FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 21, 2017

MICHAEL K. MCNARY, Petitioner, v. ALCOA WORLD ALUMINA LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. CENT 2015-0279-DM MSHA Case No. SC-MD-2014-05 Mine: Bayer Alumina Plant Mine ID: 41-00320

DECISION AND ORDER

Appearances: Tony Oppegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Whitesburg, Kentucky, for the Complainant

Christopher V. Bacon, Esq., Houston, Texas, for the Respondent

Before: Judge Moran

This case is before the Court upon a complaint of discrimination, brought by Michael K. McNary, alleging interference with his rights under Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("Mine Act," or "Act"). A hearing was held on August 15, 2017, in Victoria, Texas. For the reasons which follow, examining the totality of the circumstances, the Court finds that there was no cognizable interference against Michael McNary, nor any other Mine Act discrimination against him.

Procedural Background

Docket No. CENT 2015-0279-DM was assigned to this Court on May 6, 2015. After the parties had begun discovery, the Respondent filed a Motion for Summary Decision on August 12, 2015, citing alleged procedural errors on the part of the Complainant, as well as arguing that no adverse action had taken place. The Complainant opposed this motion, arguing that he had experienced discrimination and interference while working for the Respondent. After considering the evidence presented by both parties, this Court granted the Respondent's motion for summary decision on September 28, 2015, and dismissed the proceedings.

Thereafter, on October 27, 2015, the Complainant filed a pro se Petition for Discretionary Review, arguing that the summary decision was issued in error. The next day, Attorney Tony Oppegard noticed his appearance on behalf of Mr. McNary. The Commission granted the petition for discretionary review on November 5, 2015, and heard oral arguments on November 17, 2016. On March 28, 2017 the Commission issued a decision finding that Alcoa was not entitled to summary decision as a matter of law, and remanded the matter for further consideration. A hearing before the Court then ensued.

Findings of Fact

Carlos Delgado was called as Complainant's first witness. Delgado has an associate's degree in occupational safety and health and another such degree in instrumentation and electrical, which he described as "I & E." Tr. 40; 42. In July 2000 he began working for Alcoa, and he is presently employed by that entity as well, working as an electrical technician. Tr. 43. Starting in his first year with Alcoa, he also joined the emergency response team, and he has remained on that team ever since then. Tr. 44. In that role, he has been a lead instructor for the team, and he continues to "instruct the team on confined space rescue, high angle rescue, industrial fire-fighting, first aid[], and CPR." Tr. 44. In addition, as of December 2011, he took over the role of a lead miners' rep, that is to say he was a MSHA miners' rep. Tr. 43-44. "Miners' rep" is a shorthand reference to "miners' representative." With that new role, as the United Steel Workers Safety and Health rep, it is "a 40 hour job of basic safety and health." Tr. 44. After assuming that miners' rep role, a full time role, Delgado's I & E work would only occur in the context of overtime. Though unnecessary to resolve this matter, as background, Delgado briefly explained the mining process at Alcoa's Bayer Alumina Plant, which was also referred to as the Alcoa Point Comfort facility.[1] Tr. 46.

It is fair to state that Alcoa's involvement in and commitment to safety is extensive. Delgado explained that as the miners' rep, he and others on related committees met daily with safety and health management. Tr. 44. The committees tried to have a person from each of the four crews.

[1] The facility is an aluminum refinery. The facility takes "red dirt," which is bauxite, and it refines it, extracting alumina from it. Tr. 46. The bauxite is transported on belts up to the digestion area, where it is stored in bins and from there it is fed into rod and ball mills. At that point, the bauxite is crushed into a fine, powdery dirt. It then goes to the "25A area," which is also part of the digestion area, where it is introduced into caustic, by being mixed in slurry tanks. Then it is pumped over to the dirt area, where the incident involved here occurred. Tr. 47. At that location, the material is heated up to a very high temperatures, in the range of 400 to 450 degrees. Tr. 47. There is no dispute that extracting alumina is hazardous in the sense that very high temperatures are involved in that process.

Delgado added,

> They had the DSC coach there for the area and then you had salary people, which would be superintendents, safety and health coordinators for the area, process area supervisors. Everybody was involved in that area meeting. And then we also have had a plant-wide departmental safety committee, which consisted of myself, Mr. McNary, Mr. Luis Medina, who was our scope representative.

Tr. 45.

In fact, Delgado and Medina shared an office. *Id.* Medina "was part of the meeting along with the management lead team, which would be the plant manager, all the superintendents of the area, a human resource person was in the meeting." Tr. 45. Delgado was not the only miners' rep; the plant had a miners' rep in every area, and he had a backup rep, the "Number 2" rep, who was Mr. McNary. McNary would act in Delgado's place if he was away. McNary was also a miners' rep in the digestion area. Tr. 50.

In sum, Delgado is still in I&E, the MSHA rep for the plant, the lead instructor for the emergency response team, and vice president of the union. Tr. 46. Presently the plant is not producing alumina. When it was active, some 500 hourly employees and about 200 salaried employees worked there, but now there are about 30 hourly employees and 18 to 20 salaried people. Tr. 49-50.

Turning to the date of the incident in question, January 8, 2014, Delgado was accompanying an MSHA inspector, Brett Barrick, who was at the plant because of a complaint regarding a urinal in the mine's training facility. On their way back from viewing the urinal issue, they observed an ambulance at the digestion area. This area was a concern because six months earlier, there was a serious injury to an employee, Mike Brown. Tr. 52. Arriving at the area, Delgado saw McNary and Emig in the alleyway and other employees suited up in Tychem Suits. Tr. 53. As he recounted it, Delgado stated that when he approached "Mr. Emig was telling Mr. McNary in an aggressive manner, 'I will have you removed as MSHA rep. I will have you removed from digestion, and I will have you removed from this plant.'"[2] Tr. 53.

