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SOL (MSAH) V. ALL AMERICAN ASPHALT
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-3993/FAX (303) 844-5268

November 2, 1994

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES HYLES, DOUGLAS MEARS, DERRICK SOTO, GREGORY DENNIS, Complainants v. ALL AMERICAN ASPHALT, Respondent	: : : : : : : : : : :	DISCRIMINATION PROCEEDINGS Docket Nos. WEST 93-336-DM WEST 93-436-DM WEST 93-337-DM WEST 93-437-DM WEST 93-338-DM WEST 93-438-DM WEST 93-339-DM WEST 93-439-DM All American Aggregates

DECISION

Appearances: J. Mark Ogden, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Complainants;
Lawrence Gartner, Esq., Naomi Young, Esq., Gartner & Young, P.C., Los Angeles, California, for Respondents.

Before: Judge Cetti

I

These discrimination proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act").

The proceedings were initiated by the Secretary under Section 105(c)(2) of the Mine Act on behalf of the Complainants James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis. The Secretary alleges that Respondent All American Asphalt (All American) in violation of Section 105(c) of the Mine Act discharged the four Complainants in retaliation for engaging in

protected safety activity on two separate occasions. All eight cases were consolidated and at the request of the parties, hearings on the merits of the consolidated complaints of discrimination were held in Riverside, California.

At the close of that hearing, the undersigned Judge issued an Order of Temporary Reinstatement from the bench, followed by a written decision a few days later ordering temporary reinstatement of the Claimants. See Docket Nos. WEST 93-124, WEST 93-125, WEST 93-126 and WEST 93-127. 16 FMSHRC 31 (1994). Thereafter both parties filed post-hearing and reply briefs setting forth the facts, law and arguments in support of their respective positions in the above-captioned matters. I have considered their arguments as well as the facts and the law in my adjudication of these matters.

II

Threshold Issues

Respondent raises two threshold issues by its assertion that (1) "this entire matter is barred by the Statute of Limitations." and (2) that the Complainants' complaints are preempted by the NLRA. Both contentions for reasons discussed below are rejected.

A. The Discrimination Complaints Are Not Time-Barred

Respondent asserts that all eight complaints filed by the Secretary on behalf of the four Complainants are time-barred pursuant to 105 (c)(2), 30 U.S.C. 815 (c)(2) and the Commission Procedural Rule 29 C.F.R. 2700.41.

Section 105(2)(a) of the Mine Act, 30 U.S.C. 815(c)(2), provides that if:

> "[T]he Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination...."

29 C.F.R. 2700.41 provides:

> "A discrimination complaint shall be filed by the Secretary within 30 days after his written determination that a violation has occurred."

It is well settled that these filing guidelines are not jurisdictional. The purpose of the time limits is to avoid stale

claims. Late filing may be excused. Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (April 1979); Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539 (June 1981); Secretary v. 4-A Coal Company, Inc., 8 FMSHRC 240 (February 1989).

The Commission has indicated that dismissal of a complaint for late filing is justified only if the Respondent shows material, legal prejudice attributable to the delay. See Secretary/Hale v. 4-A Coal Company, Inc., supra. No such showing has been made here. Under the facts and circumstances presented at the hearing in this case the late filing is excused. Respondent's request for dismissal of the complaints on the grounds that they are time-barred is denied.

B. Respondents' Discrimination Complaints Are Not Preempted by the NLRA

Respondent contends that the claimants' discrimination complaints are preempted by the National Labor Relations Act (NLRA). Respondent asserts that because "Complainants' allegations include their layoff of their employment and because it is undisputed that Complainants have grieved their July 1992 layoff through the Union, thereby evincing a recognition on Complainants' part that their claim cannot be resolved without resort to the Union agreement, the wrongful layoff claims are necessarily based upon rights and duties derived from the Labor Agreement and thus preempted by of the Labor Management Relations Act." 29 U.S.C. 185.

