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SOL (MSHA) v. WESTERN FUELS-UTAH
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION
(MSHA),
ON BEHALF OF LOUIS C. VASQUEZ,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 90-271-D

Deserado Mine

v.

WESTERN FUELS-UTAH, INC.,
RESPONDENT

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Complainant;
Richard S. Mandelson, Esq., Baker & Hostetler,
Denver, Colorado, for Respondent.

Before: Judge Cetti

This discrimination proceeding is before me upon the Complaint of the Secretary of Labor on behalf of Louis C. Vasquez under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. the "Act". The complaint alleges that Louis C. Vasquez, an underground coal miner was unlawfully transferred from the crew he had been working with to a different crew on another shift at the same mine in retaliation for his safety complaints in violation of Section 105(c)(1) of the Act. (Footnote 1)

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The complaint requests a finding that Mr. Vasquez's transfer was the result of unlawful discrimination because he exercised his statutory rights under the Act and requests reinstatement, back pay plus interest, and the expungement of all matters relating to the transfer from Mr. Vasquez's employment records. The Secretary proposes a civil penalty of \$2,000 for the alleged violation of Section 105(c) of the Act.

Western Fuel contends that the transfer complained of was not motivated in any part by Complainant's protected activity and that, even had the Complainant established a prima facie case, a preponderance of the evidence established that Western Fuel had a valid business reason for transferring Complainant and for this reason alone transferred Complainant to the other crew.

The hearing was held before me at Glenwood Springs, Colorado, on the merits of Mr. Vasquez's complaint. Helpful post-hearing briefs were filed by both parties which I have considered along with the entire record in making this decision.

Stipulations

At the hearing, the parties stipulated to the following:

1. Western Fuels-Utah, Inc. is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.
2. Western Fuels-Utah, Inc., is the owner and operator of Deserado Mine, MSHA I.D. No. 05-03505.
3. Western Fuels-Utah, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act").

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4. The Administrative Law Judge has jurisdiction in this matter.

5. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

6. The proposed penalty will not affect respondent's ability to continue business.

7. Western Fuels-Utah, Inc., is a large operator of a coal mine. The total production tons of the controlling company are 1,375,174 tons per year. The total production tons of the mine are 1,375,174 tons per year, and it has 177 production workers.

Complainant's Case

Messrs. Louis Vasquez, Gary Belveal, Stanley Kretoski, and Roland Heath (as an adverse witness) were called to testify by the Complainant.

Mr. Louis Vasquez testified substantially as follows:

LOUIS VASQUEZ began working for Western Fuels on December 13, 1985, as a continuous mine helper. Five or six months later, he became a continuous mine operator, and became a shear operator approximately seven months after that. (Tr. 13-15).

In December 1988, Norm Wallace became the section boss or foreman on Vasquez's crew. To Vasquez's knowledge, Norm Wallace did not have any prior experience on the longwall, and at that time the crew was having problems with the methane gas on the wall. Beginning in August 1989, Vasquez and his fellow crew members began checking for methane gas every 20 minutes during their shift because they were having more gas problems. These gas problems continued from August 1989 to December 1989, when Vasquez was transferred to a different crew on another shift. (Tr. 19-20, 24-26).

Between August and December 1989, Vasquez talked to Rick Kendall, Norm Wallace's immediate supervisor, nearly every day about the gas problems. Vasquez reported the gas problems to Roland Heath, the mine superintendent in early December 1989. (Tr. 28-29).

On December 18, 1989, Rick Kendall picked Vasquez up in a company truck approximately an hour before the end of his shift. Kendall told Vasquez that he was being transferred to a different crew on another shift. Vasquez asked why he was being moved in

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stead of someone else, and Kendall replied that there were problems on the crew. Vasquez asked whether it was because he was causing trouble on the crew or on the shift. Kendall simply said that he was doing what the superintendent Roland Heath told him to do, and Vasquez would have to take up the details with Roland Heath. Vasquez believes that he had complained about gas problems that day at the beginning of the shift. (Tr. 31).

The next day, Vasquez talked to Roland Heath because he did not want to be moved off of his shift, as a transfer would interrupt his carpool arrangements. Vasquez also asked Roland Heath why he was the one being transferred instead of someone else. Heath replied that there were problems on the crew and that he had to solve the problems. Vasquez asked whether he had been causing any problems. Vasquez testified that Heath stated that Vasquez was the problem and that was why he and Norm Wallace, the foreman, were being transferred off the shift. (Tr. 34).