[2] Later, McNary's counsel would ask of Delgado, when he heard Emig say to McNary that he was going to remove him as a miners' rep, remove him from digestion, remove him from the plant, how did he *interpret* that, and Delgado responded that "when [Emig] started talking about the fact [of] removing [McNary] from the plant, to [Delgado] that meant termination, okay. So at that point is when I said, '[y]ou're not removing anybody from anywhere. What's going on?'" Tr. 60. The Court is not sure that the question, and consequently the response, is appropriate to consider because, as explained in the discussion of the case law, below, the "totality of the circumstances" inquiry is to be based on the reasonable miner reaction, not a personal opinion. Further, even if Delgado's response, offering *his personal interpretation* of the words he alleged Emig to have uttered, may be considered, that interpretation cannot be considered in isolation. That is, Delgado's opinion was made without the benefit of knowing one whit about McNary's prior conduct nor Emig's claim that McNary was seeking to take command of the event by attempting to have Grones replace Emig.

Delgado continued with his version of the events, stating,

> at that point, I looked at him and I said -- and I got kind of in between them. I said, 'You're not going to remove anybody from anywhere. What's going on?' Emig then said, 'Well, I'm done with him.' And he's pointing at Mr. McNary. And Mr. McNary says, 'So you're done with me, Steve [Emig]? So you're done with me?' And Steve says, 'I'm done with you for now.'

Id.

Accordingly, according to Delgado's recounting, Emig virtually immediately had moved back from his words that he was "done with" McNary.

Delgado continued,

> [s]o at that point I told Kevin McNary . . . to go ahead and go stand over [ ] with the other employees, okay, that I will have [sic] handle the situation. And I looked at Mr. Emig and I said, 'What's going on? Why do we have an ambulance over here?[3] What's going on?' And we go over to the area -- the L5 area to -- to look at the situation closer and the packing-on [the] valve is blowing out. It's blowing out pretty good. You see a bunch of heavy steam around the area. It's a very dangerous area because it's high pressure and high temperature.[4] So Mr. Emig says, 'We need to access that area because we've got to get that valve isolated so we can get the pressure off of them and change the packing.' And I looked at him, I said, 'We're not sending anybody in there.' I said, 'It's too dangerous.' I said, 'What are the other options other than sending people in there?' And he says,

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[3] It was Delgado's understanding that Emig called the ambulance, which is a company ambulance that is kept on site, just in case an employee was burned or something happened. Tr. 73. Delgado assumed that an injury of some sort had occurred, as he saw the ambulance's lights were on. Tr. 73-74. In response to the Court's comment that it assumed that Delgado would not be critical of the ambulance being present, he responded that in fact he was critical of it. Tr. 74. As he saw it, if one has an ambulance on standby, that means the mine was doing something they should not. Tr. 74. The Court wanted to be sure it understood Delgado's perspective; that he did not view it as proactive on the mine's part. Rather, he confirmed that he saw the ambulance presence to indicate there was a "highly dangerous" situation. Tr. 74.

[4] Delgado explained what he meant when expressing that the packing was blowing out of the valve. The valve has a stem and a plug; the plug is to close the valve, stopping the flow. The stem, when turned, opens it. Tr. 57. The stem has packing material and this is designed so that one is protected from the process coming out when one is working on the valve. Tr. 57. With regular maintenance, including changing the packing, a blowout should not occur. *Id*. He emphasized that because there is a high temperature and high pressure, "[i]t's the most dangerous spot in the plant." *Id*. Further, the material itself is caustic and very corrosive. *Id*. He added that it will "peel your skin off." Tr. 57-58.

> 'The only other option is shut the unit down.' And I said, 'Well, we're not -- we're going to shut the unit down 'cause we're not going to send people in there.' And he says, 'No, we're not going to shut the unit down. That's not an option right now. We have to access this area.' So at that time [MSHA inspector] Barrick, I guess, is standing behind me. . . . I believe he's, the whole time, just listening. He hasn't intervened yet. And me and Mr. Emig were kind of getting into an argument about shutting the unit down because he's clearly stating that that's not an option, that we have to do something else and get in there. And I'm arguing with him, 'No, we're not. We're not sending anybody in there. It's too dangerous.'

Tr. 54-55.

The Court notes that, in contradistinction to McNary's behavior, as described later herein, Delgado *did raise his safety concerns directly to Emig.* Further, and illuminating in the Court's view, Delgado made no claim that Emig interfered with him. Only McNary makes that claim.

Delgado continued,

> [s]o Mr. Barrick, I guess, finally had enough and he intervened. And he looked directly at Mr. Emig and he said, "When are you going to get it? At what point are y'all going to get it? That unit right there doesn't mean nothing. Those people you've got standing over there suited up in suits, that's what means something." And then he looks at Mr. Emig and he says, "Six months ago, we just got somebody seriously injured over here. What are you guys doing?" And he's pretty hot. He's hollering, okay. So at that point Ms. Grones and Mr. Medina walk up. They could have already been standing there while Mr. Barrick was talking but that's when I noticed them, okay. And we all kind of backed up and Mr. Barrick, I believe, took over the situation at that point. I think he issued a k order, which meant that there wasn't going to be anything going on in there until he was okay with it. Okay. So we stepped back and we talked about a plan of action on how to enter that area safely, and there was all kinds of things brought up. And I believe Mr. Medina is the one that brought up a company called Team Industries who specialize in that kind of thing, okay. They have other type of material, injectable packing, clamps that they can put on, other things that they can do to mitigate that situation. That way, our employees could get in there and do the job safely. That was brought up. The fact of bringing the unit down was brought up. So we kind of all got together and regrouped to get a plan together on how to mitigate the situation but the miners were withdrawn from that area.

