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FRED PETERS V. TWENTYMILE COAL  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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April 16, 1993

FRED L. PETERS, : DISCRIMINATION PROCEEDING  
Complainant :  
 : Docket No. WEST 92-311-D  
v. :  
 : DENV DC 91-02  
TWENTYMILE COAL COMPANY, :  
DARYL FIRESTONE and :  
CYPRUS MINERALS COMPANY, :  
Respondents :

DECISION

Appearances: Patricia Jo Stone, Esq., Lakewood, Colorado,  
for Complainant;  
Stanley R. Geary, Esq., Pittsburgh, Pennsylvania,  
for Respondents.

Before: Judge Morris

This case involves a discrimination complaint filed by Fred L. Peters against Respondents Twentymile Coal Company, Daryl Firestone and Cyprus Minerals Company, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act").

A hearing commenced in Denver, Colorado, on December 8, 1991. The parties filed post-trial briefs.

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

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because

such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

#### APPLICABLE CASE LAW

The general principles governing analysis of discrimination cases under the Mine Act are settled. 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 proof to establish that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. *Consolidated Coal Co. v. Marshall*, 663 F2d 1211 (3rd Cir. 1981); Secretary on behalf of *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. *Pasula*, supra; *Robinette*, supra; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-403 (1983) (approving nearly identical test under National Labor Relations Act.)

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 Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965):

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

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

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

As we emphasized in *Pasula*, and recently re-emphasized in *Chacon*, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warning to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

#### SUMMARY OF THE EVIDENCE BACKGROUND

FRED L. PETERS of Steamboat, Colorado, presently works in the electrical department of Twentymile Coal Company. He is working under temporary status and he has been there for over three years.

Mr. Peters has been a production foreman, a longwall utility foreman (hourly), and a shuttle car operator. Prior to his employment at Twentymile he was a mine superintendent for Western Fuels for over five years as well as a surface superintendent. He has also served as a fire boss for Mid-Continent Resources.

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In addition, he has worked in southwestern Pennsylvania. He has been a miner since 1971 and is familiar with MSHA's operations.

In the spring of 1991 Mr. Peters (sometimes called Fred) was working as a shuttle car operator for Daryl Firestone, the face boss. Other employees included Jim Conner and employees Harrison, Turnipseed, Meckley, Stewart, and Williams.

In May 1991 they were working between sections as they were opening up a new longwall section.

In June 1991 Mr. Peters operated two different types of shuttle cars and in early June 1991 he was operating the No. 4 shuttle car.

The No. 4 car is a DC car and the overloads on the car kept kicking out. The heaters would kick on and this would occur three times a trip and usually once on a return. When it kicks out, the electrical controls on the car fail and the service brakes automatically engage. The service brakes would not hold this DC car. In addition to these problems, the No. 4 car also had loose bolts.

Mr. Peters reported this to Mr. Firestone and the maintenance foreman was told to look into it before the shift started. They said they were working on it, but they still used the same car.

Mr. Peters also became concerned about the air in the entry. It was necessary to turn off the ventilation tubes. If a door was not totally closed, air would recirculate in the face. Mr. Peters talked to Mr. Firestone and the mine manager about this. They also tried to put buffers behind the fans in an attempt to correct the problem. Mr. Peters reported this to Mr. Firestone because he was his supervisor. These conditions were not corrected before June 10, 1991.

On a Monday or Tuesday in June Mr. Peters was given a letter after he discussed the air recirculation and the brakes with Mr. Firestone. Mr. Peters said maybe he should shut the car down and Mr. Firestone replied that he should give him an unsatisfactory job performance. Mr. Firestone and Mr. Peters discussed the matter for approximately three hours and Mr. Peters thought they had the problem resolved. Mr. Firestone said that when he received a promotion he would take care of Mr. Peters' problems.

On Monday Mr. Firestone said he had talked to Steve Rosene and they were going to give him a letter anyway. He received the letter the next day. Management did not ask him his side of the issue. Because of that Mr. Peters felt MSHA was his only recourse.

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The "second advisory" letter Mr. Peters received was dated June 10, 1991. The letter refers to Mr. Peters' "unacceptable job performance." The letter was signed by Daryl Firestone and acknowledged by Fred Peters on June 11, 1991 (see Exhibit C-1).

Mr. Peters had never received any first step letter. (The letter was stated to be a "second advisory.") Mr. Peters believes he didn't merit the letter.

On June 12 Mr. Peters went to work and he noticed the bolts were loose in the brakes. He and the section mechanic tightened them and he operated the car for two to three hours. About 7:30 or 8:00 o'clock while going uphill he lost the tram, the brakes, and the shuttle car rolled backwards and came to an abrupt stop. Mr. Firestone called the maintenance people so they could resume production. Mr. Peters didn't think he was injured. He told Mr. Firestone he had pulled some muscles in his lower back and they returned to mining coal.

Mr. Peters signed up to work through his scheduled vacation. While drilling into the floor he asked the safety representative if Mr. Firestone had ever filled out an accident report. They could not find such a report, and in July, after vacations, Mr. Firestone said he had not filled out such a report. The following night Mr. Firestone handed him an accident report form and told him to fill it out.

Mr. Peters went to a doctor and received therapy and an MRI; a ruptured disc was later removed.

Exhibit C-2 is Mr. Peters' handwritten complaint to MSHA.

Mr. Peters felt he had been discriminated against because of the letter given him by the company (Exhibit C-1). Mr. Peters thought the issues had been worked out in the three hour talk with Mr. Firestone.

When Mr. Peters made his complaints to Mr. Firestone, he had the company policies in mind and he felt he should tell his supervisor of any problems. He did not feel that the company was complying with the third paragraph of its safety and health policy statement which provides:

We hold every employee accountable for following all prescribed safe work practices and procedures. No job will be considered so urgent--no schedule will be considered so rigid that the time cannot be taken to perform the job in a safe manner.

With respect to the shuttle car, the company did not follow its policy. However, an operator does not shut down a piece of

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equipment on a production shift and Mr. Peters was told to run the shuttle car.

MSHA investigated Mr. Peters' discrimination claim. MSHA found no discrimination and so advised Mr. Peters (Exhibit C-5). Mr. Peters felt threatened for his job at the mine. Different management people said maybe they could hurt their back and sit in the guard shack.

After disc surgery Mr. Peters returned and initially worked for the safety department and later in the electrical department. As his back improved, he did more and more underground work and he has continued to work in the electrical department.

Before the accident occurred Mr. Peters was a full-time shuttle car operator and now there is a possibility that he could be transferred to a job he could not do.

Company policy does not allow overtime when a person works on light duty status. In 1992 Mr. Peters' overtime lost wages came to about \$2,500. In 1991 he lost approximately \$21,406 in overtime. In Mr. Peters' view, if Mr. Firestone had heeded his complaints an accident would not have occurred.

Mr. Peters seeks the following relief: Recovery of loss of overtime wages, attorney's fees and costs, and assignment to a permanent position to a crew he's not on at this time.

Mr. Peters is more experienced in mining matters than Mr. Firestone.

In July 1990 he received a letter of congratulations from the company.

In October 1990 the company referred him to an alcohol abuse counselor.

The pivotal portion of this case generally deals with the events of April 23, 1991, May 3, 1991, June 6, 1991, June 7, 1991, June 8, 1991 and June 12, 1991.