On the same day, Vasquez complained to Gary Belveal, the Union president in his district. Gary Belveal went to speak to Roland Heath on Vasquez's behalf, but the situation was not changed. Then Vasquez called the MSHA and spoke to Stanley Kretoski, because he did not think that the transfer was fair to him. Vasquez believed that he had been transferred off his shift "just because" he was following his "work procedures as operator" of shutting the wall down when the methane readings required it. (Tr. 35-36).

Vasquez remained a shear operator after he was transferred, and received the same rate of pay. However, he did not receive as much overtime on his new shift. (Tr. 36-38).

Prior to the transfer he worked five days at the wall. After the transfer he worked three days at the wall and two days in the "miners' section". (Tr. 35-36).

Because of his transfer, Vasquez rotated to the graveyard shift instead of to the day shift with his old crew. As a result, he had to drive himself to work the next two week period because he only had a carpool when he was on the day shift. (Tr. 39).

Vasquez stated that he is also claiming damages for wear and tear on his car based on oil changes and other things that he had to do himself. He is also requesting reimbursement for long distance telephone calls he made to the Bureau of Mines in December 1989. (Tr. 44).

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Norm Wallace, Vasquez's former foreman, was transferred to a different "miner section" at the same time Vasquez was transferred. A man named John Claybaugh, who had a temporary shear bid at the time, replaced Vasquez on his old crew. Scott Nepp replaced the foreman Norm Wallace. (Tr. 45).

Jon Hawkins, the other shear operator on Vasquez's former crew, shut down the longwall for gas problems more frequently than Vasquez did. Vasquez received training in MSHA regulations, and one of the items covered in the training is that continuous miners and shear operators are expected to shut down the longwall if there is a gas build-up. Vasquez was instructed to shut down the longwall anytime he had methane in tailgates or headgates--1 percent on the returns and 2 percent on the bleeders. Vasquez was never disciplined under the collective bargaining agreement for reporting a gas build-up which resulted in shutting down the face. There were six people on his crew who had responsibility for gas readings. To Vasquez's knowledge, no member of his crew was disciplined for shutting down because of a gas build-up. (Tr. 50-53).

There is a 40-cent differential per hour for working the graveyard shift, and a 30-cent differential per hour for working the swing shift. Vasquez believes that he was told about his transfer the week before Christmas, and that he started working on his new crew the first week in January 1990. Under a normal rotation process, he would have been on the day shift the first two weeks of January 1990, but after his transfer he was on the graveyard shift instead. Because of the transfer, Vasquez received a 40-cent differential per hour for working the graveyard shift the first two weeks in January 1990, although he lost his carpool arrangements for those two weeks. Vasquez does not recall taking off the 40 cents extra per hour when he did the damage calculations on his damage report. (Tr. 56-63).

Vasquez had problems with Norm Wallace when he first became his crew foreman. Vasquez thought that Wallace was not doing his job, that he was not keeping a constant gas watch on the tailgates and bleeders, and that Wallace got upset whenever someone tried to explain anything to him. Vasquez believes the first time he talked to Norm Wallace about gas problems was in August or September 1989. Wallace did not write Vasquez up for complaining, nor did he consider Vasquez's complaints to be insubordination. The gas problems occurred from August to November 1989, because a borehole that ventilates gas on the face of the longwall was not operating properly. (Tr. 64-70).

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Between June and December 1989, three other people asked to be transferred off Vasquez's old crew. One man, Dewey King, asked to be transferred because Vasquez gave him a hard time. Vasquez testified "we were on his (Mr. King's) case because he had the smell of liquor on his breath." (Tr. 74-76).

Vasquez admitted he has no knowledge or information that Roland Heath used any criteria other than seniority in deciding whom to transfer off his old crew. Jon Hawkins had more seniority than Vasquez on his old crew. (Tr. 78).

Vasquez had carpool arrangements during 1989 with a man who worked only day shifts. Thus, Vasquez only drove his car one week out of two when he was on the day shift. However, he drove by himself every day when he worked the swing and graveyard shifts. (Tr. 79-82).

Petitioner's Exhibit P-1, showing Vasquez's damages, was prepared by Stanley Kretoski. Vasquez does not have copies of phone bills to substantiate the amount claimed for long distance telephone calls. Vasquez's claim for lost overtime is based solely on what another miner on Vasquez's old crew told him about how much overtime he was getting. (Tr. 83-84).