As stated by the Secretary in his reply brief, the remedial purposes of the Mine Act are separate and distinct from the public policy goals of the Labor Act. The Commission has stated, the Mine Act is not a "labor" statute, but rather is intended to promote the safety and health of the nation's miners. Peabody Coal Co., 7 FMSHRC 1357 (September 1985), affirmed, 822 F.2d 1134 (D.C. Cir. 1987). The Commission has recognized that when the purposes of the Mine Act coincide with other statutes, the Commission must attempt to strike a "careful accommodation of one statutory scheme to another." Accordingly, given the mandate of the federal courts that the Mine Act must be interpreted to enforce its remedial purposes while ensuring that other important public policies are not ignored, it is self-evident that the Commission has jurisdiction to determine whether Respondent discharged the Complainants for engaging in MSHA-related safety activity. See also Southern Steamship Co. v. NLRB, 316 U.S. 31 (1962); McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

It is recognized that protected activities of miners under Section 105(c) may be identical to or closely related to activities for which protection is also provided under the National Labor Relations Act (NLRA). It is also noted that MSHA and the

General Counsel of the National Labor Relations Board (NLRB) have entered into a memorandum of understanding aimed at coordinating the processing of identical or related claims filed both under the Mine Act and the NLRA. Under this agreement, where miners file claims under both the Mine Act and the NLRA and the claims are both based on the same activity which is covered by Section 105(c), the NLRB will defer action or dismiss the claim pending before it so that the claim can be handled exclusively before the Secretary of Labor and the Mine Safety and Health Review Commission. 45 Fed. Reg. 6189.

Respondents' contention that the discrimination complaints are preempted by the NLRA is rejected.

III

In April 1991 Respondent was completing a new addition to its rock finishing plant. On Thursday morning, April 18th, Mr. Hyles, the leadman on Respondent's graveyard shift had a conversation with Mr. Ryan, the vice-president and the plant supervisor. Mr. Ryan told Mr. Hyles he was going to start running the new finishing plant the next day. Hyles told Ryan it wasn't ready to run. At that time the plant had a lot of guards, access ladders, decks, catwalks, trip cords and other basic safety features that were not in place. Since Ryan had been supervising the construction work on the new finish plant he knew many of the basic safety features had not as yet been installed.

Mr. Ryan told Hyles that they needed the material and it was going to run "shit or bleed," Ryan stated that they weren't going to spend $15,000 or $20,000 to buy material for a week and wait for the plant to be completed. Ryan told Hyles that if he did not want to run the plant in its uncompleted state "any one of these other guys here would take your job."

Later that same day, Thursday, April 18, Hyles called Mr. McGuire the business representative for Operating Engineers Local 12 and reported to him his supervisor's (Ryan) intention. In response to the Hyles call, Mr. McGuire that same day came to the plant and observed the unsafe conditions. McGuire told Hyles that if the plant actually started operating in that condition he would call and report it to MSHA. Hyles' testimony regarding this aspect of the case was affirmed by the testimony of Mr. McGuire.

When Hyles went to work on his next shift at 7 p.m., Friday, April 19th, the uncompleted new finish plant was running and had obviously been running for several hours. Mike Ryan told Hyles he wanted as many workmen as possible scattered out over the plant to watch for belts tracking properly and to make sure everything was running properly. The plant was still in the same condition as it was in the previous day. The guards, some access

ladders, decks, catwalks, stop cords and handrails were still not installed.

Ryan assigned Hyles to work as leadman that weekend, Friday, Saturday and Sunday with the combined second and third shift crews working together. Complainants Doug Mears, Greg Dennis and Derrick Soto were on Hyles' crew and worked in the finish plant that weekend under Hyles' supervision and were exposed to the hazards of the uncompleted new plant. Hyles was concerned for their safety. Hyles spoke to them about the unsafe conditions and warned them to be careful. All three Complainants made comments to Hyles that they "couldn't believe" the plant was being operated in its uncompleted state, without the basic safety features in place.

During the Saturday and Sunday shifts the three Complainants Greg Dennis, Doug Mears and Derrick Soto observed Hyles video-taping the plant in operation and questioned him about it. All voiced their concerns to Hyles about the hazards involved in working at the new plant in its uncompleted condition.