Tr. 55-56.

The Court further notes that Delgado, unlike McNary, engaged in a safety dialogue and otherwise behaved in the designed, appropriate, manner. It is also noted that Emig behaved in a like manner. As just alluded to, Emig's behavior is instructive in understanding, within the totality of the circumstances, his momentary expression of exasperation with McNary. Last, it is noted that Emig's outburst was unique, expressed only to McNary.

According to Delgado, McNary did not re-engage his conversation with Emig. Tr. 56. Asked how he concluded that Emig was speaking to McNary in an aggressive manner, Delgado stated that Emig was pointing at McNary and his voice was elevated and one could tell by Emig's face that he was very upset. Tr. 56. It is worth re-emphasizing that, with Delgado behaving professionally and engaging in the robust debate that Alcoa management and employees utilized when disputes arose, Delgado experienced no similar behavior from Emig. Both were comporting themselves appropriately – Delgado was expressing his safety concerns to Emig and interacting about the best approach to deal with the incident.[5]

It was Delgado's view that, other than sending operators to the problem area, the only other option was to shut the unit down. "Operators," in this context, refers to a miner, not the mine operator. Then a process would need to be followed: locking it out; draining the unit; and replacing the packing. Tr. 59. He also expressed that if the repairs are done expeditiously, that is, they are accomplished before the unit's temperature has dropped, one can then start the unit back up. 59-60. Because of his view that there was an unsafe risk to employees in having them go in and try to fix it, the only realistic option from his perspective was to shut the unit down. Tr. 60. While this view of Delgado's is interesting,[6] it is not part of the totality of the circumstances – those circumstances being whether Emig interfered with McNary's rights.

Following the incident, there was a formal investigation in order to determine what happened and to prevent a recurrence. Tr. 68. The investigation determined that the tarps did not hold; rather, they blew off. Tr. 69. While one photo showed the tarp on the valve, that was taken after the pressure had been relieved. *Id.*

[5] As a bit of history, Delgado was present when McNary got burned. Tr. 58. Delgado also asserted that the Tychem suits are not rated for temperature, but only for chemicals. *Id*. He stated that, at 400 degrees, such suits would've melted on the employees. *Id*.

[6] In a similar vein, Delgado's reference to photo 2, Ex. P 2, and testimony that the mine tried to throw a tarp over the valve, but that the pressure was so high that it threw the tarp off, is interesting, but not central to whether Emig interfered with McNary. Tr. 67. The same observation applies to Delgado's confirmation that, on the day in question, he observed the tarps being used in that fashion. Tr. 68. Photo 3, also from Ex. P 2, was identified by Delgado as the valve in issue, "blowing out the processed material, the steam, the liquor blowing straight out of the packing." Tr. 68. Photo 4 depicts the tarps around the valve, and the tarps are deflecting the material down. Again, the parties do not dispute that the event was serious. However, the Court notes that a serious event does not establish, per se, an interference claim. To the contrary, an interference claim can be established even in non-serious matters. The point is that seriousness alone does not end the inquiry into whether interference occurred.

In terms of learning, through the investigation, who placed the tarps on the valve, Delgado stated that some of the

> senior operators went in and tried to close[7] the valve off and isolate the valve. And they used these tarps that they threw over the packing leak and they were unsuccessful because the pressure was too much and the heat was too much and there was too much steam they couldn't see and it actually blew the tarp off.

Tr. 70.

The Court notes that in this description Delgado *did not* claim that Emig sent the operators in to close the valves.

Delgado also spoke to the investigation's remarks about Emig, stating that "Emig was there on scene, he was witnessing what was going on. *He didn't pull the people out*. They pulled themselves out because it was too much pressure, but he did see and witness what was happening." Tr. 70. Again, it is noted that Delgado *did not* claim that Emig sent the operators in. Rather, his complaint was that Emig did not pull them out. Delgado then added, "And you know, there's a little intimidation factor there, okay. It happens all the time at Alcoa." *Id*. He asserted that "[w]hen you have a superintendent out there standing and looking at you, *even though he didn't direct you to go into the area*, [but] *he's not telling you to get out of the area*, so there's a little intimidation factor.[8] Tr. 70-71 (emphasis added). The Court again notes it should not be lost that, while Delgado was talking about his claim of an "intimidation factor," he conceded that Emig *didn't direct* the operators to go into the area. Clearly, Delgado, unable to state that Emig ordered miners into the area, was inferring that Emig's presence indirectly prompted the operators to go in, a suggestion for which there is no support.

Delgado was then directed to Exhibits P 3 and P 4, which he identified as the MSHA citations[9] issued to Alcoa. Tr. 71. The Court then noted that the citations [that is, *the orders*] were not going to be tried in this proceeding, as they were beyond the scope of this matter. Tr.

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[7] Though the dictionary does not support such use, another term used during the hearing to describe closing the valve was to "seep" it. Tr. 20-21. It is likely that the term intended is to "seat" a valve. This could've been an error on the court reporter's part.