Vasquez worked the swing shift during the middle two weeks of December 1989. The mine was closed for Christmas week, and Vasquez began working the graveyard shift the first two weeks in January 1990. Vasquez worked the swing shift January 15 through January 28, 1990, (Tr. 89-92), and after that rotated back to the day shift.

Vasquez's problem with his transfer to the new crew is the way the company went about doing it, and that Roland Heath called Vasquez a troublemaker. The transfer also cost Vasquez travel expenses when he lost his carpool for two weeks and a loss in overtime pay. Vasquez did not think he received as much overtime on his new crew assignment. (Tr. 93-94).

Mr. Gary Belveal testified substantially as follows:

GARY BELVEAL runs a roof bolter at the Deserado Mine and is

President of Local 1984 of the United Mine Workers. He has been involved with the safety committee at the mine since mid-1987. (Tr. 99-100). Belveal believes that Vasquez talked to him about gas problems on the longwall, but could not recall any specific conversations with Vasquez on this subject before he was transferred. Belveal refreshed his recollection about conversations with Vasquez by looking at his handwritten notes from

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December 1989. (Tr. 102-03). Belveal became aware that Vasquez was being transferred the week of December 20, 1989, when Vasquez spoke to him about the transfer. Vasquez told Belveal that he thought he was being transferred because of safety issues he had brought up on his old crew, and thought it was unfair that he was being singled out for the transfer. Other members of Vasquez's former crew, including Jon Hawkins, told Belveal that they felt Vasquez was being transferred because of his complaints about gas problems on the wall. (Tr. 104-05).

Belveal testified that he spoke to Roland Heath about Vasquez's transfer, and Heath told him (Belveal) that the whole crew was insubordinate and that Vasquez was the cause, which was why he was being transferred. Belveal then went back to see Heath again with Al Payne, another miner's representative on the safety committee. Heath again stated that the entire crew had been insubordinate and that transferring Vasquez would take care of the problem. Belveal then asked Roland Heath if the code-a-phone call had anything to do with Vasquez's transfer, and Heath's response was "No, partly." Belveal had heard through word of mouth at the mine that a code-a-phone call had occurred on December 8, 1989. (Tr. 106-08).

Belveal discussed the situation with Jon Hawkins and Harold Putney after his conversations with Roland Heath. The first week in January 1990, Belveal called Stanley Kretoski to see if Vasquez had a justifiable discrimination complaint. (Tr. 109-10).

Under Article 13 of the Collective Bargaining Agreement, Belveal understands that seniority and ability to do work govern who is transferred when a transfer needs to be made. Belveal feels that the company has a broad range in choosing who is transferred under these guidelines, and he did not raise Article 13 with Roland Heath when discussing Vasquez' transfer. As far as Belveal knows, Vasquez's transfer was made on the basis of seniority. (Tr. 114-17).

Belveal's handwritten notes from December 1989 did not reflect that Roland Heath said "No, partly," in response to the question as to whether the transfer was based on the code-a-phone call. Al Payne, who was with Belveal at the time of Roland Heath's statement, wrote that response in his notes. (Tr. 117).

Belveal remembers speaking to Bob Hanson, Director of Safety at the mine, and stating that they needed to do something about Vasquez's crew and its supervision prior to December 8, 1989, when the code-a-phone call occurred. (Tr. 123).

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Belveal again told Bob Hanson that something had to be done about the crew and supervisor situation on Vasquez's crew after December 8, 1989. (Tr. 123-24).

Belveal also talked to Mike Weigand, his manager, about the fact that Vasquez's crew and supervision needed to be changed. (Tr. 128).

Although Vasquez complained to Belveal about gas problems on the longwall, the most vocal person on this subject was Jon Hawkins. Jon Hawkins is a member of the Safety Committee. No safety grievance was filed when the gas problems became acute in August 1989. (Tr. 129-31).

MR. STANLEY KRETOSKI, a federal Coal Mine Inspector headquartered in Denver, Colorado, testified substantially as follows:

Vasquez first called Kretoski in early January 1990 to discuss his transfer, and Kretoski told Vasquez that he had a right to file a discrimination claim. Kretoski conducted the actual investigation at the Deserado mine. He spoke to Vasquez, Mike Yocum, Jon Hawkins, Roland Heath, and Rick Kendall during the investigation. (Tr. 137, 151, 152, 154).