Hyles talked to the three Complainants about taking the video-tape to MSHA. All the Complainants agreed that it was a serious matter involving a certain level of danger in working under the existing conditions and that the video tape should be turned in to MSHA.

Early Monday morning; about 7 a.m., Hyles took the video tape to the MSHA field office in San Bernardino where the video tape was shown on a television screen to MSHA Inspector Carisoza.

Inspector Carisoza after observing the video-tape stated it warranted an MSHA inspection. That same Monday afternoon MSHA inspectors made a hazard inspection of the plant in operation. As a result of the inspection, the inspectors issued numerous citations including 29 unwarrantable failure citations. MSHA also shut down the plant until all violations were abated.

Later that same Monday, after the inspection, Ryan called Hyles at home and told him not to come to work that evening because "someone had turned them in" and MSHA had come to the plant and shut the operation down.

About a week later, the first day Hyles returned to work after the MSHA shutdown of the plant, he had lunch with Ryan and Gary White, the maintenance shift leadman. Ryan asked if they "had any idea who had turned him in." Ryan said he wanted to find out who it was and he would "make it so miserable for them, they would be happy to go work someplace else." Hyles testified he did not admit his part in initiating the MSHA inspection as it was his understanding his name would be kept anonymous. He

testified he was "foolish enough to believe that maybe he (Ryan) would never find out."

Hyles heard Mr. Daniel Sisemore, the president of All American state that he would like to find out who was causing him all the problems and that he would "make it worth their while to seek employment elsewhere."

William Smillie, a former employee, testified that he also heard Mr. Sisemore while in the mine office state that they "would like to know who had filed the complaint, so they could make it worth their while to leave."

Ryan on cross-examination admitted that company president Sisemore asked him who "turned in" the company.

In May of 1991 based on information given to him by Ryan, Hyles told Complainant Derrick Soto that Ryan planned to lay Soto off and keep some less senior employees. Soto then told Ryan that if Ryan did that he, Soto, would file a grievance with the Union. Soto was not laid off at that time.

In June 1991, MSHA conducted a Section 110(c) investigation of Respondent's vice-president Michael Ryan to determine if he authorized or ordered the numerous violations that were cited in April 1991. During that investigation the four Complainants as well as most of the other employees were interviewed by MSHA special investigator Ronald Mesa. Government Exhibit Nos. 2, 3, 4 and 5 are the MSHA interview statements of Hyles, Mears, Soto and Dennis given to the MSHA special investigator. Respondent was aware that the four Complainants as well as many other employees were interviewed during the Section 110(c) investigation because Ryan in cooperation with MSHA made arrangements for the interviews. Ryan was present at the mine site when the on-site interviews were conducted in the investigators vehicle which was parked in front of the mine office. Ryan acknowledged that he knew that the four Complainants were interviewed by the investigator during the Section 110(c) investigation. Under the Mine Act it is clear that the four Complainants as well as every employee who cooperated with the 110(c) investigation, were interviewed and gave statements were engaged in protected activity under Section 105(c) of the Mine Act.

In October 1991, Hyles was demoted from his leadman position. Hyles testified that Ryan did this without any explanation. Hyles testified that when he asked Ryan why he was demoted, the only reason given to Hyles was that they "no longer saw eye to eye." (Tr. 394). Hyles testified he first learned of Respondent's alleged concern about his conduct such as sleeping on the job was from MSHA investigator Matchett after Hyles filed his initial discrimination complaint.

On July 7, 1992, the Complainants along with 16 of its 27 operating engineers were told that they were temporarily laid off while the company was moving their big primary crusher. Complainants were told they would be off work a week or two. When Complainants called the plant every week or two in July and August, they were told work was slow and just a few of the more senior people were working a few days a week. In fact, however, Respondent had been calling the work force back to work so that by the end of August 1992 the entire work force had been called back and were working except the four Complainants and one other employee (Martin Hodgeman). Some of the employees were working overtime. Later Martin Hodgeman was permitted to bump a less senior employee so that the four Complainants were the only employees not recalled after the temporary July 7, 1992 layoff.

In late August 1992, about the 28th of that month, Complainant Hyles and Soto went to the plant and observed less senior employees than the Complainants were working. All four Complainants then filed grievances with their union contesting their layoff and the refusal to recall them.

