

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

**MAY 5 1992**

THOMAS P. MUCHO. : DISCRIMINATION PROCEEDINGS  
Complainant :  
v. : Docket No. PENN 91-1382-D  
: PITT CD 91-07  
BETHENERGY MINES, INC., :  
Respondent : Docket No. PENN 91-1558-D  
: PITT CD 91-10  
:  
: Mine No. 84

DECISIONS

Appearances: Francis C. Rapp, Jr., Esq., Feldstein, Grinberg,  
Stein & McKee, Pittsburgh, Pennsylvania, for the  
Complainant:  
R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,  
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern discrimination complaints filed by the complainant Thomas P. Mucho pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Mucho filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), on March 28, 1991, alleging that the respondent discriminated against him by removing him from his position as head engineer at the No. 84 Mine, and transferring him to a staff engineer's position at the mine central office because of a safety complaint that he lodged with mine management (PENN 91-1382-D). Following an investigation of his complaint, MSHA advised Mr. Mucho of its determination that a violation of section 105(c) had not occurred, and Mr. Mucho then filed a timely complaint with the Commission on July 23, 1991.

Mr. Mucho filed a second complaint with MSHA on June 25, 1991, alleging that the respondent discriminated and retaliated against him by laying him off from his staff engineer's position at the central office because of the filing of his first complaint. MSHA conducted an investigation of this complaint and advised Mr. Mucho of its determination that a violation of

section 105(c) had not occurred. Mr. Mucho then filed another complaint with the Commission on September 20, 1991 (PENN 91-1558-D).

The respondent filed timely answers to both complaints and **denied that it had taken** any adverse discriminatory actions against Mr. Mucho in violation of section 105(c) of the Act. The respondent asserted that any personnel actions taken against Mr. Mucho were not motivated in any part by an intent to discriminate against him, but were premised upon reasonable business justifications. Following extensive discovery, the matters were heard in Pittsburgh, Pennsylvania, during the trial term February 11-13, 1992. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of these matters.

### Issues

The critical issue in these proceedings is whether or not Mr. **Mucho's** removal as head engineer and transfer to a staff engineer's position, at no loss of pay, and his subsequent layoff, were prompted or motivated in any way by his engaging in any protected safety activity, namely, the lodging of a safety complaint with management and the filing of a discrimination complaint with MSHA. Additional issues raised by the parties are identified and disposed of in the course of these proceedings.

### Applicable Statutory and Reaulatory 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.**

### Discussion

In his first complaint, Mr. Mucho asserted that on February 8, 1991, Mr. Patrick Metheny, the mine operations manager, **at the** request of mine superintendent Michael Jones, and with the approval of the respondent's president, Richard Fisher, removed him from his head engineer's position at the mine and transferred him to the mine central office as a staff engineer. Mr. **Mucho's** complaint filed with **MSHA** states as follows:

**While** employed as the Chief Engineer at Mine #84, an **event took** place on or about January 24, 1991, wherein I advised mine management that a plan they were developing was extremely dangerous and a violation of

Federal coal mining laws. As a result of my actions, BethEnergy took adverse employment action against me on February 8, 1991.

In his second complaint, Mr. Mucho identified Mr. Metheny, Mr. Jones, and Mr. Fisher as the individuals responsible for the alleged discriminatory layoff, and his complaint states as follows:

On June 7, 1991, I was laid off from my position at BethEnergy Mines, Inc. I believe the latest adverse job action (layoff) by BethEnergy was in response and retaliation for my earlier filing of a 105(c) complaint.

#### Stipulations

The parties stipulated that the Commission and the presiding judge have jurisdiction in this matter. They also stipulated to the authenticity of their respective hearing exhibits (Tr. 9).

#### Complainant's Testimony and Evidence

Thomas P. Mucho, testified that he holds a B.S. degree in education from the California University of Pennsylvania, a BS degree in mining engineering from the West Virginia University, and that he has been employed in mining since 1971. He began working for the respondent in 1973, and was appointed superintendent and manager of Mine No. 84 in 1986. In 1989 he was promoted to manager of the Ellsworth operations, which included Mine 84, Mine 58, and a central shop that serviced three mines, and he remained in that position until December, 1990 (Tr. 13). He confirmed that he is currently employed by the Federal Bureau of Mines in the ground and methane control group. He also confirmed that he is experienced in mine ventilation, was responsible for ventilation at the mines for approximately 12 years, and has testified as an expert in this field for the respondent. He has also served as the respondent's chief health and safety officer at the mining operations that he has managed (Tr. 17).

Mr. Mucho stated that he received a telephone call from Mr. Richard Fisher, President of Bethenergy Mines, on December 7, 1990, informing him that Mr. Fisher was placing Mr. Pat Metheny and Mr. Mike Jones in charge of the No. 84 Mine, and that they would be reporting directly to Mr. Fisher. Mr. Fisher said nothing about Mr. MUCHO'S status at the mine, and simply informed him that Mr. Metheny and Mr. Jones would be in charge of the mine. Mr. Mucho stated that Mr. Metheny was the manager of operations at Mine 31 (Eagle Nest) in West Virginia, and that Mr. Jones had previously worked at the No. 84 Mine in 1989, as part of a management evaluation of the operation (Tr. 20).

Mr. Mucho stated that Mr. Jones arrived at Mine 84 on December 10, 1990, and he greeted him briefly that day, and met with him on December 11, to discuss mine business. Mr. Jones told him that he was there "to discipline the mine, to whip it in shape" and that when he was through the mine would run itself and that he (Mucho) could choose to return as the operations manager or the chief engineer. Mr. Jones also told him that he had met on several occasions with Mr. Fisher, and with Bethlehem Steel vice-president Roger Penny to inform them as to what was needed to be done at the mine, and Mr. Mucho confirmed that Mr. Jones impressed him as being well informed in this regard (Tr. 24).

Mr. Mucho agreed that the mine needed more discipline and that it was a struggling operation for many reasons, including the need to instill more discipline "within the salary ranks in terms of adherence to management's goals and direction" (Tr. 25). He confirmed that two days prior to his initial call from Mr. Fisher, Mr. Fisher told him that he was sending Mr. Jones to the mine "to be my right hand to add some discipline into the place" (Tr. 25). During his December 11, conversation with Mr. Jones, Mr. Jones made numerous references to firing people and Mr. Mucho stated that "he was, as he had been described to me as a tree shaker" (Tr. 27). Mr. Mucho stated that while he was at the mine, Mr. Jones went about making a lot of changes, including the physical appearance of the mine and all of the buildings in order to accomplish his goals.

Mr. Mucho confirmed that in December, 1990, the No. 84 Mine was a "borderline operation in a very serious situation", and that it had basically been a "captive mine" to meet the steel making needs of Bethlehem Steel. However, Bethlehem no longer desired the coal and the mine entered the commercial market in 1988, but lacked the necessary tools to be competitive, and "we were attempting to make it at least a break even operation at that point in time" (Tr. 28). He further confirmed that Bethlehem was divesting itself of all deficit coal mines by closing or selling them (Tr. 29). Mr. Mucho confirmed that in 1980, Bethenergy operated 27 coal mines, and in 1990 it had only six operations, one of which was for sale, and one of which is in the process of closing. The current operations consist of four mines, including Mine 84 which employs 450 people, has one longwall, and produces two million tons a year. He stated that "if Mine 84 was not able to be profitable, then really Bethenergy as an entity with its support staff and central office group, really didn't make much sense" (Tr. 30). He confirmed that with the exception of Mine 33, the Cambria-Ebensburg operation, Bethlehem is in the process of divesting itself of all of the other mines and they are for sale (Tr. 31).

Mr. Mucho stated that in June, 1990, severe roof and face conditions were encountered on the 6B longwall panel, and on October 26, 1990, he made the decision to recover the longwall

and discontinue mining. Without the **longwall** operation, the mine was losing \$3 million a month, and the "losses were chalking up very rapidly for Mine 84 in the latter part of 1990" (Tr. 33). He confirmed that he developed the recovery plan for the **longwall**, and that 30 shields were recovered under very difficult and dangerous conditions (Tr. 33). He confirmed that during his December 11, 1990, meeting with Mr. Jones, Mr. Jones told him that his goal was to have the **longwall** operational again by February 1, 1991, and if it wasn't, the mine would have to shut down. Mr. Mucho stated that the February 1, 1991, date was the date he had presented to Bethenergy and Bethlehem Steel officials earlier in the fall of 1990, as the date he felt the 7A **longwall** panel would be ready (Tr. 34).

Mr. Mucho stated that in addition to the **longwall** panel as a goal, Mr. Jones also expressed his dissatisfaction with the productivity level of the continuous miners, and that Mr. Fisher told him that had the Bethlehem Steel officials known about the magnitude of the **longwall** problems from June, 1990, until it began operating in February, 1991, they would have closed the operation. Mr. Mucho stated that he communicated the **longwall** losses to Mr. Fisher, and that in the fall of 1990, he told Mr. Fisher that the fourth quarter loss would be \$9.6 million on top of the losses accrued for the first three quarters. Mr. Mucho commented that "**the** economics being that if you're looking at 22 million in losses and 40 to 60 **millon** to close it, why not just go ahead and take the whole hit and close the operation and rid yourself of **it**" (Tr. 35-36).

Mr. Mucho stated that on December 14, 1990, he attended a meeting called by Mr. Metheny, and a second meeting held by Mr. Jones that same afternoon with key management members. **Mr.** Jones told the group "**that** I was the smartest man there and he said **he'd** be relying on me to make decisions" (Tr. 38). Mr. Jones met with Mr. Mucho and the engineering staff again on December 18, 1990, and announced that Mr. Mucho would be in charge of engineering. Mr. Mucho confirmed that during a prior private conversation with Mr. Jones, Mr. Jones indicated that he could continue on as chief engineer or mine manager after Mr. Jones left and to let him know. Mr. Mucho met with Mr. Jones again on January 8, 1991, and informed him that he desired to stay on as the chief engineer because he had performed that job for some time and was satisfied with it and would be relieved from the pressures of operating the mine as manager (Tr. 39). Mr. Mucho also told Mr. Jones that one of the major factors in his decision to stay on as chief engineer was the plan to sell the mine and the recognition "**that** top **management** usually goes in a deal like **that**". Since the engineers are usually retained, he would have more job security (Tr. 40).

Mr. Mucho stated that from December 10, 1990, to early January, 1991, he functioned in an advisory role to Mr. Jones,

but continued to run the mine on a day-to-day basis. He characterized Mr. Jones as a very hard worker who worked very long hours, and stated that when he met with him on January 2, 1991, it was obvious that Mr. Jones "was up to speed" and could operate the mine. During this management meeting, Mr. Jones stated that in order to make the mine profitable every department had to function together as a team and that "anyone who does not want to be a team player will not be working here". Mr. Jones also stated that the mine had "a country club reputation\*" at the home office and that he would change this image. He also made references to firing people for loafing, and the need to have "eight hours pay for eight hours work" (Tr. 45-46).

Mr. Mucho stated that he functioned in the role of chief engineer predominantly from January 2, 1991, until February 8, 1991, when Mr. Metheny called him and informed him that he was being assigned to the central office. Prior to this time he and Mr. Jones had a congenial and relaxed relationship, but it was obvious to him that Mr. Jones wanted to manage the mine, and that he (Mucho) took a subordinate role and took an office "at the far end of the building" and functioned as the head of engineering (Tr. 48-49).

Mr. Mucho stated that from January 2 to 24, 1991, two continuous mining sections (7A and 53P) were driving towards each other to speed up the development of the longwall panel. Once the cut-through was accomplished, he estimated that it would take another week in order to place the longwall into operation. Mr. Mucho developed plans for the cut-through, with input from mine foreman Duvall, and mine superintendent Black, and posted them on the mine map (Tr. 49-53).

Mr. Mucho stated that his ventilation plan for the cut-through was discussed at a meeting at 7:00 a.m., on January 24, 1991, in the foreman's room where the map was located (Tr. 57-62). Present were Mr. Black, Mr. Duvall, Mr. Dwayne Looman, and construction foreman Jim Nucetelli. Mr. Jones came through the office, paused briefly, and stated "hey boys, don't forget to switch the miners" and he explained that the 53P miner was old and was being replaced and that he did not want it on the back end of the panel. Mr. Mucho then left to go to his office to contemplate what needed to be done to change the plan. On his way back to the foreman's room he encountered Mr. Nucetelli in the hall and Mr. Nucetelli was cursing and swearing and stating that with the switching of the miners there was no way the longwall would be ready by February 1. Mr. Mucho stated that he explained to Mr. Nucetelli that the switching of the miners would not be a problem if the normal ventilation plan for building four stoppings and an air lock were followed, and Mr. Nucetelli calmed down (Tr. 65-73).

Mr. Mucho stated that when he next returned to the foreman's room, Mr. Duvall, Mr. Black, and Mr. **Looman** were at the map discussing a plan to use ventilation check curtains rather than stoppings to facilitate the cut-through and switching of miners. Mr. Mucho stated that he advised them that there was no need to devise a new plan, that the existing plan would work, and that all that was required was the construction of four stoppings. Mr. **Looman** and Mr. Black continued discussing the use of checks, and Mr. Duvall was noncommittal and **"was** more or less taking it all **in"** (Tr. 75).

Mr. Mucho confirmed that the construction of stoppings would entail more time beyond the estimated week to seven days to complete the cut-through (Tr. 76-77). He stated that he explained his plan in detail, and explained to the group that the use of checks would result in an air change. Mr. Mucho believed that the use of checks was an unsafe practice and illegal because it entailed an air change, and he tried to convince the group to go with his stopping plan. Mr. Black and Mr. **Looman** then began discussing the use of regulators to compensate for any air changes, and Mr. Mucho explained to them why this would not work. After further discussions, Mr. Nucettelli instructed his foreman (Myers) to prepare to build the stoppings (Tr. 79-84).

Mr. Mucho stated that since Mr. **Looman** and Mr. Black were still discussing the use of checks, he believed that the matter was unresolved and he returned to his office to complete his engineering recommendations and that **"they** could do what they **want"** (Tr. 86). However, realizing that he could not do this, he went to mine foreman **Duvall's** office to discuss the matter with him. Mr. Mucho explained the conversation as follows at (Tr. 86-88):

\* \* \* \* I told Mr. Duvall that, I says, under state law you are the mine foreman and therefore responsible for ventilation. I said, you heard what all went on in there. I says, what they are talking about is crazy and dangerous. I said, you know as chief engineer, I can't overrule anything if they decide that's what they're going to do, any one of those, and there was really a variation of plans that they put forth. And I said, all of them are crazy and dangerous and you know that and I **can't** stop it. I said, but if you go through with it, **I'll** tell you this, I will not be involved in it. I will not go into the mine and effect what is going on, and if anything happens I will take recourse.

\* \* \* \* I said, so things that are being put forth there just **won't** go. And he said, Tom, we're going to build the stoppings. He said, **I'm** going into the area. Mr. Black and I, and I'll make sure that the people know what to do. I said, fine. I'll go back to my office, **I'll** draw up the

plans, I'll give them to you before you go in so you can make sure that Myers and those people know where they go and know where we want them built.

Mr. Mucho stated that after his conversation with Mr. Duvall, he distributed his stopping plan to all of the key individuals who would be involved in the cut-through, including Mr. Black and Mr. Duvall (Tr. 89). Mr. Mucho confirmed that he did not discuss the incident with anyone else because he had put himself in a "tough position" and probably embarrassed Mr. Black in front of his subordinates. Mr. Mucho stated that there was no loud heated argument and that he simply discussed his views and tried to diplomatically handle the matter. He deliberately avoided discussing the matter further with anyone because he was concerned that Mr. Jones might find out about it and perceive it as interfering in his management of the mine ~~or~~ interfering with the longwall production schedule (Tr. 91). Mr. Mucho did not believe that Mr. Black or Mr. Duvall would tell Mr. Jones, but he was concerned that Mr. Looman might tell him because he was Mr. Jones' "eyes and ears". However, Mr. Looman had nothing against him, and Mr. Mucho hoped that he had no reason to inform Mr. Jones (Tr. 92).

Mr. Mucho stated that his insistence on the use of stoppings rather than checks was based on his safety concerns and belief that there was a high likelihood of an explosion if checks were installed in lieu of stoppings (Tr. 93). He confirmed that four steel stoppings were constructed during the work shifts on January 24, 1991. He also confirmed that the use of checks, no checks, or air locks where there is a major air change would constitute a violation of 30 C.F.R. § 75.322, and he explained his reasons for this conclusion (Tr. 96-97). He also explained that there was an air change when the cut through was made, and he explained the resulting ventilation problems that were encountered (Tr. 103-105).

Mr. Mucho stated that during the two weeks following the incident of January 24, 1991, he noticed a change in his relationship and interaction with Mr. Jones. He stated that Mr. Jones "became very noncommunicative, wouldn't look at me, would cast his eyes down when I'd meet him", and that the engineering department was left out of what was going on at the mine during this time (Tr. 106). Mr. Mucho stated that he called Mr. Black on February 7, 1991, and asked to speak with him because Mr. Jones wasn't talking to him, and Mr. Mucho suspected that Mr. Jones found out about the cut-through incident. Mr. Mucho stated that he and Mr. Black met with Mr. Jones and that he (Mucho) told Mr. Jones that his engineering group was being left out and Mr. Jones responded "fine, we'll involve you from now on" (Tr. 106). Mr. Mucho stated that his belief that Mr. Jones had found out about the mine map discussion of

January 24, was based on Mr. Jones' **"actions"** and "change in behavior" towards him which made him **"suspicious"** (Tr. 107).

Mr. Mucho confirmed that Mr. Metheny called him on February 8, 1991, and informed him that he was to report to Mr. Jay Hasbrouck at the central office and that there was a job there that he would like. Mr. Mucho stated that Mr. Metheny told him that he would be working with all of the mines and that the change **"would be better"** for him in the long run and that he would speak to him further about the matter. Mr. Mucho stated that he then cleaned out his desk at the 84 Mine, threw out some files, and took a half day vacation and left for the day. Mr. Mucho stated that he was surprised by his move to the central office because Mr. Jones had told him how much he respected his abilities and had told him that he would not be laid off or discharged. Mr. Jones had also previously told him that the mine problems were not his fault and that the stuck **longwall** caused the losses (Tr. 110).

Based on his management experience at the mine, Mr. Mucho was of the opinion that his transfer-from the position of chief of engineering to a staff engineer position at the mine central office was something that normally would be discussed by higher management, such as operations manager Briskey, and Mr. Fisher, the company president (Tr. 111). Mr. Mucho believed that he was moved for the following reasons (Tr. 112):

A. I believe I was moved because of that incident on the 24th. I believe that it was viewed by Mr. Jones as interfering in management and not being a team player. And I think it was just interpreted that way. I don't think the safety implications were assessed and looked at in the correct light, if at all.

And I think it was the facility that enabled him to call Mr. Metheny and say, hey, I can't have two people here, I **can't** have Mucho interfering with what **I'm** trying to do if you want me to do the job here and, something that Mr. Metheny would buy and something he could sell to Fisher. So that's how I think it went down.