During his investigation, Kretoski learned that Vasquez had been transferred to a different crew and that he had a discrimination claim against management. This conclusion was based solely on a statement made by Heath to Belveal and Al Payne that the transfer was "partly" based on the code-a-phone call. (Tr. 138-39). However, Kretoski did not interview or talk to Al Payne. He did not completely interview or take a statement from Gary Belveal. He did not ask Roland Heath or Rick Kendall whether the transfer was based on the code-a-phone call. (Tr. 152, 154).

Kretoski prepared Petitioner's Exhibit 1, which itemizes Vasquez's damages. Vasquez told him that his damages were the expenses of traveling to and from work four times a week, \$200 for wear and tear on his car, and \$20 for long distance phone calls. Vasquez also said that he had lost overtime when he was transferred. Kretoski calculated the lost overtime based on five hours lost per pay period. He has no documentation for using five hours per pay period. Vasquez claims that during the first three quarters of 1990, the total lost overtime and interest totals \$225.57. (Tr. 141-146).

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Kretoski did not look at any records from the Deserado Mine in compiling the overtime figures delineated in Petitioner's Exhibit 1. He is aware that management keeps records of overtime, but did not request to see these records when he was conducting his investigation at the mine, or in preparation for his hearing testimony. Kretoski spent one afternoon at the Deserado Mine in making his investigation. (Tr 155-56, 157).

Respondent's Case

MR. ROLAND HEATH the Mine Superintendent at the Deserado Mine for approximately one and one-half years testified substantially as follows:

Heath was aware that there were gas problems in one section of the mine beginning approximately in August 1989. He does not specifically recall talking to Vasquez about the gas problems, but does recall discussing concerns about gas buildups with some of the crew members. He spoke to Norm Wallace many times about this problem--especially from late September to mid-November 1990. (Tr. 161-63).

Heath testified he thought that Norm Wallace was having problems with his crew from August through December 1989. Heath felt that Norm Wallace was generally ineffective with the crew in getting things accomplished. However, Heath left Norm Wallace on the crew for four months because he wanted Wallace to have the chance to work with the crew and solve the problems on his own. (Tr. 164-65).

Both Rick Kendall and Norm Wallace mentioned to Heath that Vasquez's crew was giving them problems. The crew was not doing what it was told, it was taking over and directing other workers, and generally causing problems. The crew heckled Dewey King, and eventually it came to a point where King asked to be transferred to another crew. (Tr. 165).

Vasquez and two other members of the crew, Jon Hawkins and Mike Yocum, were called the "cartel" by management because of the problems they were causing. (Tr. 178). Heath testified that "these three guys were pushing people around". They were "doing things and kind of pushing Norm (their foreman) out of the way." They "bullied everybody else around and paid little attention to the foreman." (Tr. 161).

On December 12, 1989, there was a meeting between Roland Heath, Gary Belveal, Mike Weigand, Harold Putney (another member of the safety committee) and possibly a few others to determine

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what to do about the personnel problems on Vasquez's crew. Gary Belveal, UMW local 1984 President, made a strong push for changes on the crew because of the personnel problems. (Tr. 166-67).

After this meeting, Roland Heath spoke to Mike Weigand, his boss, and they decided to make some moves on the crews. They decided that the problems on the crew centered on the foreman Norm Wallace, Mike Yocum, Jon Hawkins and Louis Vasquez.

Roland Heath met with his three shift supervisors (including Rick Kendall) on Monday, December 18, 1989, to decide what changes to make. (Tr. 167).

The first decision made was to transfer Norm Wallace onto another crew. Roland Heath and the shift supervisors then decided to break up the "cartel" by transferring one of the members onto the other longwall crew. There are only two longwall crews in operation, so it made sense to transfer only one member of the "cartel," since two members of "cartel" would still end up together in any event. (Tr. 169).

Asked by the Solicitor "Why did you only move one man if you wanted to split up the crew?" Mr. Heath replied as follows:

I'll go through it again. You got two crews that are very essentially all bid positions, in except for a few positions. But the guys that we're talking about have bid positions. Okay? You got three guys, you got two crews. All right? The only thing you can do, effectively--I mean you can't--you're moving two of them is crazy, so, because you got more people to move around. So really, the best thing to do is move one guy, leave the other two together. So it's--we just want a logical thing that helped to break this group up. We needed to move them. We can only move one. Now, we didn't go on discipline or anything like this. It was how to do this thing so that the foreman coming in don't have to contend with this group of three guys. (Tr. 179).