The union contract in July and August of 1992 required Respondent All American to notify the union if the company planned a layoff and that there be a "bumping meeting." In a bumping meeting a more senior employee could, if qualified, bump a less senior employee. At the arbitration it was found the company violated the union agreement by not having a bumping meeting.

IV

The provision of All American's contract with the International Union of Operating Engineers, Local 12 in pertinent part as to seniority, layoffs and bumping privileges are as follows:

> Article XIII, Seniority
>
> Section 1(a): ... For the purpose of bidding or bumping, an employee must be qualified in the opinion of the Employer to perform the work required by the classification into which he is bidding or bumping.
>
> Section 1(b): Regular Layoff and Recall. At a reasonable time before a layoff or recall takes place, the Employer shall notify the Union and the parties shall meet and effect the layoff or recall in accordance with the provisions of this Section. In cases of reduction in force, seniority by job classification shall prevail. He shall have bumping privileges as follows:

> 1. He shall have the right to bump into any classification provided he has total seniority over the employee he is bumping and is qualified. Bumping shall be on the shift and at any location his seniority entitles him to.
>
> Section 3: Seniority Termination. Seniority shall be terminated by . . .(3) if the employee performs no work for the Employer within the bargaining unit for a period of six months . . . .
>
> Article XIV, Grievance Procedures
>
> Section 1. ... A "grievance as that term is used in this contract means a claim by an employee or employer, that a term of this Contract has been violated. . . .No dispute, complaint or grievance shall be recognized unless called to the attention of Employer and the Union within 30 days (except on discharge, which shall be seven working days) after the alleged violation occurred.
>
> (b) Step Two: If the grievance is not settled in Step One within two working days, within ten days thereafter, it shall be presented in writing through the Union to the Employer. A committee of an equal number of representatives of the Employer and the Union will meet within 30 working days thereafter to settle the grievance. If a decision is reached by this committee, it shall be final and binding upon all parties involved.

V

The Secretary in his post-hearing brief points out that the union contract required All American to afford a senior employee the right to bid on jobs held by less senior employees in the event of a layoff or recall, and to reassign the more senior employee to any job classification which he is capable of performing. (Tr. 201-202). The Labor Agreement did not require that the more senior employee who is bidding on the job to be the best equipment operator, or better or faster than the less senior employee, in order to be entitled to "bump" into that job. [Tr. 1660 (Ryan); Government Exhibit No. 51 Arbitrator's Decision at 15, fn. 7].

The Complainants filed complaints of discrimination with MSHA in September 1992. The Secretary initiated temporary

reinstatement proceedings in January 1993, and the four Complainants were temporarily reinstated on February 11, 1993, by agreement of the parties.

When the four Complainants were temporarily reinstated, All American had changed the hours of the two shifts. The maintenance shift was changed from the day shift to the second shift, and the production shift was changed to the first (day) shift. (Tr. 443).

The four Complainants were assigned to work on the day shift performing production job classifications. Evidence was presented that each of the Complainants experienced a deterioration in working conditions, including increased scrutiny and verbal harassment. (Tr. 444-445, 468-470).

In early March 1993, All American implemented a temporary third (midnight) shift to run production, temporarily assigning several of the most senior plant repairmen to perform production jobs during the third (midnight) shift. Ryan testified that the third shift was implemented on a temporary basis, in order to run wet material through the plant. Hyles testified that the senior plant repairmen assigned to the third shift, Alex Alegria, Dennis Simmons, Clemente Nunez, and Mack Crutchfield, had performed maintenance work on the day shift for many years prior to March 1993. (Tr. 447). Hyles testified that it was unusual for senior employees to be assigned to work the midnight shift. (Tr. 450). The most senior employees are entitled to the best shift, and most senior employees bid onto the day shift, which is considered the best shift in terms of the working hours. (Tr. 447).

On March 24, 1993, after having assigned the senior plant repairmen to perform the production jobs on the midnight shift for three weeks, All American announced a layoff. Prior to the layoff, Ryan stated to McGuire, the union agent, that he had "four too many operators at the plant," and "had four problem children on days." McGuire testified that he believed Ryan was referring to the four Complainants, and that he expected that Ryan would layoff the four Complainants. (Tr. 206).