Mr. Mucho stated that the central office was located approximately one mile from the No. 84 Mine, and that he received no cut in pay or benefits when he was transferred (Tr. 114). Mr. Mucho assumed he would be supplying technical engineering services to the various mining operations in his new job at the central office, but instead he was assigned **"odds and ends"** and Mr. Hasbrouck expressed surprise at **Mr. Mucho's** understanding of what he would be doing and told him that he believed the job would only be temporary. Mr. Mucho stated that Ms. Frances Cooley replaced him as chief engineer at the 84 Mine and that his

new job at the central office did not entail any supervision over any one and he was strictly a staff engineer working on permitting for Mine 58. He was not permitted to do any work in connection with the 84 Mine (Tr. 116).

Mr. Mucho stated that he met with manager of human resources Tom Robertson on March 1, 1991, and informed him that **"it's** obvious they have no plans for me, as far as **I'm** concerned, **I'm** going **out**" (Tr. 117). Mr. Mucho **also** informed Mr. Robertson that **"I'm** amenable to talking about some type of severance arrangement" and that Mr. Robertson informed him that he would try to arrange a dialogue with Mr. Fisher (Tr. 118). Mr. Mucho stated that he received no further information from Mr. Robertson, and filed his discrimination complaint on March 28 1991, and an age discrimination complaint with the EEOC that same day. Subsequently, on April 22, 1991, he received a call from superintendent Stickler at the No. 33 Mine offering him a job as a project special engineer. Mr. Mucho turned the job down on April 24, because he did not believe it was comparable to the chief engineer's job at Mine 84. Mr. Mucho then met briefly with Mr. Fisher on May 15, 1991, and within a week Mr. Robertson called him and informed him that the 33 Mine job was the only one available and that he would be laid off on June 7, 1991, if he did to take it (Tr. 119-120).

Mr. Mucho confirmed that the No. 33 Mine is the only mine that the respondent intends to keep, but that it offered him **no** job security because it was well staffed with engineers and Mr. Fisher had previously indicated that it would probably operate for three years and would be downscaled (Tr. 120). Further, the mine was located in Ebensburg, a two-hour drive and long commute, and he would have taken a 9.4 percent pay cut (Tr. 126). Mr. Mucho believed that a job in technical services may have been available, but he was not sure. Mr. Fisher subsequently told him that there was no job (Tr. 124). Another potential job opening of personnel director was not offered to him by Mr. Fisher, even though Mr. Mucho believed that Mr. Robertson had **recommended** him for the position (Tr. 125).

On cross-examination, Mr. Mucho confirmed that he had no cut in pay until he was terminated on June 7, 1991. He also confirmed that he began consolidating his notes and keeping a daily log or journal on December 7, 1990, out of concern as to what might happen to him with respect to his continued employment. He knew of Mr. Jones' reputation as a **"tree** shaker", was aware that his management style was different than his, and he thought it would be in his best interest to keep good notes (Tr. 143).

Mr. Mucho confirmed that Mr. Fisher has an accounting background, and that this caused problems in communicating the nature of mining problems to him. Mr. Mucho confirmed that Mr. Fisher took a personal interest in the No. 84 Mine because it

was the "keystone to Bethenergy surviving as an entity", and "it was borderline and our intent was to infuse capital in it in some way to make it profitable" (Tr. 146). Mr. Mucho confirmed that September, 1991, was the estimated completion date for the rehabilitation of the 33 Mains area, and that Mr. Jones was assigned to that project, and he (Mucho) was assigned certain responsibilities by Mr. Jones to reevaluate the costs for the project, and to evaluate the ventilation (Tr. 149-156). Mr. Metheny asked Mr. Willison to come to the mine on February 4-6, 1991, to take an independent look at the project (Tr. 157).

Mr. Mucho stated that during the cut-through discussion on January 24, 1991, he mentioned the air change that he believed would result by the use of curtains to Mr. Black, Mr. Looman, and Mr. Duvall, but said nothing at that time about this being dangerous or in violation of any MSHA standards, because he assumed that they would understand and that this was implicit in the discussion. He also wanted to downplay the matter and did not want the foremen to know what they were talking about (Tr. 166).

Mr. Mucho described his conversation at the mine map as a "terse discussion", rather than an argument, and although he believed that Mr. Black seemed upset when he later went to his office, he was not upset during the discussion at the map. Mr. Mucho confirmed that he never discussed the matter with Mr. Jones, and that he had a congenial meeting with Mr. Jones on January 24, 1991, and Mr. Jones did not mention the matter (Tr. 168). Mr. Mucho confirmed that he added a reference about the January 24, 1991, mine map discussion to his personal notes at a later time after that date, and that he did not enter any notation about that incident when he was putting any his notes together on that day (Tr. 169).

Mr. Mucho confirmed that during a staff management meeting on January 15, 1991, Mr. Jones stated that he had turned down an offer from the Peabody Coal Company, that he had changed his mind about staying at the No. 84 Mine temporarily and would be there permanently, and he changed the "chain of command" with respect to the individuals who were to be in charge of the mine in his absence. Mr. Black and Mr. Hayden were to be in charge in Mr. Jones' absence, and Mr. Mucho was not included in the management "chain" (Tr. 171). Mr. Mucho stated that he was not surprised that he was not included because he had previously told Mr. Jones on January 8, 1991, that he was satisfied with his engineering position and did not wish to return as mine manager. Mr. Mucho stated that he believed that Mr. Jones "was asserting himself as the number one man and no longer had to keep me in a position to where I could step comfortably back into the role as a manager" (Tr. 172).

Mr. Mucho confirmed that in early January, 1991, while still manager of operations at the No. 84 Mine, he prepared a letter to the State Department of Environmental Resources, and during the interim when it was written and typed, Mr. Jones was placed in charge and Mr. Mucho felt it appropriate that Mr. Jones sign the letter. Mr. Mucho stated that he believed the state **"was out of bounds"** with respect to a mine scrubber issue, but he believed that he worded the letter diplomatically. Mr. Mucho assumed that Mr. Jones signed it and mailed it, but he has not seen a copy of the letter (Tr. 183-184).

Mr. Mucho stated that when he was transferred to the central office he considered himself as "effectively being terminated" and that it **was "only a matter of time"** before his overall employment with the respondent would be terminated (Tr. 184). After a job in technical services which had been mentioned by Mr. Metheny did not materialize, Mr. Mucho stated that **"very quickly I started catching on to where I was at"** (Tr. 185). He confirmed that Mr. Hasbrouck told him that he had heard that the reason he was transferred to the central office was because it was awkward having him at the No. 84 Mine with Mr. Jones (Tr. 185).

Mr. Mucho stated that after his assignment to the central office he spoke with Ms. Cooley on February 15, 1991, about certain statements that Mr. Bookshar had made to him. Mr. Bookshar had previously told him that Ms. Cooley had a meeting with Mr. Jones and Mr. Hayden after his reassignment to the central office and that they discussed why Mr. Mucho was sent to the central office, and included in the reasons given were "divided loyalties; and a ship can't have two masters" (Tr. 187). Mr. Mucho stated that Ms. Cooley could not recall Mr. Jones making such statements, and her recollection was that Mr. Hayden had made these statements on February 8, 1991, the day Mr. Mucho went to the central office. Mr. Mucho stated that Ms. Cooley did not mention the **53P-7A** cut-through incident and he did not ask her about it (Tr. 188).

Mr. Mucho stated that on March 1, 1991, and thereafter, and prior to the filing of his MSHA discrimination complaint and his age discrimination complaint with the EEOC, he spoke with Mr. Robertson about resolving his employment situation and suggested that the respondent might pay him two or three years severance pay similar to IBM severance payments to their personnel under similar circumstances (Tr. 189-190). With regard to the job offer by Mr. Stickler at Mine No. 33, Mr. Mucho stated that he had previously worked for Mr. Stickler, and that Mr. Stickler expressed his disappointment with his situation when he informed him that he would not take the job. Mr. Mucho also stated that in April, 1991, Mr. Jim Baer told him that someone had asked him about plant foreman or first line supervisory openings at the No. 33 Mine for him (**Mucho**) but that Mr. Baer

advised the individual that he would not insult Mr. Mucho with such an offer (Tr. 189-192). Mr. Mucho confirmed that he met with Mr. Fisher on May 15, 1991, and that Mr. Fisher did not mention his MSHA or EEOC complaints. Mr. Mucho stated that he explained to Mr. Fisher why he believed he was effectively terminated illegally when he was transferred on February 8, 1991, to the central office (Tr. 193).

Mr. Mucho confirmed that that his EEOC complaint alleged that his demotion from mine manager and chief engineer and his reassignment to the central office were the result of age discrimination and the respondent's attempts to force him to resign (Tr. 201-202; Exhibit R-3). Mr. Mucho further identified a second complaint he filed with the EEOC claiming that his layoff of June 7, 1991, was in retaliation for the filing of his first complaint (Exhibit R-4: Tr. 202-203; 205). Mr. Mucho believed that he was discriminated against because of some statements by Mr. Jones that part of the respondent's goal was to rid themselves of some older and experienced workers. He further believed that the cut-through incident of January 24, 1991, "was merely the vehicle that elevated me into that group", and that he was placed there because of his interference with Mr. Jones' management (Tr. 215).

Mr. Mucho confirmed that immediately upon his speaking with Mr. Duvall about the use of curtains as opposed to stoppings for the cut-through ventilation he knew that his recommended stopping plan would be followed and that ended the issue (Tr. 236).

Mr. Mucho further confirmed that Mr. Bookshar called him at home on March 10, 1991, and told him that he had heard that his move to the central office "revolved around the incident involving the 58P/7A cut-through, and Jones found out about it the following Friday and was going to fire me on the spot but that Clarence Hayden intervened, convinced Mike to think about it over the weekend" (Tr. 239). Mr. Mucho confirmed that he never spoke to Mr. Hayden about the matter (Tr. 239).

Thomas F. Duvall, General Mine Foreman, No. 84 Mine, testified that he has been in that position since November 1, 1990, and is in charge of the underground mine workings. He confirmed that certain management changes were made in December, 1990, and the mine was placed under the direction of Mr. Metheny who was appointed mine manager replacing Mr. Mucho. Mr. Jones was also brought in and "it became apparent that he was going to run the mine". Mr. Mucho was assigned to head the engineering department after Mr. Metheny and Mr. Jones were assigned to the mine.

Mr. Duvall stated that the longwall panel was being prepared for production and that an important cut-through had to be made between the No. 7A and No. 53P areas to facilitate the switching

of two continuous miner machines. The target date for completing the cut-through was February 1, 1991, and Mr. Jones made it known that if this were not done and the longwall was not in production the mine would have to close. Mr. Jones made it known a few days or a week before the cut-through was made that the miners had to be switched.

Mr. Duvall stated that on January 24, 1991, there was a discussion around the mine map in the mine office with respect to the cut-through and the switching of the two mining machines. In addition to himself and Mr. Mucho, also present were Mr. Black, Don Myers, Jim Nuccetelli, and Dave Looman. The group discussed certain stoppings which were to be constructed to facilitate the switching of the miners, and Mr. Black indicated that canvas ventilation checks or no checks at all could be used in lieu of the stoppings, and that this would save time and involve less work. Mr. Mucho disagreed with Mr. Black's suggestion, and he wanted to proceed with his plan to use a double row of steel metal stoppings in order to insure the control of ventilation during the cut-through and switching of the miners. Mr. Duvall stated that Mr. Mucho was upset over the suggestion that his stopping plan would not be followed.

Mr. Duvall stated that during the discussion in question, Mr. Jones walked through the office and stated "don't forget to change the miners" and continued walking. Mr. Nuccetelli mentioned a prior training class concerning a prior cut-through which was done improperly and resulted in an explosion, and this was a reminder about what could happen if a cut-through is not done properly. Mr. Mucho commented about certain air changes and pressure differentials which could occur without the use of a double row of metal stoppings, and he indicated that the air pressure could not be controlled without stoppings.

Mr. Duvall was of the opinion that Mr. Black's suggestion for using check curtains or no curtains in lieu of stoppings was not a safe method. Mr. Duvall believed that doing it Mr. Black's way would have resulted in an air change and the air would have been out of control. This would pose a methane build-up and explosion hazard.

Mr. Duvall stated that after the group discussion, Mr. Mucho came to his office to discuss the matter further in private and informed him that in the event "they were going to do anything crazy" as was discussed at the mine map, he (Mucho) "did not want any part of it". Mr. Duvall further stated that Mr. Mucho reminded him (Duvall) that he was the responsible mine foreman, and Mr. Duvall told Mr. Mucho that the cut-through would not be done in the manner suggested by Mr. Black, and that Mr. Mucho's stopping plan would be followed.

Mr. Duvall stated that he first learned about Mr. **Mucho's** discrimination complaint in late March, 1991, while attending a management meeting in Washington, Pennsylvania. Mr. Metheney, Mr. Jones, Mr. Black, and other managers were at this meeting and Mr. Biszik received a telephone call advising him of Mr. **Mucho's** complaint, and he informed the others at the meeting about the complaint. Mr. Duvall stated that the management group at the meeting were trying to determine what the complaint was all about, and Mr. Duvall was of the opinion that the cut-through discussion precipitated the filing of the complaint (Tr. 243-261).

On cross-examination, Mr. Duvall stated that the discussion concerning the use of air regulators and curtains "was so ridiculous it could not be serious" and that there was no doubt in his mind that the metal stopping plan suggested by Mr. Mucho would be used during the cut-through and switching of the miners. Mr. Duvall confirmed that he did not see Mr. Mucho often after he was placed in charge of the engineering department. In response to further questions, he confirmed that Mr. Black could have been serious about the use of ventilation curtains. He confirmed that his opinion that Mr. **Mucho's** complaint was related to the January 24, 1991, cut-through discussion was based on the fact that he knew that the complaint had something to do with an occurrence on that day, and that Mr. Mucho was upset. Mr. Duvall further confirmed that he did not discuss Mr. **Mucho's** transfer to the central office with Mr. Jones (Tr. 261-268).

John M. Gallick, Director of Safety, testified that he works for Mr. Tom Robertson, the Human Resources Manager, and that he knows Mr. Mucho and considers him to be safety conscious. Mr. **Gallick** stated that he became aware of Mr. **Mucho's** discrimination complaint on about the end of March, 1991, and that he advised Mr. Robertson about the complaint. Mr. **Gallick** was assigned to investigate the complaint, and he telephoned Mr. Ron Biszick at the Ramada Inn in Washington, Pennsylvania, where he was attending a meeting and asked him to inform Mr. Metheney and Mr. Jones that the complaint had been filed. Mr. **Gallick** identified a memorandum that he prepared concerning the matter (Exhibit C-37). He confirmed that he spoke with Mr. Mucho and that the memorandum is a summary of what Mr. Mucho told him. He stated that Mr. Mucho told him that he had learned that Mr. Jones had found out about the cut-through incident and told Mr. Hayden that he was going to fire him, but Mr. Hayden told him to think about it over the weekend (Tr. 269-283).

On cross-examination, Mr. **Gallick** stated that he had no involvement in any decision to end Mr. Mucho's employment. He stated that the memorandum previously referred to was prepared from information which was furnished to him by Mr. Mucho. Mr. **Gallick** confirmed that there are cut-through situations where air pressures are not an issue, and that there are instances when

ventilation curtains can be safely used. Mr. Gallick made reference to a letter to the State department of environmental resources which resulted in that agency becoming upset with the respondent. The letter concerned the company position on belt ventilation and it was drafted by Mr. Mucho. It was Mr. Gallick's understanding that Mr. Jones claimed that he had not read the letter before signing it. Mr. Jones also made the statement that if he had read it, the letter would never had gone out over his signature because it was too harsh. Mr. Jones also "made some derogatory remarks about engineers in general and that some of his people aren't doing things that he wanted done" (Tr. 291).

Stanton O. Black, Superintendent of Underground Operations, stated that there were changes in upper-level management at the No. 84 Mine in December, 1990, when Mr. Jones and Mr. Metheny came to the mine, and he identified copies of notes that he took concerning meetings held by Mr. Jones and Mr. Metheny on December 14, 1990. Mr. Jones indicated that Mr. Mucho would be in charge of engineering and Mr. Metheny indicated that Mr. Jones would be acting manager in charge of operations. Mr. Black stated that during this period of time he did not see Mr. Metheny a great deal at the mine (Tr. 6-12).

Mr. Black confirmed that Mr. Jones placed a February 1, 1991, deadline on the 53P-7A cut-through, in order to put the longwall in production by that day, and that he made the statement that "we might shut down" if the deadline was not met. He confirmed that Mr. Mucho prepared the cut-through plan, including the required ventilation and use of steel stoppings to insure against interruption to the ventilation and accumulation of methane. Mr. Black confirmed that he participated in the cut-through discussion at the mine map on January 24, 1991, and that it concerned the location of the stoppings and the cut-through sequence which would be followed. He denied that he ever suggested the use of curtains as opposed to steel stoppings, and stated that he simply made a statement to that effect "to lighten up what I considered to be a very tense situation there, and I didn't think that anyone took it serious" (Tr. 15). However, he immediately stopped when he saw that Mr. Mucho was taking it seriously.

Mr. Black stated that prior to the cut-through discussion everyone was under a lot of pressure because of the changing management situation and "the people there not really knowing where we stood with Mike Jones and with Tom, because Tom was still the manager of operations" and his title had not changed (Tr. 16). Mr. Black stated that Mr. Mucho seemed upset during the discussion and indicated that his plan should be followed with no changes, and he confirmed that Mr. Mucho's plan was carried out as he originally outlined it (Tr. 17).

Mr. Black stated that he never observed Mr. Mucho attempting to cultivate factions and/or groups of employees as his supporters, and he confirmed that within a week or two after Mr. Jones' arrival he (Black) began to feel pressured. He also did not believe that Mr. Mucho ever cultivated any mistrust and believed Mr. Mucho was performing his job as an engineer (Tr. 18, 22). He further explained as follows at (Tr. 18-20):

A. When the salaried people were unsure of what Mr. Jones' role was and what Tom Mucho's role was, because Tom was still titled as manager of operations. We didn't know what Mike Jones' title was, and it just seemed like that Tom was in limbo for a period of time, and we didn't really know which way it was going to go.

And yet, Mike Jones was giving orders to people, and he was telling what had to be done, and there's just considerable tension when you're not quite sure who your leader is.

Q. Did you, during that period of time, observe any friction developing within the salaried personnel?

A. I don't know if I would describe it as friction, but I certainly noticed during that time that there was perhaps apprehension among salaried people and just a very tense period of time, where people then all of a sudden wasn't sure which way their loyalties were going to go. They didn't know how to act. It was not a comfortable time at all.

Q. Did you notice any distrust among those people?

A. Yes, I did.

Q. In what regard?

A. People weren't talking to one another like they had before, with openness. They seemed to be afraid to say things that they had said before as far as our operations, and the way we conducted business wasn't the same, and so people clammed up. They just weren't talking to one another, which is not good when you're trying to run a business. People have to be open.

Q. Mr. Black, is there any reason that you can think of why that occurred?

A. My opinion, the reason why it occurred --

Q. All right.

A. -- was because that a person comes in and then **it's** stated that **he's** going to be acting manager, but the manager is still there and **he's** still titled as the manager of operations. Does that mean that he is out the door but he is still there? Is the other guy going to be there a month and then **he's** leaving and the other guy's coming back in? No one really knew.

Mr. Black stated that Mr. Jones had "**a** threatening management **style**" in that he threatened to fire people for not doing what he wanted (Tr. 21). He confirmed that Mr. Jones threatened to fire him on many **occasions**, and when he asked Mr. Metheny why Mr. Jones treated him that way, Mr. Metheny told him that Mr. Jones felt intimidated by him (Black) and that he felt "inferior, knowledge wise to **me**" and may have been jealous (Tr. 23-24).