Heath's first choice was to move Mike Yocum, but he was the "papered man" on the shift and had to remain there to take over if the foremen were sick or there was an emergency. Having a papered foreman on each production shift is required by statute. (Tr. 168-69, 183-84).

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Because Mike Yocum could not be transferred, the only two other choices were Jon Hawkins and Louis Vasquez. From a seniority standpoint, Jon Hawkins had more seniority, and thus Vasquez was transferred to the other crew. (Tr. 168-69).

A few days after Rick Kendall told Vasquez about his transfer, Belveal and another miner came in to speak to Heath. Heath explained that Belveal had already been aware that they were going to change the foreman and change the crew from the meeting on December 12, 1989. Sometime during this discussion, Vasquez stuck his head in the door and asked why he had been transferred. Heath tried to explain to him that he was not being singled out, but they were trying to split up the crew so that things would work out with the new foreman coming in. Heath did not tell Vasquez that he was the problem on the crew. He also did not say that Vasquez was transferred because of the code-a-phone call. (Tr. 175).

After the transfer decisions were made, Heath wrote a letter to Norm Wallace explaining what he needed to do to improve his management skills. In this letter, Heath said that it was evident things weren't going very well down on the longwall face, and mentioned various problems which had been brought to his attention, including the code-a-phone call. (Tr. 177-78).

Heath is aware that there was a code-a-phone call on December 8, 1989, but he does not know who made the call. (Tr. 185-86).

Vasquez has never asked to be transferred back to his former crew. (Tr. 187).

Heath had no objection to Vasquez's shutting down the long-wall because of gas problems on his old crew. This was part of the job and in accordance with company policy. However, Vasquez would double check Norm Wallace's safety checks as soon as Wallace had finished. This amounted to distrust of the foreman and this lack of respect and trust was one of the problems on the old crew. (Tr. 193).

It was part of Vasquez's job as a shear operator to monitor and shut down the machine when it reached too high a methane gas level. Vasquez was never disciplined for carrying out this portion of his job. (Tr. 195-96).

GARTH CONDIE, Human Resources Director at the Deserado Mine, testified substantially as follows:

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Part of Condie's job is to maintain overtime turnsheets in order to try and equalize overtime among the employees in a particular department. The Collective Bargaining Agreement requires the mine to split up overtime among the workers. (Tr. 197-198, 207).

Condie's testimony was based upon the mine's records of overtime worked (or offered and refused by workers) from November 1989 through the end of the third quarter of 1990. These overtime records were admitted as Respondent's Exhibit 4. (Tr. 205). The overtime worked (or offered to and refused) by Jon Hawkins and Vasquez is as follows:

Period Ending	Overtime Hours	
November 30, 1989	82	Hawkins
	72	Vasquez
First Quarter, 1990	110	Hawkins
	96	Vasquez
April 30, 1990	123.75	Hawkins
	107	Vasquez
June 22, 1990	18.5	Hawkins
	12.5	Vasquez
September 28, 1990	38	Hawkins
	71.5	Vasquez

FINDINGS AND CONCLUSIONS

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of proving by a preponderance of the evidence that (1) he engaged in activity protected under the Act; and (2) the adverse action complained of was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall 663 F.2d, 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 817-818 (April 1980).

The mine operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was

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motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity. Pasula, supra, Robinette, supra; see also Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F2d 954 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F2d 194 (6 Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). See NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), approving a nearly identical test under the National Labor Relations Act.

At the relevant time beginning about December 1988, Norm Wallace was the section boss or foreman of Complainant's crew. Complainant Louis C. Vasquez was the shear operator in that crew consisting of six underground miners working on a longwall face in the mine. Roland Heath, the mine superintendent, became aware of problems on the Complainant's crew when workers on that crew began complaining about personnel problems after Norm Wallace became the foreman. (Tr. 160-61). These workers told Heath that there was a group of guys on the crew (including Complainant) who bullied crew members and pushed the foreman around. (Tr. 160-61). Three crew members asked to be (and were) transferred off this crew after the personnel problems began. The personnel problems became so bad that mine management began calling Complainant and two of his co-workers, Jon Hawkins and Mike Yocum, the "cartel" because of the problems they were causing. (Tr. 178). The "cartel" would double check the procedures and directions of their foreman as soon as he had finished. This showed a distrust of the foreman.