On the credibility issues surrounding these dates I credit the testimony of Daryl Firestone. His testimony is supported by almost contemporaneous notes of the events.

In considering this evidence I have outlined Respondents' evidence and footnoted Complainant's evidence.

According to Mr. Firestone when Fred Peters started on Mr. Firestone's crew his performance was good and they got along well. (Tr. 225).

When Mr. Peters began using alcohol his performance started to drop. Mr. Firestone discussed Mr. Peters' performance with management, mostly the shift supervisor. He also discussed Mr. Peters' performance with Mr. Rosene.

On April 23, 1991 Gary Harrison said Mr. Peters' shuttle car had broken down. Gary said that on the last trip Mr. Peters was crowding he and Allen on the high side, i.e. he was pushing them tight to the rib. (Tr. 238, 239). It sounded like horseplay to Mr. Firestone. Gary and Mr. Peters hollered at each other. Gary then told Mr. Firestone that Mr. Peters had backed up and slammed into the miner as hard as he could with the shuttle car, putting the lights out. (Tr. 239).

At that point Mr. Firestone went back to the shuttle car to locate Mr. Peters. Mr. Firestone told Mr. Peters what Gary had said. Further, he said Allen (Meckley) had backed him up. Mr. Peters got real defensive and started hollering at Mr. Firestone. He told him he was calling him a liar because he was insisting his tram had stuck. (Tr. 239). Mr. Firestone was pushing the issue that Mr. Peters was crowding Allen and Gary. In addition, they had words. Mr. Firestone and Mr. Peters again had words; nothing was resolved and the car was down for 45 minutes. (Tr 239, 240).

Mr. Firestone described how in a small space miners can be crowded against the ribs. Mr. Firestone considered Mr. Peters' conduct an unsafe act and basic horseplay. He also believed Mr. Peters' hollering at him was insubordination. (Footnote 1)

On May 3, 1991 Gary (Harrison) complained that the shuttle car operators weren't helping them move from place to place. Mr. Firestone called a meeting between the miner operators and the shuttle car operators. Mr. Firestone flagged Ross and he got out. Fred kept going. Upon being flagged again he stopped. Mr. Peters got real defensive. He approached the four men: Conner, Gary Harrison, Ross Stewart and Mr. Firestone. Mr. Peters became defensive and he was hollering at Mr. Firestone and at Gary. He told Gary that he was "the laziest, sorriest shuttle car operator he'd ever seen in his life." (Tr. 242).

During this time Mr. Firestone was trying to calm Fred down. At the time he considered taking Fred outside but it was about five minutes to quitting time. If Mr. Firestone had taken Mr.

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1 Mr. Peters testified he was not aware of any complaint. But he admits he might have had words with Gary and possibly Mr. Firestone. When Mr. Firestone asked him what happened he said the tram stuck on the shuttle car. This was the only time they ever talked about the way he operated the shuttle car. (Tr. 49, 50). I am not persuaded by Mr. Peters testimony. It is considerably short of unequivocal.



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Peters outside the crew would have been waiting underground for him. Also Mr. Peters had calmed down.

Taking him "outside" means Mr. Firestone would call the shift supervisor and tell him why he was taking such action. (Tr. 242, 243).

The next morning Mr. Peters immediately apologized and Mr. Firestone didn't feel it was necessary to take Mr. Peters to the supervisor's office. (Footnote 2) (Tr. 243).

On June 6, 1991, Mr. Firestone and Mr. Peters met to review performance appraisals. Such appraisals are reviewed with each individual employee and supervisor. The evaluation was for the last six months of 1990, Daryl indicated it was a good evaluation but for the period in 1991 to June 6, 1991, he had some performance problems with Mr. Peters. Mr. Firestone told Fred his performance (in 1991) was not up to par and it wasn't acceptable. They discussed the hollering incidents. Fred agreed his performance was not up to par. It was a good meeting. (Footnote 3) (Tr. 243, 244).

The following day, June 7, Daryl was shorthanded a roof bolter and a new man (Phil) came in to run the bolter. Mr. Peters talked to Phil, telling him to run the shuttle car and he (Fred Peters) was going to bolt. Mr. Firestone told Mr. Peters that Phil was going to bolt, that he wanted him to learn and he (Mr. Firestone) was going to train him. (Tr. 245).

Mr. Firestone didn't say so to Mr. Peters but he wasn't going to reward him by letting him do any job he wanted for that day. (Footnote 4) (Tr. 245).

Fred was mad. He said he wasn't going to run that shuttle car and he was "shutting it down because of the brakes." (Tr.

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2 Mr. Peters remembered this incident when Gary complained to Mr. Firestone about the shuttle car operators not helping. A meeting was called between Ross, Fred, Jim and Gary.

He further agrees Gary, Daryl and Fred were talking in a heated tone of voice but he denies putting Mr. Firestone down in front of the crew. In addition he does not remember apologizing. Mr. Peters does not deny the main elements of the May 3 events.

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3 Mr. Peters testified he had an attitude problem and it was in direct relationship to the way things were being run. (Tr. 52). During that discussion Mr. Peters agrees that Mr. Firestone might have told him that his performance was not up to par. (Tr. 53). I am not persuaded by Mr. Peters' less than positive testimony.

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4 Mr. Peters didn't remember the roof bolter incident. (Tr. 54).

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245). Mr. Firestone said "fine." Right at hand was Dean Smith, the graveyard mechanic. Mr. Firestone told Dean to go with Mr. Peters and to work on the brakes until Mr. Peters was comfortable enough to run with it. At that point Dean and Fred were working on the brakes. (Tr 245, 246). They were bleeding the brakes and pulling the equipment forward and backwards. At this time Jim (Lewis) told Mr. Peters he was walking behind him. When Jim made the statement Mr. Peters started to tram towards him. This scared Jim and he hollered for Mr. Peters to watch out. Jim had said to turn your lights on in the direction of travel. Mr. Peters got real defensive with Jim and hollered back "fuck you." Jim walked away and went to Mr. Firestone to complain.(Footnote 5)

Later that day Mr. Firestone stopped Mr. Peters. Mr. Firestone wasn't real stern. Mr. Peters explained to Mr. Firestone the same thing that Jim had discussed. Mr. Firestone asked Mr. Peters not to holler or swear profanities at other employees. As foreman he didn't. Mr. Peters agreed and he apologized to Jim later that day. (Tr. 246, 247).

On June 8, 1991, the crew came into the section following the bull gang crew. The bull gang crew hadn't gotten all their work done. Mr. Peters' cable wasn't hung and the arc bar wasn't up. Mr. Peters hung the cable anchor but couldn't make one trip because he was running over his cable. Mr. Firestone asked Mr. Peters if they were going to have to drop the anchor and rehang the cable. Mr. Peters said he wasn't going to do it because he had just finished it.(Footnote 6)

Fred was aggravated. Mr. Firestone told Mr. Peters the work had to be done. Mr. Firestone discussed taking him "outside."

They, that is, Mr. Peters, Mr. Firestone, and Clyde Bower, continued working hanging the cable. Mr. Peters complained

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5 Mr. Peters recalled a "near miss" when Jim came around a corner. Mr. Peters told him he needed to watch where he was going. He and Jim had an argument and he possibly told Jim to "fuck off." (Tr. 55).