Mr. Black identified Exhibit C-93, as an excerpt from his personal notes of January 18, 1991, when he was underground with Mr. Jones and certain union officials. Mr. Black stated that Mr. Jones was talking to Donald **Redman**, the president of the union district, and his notes reflect that Mr. Jones made the statement that he would fire foremen if necessary. Mr. Black stated that he heard Mr. Jones mention that "**he** almost fired Tom Mucho last Friday", and this is reflected in his notes (Tr. 31). Mr. Black also referred to another note entry of January 21, 1991, which reflects that Mr. Jones stated that he did not like Mr. Mucho and Mr. Brookshar (Tr. 32). He also made reference to an entry of April 22, 1991, concerning a prior meeting with Mr. Jones about Mr. Jones' threats to fire him. Mr. Black stated that during that meeting Mr. Jones showed him Mr. **Mucho's** lawsuit and made the statement that he (Jones) probably would be gone before him (Black) (Tr. 35).

Mr. Black confirmed that his personal notes reflect that he and Mr. Jones and Mr. Metheny met with shift foreman Mike Error February 13, 1991, and informed him that due to an evaluation of the workforce his position was being eliminated effective February 28, 1991, and that he could continue to work until then or he could stay off and still be paid through that date (Exhibit C-45: Tr. 36). Mr. Black also made reference to an additional notation for February 13, 1991, concerning his possible transfer to Mine No. 33. Mr. Black stated that he did not want to go to that mine because he viewed it as a large dead end mine with many problems and continual losses, and he did not believe that a manager could go there and make a profit (Tr. 37).

On cross-examination, Mr. Black confirmed that he is currently the senior management person at the No. 84 Mine reporting to Mr. Metheny. He confirmed that the decision to switch the two mining machines on January 24, 1991, was made by himself and others prior to that date and then relayed to Mr. Jones. He

stated that when he sensed that Mr. Mucho appeared tense during the discussion that day, and in order "to sort of lighten the **discussion**", he commented that "Well, we could just hang a couple of canvasses up in each station and just use a regulator and just do it that **way**". He believed that Mr. Mucho would understand how ridiculous this was and would laugh and help lighten things up. However, this did not happen. Mr. Black stated that he had the greatest respect for Mr. Mucho and did not wish to upset him further (Tr. 40).

Mr. Black confirmed that Mr. Mucho mentioned that doing anything other than following his plan would create a dangerous situation and Mr. Black understood what he meant by this. Mr. Black stated that Mr. Mucho proceeded to explain the plan and everyone was listening but "wanted to get away from it because I don't think that everyone realized that Tom was **upset**" (Tr. 42). Mr. Black stated that he did not feel embarrassed by Mr. Mucho but "**was** worried that I may have created more turmoil for **Tom**" (Tr. 42). He confirmed that Mr. **Mucho's** situation at the mine was not good because he was still at the mine, and Mr. Jones, who did not have Mr. **Mucho's** title, was **functionally** in charge and had a management style totally different from Mr. Mucho. Mr. Black stated further that not knowing whether Mr. Mucho would later return as manager, or whether Mr. Jones would stay on, also created apprehension and tension (Tr. 43).

Mr. Black believed that Mr. Jones felt threatened by Mr. Mucho and he confirmed that Mr. Jones did not explain why he did not like Mr. Mucho or Mr. Brookshar during their discussion on January 21, 1991, nor did he explain why he almost fired Mr. Mucho when he made that statement on January 18, 1991 (Tr. 46). Mr. Black stated that he did not recall if Mr. Jones actually said that he did not like Mr. Mucho or whether he (Black) deduced this from his comments (Tr. 51).

Mr. Black confirmed that Mr. Mucho and Mr. Jones had a business-like relationship and were not overly friendly (Tr. 74). He confirmed that while Mr. Mucho never encouraged any factions, they did exist because the engineering, safety, production, and construction groups, who ordinarily communicated with each other, began separating themselves and "started to implode within their own **groups**" within a couple of weeks after Mr. Jones arrived (Tr. 54). This never occurred when Mr. Mucho was manager (Tr. 58).

Mr. Black agreed that management had the prerogative to transfer him to the No. 33 Mine, and if he chose not to go he could **quit** and would have no recourse or grievance (Tr. 62-63). He confirmed that he never said anything to Mr. Mucho about how Mr. Jones may have felt about him. Mr. Black confirmed that he had previously gone through management changes, but not like the

one in question where there was no prior announcement and "some-one just shows up on the scene. You're not sure what his role is going to be. The other person that was in charge was left there" (Tr. 71).

Francis Cooley, testified that she is in charge of the engineering department at Mine 84, and assumed that job when Mr. Mucho was transferred to the central office. She stated that Mr. Jones came to the mine in December, 1990, and she heard him state that "his mission was to get rid of everyone from the shift foremen on up". She stated that on or about February 8, 1991, or a couple of days later, she observed Mr. Mucho clearing out his desk and thought that he either quit his job or was fired. She asked Clarence Hayden, the Company controller, about it that same day or within a few days, and he told her that Mr. Mucho was being transferred to the division office to work there as an engineer. She stated that Mr. Hayden also told her that there had been an "incident" about the 7A and 53P cut-through and that Mr. Jones told Mr. Hayden that he wanted to fire Mr. Mucho over that incident. Mr. Hayden told her that he told Mr. Jones to think about it over the weekend and not to do anything rash, and that the following work day Mr. Jones told Mr. Hayden that he was right and that Mr. Mucho had a lot of knowledge and was valuable, and that "the company should be able to find something for him" (Tr. 81). Ms. Cooley also indicated that Mr. Hayden told her that Mr. Jones commented that "a ship could not have two masters. That as long as Tom was there, whether anything was intentional or not, people still tended to go to Tom for decisions and advice because he had been in charge for so long, and that was why he was being sent away from the mine" (Tr. 81).

On cross-examination, Ms. Cooley confirmed that when she gave her deposition she stated that Mr. Hayden told her that Mr. Jones told him that he felt that he could never really be in charge as long as Mr. Mucho was at the mine, but that he felt that Mr. Mucho had something to contribute to the operation and decided not to fire him (Tr. 83). Ms. Cooley further confirmed that she was not sure of the day when her conversation with Mr. Hayden took place, that she is simply relating "the gist" of what Mr. Hayden told her, and that she took no notes (Tr. 84).

Ms. Cooley stated that in late January, 1991, she was part of an effort requested by Mr. Jones to recalculate the costs of the 33 Mains renovations and that the original rehabilitation costs were estimated at \$3.6 million, while the estimated costs for the alternative solution of driving parallel entries was \$5.2 million (Tr. 85-86). She confirmed that the 33 Mains project was the responsibility of the engineering department as a group, and that Mr. Mucho, as the mine manager, and later chief of engineering, would pass the project information on to higher management, including Mr. Fisher. She confirmed that the planning is now completed, but that the project is not (Tr. 90). She

also confirmed that Mr. Hayden never indicated to her that Mr. Jones was displeased about Mr. **Mucho's** role in the 33 Mains project (Tr. 93).

William Bookshar, Mining Engineer, No. 84 Mine, confirmed that Mr. Jones arrived at the mine at the end of December, 1990, and that Mr. Mucho became the head of the engineering department at the end of January, 1991. He confirmed that he was present during a discussion at the mine map on January 24, 1991, and Mr. Mucho, Mr. Duvall, Mr. Nuccetelli, and Mr. Black were also present. Mr. Bookshar stated that the discussion "**got** rather heated" and each group was "rather adamant" as to how the ventilation would be established after the cut-through. One group advocated the use of no ventilation, and another group, including Mr. Mucho and Mr. Duvall, wanted to use steel stoppings to help keep the air separated and to preclude any explosion hazard.

Mr. Bookshar stated that the use of canvas curtains to ventilate the area where the cut-through would occur, or the use of no ventilation curtains, would "**save** a big equipment move down the **road**". He did not recall Mr. Mucho stating anything about any air change if stoppings were not used. Mr. Bookshar believed that the use of Mr. **Mucho's** stopping plan would avoid any idling of the mine, and would not result in any changes in the air ventilation. He confirmed that he later discussed the matter further with Mr. Mucho when he (**Mucho**) was writing up the ventilation plans in conjunction with the stoppings, and Mr. Mucho was upset because part of the group which had discussed the matter did not want to use any ventilation controls. Mr. Bookshar stated that it did not appear to him that any of the participants in the discussion concerning the ventilation procedures for the cut-through were joking about the matter, and Mr. Bookshar believed that it had serious implications and that everyone treated the matter seriously (Tr. 98-106).

Mr. Bookshar stated that after Mr. Mucho was transferred to the central office he (Bookshar) had a conversation with Ms. Cooley who told him that she had been informed by Mr. Hayden that Mr. Jones was mad about the cut-through ventilation incident and wanted to fire Mr. Mucho over that matter. Mr. Bookshar further stated that prior to the arrival of Mr. Jones at Mine 84, the engineering department was heavily involved in the operation of the mine, but its involvement "**fell off**" after Mr. Jones was assigned to the mine. Mr. Bookshar stated that after Mr. Mucho was transferred to the central office, he informed Mr. Mucho that he was not to work on any further engineering projects affecting Mine 84. Mr. Bookshar stated that Mr. Black instructed him to inform Mr. Mucho of this decision (Tr. 108-109).

On cross-examination, Mr. Bookshar stated that he had worked with Mr. Mucho for 8 years and considers him to be a "**pretty good friend**". Mr. Bookshar could not recall who suggested the use of

check curtains, and he stated that he was only present for 5 minutes and was standing to the rear of the group. He stated that it was not "a real loud" discussion, and that different people were expressing their opinions. Mr. Bookshar stated that during his discussion with Ms. Cooley, she told him that Mr. Hayden stated to her that Mr. Jones had made a statement that "you can't have a ship with two master", but he could not recall any further statements attributable to Mr. Hayden or Mr. Jones (Tr. 109-112).

Mr. Bookshar confirmed that he was in charge of the engineering department when Mr. Mucho was mine manager, and that after Mr. Jones was placed in charge of the mine, the role of the engineering department was diminished and he assumed this caused hard feelings (Tr. 118). He confirmed that the mine was not doing well because of the longwall failure and production was down when it was idle (Tr. 118). He further confirmed that after Mr. Mucho was transferred to the central office, he (Bookshar) did not assume his prior role as engineering head, and Ms. Cooley was given that job (Tr. 119).

Howard D. Looman, testified that he has been permanently employed at the No. 84 Mine for 8 or 9 months, and that he was initially assigned there in December, 1980, when Mr. Jones asked him to "come look around and help him develop the mine". He has known Mr. Jones all of his life, and previously worked with him intermittently for 4 or 5 years. He stated that Mr. Jones told him that he needed someone he could trust, and they stayed at the Days Inn together and occasionally commuted to the mine together. He confirmed that he and Mr. Jones are Lodge brothers (Tr. 120-125).

Mr. Looman recalled that the cut-through discussion of January 24, 1991, took place during a shift change and he only vaguely recalled the details. He stated that Mr. Mucho mentioned the use of ventilation steel stoppings and sealing off one side of the cut-through, and Mr. Looman confirmed that this was the way it was done. Mr. Looman could not recall whether he spoke with Mr. Jones about the cut-through discussion, and stated that he "could have discussed it" because it was an important project. (Tr. 125-131).

On cross-examination, Mr. Looman stated that his role at the mine was to make suggestions and recommendations to Mr. Jones. He confirmed that he had a conversation with Mr. Jones one evening while riding home from the mine, and Mr. Jones stated that he was going to fire Mr. Mucho. Mr. Looman did not recall when the conversation took place, but he believed that it was after Mr. Jones had a conversation with Mr. Hayden in his office and Mr. Looman saw them in the office when he came by to pick up Mr. Jones (Tr. 131-133). Mr. Looman stated that Mr. Jones told him that he was going to fire Mr. Mucho because of the cost and

time estimates for the 33 Mains project, and because Mr. Mucho had lied to him and made him look bad when he presented his business plan for that project (Tr. 133).

Mr. **Looman** could not recall the day of the week when he and Mr. Jones had their conversation, and he confirmed that Mr. Jones was upset because he believed that Mr. Mucho had lied to him about the completion costs for the project. He confirmed that Mr. Jones told him that Mr. Hayden had settled him down (Tr. 136). Mr. **Looman** confirmed that when he gave his deposition on November 1, 1991, and in response to a question as to whether or not Mr. Jones was upset because he had been given inaccurate information about the 33 Mains project, he responded "**I** think he might have mentioned that one time. **I'm not sure**", and when asked if he recalled when Mr. Jones may have mentioned that he was going to fire Mr. Mucho, he responded "**No**. These times all run together", and he stated that "**they still do**" (Tr. 137).

In response to further questions, Mr. **Looman** stated that "**he** may have **seen**" Mr. Jones on the evening of the cut-through incident of January 24, 1991, but that he was not sure (Tr. 142). When asked if he had ever mentioned the cut-through incident to Mr. Jones, Mr. **Looman** stated "**I** didn't say that I never. I said, if I did, it **wasn't** that big a deal", but that he could not remember mentioning it or discussing it with Mr. Jones (Tr. 142). Mr. **Looman** stated that he casually heard the conversation at the mine map during the shift change and "**he** just got in on the conversation" and "**kind** of stumbled on to it, and then stumbled back out of **it**" (Tr. 145).

Jav L. Hasbrouck, Superintendent of Engineering and Planning, confirmed that Mr. Mucho reported to the central office in early February, 1991. He explained that Mr. Fisher informed him approximately a week earlier that Mr. Mucho would be assigned to him for temporary engineering work until some other decision was made or until some other job could be found for him (Tr. 147-150).

On cross-examination, Mr. Hasbrouck stated that he could not recall whether he told Mr. Mucho that his assignment to the central office was temporary, but he assumed that he did. He stated that Mr. Fisher told him that Mr. Mucho was assigned to the central office because "**things** were getting awkward with Tom over there at Mine 84, or uncomfortable", and Mr. Hasbrouck took this to mean that Mr. Mucho, as the ex-manager, clashed with the current management. Mr. Hasbrouck stated that Mr. Mucho was an extra person assigned to him and that he had no vacancy to fill. He stated that Mr. Mucho did not fill the vacancy of engineer Mike **Bedine** who went to the No. 84 Mine, and that Mr. **Bedine** had completed his work at the central office (Tr. 150-153).

Mr. Hasbrouck stated that Mr. Mucho was assigned "bits and pieces" of work, particularly the permit renewal for Mine 58. Mr. Mucho's departure date was extended so that he could complete as much work as possible on that project. He confirmed that there were times when Mr. Mucho had little or nothing to do because of the lack of work. He confirmed that he was not involved in the offer of an engineering job to Mr. Mucho at the No. 33 Mine (Tr. 154-155).

Mr. Hasbrouck stated that after Mr. Mucho's meeting with Mr. Fisher on May 15, 1991, Mr. Fisher informed him (Hasbrouck) that Mr. Mucho "was adamant that he wanted to leave Bethenergy." Mr. Hasbrouck stated that Mr. Mucho had previously told him that he "wanted out of Bethenergy" (Tr. 156). He explained further as follows at (Tr. 156-157):

Q. Mr. Hasbrouck, when Mr. Mucho told you that he wanted out of Bethenergy, was that in the context of his being stationed at the central office and not having anything to do?

A. No, I don't believe so. I asked Tom what he wanted to do, you know, where he saw his future, or what he would like to do even for me, if I could assign him any more meaningful work, to let me know that. And he said he didn't have any plans, that he just wanted out of this company. He had enough of Bethenergy and wanted to leave.

Q. He --

A. So I didn't detect it as just being frustrated with a lack of things to do. I detected a deeper reason than that.

Q. You asked him if he wanted more meaningful work and he told you he just wanted out of Bethenergy?

A. Yeah.

Q. What were you going to do by way of more meaningful work? What if he would have said, yes, I would like more meaningful work?

A. I would have --- The only thing I could have done was just assign him more of the things that were under my power. You know, if he wanted to participate in anything else I was doing. I had no control over assigning him anything other than the jobs I was handling.

Mr. Hasbrouck stated that Mr. Fisher did not explain how he knew that Mr. Mucho's presence at the No. 84 Mine was "awkward

and uncomfortable" and that he (Hasbrouck) made that assumption because Mr. Mucho had previously served as mine manager (Tr. 158). He confirmed that subsequent to Mr. **Mucho's departure**, an engineer was hired on a temporary consulting non-full time basis for reclamation work at the No. 91 Mine, and he could not recall that he told Mr. Fisher that Mr. Mucho might be able to do that work (Tr. 159).

In response to further questions, Mr. Hasbrouck stated that, Mr. Mucho was to be terminated on May 31, 1991, but that he asked Mr. Robertson for an extension for Mr. Mucho so that he could complete the Mine 58 permit work. Mr. Mucho indicated that he needed another week to finish the project, and his termination date was extended for one week. Mr. Hasbrouck stated that he was never told why Mr. Mucho was terminated, and he was of the opinion that when he turned down the job at the No. 33 Mine there was no other available job for him (Tr. 167). He confirmed that Mr. Mucho did a good job for him while at the central office, but he believed that **"most** of the work I assigned him was beneath his skills and background" (Tr. 171).

William N. Ross, Assistant Mine Inspector, confirmed that he was aware of the fact that Mr. Mucho was moved to the central office, and he stated that Mr. Jones told him that Mr. Mucho was moved because **"he** was not a team player" (Tr. 173).

On cross-examination, Mr. Ross stated that during a conversation with Mr. Hayden, Mr. Hayden was of the opinion that Mr. Mucho was moved to the central office because his presence at the No. 84 Mine was disruptive because he was the former mine manager and people still went to him for problems because he had been there so long and that this was hard on the new management. Mr. Ross confirmed that he had worked for Mr. Mucho for two years at the No. 84 Mine and people were used to going to him with problems. He got along well with Mr. Mucho, and occasionally went to him with problems after Mr. Jones was placed in charge. However, he did not deal directly with Mr. Jones, and only dealt with his supervisor Mr. Ronald Biszick (Tr. 177).

#### Respondent's Testimony and Evidence

Clarence S. Hayden, Senior Analyst, testified that he has worked at the No. 84 Mine since January, 1991, and that he previously worked at the central office. He confirmed that he had a conversation with Mr. Jones on Friday afternoon, January 25, 1991, concerning Mr. Mucho, and that Mr. Jones was upset and stated that he should fire Mr. Mucho because of certain incorrect projections that Mr. Mucho had made with respect to the 33 Mains project. Mr. Jones was concerned that this had created some credibility problems for him with the corporate office.

Mr. Hayden stated that he told Mr. Jones to **"sleep on it"** over the weekend before making any final decision and that he could do what he had to do at a later time (Tr. 182-189).

Mr. Hayden stated that when he next spoke with Mr. Jones the following Monday, Mr. Jones informed him that he had decided against firing Mr. Mucho, and several weeks later, he learned that Mr. Mucho had been transferred to the central office. Mr. Hayden stated that he spoke to Mr. Jones briefly after the transfer and that Mr. Jones told him that he had discussed their January 25, 1991 conversation with Mr. Metheny and that they thought it was best for Mr. Mucho to go to the central office. Mr. Hayden was of the opinion that Mr. Jones and Mr. Metheny were concerned about the credibility problem created by Mr. Mucho (Tr. 190).