When All American discontinued the temporary third shift, on March 23, Ryan did not reassign the senior plant repairmen to their regular positions on the maintenance shift. All American required all of the temporary third (midnight) shift employees to participate in the formal layoff meeting and to bid on jobs held by less senior employees in order to get back onto the day shift. Ryan testified during cross-examination that he expected the senior plant repairmen on the temporary third (midnight) shift to bid back onto the day shift. (Tr. 1687).

Each of the four Complainants was "bumped" (replaced) by a senior plant repairman. Plant repair positions were available on

the seniority list. Union official McGuire testified that it was unusual for a plant repairman to bump into a conveyerman position, when plant repair positions were available. (Tr. 798-850). The four Complainants were the only employees who were displaced as a result of the layoff on March 24, 1993. (Tr. 457).

Alex Alegria, the most senior plant repairman at the mine, replaced Complainant Gregory Dennis in the conveyerman position, the least skilled position at the mine and one which involves primarily manual shoveling. The other three senior plant repairmen, Clemente Nunez, Dennis Simmons, and Mack Crutchfield, who had been classified as plant repairmen for many years prior to the March 1993 layoff, replaced ("bumped") Complainants Hyles (loader operator), Soto (loader operator), and Mears (crusher operator). (Tr. 456). Hyles testified that it was unusual for senior plant repairmen to bump into production jobs. (Tr. 457).

On March 24, 1993, each of the four Complainants was called into the layoff meeting and instructed that he was to bid on a job held by a less senior employee because he had been "bumped" out of his current job. (Tr. 452). The four Complainants testified that they were apprehensive and intimidated during the course of the layoff meeting, and believed that Ryan would refuse to allow any of them to bump into job classifications (disqualifying them) for which they were qualified in order to terminate their employment. (Tr. 452). Complainants Hyles and Soto requested they be permitted to consult with their attorney, due to the pending MSHA discrimination complaints, prior to selecting a job bid. (Tr. 452). Neither Ryan or anyone else advised the Complainants that their job bids would be considered untimely after the meeting. Evidence was presented that Complainants Mears and Dennis did not request to bump during the meeting, because they believed Ryan would automatically disqualify them from any job. The Complainants wanted to consult with the Solicitor handling these discrimination cases before exercising any bidding or bumping rights they may have had under the employer's agreement with the union.

Shortly after the layoff meeting, Local 12 business agent, McGuire, called Ryan to inform him that Hyles requested to bump into the plant operator position. McGuire testified that Ryan responded, "You can tell Marty Collins (Business Agent) no fucking way." (Tr. 220-221). Each of the Complainants later submitted a written request to bid into jobs held by less senior employees. All American refused to accept any of the Complainants' requests to exercise their "bumping" rights, alleging that their requests were untimely.

Union officials McGuire and Collins testified that there is no requirement in the Labor Agreement that the employee select a job bid at the time of the layoff meeting. (Tr. 218, 1096). Collins testified that the industry practice is to allow

employees to consider their options and consult with their families for several days. (Tr. 1102-1103). Collins testified that he believed that it was improper for All American to refuse to honor the job bids of the Complainants after the meeting, and that it was reasonable for Hyles and Soto to request time to seek advice of counsel due to the pending MSHA case. (Tr. 1092, 1095).

VI

Each of the four Complainants filed a second complaint of discrimination with MSHA alleging that the March 1993 layoff was in retaliation for their MSHA-related safety activity. The Secretary initiated temporary reinstatement proceedings, but did not at that time proceed with the hearing set for reinstatement when the Complainants were again temporarily reinstated by agreement of the parties on April 26, 1993.

Petitioner presented evidence that when Complainants returned to work in late April 1993, the four Complainants were again verbally harassed by mine management, subjected to increased scrutiny on the job, and given reduced working hours and constantly changing reporting times. (Tr. 462-464, 471-472, 729-732). The Secretary points out that during the same period in April 1993, All American began hiring approximately 10 new employees, including several plant repairmen. (Tr. 472-474; Government Exhibit No. 16 Seniority list dated August 25, 1993 and Government Exhibit No. 28 Dispatch records of new employees).