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6 Mr. Peters denies that Mr. Firestone asked him to hang cable because it hadn't been hung by the down shift. (Tr. 56). Mr. Peters said he didn't have enough cable. He told Mr. Firestone that if he'd anchor his cable back there I'm going to run over it. Mr. Firestone said do it anyway. So he reanchored his cable and made one try and Mr. Firestone said you are running over your cable. Mr. Firestone told him to move the cable back. When asked to move the cable back for the second time he did not refuse to move it but he might have said "I don't want to." (Tr. 56). Mr. Peters did move the cable; he was upset because he knew he'd be running over his cable where he was told to locate it. (Tr. 56, 57).

I credit Mr. Firestone's version of the occurrence. Mr. Peters somewhat concedes he refused to rehang the cable. This could be considered to be an act of insubordination to the face boss. His continuing complaints about the down shift confirm that the downshift had not hung the cable.

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constantly about the downshift screwing up. Mr. Firestone said we get paid for ten hours, let's continue to work. (Tr. 248).

Mr. Peters kept arguing. Mr. Firestone got fed up. Mr. Firestone said they were going outside to talk to a shift supervisor. Mr. Peters and Mr. Firestone and superintendent Bob Deirkes went into the kitchen. They discussed Mr. Peters' previous performances. Mr. Firestone told Bob he was instituting a second advisory step and if that didn't do any good then a third step. (Tr. 249).

Mr. Peters agreed he was not performing but it was because of the morale of the hourly employees. He was complaining that the downshift crew was not doing their jobs; likewise, as to the supervisors. Mr. Firestone said if this would be documented it was a second advisory. Bob Deirkes and Mr. Peters then had a discussion. (Tr. 250).

Mr. Firestone went back up to the section. Mr. Peters followed and said they needed to talk. They talked for two or three hours about everything including air to bull gang problems. (Tr. 250).

Mr. Firestone was completely frustrated due to the time he had been spending with Mr. Peters. They talked for three or four hours but didn't accomplish anything except they weren't hollering at each other when it was over. (Tr. 250). Both men agreed they could do better at communication. Mr. Peters didn't want to go to the second step. Mr. Firestone didn't give Mr. Peters any indication the second step letter wasn't going to happen. (Tr. 25).

On June 9 Mr. Peters called Mr. Firestone at home and wanted to know if he had talked to Steve Rosene. (Tr. 252, 253).

Mr. Firestone prepared a rough draft of the second-step letter. He and Steve Rosene and Bob Deirkes went over it. (Tr. 253).

The second advisory letter, dated June 10, 1991, was received by Mr. Peters on June 11, 1991. (Ex. C-1).

The parties presented evidence of events that occurred on June 12, 1991. On that occasion bolts were tightened on the shuttle car brakes. Four bolts held the rotary in place. The mechanic said the rotor needed to be changed out. Mr. Peters did not know the equipment would break. When the part broke, he was going upgrade and the car then rolled backwards. He did not hit the panic bar on the shuttle car. As a result of the accident, he did not feel he had a serious injury.

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Mr. Firestone was in the area but did not see the parts break on No. 4 shuttle car. Mr. Peters told Mr. Firestone that he had pulled a muscle.

On June 12 Mr. Peters told Mr. Deirkes that he wanted off the shuttle car; he didn't remember telling him that he had hurt his back. Mr. Peters did not know if he had received a first step letter.

Since his back injury, Mr. Peters has received hourly wage increases from Twentymile when there has been a general hourly increase.

Mr. Peters has not been told by Twentymile that if equipment is unsafe he is not to run it.

In 1991 there was a period when he did not work because of back surgery. He also received Workmen's Compensation.

FRANK PAVLISICK of Paonia, Colorado, is employed by the Western Coal Company as a mechanic. Mr. Pavlisick was employed by Twentymile from February 1985 to July 1991 as a maintenance foreman. He and Mr. Peters were on the same crew.

On June 12, 1991, Mr. Pavlisick was called to repair shuttle car No. 4. He found the side was broken. Also, the drive line was broken. The witness was familiar with the particular shuttle car. It was an original in 1985.

Shuttle car No. 4 was not in continuous use but he had received complaints about the brakes not holding. The resistors had been bypassed in shuttle car No. 4 and this would cause the front of the shuttle car to rise up when it started forward. He testified that when an operator turns in a report that a piece of equipment is defective, the equipment goes to the maintenance department. The maintenance department fixes it with the necessary parts.

This car was used and worn out and the brakes had not ever been totally replaced. To fully repair the brakes, you need time to get the necessary parts and such a repair could be made in ten hours.

As maintenance foreman, failure to keep the brakes in repair could cause loss of control of the car when the brakes failed.

Mr. Pavlisick worked with Mr. Peters until he terminated with the company. He had never seen Mr. Peters operating the shuttle car in any way that might adversely affect the brakes. The equipment should do what is required of it. It is possible to tram with the brakes engaged and that will damage them.

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Mr. Pavlisick would take Mr. Peters on his crew at any time. Mr. Pavlisick believed there was friction between Mr. Firestone and Mr. Peters. In his opinion, it was a power struggle and Mr. Firestone felt threatened by Mr. Peters.

Mr. Pavlisick had never observed Mr. Peters' conduct inappropriate or against safety. He was not aware Mr. Peters had complained about the brakes.

In the chain of command, Mr. Firestone could remove the shuttle car from service and have it repaired.

Mr. Pavlisick did not see any conduct on the part of Mr. Peters to justify any reprimand of Mr. Peters.

In Mr. Pavlisick's opinion, the cars should have been taken out of service or rebuilt; both of the shuttle cars were unsafe to run.

As maintenance foreman, Mr. Pavlisick's responsibility was to repair cars that break down during production.

Mr. Pavlisick examined broken parts in the shuttle car. The metal break had egg-shaped holes. That's why he directed the new parts be installed. Mr. Pavlisick did not know if the DC car was designed to hold itself back. At times these cars ran 20 hours with four hours' maintenance. Mr. Peters had worked for Mr. Pavlisick but not on a full-time basis and he had never worked with Mr. Firestone and Mr. Peters for any length of time.

On June 12 the rotor part broke. If Mr. Firestone had seen the loose bolts, he wouldn't know that they would break on that particular day.

DOUGLAS W. OGDEN of DeBeque, Colorado, is now a section mechanic for Powderburn Coal Company. He left Twentymile in 1992. He had started there as a downshift continuous miner mechanic and transferred to the electrical department. He has been mining since 1978.

In June 1991 he worked for Frank Pavlisick. On June 12 he was advised they needed help repairing a shuttle car in two-left. When he arrived he learned that the shuttle car was the one that Mr. Peters had been running. The brakes and traction were out and it was necessary to crawl under the equipment and work under it. Mr. Ogden explained in detail how the shuttle car brakes and traction were restored.

The supervisors knew about the problem on the shuttle cars as it kept coming up on conversation.

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It was not part of Mr. Ogden's job function to analyze what needed to be done on the shuttle cars. He had talked to Mr. Peters socially and had seen him in the section.

After June 12, 1991, the shuttle car was returned to service when it was repaired. Mr. Ogden was never fully in charge of pulling down and repairing the brakes.

The bolt holes that were oblong were replaced. An individual would not notice if the bolt holes were tight.

Mr. Pavlisick had the authority to take defective equipment out of service.

After the repairs were effective, Mr. Ogden thought the brakes were operational but he believed some risk existed. They bled the brakes after tightening the bolts.