Mr. Hayden could not recall any specific conversation with Ms. Cooley mentioning any reasons for Mr. **Mucho's** transfer to the central office. He denied that he discussed the **53P-7A cut-**through ventilation incident with Ms. Cooley. He confirmed that during this period of time there were numerous conversations concerning the management change and that many of the discussions "concerned allegiances toward **the new**, allegiances toward the old". He stated that he would not extensively discuss any personnel moves such as Mr. **Mucho's** with Mr. Cooley because he worked closely with Mr. Jones and had to be careful in what he said to others. He further stated that he was not aware of the cut-through dispute at any time prior to February 8, 1991, and learned about it many months later (Tr. 192).

On cross-examination, Mr. Hayden stated that when he spoke to Mr. Jones about his prior statement that he should fire Mr. Mucho, he opened the door to Mr. Jones' office and saw that he had visitors. Mr. Jones raised his hand and stated **"No action at this time"**. Mr. Hayden confirmed that Mr. Jones could have said **"No, not now"**, and in fact testified that is what he said when he gave his deposition. Mr. Hayden explained that he asked Mr. Jones whether he was going to take any action, and that Mr. Jones replied **"No, not now"** (Tr. 194).

Mr. Hayden stated that during his January 25, 1991, conversation with Mr. Jones, Mr. Jones told him that Mr. Mucho had admitted that the information he had reported to the corporate office concerning the 33 Mains project was not correct, and that Mr. Mucho knew it was not correct and was not overly concerned (Tr. 196). Mr. Hayden confirmed that he stated in his deposition that he was surprised to hear from Mr. Jones that Mr. Mucho showed a lack of respect for the corporate office and would lie about such important matters because this was not consistent with what he knew about Mr. Mucho (Tr. 197).

Mr. Hayden stated that he never heard Mr. Mucho make any statement that he was "hanging **on**" at Bethenergy for 3 to 4 years so that he could retire. He considered Mr. Mucho to be a conscientious manager, and although he was concerned about profitability, the mine had been losing money (Tr. 203). He stated that Mr. Mucho had a quiet demeanor, was doing his job in the engineering department and was causing no problems that he was aware of (Tr. 203-204).

In response to further questions, Mr. Hayden stated he recalled no conversation with Ms. Cooley on the day that Mr. Mucho moved out of his office to go to the central office, and he believed that he probably had a conversation with her the following Monday, but felt that it would be inappropriate to comment about Mr. **Mucho's** departure until he learned all of the facts (Tr. 217-218). He believed that Mr. **Mucho's** transfer to the central office "was an inevitable decision that was going to be made since Tom had been relieved as being manager of the operation" and because "**there** were some people within the organization that still looked upon him **as** being in charge and reported directly to him, or in those instances where decisions had been made by the then management, they were checking with Tom before they would take steps to do what they had been assigned to **do**" (Tr.218). He further stated that "**we** had the ex-chief still present, and that made for an uncomfortable **situation**".

Mr. Hayden confirmed that he found out 'about the January 24, 1991, cut-through incident many months after his January 25, 1991, conversation with Mr. Jones, and well after his conversation with Ms. Cooley (Tr. 219). He reiterated his denials that he and Mr. Jones ever discussed the January 24, 1991, cut-through incident, and he confirmed that Mr. Jones never mentioned it (Tr. 223-224). Since he did not know about that incident until much later, Mr. Hayden insisted that he never mentioned it to Ms. Cooley during their conversations (Tr. 225).

Richard Fisher, President and General Manager of Bethenergy Mines, testified that he holds a BS degree in economics, and that most of his work with Bethlehem Steel or its subsidiary Bethenergy Mines for approximately 36 and one-half years has been accounting work. He stated that in 1985, he supervised 13 mining operations, and as a result of Bethlehem's desire to exit the coal business, there are presently only four operations. He confirmed that he has no "**hands on**" mining experience and his knowledge of mining has been received from his managers. He confirmed that he made the decision to remove Mr. Mucho as mine manager on December 7, 1990, after a period of long deliberation because the mine was not doing well and it was not performing as effectively or efficiently as he was informed that it could. He explained that in 1986 the No. 84 mine was a primary supplier of high volatile metallurgical coal to a steel company. However, in 1988, the sulphur content was such that the coal was no longer

acceptable to steel plants, and it was decided that the mine would be classified "commercial" rather than "captive". Since the commercial market was very competitive, the mine needed to become more competitive, and in 1989 he instituted a "peer review" or audit of the mine to evaluate its performance (Tr. 227-233).

Mr. Fisher stated that the mine peer review noted several deficiencies, and recommendations were made to improve performance, and these were reviewed with Mr. Mucho and his supervisor Tom Brisky. Mr. Mucho was instructed to take action to try and correct the deficiencies, and that process started in early 1990. Outside groups of experts were also brought in to evaluate the performance of the mine, and Mr. Fisher explained what was done (Tr. 234-236). He stated that by July, 1990, it was obvious to him that the conditions noted by the peer reviews continued to exist relative to the way the mine was being managed. After further problems were encountered, including a longwall failure, and after considering all of the input he received from inside and outside of the company, he concluded and decided that the mine could be made more efficient by a change in management, which affected Mr. Mucho and Mr. Brisky. They were relieved of their management responsibilities, and he brought in Mr. Metheny and Mr. Jones to manage the mine. They both reported to him, and Mr. Jones also reported to Mr. Metheny (Tr. 237-242).

Mr. Fisher stated that when he selected Mr. Jones he was not given any specific title, and he informed Mr. Jones that if he proved himself, he might eventually have the title of operations manager (Tr. 244). Mr. Fisher stated that he decided not to remove Mr. Mucho from the mine when he made the management change because Mr. Metheny told him that Mr. Mucho expressed relief that the pressure had been taken off him and that he could focus his attention on the recovery of the longwall. Mr. Metheny believed that Mr. Mucho could play a useful role in an engineering capacity, and they reached that understanding. Mr. Fisher confirmed that he informed Mr. Mucho of his decision by telephone and sent him a fax announcing the new changes (Tr. 246).

Mr. Fisher confirmed that Mr. Mucho was transferred from his position as the mine chief engineer and to the central office on February 8, 1991. He explained that Mr. Metheny called him a week earlier and informed him that "the situation" at the mine was not working the way he had hoped, and that it was a mistake to have assumed that Mr. Mucho could be allowed to stay at the mine at the same time that changes were being made in the operation, and that Mr. Mucho needed to be removed. Mr. Fisher stated that Mr. Metheny gave him no further explanation, and Mr. Fisher did not question him further because "Of the deep trust I have in terms of Pat's opinion and judgment" (Tr. 248).

Mr. Fisher stated that he suggested to Mr. Metheny that Mr. Mucho be moved to the central office as a convenience, and he then spoke with Mr. Hasbrouck and informed him that he wanted Mr. Mucho to work for him at the central office and that he was to give him **"as much productive work as possible"** (Tr. 249). Mr. Fisher stated that he viewed Mr. Mucho's move to the central office as temporary because Bethenergy was being restructured and downsized and had basically only one central group at the central office. Attempts were being made to make each mining operation self-sufficient entities and there was a relatively small group of technical support people at the central office and the operations people were pressuring him and questioning the need for such a support group. Mr. Fisher further explained that he was unsure as to whether the central group would be disassembled or whether a modest support group would remain. He confirmed that a determination was made before Mr. Mucho left the company that the technical support group could not be justified (Tr. 252).

Mr. Fisher confirmed that the 33 Mains project was essential to the future of the No. 84 mine, and as a result of a January 7, 1991, business plan meeting, the project was reevaluated. He confirmed that Mr. Jones called him about the project and was upset that he may have given him misleading information. Mr. Fisher stated that Mr. Jones told him that if he wasn't happy with his performance he could fire him, and Mr. Fisher told Mr. Jones **"Don't worry. I understand. There's nothing to get excited about. We'll get on with it"** (Tr. 255).

Mr. Fisher confirmed that he met with Mr. Mucho at Mr. Robertson's suggestion on May 15, 1991. He stated that Mr. Mucho **"made it very, very clear to me that too much water had gone under the bridge, that he felt that he had to sever his relationship with Bethlehem Steel and Bethenergy"** (Tr. 256). Mr. Fisher stated that he was aware of the fact that a job would be available in the human resources office after the retirement of Fred Ling, and that he was prepared to offer it to Mr. Mucho. However, in light of Mr. **Mucho's** statements that he did not wish to stay with the company, and his previous rejection of another job offer at Mine 33, Mr. Fisher did not offer Mr. Mucho the position. Mr. Fisher stated that he met with Mr. Mucho hoping there was a way to avoid his ultimate severance, but after speaking with him he concluded that this was not possible because **"we had struck out when we made the offer at 33, and it became pretty obvious to me that if I would make another offer in human resources, that I would strike out there as well"** (Tr. 258).

Mr. Fisher stated that Mr. Robertson tried to identify areas where Mr. Mucho could be effectively utilized and that no one wanted to see him injured by the decision to move him to the central office. Mr. Fisher stated that after his **meeting** with Mr. Mucho it became obvious that the next step would be his termination (Tr. 259). Mr. Fisher stated that at the time

Mr. Mucho was moved to the central office he was not aware of any dispute concerning the **53P-7A** cut-through, and as far as he was concerned that incident had nothing to do with Mr. **Mucho's** move to the central office (Tr. 259-260). Mr. Fisher summarized Mr. **Mucho's** termination as follows at (Tr. 260):

**Q.** And when you decided, after having met with Mr. Mucho, that there wasn't any way to resolve the issues with him, what was the reason he was terminated?

**A.** That we had no place for him to go. He had turned down an opportunity, which basically we felt was a positive one, made for the right reason. And then he made it very, very clear to me on May 15th that he had selected his course of action that he wanted to take for the rest of his life, and that did not include Bethlehem Steel or Bethenergy.

Mr. Fisher stated that Bethlehem Steel has announced that it will be exiting the coal mining business and that the No. 84 Mine is for sale and bids have been made by potential buyers who have been invited to visit the mine (Tr. 260-261).

On cross-examination, Mr. Fisher identified a copy of his December 11, 1990, memorandum to R. P. Penny, senior **vice-**president of Bethlehem Steel, in which he indicated that "depending on what happens with Mr. Mucho's performance, it is possible that Tom will be demoted to Underground Superintendent" (Exhibit C-89, Tr. 263). Mr. Fisher stated that he did not believe that he planned to bring Mr. Mucho back as operations manager and that he made that statement in the memorandum because he did not want Mr. Mucho to fail and did not want Mr. Penny to take any unilateral action with respect to Mr. Mucho "**as we tried to work out this whole problem at Mine 84**" (Tr. 264). Mr. Fisher conceded that when he gave his deposition he stated that Mr. Metheny and Mr. Jones perhaps were on a temporary basis and he would restore Mr. Mucho, and that the "**worst case scenario**" would be the demotion of Mr. Mucho to underground superintendent (Tr. 266).

Mr. Fisher confirmed that he did not hold Mr. Mucho totally responsible for the **longwall** failure, or for some of the problems at the mine, but he believed that Mr. Mucho was partially accountable for the basic blunder relative to mine planning and the direction in which the **longwall** was mined. He confirmed that Mr. Rich made a study and informed him that there were some foreseeable geological conditions that caused a problem in mining in the wrong direction. Mr. Fisher stated that there were some others who should have been involved in the accuracy of mine planning, but since Mr. Mucho was responsible for operating the mine, he should have foreseen the geological conditions (Tr. 280-281). Mr. Fisher confirmed that when he gave his

deposition, he stated that he did not hold Mr. Mucho responsible for the condition discussed by Mr. Rich, and that he felt that Mr. Mucho "was victimized" by the "environment of Bethenergy" (Tr. 281).

Mr. Fisher confirmed that when he spoke to Mr. Metheny about removing Mr. Mucho from Mine 84, he suggested to Mr. Metheny that Mr. Mucho might go to the central office, but he did not ask Mr. Metheny for any specific examples of any problems at the mine, and that he simply accepted Mr. Metheny's judgment that there was a problem without any further evaluation. He reiterated that he did not offer Mr. Mucho the job to be vacated by Mr. Ling upon his retirement because "it was absolutely clear in my mind at that time as to what his intentions were, and his intentions weren't to stay with Bethlehem Steel" (Tr. 286).

Mr. Fisher reviewed Mr. Mucho's performance ratings dating back to 1987, and confirmed that he signed some of them (Tr. 288). He agreed that some of the ratings he reviewed and signed reflected that Mr. Mucho "worked diligently on personal development to improve attitudes of work force", that he was doing "an outstanding job of communicating with his people", and that he had "exceptional managerial and communications skills and no major weaknesses" (Tr. 289). He further confirmed that one of the evaluations which he did not sign reflects that Mr. Mucho could be considered qualified for a human resources position (Tr. 290).

Mr. Fisher stated that when Mr. Jones called him about the 33 Mains project to inform him that he may have misled him, Mr. Jones did not mention Mr. Mucho (Tr. 296). Mr. Fisher stated that he did not recall Mr. Mucho stating that he would quit his job (Tr. 297). He confirmed that he performed a "performance management system analysis" of Mr. Mucho in February, 1991 (Exhibit R-22). He described it as a performance "contract" relative to certain key factors for purposes of a monetary bonus. He and Mr. Robertson prepared the analysis, and it reflects that Mr. Mucho received an overall rating of 2.8, which fell short of a 4.0 rating which reflects that all basic requirements of the business have been met. He stated that he gave Mr. Mucho "a less glowing or a worse evaluation" than previously given "because of what occurred during 1990 relative to the effectiveness of the mine, the operation of the mine" (Tr. 301-302).

Mr. Fisher stated that he "made a mistake" accepting and signing Mr. Mucho's management performance assessment prepared by Mr. Brisky for the period June 1, 1989 to May 31, 1990, and that he did not believe that Mr. Mucho was as an effective manager as he had thought. Mr. Fisher stated that he could not ignore the management assessments made with respect to the operation of the mine (Tr. 306-307). He further explained the management evaluations concerning Mr. Mucho and he confirmed that no ratings were

made for anyone in 1991, because "the whole system was thrown out in 1991 as being very, very ineffective" (Tr. 315-318). Mr. Fisher stated that he had no conversations with Mr. Jones or Mr. Metheny about the cut-through incident and that he had no knowledge of it (Tr. 319-320).

Michael E. Jones testified that he is currently employed by Back Diamond Resources, which is more or less his company, and that he retired from Bethenergy in July, 1991, after a brief stay at Mine No. 108. His final day of employment at Mine No. 84 was May 31, 1991, and he was employed by the respondent for a total of 22 years.

Mr. Jones stated that prior to his appointment at Mine 84, he was employed at the No. 108 Mine and was in charge of the tipple and purchasing outside coal for the company. Mr. Fisher asked him to take a position at the No. 84 Mine in order "to turn the mine around, give it credibility, and make it profitable." Mr. Jones stated that he knew nothing about the mine before he was assigned there and did not know Mr. Mucho prior to going there. He stated that Mr. Fisher emphasized to him the need to recover the longwall and put it into production in order for the mine to survive.

Mr. Jones stated that he held the title of acting manager when he was assigned to Mine 84, and that he reported to Mr. Metheny. Mr. Jones stated that he felt sorry for Mr. Mucho and told him that he would afford him an opportunity to reposition himself as the mine manager. He also informed Mr. Mucho in early January, 1991, that he would serve as chief engineer because of his ability and background. He also informed Mr. Mucho that he believed he could continue to contribute as a team player and that Mr. Mucho agreed to assume the job of chief engineer.

Mr. Jones characterized his management style as Very, aggressive and a lot of discipline". During his initial time at the mine he made certain observations "to get the feel" for the abilities and knowledge of the work force and made certain personnel changes, although not immediately. However, time was of the essence insofar as putting the longwall into production was concerned, and that without a producing longwall, it was his opinion that the mine would not survive (Tr. 7-13).

Mr. Jones stated that as time passed, his opinion of Mr. Mucho changed, and in January 1991, he announced that Mr. Mucho would no longer serve as mine manager in his absence and that Mr. Stan Black and Mr. Clarence Hayden would serve in that capacity (Tr. 13).

Mr. Jones made reference to a letter which was mailed to the Pennsylvania State Department of Resources regarding the mine belt ventilation, and he confirmed that the tone of the letter offended the state official to whom it was addressed and may have adversely affected the respondent's working relationship with the state. The letter was drafted by Mr. Mucho's engineering department. Mr. Jones stated that he may or may not have signed the letter and he confirmed that he often signed letters drafted by others without reading them or after simply glancing at them (Tr. 14-19).

Mr. Jones stated that the target date for the recovery of the longwall was February 1, 1991. He confirmed that a cut-through was in progress to connect the 53-P and 7-A panels, but that he did not participate in the discussion at the mine map on January 24, 1991, and only walked through the office quickly and reminded everyone not to forget the switching of the continuous miners. He stated that no one ever told him about the discussions which took place or any disagreements between Mr. Mucho and Mr. Black. Mr. Jones also denied any knowledge of any "confrontations" between Mr. Mucho and the others who were present during the discussions, and he denied that the fact that Mr. Mucho may have expressed his disagreement as to how to accomplish the cut-through was a factor in his re-assignment to the central office on February 8, 1991 (Tr. 20-21).

Mr. Jones stated that the dewatering and development of the 33-Mains section at Mine 84 was a high priority item and vital to any future mining and that Mr. Metheny made him and the entire operation responsible for this project. Mr. Jones stated that he presented a business plan at a management meeting on January 7, 1991, with respect to the 33-Mains project and read it from a statement prepared by the engineering department. Mr. Jones confirmed that he had only been at the mine for two or three weeks and spent much of his time underground when this report was made. Subsequently, on January 14, 1991, and based on his presentation of January 7, Mr. Metheny issued a follow-up business plan memorandum assigning him the responsibility for the 33-mains project (Tr. 21-24).

Mr. Jones stated that he subsequently informed Mr. Metheny that he did not believe that the information which had been compiled regarding the 33-Mains project **was accurate and that during his discussions with the engineers** in Mr. Mucho's engineering department he found that the information was based on 90 percent theory and 10 percent practicalities. **Mr. Metheny expressed his concern about the project and stated that if it were not completed there would be no coal mine.** Mr. Jones stated that he was frustrated about the engineering information he was receiving and that the original deadlines which had been established were simply being reasserted by the engineers (Tr. 24-25).

Mr. Jones stated that on January 25, 1991, he spoke to Mr. Hayden and expressed his dissatisfaction with the engineering department and the mine management team. He was very upset and remarked that he should fire Mr. Mucho. Mr. Jones denied that the cut-through matter of January 24, 1991, was discussed with Mr. Hayden, and he stated that he first learned about that matter after Mr. Mucho had filed his discrimination complaint with MSHA when he was advised of the complaint while at a management meeting at the Ramada Inn in Washington, Pennsylvania.

Mr. Jones explained that when he spoke with Mr. Hayden and commented that he should fire Mr. Mucho, he was upset that the credibility of mine 84 "was zero" and had a reputation of telling higher management "what they wanted to hear" and that "it was business as usual". However, Mr. Hayden calmed him down and Mr. Jones stated that he subsequently changed his mind and did not believe that "engineering was off on their own and was not playing as part of the management team". Mr. Jones confirmed that after speaking with Mr. Hayden he rode home with Mr. Looman that evening and mentioned his discussion and statement that he wanted to fire Mr. Much because of the lack of team work and the inaccurate information he had received with regard to the 33-mains project (Tr. 25-30).