In August 1993, All American posted a seniority list which indicated that the seniority dates of Complainants Mears, Soto, and Dennis were January 1993. (Tr 732). When Mears asked why his original seniority date was not on the list, Ryan stated that he had no seniority. (Tr. 733).

Petitioner points out that the monthly production records provided by All American which reflect gross production of aggregate show that All American increased its output of finished material in July-August 1992, and in March-April 1993. (Government Exhibit 50). Petitioner also points out that the charts introduced by Respondent do not reflect that the company reduced the number of employees when the national economy was performing poorly. (Respondent's Exhibit 40A).

VII

Cathy Ann Matchett, the special investigator with MSHA, who investigated the discrimination complaints testified that in her interview with Mr. Smillie, a former employee, he stated that he had overheard a conversation between Mr. Sisemore and Mr. Ryan saying that they wish they knew who had reported them to MSHA so they could make it worth that person's while to leave.

Matchett when asked what information Smillie provided concerning sleeping on the third shift. She replied "He stated that Mr. Hyles had--that that had happened quite a bit, and that everyone did it now and then, including himself".

The special investigator also testified she obtained information that the four employees that bumped the four Complainants were heavy-duty repairmen, with the highest seniority at the mine, and at that time there were two plant repair jobs available.

Asked as to what the union officials told her regarding whether the Complainants' layoff was proper, the investigator replied as follows:

> A. The three individuals I spoke to strongly indicated to me that the Company was trying to manipulate the bumping procedure and the lay-off procedure in order to get rid of the four Complainants; that, although it was technically done correctly, it was not the common way to handle a bumping procedure.
>
> Q. And, how strongly did the Union officials make that statement to you?
>
> A. Very strongly. (Tr. 68).

The special investigator testified as a result of her investigation that she concluded that discrimination had occurred and recommended that enforcement of the provisions of 105(c) of the Act be pursued.

Matchett, the MSHA special investigator in this matter prepared a Memorandum of Interview immediately after her March 26, 1993, interview of Patrick McGuire, business representative for the Operating Engineers. The Memorandum of Interview (Government Exhibit 19) states in part the following;

> Mr. McGuire stated that as long as he has been associated with All American Asphalt (3-4 years) the repairmen who bumped into the production jobs held by the four Complainants, had always worked as repairmen. I asked if, by working on the third shift for 3 weeks, these men then were qualified to work in production. He said that the company is the sole qualifier and if the company says they are qualified, they are qualified. He did point out that there were repair jobs

> available to bump, but none of the men (repairmen) did so. McGuire foresees that Ryan will work the four repairmen on production and then hold them over to do repair.
>
> McGuire said that the bumping procedure was strange because as the men came in, one at a time, they didn't say, "I want a loader position." They said, "I want Hyles' loader position." McGuire stated that this was at the bounds of legality, and that the men doing the bumping would not talk to the union representatives. Ryan had taken the reinstatement order (not a copy of the reinstatement agreement) and posted it on the company bulletin board three days before the announcement of the lay-off--presumably to show that he had the right to RIF the reinstated employees.
>
> McGuire stated that Ryan never directly said he was going to "get" these men, but "that was the inference that was made." McGuire says that Ryan and All American Asphalt is his worst nightmare. He foresees that Ryan will work the guys he has 14-16 hours/day rather than put on another shift and place these guys. ... .
>
> McGuire thinks the company is trying to use the union against MSHA to protect the company. ... .
>
> McGuire is very disgusted about the latest developments and believes that the company and its attorney have planned this for some time.