They would also tram the brakes and if the brakes were spongy, they would bleed them. As to shuttle car No. 4, they would report their repairs back to Frank Pavlisick and in a few days there would again be reports of loose bolts.

DAN GAGON of Craig, Colorado, has been at Twentymile since March 1984 on the longwall bull gang.

In June 1991 he was a shuttle car operator and he became acquainted with Mr. Peters. He operated the shuttle car No. 4 on a different shift.

Prior to June 12, 1991, shuttle car No. 4 had bad brakes and he reported this condition to the supervisor.

On June 12 he shut the car down because of the brakes and he tightened the bolts. He was stopping in a safe distance but the brakes were mushy. He had the same problems both before and after the repairs. On June 12 he parked shuttle car No. 4 and refused to run it. The shift mechanic then tightened the bolts and the brake rotors. Mr. Gagon also talked to the shift supervisor and the mechanics on the down shift.

After June 12, 1991, the brake rotors were repaired and they got a little better.

Mr. Gagon has no knowledge of the June 12 accident involving Mr. Peters. He has run shuttle car No. 4 and No. 5 off and on since 1984 and the brake rotor broke three times while he was operating the equipment. For the last two or three years he has lost the brakes on three occasions.

ROSS STEWART, Craig, Colorado, is now a shuttle car operator. In 1991 he was on the same crew with Mr. Peters.

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Mr. Firestone was his supervisor.

In June 1991 Mr. Stewart drove No. 4 or No. 5 shuttle car. He didn't see the June 12 accident involving the shuttle car but he was in the section. He reported the brakes on his car when they were malfunctioning. These reports were made to the foreman or the mechanic.

There was a time when Mr. Firestone and Mr. Peters were co-bosses with Mr. Stewart. Mr. Stewart believed there was some friction between them.

Mr. Peters was a good worker.

Mr. Stewart believed he was familiar with the company criteria for a Step 1 or Step 2 reprimand. These included unsafe acts, horseplay, unsafe job conditions, and lack of concern for safety.

Mr. Stewart agreed that on one occasion Mr. Peters had run into his shuttle car, and he also had struck his once or twice.

Mr. Stewart complained about Mr. Peters having alcohol on his breath.

At a meeting of the shuttle car operators, Mr. Firestone and Mr. Peters yelled, and Mr. Peters criticized Mr. Harrison's performance and some words were said.

In May and June 1991 Mr. Peters complained about the down shift not doing its share of the work. Alcohol was not involved in any manner in the May or June 1991 incidents.

#### RESPONDENTS' EVIDENCE

DARLY FIRESTONE's testimony has been previously reviewed.

STEVE ROSENE has been in the employ of Twentymile Coal Company since October 1987. He is responsible for the Human Resources activities.

He has been involved in disciplinary matters for Mr. Peters since April 1989. He was involved in ten formal contacts, including a referral for alcohol abuse in 1989-1990 as well as overall job performance in 1990 and 1991.

Mr. Peters was issued a Step 2 advisory on June 11, 1991.

Mr. Rosene is familiar with the company's corrective action program. The program is a step program to identify performance issues which the company tries to resolve.

The steps consist of what is called a first reminder which takes place between the supervisor and the employee. If there's no change in the situation, there is a second reminder or advisory step. This involves formal documentation, letters and is structured towards improvements. It goes in the performance file. If there is no improvement, then there is a career discussion advisory where he meets with the employee and summarizes the problem. The employee is sent home for one day with pay and the company seeks a commitment by the employee to remedy whatever may be the problem.

Exhibit R-7 outlines the corrective action counseling guidelines that are followed.

There is not necessarily an initial step program; the company can go immediately to any one of the levels. The gambit of performance issues include fighting, disruptive activities, work quality, work quantity, and damaging company equipment. Miners have been terminated under this program. Mr. Rosene becomes involved in the second advisory level.

Mr. Firestone came to him concerning Mr. Peters. Mr. Rosene had counseled Mr. Peters on work performance, disruption with crew, and co-worker complaints.

Mr. Rosene was not aware of the air recirculation and shuttle car complaints. The fact that Mr. Peters had made safety complaints did not enter the conversation when the second advisory took place.

Mr. Rosene was aware of Mr. Peters' back surgery and when he returned to work, he was on restricted duty and the company required a doctor's report. When Mr. Peters returned, he joined the electrical group, working mostly on the surface. Mr. Peters has a permanent restriction, namely a 50-pound lifting limit. In view of Mr. Peters' restriction, he has not returned to work in full capacity, although he works full-time in the electrical department doing day-to-day duties and assisting in the maintenance of the electrical equipment. Mr. Peters requested this assignment and it was appropriate under the circumstances.

Twentymile has two departments, maintenance and production, and people are rotated in various subdepartments for training.

In 1991 and 1992 overtime work at Twentymile was handled through a sign-up system. The company posts a sheet and any miner can sign up. If he does, he's expected to show up for the work. Mr. Peters could sign up for electrical work. In the last two years the company's overtime percentage has been high.

Twentymile has been attempting to cut down its overtime and limit it to one overtime shift per employee per month. They also



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hired additional miners to cut back on excessive overtime. The overtime percentage is over 10 percent and this was necessary due to two longwall moves.

Mr. Peters accepted a lead supervisory position and employees in this category are paid an additional one and a half hours at time and a half. From December 1989 to July 1990, this was his work status.

When Mr. Peters first returned to work, the return-to-work program necessarily restricts his duty and he is limited to 40 hours per week.

Twentymile has a complaint procedure. It's a step procedure. The employee first addresses the problem with his supervisor and the employee learns of this when he is a new hire. Mr. Peters would have learned of it at that time.

The second advisory letter of June 10, 1991, given to Mr. Peters recites "he (Peters) was not up to standard." The given behavior of Mr. Peters was not as clear as Mr. Rosene would like it to be, but the specific behavior by Mr. Peters was that he was not doing his assigned work; his manner of doing work; his request that miner cable be hung; his unacceptable performance; his foul language; and his insubordination. These were discussed with Mr. Firestone and Jody Hampton. Mr. Firestone mentioned the recirculating air but he did not mention the shuttle car.

The company had no complaints with Mr. Peters about fighting or about his absenteeism.

Mr. Rosene did not know in what manner Mr. Peters was operating the shuttle car.

Mr. Peters wasn't given the second advisory letter because of the air recirculation complaints nor for the shuttle car complaints.

Mr. Rosene was not aware of Mr. Peters' MSHA complaint (Ex. C-2) until after MSHA investigated his complaint. When he talked to Mr. Firestone there was some mention of the air in the section. Mr. Rosene did not discuss with Mr. Peters his side of the story, and his involvement went back to prior evaluations including the mandatory referral and Mr. Peters' work performance.

Mr. Rosene did not assume Mr. Peters was at fault and he talked to other supervisors and mine management. He did not talk to Messrs. Stewart or Gagon. He talked to Conner but didn't discuss anything about the brakes. He first learned about shuttle car No. 4 when Mr. Peters filed his complaint with MSHA at the end of the June 1991. No report was filed by Mr. Peters after the accident. The accident involving the shuttle car

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losing its brakes was serious and it attracted attention when the shuttle car shut down. On June 12 nothing was reported to Mr. Rosene.

After his accident Mr. Peters had surgery on his back and filed a Workmen's Compensation claim.