Mr. Jones stated that he subsequently received a telephone call from Mr. Metheny who informed him that Mr. Mucho was being transferred to the central office. Mr. Metheny further informed him that as long as Mr. Mucho was in the same building at Mine 84, there would be a "choosing of sides" as far as management was concerned (Tr. 28).

On cross-examination, Mr. Jones reviewed his prior "statement" made to the MSHA investigator during the investigation of Mr. Mucho's complaint (Exhibit C-136), and he confirmed that he did not mention the 33-mains project to the investigator. Mr. Jones further stated that the mine was not working together and that this did not personally bother him. Referring to his deposition of December 12, 1991, Mr. Jones acknowledged that he stated that "he sensed the factions from day one" and that it was not a problem personally, but that it was a problem for the mine operation every day even though he did not mention it during his deposition (Tr. 32-44).

With regard to his January 25, 1991, conversation with Mr. Hayden, Mr. Jones stated that although no specific event resulted in his being upset, he felt pressured to get the 33-mains area de-watered and that he had discussed the matter

with Ms. Cooley and Mr. Bookshar that day and with the engineering department every other day. He explained his "outrage" when he spoke with Mr. Hayden as follows at (Tr. 45-46):

A. The various information I had accumulated from Engineering. I'd talk to one engineer, I'd get one story. Another engineer would say, well, I really don't want to say. I don't want to get in the middle to it. Could cost me my job or, you know, there was a lot of protecting each other.

And people wouldn't talk on the record. But off the record, they would and I would ask detailed questions, how we'd come up with these answers. And it all reverted back to, this is what Tom said. This is what the book says. This is the way Engineering has always done it. And I was supposed to take that as the Gospel.

I did have a lot of experience in rehabilitation, approximately 15 years. I felt that I had just as much knowledge, if not more, than the individuals giving me the information. That was somewhat of an expertise that I've acquired over the years.

\* \* \* \* \*

A. I had talked to Engineering about the dewatering of 33 Mains.

Q. That day?

A. That day and almost every day. We were waiting on a thrust block. We were waiting on this and that. We paid thousands of dollars for a design thrust block. It did not work. Then we went right back to the way they done it 20 years ago. You can't beat common sense. You can only do so much from a book. I was to the point I was fed up. I wasn't going to take anymore. Every time I asked a question, I was given a runaround. And I told Clarence that the pressure was on me to get that 33 Mains open, dewatered and back in coal. It was just one crisis after another at that time.

Mr. Jones stated that when he discussed the 33-mains project with Mr. Hayden he did not tell him he was misled about the costs of the project, and he could not recall whether he mentioned any cost problems when he discussed the project with Mr. Looman (Tr. 58-59). He stated that Mr. Looman would have no reason to tell him about the status of the cut-through because it was not his job and cut-throughs are every day occurrences for a longwall move. Further, the engineering department kept him advised daily on the progress of the cut-through (Tr. 63-64).

Mr. Jones stated that he called Mr. Fisher during the week of January 28, 1991, and informed him that he had given him misinformation about the 33-mains project and that it would not be ready by the original time estimate. He also told Mr. Fisher that the completion of the project would take longer than previously anticipated and that Mr. Fisher could do what he liked about him. He also told Mr. Fisher that Mr. Mucho had given him the information about the project (Tr. 70). Mr. Jones stated that he probably spoke with Mr. Metheny after he had spoken with Mr. Fisher that day, and after he had spoken with Mr. Hayden (Tr. 71-72).

Mr. Jones stated that he left the 84 mine after Mr. Fisher offered him another job but could not agree on his requested compensation, and that he subsequently retired and went into his own business. He acknowledged that Mr. Mucho informed him that if people were not assigned to the No. 33 project it would not be done. Mr. Jones stated that he did not hire additional people for the project because the 33-mains area was under water and he didn't want people just standing around with no work to do while the area was under water (Tr. 73-78).

In response to further questions, Mr. Jones stated that Mr. Mucho was not participating in the mine organization and that everytime he would ask for information from the engineering department, he could not get an unbiased opinion and the information was simply rearranged "because they didn't want to go against Tom" (Tr. 80). He stated that he informed everyone in management that he did not feel comfortable with the situation, that it was "a constant every-day battle", and that he was being misled (Tr. 81). Mr. Jones stated that "It was a relationship that engineering had run the mine for years. Anyone else's opinion did not count. And we didn't know what we were talking about, operations people, I'm saying. And I wasn't given the respect and the courtesy of what prior knowledge I'd acquired " (Tr. 82).

Mr. Jones stated that he harbors no animosity towards Mr. Mucho, and that Mr. Mucho never raised any safety issues with him while he was at Mine 84. He also stated that he never discussed the January 24, 1991, cut-through incident with Mr. Metheny or anyone else, did not participate in those discussions, and that he did not know about any such discussions until after Mr. Mucho filed his complaint (Tr. 84).

John P. Metheny, Manager of operations of the respondent's Eagle Nest and Mine 84 mining operations, stated that he was assigned to this position on December 7, 1990, when Mr. Fisher called him and asked him to take the job and to work with Mr. Jones. Mr. Metheny stated that the mine was losing money,

its productivity and credibility was down, and that cost projections and scheduling were not being met. It was his understanding that he and Mr. Jones would work as a team, that he (Metheny) would be manager of operations and that Mr. Jones would be there on a day-to-day basis (Tr. 90-95).

Mr. Metheny stated that he concluded in February, 1991, that Mr. Mucho had to be transferred because the mine personnel were not responding to Mr. Jones. He stated that he had gone through a similar situation at another mining operation where he removed the mine manager and made him his foreman. He stated that he **"had a feeling that things weren't right"** at the mine and that **"the mine wasn't jelling as long as Mucho was there"**. Under the circumstances, he decided to transfer Mr. Mucho because he believed that his presence was disruptive and that everyone needed to report to Mr. Jones. After reporting this to Mr. Fisher, Mr. Fisher told him that **"if that's your decision go ahead and make the move"** (Tr. 99-101).

Mr. Metheny was not sure if it was Mr. Fisher's idea to reassign Mr. Mucho to the central office, but he was sure that this was discussed. On January 24, 1991, after he had spoken to Mr. Fisher, he called Mr. Jones and then called Mr. Mucho to advise him of his decision to reassign him. He told Mr. Mucho that he believed there were some problems and some friction and that **"for the betterment of, myself, the operation and Tom himself, that he needed to be away from Mine 84"**. He instructed Mr. Mucho to report to Mr. Hasbrouck on the following Monday (Tr. 102).

Mr. Metheny stated that he was unaware of the **cut-through** incident of January 24, 1991, at the time he reassigned Mr. Mucho to the central office, and that he first learned about it on March 29, 1991, while at a management meeting at the Ramada Inn in Washington, Pennsylvania, when he was first informed of Mr. **Mucho's** complaint to MSHA (Tr. 102-103). Mr. Metheny stated that prior to February 8, 1991, Mr. Jones never called him to tell him that he wanted Mr. Mucho out of the mine. He also confirmed that he was not consulted when Mr. Mucho was laid off, and he did not believe that he had any role in that decision (Tr. 104). He confirmed that he did not consider reinstating Mr. Mucho as mine manager to the No. 84 Mine when Mr. Jones was leaving because **"things were on the right track, production was on the increase profits were up"**, and he believed that morale was up and the mine was being cleaned up and **"moving in the right direction"**. He was afraid that if Mr. Mucho returned, **"it might go the other way"** (Tr. 104).

Mr. Metheny confirmed that Mr. Jones made a presentation concerning the 33 Mains project which reflected that \$3.7 million in extra expenditures would be required for a ventilation shaft in connection with that project and that this came as a shock to

him because it had not previously been discussed. Mr. Metheny stated that the 33-mains project was not a part of his decision to transfer Mr. Mucho and that he simply wanted everyone to follow only one individual (Tr. 105-113).

On cross-examination, Mr. Metheny conceded that while the 33-mains project was not the definitive reason for his decision to transfer Mr. Mucho, it could have been part of his decision. He also stated that he had previously told Mr. Jones not to worry about the costs or time frame for the project.

Mr. Metheny confirmed that when he spoke with Mr. Jones at the end of January, 1991, about the problems with the 33 Mains project, Mr. Jones inferred that Mr. Mucho had given him the information about that project. Mr. Metheny further confirmed that he had given serious thought to moving Mr. Mucho in early February, 1991, but that during the previous second week in December while at the mine he **"had** this feeling that something wasn't quite **right**" and that he could sense that there was friction (Tr. 138). He stated that there were no specific instances of Mr. Mucho attempting to subvert Mr. Jones, but that based on his conversations with Mr. Jones he did not feel that Mr. Jones was being supported **(Tr. 139)**.

Mr. Metheny stated that he considered Mr. Jones to be a good mining man, and a disciplinarian, and he confirmed that the thought entered his mind that Mr. Jones might be the cause of the friction and spoke to him about his management techniques (Tr. 139-142). He confirmed that he heard rumors **"about** people going to Mr. Mucho. Telling him things that Mike was **doing**" (Tr. 142). Mr. Metheny stated that he had worked with **"that** scenario for four years" and that he **"saw** the same kind of **atmosphere**" and found that it did not work. He further stated that Mr. **Jones'** activities **"were** going to cause problems with the people who were loyal to Tom **Mucho**" (Tr. 140, 143).

In response to' further *questions*, Mr. Metheny reiterated that he was unaware of the cut-through discussion of January 24, **1991, until** well after the events in this case, and that he did not discuss that matter with Mr. Jones, Mr. Black, or Mr. Duvall. He denied that Mr. Mucho was transferred to the central office because of that incident (Tr. 158). He confirmed that he had no role in Mr. **Mucho's** subsequent lay off, and **"pretty** much lost contact with **him**" after his transfer, but did stop by his office to speak with him two or three times (Tr. 159-161).

Thomas H. Robertson, Manager of Human Resources, testified that he is responsible for labor relations, personnel, and EEO matters. He stated that he was not involved in Mr. **Mucho's** removal from the mine manager's position at Mine 84 or his reassignment to the central office. He confirmed that after

Mr. Mucho was assigned to the central office he saw him on a daily basis, and in March, 1991, before Mr. Mucho filed his **MSHA** complaint, they discussed his employment situation. Mr. Robertson stated that Mr. **Mucho informed** him at that time that he "wanted to exit the organization" and they briefly discussed a possible severance settlement. Mr. Robertson stated that he and Mr. Mucho met again after he filed his MSHA complaint and they again discussed a possible severance settlement. Mr. Robertson stated that he had in mind the **usal** severance arrangement offered by the company, 'but-that Mr. **mucho** wanted a settlement similar to a severance formula used by I.B.M. which **would have** amounted to a payment of 2 to 3 years severance pay at a cost of \$200,000 to \$300,000. Mr. Robertson stated that he informed Mr. Mucho that this was beyond what he could offer and that he also told him that in light of his MSHA complaint and his EEOC complaint that he (Robertson) would have to defend the company's position (Tr. 163-170).

Mr. Robertson stated that a position of project engineer at the No. 33 mine was offered to Mr. Mucho by mine manager Richard Stickler, but that he (Robertson) was not involved in that offer. Mr. Robertson stated that he then suggested that Mr. Fisher and Mr. Mucho meet to discuss his situation. Mr. Robertson stated that while he was at the central office, Mr. Mucho was in a "**make work**" position, but that he always seemed to have something to do, even though it was not any substantive work. Mr. Robertson stated that he was concerned that Mr. **Mucho's** situation was adversely affecting morale at the central office because he had been a high level manager, was still being paid his previous manager's salary, and did not seem to be doing any meaningful work. For these reason, Mr. Robertson believed that Mr. Fisher and Mr. Mucho needed to meet in order to resolve Mr. **Mucho's** employment situation (Tr. 172-173).

Mr. Robertson stated that he made an effort to find a job for Mr. Mucho by submitting his name to Bethlehem Steel for possible placement but received no response. Mr. Robertson also spoke with Mr. Fisher and Mr. Fisher informed him that Mr. Mucho wanted to leave the organization. Mr. Robertson stated that he met with Mr. Mucho on May 21, 1991, and informed him that June 1, 1991, would be his effective date if he accepted the Mine 33 job, and if not, he would be laid off. He also advised Mr. Mucho that if he were laid off his health care and life insurance benefits would continue for two years, and that he would be eligible for a "deferred vested **quit**" pension. Since Mr. Robertson did not consider the lay-off to be permanent because Mr. **Mucho's** name had been submitted to Bethlehem Steel for possible placement, he wasn't sure that a job would not be available at a later time (Tr. 173-177).

Mr. Robertson stated that he explained to Mr. Mucho that if he accepted the Mine 33 job offer he would take a salary cut, but would be at the top of the pay scale in that new position. Mr. Robertson confirmed that he also discussed the company benefits guidelines concerning permanent position eliminations and shut-downs with Mr. Mucho. Mr. Mucho then informed him that he wanted to think about it and review the job offer with his attorney. Mr. Mucho subsequently informed him on May 28, 1991, that he did not feel the offer was a legitimate offer and did not explain his reasons for rejecting it (Tr. 177-181).

Mr. Robertson stated that Mr. Mucho asked him why he was not retained at the No. 84 Mine, and Mr. Robertson informed him of his belief that it was because the mine lost money and had a poor performance. Mr. Robertson also informed Mr. Mucho that he was informed that there was "a divided loyalty situation" at the mine which prevented the new manager from pulling everyone together. Mr. Robertson stated that he also informed Mr. Mucho that he did not believe it was appropriate to keep him in "a make work" situation at the central office, but that Mr. Mucho stayed on for awhile to finish up a mine permitting project. His lay-off was effective June 7, 1991 (Tr. 183).

Mr. Robertson confirmed that Mr. Mucho filed for unemployment compensation and that the respondent's legal department initially challenged the claim and took the position that Mr. Mucho had quit his job. Mr. Robertson stated that he disagreed with this decision and took the position that Mr. Mucho's departure was a lay off. He confirmed that the company did not appear at the initial hearing on Mr. Mucho's claim and that he ultimately prevailed and was awarded his compensation (Tr. 184-185).

Mr. Robertson believed that Mr. Mucho's situation was unusual, and since he considered his lay off to be "temporary", he made the decision that Mr. Mucho was not entitled to outplacement benefits pursuant to the Company's plan. Mr. Robertson believed that Mr. Mucho would have been laid off even if he had not filed a discrimination complaint because the central office was being re-structured, the staff was being cut, and everyone who was needed in the engineering department were already in place, and that 2 of the 3 mines operated by the respondent are for sale (Tr. 185). He confirmed that Mr. Ling worked for him, but that his position was never filled when he retired, and he does not anticipate that it will be filled because the central office "for all intents and purposes will not be there" (Tr. 187).

On cross-examination, Mr. Robertson confirmed that the company's law department was aware of the manner in which he handled Mr. Mucho's separation, and that they were not happy about it (Tr. 187). Mr. Robertson stated that when Mr. Mucho

left the company he still held the title of operations manager and that is why he did not consider his situation to be a position elimination (Tr. 188). He confirmed that when Mr. Mucho was no longer functioning as chief engineer, no paperwork was forthcoming changing his title, and although this would normally be done, it was Mr. Fisher's decision not to do it, Mr. Fisher took the position that there was no position elimination because the position of manager of operations still existed (Tr. 190).

Mr. Robertson explained the company's Income Protection Plan (IPP), which is a general benefit providing for a percentage of pay for a period of 12 months, and he confirmed that Mr. Mucho did not receive those benefits because there was no position elimination, and the position of manager of operations still exists at this time (Tr. 191). Mr. Robertson did not recall discussing this matter with Mr. Mucho (Tr. 192). He also confirmed that he mentioned filling Mr. Ling's vacancy with Mr. Mucho to Mr. Fisher, but that Mr. Fisher told him he was either not going to fill it or would defer it (Tr. 194).

Mr. Robertson confirmed that when he spoke with Mr. Mucho in March, 1991, the substance of what Mr. Mucho told him was that "I'm here at the Central Office. We all know what's going on. At this point, there's no future for me here" (Tr. 195). Mr. Robertson stated that he agreed with Mr. Mucho's assessment of his situation, and while he did not believe Mr. Mucho's career was over, he had some concerns and that is why he submitted his name to Bethlehem Steel for possible placement (Tr. 196). Mr. Robertson further explained the disposition of Mr. Mucho's unemployment compensation claim and the position taken by the law department, and he could not recall telling Mr. Mucho that the company would not oppose his claim (Tr. 199-201).

Mr. Robertson believed that Mr. Mucho was transferred because the mine did not succeed under his leadership. He confirmed that during all of the time Mr. Mucho was assigned as chief engineer at Mine 84, and project engineer at the central office, he still had the title of mine manager and retained his salary. Mr. Robertson confirmed that this was unusual, and it was his opinion that this occurred because of the uncertainty of filling the mine manager's position at the No. 84 Mine and "it was still in limbo" (Tr. 210-211). He also confirmed that if Mr. Mucho's title had been changed from mine manager to something else, this would have resulted in a pay cut (Tr. 213).

#### Complainant's Rebuttal Testimony and Evidence

By agreement of the parties, the following prehearing discovery depositions were filed for my consideration.

Larry R. Willison was deposed on November 1, 1991 and he confirmed that he is a professional mining engineer and has

served as the superintendent of surface mining for the High Power Mountain Corporation, a wholly owned subsidiary of the respondent, since June 1991. Prior to this position, he served as the chief engineer of the respondent's West Virginia Division during December, 1990, and January, 1991. He stated that in late January, or early February, 1991, Mr. Metheny asked him to come to the No. 84 Mine to review and assess the planning and timing of two development projects, namely, the acquisition of additional coal reserves for additional **longwall** panels in the northern area of the mine, 'and the possible renovation or parallel entries for the 33 Mains area. Also included in his review were matters concerning haulage; ventilation, and all of the support activities incident to any future mining.

Mr. **Willison** stated that he was at the mine **intermitently** from February 4, 1991, to February 21, 1991, and that he met with the engineering personnel (Bookshar and Cooley), and later met with Mr. Mucho and traveled with him underground as part of his evaluation of the projects. Mr. **Willison** could not recall whether Mr. Mucho informed him about any projected dates for access to the coal reserves through the 33 Mains area, but he confirmed that he was given a bar chart prepared by Mr. **Mucho's** engineering group concerning the timing' for these projects. Based on the planned volume of work, Mr. **Willison** assumed that it would take two months to pump the water from the 33 Mains area, and he explained the projected manpower needs and work which needed to be accomplished (Tr. 1-22).

Mr. **Willison** stated that he presented his initial mine assessment report to a management group at the mine central office on February 5, 1991, and he believed that Mr. Fisher, Mr. Metheny, and Mr. Hasbrouck were present, but Mr. Jones was not (Tr. 26). Mr. **Willison** explained the briefing that he gave, and he advised management that he did not have much time to review the projected construction related costs of \$3.7 million, and that he believed that from a coal development and marketing standpoint, the projected costs of \$5.2 million would be higher because of the higher sulfur content in the parallel mains. He further advised management that the 33 Mains project work items which needed to be done would probably take until the end of 1991 to complete, and he based this conclusion on the information given to him by Mr. **Mucho's** engineering group and others (Tr. 38).