[8] Delgado was later asked about his remark on direct examination that some miners were hesitant to refuse performing a job, even when they felt it was unsafe because they held concerns about possible retaliation. Delgado then expressed that their concern was they might not get flex time. Tr. 105. However, he then acknowledged that flex time is governed by the collective bargaining agreement. Tr. 106. He added that management retains some discretion on granting flextime, but acknowledged that denial of vacation would be a contractual and grievance issue. Tr. 107. Delgado concluded with the admission that it's complicated because management has the right to direct the workforce. *Id*. The Court considers this to be an excursion from the issues to be resolved and therefore a distraction.

[9] Though sometimes referred to as "citations," they were actually "orders."

71. It is the Court's view that the issuance of citations or orders cannot be a substitute for establishing interference. Such an approach would amount to determining interference by association. That kind of an emotional appeal has no place in examining the totality of the circumstances.[10]

Delgado was also asked about the demeanor of the workers when he arrived at the scene and he obliged, expressing that "they looked like they were glad to see [him] there, but they looked like they didn't want to go in, they looked scared. Okay. You could see it in their eyes, all right. They just didn't -- it looked like they didn't want to have no part of that." Tr. 74-75. In a similar vein to the distraction of whether citations were issued, Delgado's being asked about the demeanor of the workers, is at odds with the scope of the analysis under the totality test.

Another approach used by the Complainant to establish his interference claim was through character assassination of Emig. Delgado stated that he had prior instances of dealing with Emig on plant safety issues. In this regard, he stated that during walk-throughs, upon identifying hazards, on "just about [ ] every occasion" when such matters were raised to Emig, there would be a confrontation, meaning an argument. Tr. 75. He asserted that Emig "didn't like to shut down equipment to fix the leaks, okay, to fix the holes in piping, to fix the packing leaks." Tr. 75. Delgado, it is fair to state, did not have good things to say about Emig. He asserted that Emig would "get heated pretty quick," that "he didn't have a middle," and that he "was zero to a hundred." Tr. 76.

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[10] Complainant's Brief at 14-15 recites most of the text from the section 104(d)(2) order (Order No. 8769213) and the 104(g)(1) order (Order No. 8769214). Unfortunately, Complainant's recitation of those orders applies bold print to some portions of those orders. The Court understands that the nature of advocacy can sometimes involve emphasis of certain words, as Complainant did here. However, the Court notes that, for Order No. 8769213, that had the effect of deemphasizing that the Order stated that the "Miners state that Mr. Emig gave the order of withdrawal from the area after the tarp was in place and the valve seated." Thus Emig's name appears in the Order only with regard to giving the order of withdrawal, *not for any order to have the miners <u>enter</u> the area.* Driving home this point it is further noted that, earlier in the text of that same Order, the inspector alleged, "The miners attempted to tarp the leak but a sudden release of pressure resulted in the tarp being blown off of the pump forcing the miners out of the area. The miners then requested additional PPE so they could return to the pump and attempt to tarp the pump again as well as seat the valve causing flow to the packing. Management provided the equipment and oversight for re-entering the area of the leak." It should be noted that Mr. Emig's name was not identified for this. *Emig's name specifically appears in the Order only to state that he gave the order of withdrawal*. The Court notes that this is consistent with Emig's testimony on this. In addition, Complainant's Counsel inaccurately stated at the hearing that Barricks' citation accused McNary of allowing employees *to go into that area*. Tr. 263. That is not true. Most important, the Court believes that it is fundamentally unfair to Emig and Alcoa to let the orders operate to taint Respondent's defense to the interference claim, because those orders have nothing to do with that claim.

The Court would comment that this is an interesting claim by Delgado, as he made no claim of Emig going from zero to a hundred when the two of them were discussing the matter involved in this case. Further, to put his claim about Emig's alleged temperament in context, Delgado agreed that, *on both sides*, voices were raised during disagreements at safety meetings and he allowed that everyone tried to "stay professional" during those meetings. Tr. 76-77. Trying to draw a distinction between this incident and the safety meetings, Delgado asserted that no hourly employee was ever threatened in the meetings, nor threatened with removal as a miners' rep, nor threatened with removal from their department, nor removal from the plant. Tr. 77. In the Court's view, Delgado's acknowledgement about the conduct of meetings underscores that the focus of this decision must be upon the events leading up to Emig's words and the determination of what those words were and the context in which they were uttered and how, under the totality of those circumstances, a reasonable miner would have taken them. Thus, the Court finds that the alleged prior history of Emig when dealing with other disputes is both seriously questionable and, in any event, not properly part of the totality of the circumstances in this claim of interference.

The direct examination completed, the Court asked some questions of Delgado, inquiring how common an instance it was at the plant, wherever these valves were located, to have a blow out and the need for repair. Delgado responded that it was not very common, as normally one could address the issue when they were just starting to leak. Tr. 78-79. Asked to be more precise about the number of blowout occurrences, Delgado answered that since December 2011 it had happened perhaps five to six times. Mere leaking valves were more common. Asked if he was at the scene during those five to six events, he responded he had *not* been present on those occasions. However, a lot of times, he was part of the investigations following those events. Tr. 80.

The Court also inquired if the L5 area was a location where McNary would commonly be; Delgado answered yes, as he did the PDM group, for which digestion was his area. Delgado also confirmed that when he arrived at the scene at the time of the event in issue here and he witnessed the exchange between Emig and McNary, that Delgado took over and so informed McNary of that and the exchange between McNary and Emig ended and the interaction was then between Delgado and Emig. Tr. 81.