On June 12, 1991, the company filed a form entitled "Final Admission of Liability" with the Colorado Department of Labor and, in particular, with the Division of Workmen's Compensation as it related to Mr. Peters. (Ex. C-7).

Mr. Rosene did not talk to Mr. Peters after he learned about shuttle car No. 4 because he felt it was inappropriate to discuss the matter with Mr. Peters while MSHA was investigating it.

At a later time he asked Mr. Firestone if shuttle car No. 4 or the air complaints resulted in any action, and he stated they did not.

#### COMPLAINANT'S REBUTTAL

Mr. Peters, in rebuttal, indicated that he didn't believe there was an emergency bar on the shuttle car on June 12, 1991.

Between June 8 and the step letter of June 11, Mr. Peters believed he had called Mr. Stuckey and stated that he had concerns over safety issues. He stated the mine was being run like Mid-Continent Resources when he worked there in 1977-1981. He had told Mr. Firestone about the air problems which were occurring. Mr. Firestone said he would take care of it, but other concerns were not being taken care of.

The following morning Mr. Peters was driving the mantrap and Mr. Firestone said it was a performance problem for him (Peters). He also said Mr. Peters' attitude was real bad and that he wasn't pulling his share. Mr. Peters agreed he wasn't happy about the recirculation and the brakes and the kicking heaters some 30 to 40 times a shift; this would engage the emergency brakes.

Prior to the evaluation in June 1991, all previous evaluations of Mr. Peters had been outstanding or excellent. There had been no alcohol recurrence. The last one was in October 1990.

Having considered the hearing evidence and the record as a whole, it is appropriate to enter specific findings of facts. The preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. Fred L. Peters is a full-time employee of Twentymile Coal Company (Twentymile) in the electrical department as a mine electrician. (Tr. 15, 87).

2. Mr. Peters has held several mine management positions. (Tr. 48).

3. In May 1989 Mr. Peters was referred by Twentymile to counseling for alcohol abuse. In July 1990 Twentymile congratulated Mr. Peters on completion of his alcohol abuse counseling. (Tr. 48).

4. On September 20, 1990 Daryl Firestone and Jody Hampton counseled Mr. Peters about coming to work under the influence of alcohol. (Tr. 49).

5. In October, 1990 Mr. Peters was again referred by Twentymile to counseling for drug abuse. (Tr. 49).

6. Daryl Firestone was Mr. Peters' supervisor in the spring of 1991. (Tr. 18). Mr. Peters had been temporary foreman of the same crew before Daryl Firestone. (Tr. 49).

7. In the spring of 1991 Mr. Peters was operating two shuttle cars, including the No. 4 shuttle car. (Tr. 20).

8. On June 10, 1991 Mr. Peters was issued a second step discipline letter under Twentymile's corrective action counseling program. (Tr. 24, Ex. C-1).

9. Mr. Peters filed his complaint of discrimination on June 15, 1991, because he felt it was the only way to get the second step discipline letter removed from his file. (Tr. 36, Ex. C-2).

10. As of May 28, 1992, when Mr. Peters filed answers to interrogatories the only discriminatory act which Mr. Peters was complaining about was receipt of the second step letter. (Ex. R-6).

11. Mr. Peters served on Mr. Firestone's continuous miner crew. (Tr. 224).

12. There are several events which preceded issuance of the second step disciplinary letter, each of which would constitute sufficient business justification for the letter.

13. On April 23, 1991, Mr. Peters was crowding the continuous miner operators with his shuttle car, he was pushing them tight to the rib. One of the miner operators, Gary Harrison, had

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words with Mr. Peters about the crowding. Mr. Peters then backed up and slammed his shuttle car into the miner, breaking the lights on the shuttle car. (Tr. 239, Ex. R-8). When confronted on this matter, Mr. Peters insisted that his tram had stuck. Mr. Firestone pressed the issue of Mr. Peters crowding the miner operators. Mr. Peters and Mr. Firestone had words. (Tr. 239-240, Ex. R-8). By "crowding" the miner operators (who stand behind the miner and operate it by remote controls) Mr. Peters was intentionally pushing them towards the rib. (Tr. 240). Such conduct is unsafe. (Tr. 240).

14. Mr. Peters admits that on April 23, 1991, he ran his shuttle car into the miner and broke the lights on his shuttle car. (Tr. 49).

15. Mr. Peters admits that on April 23, 1991, he had words with Daryl Firestone about the manner in which Mr. Peters was operating his shuttle car. (Tr. 50).

16. Mr. Peters admits that on the day he ran his shuttle car into the miner (April 23, 1991) he might have had words with Gary Harrison about crowding Gary with the shuttle car. (Tr. 50).

17. On May 3, 1991, Gary Harrison, a continuous miner operator, complained to Mr. Firestone that the shuttle car operators were not helping move the cable for the continuous miner. As a result, Mr. Firestone called a meeting of the two shuttle car operators and two miner operators and himself. (Tr. 24, Ex. R-9). When Mr. Firestone advised Mr. Peters that the meeting was about helping the miner operators, Mr. Peters became very defensive and began yelling at Mr. Firestone as he approached the meeting. Mr. Peters yelled at Mr. Firestone and had words with Gary Harrison. He told Mr. Harrison that he was the laziest, sorriest shuttle car operator he had ever seen. Mr. Peters was insubordinate to Mr. Firestone and he was abusive and derogatory towards Mr. Harrison. (Tr. 156, 242, Ex. R-9).

18. Mr. Peters admits that on May 3, 1991, he was involved in a heated argument with Daryl Firestone and Gary Harrison about the shuttle car operators' unwillingness to assist the continuous miner operators in moving the trailing cable for the miner. (Tr. 50-52).

19. On June 6, 1991, Mr. Firestone gave Mr. Peters his performance evaluation for the last 6 months of 1990. (Tr. 244). During the discussion concerning that performance evaluation, Mr. Firestone told Mr. Peters that, although the evaluation for the last 6 months of 1990 was good, Mr. Peters' performance in 1991 was not satisfactory. (Tr. 244, Ex. R-10). Mr. Peters agreed that his performance was not up to par. (Tr. 244, Ex. R-10).

20. Mr. Peters admits that on June 6, 1991, Mr. Firestone may have told him that his performance was not up to par. (Tr. 53).

21. On June 7, 1991, at the beginning of the shift, Mr. Peters wanted to run the roof bolter because the regular roof bolter was absent. Mr. Firestone, however, directed Mr. Peters to run his shuttle car and instructed another employee to run the roof bolter. Mr. Peters became angry because he was not permitted to run the roof bolter. He then threatened to shut down his shuttle car because of the brakes. At that time, the graveyard mechanic happened to be in the area and Mr. Firestone sent the mechanic with Mr. Peters to make sure the shuttle car brakes were working properly. While the mechanic and Mr. Peters were bleeding the brakes, Mr. Peters was trammng the car forward and backward. Jim Lewis told Mr. Peters that he was walking behind the shuttle car, but Mr. Peters trammed toward Mr. Lewis without turning on the lights in the direction of travel and scared Mr. Lewis. Mr. Lewis told Mr. Peters to turn on the lights in the direction of travel and Mr. Peters responded by swearing at Mr. Lewis. Mr. Firestone met with Mr. Peters and asked Mr. Peters not to swear at his fellow workers. (Tr. 53, 55, 246-247, Ex. R-11). Trammng towards Mr. Lewis was unsafe because Mr. Peters did not have his lights on in the direction of travel.