Mr. **Willison** stated that he assigned several specific work items to Mr. Mucho, Ms. Cooley, and Mr. Bookshar in connection with his plan evaluations, and Mr. Mucho was to prepare a projection for the E left section which provided for haulage and ventilation, including some redevelopment of the **53P** area in connection with enhancing the returns and the ventilation (Tr. 43).

Mr. **Willison** stated that during his final evaluation week at the No. 84 Mine he had some verbal discussions with Mr. Metheny concerning the development of the mine, and he informed Mr. Metheny of his belief that the 'status of the pumping system had not progressed as he believed was necessary (Tr. 47). Mr. **Willison** stated that Mr. Metheny informed him that the water pumping operation was a high priority item, and that he would continue to emphasize this with Mr. Jones (Tr. 47). Mr. **Willison** was of the view that not enough attention was being applied to that project, and he confirmed that he **advised** Mr. Metheny of this (Tr. 48).

Mr. **Willison** stated that he knew Mr. Mucho before he began his evaluation of the No. 84 Mine in February, 1991, but that he had limited contact with him during their careers. In response to an opinion about Mr. **Mucho's** engineering work, Mr. **Willison** responded as follows at (Tr. 52-53):

**Q.** To a certain extent, when you came up to mine 84 in February, you got an opportunity to take a look at some of the work that he and his group 'had done, didn't you?

**A.** Yes.

**Q.** What did you think about that work? Was it good engineering work?

**A.** I would say generally, yes. I think the thing that concerned me was this planning and the timing that had been worked out. And, as **I say I don't** know what constraints may have been put on the timing process. But the plan that I was presented when I first started out I said during our conversation that I didn't feel to be realistic. That's maybe the only negative I would say to the situation.

**Q.** Do you think that Tom was a good engineer?

**A.** I really can't answer that. I've been around him in more of a management role than an engineering role.

Mr. **Willison** was subsequently deposed again by telephone on December 20, 1991, and he explained and discussed the materials that he used during his Mine 84 briefing to mine management and the J.T. Boyd Company (Tr. 1-20). He also identified and explained certain notes given to him by Mr. Metheny concerning the 33 Mains project, a work assignment that he had given to Mr. Mucho, and other documents incident to Mr. **Metheny's** request for an evaluation and assessment of the previously identified mine projects (Tr. 21-25). Mr. **Willison** also explained his completion time estimates for the projects (Tr. 26-29).

Theodore J. Brisky, was deposed on November 21, 1991, and he testified that he was previously employed by the respondent for 36 and a half years, and that he served as the senior manager of operations for all of its mines from November 1987, until he retired on February 1, 1991. He confirmed that he was senior manager of operations in August, 1990, and that Mr. Mucho worked for him at that time. He considered Mr. Mucho to be "a very strong communicator, a very knowledgeable engineer, and very professional in doing his responsibilities" (Tr. 10).

Mr. Brisky recalled that during the time frame of August 30, 1990, the 33 Mains project was discussed at a meeting with Mr. Fisher, Mr. Mucho, and Ms. Cooley, and that Mr. Fisher communicated his view that using the 33 mains area as a means of access to the northwest reserves might make the mine more attractive to investors. The consensus was to study the feasibility of going through the 33 mains area, and this phase was assigned to Mr. Mucho and his engineering staff. Mr. Brisky recalled that Mr. Mucho raised some questions at that time about adverse roof conditions, a large volume of water, and the need for a ventilation fan. Mr. Brisky confirmed that Mr. Mucho took the position that the project was "doable", but that the timing and water pumping needed to be addressed by his study (Tr. 15). Mr. Brisky identified a copy of a presentation made by Mr. Mucho at a meeting on October 5, 1990, and although he could not specifically recall whether Mr. Fisher and Mr. Metheny were present, he believed that all "key players", including Mr. Fisher and Mr. Metheny would have been present (Tr. 18).

Mr. Brisky stated that the 33 Mains project involved "a tremendous amount of work", and although he couldn't specifically recall what Mr. Mucho may have said at the October 5, meeting, he assumed that he covered the items reflected in the agenda which he had prepared (Tr. 18-20). Mr. Brisky could not recall whether Mr. Mucho covered the projected costs for the project, did not recall any numbers, and he assumed that costs would have been addressed in another report (Tr. 21-23). He confirmed that he had often heard Mr. Fisher remark that he (Fisher) was not a mining person and that he did not understand the technical aspects of mining (Tr. 21).

Mr. Brisky stated that during the fall of 1990, and prior to that time, several options were under study, and the alternatives ranged from a complete-shut down of Mine 33 to the elimination of one or more long-walls. Manpower was reduced from 1,800 to 450, and "there was almost a year where we were changing our mind what we were going to do with 33; every two weeks or a month" (Tr. 25). He confirmed that keeping the mine open for a year or three years, or reducing it to one longwall were options available to Mr. Fisher (Tr. 26-27).

Mr. Brisky recalled a management meeting during November/December 1990, when Mr. Mucho discussed some roof condition problems in connection with the 6-B **longwall** area. The problems came to light during a geological study conducted by Mr. Doug Rich, who agreed that the problem was not foreseeable without the study he conducted, and who pointed out that mining had taken place for 40 to 60 years without the specific roof problem in question. Mr. Brisky further recalled a telephone conversation when Mr. Mucho told him that Mr. Fisher believed that Mr. Mucho was responsible for the **longwall** problems and felt that they were conditions that mine management should have known about, and that Mr. Mucho "**should** have known better" (Tr. 27-30).

Mr. Brisky did not believe that Mr. Mucho was responsible for the **longwall** problems, and he stated that "**I** do not put near the weight of a north-south direction that other people have in the failure of this **face**". Mr. Brisky also believed that the area could have been mined through in a north-south direction if certain requested equipment replacements sought two or three years earlier had been made (Tr. 31).

Mr. Brisky stated that he and Mr. Fisher had a strong difference of opinion about Mr. Mucho's capabilities. Mr. Fisher believed that Mr. Mucho "was part of the old regime of mining and parochial in his thinking, . . . and was not willing to change and adjust to new management styles as rapidly as Mr. Fisher wanted" (Tr. 32). Mr. Brisky stated that he did not share in this opinion of Mr. Mucho, and that in 1989 he submitted performance appraisals on all of his department heads, managers, and chief engineers, and Mr. Mucho was among three people who he ranked "**very** high potential performers for **Bethenergy**" (Tr. 33). He stated that he sent his appraisal reports to Mr. Fisher. He also indicated that he had been under extreme pressure from Mr. Fisher about Mine 84 from October, 198-7 until his retirement, and that during his discussions with Mr. Fisher he always advised Mr. Fisher of his belief that the management of the mine "**was** the right choice" (Tr. 34).

Mr. Brisky stated that a peer evaluation of the 84 Mine was conducted during November/December, 1990, and that Mr. Mucho worked diligently to fulfill each of the recommendations. He further believed that Mr. Mucho did a good job as manager to maintain a safe mining operation and that he was concerned about safety (Tr. 34-35). Mr. Brisky could not recall reviewing any specific part of any evaluation report prepared by the J.T. Boyd Company in March, 1990, with respect to the 84 Mine (Tr. 35-37). Mr. Brisky confirmed that management changes were made at the mine during December 7, 1990, without his knowledge, and that a meeting was held in his absence by Mr. Fisher where the financial status of the mine may have been discussed (Tr. 37).

Ms. Cooley was deposed on November 18, 1991, and her testimony is essentially consistent with her hearing testimony. With regard to her conversation with Mr. Hayden when Mr. Mucho was transferred to the central office, Ms. Cooley stated that she could not recall the date of the conversation but was sure that it was the day that Mr. Mucho left the mine to go to the central office. She described the "general gist" of the conversation as follows at (Tr. 25-26):

A. That he said that Tom -- that there had been an incident, I'll call it an incident, earlier about an air change with the 7A, I guess, air change, about the two sections cutting into each other.

Q. To 53P?

A. Yes. And Tom had concerns about how some people wanted to do it. And there had been I guess a scene. I wasn't in the room, so I don't know. And my understanding was that Mike had been very mad about that, and had wanted to fire Tom because of that. And Clarence had said to him well, you know, why don't you think about it over the weekend before you do anything. So then when Mike came back Monday, he said to Clarence yeah, you're right, he's a valuable person, that we should -- the company should be able to utilize him somewhere, but he didn't really want him there at Mine 84. And there was something discussed about that there had been things that Tom hadn't passed on to Mike that he should have. He didn't go into specifics on that. And also he talked about that Mike felt that a ship couldn't have two masters. And whether Tom was trying to or not, as long as he was there, people still tended to go to Tom for decisions and things like that, because he'd been in charge for so long, it was just habit. And Mike felt that he would never be able to be in charge of the place as long as Tom was still there.

#### Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Va Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. v a n v .

Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Managment Corporation, \_\_\_ U.S. \_\_\_, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processins Co., 351 F.2d 693, 698 (8th Cir. 1965):

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

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

#### Mr. Mucho's Protected Activity

It is clear that Mr. **Mucho** had a right to make a safety complaint or to bring to the attention of management safety

matters which he believed presented a potential hazard to miners. Equally clear is the fact that any such safety complaint is a protected activity which may not be the motivation by mine management for any adverse personnel actions against Mr. Mucho, **See: Secretary of Labor ex rel. Pasula v. Consolidation Coal co.**, 2 FMSHRC 2786 (October 1980), **rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall**, 663 F.2d 1211 (3d Cir. 1981), and **Secretary of Labor ex rel. Robinette v. united Castle Coal Co.**, 3 FMSHRC 803 (April 1981); **Baker v. Interior Board of Mine Operations Appeals**, 595 F.2d 746 (D.C. Cir. 1978); **Chacon, supra**. The complaint must be made with reasonable promptness and in good faith, and be communicated to mine management in order to afford management with a reasonable opportunity to address it. **See: MSHA ex rel. Michael J. Dunmore and James Estle v. Northern Coal Comnanv**, 4 FMSHRC 126 (February 1982); **Miller v. FMSHRC**, 687 F.2d 194, 195-96 (7th Cir. 1982); **Sammons v. Mine Sevices Co.**, 6 FMSHRC 1391 (June 1984); **Secretary ex rel. Paul Sedgmer et al., v. Consolidation Coal Company**, 8 FMSHRC 303 (March 1986); **Miller v. FMSHRC**, 687 F.2d 194 (7th Cir. 1982); **Simpson v. Kenta Energy, Inc.**, 8 FMSHRC 1034, 1038-40 (July 1986); **Dillard Smith v. Reco, Inc.**, 9 FMSHRC 992 (June 1987).

In addition to his protected right to make safety complaints, Mr. Mucho also had a protected right to file a discrimination complaint without fear of reprisal or adverse action. In the instant proceedings, Mr. Mucho contends that his transfer on or about February 8, 1991, from his position of chief engineer at the No. 84 mine to a staff engineer's position at the mine central office was an adverse personnel action prompted by a safety complaint which he made to mine management on or about January 24, 1991. He takes the position that this complaint was a protected activity pursuant to section 105(c) of the Act, and that management acted illegally when it transferred him because of the complaint. Mr. Mucho further contends that his subsequent layoff from his staff engineer's position at the central office on or about June 7, 1991, was likewise discriminatory and retaliatory because it was prompted by his filing of a discrimination complaint challenging his transfer.

In **Secretary ex rel Jenkins v. Hecla-Dav Minez Corp.**, 6 FMSHRC 1842, 1947-48 (August 1984), the Commission **held that an adverse action is an act of commission or omission by the operator subjectina the affected miner to discipline or a detriment in his employment relationshin**, and that any determination as to whether an adverse action was taken must be made on a **case-by-case basis**. The Commission followed this approach in **Ronny Boswell v. National Cement Comnanv**, 14 FMSHRC 253 (February 1992), when it concluded that a miner who was transferred to a lower paying hourly job suffered an adverse action even though he earned more annually in his new job than he would have in his previous one.

On the facts of this case, I conclude and find that Mr. Mucho's transfer from the position of head of the engineering department at Mine No. 84 to a staff engineer's position at the mine central office one mile away was an adverse personnel action. Although it is true that Mr. Mucho retained his salary and other benefits and still had the title of mine manager, it is clear to me that his transfer was in effect a demotion to a lower engineer's position, with no supervisory authority, and with no management responsibilities. I further conclude and find that Mr. Mucho's lay off was also an adverse personnel action, and was for all intents and purposes a termination from his job.

With the exception of the cut-through event of January 24, 1991, there is no evidence that Mr. Mucho ever made any prior safety complaints to mine management, or to any state or Federal inspector or mine enforcement agency. There is also no evidence that Mr. Mucho ever made any safety complaints, or raised any safety issues, with any of the three management officials who he claims were responsible for his transfer and subsequent lay off (Fisher, Metheny, and Jones).

The evidence establishes that in the course of a discussion at the beginning of the morning shift on January 24, 1991, at the mine map in the mine foreman's office, Mr. Mucho explained his ventilation plan to underground mine foreman Duvall, underground mine superintendent Black, and other mine management personnel. Mr. Mucho was at that time serving as the head of the engineering department, and the ventilation plan in question included the use of a double row of steel stoppings to maintain the ventilation at acceptable levels during the impending cut-through linking the No. 7A and No. 53P panels in anticipation of placing the **longwall** in production.

The evidence further establishes that during the discussion at the mine map, one or more of the participants-other than Mr. Mucho either suggested or brought up the question of using alternative methods of maintaining the ventilation during the cut-through. These alternatives included the use of canvas ventilation checks, no curtains at all, and air regulators, and Mr. Mucho became upset and somewhat agitated by the suggestion that these alternate ventilation controls might be used in lieu of his suggested stoppings plan. I find credible Mr. **Mucho's** testimony that he informed the group who were present of his view that the use of curtains would result in an air change and that he tried to convince them to adopt and follow the stoppings plan that he had developed. I also find credible Mr. Mucho's belief that the use of any of the alternative ventilation devices other than stoppings would result in an air change and a potentially dangerous situation and I conclude and find that Mr. Mucho's safety concerns were reasonable and good faith conclusions based on his ventilation expertise and the facts then known to him.

Although Mr. Mucho conceded that he may not have clearly and directly made his safety concerns known during the initial discussion at the mine map, Mr. Duvall confirmed that Mr. Mucho commented about air changes and lack of control over the air pressure if stoppings were not used, and Mr. Duvall agreed that using check curtains would be unsafe. Further, Mr. Black confirmed that Mr. Mucho stated that doing anything other than using his stopping plan would create a dangerous situation, and he confirmed that he understood what Mr. Mucho meant by this statement.

Mr. Mucho's credible testimony, which is essentially corroborated and un rebutted by Mr. Duvall, further establishes that after the mine map discussion, Mr. Mucho went to Mr. Duvall's office and directly and unequivocally communicated to him his safety concerns about ignoring his stoppings ventilation plan and using any of the other alternative methods which were the topic of the group discussion. This communication by Mr. Mucho included a veiled warning to Mr. Duvall that he would be held accountable as the mine foreman for any ventilation breakdown and resulting hazardous conditions, including possible violations of the law.

I conclude and find that Mr. Mucho's discussions at the mine map concerning the safe cut-through procedures and the need to maintain proper ventilation, and his subsequent conversation with mine foreman Duvall in his office were safety related and in the nature of safety complaints and communications based on Mr. Mucho's reasonable and good faith belief that the failure to follow his ventilation stoppings plan would likely result in serious ventilation problems and potential safety hazards. Accordingly, I conclude and find that the articulation and communication of these safety concerns by Mr. Mucho was protected activity, and the respondent would be prohibited from discriminating against Mr. Mucho because of that activity. I further conclude and find that the filing of his discrimination complaint after his transfer to the central office was also protected activity, and the respondent would likewise be prohibited from discriminating against Mr. Mucho for filing the complaint.

The evidence establishes that the respondent promptly responded to Mr. Mucho's safety concerns by immediately constructing the ventilation stoppings in question, and Mr. Mucho himself conceded that he knew as soon as he spoke with Mr. Duvall in private that his recommended ventilation plan for the cut-through would be followed.

#### Mr. Mucho's Transfer of February 8, 1991

As the complainant in this case, Mr. Mucho has the burden of establishing by a preponderance of all of the credible evidence

that his protected safety concerns during the mine map discussions and his protected safety complaint to mine foreman Duvall on January 24, 1991, was known to those management officials who he claims made the decision to transfer him from the head engineer's position at Mine No. 84 to a staff engineer's position at the central office, and that the decision to transfer him was in part based on his complaint. In short, Mr. Mucho must establish a nexus between his safety complaint and the adverse personnel action (transfer). **See:** Sandra Cantrell v. Gilbert Industrial, 4 FMSHRC 1164 (June 1982); Alvin Ritchie v. Kodak Minins Comnanv, Inc., 9 FMSHRC 744 (April 1987); Eddie D. Johnson v. Scotts Branch Mine, 9 FMSHRC.1851 (November 1987); Robert L. Tarvin v. Jim Walter Resources, Inc., 10 FMSHRC 305 (March 1988); Connie Mullins v. Clinchfield Coal Comnanv 11 FMSHRC 1948 (October 1989).

As noted earlier, in the absence of any direct evidence that management's decision to transfer Mr. Mucho was motivated in part by his safety complaint, a discriminatory motive may be determined by circumstantial evidence showing that management knew he had made the complaint and were hostile towards him because of the complaint, the coincidence in time between the complaint and transfer, and any disparate treatment accorded Mr. Mucho. Reasonable inferences of motivation may be drawn from such circumstantial evidence, Secretary ex rel. Chacon v. Phelps Dodae Corn., *sunra.* Sammons v. Mine Services Co., *sunra.* However, it has been held that an employee's "mere conjecture that the employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment". Branson v. Price River Coal Co., 853 F.2d 768, 46 FEP Cases (BNA) 1003 (10th Cir. 1988). There must be evidence of discriminatory intent or evidence from which a reasonable inference of discriminatory intent can be drawn.

The critical question in this case is **not** whether the respondent treated Mr. Mucho in a reasonably fair manner when he was transferred, but whether or not that transfer was made in part because of his engaging in a protected activity. As appropriately noted by Judge Broderick in Jimmv Sizemore and David Rife . Dollar Branch Coal Comnanv, 5 FMSHRC 1251, 1255 (July 1983), ". . .the Commission has no responsibility to assure fairness in employment relations or to determine whether an employee was discharged for cause, but only to protect miners exercising their rights under the Act". And, as stated by the Commission in Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982), "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as **claimed.**"

Mr. Mucho does not allege that his removal as manager of the No. 84 Mine by Mr. Fisher on December 7, 1990, was discriminatory.

Mr. Fisher's credible testimony establishes that his decision to make a management change and to place Mr. Metheny and Mr. Jones in charge of the mine was based on his belief that the mine could be operated more efficiently by a change in management. In the absence of any evidence to the contrary, I conclude and find that as president of the company, it was well within Mr. Fisher's managerial discretion to remove Mr. Mucho as mine manager. As a matter of fact, Mr. Mucho agreed that the mine was a struggling and borderline operation that was in need of more discipline, and he confirmed that it was his desire to stay on as head of the engineering department because that job had less pressure and offered him better job security in the event the mine were sold (Tr. 28-30; 39-40).