Investigator Matchett also prepared a Memorandum of Interview immediately after her March 26, 1993, interview of Marty Collins, the business representative for the Operating Engineers IUOE Local No. 12. The Memorandum (Government Exhibit 18) states in part the following:

> I asked Mr. Collins about the latest lay-off at All American. He said management had accomplished it according to the collective bargaining agreement but that they were sure the repairmen who did the bumping had been told where to bump. According to Mr. Collins, it doesn't make sense for a repairman to bump a conveyorman, who just shovels all

> day. The union has no proof that the men were coached by the company. At the bumping meeting, Collins and McGuire objected to the company bumping the two shop stewards (Soto and Dennis). Management said they didn't recognize the language in the contract about stewards.
>
> I asked Mr. Collins if he heard a comment made by Mr. Ryan to Pat McGuire to the effect that "one way or another, we'll get rid of those four." Collins said he did not hear such a comment.
>
> I asked Mr. Collins if, in setting up the third shift which was subsequently subject to lay off, the company had acted in accordance with the agreement. He said that they had. He stated that the company told the union the reason they put on the third shift was because of the wetness of the material. It was so wet that the plant would not run to capacity and therefore, they needed another production crew to keep the plant running more hours. Since the material had dried out, the company contends that these positions are now extra. The lay off of this third shift resulted in the bumping of the four complainants. ... .
>
> He contends that the company is trying to do through the lay off procedure what they couldn't do through the grievance procedure. (Ex. 18).

VIII

Applicable Law

Section 105(c)(2) of the Mine Act, 30 U.S.C. 815(c)(1) in relevant part provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, in-

> cluding a complaint notifying the operator or the operator's agent...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 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 by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c) of the Act was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act.

The basic principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the complaining miner must prove, by a preponderance of the evidence, that (1) be engaged in protected activity, and (2) that the adverse action taken against him was motivated in any part by that protected activity. In order to rebut a prima facie case of discrimination, the operator must show either that no protected activity occurred, or that the adverse action was in no part motivated by the miner's protected activity. Secretary of Labor on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

If the operator cannot rebut the miner's prima facie case in this manner, it nevertheless can defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to such an affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982)

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. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, (November 1981), rev'd on other grounds sub nom at 2510. See also Boich v. FMSHRC, 719

F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test), NLRB v. Transportation Management Corporation, 462 U.S. 393, (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

IX

Adverse Action

Based upon the record and Respondent's representation I find that as of October 1991 Respondent still had not found out who "turned in" Ryan and All American to MSHA for the safety violation of April 1991. I further find that the demotion of Hyles from his leadman position on the graveyard shift to a journeyman loader position on the day shift in October 1991 was not motivated by Hyles' protected activity. I find that at that time Hyles' supervisor, Ryan, had received credible substantiation of the rumors of Hyles' on the job misconduct in the performance of his duties as a leadman on the graveyard shift. This misconduct involved sleeping on the job and possible time card fraud. I further find that even assuming arguendo that Respondent suspected or knew of Hyles' protected activity and had mixed motives in demoting Hyles, that Hyles' unprotected on the job misconduct by itself would have caused All American to demote him from his leadman job and assign him to a lower paying journeyman job on the day shift. There was no violation of 105(c) in demoting Hyles from his leadman position.

The major adverse action taken by All American was it's failure to recall the four Complainants after the temporary July 1992 layoff. Respondent's refusal to recall the Complainants resulted in termination of their seniority pursuant to section 3 item (3) of Article XIII of the Union Agreement. That section provides "Seniority shall be terminated by ...(3) if the employee performs no work for the Employer within the bargaining unit for a period of six months ... ."

Based upon the interview statements received in evidence and the testimony of the four Complainants, the special MSHA investigator, Mr. Smillie, and the Union officials Collins and McGuire, I find that sometime prior to the July 1992 layoff All American became acutely aware of the Complainants' April 1991 protected activity and were motivated because of that protected activity to get rid of the four Complainants. In order to obscure its discriminatory animosity towards the Complainants, Respondent pursued an indirect course of action that resulted in termination of the employment of the Complainants. This course of action started with the July 1992 temporary layoff that resulted in the recall of the entire work force except the four Complainants.

