

CCASE:
SOL (MSHA) V. LAD MINING
DDATE:
19930402
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : DISCRIMINATION
PROCEEDING :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-181-D

Petitioner :
v. : Mine No. 50
:
LAD MINING INCORPORATED, LARRY :
FLYNN AND RONALD CALHOUN, :
Respondent :

PARTIAL DECISION PENDING FINAL ORDER

Appearances: Gretchen M. Lucken, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington, Virginia,

for Petitioner;
Michael W. Boehm, Esq., and Thomas S. Kale,
Esq.,
Spears, Moore, Rebman and Williams,
Chattanooga, Tennessee, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

This case involves a discrimination complaint filed by the Secretary of Labor ("Secretary") on behalf of Jerry Lee Dotson pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2) ("Act" or "Mine Act"). The Respondents are Larry Flynn, Lad Mining, Inc. ("Lad") and Ronald Calhoun. The essence of Dotson's complaint is as follows: (1) that Dotson was working at Mine No. 50; (2) that the operator for whom Dotson was working went out of business and closed the mine; (3) that shortly, thereafter, the mine reopened under a new operator, Lad Mining, Inc., and that Larry Flynn, the owner of Lad, and Ronald Calhoun, the president of the company that leased coal rights to Lad, refused to hire Dotson to continue working at the mine because of Dotson's protected activity and in violation of Section 105(c)(1) of the Act.(Footnote 1)

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

No person shall discharge or in any manner

discriminate against or cause to be discharged or
cause discrimination against or otherwise interfere
with the exercise of the statutory rights of any
miner, representative of miners or applicant for
employment in any coal or other mine subject to this

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Dotson seeks "reinstatement" to his former position as a miner, back pay with interest, all employee benefits lost because of the refusal to hire, and compensation for economic damages resulting from the refusal to hire. Dotson also seeks a cease and desist order barring the Respondents from further discriminatory conduct against Dotson and other employees, and expungement from Dotson's records of all references to the circumstances giving rise to the failure to hire. In addition, the Secretary seeks assessment of a civil penalty against the Respondents for their alleged violation of Section 105(c)(1) of the Act. Tr. I 5, 11.(Footnote 2) A hearing on the merits of the claim of discrimination was held in Chattanooga, Tennessee. Helpful post-hearing briefs have been filed by counsels.

COMPLAINANT'S CONTENTIONS

At the commencement of the hearing, counsel for the Secretary outlined the case she intended to prove on Dotson's behalf. According to counsel, the evidence would show that prior to working at Mine No. 50, Dotson worked at Mine No, 15, where he made protected safety complaints to the operator, Lonnie Stockwell, about conditions at the mine.(Footnote 3) The evidence would

1 (...continued)

[Act] because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to the [Act], including a complaint notifying the operator or the operator's agent, or the representative of miners at the...mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be

instituted
any proceeding under or related to this [Act] or has
testified or
is about to testify in any such proceeding, or because of
the
exercise of such miner, representative of miners or
applicant for
employment on behalf of himself or others of any statutory
right
afforded by this [Act].

30 U.S.C. 815(c)(1)

2 During the course of the hearing I determined that evidence
relating to
restitution issues should be deferred pending my decision with
respect to
whether the Respondents violated Section 105(c)(1). Tr. I 94-95;
Tr. II 211.
Accordingly, this partial decision treats only the issue of the
alleged
violation.

3 Counsel maintained that Stockwell was a contractor-operator
of
Tennessee Consolidated Coal Corporation ("TCC"), that TCC
controlled the coal

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further show that Dotson also complained to the Mining Enforcement and Safety Administration ("MSHA") about conditions at the mine, and subsequent to his complaint, MSHA inspected the mine and issued citations and orders.

According to counsel, when Dotson complained to Stockwell about conditions at the mine he was told either to mine in the face of the conditions or to quite, and he quite. Tr. I 8-9. As a result, Dotson filed a discrimination complaint against Stockwell alleging that he had been subjected to a discriminatory discharge. However, a few days after filing the complaint he changed his mind and withdrew it. Id.

Counsel stated that shortly thereafter Dotson was hired by Alfred Meeks to work as a miner at Mine No. 50. Meeks, like Stockwell, was a contractor-operator of TCC. Counsel maintained that about one week after Dotson was hired, Calhoun went to Mine No. 50 and told Meeks that Dotson was a troublemaker and to get rid of Dotson. A few days later Calhoun returned and told Meeks that he, Calhoun, would arrange a meeting between Stockwell and Meeks so that Stockwell could tell Meeks about the trouble that Dotson had caused at Mine No. 15. Tr. I 9. Meeks declined the offer, and Dotson continued to work at Mine No. 50.

Counsel further stated that approximately six months later, Meeks went out of business and closed Mine No. 50. Approximately, one week later, Larry Flynn reopened the mine under the name of Lad Mining Incorporated and as a contractor-operator of TCC. Flynn hired all of the miners who previously had worked at Mine No. 50 with the exception of Dotson and another miner who had an attendance problem. Tr. I 9. Counsel asserted that Dotson was not hired because of his protected activity while at Mine No. 15 and that Lad, Flynn and Calhoun were jointly and severally responsible for violating Dotson's Section 105(c)(1) rights.

RESPONDENTS' CONTENTIONS

Counsel for the Respondents answered that the Respondents had not discriminated against Dotson and that, in any event, the Secretary's case was based on several fallacious assumptions. According to counsel, contrary to the Secretary's contention, when a mine in the area closed and changed owners it was not a common practice for every miner who worked at the mine prior to it closing to be hired by the new operator. Rather, operators went through an application process and hired only those whom

3(...continued)
rights, which Stockwell leased from TCC, and that although Stockwell was the titular operator of the mine, TCC's president, Ronald Calhoun, also, had control and influence over the operation of the mine in that he made frequent visits to the mine and oversaw its production and costs. Tr I 8-9, 11.

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they needed. Further, Calhoun did not control hiring and firing, as shown by the fact that after Calhoun supposedly, told operators not to hire Dotson, Dotson was hired by Meeks. Moreover, to accept the Secretary's position would be to accept that Dotson had a vested right to be hired by Flynn at Mine No. 50, when, in fact, he did not. Flynn, as was his right, employed a standard method of hiring and filled positions as he needed them. The fact that Flynn had no need to hire Dotson did not suggest unlawful discrimination on Flynn's part.

THE SECRETARY'S CASE

Jerry Lee Dotson

The Complainant was the first to testify. Dotson stated that he had worked as a miner since 1975. During that time, he had engaged in a number of different jobs, including operating continuous mining machines, shuttle cars, roof bolting machines, and tractors. He estimated that he had worked for a dozen operators in the area of Tennessee where he lives -- the Whitley Mountain area.

From 1985 through January or February 1991, he worked at Faith Coal Company's ("Faith") No. 15 Mine. At that mine, he did a number of different jobs, including running a scoop, a roof bolting machine, a cutting machine and general maintenance work. Tr. I 20-21.

Dotson stated that Lonnie Stockwell was the president of Faith. Tr. I 101. Dotson described Stockwell as a contractor-operator of TCC. Tr. I 20. Dotson understood that Stockwell leased the No. 15 Mine from TCC. Tr. I 101.

Ronald Calhoun is the president of TCC, and Dotson described the relationship of Stockwell and Calhoun as he had observed it. He stated that Calhoun "quite often" (i.e., more than two times a week) was at the mine. Tr. I 21. According to Dotson, Stockwell reported the mine's daily production to Calhoun and informed Calhoun of any conditions that would cause a

decrease in
production. Dotson reported Stockwell as saying, "When Mr.
Calhoun comes . .
. if you don't run coal he gets on you."
Tr. I 23.