Under cross-examination, Respondent's Counsel asked Delgado if, when he arrived at the scene on January 8, 2014, he began engaging with Emig and others about how to deal with the situation. Delgado stated that first he interacted with Emig, and then Inspector Barrick took over, and others then came to the scene and it became a group effort. Tr. 82. Kelly Grones was a part of that group effort. *Id*. Delgado stated that he learned *only later*, during the subsequent investigation of this matter, that Grones was called to the scene after McNary called Luis Medina and asked him to get her there. Tr. 83. Delgado *did not know* that Emig had also called Grones. Subsequently there was a discussion, with him, Grones, and Emig involved. He agreed that the discussion involved how to best deal with the situation and that such a discussion was the procedure that was to be employed. Tr. 83-84. He also agreed that there were different ways to address the situation, but he did not view all of ways as necessarily being safe. Tr. 84. For example, throwing a tarp on the upset was identified by Delgado as a non-safe approach. *Id*.

However, Delgado agreed that none of the miners told him that Emig directed them to use the tarp-throwing approach. Id.

When asked if he learned that Emig in fact pulled the workers out of the area when he saw them in it, Delgado's memory failed him as he responded that he was "not sure on that." Tr. 84. However, Delgado agreed that when he arrived at the scene, the workers were out of the line of fire. Tr. 84. *Therefore, importantly in the Court's estimation, Delgado agreed that he wasn't present to see what Emig did, nor what the miners did*. Tr. 85. Instead, Delgado conceded that his knowledge was based on talking with people during the investigation phase. Tr. 85. However, though no one claimed that Emig told them to go in, Delgado replied that no one stated that Emig told them to get out either. *Id*. Delgado repeated his unsupported claim that the workers were "pretty intimidated" by Emig being present. Tr. 85. Against that claim of worker intimidation, Delgado then conceded that he has had many, many conversations with Alcoa workers "about their right to refuse to do something that they think is unsafe." *Id*. Though he made that admission, he insisted that despite Alcoa's policy, workers still are hesitant that speaking up may work against them. Tr. 86.

Returning to the subject of how to deal with the problem that existed, Delgado agreed that there were options besides using a tarp. Tr. 86. It was his view that the best option was to shut the unit down and he agreed there was discussion about that option. He did not agree with the assertion that shutting down a unit and then starting it up again creates increased safety risks. Tr. 87. Instead, it was his view that while it involves "a lot of extra work" and "could take more time," he didn't know, that is, he did not believe, there were extra risks, if it's done correctly. Tr. 87. It was his view that the motives opposing shutting down were time and production. Tr. 87. Respondent's Counsel then asked if Delgado would agree "that if a unit -- the whole unit has to be shut down for a long period of time, there is an increased risk when you have to start up again," and Delgado responded that he agreed with that. Tr. 88. Therefore, with that concession, Delgado agreed that if Emig or Grones had concerns about that option, there was a genuine basis for those concerns. Tr. 88.

Another option, Delgado agreed, was to have a third-party contractor, who specialized in such problems, brought in to deal with it. Tr. 88. Mr. Medina, who is the scope representative and another full-time MSHA representative, along with Delgado, Emig and Grones, was part of the discussion for that option. Tr. 88-89. Delgado also acknowledged that Medina, like himself, was another paid-by-Alcoa, full-time, 40 hours a week, safety person. Tr. 89.

Still another option was simply to wait and see if things calmed down. In fact, that is what happened, and Delgado agreed that the upset died out. Tr. 90. Delgado also conceded that three or four hours later it became safe to enter the scene and repair the problem. Tr. 90. However, Delgado added that certain steps were required before it became safe to enter the area. He admitted both that he was comfortable with the decision to see if things calmed down and was a party to the decision to not shut it down. *Id*. Thus, the Court observes, apart from McNary's interaction with Emig, Alcoa's designed miner/management process for resolving issues worked – Delgado was an active player in that process and he was a participant in the decision to not shut the unit down. The Court finds this is instructive in determining what actually transpired between McNary and Emig, as Emig was a participant with Delgado

immediately after his exchanges with McNary and, there is no dispute that he comported himself professionally with Delgado.

Delgado also conceded that there was some history between him and Emig; in the past they had argued robustly about how to deal with particular situations. Tr. 91. Delgado did not feel that Emig listened to him or at least that they weren't agreeing. *Id*. However, in this instance, the instance the Court must analyze, a time out was then called and Grones, Emig, Medina, Delgado and others then talked about the situation and they reached a solution. Tr. 92.

Although Delgado reaffirmed that, upon approaching the site, the first thing he heard was Emig's words – that Emig would have McNary removed as a rep and from the plant, *Delgado agreed that he did not know what had transpired before he arrived, and therefore could not know what had prompted Emig to say those things*. Tr. 93. Delgado also agreed that Emig, as the superintendent of digestion, was in charge of the area in issue. Tr. 93. Delgado further admitted that MSHA would view Emig as the operator's agent with responsibility for the area and, if something went wrong, the blame would have been on Emig's shoulders. *Id*. *Significantly, Delgado then agreed that, if McNary had told Emig, that Emig couldn't tell him what to do, this would have been a reason for Emig to have been upset with McNary.* Tr. 93-94.

Probing further on Emig's and McNary's interaction, Delgado agreed that while miners have a right to point out things they believe are unsafe and they have a right to refuse to do things they believe are unsafe, on the other side of the equation, an Alcoa manager would have the right to remove a worker from an area if he determined that the person was being disruptive. Tr. 94. However, Delgado added that one's definition of "disruptive" is important. *Id*.