22. On June 8, 1991, Mr. Firestone's shift and crew followed the bull gang crew. The bull gang had not finished its work, so the cable for Mr. Peters' shuttle car needed to be hung and the anchor needed to be moved. Mr. Peters and Mr. Firestone discussed the possibility that the cable may be in the way where Mr. Firestone wanted it hung, but Mr. Firestone decided to hang it there because otherwise they would have to piggyback (loads of coal). (Tr. 247). Mr. Peters hung the cable as instructed and attempted to haul coal, but the shuttle car was running over the cable. Therefore, Mr. Firestone asked Mr. Peters to rehang the cable at another location and Mr. Peters refused. (Tr. 248).

23. Subsequently, Mr. Peters helped rehang the cable, but he complained the whole time about the down shift not getting its work done. Mr. Peters kept arguing with Mr. Firestone about the down shift not doing its job so Mr. Firestone decided to take Mr. Peters to talk with Dennis Bowens, a shift superintendent. However, Mr. Deirkes, another shift superintendent, came by and they had a meeting with him. (Tr. 248-249).

24. Mr. Peters admits that on June 8, 1991, he may have refused a directive from Mr. Firestone to relocate the cable for Mr. Peters' shuttle car. (Tr. 56). Mr. Peters also admits that he had an attitude problem in June, 1991. (Tr. 52).

25. While on Mr. Firestone's crew, Mr. Peters' performance level began to drop during the time when Mr. Peters was using

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alcohol. (Tr. 226). He was counseled by Mr. Firestone and Jody Hampton for coming to work under the influence of alcohol in September, 1990. (Tr. 49).

26. Mr. Peters was referred to mandatory counseling for alcohol abuse in 1989 and again in 1990. (Tr. 170).

27. Mr. Peters' alcohol problem was part of his performance problem. Part of the performance evaluation given to him on June 6, 1991, referred to his previous alcohol abuse problems. (Tr. 267).

28. Mr. Ross Stewart has complained to Mr. Firestone about Mr. Peters coming to work with alcohol on his breath. (Tr. 155).

29. The way Mr. Peters operated his shuttle car was abusive to himself and the car. Other employees, including Mr. Peters' witness, Mr. Pavlisick, told Mr. Firestone that Mr. Peters had to slow down because he was going to hurt himself or damage the shuttle car. Mr. Firestone recalls one location where the road was rough and recalls seeing Mr. Peters really bouncing around in his shuttle car. This was before June 12, 1991. Mechanics also complained about Mr. Peters free wheeling the AC shuttle cars. (Tr. 259).

30. Mr. Peters' manner of operating his shuttle car was causing the car to be damaged. (Tr. 194).

31. Mr. Peters has a reputation for running his shuttle car hard. (Tr. 155).

32. Mr. Peters admits that Jody Hampton talked to him about taking better care of the equipment. (Tr. 90).

33. Mr. Stewart is aware of one instance where Mr. Peters crowded a continuous miner operator with his shuttle car; Mr. Stewart considered that to be an unsafe act. (Tr. 157).

34. On one occasion Mr. Peters rammed his shuttle car into Mr. Stewart's shuttle car. (Tr. 155).

35. Mr. Peters admits that he often became angry and complained to Mr. Firestone about the down shift not doing their job when Mr. Firestone's crew had to finish work which the down shift did not complete. (Tr. 57).

36. Mr. Peters complained about the down shift not doing its work and he complained if he had to do work that the down shift had not completed. (Tr. 158).

37. Mr. Peters' poor work performance included, insubordination, yelling at Mr. Firestone, yelling at his co-workers,

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refusing to do work which he was directed to do, and not helping move the continuous miner from place to place. (Tr. 280).

38. Mr. Peters' failure to help move the continuous miner from place to place was a daily occurrence. (Tr. 280).

39. During their discussion on June 8, 1991, Mr. Firestone advised Mr. Peters that Mr. Firestone was going to issue a second step disciplinary letter to Mr. Peters. (Tr. 250).

40. On June 8, 1991, Mr. Peters threatened Mr. Firestone. After Mr. Firestone told Mr. Peters he was going to be issued a second step letter, Mr. Peters said he had notes on Mr. Firestone and other supervisors and that if he was going to lose his job, Mr. Firestone and other supervisors would also. (Tr. 252).

41. On June 8, 1991, Mr. Peters attempted to convince Mr. Firestone not to issue a second step disciplinary letter and tried to convince Mr. Firestone to tell Mr. Rosene that they (Firestone and Peters) had worked out the problem with Mr. Peters' performance. (Tr. 251).

42. Shortly after June 8, 1991, Mr. Peters called Mr. Firestone at home to ask if Mr. Firestone had talked to Mr. Rosene and to attempt to persuade Mr. Firestone not to issue the second step disciplinary letter. (Tr. 252). Mr. Firestone believed Mr. Peters did not want the second step letter issued because Mr. Peters was trying to get a truck driver job on the surface at the mine. (Tr. 252-253).

43. Mr. Rosene is the Human Resources Manager for Twentymile Coal Company. He had held that position since October 1968. Mr. Rosene has 14 years experience in coal and noncoal mines in hourly and management positions. (Tr. 168).

44. Twentymile Coal Company has a corrective action counseling program which was implemented in 1988. (Tr. 171, Ex. R-7).

45. The corrective action counseling program has three steps: a first reminder; a second reminder, and then a career discussion advisory. (Tr. 171, Ex. R-7).

46. A first reminder is a confidential meeting between a supervisor and an employee to identify performance problems. (Tr. 172, Ex. R-7).

47. A second reminder (or second step advisory) is more serious and it includes a letter to identify problems and means of improving. (Tr. 172, Ex. R-7).

48. A career discussion (or third step) advisory identifies performance issues and the affected employee is sent home for a

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day with pay to decide whether or not he or she can make a commitment to the guidelines, policies and procedures of Twentymile. If the employee makes such a commitment, a joint action plan is formulated. If the employee succeeds in following the plan, the employment relationship continues. If not, the employee is terminated. (Tr. 173, Ex. R-7).

49. Any appropriate step of the corrective action counseling program may be used at anytime, depending upon the severity of the performance issues involved. (Tr. 175, Ex. R-7).

50. Mr. Firestone was frustrated with the amount of time he was spending concerning performance problems with Mr. Peters. (Tr. 250).

51. Mr. Peters was issued a second step advisory letter because his job performance was inadequate, he was disruptive on his crew, his co-workers were complaining about the way he treated them, he refused to hang his shuttle car cable when told to do so by his foreman, he refused to help the continuous miner crew move the miner, and for unsafe conduct. (Tr. 177, 192, 196, 280).

52. The second step disciplinary letter was based on concerns about Mr. Peters' performance since April 1991. (Tr. 199).

53. Mr. Peters signed the acknowledgment on the second step disciplinary letter (Ex. C-1), which letter specifically states that Mr. Peters agreed that his performance was not up to standard. (Tr. 60).

54. Mr. Peters admits that he tried to persuade Mr. Firestone that it would not be fair to give Mr. Peters a second step disciplinary letter. (Tr. 59).

55. Mr. Firestone's decision to issue the second step letter to Mr. Peters was not motivated in any way by Mr. Peters' complaints about ventilation or the condition of his shuttle car. (Tr. 177, 196, 221, 261).