Dotson also described the events that he believed had led
to his
differences with Stockwell and Calhoun. He stated that in
December 1990 or
January 1991, there were safety and managerial problems at the
No. 15 Mine.
Miners were working in what had been a sealed off area. In
addition, some
taxes were not being withheld from the miners' pay checks and
FICA taxes were
not being paid. Tr. I 24, 101, 159. According to Dotson, these
problems lead
to a strike. Tr. I 24. In the negotiations to end the
strike, Calhoun
represented management.

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Dotson stated that during the strike, and in front of other miners, he told Calhoun, "[I]f you don't want to run these mines halfway right . . . get out of them and let somebody in here that will run them right because they will run." (He claimed that when he spoke to Calhoun about "running the mines right," he was referring to working in the previously sealed off area and to withholding taxes. Tr. I 25-26.) Dotson described Calhoun's reaction: "He didn't like it. He gets red faced. [H]e looks like he's got tobacco in both jaws. He could have bit a twenty penny nail in two that day." Tr. I 26.

However, Dotson agreed that Calhoun had played a positive role ending the strike: that Calhoun talked to miners on the picket line, listened to their complaints about the way they were being paid, agreed that the miners were justified in striking, suggested they all talk to Stockwell to resolve the matter, and told Stockwell that he needed to pay the men right and give them the pay records they needed. Tr. I 104.

After the strike, in February 1991, Stockwell again sent the miners to work in the area that had been sealed off. According to Dotson, the foreman did not want to work in the area because it was so dangerous. Dotson described being sent into the area as equivalent to "taking a gun and putting it up to somebody's head and pulling the trigger." Tr. I 28. Because of the danger, Dotson called MSHA Inspector Larry Anderson and told him that Stockwell was "going to get somebody killed." Tr. I 29. This lead to an MSHA inspection of the mine on or about February 6. Tr. I 28, 105. In turn, the inspection led to citations and orders being issued against Faith and to a criminal investigation of Stockwell, an investigation in which Dotson was called to testify. Tr. I 30-40. Dotson believed that somehow "the word got out" and both Stockwell and Calhoun learned that he had made the safety complaint to MSHA that triggered the inspection. Tr. I 110-112.

On or about February 18, 1991, Dotson was working under what he believed were bad roof conditions. Stockwell was in the mine and Dotson asked him for some jacks or timbers to support the roof. Stockwell did not respond and left the mine. Because he got no response from Stockwell, Dotson asked the foreman, Dennis Nunley, for the roof supports. Dotson testified that Nunley answered that if Dotson didn't like the job he should either leave or do another job. Tr I 40-41. When he came out of the mine at the end of the shift, Stockwell asked Dotson to stay and Stockwell, in front of Nunley and some others, asked Dotson what the problem was? Dotson described his safety concerns and the group argued with Dotson over whether or not the mining practice that lead to the need for the additional roof supports was permissible under the mine's approved roof control plan. Tr. I 46-47. Stockwell told Dotson that he did not have the plan at the mine, and Dotson went home. Tr. I 47.

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The discussion resumed when Dotson returned to work the following morning. Finally, according to Dotson, Stockwell told him, "either do it the way we've always done it or . . . go to the house," meaning that Dotson should quit. Tr. I 48. Dotson described his response: "I just bowed my head and I said that the best thing I can do is go to the house." Id.

The next day Dotson filed a discrimination complaint with MSHA and against Stockwell. Tr. I 51; C. Exh 2. Dotson also began looking for another job. A few days after he had left Mine No. 15, Dotson met James Earl Nunley, another contractor-operator with TCC. Dotson stated that Nunley told him if he proceeded with his discrimination action against Stockwell he would not work again on the mountain (i.e., in any of the mines on Whitley Mountain). Tr. I. 55, 105. On February 28, 1991, Dotson withdrew the complaint. Tr. I 56, 58; C. Exh. 3. Dotson explained, "I thought . . . if I dropped this thing than everything would be hushed, I could go back to work and just let things go . . . I just needed to work. I got a family." Tr. I 55.

Eight to ten days later, Dotson was hired to work as a general laborer at Mine No. 50. The mine was operated by Mosley Creek Coal Company and Alfred Meeks was the owner. Meeks leased the coal rights from TCC and was a contractor-operator with TCC. Tr I 61-62. Mine No. 50 is "on the mountain."

As a general laborer Dotson performed a variety of jobs, including operating a shuttle car, a scoop and a roof bolting machine, as well as maintenance work. Tr. I 63. In getting the job at Mine No. 50, Dotson did not apply for any specific job, but rather for any job that was available. As Dotson stated, "I needed to work." Tr. I 64.

Dotson was asked about the relationship of Meeks and Calhoun. He stated that, frequently, he had seen Calhoun at the mine. Dotson believed that Calhoun "stayed on" Meeks about production at the mine and that Meeks had to

report the mine's production on a daily basis to Calhoun. Tr. I 65-66.

Dotson worked for Meeks from late February 1991 until approximately August 12, 1991, when Meeks and Mosley Creek Coal Company went out of business. Although, he did not know for sure, Dotson believed that Meeks ceased mining because "he was tired and [Calhoun] was on him" to produce coal and to cut supply costs. Tr. I 66, 123. (Under the contractor-operator relationship, TCC purchased the necessary supplies.)

Once Meeks ceased to operate Mine No. 50, Meeks told Dotson that approximately two weeks after hiring Dotson, Calhoun had come to the mine and told Meeks to get rid of Dotson. Tr. I 79, 117. According to Dotson, Meeks told Calhoun that

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Dotson was hired subject to a ninety day probationary period and that if Dotson did not work out, Meeks would then get rid of him. Tr. I 79. Dotson recalled that Meeks also told him that Calhoun, subsequently, offered to arrange a meeting between Meeks and Stockwell; so that Stockwell could tell Meeks why Dotson should be fired. At that time, Calhoun told Meeks that Dotson was "a troublemaker." Id.

The same day that Meeks ceased operating Mine No. 50, Dotson stated that he learned a new operator was going to take over the mine. Meeks' son, Donnie Meeks, who was employed by his father as the mine foreman, told Dotson that he should go and see the new operator, Larry Flynn, because Flynn needed a crew for Mine No. 50. Tr. I 67. At the time, Flynn was operating another mine on the mountain, Mine No. 35.

On the day after Mine No. 50 closed, Dotson telephoned Flynn and told him that he was looking for a job and that he would "do anything." Tr. I 68. According to Dotson, Flynn did not have a crew picked yet and he told Dotson that he would get back to him. Tr. I 68. Dotson believed that he called Flynn on or about Wednesday, August 14, 1991. During cross-examination, Dotson recalled the substance of their conversation: "He told me . . . he was fixing to be putting some men to work. He wanted to know what I could do . . . I told him I could do anything. And he said . . . I'm sure going to be putting some men back to work . . . I'll be getting back in touch with you . . . just as soon as I can use you . . . I will get back a hold of you." Tr. I 128.(Footnote 4)

On Friday, August 16 when he had not heard from Flynn, he went to Flynn's mine with three other men to talk to Flynn in person about a job. Dotson and two of the men previously had worked for Meeks at Mine No. 50. The person who had not worked at Mine No. 50 was a young man with no previous mining experience. Tr. I 69-70. Flynn gave two of the men, Dewey Layne and

Barry Mosley, applications. He told them to complete the applications and to be at Mine No. 50 at 6:00 a.m., the following Monday to start work. Dotson maintained that it was another story as far as he was concerned. He stated that Flynn looked at him and said that he would have to get back to him. Tr. I 69-70. (Dotson further stated that the young man with no mining experience was never considered by Flynn for a job.) Dotson was not given any explanation as to why he was told this, nor did he ask. Tr. I 158.