Respondent's Counsel, correctly in the Court's view, described the worker/management relationship in such circumstances as a "balancing act." Tr. 94. Again, it was pointed out that Delgado had no knowledge of what preceded his hearing Emig's words to McNary. Delgado also agreed that at that moment, Emig had "a lot on his hands." *Id*.

Respondent's Counsel asked whether in such a situation, with "serious stuff" going on, the focus should be on dealing with the stuff, as opposed to an employee complaining about the manager's authority. Tr. 95. Delgado responded "yes." Tr. 95.

Illustrative of Alcoa's attitude towards safety, Delgado agreed that "Alcoa has never objected to paying for more than one to accompany an MSHA inspector when he's doing [an] inspection." Tr. 99.

Delgado agreed that McNary was second-in-command as a miners' rep to accompanying an MSHA inspector. Tr. 100. In selecting McNary as second-in-command, Delgado conceded that McNary was not someone who would be intimidated easily and was comfortable in speaking up. Tr. 100-101. Consistent with that view, Delgado acknowledged that McNary would not be intimidated by Grones, Emig, or the plant manager, Ben Cars. Tr. 101. Delgado also agreed that he was not intimidated to visit the plant manager and complain about safety issues. Tr. 102. Thus, the Court observes that Delgado's *own words* on the subject of intimidation by Alcoa management contradicted themselves.

Further, of relevance in the Court's estimation in understanding the context of this matter, Delgado informed that, at the twice monthly safety meetings, *McNary and everyone else felt comfortable speaking up*. Tr. 104. Emig was present at such meetings. *Id*. These admissions by Delgado also undercut his earlier claim of employees being intimidated.

Delgado agreed that when he arrived at the scene "there was tension between Mr. Emig and Mr. McNary." Tr. 104. Delgado made the decision that it was better for him to handle the situation than McNary, but added, "[e]specially when Mr. Emig hollered at me, I'm done with [McNary]." Tr. 104. However, Delgado also agreed that his biggest concern at that moment was the safety of the miners and accordingly he wanted to talk with Emig about the danger he was observing. Tr. 104-105.

When asked if he recalled Emig offered to remove himself from the situation, Delgado responded that he did not remember that. However, Delgado acknowledged that Emig could have said that, but that he simply did not remember it. Tr. 105.

The investigation regarding the January 2014 incident was a joint company/union investigation. Tr. 109. Delgado never restrained McNary in this matter; instead he asked him to move to a nearby location and McNary did that, without incident. Tr. 110. Delgado responded "no," when asked if, prior to this incident he had never heard Emig threaten to remove a miners' rep from their role, or from the plant. Tr. 110-11. Thus, the Court notes that Delgado conceded Emig had never made such a threat prior to this incident. Further, Delgado admitted that Emig never asserted that it was insufficient for McNary to move where Delgado directed him; that is, Emig never uttered, "no, he [McNary] needs to get out of here." Tr. 112. Nor did Emig assert to Delgado that McNary needed to get out of the plant. In fact, as discussed herein, in the Court's view, McNary seemed to be goading Emig into saying something more, asking if Emig was done with him. Emig responded that he was done with him for now. *Id*.

Following Delgado, the Complainant, Michael Kevin McNary testified. Tr. 115. At the time of his testimony in this proceeding he was not employed and his last employment was with Alcoa at the Point Comfort plant. In June 2016, he was among the large majority of employees that were laid off from the plant.[11] Tr. 117. He worked at the Point Comfort plant for about eight years. *Id*. During his employment he had always been an hourly employee. Tr. 120.

When he started working at the plant, McNary was an "area operator," and was classified as such, working in the preventative maintenance group, known as "PDM." Tr. 118. McNary described his job then as one who worked the valves, opening and closing them, as part of controlling the process. *Id*. He agreed with Delgado's earlier testimony, which testimony, as the Complainant and therefore not sequestered, he heard, about "the process, digestion, clarification,

[11] The layoff was not peculiar to McNary as he admitted that "the majority of the people was laid off. [sic]" Tr. 117. Only a skeleton crew remained. *Id*. A lot of management was laid off too. Tr. 118.

precipitation, calcination." Tr. 118-19. During his employment, he worked in each of those processes, except for calcination. Tr. 119. He estimated spending about two to three years in each of those departments. Tr. 120.

At the time of the incident in issue, he had been in the digestion department for about three years. Tr. 120. He added some description to his "area operator" title, stating while

> classified as an area operator [he was] working the job of gland manager and gland manager[12] is the individuals [sic] that goes out into the area and do the maintenance on pumps, check out the pumps, make sure everything is going good with the pumps, troubleshoot the pumps, like a pump specialist pretty much.

Tr. 120.

In his role as gland manager, he would make daily rounds[13], "troubleshoot pumps that had problems. We'd go out and we identified bad actors [with bad actors referring to machinery, not personnel]. A bad actor is a pump that is continuously having problems." Tr. 121-22. This was, as he described it, all part of maintenance, "keeping the pumps running well." Tr. 122.

McNary is a union member, with the United Steel Workers, and in that role he was a worker's compensation representative for individuals injured on the job. Tr. 122. He was also a MSHA rep. Tr. 123. The terms "miners rep" and "MSHA rep" are used synonymously at the plant. Tr. 123. He was a miners' rep "plant-wide," as the "number 2 in charge," after Delgado. Tr. 125. It is fair to state that McNary's duties as the miners' rep and his involvement in investigations and Department Health and Safety meetings composed the wealth of his work time.