Management also had another personnel problem on this crew. Superintendent Heath regarded foreman Norm Wallace as ineffective when it came to getting things accomplished with his crew. (Tr. 163). Although Superintendent Heath became aware of escalating problems on the crew in August 1989, he left Norm Wallace on the crew for four more months in order to give him a chance to work things out and solve the problems.

The personnel problems on Complainant's crew were also well known to the Union officials at the mine. Gary Belveal, president of Local 1984, discussed the problems on the crew with Bob Hanson, the Director of Safety at the mine on at least two occasions in early December, 1989. Belveal stated that they needed to do something about Complainant's crew and its supervision. (Tr. 123). Belveal also told Mike Weigand, his manager, that something needed to be done to change the workers on Complainant's crew and the supervisor.

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During the same time period as the personnel problems on Complainant's crew, there were also problems with methane gas on the section of the longwall where the crew was working. (Tr. 24-5, 162-3). Complainant, in accordance with the operator's policy of complying with the methane safety regulations, would when the methane gas readings required it ask for all power on the longwall face to be shut down several times during his shift. Jon Hawkins requested shutdowns of the long wall because of this problem even more often than Complainant did. Neither was reprimanded or disciplined for doing this. It was a part of their job. From August to December 1989, Complainant talked to Rick Kendall, Norm Wallace's immediate supervisor, every day concerning the gas problems on the longwall. Jon Hawkins spoke to Gary Belveal, the Union president, about these gas problems during the fall of 1989, but Belveal cannot recall Complainant's talking to him on this subject prior to December 18, 1989. No one on Complainant's crew was ever reprimanded for complaining about the gas problems to their foreman or other members of mine management.

On December 12, 1989, Roland Heath decided to solve the personnel problems on Complainant's crew by transferring two people, the Complainant and foreman Norm Wallace, to different crews. (Tr. 166). The first decision was to transfer Norm Wallace to another crew because he had never overcome his problem in dealing effectively with Complainant's crew. The next decision centered on breaking up the "cartel" so that the new foreman would not have to walk into the same situation that Norm Wallace could not control. (Tr. 167). There are only two longwall crews, so the only solution was to move one of the three workers onto the other crew (because in any event, two members of the so-called cartel would still be on the same crew).

Roland Heath and the shift supervisors wanted to move Mike Yocum, but Yocum was the "papered man" on the crew (the only one who could take over for the foreman in case of illness or an emergency). Thus, the only candidates for transfer were Jon Hawkins and the Complainant, and Complainant was chosen because he had less seniority than Hawkins.

On December 8, 1989, someone from the mine made an anonymous "code-a-phone" call to MSHA to report a safety violation. Although Complainant alleges that members of the mine management connected him with the phone call, the uncontroverted evidence at the hearing established that Roland Heath did not, and still does not know who made the phone call and there is no evidence that anyone in management knows to this day who made the call.

Complainant, as a result of the transfer, remained a shear

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operator at the same rate of pay. (Tr. 37). Although he claims to be getting less overtime than he did on his old crew, this claim is not entirely accurate. The overtime records for the mine (Respondent's Exhibit 4) indicate that although Complainant had slightly less number of overtime hours on his new crew through the third quarter of 1990 as Jon Hawkins had on the old crew (Tr. 203-05) during the period from May 5, 1990, through September 28, 1990, Complainant received 71.5 hours of overtime, while Jon Hawkins received only 38. It is also noted that Complainant has never requested, and is not now requesting, a transfer back to his former crew. (Tr. 208).

On careful review of the evidence, I find there is no credible evidence linking the decision to transfer Complainant to another crew and any safety complaints or other protective activity in which he may have engaged.

There is no reliable or credible evidence in the record to establish that Complainant was transferred to another crew because of protected activity such as complaining about gas problems on the longwall or because anyone thought that he may have made the code-a-phone call. I find no persuasive evidence on which to base an inference that Complainant's transfer was motivated by any protected activity.

I credit the testimony of Superintendent Heath who made the decision to transfer Mr. Vasquez. He testified that the transfer was a business decision which had no relation to Complainant's safety complaints. The uncontroverted evidence at the hearing established that Mr. Heath did not know who made the code-a-phone call when he made the decision to transfer Complainant and still does not know who made the code-a-phone call.