4 This version of the conversation was more expansive than the one reported to the MSHA investigator on October 8, 1991. At that time, Dotson reported that he had called Flynn and asked him about a job and that Flynn had stated that he would be getting right back to Dotson. C. Exh 4 at 4.

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Dotson stated, he was certain that during the discussion with Flynn he did not say anything to Flynn about wanting to only work at one job, as a roof bolter. Tr. I 70. Rather, he told Flynn that he would do anything. Tr I 72. However, he recalled, Flynn asked him what positions he had held when he worked for Meeks and that he had told Flynn he had run a roof bolting machine. Tr. I 131.

Flynn began operating Mine No. 50 on Monday, August 19. Tr. I 128. For the first two weeks that Mine No. 50 was in operation under Flynn's direction, Dotson worked as a security guard near the mine. Dotson stated that he had been hired by the county sheriff's department to guard some equipment that was the subject of a legal dispute between TCC and a bank holding a lien on the equipment. See Tr. 73. During this time, Dotson maintained that when he would see Flynn, he would tell Flynn he needed work and would do anything. Id. Flynn never offered Dotson a job.

According to Dotson, Flynn hired all of the other miners who had worked at Mine No. 50 for Meeks, except Dotson and Davey Johnson, who had a bad absentee record. However, not all of the miners who had worked for Meeks were hired right away. Dotson stated that Hank Lawson, a roof bolter, first worked for another operator before Flynn hired him. Tr. I 76, 132. In addition, two others, Johnny Hamby and Ricky Burgan also were hired after working as miners for someone else. Tr. I 76.(Footnote 5)

Dotson recalled that after failing to get employment with Flynn he continued to visit other mines on the mountain in order to find work. During one of these visits he happened to see Henry Harvey standing by the mine entrance talking to the operator of the mine. Dotson asked the mine operator about jobs and the mine operator said that he had none available. Later, in November or December 1991, Dotson again saw Harvey at the post office. As Dotson remembered it, Harvey said that when he had seen Dotson at the mine he knew Dotson was wasting his time, that the operator had told

Harvey that he could not hire Dotson, that everyone knew about his troubles with Stockwell. Harvey knew that somebody had "put the word out" on Dotson. See Tr. I 83, 85-86.

5 Dotson maintained that it was a common practice on the mountain for a new operator to hire the crew that had previously worked in the mine. His opinion was based on "common sense." "[I]f you've got good miners there and their record speak for theirselves, they know the mines, they know the operation, they know the top, you'd be a fool not to keep these same men." Tr. I 145. However, he could not think of an occasion when a new operator came in and hired all of the previous miners. Tr. I 148.

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Dotson stated that after he was not hired by Flynn, he continued to look for a job on the mountain and that he visited the eight to ten mines located there. For several months he was unable to get a job. In December 1991, he was offered a job at Mine No. 30, but he turned it down because of his concern that the mine was not safe. Tr. I 135.(Footnote 6)

Dotson's believed that because of his safety complaints to Stockwell and because it had become known that he requested the MSHA inspection at Stockwell's mine, Calhoun had, in effect, blacklisted him on the mountain and that Flynn and Lad in denying him employment, were complying with Calhoun's wishes that he not be employed because of his protected activity.

ALFRED MEEKS, JR.

The Secretary next called Alfred Meeks, Jr. to testify. Meeks stated that prior to going out of business on August 12 or 13, 1991, he had worked for 27 years in the mining industry and that for 18 or 19 of those years he had been associated with TCC, either as an employee or as a contractor-operator. Tr. I 177. Regarding Mine No. 50, Meeks testified that he was asked by Calhoun if he wanted to operate the mine and ultimately he became the operator under a contract arrangement with TCC. Tr. I 177-178. (Prior to operating Mine No. 50, Meeks had operated two other mines as a contractor-operator for TCC.

Tr. I 202-206.) It took several months for Meeks to get Mine No. 50 to the point where production could begin and during this time TCC paid all of Meeks' expenses. Once mining began, TCC paid all of Meeks' costs and Meeks received a salary. TCC purchased all of the coal that Mine No. 50 produced. Tr. I 213-214.

Meeks described Calhoun as being very involved in the running of Mine No. 50. According to Meeks, Calhoun decided in which direction to mine coal and Calhoun was constantly concerned about increasing production. Tr. I 179-

181. Calhoun, frequently, would come to the mine and would ask how many trucks of coal had been loaded and what were the mining conditions. In addition, Calhoun was concerned that Meeks' supply costs were too high. Tr. I 182-183, 190-191, 216-217. Meeks understood that TCC had a contract requiring it to provide coal to TVA. He also understood Calhoun to believe that if TCC was to survive economically, Mine No. 50 had to be a productive mine. Tr. I 218.

6 Dotson also stated that he turned down the job because he was advised by "his lawyer" not to go back to work on the mountain. Tr. I 140-141. Dotson's testimony regarding the advice is confusing. It seems to have been given after he declined the offer. It also appears that the advice was based upon events unrelated to this case. Tr I. 153-156.

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Despite Calhoun's concern with production and cost, Meeks testified that he, Meeks, was solely responsible for hiring and firing at the mine. Tr. I 231. Meeks hired Dotson on February 28, 1991. Dotson was hired to operate a roof bolting machine and to do anything else that Meeks needed him to do. Meeks explained that he would not hire a person to do only one job because "they ha[ve] to pitch in and do other jobs." Tr. I 192. Thus, while working at Mine No. 50, Dotson not only operated a roof bolting machine, he also ran a scoop, cleaned the belt line, hung ventilation curtains, and "did anything that he was asked to do." Id. Meeks described Dotson's skills, attendance and attitude as "excellent." Tr. I 193.

Turning to his conversations with Calhoun involving Dotson, Meeks stated that when he told Calhoun that he had hired Dotson, Calhoun "said . . . Dotson is nothing but a 'GD' troublemaker [and that I] had better get rid of him." Tr. I 193. Meeks testified he responded that Dotson was on a 90-day probationary period and if he caused Meeks trouble during that time, Meeks could let him go. Id. Meeks stated that this conversation occurred about one week after he had hired Dotson. Tr. I 194, 221. Meeks was positive the conversation did not occur during labor trouble at another mine and that the conversation did not involve a strike at another mine. Tr. I 194.

Meeks also stated that he had a second conversation with Calhoun concerning Dotson. Meeks testified that a few days later Calhoun came to the mine and told Meeks that Stockwell would come to the mine and that Meeks could talk to Stockwell and find out from Stockwell "what kind of a man . . . Dotson was." Tr. I 194, 221. However, Meeks stated that he was not interested in talking to Stockwell. Tr. I 194-195. At the time, the only person Meeks told about his conversations with Calhoun was his son, Donnie Meeks, the section foreman at Mine No. 50. Tr. 195-196. Calhoun did not raise the subject again

with Meeks and Dotson remained employed at Mine No. 50 until Meeks ended the operation. Tr. 221.