The thrust of Mr. Mucho's complaint is his belief that Mr. Jones found out about the cut-through discussion of January 24, 1991, and threatened to fire him the next day over that incident. Although Mr. Jones did not follow through with his alleged threat to fire Mr. Mucho, Mr. Mucho nonetheless suggests that Mr. Jones perceived his safety concern as an interference with Mr. Jones' authority to manage the mine or an interference with the **longwall** production schedule, and decided to have him transferred. Mr. Mucho further asserts that Mr. Metheny, at the request of Mr. Jones, and with the approval of Mr. Fisher, made the decision to transfer him, and that all three of these management officials conspired to transfer him because of the cut-through incident of January 24, 1991.

The evidence establishes that the decision to transfer Mr. Mucho to the central office was made by Mr. Metheny and not by Mr. Jones. Mr. Fisher accepted Mr. **Metheny's** judgement that Mr. Mucho should be transferred and he concurred in the decision. Mr. Metheny and Mr. Fisher denied any knowledge of the **cut-through** incident prior to the transfer, and they denied ever discussing the matter with Mr. Jones prior to the transfer. They testified that they first learned about the cut-through discussion after Mr. Mucho filed his complaint. Having viewed Mr. Metheny and Mr. Fisher in the course of the hearing, I find them to be straightforward and credible witnesses, and I believe that they were unaware of Mr. **Mucho's** cut-through safety concerns or his conversation with Mr. Duvall prior to Mr. Mucho's transfer. Accordingly, I find no credible evidentiary support for Mr. Mucho's suggestion that Mr. **Metheny's** decision to transfer him, and Mr. Fisher's concurrence in that decision, were prompted or motivated in any part by the safety concerns raised by Mr. Mucho during the cut-through discussion at the mine map or during his subsequent conversation with foreman Duvall.

Mr. Mucho's conclusion that Mr. Fisher and Mr. Metheny were aware of the cut-through discussions prior to his transfer is based in part on Mr. Mucho's speculative belief that such a

transfer could not have been accomplished without a discussion among higher management officials such as Mr. Fisher and operations manager Brisky (Tr. 111). However, Mr. Brisky, who was retired at the time he was deposed and had nothing to lose by testimony favorable to Mr. Mucho, made no mention of any such discussion that he may have participated in, and it would appear from his testimony that he was not even consulted about Mr. Metheny's decision to transfer Mr. Mucho. Mr. Fisher and Mr. Metheny confirmed that they discussed Mr. Mucho's transfer prior to Mr. Metheny's decision of February 8, 1991, but there is no evidence or any supportable inferences that the discussion included the cut-through incident of January 24, 1991.

I find no credible evidence of any animus on the part of Mr. Metheny or Mr. Fisher towards Mr. Mucho. Indeed, at the time that Mr. Fisher decided to relieve Mr. Mucho of his mine manager's responsibilities, rather than firing him or transferring him at that time, Mr. Fisher decided to keep Mr. Mucho at the mine at the urging of Mr. Metheny who believed that Mr. Mucho could make a meaningful contribution in an engineering capacity. Mr. Metheny and Mr. Mucho confirmed that after Mr. Mucho was transferred, Mr. Metheny visited and spoke with Mr. Mucho at his new job in the central office on two or three occasions, and I find no evidence of any ill-will on the part of Mr. Metheny towards Mr. Mucho, and Mr. Mucho has not asserted, nor has he established, that Mr. Metheny was angry with him or exhibited any hostility towards him. As for Mr. Fisher, although he expressed some personal reservations about Mr. Mucho's management skills, I find no evidence of any hostility or ill-will on his part towards Mr. Mucho. Indeed, even after Mr. Mucho filed his discrimination and EEOC age discrimination complaints, Mr. Fisher met with him to discuss his job situation and there is no evidence or suggestion that this meeting was other than cordial, nor is there any evidence that Mr. Fisher ever exhibited any hostility or anger towards Mr. Mucho during their employment relationship.

Mr. Mucho confirmed that when he served as mine manager, and in order to address certain management and supervisory problems, he too made decisions affecting mine personnel, including removals and reassignments (Tr. 175-181). He also confirmed that he participated in management discussions and decisions which included the monitoring of the performance of foreman Durko, which subsequently resulted in his cut in pay and subsequent retirement, and the lay off of foreman Error (Tr. 221-232). Further, Mr. Mucho candidly admitted that the appointment of Mr. Jones by Mr. Fisher to the No. 84 Mine was in response to management problems that Mr. Mucho himself had been reporting for a couple of years (Tr. 175).

The record in this case reflects that Mr. Mucho was not the only managerial employee affected by Mr. Fisher's decision to install a new management team at the No. 84 Mine. Mr. Metheny

confirmed that during the period from December, 1990, through the first part of February, 1991, he brought in a superintendent, a shift foreman, and a longwall foreman from another mine (Tr. 96). Mr. Bookshar, who previously headed the engineering department when Mr. Mucho was mine manager, did not return to that position after Mr. Mucho was transferred, and Ms. Cooley was placed in charge of engineering (Tr. 119).

Mr. Fisher relieved Mr. Brisky from his position of senior manager of mine operations at the same time that Mr. Mucho was relieved of his mine manager's duties, and Mr. Brisky subsequently retired on February 1, 1991 (Tr. 10; 240). Mr. Black, who testified that he felt pressured by Mr. Jones, and that Mr. Jones threatened to fire him on many occasions, is still employed at the mine as the senior management person and superintendent of underground operations. Mr. Jones has since left his employment and retired after a disagreement with Mr. Fisher about another position and pay. Mr. Mucho's personal log contains entries for February 13 and 22, 1991, March 12, and July 29, 1991, confirming several additional managerial lay offs, a job elimination, and additional reassignments and changes among foremen and other managers.

Mr. Mucho characterized Mr. Jones as a very hard worker who worked long hours and who was well informed as to what needed to be accomplished at the mine when he and Mr. Metheny assumed their managerial roles (Tr.24, 45-46). Mr. Jones conceded that his management style was "very aggressive and a lot of discipline", and the respondent's counsel conceded that Mr. Jones' management style included threatening people with discharge (Tr. 26, 28-29). The fact is, however, that Mr. Jones never followed through with his January 25, 1991, statement to Mr. Hayden that he should fire Mr. Mucho, and he decided to keep Mr. Mucho on because he believed he could make a contribution. Two weeks passed before Mr. Metheny made the decision to transfer Mr. Mucho and he advised Mr. Jones of his decision by telephone.

Mr. Mucho conceded that his conclusion that Mr. Jones found out about the cut-through discussion was based on his perception of a change in Mr. Jones' "actions and behavior" towards him which made him "suspicious" (Tr. 107). However, I take note of Mr. Mucho's testimony that prior to his transfer on February 8, 1991, he and Mr. Jones had a relaxed congenial relationship, and that on the very day of the cut-through discussion of January 24, 1991, he and Mr. Jones had a congenial meeting and Mr. Jones never mentioned that incident (Tr. 48-49: 168). I also take note of Mr. Jones's testimony that prior to the cut-through matter, his opinion of Mr. Mucho changed, and he removed Mr. Mucho from the management "chain of command" of people who would fill for him in his absence (Tr. 17).

Mr. Jones testified that he harbored no animosity towards Mr. Mucho. Mr. Black, who also experienced a feeling of aloofness on the part of Mr. Jones, testified that Mr. Metheny told him that Mr. Jones felt inferior and intimidated by Mr. Black's knowledge. Mr. Black characterized the relationship between Mr. Mucho and Mr. Jones as "businesslike and not overly friendly" (Tr. 74), and although Mr. Black stated that Mr. Jones once told him that he did not like Mr. Mucho, on further questioning, Mr. Black conceded that he could not recall whether Mr. Jones actually made such a statement of whether he deduced it from their **conversation**. Mr. Black also testified that during the time that Mr. Jones was in charge of the mine and Mr. Mucho was still there, the salaried personnel in general were not speaking to each other and it was a tense period of apprehension and mixed loyalties.

Mr. Black testified to a conversation he overheard on January 18, 1991, while underground with Mr. Jones and several union and mine officials. He stated that Mr. Jones made a statement that he would fire foremen if it was necessary and that **"he almost fired Tom Mucho last Friday"** (Tr. 31). Mr. Black recorded this incident in his personal log (Exhibit C-93), but he could not further explain the statement attributed to Mr. Jones and he did not know whether it was true and simply recorded what he heard. In the absence of any further clarification and explanation, I cannot conclude that this **purported** isolated statement by Mr. Black sufficiently establishes animus on the part of Mr. Jones towards Mr. Mucho. The fact is that Mr. Jones did not fire Mr. Mucho, and three weeks passed before Mr. Mucho was transferred by Mr. Metheny.

I find no credible evidence that Mr. Jones ever expressed any animosity towards Mr. Mucho directly, or that he openly expressed his anger or showed any dislike of Mr. Mucho in his presence. Mr. Jones does not deny that he was upset with Mr. Mucho when he spoke with Mr. Hayden on January 25, 1991, nor does he deny that he made the statement that he should fire Mr. Mucho. However, as previously noted, Mr. Jones did not follow through with his threat to fire Mr. Mucho, and he asserted that his displeasure with Mr. Mucho stemmed from his frustration with the engineering department, his belief that he was not being accorded any respect and was being given the runaround, and his feeling of pressures from Mr. Metheny and Mr. Fisher to complete the 33 Mains project.

Mr. Jones, Mr. Metheny, and Mr. Fisher all denied any connection between Mr. **Mucho's** cut-through safety complaint and his transfer of February 8, 1991. Three additional credible witnesses testified to other reasons for the transfer. Superintendent Hasbrouck testified that Mr. Fisher told him that Mr. Mucho was transferred because his continued presence at the No. 84 Mine was "awkward and uncomfortable", and Mr. Hasbrouck

interpreted this to mean that Mr. Mucho, as the former mine manager, clashed with the newly appointed management. Mr. Mucho's personal journal has an entry for February 11, 1991, 3 days after his transfer, which reflects a statement by Mr. Hasbrouck that Mr. Mucho was transferred because his presence at the mine was awkward for both management and Mr. Mucho. Assistant Mine Inspector Ross testified that Mr. Hayden told him that Mr. Mucho was transferred because his presence at the mine as the former manager was disruptive because people continued to go to him with their problems rather than going to the new management.

Human Resources Manager Robertson testified that he believed Mr. Mucho was transferred because the mine lost money and had a poor performance record under Mr. Mucho's management, and that after new management came in, there was a "divided loyalty situation" at the mine. Mr. Robertson's testimony is consistent with an entry in Mr. Mucho's journal on March 1, 1991, noting a statement by Mr. Robertson that he told Mr. Fisher that Mr. Mucho was "caught up in situation and that what happened with the long-wall would have happened anyway". The notation also reflects a statement by Mr. Robertson that the performance of the No. 84 Mine "was the worst in its history" and that Mr. Mucho just happened to be manager.

The focal point of Mr. Mucho's suspicion that Mr. Jones learned about the cut-through matter prior to his transfer is the testimony of Ms. Cooley. In her pretrial deposition, Ms. Cooley testified to a conversation that she had with Mr. Hayden on or about the day that Mr. Mucho was cleaning out his office at the mine to move to the central office. Ms. Cooley could not recall Mr. Hayden's exact words. She testified that the "general gist" of the conversation was Mr. Hayden's reference to an earlier "incident" about an air change when sections 7A and 53P were cutting into each other, and Mr. Mucho's "concerns about how some people wanted to do it". Ms. Cooley "guessed" that there had been "a scene" and that Mr. Jones was "very mad about that, and had wanted to fire Tom because of that". Ms. Cooley further stated that Mr. Hayden mentioned that Mr. Mucho had not passed on certain unspecified information to Mr. Jones, Mr. Jones' feeling that "a ship couldn't have two masters", his belief that people continued to seek out Mr. Mucho for decisions, and Mr. Jones' feeling that he would never be able to be in charge of the mine while Mr. Mucho was still there.

At trial, Ms. Cooley confirmed that she made no notes of her conversation with Mr. Hayden. She reiterated her previous deposition testimony and confirmed that Mr. Hayden told her that Mr. Jones had informed him that Mr. Mucho was transferred from the mine because "a ship could not have two masters" and that people still went to Mr. Mucho for decisions and advice because he had previously been in charge for so long.

Mr. Bookshar testified that after Mr. **Mucho's** transfer, Ms. Cooley told him about her conversation with Mr. Hayden and informed him that Mr. Hayden told her that Mr. Jones was mad about the cut-through incident and wanted to fire Mr. Mucho at that time over that matter. Mr. Bookshar confirmed that Ms. Cooley also told him about the comment that "**a ship cannot have two masters**", but he could not recall that Ms. Cooley said anything about people continuing to rely on Mr. Mucho, or Mr. **Jones'** feeling that he would never be in charge of the mine as long as Mr. Mucho was still there. There is no evidence that Mr. Bookshar ever spoke with Mr. Hayden about the cut-through matter, and whatever he knew about the matter he learned **second-hand** from Ms. Cooley. Having viewed Mr. Bookshar during his testimony, I detected that he was not too enchanted with Mr. Jones, and given the fact that he was not retained as head of the engineering department, and characterized himself as a very good friend of Mr. Mucho, I am not convinced that his testimony was totally unbiased.

Mr. Mucho confirmed that he began keeping a detailed log or journal on December 7, 1990, the **day he** was removed as mine manager, and that he did so out of concern for his employment situation. He believed that it was in his best interest to keep a log because he knew about Mr. **Jones'** management style and reputation as "**a tree shaker**". However, I take note of Mr. **Mucho's** admission that **he made** no contemporaneous journal **entry** about the cut-through incident and his disagreement and objections about proceeding with the cut-through without following his stopping plan, and that he added a journal entry covering that event at a much later time (Tr. 169; Tr. R-20). Given Mr. **Mucho's** obvious concern for his continued employment situation after his removal as mine manager, and his decision to keep a log for his own protection, I find it strange that Mr. Mucho did not deem it particularly important to make the cut-through journal entry on January 24, 1991, when the event occurred.

Mr. **Mucho's** journal contains the following notation for February 11, 1991:

Per BB.Fran in mtg. **w/MJ** on **2/8/91**. M. J. indicated that there was too much allegiance to T.P.M. Can't have 2 bosses (Masters) and that's why TPM was moved to **C.O.** According to **MJ**, there were a couple of incidents (of disloyalty) that made him mad.

Mr. **Mucho's** journal contains the following entry for February 15, 1991:

Talked to Fran C. . . **Said** Bill B. is "**spastic**" over events. Said he had meeting **w/MJ** this AM about this. Asked her about what BB said **MJ** told her about why I

was transferred. She said that CH was one that told her about me being moved due to loyalties, people coming to me for things, etc. Said she **didn't** remember MJ saying that but CH (who must have gotten from MJ) talked to RB & WR.

An additional journal entry by Mr. Mucho on February 15, 1991, is a comment concerning his belief that management's putting his brother "on notice" appeared to be in retaliation against Mr. Mucho and his "loyalists".

My interpretation of Mr. **Mucho's** journal entries for February 11, and 15, 1991, is that within a week after his transfer of February 8, 1991, during conversations with Ms. Cooley, Mr. Mucho was told that the reasons he was transferred were Mr. Jones' belief that there was too much loyalty to Mr. Mucho and that the mine cannot have two bosses. There is absolutely no mention of the cut-through event of January 24, 1991, in these journal entries, nor is there any statement or hint that the cut-through incident had anything to do with Mr. Mucho's transfer. However, subsequent journal entries on March 10, and 11, 1991, more than one month after the transfer, contains a notation that Mr. Bookshar spoke with Mr. Mucho on those days and advised him that he "**had** heard" that the transfer "revolved around" the cut-through incident, and that Mr. Jones found out about it and was going to fire Mr. Mucho on the spot **over** that incident, but **was** convinced by Mr. Hayden to think about it over the weekend. A second notation reflects a statement by Mr. Bookshar expressing his concern that he and Ms. Cooley were the "**only** ones who knew info. about MJ going to fire me over air incident".

Ms. Cooley testified that she spoke with Mr. Hayden on or shortly after February 8, 1991, the day Mr. Mucho was transferred, and that the general gist of the conversation was that Mr. Jones was upset and mad at Mr. Mucho because of the **cut-through** incident and wanted to fire him over that matter. Mr. **Bookshar's** testimony reflects that he learned about Ms. **Cooley's** conversation with Mr. Hayden from Ms. Cooley during a conversation with her after Mr. **Mucho's** transfer. Yet, nowhere in Mr. Mucho's journal entries of February 11, and 15, 1991, is there any mention of Mr. Hayden's purported statements to Ms. Cooley that Mr. Jones had threatened to fire Mr. Mucho over the cut-through incident. It seems reasonable to me that if Mr. Hayden had in fact made the statements attributed to him by Ms. Cooley, she would have communicated this to Mr. Mucho during their conversation of February 15, 1991, when he asked her about her knowledge of any reasons for his transfer. Her apparent failure to do so at that time raises a question in my mind about Ms. **Cooley's** credibility and the reliability and probative value of her testimony concerning her purported cut-through conversation with Mr. Hayden.

Mr. Mucho confirmed that he spoke with Ms. Cooley on February 15, 1991, and that she did not mention the cut-through incident. Mr. Mucho explained that he considered the statements "divided loyalties", "a ship not being able to have two masters", etc., which were communicated to him by Ms. Cooley as reasons for his transfer, to be "code words", and he probed no further and asked Ms. Cooley no further questions because he did not want to put her "on the spot" (Tr. 187-188). Mr. Mucho also confirmed that he never spoke to Mr. Hayden about his conversation with Ms. Cooley, and he explained that he did not feel "close enough" to Mr. Hayden to speak with him about his knowledge of the reasons for his transfer and the statement attributed to him by Ms. Cooley (Tr. 239).

Mr. Mucho further confirmed that when he spoke with human resources manager Robertson on March 1, 1991, less than a month after his transfer, he acknowledged to Mr. Robertson that it was obvious that the respondent had no plans for him and that he (Mucho) would be leaving and would be amenable to talking about a severance arrangement (Tr. 117-118). Under these circumstances, and considering the fact that Mr. Mucho had kept a rather detailed journal to protect his employment interests, had received information from Ms. Cooley and Mr. Bookshar which suggested some ulterior motive for his transfer, and Mr. Mucho's recognition that his continuous employment was on tenuous grounds, I find it difficult to understand why he abandoned any further efforts to pursue the cut-through matter with Ms. Cooley and Mr. Hayden. His failure to do so, coupled with his admission that he included a reference to the cut-through incident in his journal well after the event as an after-thought, raises a serious credibility doubt in my mind concerning Mr. Mucho's after-the-fact suspicion and speculation that Mr. Jones found out about the cut-through incident and somehow convinced Mr. Metheny and Mr. Fisher to transfer Mr. Mucho because of that incident.

On the basis of the foregoing findings and conclusions, and after careful scrutiny of all of the testimony and evidence in this case, I find no credible evidence to support a conclusion that Mr. Jones was aware of Mr. Mucho's safety concern or complaint concerning the cut-through, and that as a result of that knowledge, he somehow convinced Mr. Metheny or Mr. Fisher to transfer Mr. Mucho to the central office because of that incident. Even if Mr. Jones had knowledge of the cut-through incident, for the reasons which follow, I cannot conclude that this had anything to do with the decision to transfer Mr. Mucho to the central office. I conclude that Mr. Mucho would have been transferred in any event.