McNary also informed that, in December 2011, he was injured on the job in the clarification department when standing next to a drain valve. That valve failed, spraying hot slurry on him. Tr. 127-28. He received burns on 30% of his head and his whole right side. The injuries caused him to be hospitalized for a month. Tr. 129. In total, it took him slightly more than a year to recover before he returned to work. *Id*. It was after that return to work that he became a miners rep. *Id*.

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[12] For what it's worth, McNary explained that a "gland is actually two pieces of metal that -- that holds the packing back. You know, just -- the same way of the valve that [Delgado] was explaining the packing is what holds the product from coming out, a pump is the same way. It has packing in the stuffing box. It's called the stuffing box. And you have a shaft that goes into the stuffing box. And the packing is around the shaft and you have two pieces of metal. You know, most of the pumps are ideally the same, you know. These two pieces of metal holds the packing in and you tighten the packing to keep the product from coming out of the pump." Tr. 121. He added that, "[i]f that packing fails, then, you know, you have a pump blowing out the same way the valve blew out at the L5 area." *Id*.

[13] By "making rounds," McNary meant checking the pumps. Tr. 123. McNary was making such daily rounds at the time of the January 2014 event in issue. Tr. 124.

The January 8, 2014 Incident

As noted, the January 8, 2014 incident, which is the subject of this litigation, occurred about eight (8) months after McNary became a miners' rep. Tr. 131. At that time McNary's job title was gland manager. On that day, as part of his duties, he was checking pumps and making adjustments on them. In the course of that work, he came to the L5 area, where there are some seven or eight large pumps. It was then that he saw steam, that is to say, slurry, spraying out everywhere. At that time he also saw supervisor Donnie Broussard and Joe Nevlud, a contractor. Those two individuals were looking at the valve which McNary had observed spewing and blowing out. Broussard and Nevlud exchanged words with one another and then walked back towards the office area. Tr. 133. Then, McNary saw Marty Montes and Robert Serna walking towards him. Serna, McNary informed, is a 6A operator and an hourly employee. As a reference, an 8A is a superior, or main, operator. Tr. 133-34. Montes is also an hourly employee. Tr. 134. The two approached McNary who observed that both men were covered in slurry. *Id*. Montes told McNary that a valve went out and that it continued to get worse, to the point that he thought they would need to shut the unit down. *Id*. McNary added that Serna told him he didn't want to go back over there. Tr.134. The Court observes that, at that point, based upon McNary's own testimony regarding the information from Montes and Serna, McNary could've invoked a stop job order.

Next, McNary got a call from Miguel Gonzalez. Gonzalez is an hourly employee that worked temporarily as a supervisor. Tr. 135. While McNary, according to his recounting, continued to *just observe* the situation, Gonzalez arrived and then Donnie Broussard with Steve Emig arrived right after Gonzalez. *Id*. At that point, McNary stated, Broussard, Gonzalez, and Emig began handing out Tychem suits to the operator.[14] Tr. 136. Then, Delton Luhn, a general mechanic, and another MSHA miners' rep, arrived at the scene, and asked McNary what was occurring.

Including Emig, and McNary, and with Broussard, Gonzalez, and Luhn also present, all there with McNary, when McNary was asked by Luhn about the situation, his response was "*Man, I don't know. I'm just looking*." Tr. 136-37 (emphasis added). While he told Luhn that a "valve was going out and there's a lot of people moving around," he added "but just basically 'I'm just watching, just observing.'" Tr. 138. Thus, McNary stated that his role was passive.[15]

[14] McNary contended that the Tychem suits were inappropriate for the situation being confronted, as they are useful only for chemical exposures, not for situations involving hot temperatures, as here. Tr. 136-37. This assertion, the Court notes, was yet another basis for McNary to invoke a stop job, yet he did not do that.

[15] Shortly thereafter in his testimony, McNary then contradicted his asserted general passivity, stating that when Gonzalez told him "about that pump that was supposedly to have been blowing out [he] wanted to see what pump [Gonzalez] was talking about. So [he, McNary] veered off -- I veered off from going directly back to the L5 area and [ ] went through the 25 area … looking for steam and slurry blowing out, and I'm looking through the whole area. I don't see anything. There's nothing blowing out." Tr. 141-42. Not seeing anything blowing out, McNary then went

At that point McNary stated that he observed Emig assisting Marty Montes putting on a Tyvech suit and that Emig, who brought Montes with him, approached McNary and Luhn, asking if they had any tape. Tr. 138. Both responded that they had no tape but then McNary asked Emig why he needed tape. Tr. 139. Emig responded, according to McNary, that he needed the tape for Montes' wrist. *Id*. Emig then asked McNary if he would get some tape from the tool room. McNary thought to himself, "*I better go get this tape*." *Id*. (emphasis added). McNary acknowledged that Emig had the authority to give such directions to him. Tr. 139. The Court finds McNary's testimony to be dubious on this claim – that he thought, "I better go get this tape," as he would later claim that the search for tape was a ruse on Emig's part to remove him from the area. The Court notes that if McNary believed Emig's real purpose was to get him away from the area, he then had his second opportunity to invoke a stop job directly to Emig.

According to his testimony, McNary then went to the tool room, but there was no tape there. However, as he departed the tool room, he thought "this is a bad situation . . . those guys need[ ] some help over there." Tr. 140. The Court notes that, by his own testimony, when McNary formulated this thought, he did so *without any new information*. This underscores that he passed up the opportunity to invoke the stop job when directly before Emig.