Meeks terminated mining activity on or about August 13, 1991, because he was "tired of constant harassment day in and day out for more production and to cut supply costs . . . I just had enough." Tr. I 196. Meeks testified when he shut down he told Calhoun that a "good bunch of men" had worked for him and that Calhoun responded that he wanted to get them all back to work. Tr. I. 198.

DONNIE MEEKS

The Secretary subpoenaed Donnie Meeks. Donnie Meeks stated that in February 1991, while he was acting as foreman at Mine No. 50, his father told him that Calhoun had said that Dotson had caused trouble and his father had asked him to keep an eye on Dotson in order to see what kind of an employee he was.

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Tr. I 236. He confirmed his father's testimony that Dotson worked as a roof bolter and that he also did anything else that needed to be done. Tr. I 236.

After his father went out of business, Donnie Meeks stated that he spoke with Flynn over the telephone and gave Flynn the names of all of the employees at the mine, including Dotson, and told Flynn what they could do. As he recalled, he told Flynn that Dotson could operate, among other things, a roof bolting machine, a shuttle car and a scoop. Tr. I 238-239.

However, Donnie Meeks confirmed that not everyone who had worked for his father was hired by Flynn. Davey Johnson, who had an absentee problem, was not hired and Johnny Hamby and Ricky Burgan were not hired immediately. (Donnie Meeks did not state why Hamby and Burgan were not hired when Flynn commenced operation of the mine.)

Donnie Meeks also recalled that Flynn brought two miners with him, Johnny Jones and Buck Harris. Harris was employed as a roof bolter. (In addition, Harris was authorized to act as a mine foreman. He could fill-in as mine foreman if Donnie Meeks were sick. Tr. I 248.) Jones was employed to do general maintenance. Tr. I 240-241. Harris came with Flynn the day Flynn began mining. Jones came approximately one month later. Tr. I 242. Donnie Meeks also stated that a miner named Jerry Boston came to work at Mine No. 50 from one of Flynn's other mines, but that too was later. Id.

Donnie Meeks gave his opinion that when hiring a roof bolter, it is advantageous to hire someone who knows the roof and is familiar with the mine. Tr. I 243-244.

HENRY HARVEY

The Secretary also subpoenaed Henry Harvey to testify. Harvey stated that he had worked as a miner for 27 years, 17 of which were with TCC. During his mining career, he had occasion to supervise Dotson. He described Dotson as a good worker, who never missed a day and who always did any job

asked of him.

Tr. II 8-10. Harvey stated that in October or November 1991, he worked at a mine operated by James Earl Nunley and that he and Nunley were standing together when Dotson pulled up in the mine parking lot. Harvey assumed that Dotson was looking for a job because when someone comes to a mine that is usually why. Tr. II 12-13. Nunley said to Harvey "[I]t won't do him any good." Tr. II 11.

In January 1992, Harvey saw Dotson at the post office. He asked Dotson if Dotson had asked Nunley for a job that day? Dotson responded that he had and that Nunley told him that he did not need any miners. Harvey responded that this was strange

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because Nunley had hired people after telling Dotson that he did not need anybody. Tr. II 15-16. Harvey added, "I told Jerry, in my opinion, it looked like somebody had put the word out on him not to hire him." Tr. II 16-17.

RESPONDENTS' CASE

LARRY FLYNN

Larry Flynn, the forty-nine-year-old president of Lad Mining, Incorporated, was the first person to testify for the Respondents. Flynn stated that Lad was formed in July 1987. Since that time he had been a contractor-operator of TCC and had constantly operated Mine No. 35. Also, there had come a time when he became the operator of Mine No. 50, and Flynn described how that happened.(Footnote 7)

On approximately the same day that Meeks ceased mining, Flynn met Calhoun who told him about Meeks' decision to shut down. Calhoun asked Flynn if he would be interested in taking over the operation? Flynn responded that he would have to look at the mine first. Tr. II 51. There was no discussion of Dotson, whom Flynn had never met and did not know. Tr. II 52.

Flynn went to Mine No. 50. After he had examined it, he met Donnie Meeks who asked if Flynn were going to take over the mine? Flynn stated that he was not sure, that he would have to talk to Calhoun. Flynn stated that Donnie Meeks responded he would like to work for Flynn as a foreman if Flynn decided to operate the mine. Tr. II 55. Flynn told Donnie Meeks that he had heard good things about him and that he would give him a job if he decided to run the mine. Donnie Meeks said, "I'll send you some more people if you take this mine over." Id.

Flynn also stated that he did not recall a telephone conversation with Dotson on that date regarding Dotson's desire for any type of job should Flynn operate Mine No. 50. Tr. II 62.

Subsequently, Flynn decided to reopen Mine No. 50 and on

approximately
Friday, August 16, he called Donnie Meeks and asked him to come
to the mine
the next day to help get the mine ready to reopen. That same
Friday, Dotson,
Dewey lane and Barry Mosley came to Mine No. 35 to speak with
Flynn. They
asked if he were going to reopen Mine No. 50. When Flynn
responded
affirmatively, they asked if he needed miners and Flynn said that
he did.
According to Flynn, he asked the three what they could do.
Dotson asked Flynn
for a roof bolting job. Flynn stated that he told Dotson he
already had roof
bolters, that he did not need any more, but that if he did, he
would be in
touch with Dotson.

7 Flynn no longer operates Mine No. 50.

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Tr. II 56-57.(Footnote 8) (Flynn was asked about the basis for his recollection of the meeting, and he testified that shortly after the commencement of this discrimination action he had spoken with Dewey Layne about what had transpired. He said to Layne, "I don't remember for sure and I want to know everything I said to [Dotson]." Tr. II 63. Flynn's testimony thus reflected what Layne had told him. Tr. II 63-64.)

Flynn explained that he had decided to take a roof bolter named Bradley Shipley to Mine No. 50, as well as one named Buck Harris. Tr. II 57, 59. (As it turned out, Shipley never showed up to work at Mine No. 50 (Tr. II 59) and of the two, the sole roof bolter who went to Mine No. 50 was Harris.) According to Flynn, three months before the Mine No. 50 situation arose, he had discussed with Calhoun the possibility of opening a different mine and at that time Harris had asked if he could work at the other mine as a roof bolting machine operator? Flynn stated that the mine he was interested in opening was near Mine No. 50 and that both mines were closer to Harris' home than was Mine No. 35. Tr. II 57-58. Harris was a qualified roof bolter as well as a mine foreman. The advantage of employing a person with foreman's papers was that mining could continue if the regular foreman was for some reason unable to work. Tr. II 59.

Flynn began mining on Monday, August 19. When Shipley did not report for work, Flynn needed to hire another roof bolter. (Flynn maintained that unbeknownst to him, Shipley had been on layoff when he was hired and that he had been called back to work. Tr. II 115.) Flynn stated that the choice was then between Dotson and Hank Lawson, both of whom had worked for Meeks when he ceased operation. Because he did not know either man, Flynn asked Donnie Meeks about them. According to Flynn, Donnie Meeks said that both were good workers. Flynn then asked who was the best, and Donnie Meeks said that Lawson was and Flynn hired Lawson. Tr. II 60-61.(Footnote 9) Flynn acknowledged,

however, that he had not told the MSHA investigator about this conversation with Donnie Meeks. Also, he did not mention the conversation when Dotson's counsel deposed him in April 1992. Tr. II 121-122.(Footnote 10)

8 Flynn stated that he did not give an application to Dotson because he only gave applications to people he was going to hire. Tr. II 138.