As noted earlier, the decision to transfer Mr. Mucho was made by Mr. Metheny, with Mr. Fisher's blessing. I find no credible evidence to establish that Mr. Jones was consulted before the decision was made by Mr. Metheny to transfer

Mr. Mucho. After careful review of Mr. Jones' testimony, it seems obvious to me that after the initial "honeymoon period" of two or three weeks after Mr. **Jones'** initial arrival at the mine was over, Mr. Jones began losing confidence in Mr. Mucho and had reservations and misgivings about his continued presence at the mine.

Mr. Jones testified that as time passed, his opinion of Mr. Mucho changed, and Mr. Jones removed Mr. Mucho from the "**chain of command**" of individuals who would fill in for him in his absence. Mr. Jones also expressed some misgivings about the offensive tone of a letter drafted by the engineering department and mailed to a State mining official over his signature. Mr. Jones expressed his frustrations and dissatisfaction with the engineering department, and he questioned the accuracy and credibility of the engineering information which he was receiving and passing on to higher management officials. Mr. Jones also felt that he was being misled by the engineering department, that he sensed "**factions**" who relied on Mr. Mucho, that he could not receive any unbiased opinions from the engineering department, and that the information he was receiving was being rearranged because the department did not want to go against Mr. Mucho. Some of the information received by Mr. Jones resulted in his communicating with Mr. Fisher and confessing error, and inviting Mr. Fisher to fire him if he deemed it appropriate.

Mr. Jones testified that he informed "everyone in management" of his discomfort with the situation which existed at the mine and he characterized it as "**a constant every-day battle**". I believe that it is reasonable to conclude that Mr. Jones discussed his management problems with Mr. Metheny and that Mr. Metheny was aware of his frustrations. I also believe and find credible Mr. **Metheny's** belief that Mr. Jones did not have the total support of all management personnel at the No. 84 Mine, and that there were divided loyalties toward Mr. Mucho and Mr. Jones. I also find credible support for a conclusion that there was friction over Mr. Jones' threatening management style, which was in contrast to Mr. Mucho's previous management style prior to his removal as manager.

I conclude and find that Mr. **Metheny's** explanation that he transferred Mr. Mucho after concluding that mine personnel were not responding to Mr. Jones, and that Mr. Mucho's continued presence at the mine was disruptive, were reasonable and plausible reasons for the transfer. I further conclude and find that Mr. Metheny and Mr. Fisher acted well within their managerial and discretionary authority in effecting Mr. Mucho's transfer, and that they were free to make managerial judgments which they reasonably believed would result in a productive and harmonious mine operation. I reject Mr. Mucho's suggestions that mine management, namely, Mr. Jones, Mr. Metheny, and Mr. Fisher, conspired to transfer him from the No. 84 Mine to the central

office because of the safety concerns that he expressed in connection with the cut-through matter of January 24, 1991.

Mr. Mucho's June 7, 1991, Lay Off

Mr. Mucho alleges that the respondent terminated his employment on June 7, 1991, and laid him off out of retaliation for the filing of his MSHA discrimination complaint on March 28, 1991.

I take note of the fact that from the day he was removed as mine manager by Mr. Fisher on December 7, 1990, until he was laid off, Mr. Mucho continued to receive his full salary at the pay level of a mine manager. I assume that the respondent could have revised Mr. Mucho's job description and made an adjustment in his salary to reflect his new position as a project engineer when he was transferred to the central office on February 8, 1991, but it did not do so. Even after he filed his complaint with MSHA and a simultaneous age discrimination complaint with the State EEOC, Mr. Mucho's salary remained unchanged until he was laid off. It seems to me that if the respondent wanted to retaliate against Mr. Mucho it would have cut his pay to reflect his new job responsibilities rather than allowing him to retain his mine manager's pay for more than two months after his discrimination complaint was filed.

I believe that Mr. Mucho's tenuous employment situation with the respondent began on December 7, 1990, when company president Fisher removed him as mine manager and replaced him with the Metheny-Jones management team. I conclude that Mr. Mucho realistically appraised his prospects for continued employment with the respondent at that time, and for that reason he began consolidating his notes and keeping a detailed log or journal for his own protection. Mr. Mucho candidly admitted that upon his removal as head of the engineering department and transfer to the central office he knew that he had been "effectively terminated" and that it was "only a matter of time" before he would be terminated (Tr. 184). He also confirmed that he also made that statement to Mr. Fisher during a subsequent meeting with him after he had filed his complaint (Tr. 193).

Mr. Mucho testified that he met with human resources director Robertson on March 1, 1991, approximately a month before he filed his complaint, and that he suggested a severance arrangement to Mr. Robertson and informed him that "it's obvious they have no plans for me, as far as I'm concerned, I'm going out" (Tr. 117-118). Mr. Robertson confirmed that he met with Mr. Mucho before he filed his complaint and that Mr. Mucho informed him that he wanted to leave the company and briefly mentioned a severance settlement, but he did not mention the cut-through incident. **Mr.** Robertson's credible and un rebutted testimony further reflects that he had a second meeting with

Mr. Mucho after he filed his complaint, and Mr. Mucho at that time informed Mr. Robertson that he wanted a severance settlement amounting to 2 to 3 years of his salary. Mr. Robertson informed Mr. Mucho that this was beyond what the company could offer.

The record reflects that approximately a month after filing his complaint, Mr. Mucho received a job offer as a project engineer from the superintendent of the No. 33 Mine. Mr. Mucho testified that he rejected the offer because the job offered no security, it was not a comparable job, and he would have a **two-**hour commute and would have to take a 9.4 percent pay cut. Mr. Robertson confirmed that he informed Mr. Mucho that he would take a pay cut if he accepted the job, but he pointed out that Mr. Mucho would have been at the top of the pay scale for that position. Mr. Mucho subsequently rejected the job after consulting his attorney, and Mr. Robertson testified that when Mr. Mucho rejected the job he gave him no reasons other than his belief that it was not a legitimate offer. The record also reflects that in addition to the engineer's job offer at the No. 33 Mine, Mr. Mucho was informed that someone had inquired at that mine about possible plant foreman or first line supervisory positions for Mr. Mucho, but that the individual to whom the inquiry was addressed did not want to **"insult"** Mr. Mucho with such offers. Mr. Robertson confirmed that he made an effort to find a job for Mr. Mucho by submitting his name to Bethlehem Steel for possible placement, but no response was forthcoming.

Mr. Fisher confirmed that he met with Mr. Mucho on May 15, 1991, after the complaint had been filed, and that Mr. Mucho **"made** it very, very clear to me that too much water had gone under the bridge, that he felt that he had to sever his relationship with Bethlehem Steel **and Bethenergy"** (Tr. 256). Mr. Hasbrouck testified that Mr. Fisher informed him about his meeting with Mr. Mucho and told him that Mr. Mucho was adamant and that he wanted to leave the company. Mr. Hasbrouck further testified that he had previously discussed with Mr. **Mucho's** his assignment to his office and his job situation and that Mr. Mucho told him that **"he** just wanted out of this company. He had enough of Bethenergy and wanted to leave" (Tr. 156). Mr. Hasbrouck also confirmed that Mr. Fisher informed him that Mr. **Mucho's** assignment to his office was temporary (Tr. 148).

Mr. Fisher further testified that in view of Mr. **Mucho's** statement that he did not wish to remain with the company, and in light of his prior rejection of a job offer at the No. 33 Mine, he (Fisher) did not offer to retain Mr. Mucho in a human resources position that may have been available after the retirement of the individual in that position. Mr. Fisher concluded that it would have been fruitless to offer Mr. Mucho that position, and he believed that it became obvious that the next step would be Mr. **Mucho's** termination.

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A week following Mr. Mucho's meeting with Mr. Fisher, Mr. Robertson informed Mr. Mucho that the No. 33 Mine job offer was the only offer available for him and that if he did not accept it, he would be laid off effective June 7, 1991. Mr. Fisher confirmed that Mr. Mucho was terminated because he had made it absolutely clear to him during their meeting that his future plans did not include Bethlehem Steel or Bethenergy, and that after Mr. **Mucho** rejected the NO. 33 Mine job offer there was no place for him to go. Mr. Fisher further confirmed that before Mr. Mucho left the company, a decision was made that the small technical support group at the central office could no longer be justified, and that the No. 84 Mine is for sale.

I find no credible evidence to support a conclusion that the respondent was motivated to lay off Mr. Mucho because of the filing of his discrimination complaint challenging his transfer to the central office. Nor do I find any credible evidence that the proffered justification for Mr. Mucho's transfer and subsequent lay off some four months later was pretextual. To the contrary, I conclude and find that a combination of factors unconnected with Mr. Mucho's cut-through safety concerns and his complaint over that incident, culminated in his inevitable lay off on June 7, 1991. These factors include the fact that Mr. Fisher considered Mr. Mucho's transfer to be a temporary measure while attempts were being made to find a place for him in the organization, Mr. Mucho's own candid recognition that his days with the company were numbered when he was initially transferred to the central office with virtually little or no work to do, the respondent's rejection of Mr. Mucho's suggested severance pay settlement of the matter, and Mr. Mucho's consistent and un rebutted statements to Mr. Hasbrouck, Mr. Robertson, and Mr. Fisher that he wished to end his relationship with the respondent and its parent company. Under all of these circumstances, I cannot conclude that Mr. Fisher's decision that Mr. Mucho should be laid off was unreasonable, or that his stated reasons for this personnel action were less than plausible.

#### Additional Acts of Alleged Retaliation.

Mr. **Mucho's** MSHA discrimination complaints are confined to his transfer and subsequent lay off. However, in the course of the hearing Mr. Mucho raised additional claims of alleged retaliation by the respondent because of the filing of his discrimination complaint. Mr. Mucho asserted that the respondent retaliated against him by initially contesting his unemployment claim, denying him severance pay benefits under a company Income Protection Plan (IPP), posting a notice about him on April 21, 1991, at the No. 84 Mine stating that he was not authorized to be there, and paying him only up to the last day he worked rather than through the end of the month, or at least for half a month, as was the usual company practice (Tr. 127-134). Mr. Mucho also suggested that his brother's lay off on March 5, 1991, and

Mr. Nucettelli's brief transfer to the portal to fill in for an outside foreman "were generally retaliatory in nature" (Tr. 130-132). Mr. Mucho further asserted that he was discriminated against by certain statements purportedly made by Mr. Jones reflecting that part of the respondent's goal was to rid themselves of some of its older and experienced employees (Tr. 214-215).

#### Unemployment Compensation Claim.

Although the paperwork initiated in connection with Mr. Mucho's unemployment compensation claim suggests that Mr. Mucho may have quit his job, respondent's counsel conceded that the respondent does not take the position that Mr. Mucho quit (Exhibits C-87, C-32, C-33; Tr. 203). The respondent's benefits coordinator, A.S. Berchin, whose name appears on some of the correspondence relating to Mr. Mucho's claim, was not called to testify or to explain the matter further. Mr. Robertson, respondent's manager of human resources, confirmed that the corporate legal department initially challenged the claim and took the position that Mr. Mucho had quit his job. Mr. Robertson further confirmed that he disagreed with the legal department's view that Mr. Mucho quit his job, and he believed that Mr. Mucho was in a lay off situation. In any event, the respondent did not appear at the initial hearing to contest Mr. Mucho's claim, and Mr. Mucho received his unemployment compensation benefits.

Mr. Robertson confirmed that he was not involved in Mr. Mucho's initial removal as mine manager or his reassignment to the central office, and I find no evidence to the contrary., Mr. Mucho's speculative suggestion that the respondent retaliated against him by opposing his compensation claim is not supported by any credible evidence of record, nor is there any evidence to support any reasonable inferences that Mr. Fisher, Mr. Metheny, Mr. Jones, and the respondent's legal department entered into some sort of conspiracy to deprive Mr. Mucho of his rightful unemployment compensation. Under the circumstances, Mr. Mucho's retaliation allegation IS REJECTED.

#### Severance Pay and Other Pay Benefits.

The respondent's policies and procedures concerning the reduction in force and compensation benefits for non-represented management employees are discussed in several Bethlehem Steel Corporation personnel office memorandums (Exhibit R-11). The memorandums were apparently circulated by L.C. Kesselring, Jr., who is identified as the Director of Personnel and Equal Employment. However, Mr. Kesselring was not called to testify or to explain these policies.

The record reflects that Mr. Mucho was paid \$4,157.81, for his vacation benefits, and in the absence of any evidence to the contrary, and according to the un rebutted testimony of Mr. Robertson, Mr. Mucho was eligible for some kind of a pension and a two-year continuation of his health care and life insurance benefits (Tr. 173-177). The record also reflects that Mr. Mucho received no cut in salary when he was relieved as mine manager, and he continued to be paid at that salary level after his transfer and up to the day of his lay off. I assume that the respondent could have changed Mr. Mucho's job title and paid him less money, but this was not done, and Mr. Robertson confirmed that a change in title would have resulted in a pay cut (Tr. 213).

The credible and un rebutted testimony of Mr. Robertson reflects that he and Mr. Mucho discussed a severance arrangement. Mr. Robertson was willing to consider the respondent's "usual severance arrangement", but he rejected Mr. Mucho's request for an "I.B.M. type settlement" amounting to 2 to 3 years severance pay. Mr. Robertson confirmed that he discussed the company benefits guidelines with Mr. Mucho, submitted Mr. Mucho's name to Bethlehem Steel for possible placement, and discussed another job offer with Mr. Mucho. Mr. Robertson further explained the reasons why Mr. Mucho was ineligible for the company's Income Protection Plan (IPP) and outplacement program.

Although Mr. Mucho contended that the usual company practice was to pay an employee through the end of the month, and that a former foreman who was laid off (Error) may have been paid through the end of the month even though he did not work the full month, I cannot conclude that Mr. Mucho has established that paying an employee through the end of the month, or at least for half a month, regardless of when he may have been terminated, was in fact a regular company practice. Even if this were established, I cannot conclude that there is any credible or probative evidence to support any reasonable conclusion that the respondent's failure to pay Mr. Mucho through the end of the month was in retaliation for his filing his discrimination complaints. After careful examination of Mr. Robertson's testimony, and having viewed him during his testimony, I find him to be a credible and candid witness and I cannot conclude that his treatment of Mr. Mucho was unfair. Indeed, Mr. Robertson was of the opinion that the cut-through safety issue raised by Mr. Mucho had nothing to do with the personnel actions taken against him, but were rather based on the fact that the No. 84 Mine had a poor performance record and did not succeed under Mr. Mucho's leadership. Mr. Robertson was of the further opinion that Mr. Mucho should have been let go in December, 1990, when Mr. Fisher appointed the new management to run that operation.

As noted earlier, Mr. Mucho's employment rights, including his severance rights, are covered by the respondent's personnel

policies and directives, and in the absence of any evidence of any illegal discriminatory motives prohibited by the Mine Act, Mr. Mucho must look to some other forum for relief if he believes that his salary and severance entitlements have been violated by the respondent. See: Jimmy Sizemore and David Rife v. Dollar Branch Coal Company, 5 FMSHRC 1251, 1255 (July 1983); Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982). Under all of these circumstances, I conclude and find that Mr. Mucho has failed to establish that the respondent retaliated against him by withholding certain salary and severance benefits, and his allegations in this regard ARE REJECTED.

The Posted Notice of April 21, 1991.

The mine notice which Mr. Mucho complained about is addressed to **"Dispatchers"**, and it signed by T. McGinty. The notice states as follows (Exhibit C-134):

You are to keep the gate closed at all times except shift change on weekends. Everyone who wants to enter the property must identify himself. Record their name and check number. Tom **Mucko** (sic) is not authorized to be at the mine. He is not permitted to enter the gate. If he comes into the building you are to call Tom Duvall and Tom McGinty immediately. You are to inform him that he is to leave the property.

Mr. Mucho confirmed that he went to the No. 84 Mine on Sunday, April 21, 1991, rather than during the regular work in order to avoid Mr. Jones. Mr. Mucho stated that he went to the mine to pick up some keys and that he called in advance to speak to Mr. Duvall who was normally there on Sunday. However, Mr. Duvall was not at the mine and Mr. McGinty was in charge. When Mr. Mucho arrived, Mr. McGinty informed him that he was instructed by Mr. Jones to follow him around the mine. Mr. Mucho, accompanied by Mr. McGinty, proceeded to the building housing the engineering offices, the foremen's offices, and Mr. Jones' office. Mr. Mucho was perturbed that Mr. McGinty had called Mr. Jones and Mr. Black and informed them that he was at the mine, and Mr. Mucho decided **"to have some fun"** with Mr. McGinty by pretending that he was looking through some file drawers. Mr. Mucho then left the mine after tiring of **"playing the game"** with Mr. McGinty, and Mr. **Mucho's** visit apparently prompted the posting of the sign (Tr. 197-199).

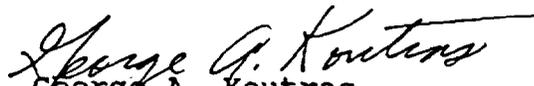
Mr. Mucho conceded that at the time of his Sunday mine visit he was not officially assigned to work there and Mr. Bookshar had informed Mr. Mucho about Mr. Black's instructions that he was not to do any further work on any engineering projects affecting the No. 84 Mine. There is no evidence that Mr. Mucho had advance permission to be on the mine premises. At the time of his visit Mr. **Mucho's** safety discrimination and EEOC age discrimination

complaints were pending and Mr. Mucho had retained a lawyer. Under the circumstances, and in view of the fact that Mr. Mucho apparently had free access to Mr. Jones' office and the company's files, and deliberately gave Mr. **McGinty** the impression that he was searching through the company records, I find nothing unusual in management's posting a notice barring any future unauthorized mine visits by Mr. Mucho. I conclude and find that mine management had a right to insure the integrity of its offices and files, particularly in situations that are in litigation. Further, it would appear that Mr. Mucho enjoyed his visit, and I find no evidence that the posting of the sign was in any way intended to retaliate against him for the filing of his discrimination complaints. Under the circumstances, Mr. **Mucho's** allegations concerning the posting of the **notice** ARE REJECTED.

Mr. **Mucho's** suggestions that his brother's layoff and Mr. **Nucetelli's** transfer to an outside foreman's position were somehow accomplished to retaliate against him or to punish his brother and Mr. Nucetelli because of his complaints ARE REJECTED. I find absolutely no evidence to support any such conclusion. Mr. **Mucho's** brother and Mr. Nucetelli had a right to file their own complaints if they believed they were discriminated against. Finally, Mr. Mucho's contention that he was discriminated against because of some purported statements by Mr. Jones that the respondent wanted to get rid of some older and experienced employees is a matter for consideration and adjudication in connection with Mr. Mucho's pending EEOC age discrimination **case**.

#### ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in these proceedings, I conclude and find that the complainant Thomas P. Mucho has failed to establish that his transfer of February 8, 1991, and his subsequent lay off of June 7, 1991, were discriminatory personnel actions **in violation** of section 105(c) of the Act, or were motivated by the respondent's intent to retaliate against him for exercising his protected safety rights under the Act. Even if Mr. Mucho had established a prima facie case, I would still find and conclude that it was rebutted by the respondent's credible evidence establishing reasonable and plausible management related non-discriminatory reasons for the actions in question. Under the circumstances, Mr. Mucho's complaints ARE DISMISSED, and his claims for relief ARE DENIED.

  
George A. Koutras  
Administrative Law Judge

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