time the MSHA inspectors came to the job site and shut the slope down and issued violations, he was aware that they spoke with Mr. Fowler. He stated



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that he observed Mr. Fowler speaking with the inspectors, and he recalled that Mr. Ben Jordan and Mr. Brienza were also present at the slope with Mr. Fowler and the inspectors when it was shutdown, but he had no idea what the conversations were about (Tr. 419). He denied making any statement that Mr. Fowler would never get to work at the Meadow Run Mine, and confirmed that he never heard of that mine (Tr. 421).

Mr. Parshall confirmed that he laid off Mr. Broadwater. He explained that Mr. Broadwater was hired as a high lift operator, but that he did not consider him to be satisfactory at that job. He assigned Mr. Broadwater to other equipment at another shaft because the superintendent at that site needed an operator, but he was sent back within 2 days because the superintendent did not want him "because he wasn't very good" (Tr. 420). He then assigned Mr. Broadwater to "burning work," but found that he had difficulty doing that job. He then assigned him to "laboring here and there until I had to make a cutback . . . . I was going to lay laborers off, so I just let him go because he wasn't qualified to do any of the work, really" (Tr. 421).

Mr. Parshall denied that he ever told Mr. Broadwater that there was plenty of work, and he considered such statements to be a bad business practice. He denied that he laid off Mr. Broadwater because of any complaints concerning safety violations or transformers, and stated that he had no knowledge that Mr. Broadwater had made any complaints prior to the time he laid him off. He also denied that Mr. Vavrek ever informed him that Mr. Fowler and Mr. Broadwater had made safety complaints (Tr. 422).

Mr. Parshall confirmed that he knew about the EP