9 Flynn stated that he told Dotson that he would hire him as a roof bolter for the second shift when he started one. However, Flynn never heard from Dotson again about employment. Tr. II 113.

10 Donnie Meeks testified on the first day of the hearing and was excused as a witness after the Secretary rested. Counsel for the Secretary wanted to recall Donnie Meeks as a rebuttal witness concerning Flynn's testimony that Donnie Meeks had recommended Lawson over Dotson. However, counsel decided not to do so after a telephone conversation with Donnie Meeks.

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Flynn was asked whether it was an usual practice to hire all previous workers when a mine was reopened? Flynn stated that he had never heard of such a thing, that he had no knowledge of an entire crew being rehired. He testified that when he reopened Mine No. 35 he had hired only one person from the previous crew. Tr. II 68. However, he confirmed that he brought only two of his employees to Mine No. 50 -- Buck Harris as a roof bolter and Jerry Boston as a belt man -- and that other than these two, the rest of the men he used at Mine No. 50 previously had worked there. Tr II 99. Whether he hired all of the previous workers except Dotson and Davey Johnson, Flynn could not say. Tr. II 100.

Flynn described a very different relationship with Calhoun than had Meeks. The Calhoun depicted by Flynn did not come to the mine on a regular basis. He might come once or twice a week, or he might not come for two weeks at a time. He also telephoned infrequently. Tr. II 81-82. Flynn maintained that he did not report mining conditions to Calhoun on a regular basis and that although, he completed production reports he did not know if Calhoun reviewed them. Tr. II 83. However, Flynn recalled Calhoun telling him that Calhoun wanted Mine No. 50 to be a big producer of coal. Tr. II 82. According to Flynn, it was Calhoun who pressed for the addition of the second shift. As Flynn described it, Calhoun "said they needed the coal bad." Tr. II 84.

Flynn also stated that Calhoun never attempted to influence his decisions regarding hiring and firing, that Flynn had never even recommended someone that he might hire. He further stated that before this discrimination case was brought he had never discussed Dotson with Calhoun. Tr. II 68-69. Flynn claimed that until he was deposed in connection with this case he had never heard of the discrimination complaint that Dotson filed against Stockwell and Faith Coal Company. Tr. II 72.

ROY CALHOUN

Roy Calhoun, president and chief executive officer of TCC, was the last witness for the Respondents. Calhoun explained that TCC has 15 to 18 million tons of coal reserves in southeastern Tennessee, all but approximately 5 million of which are leased from USX Corporation. TCC does not mine coal, but rather contracts with others to mine its reserves. Tr. II 145-147. Calhoun also explained that under the contractor-operator arrangement between TCC and the actual operator, the operator has full responsibility for everything relating to the operator's

10(...continued)

She reported that Donnie Meeks stated that he had no recollection of the conversation. Tr. II 208.

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employees, including hiring and firing. Further, the contractor-operator, also, is responsible for submitting all required plans to MSHA, except that TCC supplies an up-to-date map of the mine workings. Because TCC leases the coal reserves, it makes the decisions regarding the direction of mining so that future mining of the reserves will not be jeopardized. Tr. II 152-154.

Calhoun stated that while it was not his practice to go to all of the mines of TCC's contractor-operators on a daily basis, he did go to Mine No. 50 more often than to the others. Indeed, Calhoun acknowledged that he went to Mine No. 50 "fairly regularly", because the mine was under development and needed to be looked at more closely than the others. Tr. II 155-156, 170. Still, he maintained, he did not go daily to the mine nor did he call Meeks every night at home. Tr. II 156.

Calhoun's version of the strike at Mine No. 15 differed from Dotson's. Calhoun stated that the strike was solely about economic issues -- Stockwell was not showing that he was withholding FICA taxes on the miners' pay slips and he was not paying additional money that he had promised the miners for increased production. Tr II 158-160. Calhoun was advised of this by miners on the picket line, including Dotson, and he went to discuss the situation with Stockwell and was successful in resolving the matter. Tr. II 159. (Calhoun made no mention of any complaints regarding safety or of any discussion with Dotson alluding to safety.)

After leaving Mine No. 15, Calhoun stated he went that same day to Mine No. 50 where Meeks asked him about the strike. Calhoun testified that he told Meeks what he knew, but that when Meeks persisted in inquiring, Calhoun told him if he wanted to know more about what was going on, he (Calhoun) would arrange a meeting between Stockwell and Meeks. When Meeks then asked who was on the picket line, Calhoun mentioned, Dotson and "a bunch more." Tr. II 162. Calhoun stated that he had no recollection of Meeks telling him

that he had
hired Dotson. Tr. II 186. Calhoun denied that he had ever told
Meeks to fire
or to get rid of Dotson or that he had ever told Meeks that
Dotson was a
troublemaker. Tr. II 162, 186-187.

Calhoun also claimed that he never discussed Dotson with
Flynn.
Further, he stated that his "recommendations" to Flynn concerning
who should
be employed consisted of advising Flynn that someone wanted to
work and saying
something to the effect that "[i]f you have anything, there's a
man that's
available."
Tr II 166.

With regard to his knowledge of Dotson's contacts with
MSHA, Calhoun
claimed that the first he knew of the MSHA "raid" on Mine No. 15
(i.e., the
"blitz" inspection of February 6, 1991, that

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Dotson requested and that resulted in criminal charges being brought against Stockwell) was when his deposition was taken for this discrimination proceeding in April 1992. Tr. II 162. He acknowledged, however, that it was "unusual" that he did not know sooner. Tr. II 199. Calhoun claimed that if he had known, he probably would have closed the mine. Tr. II 192.

Further, Calhoun claimed that until the MSHA investigator took his statement with respect to this case, he had no prior knowledge of Dotson's previous discrimination complaint against Stockwell. Tr. II 163.

Calhoun maintained that it was not a common practice for a new operator to hire all miners, previously employed at a mine and that he knew of no instance where a new contractor-operator hired 100 percent of the previous miners. He stated that while a new operator usually would check with the previous operator and would hire some of the previous miners, if he operated another mine, the new operator usually would bring with him some of the miners from the other mine. Tr. II 164. As Calhoun explained, a new contractor-operator is under no legal obligation to hire the previous miners, and Calhoun did not believe that a previously employed miner had a legitimate expectation to be hired, even if he had a good work record and was recommended by his old foreman. Tr. II 191. Calhoun stated, "I think . . . a coal mine operator ought to have his right to hire who he wants to for his mine. He's the one paying them. He's the one that works them and he should be the one that makes that decision." Tr. II 192.

APPLICABLE CASE LAW

In order to establish a prima facie case of discrimination under Section 105(c) of the 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 Co., 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom., Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either than no protected activity occurred or that the adverse action was in no way motivated by the protected activity.

With regard to establishing that the adverse action complained of was motivated in any part by protected activity, the Commission has acknowledged the not-infrequent difficulty the Complainant faces in establishing a motivational nexus between

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protected activity and the adverse action that is the subject of the complaint when the link between the protected activity and the adverse action cannot be supplied by direct evidence. The Commission has stated that such "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" Chacon, 3 FMSHRC at 2510 (quoting NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965)). In analyzing the evidence, whether it be circumstantial or direct, the Commission and its judges are free to draw reasonable inferences. Melrose, 351 F.2d at 698.

If the operator cannot rebut the prima facie case, it may nevertheless affirmatively defend by proving that it was also motivated by the miners' unprotected activity 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); Donovan v. Stafford Construction Company, 732 F.2d 954 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 397-413 (1983) (where the Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act).