56. Mr. Peters talked to Mr. Firestone and the mine manager about ventilation issues at various times. (Tr. 22-23).

57. When Mr. Peters complained to Mr. Firestone about ventilation in the mine, Mr. Firestone would take measurements. If they needed more air, Mr. Firestone would notify one of the shift supervisors who would make arrangements for the graveyard shift to provide more air. (Tr. 227).

58. If there was recirculation of air, Mr. Firestone would shut down production and repair what needed to be done. (Tr. 227).



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59. Mr. Peters admits that when he identified ventilation problems to his supervisors, various actions were taken to correct them. (Tr. 23).

60. The No. 4 shuttle car is the one which Mr. Peters was operating on June 12, 1991, and generally during the time period in question. (Tr. 65).

61. The No. 4 shuttle car was also operated by another operator, Dan Gagon, on a different shift. (Tr. 66, 138).

62. Mr. Firestone would often run the No. 4 shuttle car during Mr. Peters' lunch breaks. (Tr. 65).

63. During May and June, 1991, Mr. Firestone ran Mr. Peters' shuttle car for approximately one hour every other day. (Tr. 229).

64. When Mr. Peters complained to Mr. Firestone about the brakes on Mr. Peters' shuttle car, Mr. Firestone and Mr. Peters would determine if the car was safe to continue operation. If something needed to be done immediately, it was done. If the maintenance or repair could wait, it was reported to the down shift. (Tr. 228). This was standard practice. (Tr. 103, 151).

65. Mr. Firestone relied upon the maintenance foreman to repair Mr. Peters' shuttle car. (Tr. 277).

66. During May and June, 1991, the brakes on Mr. Peters' shuttle car were adequate to stop the loaded car on an incline. However, the brakes were not as good as the brakes on the newer AC cars. (Tr. 230).

67. When the brakes failed on Mr. Peters' shuttle car on June 12, 1991, it was because a brake rotor broke. (Tr. 61).

68. It is not common for a brake rotor to break on shuttle cars such as shuttle car No. 4. (Tr. 132, 146, 256). A typical daily walk around inspection of the shuttle car would not have revealed that the brake rotor was about to break. (Tr. 63, 132, 145).

69. Mr. Dan Gagon operated the No. 4 shuttle car on a different crew from Mr. Peters. (Tr. 138).

70. On June 12, 1991, during the day shift, Mr. Gagon had his shift mechanic check the brakes on the No. 4 shuttle car. (Tr. 139).

71. On occasion, Mr. Gagon shut down the No. 4 car during his shift to check the brakes. He also reported problems with the brakes to his supervisor and to maintenance. (Tr. 138).

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There was no testimony that Mr. Gagon was disciplined or of any hostility towards him for such actions.

72. Mr. Ross Stewart is a shuttle car operator for Twenty-mile Coal Company. He drove the other shuttle car on Mr. Peters' crew. (Tr. 148).

73. At times Mr. Stewart shut his shuttle car down when he felt it was not safe to operate. (Tr. 150). There was no testimony of any discipline or hostility towards Mr. Stewart for such conduct.

74. Mr. Frank Pavlisick was employed by Twentymile Coal Company from 1985 to July, 1992. In June 1991, he was a maintenance foreman. (Tr. 99)

75. Mr. Pavlisick's crew was not the regular crew that worked on the No. 4 shuttle car. (Tr. 115-116, 119). His crew only worked on it if it broke down during a production shift. (Tr. 116).

76. Generally, if Mr. Firestone reported problems with the brakes on the No. 4 shuttle car, they would have been fixed by a different maintenance crew than Mr. Pavlisick's crew. (Tr. 119).

77. When Mr. Pavlisick's crew did work on the No. 4 shuttle car, it was safe to operate when he released it for production work. (Tr. 116).

78. According to Mr. Pavlisick, no one could have known that the brake rotor was going to break on the day it broke. (Tr. 122).

79. Mr. Pavlisick does not know if the No. 4 shuttle car was designed and constructed so the motor would hold it back going down hills. In any event, the car still had brakes to hold it back on hills. (Tr. 118).

80. Mr. Pavlisick, as a maintenance foreman, had authority to take the No. 4 shuttle car out of service if he thought it was unsafe. (Tr. 134).

81. Mr. Pavlisick admitted that he is not an expert with regard to electrical matters. (Tr. 101). Therefore, the opinions he gave about the electrical circuits of the No. 4 shuttle car cannot be given any weight.

82. Mr. Doug Ogden was on Mr. Pavlisick's downshift continuous miner maintenance crew in June, 1991. (Tr. 125).

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83. Mr. Ogden is aware that in June 1991, the brakes of the shuttle cars were checked by maintenance people on the production shifts and on the maintenance shifts. (Tr. 143).

84. When Mr. Ogden worked on the brakes on the No. 4 shuttle car he would check them to make sure they worked before he would release the car. (Tr. 133).

85. Mr. Ogden's crew had tightened the bolts on the brakes on the No. 4 shuttle car on occasions prior to June 12, 1991. When they tightened the bolts, they felt the machine was operational. (Tr. 129).

86. It was acceptable for Mr. Peters to shut down his shuttle car if he felt the brakes were not working properly. (Tr. 273, 275).

87. Mr. Firestone never decided not to have Mr. Peters' shuttle car checked or repaired because of Mr. Peters' complaints about the car or ventilation. (Tr. 262).

88. MSHA investigated shuttle car No. 4 following the brake failure on June 12, 1991, and found no neglect by Twentymile Coal Company with respect to maintenance of the car. (Tr. 213).

89. When Mr. Peters refers to the "heaters" on his shuttle car, he is referring to the electrical overloads. (Tr. 75).

90. An overload is an electrical unit that protects the motor from drawing too much amperage. (Tr. 20).

91. During the time in question, the "overloads" kept kicking on the No. 4 shuttle car. (Tr. 20).

92. When the "heaters" would kick on shuttle car No. 4, the power would be cut off. The shuttle car could not be operated again until the heaters cooled and they could be reset. (Tr. 228).

93. When the heaters kicked on Mr. Peters' shuttle car the breaks were activated by a selinoid and they set immediately. (Tr. 230).

94. The downshift had been working on the No. 4 shuttle car frequently to correct the situation with the heaters kicking. (Tr. 229).

95. If a shuttle car is worked on during a production shift, it is noted on a report called a production and maintenance report. (Tr. 69).

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96. If a shuttle car is worked on during a maintenance shift, it is noted on a report called a maintenance report. (Tr. 69).

97. The brakes on the No. 4 shuttle car had been worked on several times shortly prior to June 12, 1991, as indicated in Exhibits R-1 through R-5. (Tr. 257).

98. The production and maintenance report for Mr. Peters' crew on the day shift on May 31, 1991, indicates that work was done on his shuttle car with regard to the heaters kicking and to replace a brake puck. (Tr. 71, Ex. R-1).

99. A maintenance report for the swing shift on May 31, 1991, indicates that repairs were made to the electrical system of the No. 4 shuttle car and that 4.1 hours were spent replacing the brake rotor on the right side of the shuttle car. (Tr. 72, Ex. R-1).

100. A maintenance report for the swing shift on June 6, 1991, indicates that work was done on the heaters on the No. 4 shuttle car. (Tr. 76, Ex. R-2).