The Claimants were again voluntarily reinstated by agreement of the parties on February 11, 1993. Thereafter, All American temporarily put on a third (graveyard) shift for a short period of time, March 6, 1993 to March 27, 1993. Ryan assigned his most senior employees to this graveyard shift such as the repairmen who had for a long period of time been doing maintenance work on the day shift. Respondent changed the first production shift from a night shift to the day shift. Thus the four Complainants were reassigned to do their production work on the day shift. I agree with the Secretary that the main purpose of Respondent's convoluted work assignment, shift changes, temporary graveyard shift and layoff was to terminate the Complainants' employment while appearing to be simply complying with the union agreement.

The Secretary accurately summarizes the contrived basis for the layoff of the four Complainants as follows:

> Accordingly, Respondent manipulated the job assignments of the senior plant repairmen, contrary to the normal practice at the mine, assigning them to the least desirable working hours on a temporary basis, in order to have them "bump" the Complainants off of the day shift.
>
> Instead of simply reassigning the plant repairmen to their normal jobs on the maintenance shift (which presumably required their assistance to continually repair and maintain the finish plant), Respondent implemented a formal layoff which it planned to result in the four Complainants being "bumped" by the senior plant repairmen. In sum, this convoluted series of work assignments was contrived by Respondent to terminate the Complainants, while appearing to comply with the contractual requirement of holding a meeting with the union.

Conclusion

Without question the remarks of Mr. Ryan, Respondent's supervisor and vice-president and those of Mr. Sisemore, Respondent's president, displayed hostility towards the protected activity of April 1991 and it was only a matter of time before Respondent gained knowledge of who engaged in the protected activity and contrived a way to get rid of Complainants in a manner that they hoped would obscure their retaliatory animus towards Complainants for their protected activity.

Based upon reasonable inferences from the evidence presented I find and conclude that Respondent discriminated against Complainants in violation of 105(c) of the Mine Act.

ORDER

1. The Respondent is ORDERED to reinstate each of the Claimants to his former position with full back pay, benefits and interest to the date of his reinstatement, at the same rate of pay, and with the same status and classification that he would now hold had he not been unlawfully discharged in July 1992. Interest shall be computed in accordance with the Commission's decision in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (December 1983), and at the adjusted prime rate announced semi-annually by the Internal Revenue Service for the underpayment and overpayment to taxes.

2. The Respondent is ORDERED to expunge from each of the Claimant's personnel file and company records all references to the circumstances surrounding his employment termination.

Counsel for the parties are ORDERED to confer with each other during the next twenty (20) days with respect to the remedies due each of the Claimants, and they are encouraged to reach a mutually agreeable resolution or settlement of these matters, and any stipulations or agreements in this regard shall be filed with me within the next thirty (30) days.

In the event counsel cannot agree, they are to notify me of this within the initial twenty (20) day period. If there are any disagreements, counsel ARE FURTHER ORDERED to state their respective positions on those compensation issues where they cannot agree, with supporting arguments and specific references to the record in this case, and they shall submit their separate proposals, with supporting arguments and specific proposed dollar amounts for each category of relief, within thirty (30) days. If the parties believe that a further hearing may be required on the remedial aspects of this matter, they should so state.

I retain jurisdiction in this matter until the remedial aspects of this case are resolved and finalized. Until those determinations are made, and pending a finalized dispositive order by the undersigned presiding judge, my decision in this matter is not final. In addition, assessment of the civil penalty assessment for the discrimination violations in this matter is held in abeyance pending a final dispositive order.

August F. Cetti
Administrative Law Judge

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Distribution:

J. Mark Ogden, Esq., Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Naomi Young, Esq., GARTNER & YOUNG, P.C., 1925 Century Park East #2050, Los Angeles, CA 90067-2709 (Certified Mail)

Eve Chesbro, Esq., Ontario Airport Center, 337 North Vineyard Avenue #400, Ontario, CA 91764-4453 (Certified Mail)

Mr. James Hyles, 15986 Nancotta Road, Apple Valley, CA 92307 (Certified Mail)

Mr. Douglas Mears, 18212 Brightman Avenue, Lake Elsinore, CA 92503 (Certified Mail)

Mr. Derrick Soto, 15394 Dakota Road, Apple Valley, CA 92307 (Certified Mail)

Mr. Gregory Dennis, 11128 Amarillo Street, Alta Noma, CA 91701 (Certified Mail)