COMPLAINANT'S PRIMA FACIE CASE

The Secretary claims that the evidence establishes that Dotson engaged in protected activity in January and February 1991, when he was employed by Stockwell. According to the Secretary, Dotson's protected activities are: (1) his complaints to Calhoun about unsafe mining practices during the strike at Mine No. 15, (2) his request to MSHA for an inspection of the mine, (3) his complaints to Stockwell about unsafe conditions and practices at

the mine, and
(4) his filing of a discrimination complaint against Stockwell.
According to
the Secretary, Flynn's refusal to hire Dotson in August 1991 when
Flynn took
over Mine No. 50 was directly motivated by these activities. See
Sec.
Br. 18-19, 31-32.

PROTECTED ACTIVITY

Reviewing each of the alleged protected activities in
sequence, I
conclude the evidence establishes Dotson engaged in protected
activity while
employed by Stockwell with respect to Nos. 2, 3 and 4.

Dotson's Safety Complaints to Calhoun

The Secretary's first contention is that Dotson engaged in protected activity when he complained to Calhoun about safety conditions during the strike at Mine No. 15. I do not believe that the evidence allows a conclusion that Dotson actually made such a complaint. While, it is clear that the strike involved economic issues, the record does not establish that it also involved safety issues. Dotson maintained that his statement to Calhoun that "[I]f you don't want to run these mines halfway right . . . get out of them and let somebody in that will run them right because they will run" referred to both the withholding of taxes and to unsafe working practices at the mine. Tr. I 25-26. However, the statement is general and open to interpretation. On its face it does not clearly relate to safety nor does the testimony regarding the context in which it was delivered tie it to safety. Certainly, Calhoun, the only other person who was present and who testified, did not indicate that he understood a safety complaint had been made to him at the time. Indeed, he did not mention any complaint made by Dotson nor did he indicate that he understood the strike to involve any safety-related issues. See Tr. II 158-160. In fact, I find the weight of the evidence to be that it did not.

Dotson's rendition of how the strike was resolved essentially corresponds with Calhoun's. Tr II 158-160. As Dotson himself testified, Calhoun's involvement in the strike lead to its successful resolution, when Calhoun intervened with Stockwell on the miners' behalf and advised redress of their economic complaints. Tr. I 104. Even more telling, in my view is the fact, that on October 7, 1991, when Dotson filed his discrimination complaint, he did not mention his strike-related statement to Calhoun as a reason for the alleged discrimination. See C. Exh. 4 at 2. Further, although four days later he told the MSHA investigator that he guessed his statement "made the man mad

at me," he did not then link it with any expression of his safety concerns.
C. Exh 5 at 9.

Dotson's Inspection Request

The Secretary next asserts that Dotson engaged in protected activity when in early February 1991, he requested an MSHA inspection of Mine No. 15 because of what he believed to be unsafe mining practices. Sec. Br. 20. There is no doubt that Dotson made the request that resulted in the inspection of Stockwell's mine. Dotson's testimony in this regard was not disputed by the Respondents. Tr. I 29 and 105. Such a request is protected activity under the Act.

Dotson's Safety Complaints to Stockwell
and
Dotson's Discrimination Complaint against
Stockwell

The Secretary also asserts that Dotson's safety complaints to Stockwell in late February 1991 were protected. Sec. Br. 20. Dotson's testimony to the effect that he complained to Stockwell on or about February 18, 1991, regarding mining practices resulting in the need for additional roof support was not refuted. Tr. I 46-47. It was, of course, these complaints that lead to the alleged order from Stockwell to either continue the practice or "go to the house" and Dotson's resulting short-lived discrimination complaint against Stockwell.

I accept Dotson's un rebutted testimony concerning his complaints to Stockwell. His testimony at trial describing his discussion with Stockwell essentially corresponded with his nearly contemporaneous account of the same discussion in his discrimination complaint. See C. Exh. 2. A miner's safety complaints when reasonable and made in good faith are protected. Further, the filing of a complaint of discrimination is protected activity. I conclude, therefore, that when Dotson complained to Stockwell and when he filed the complaint charging Stockwell with discrimination he engaged in activity that cannot be the basis for subsequent retaliation.

ADVERSE ACTION

Having established protected activity, Dotson must prove that he suffered an adverse action. The adverse action of which Dotson complains is that he was denied employment by Flynn at Mine No. 50, when Flynn took over as the operator of the mine. Dotson and Flynn agreed that Dotson sought and was denied employment by Flynn and Lad.

I credit Dotson's testimony that he telephoned Flynn on or about Wednesday, August 14, 1991, and asked for employment. Dotson had a specific recollection of this telephone conversation, while Flynn had none. Tr. I 67-

68, Tr. II 62. In addition, approximately two months after the conversation, Dotson told the MSHA investigator that he had made the call. C. Exh. 5 at 4. Dotson credibly stated that Flynn said that he would get back in touch with Dotson, but he did not, and Dotson was never hired. Id.

In addition, Dotson testified that on Friday, August 16, 1991, he went to Mine No. 35 and spoke with Flynn about working for Flynn at Mine No. 50. Tr. I 69-70. Flynn agreed that Dotson had come to Mine No. 35 on August 16. Tr. II 56-57. Although, Dotson and Flynn gave decidedly different versions of what transpired at the meeting, both agreed that the reason Dotson was at the mine was to seek employment. Dotson also stated that

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after Flynn took over operating Mine No. 50 and during the time that Dotson was employed as a security guard, he asked Flynn for employment whenever he would see Flynn. Tr. I 73. Flynn did not testify regarding these contacts with Dotson and I credit Dotson's testimony. It is clear that Dotson was anxious for work and I find it reasonable to believe that he asked Flynn about employment whenever the opportunity to do so presented itself. The record thus establishes that Dotson repeatedly sought employment at Mine No. 50, and I so find. An adverse action is an act of commission or omission by an operator that subjects the affected miner or applicant for employment to discipline or to a detriment in an employment relationship. See Secretary on behalf of Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC at 1847-48. Failing to be hired by Flynn and Lad meant that Dotson had no employment relationship, which was certainly a detriment, to say the least. It is clear, therefore, that Dotson established he was subjected to an adverse action.

Having established protected activity and adverse action, the next question is whether Dotson, also, established that in denying him employment, any or all of the Respondents were motivated by his protected activity.

MOTIVATION

Dotson presented no direct evidence that he was denied employment because he had complained about safety conditions, requested an inspection and had filed a discrimination complaint while he was employed by Stockwell. However, as noted, the Commission has recognized that such evidence is rarely available to a complainant and has made clear that a finding of discriminatory motivation may be made on the basis of circumstantial evidence. Chacon, 3 FMSHRC at 2510. The Commission has listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the

adverse action;
and (4) disparate treatment of the complainant. Chacon, 3 FMSHRC
at 2510.

A logical approach for analysis of a motivation question is
to accept as
a starting point that something, at this point unknown, motivated
Flynn to
reject Dotson as an employee and to deduce what it was. (Footnote
11) This is
the approach adopted by the 8th

11 The Respondents point out, correctly, I think, that this is
not a case
of an employee seeking to be rehired. When Meeks went out of
business, his
employees' jobs ceased. Thus, Dotson's employment with Meeks had
ceased.
Flynn was a new operator. In general, I agree with Calhoun that
a new
contractor-operator is under no legal obligation to hire miners
who had

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Circuit in Melrose, 351 F.2d at 698-700, and it is one that courts frequently have followed.