The sole reference to a possible connection between Complainant's transfer and the code-a-phone call occurred when Gary Belveal used notes allegedly taken by another miner, Al Payne (who was not present at the hearing and did not testify), following a discussion between Belveal, Al Payne, and Roland Heath. However, these notes were not offered into evidence, and Gary Belveal did not testify that he had an independent recollection of what Roland Heath said at that meeting.

I find Mr. Vasquez has failed to establish a prima facie violation of 105(c). He has not shown that his transfer was motivated in part by his safety complaints or other protected activity. There is no reliable evidence tending to show that Complainant was ever harassed or punished for his safety concerns, which everyone who testified agreed were part of his job

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duties. It is also noted that the uncontroverted evidence established that Jon Hawkins (who was not transferred) and not the Complainant, was the most vocal safety complainer on the crew.

II

Once a complainant has established a prima facie case of a violation of 105(c), an employer may affirmatively defend by proving that although part of the motive in the discrimination was unlawful: (a) the employer was also motivated by the miner's unprotected activities; and (b) the employer would have taken the same adverse action against the miner in any event for the unprotected activities alone. *Pasula v. Consolidation Coal Co.*, 2 MSHC at 1010. This affirmative defense must be established by a preponderance of the evidence and is known as the "mixed motive" test. *hacon v. Phelps Dodge Corp.*, 2 MSHC 1505, 1509 (1980). Once an employer establishes that it had a valid business reason for the alleged discrimination, then the court reviews only the credibility of the business decision--not its fairness. *Id.* at 1511; *Johnson v. Scotts Branch Mine*, 4 MSHC 1631, 1632 (1987). Thus, the narrow issue is whether the proffered reason was enough to have legitimately motivated the employer to have disciplined or as in this case transferred the miner. *Chacon*, 2 MSHC at 1511.

In *Johnson v. Scotts Branch Mine*, 4 MSHC 1631 (1987), a miner alleged he had been transferred to a less favorable position in retaliation for making safety complaints. Although safety complaints are obviously a protected activity under the Act, the Judge held that there was no evidence that the miner had been transferred for making them. In contrast, the evidence established that the miner was transferred as a part of a larger plan to eliminate problems on his former areas of complaints and lagging production. The Judge dismissed the complaint, holding that the miner's transfer was "well within the managerial and discretionary authority of mine management," and that mine management had sustained its burden of proof on its affirmative defense by establishing a valid business reason for the transfer.

Like the *Johnson* case, mine management in the instant case had a valid business reason for transferring the Complainant. The evidence at the hearing established that mine management made a business decision to transfer the Complainant in order to solve the personnel problems on his crew. Further, Complainant was not singled out in any way--his foreman was also transferred to another (different) crew. These two transfers were made only after management decided that they were the best way to solve serious

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personnel difficulties on the crews (Tr. 166-69). In fact, the evidence also established that Complainant was not the first candidate for transfer-- but he was the final choice because the first choice was the "papered man" on the crew who had to remain because he alone could take over for an absent foreman, and the other member of the "cartel" had more seniority than Complainant. Because of this factual situation, Mr. Vasquez was the logical member of the cartel who could be transferred and the transfer would have occurred whether or not Complainant had made safety complaints or engaged in other protected activity. Thus, the transfer of Vasquez plus that of a supervisor was clearly part of a larger plan to solve a bad working situation on Complainant's former crew.

Western Fuels made a valid business decision in transferring the Complainant to another crew. Western Fuels has met its burden of proof under the mixed motive test by establishing that the transfer was based upon a valid legitimate, business decision. It was not a mere pretext. In *Secretary of Labor/Chacon v. Phelps Dodge Corp.* supra, the Commission in reversing the Administrative Law Judge's finding of discrimination stated as follows:

Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise."

ORDER

Based on the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and most reliable evidence adduced in this case, I conclude and find that the Complainant has failed to establish that his transfer to another crew was discriminatory, or was motivated by the Respondent's intent to prevent him, discipline him or retaliate against him for exercising any protected rights with respect to his employment as a miner. Even had the Complainant established a prima facie case, I conclude that it was rebutted by the Respondent's credible evidence which established that the transfer constituted a reasonable and plausible business-related and non-discriminatory effort by management to solve longstanding concerns

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about personnel problems on Complainant's former crew. It was a valid business decision. Accordingly, the complaint is DISMISSED.

August F. Cetti
Administrative Law Judge

1. Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.