101. A maintenance report for the graveyard shift on June 6, 1991, indicates that additional work was done on the heaters of the No. 4 shuttle car. (Tr. 76, Ex. R-2).

102. A maintenance report for the swing shift on June 7, 1991, indicates that work was done on the electrical system on the No. 4 shuttle car. (Tr. 77, Ex. R-3).

103. A maintenance report for the graveyard shift on June 7, 1991, indicates that work was done on the brakes on the No. 4 shuttle car. (Tr. 77, Ex. R-3).

104. A maintenance report for the swing shift on June 8, 1991, indicates that one man spent nine hours working on the electrical system on the No. 4 shuttle car. (Tr. 79-80, Ex. R-5).

105. A maintenance report for the day shift on June 10, 1991, indicates that work was done on the electrical system of the No. 4 shuttle car. (Tr. 78, Ex. R-4).

106. A maintenance report for the day shift on June 11, 1991, indicates that two men worked seven hours to check the tram circuit of the No. 4 shuttle car "for why the overloads kick." (Tr. 79, Ex. R-4).

107. Mr. Peters testified that it is the operator's responsibility to check his car before the start of each shift. (Tr. 27).

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108. During the day shift on June 12, 1991, the operator of shuttle car No. 4 had the shift mechanic work on the brakes. (Tr. 139).

109. On June 12, 1991, Mr. Peters noticed some loose bolts on the brakes of the No. 4 shuttle car during his walk around inspection. He and the section mechanic tightened up the loose bolts. (Tr. 27).

110. After Mr. Peters and the section mechanic tightened up the bolts on the brakes on his shuttle car at the beginning of his shift on June 12, 1991, he operated the car for three or four hours before the brake rotor broke. (Tr. 27).

111. When the brake rotor broke, Mr. Peters was driving the unloaded shuttle car up a hill. (Tr. 27). The car then rolled backwards down the hill for a distance of 25 to 30 feet where it bottomed out and came to a sudden stop. (Tr. 27).

112. Mr. Peters is not sure whether his car had a panic bar on June 12, 1991, but he knows he did not hit the panic bar when the car rolled backwards. (Tr. 64).

113. At the time Mr. Peters' shuttle car rolled backwards on June 12, 1991, Mr. Peters did not believe he had been injured and he told Mr. Firestone that there was no problem. (Tr. 28, 65).

114. On June 12, 1991, Mr. Peters did not tell Mr. Firestone that he was injured. If he had, Mr. Firestone would have either taken Mr. Peters outside or he would have completed an accident report. (Tr. 255-256).

115. Subsequent to June 12, 1991, while working through vacation, Mr. Peters began to have pain going down his leg which he believed was connected to the sudden stop of his shuttle car on June 12, 1991. (Tr. 29). It was then that Mr. Peters inquired as to whether an accident report had been filed. (Tr. 30).

116. Mr. Peters never proved that his back injury was a result of the sudden stop of his shuttle car on June 12, 1991, since there was no medical expert testimony to connect the accident to the injury.

117. Mr. Peters has been instructed by mine management personnel that if he feels a piece of equipment is unsafe, he is not supposed to operate it. (Tr. 88).

118. Mr. Firestone was not present in the section on June 12, 1991, when the brake rotor broke on Mr. Peters' shuttle car because he was in another section running an errand for his supervisor. (Tr. 255).

119. Mr. Peters is not aware of any damage to the shuttle car on June 12, 1991, when the brake rotor broke. (Tr. 67).

120. There was no reason for Mr. Firestone to file an accident report immediately following the failure of the brakes on June 12, 1991, because Mr. Peters said he was not injured and because there was no damage to the shuttle car other than the broken brake parts.

121. There was no accident report filed with respect to the incident when the brakes broke on Mr. Peters' shuttle car on June 12, 1991, until July, 1991. Mr. Peters did not file a report. Accident reports are initiated at the mine by the employee involved. (Tr. 203).

122. Mr. Peters' complaint to MSHA states that the brakes would not stop his shuttle car very good with a load on; however, his car was unloaded when the brake rotor broke on June 12, 1991. (Tr. 66).

#### DISCUSSION

As a threshold matter there is no proof in this record as to the status of Cyprus Minerals Company. Accordingly, the case is dismissed as to said Respondent due to lack of proof.

#### Protected Activity

There is no question but that Fred L. Peters was engaged in activities protected under the Mine Act when he complained about the shuttle cars, the overloads kicking out and the service brakes on the shuttle cars. In addition, his complaints about air in the entries and his written complaints to MSHA were further protected under the Mine Act.

#### Direct Evidence of Discrimination

As a threshold matter, it is apparent that the record fails to disclose any direct evidence of discrimination as to Mr. Peters' protected activities. However, as noted under the case law direct evidence is seldom seen in such cases. Accordingly, it is appropriate to determine whether any circumstantial indicia might be established by the evidence.

#### Knowledge of Protected Activity

Twentymile's supervisor knew of Mr. Peters' safety complaints but took no adverse action.

### Hostility to Protected Activity

There was no hostility to Mr. Peters' protected activity. Ross Stewart, a shuttle car driver on Mr. Peters' crew shut down the shuttle car when he felt it was unsafe to operate it. No discipline or hostility was shown towards Mr. Stewart. In addition, it was acceptable for Mr. Peters to shut down his car if he felt it was unsafe. Finally, Mr. Peters had been instructed to shut down unsafe equipment. Compare Hicks v. Cobra Mining, Inc., et al 12 FMSHRC 563, 568 (Weisberger, J.).

In sum, the failure of management to manifest hostility, displeasure or anger appears to confirm the lack of any discriminatory intent against employees who exercise such rights.

### Coincidence in Time

Mr. Peters claims the second step letter of June 10, 1991, was discriminatory conduct on the part of the company. However, that bears only a minimal relationship in time to the events beginning April 23, 1991. In Larry Cody v. Texas Sand and Gravel Co., 13 FMSHRC 606, 668 it was held that adverse action was not motivated by a two week old safety complaint.

### Disparate Treatment

There is no evidence that Mr. Peters was treated differently than other employees.

In support of his position Mr. Peters relies on Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (1974). He asserts Phillips is identical with the case at bar.

I disagree. The primary issue in Phillips is when a miner's safety complaints first come under protection of the Mine Act (when made to a foreman or when made to MSHA).

The determination in Phillips was specific to the facts in that case.

Mr. Peters further argues the failure of Respondents to fully repair the defective shuttle car brakes constitutes discrimination which resulted in direct damage to him and deprived him of full pay, overtime and a demotion to the status of a temporary position.

Contrary to Mr. Peters' views the record establishes extensive repairs were made to shuttle car No. 4. Mr. Peters' position apparently seeks to by-pass the work refusal rights under the Mine Act. On the other hand, the Judge is obliged to follow the Commission's established analysis for considering discrimination cases.

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On the record of this case and for the reasons stated I conclude that any adverse action was not motivated, in whole or in part, by Mr. Peters' protected activities. Assuming Twenty-mile and Mr. Firestone's actions were motivated in part by Mr. Peters' protected activities the Respondents' established by a preponderance of the evidence that they were also motivated by business reasons and Mr. Peters' unprotected activities and they would have taken the adverse action in any event.

For the foregoing reasons stated herein, this case is DISMISSED.

John J. Morris  
Administrative Law Judge

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