The approach begins with the elimination of certain motivational factors that are usually offered in these types of cases. There is no suggestion that Dotson was incompetent, had a record of absenteeism, had a poor safety record or that Flynn or Calhoun had any personal animosity (i.e., extra-mining related animosity) toward Dotson.

Dotson had been mining coal since 1975. In that capacity he had engaged in a wide variety of tasks. After Dotson left his job at Faith Coal Company, he was hired shortly thereafter by Meeks. Meeks described Dotson as a man of "excellent" skills, attitude, and attendance, and I credit his testimony. Tr. I 193. After all, it would hardly have been in Meeks's interest to employ someone who did not have these qualities. In addition, Donnie Meeks, who was Dotson's foreman and thus should know, described Dotson as a "good miner" with "good" skills. Tr. I 237. Further, Dotson's reputation as a good, willing and reliable worker was confirmed by Harvey, another former supervisor of Dotson. Tr. II 9-10.

Also, there is no suggestion in the record that Flynn's failure to hire Dotson was the result of any personal hostility. There was no testimony that prior to Flynn taking over Mine No. 50, he and Dotson were even acquainted. Moreover, there was no indication in the record that Calhoun had any extra mine-related animus toward Dotson. As described in the record, Calhoun's knowledge of and contacts with Dotson were based solely on Dotson's mining activities, first, with Stockwell, and second, with Meeks.

Still, the fact remains that Flynn did not hire Dotson, and the search for the reason why continues with an examination of the customary hiring practice and a determination of whether Flynn's failure to hire Dotson represented a departure from that practice. If so, motivation may be

suggested in the manner and the reasons proffered for Dotson's rejection.

11(...continued)

previously worked at the mine and that a coal mine operator has the right to hire whomever he wants. There is a caveat, however -- hiring must be done according to law and cannot be denied because of protected activity.

The right to hire or not to hire is not an absolute right, and the Act makes very clear that it is not only miners but also applicants for employment who cannot be discriminated against because of protected activity. The fact that Dotson was seeking work as an applicant for employment rather than as a miner subject to rehire, does not alter the protections afforded him by Section 105(c) or the fact that he cannot be denied employment solely on the basis of protected activity.

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Evidence regarding hiring practices by a new contractor-operator was in conflict. Dotson, who spoke from the perspective of a miner who had worked on the mountain and for several different contractor-operators, believed that it was just common sense for a new operator to hire the previous crew. As he pointed out, these are the people who know the mine best. Tr. I 145. Meeks' testimony supports by inference what Dotson believed. He stated that when he decided to shut down his operation at Mine No. 50 he told Calhoun that "there's a real good bunch of men working here" and that Calhoun replied "I want to get them all back to working." Tr. I 198. Like Dotson, Meeks struck me as an honest and forthright individual, and I believe his account of this conversation.

Donnie Meeks' testimony, also, supports Dotson's "common sense" theory of hiring. He stated that it would be advantageous to hire a roof bolting machine operator who was familiar with the roof conditions in the mine because such a person would be aware of the mine's particular roof problems. He believed this to be especially true of Mine No. 50, which had a roof fall problem. Tr I 243-244.

Flynn emphasized that in his experience he had never known of a situation wherein a new operator took all previous workers. Tr. I 65-66. I do not doubt this to be a fact and, indeed, Flynn supported his statement with several examples of situations in which few previous miners were hired. Tr. I 67-68. However, his testimony in this regard is not necessarily inconsistent with that of Dotson and Meeks. In the situations that he cited, Flynn did not explain why previous miners were or were not hired, and, obviously, there could be any number of reasons. Nor was Calhoun's testimony, necessarily, inconsistent with the essence of Dotson's and the Meeks'. Calhoun explained that the new operator will check with the previous operator and will hire some of the old employees but that he knew of no instance where 100 percent of the old employees were hired. Tr. II 164.

I do not understand Dotson and the Meeks' to have testified that when an operator goes out of business and another operator reopens the mine the new operator will hire all previous employees. Dotson himself could not think of such a situation. Tr. I 148. Rather, I understand them to have stated that it is common for most of the miners to be hired, as indeed happened at Mine No. 50, and I so find. Dotson's observation that the previous miners are the ones who know the mine best, Donnie Meek's correlating acknowledgement of roof control problems at Mine No. 50 and the advantages of hiring miners who know the roof, and Meek's statement to Calhoun that he had good men at the mine and Calhoun's response that he wanted to get all of them back to work, convince me that such was the practice.

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That being the case, when a previous miner is not hired while virtually all his peers are, the motive for failing to hire the left-out miner must be explained. In other words, here, where Flynn's failure to hire Dotson represented a departure from the norm, the question is why?

The Respondents offer a business justification -- that Dotson applied for a roof bolting job, that there were two roof bolter positions available, that the positions were filled when Dotson applied, and that when one of the hired roof bolters unexpectedly did not show up for work, Flynn, on the recommendation of Donnie Meeks, hired someone other than Dotson.

I conclude that this justification is not established by the evidence and that it is pretextual. I have accepted Dotson's testimony that he called Flynn on August 14, and asked about a job and was told that Flynn would get back to him. I also accept his testimony that Flynn asked him what he could do and that Dotson told Flynn that he could do anything. Tr. I 128. (Flynn could not recall this telephone conversation. Tr. II 62.) I also believe that when Dotson went to the mine on Friday, August 16, he was asked about the jobs that he had held and that Dotson indicated that he had run a roof bolter. Tr. I 131. However, I do not believe that Dotson indicated to Flynn he was applying to work only as a roof bolter. (Footnote 12) Such a statement would have been self-limiting and, as Dotson explained, he needed work. Rather, it seems likely that Dotson indicated that he would work, also, as a roof bolter. In any event, I accept Donnie Meeks testimony that he spoke with Flynn the day his father went out of business and gave Flynn a list of names of the miners and a list of all jobs that the men could do. Tr. 236. Thus, when Dotson and Flynn met on August 16, I believe that Flynn already knew that Dotson was not limited to operating a roof bolting machine, but, as Donnie Meeks explained that Dotson could do "anything else that needed to be done." Id.

Flynn maintained that when Shipley, one of the roof bolters

he had
hired, failed to report for work he selected Lawson over Dotson
on the basis
of Donnie Meek's recommendation that Lawson was the better roof
bolter. Tr.
II 60-61. However, I find the credibility of this assertion
undermined by
Flynn's failure to

12 It is important to note that during the course of the
testimony I was
struck by Dotson's sincerity and lack of guile. While I found
him to be
unsophisticated and naive, I also found him to be truthful.

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mentioned it to the MSHA investigator when he was asked why Dotson was not hired. It is after all, the major reason why the Respondents now contend Dotson was refused employment.

As the Secretary rightly points out, Flynn ultimately hired all of the previous crew except Dotson and Johnson. See Sec. Br. 26-27. There was a legitimate business reason for not hiring Johnson. The record discloses none for refusing Dotson employment.

Therefore, accepting the premise that something must have motivated Flynn to deny Dotson employment, and the proffered reasons for the refusal having been eliminated by the evidence and the reasonable inferences drawn therefrom, the search for motive must continue by analyzing other actions of Calhoun and Flynn relating to Dotson. When these are reviewed, I believe the conclusion is inescapable that in refusing to hire Dotson, Flynn was responding to Calhoun's directive and was motivated, as was Calhoun, by Dotson's protected activity.

In the first place, I conclude the evidence establishes that Calhoun was seeking to "blacklist" Dotson because of his safety complaints to Stockwell and his, subsequent, discrimination complaint. As I have found, Dotson engaged in protected activity, and I believe, despite Calhoun's denials, that Calhoun was fully aware of that activity. The picture of Calhoun that emerged at trial was of a person actively interested and involved in the daily affairs of TCC's contractors as those affairs related to production. Calhoun explained the interest TCC had in the development and production of its contractor's mines (Tr. II 152-154) and this was especially true of Mine No. 50. See Tr. I 179-183; Tr. II 155-156 and 170. I think that it is fair to conclude that if a matter affected production, Calhoun knew of it.

It was Calhoun, after all, who took the lead in resolving the strike at Mine No. 15, a resolution that allowed production to resume. It was Calhoun

who told Flynn that he wanted Mine No. 50 to be a big producer of coal. Tr.
II 82. Certainly, MSHA's "blitz" inspection at Mine No. 15, coming as it did, on the heels of the strike, and resulting in the issuing of notices and orders at the mine and eventually in criminal charges against Stockwell, impacted production and must have been known almost immediately to Calhoun. Calhoun stated that it was "unusual" that he did not

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know of the inspection until his deposition was taken in April 1992. Tr. II 192. I find it more than unusual; I find it incredible. Tr. II 162. Quite simply, I believe that he knew about it, and knew soon after it happened. (Footnote 13)

I also find incredible Calhoun's assertion that he did not know about the discrimination complaint Calhoun filed against Stockwell until the MSHA investigator took his statement regarding the present discrimination complaint. Tr. II 163. Again, the closeness of Calhoun's relationship with the daily operations of TCC's contractor-operators makes it permissible to infer, in my view, that Calhoun was well aware of Dotson's complaint.

Being aware of these activities, activities that potentially impinged upon the smooth operation of TCC's contractor, I conclude that Calhoun undertook to bar Dotson from employment on the mountain and that Flynn followed his lead. I believe that Calhoun's animosity toward Dotson because of his safety-related activities is shown by Calhoun's attempt to have Meeks "get rid of" Dotson and, by his offer, to arrange a meeting between Meeks and Stockwell so that Stockwell could tell Meeks "what kind of a man . . . Dotson was." Tr. I 193-194, 221.

Calhoun, of course, stated that although he mentioned Dotson to Meeks it was in the context of a response to Meek's question concerning who had been on the picket line at Mine No. 15. I do not discount the fact that if in fact this conversation occurred in close proximity to the strike, the subject of the strike may have arisen in the course of the Meeks-Calhoun conversation. It is logical that Meeks would have been interested in the strike. However, Calhoun's denial that he ever told Meeks to fire or to get rid of Dotson or told Meeks that Dotson was a troublemaker rings false when viewed in the context of what must have been Calhoun's animosity toward Dotson for his activities impinging upon production at Mine No. 15. Tr. II, 162, 166, 187-

186.

13 Although, I believe that Calhoun knew of the MSHA inspection on February 6, 1991, at Mine No. 15; I do not believe that there is sufficient evidence of record to conclude that he knew Dotson requested the inspection. Dotson admitted his suspicions in this regard were simply -- suspicions.

Tr. I 111-113. Moreover, the Mine Act would prevent MSHA's inspectors from divulging the name of a person requesting an inspection, and I assume, unless proof to the contrary is offered, that MSHA complies with the law it administers. (There is, of course, nothing that would have prevented Stockwell from telling Calhoun about Dotson's safety complaints to Stockwell and Dotson's discrimination complaint against Stockwell.) Still, Calhoun's denial of any knowledge of the inspection until he was deposed in April 1992 is patently incredible and, in my view, casts a long shadow over the credibility of the rest of his testimony.

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Rather, I believe Meeks' version of what Calhoun said to him. As I have stated Meeks impressed me as an honest and forthright witness. At one time he impressed Calhoun too, for Calhoun testified that Meeks had a good reputation when he worked for TCC and that he had considered Meeks to be a reliable business partner for the corporation. Tr. II 173. Although, Meeks was, subsequently, involved in a legal dispute with TCC, at the time the Calhoun-Meeks conversations occurred, they appear to have been on good business terms and were working closely together.

Given the fact that I conclude the Meeks-Calhoun conversations occurred, essentially as Meeks reported them, and given the fact I also conclude that Calhoun was aware of Dotson's safety complaints and his discrimination complaint against Stockwell; there is no other logical explanation offered or suggested by the record for Calhoun's desire to have Meeks "get rid of" Dotson than Dotson's protected activity.

Further, I agree with counsel for the Secretary that Calhoun's urging that Meeks get rid of Dotson for engaging in protected activity supports an inference that he, likewise instructed Flynn not to hire Dotson. Sec. Br. 32. As the evidence establishes, Flynn was subject to Calhoun's influence and monitoring; and as I have found, his excuses for failing to hire Flynn are otherwise pretextual.

CONCLUSION

Accordingly, I conclude that Dotson has established that he engaged in activity protected under the Act when he complained to Stockwell regarding safety conditions at Mine No. 15 and when he filed a discrimination complaint against Stockwell. Further, I conclude that Calhoun knew of these activities and was motivated by them to have Dotson "blacklisted" -- i.e., to have him removed from his job by Meeks and, failing that, to have him denied employment by Flynn. I also conclude that Flynn and through Flynn, Lad, in denying

Dotson employment, were acting at Calhoun's behest and were motivated by the same protected activities. Finally, I conclude that the proffered reasons for Flynn's failure to hire Dotson are pretextual and that the Respondents have not established that they were in no way motivated by Dotson's protected activity or that they were only motivated by unprotected activity on Dotson's part.

Therefore, I hold that in failing to hire Dotson, the Respondent's violated Section 105(c)(1) of the Act.

ORDER

Counsels for the parties ARE ORDERED to confer with each other during the next fifteen (15) days with respect to the remedies due Dotson, and they are encouraged to reach a mutually agreeable resolution of the matter. Any stipulations or agreements in this regard shall be filed with me within the next thirty (30) days. In discussing any back pay due Dotson, counsels are requested to keep in mind Dotson's testimony that subsequent to being denied employment at Mine No. 50, he was offered a job at Mine No. 30, and he declined to accept the offer. Tr I 134-137.

In the complaint of discrimination the Secretary requests "[a]n order assessing an appropriate civil penalty against Respondent . . . not to exceed \$50,000.00". This proposal, void as it is of any reference to the statutory civil penalty criteria, is equivalent to no proposal. Accordingly, Counsel for the Secretary IS ORDERED within ten (10) days to submit a penalty proposal supported by the Secretary's contentions with respect to the relevant statutory criteria set forth in Section 110(a) of the Act, 30 U.S.C. 820(a), and counsel for the parties are requested to confer regarding this aspect of the case during their discussions with respect to the remedies due Dotson.

In the event counsels cannot agree regarding the remedies and proposed civil penalty, they are to notify me no later than the end of the referenced fifteen (15) day period. Counsels ARE FURTHER ORDERED at that time to state their specific areas of disagreement and if they believe that a further hearing may be required on the remedial aspects of this matter, to state that as well. Counsels may notify me orally, but the notification must be confirmed in writing that same day.

I retain jurisdiction in this matter until the remedial aspects of this case are resolved and finalized. Until such determinations are made and pending a finalized dispositive order, my decision in this matter

is not
final. In addition, payment of any civil penalty by the
Respondents is held
in abeyance pending a final dispositive order.

David F. Barbour
Administrative law Judge
(703) 756-5232

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