Acting upon his claim of his then-arrived-upon concern, McNary decided he needed to have Kelly Grones involved. To that end, he asked Luis Medina to request for "Kelly [Grones] to come over to the L5 area as quick as she could." Tr. 140. He sought Ms. Grones' involvement because she is an environmental health and safety ("EHS") manager. As McNary saw it, he determined that "she can help us assess the situation and come to a decision and help come to a formal decision without putting the miners at risk, without putting the operators at risk." Tr. 140.

In the Court's view, McNary's action, surreptitiously seeking to bring in Grones and therefor attempting, covertly, to usurp Emig's authority, was improper. McNary's actions were an attempt to override Emig. It was clear that *McNary had determined* that Grones had to take over the situation, expressing that Grones,

> was a very critical thinker and she had empathy and compassion for the operators and she made the decisions for us. That tended to change a little after she become [sic] safety manager, but I was still hoping that she had that compassion to make the right decision when she did come out there.

Tr. 141.

Clearly, McNary was expressing that the traits he believed Grones might still possess were not Emig's traits. Although, the Court acknowledges that McNary could believe whatever he wished regarding the traits of Emig or Grones, he still acted outside of his authority by

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back to the L5 area. In the Court's view, this calls into question how pressing McNary viewed the L5 situation to be, as he was able to make a side trip to view a claimed issue with a different pump.

attempting to direct how management should address the problem, by his deciding which management official should be in control.

Upon returning to the L5 area, McNary described Emig as "standing off by himself. He was tending -- seems like he was walking in circles." Tr. 142. McNary then walked up to Emig and gestured with his head to signal for Emig to "come over here." Tr. 143. Emig then acceded to McNary's gesture and began to follow McNary. They walked, according to McNary, "a pretty good distance away" so that they could speak away from the noise in the pump area. Tr. 144. Delton Luhn, who was right behind McNary, joined this meeting, a meeting which was initiated by McNary. Arriving at a location where it was quiet enough to speak, McNary informed Emig that he

> called Kelly [Grones] and [she] should be on her way to help us assess the situation." And [Emig], he looked at [McNary], [and] said, 'You did what?' And I started to explain it to him again. And [Emig] says, 'You should not have called anyone. This is my department. I direct the work force. I make the decisions.' [McNary then] said, 'Well, Steve [Emig],' . . . Why did you direct those operators into that hot slurry -- that hot slurry after you sent me off to get tape?' [Emig] said, 'I didn't send them in there.' [McNary then] said, 'Well, how did they get in there?'

Tr. 145.

McNary continued his recounting of the event, stating that he asked Emig,

> 'How did they get in there?' [McNary then] said, 'they've been in there already.' And [Emig] said, 'Well, they volunteered.' Tr. 146. McNary then responded to Emig's remark, stating, 'Well, you watched them go in there. You didn't stop them?' Again, according to McNary's recounting, Emig then stated that he had 'called them out.'

Tr. 146.

McNary challenged Emig's remark, responding "You [i.e. Emig], called them out after they went in there. You helped them -- you helped them suit up. You had intentions of them to go in there. If you didn't have intentions of them going in there, you wouldn't have helped them suit up." *Id.*

The Court also considers McNary's words towards Emig to have been entirely inappropriate. McNary, apart from directing Emig to follow him, then engaged in what was essentially a dressing down by McNary's assertions of what he claimed Emig had done. Thus, McNary *was not* directly making safety complaints to Emig, an option he knew about and could have invoked. Instead, he was challenging, and disputing, Emig's responses.

By McNary's retelling of the interaction, Emig responded that he didn't like McNary's actions, informing McNary, using those words, that he "didn't like McNary's actions," and

adding the remark that McNary "shouldn't be involved in these matters." Tr. 146. McNary challenged that statement too, questioning Emig's assertion, by remarking, "I shouldn't be involved? I should be involved. I'm the MSHA rep and I'm concerned for their safety." *Id*. Because the sequence of the events is important, the Court notes that, even by McNary's version of the events, during his testimony at the hearing, *this was the first moment in time when McNary expressed a safety concern to Emig*.

Next, according to McNary's testimony, Emig then said "Well, I will remove you as MSHA rep. [sic] I will remove you from this department, and I will remove you from this plant." Tr. 146. It was McNary's testimony that when Emig made those remarks, Carlos Delgado and MSHA inspector Brett Barrick were present. Tr. 146. McNary then turned around and told Delgado and Barrick that Emig had just threatened him. McNary stated, effectively, that he was stunned by Emig's words, asserting "at that point, you know, my head was kind of reeling. You know, it was kind of like 'I know this didn't just happen. I just -- I just got threatened. It's not supposed to happen.'" Tr. 147. McNary interpreted that Emig's words meant "[a] termination automatically." *Id*.

McNary's testimony continued, stating that Delgado, Barrick and Emig then walked off about ten or fifteen feet from him. Tr. 148. At that point McNary could not hear completely what the three were saying, as he was able to understand only "bits and pieces" of the conversation. However, McNary apparently heard enough "bits and pieces" of the conversation for him to walk over to the three and assert "Steve [Emig], you know it didn't happen that way. Why don't you tell them you sent those operators in that slurry while you sent me away to get tape." Tr. 149. After that remark by McNary to Emig, by McNary's account, Emig then told him "Kevin [McNary] I'm done with you." Tr. 149.

At this point, McNary, apparently his head no longer reeling, regained his bearings, as he replied to Emig, "You're done with me or you're done with me for good?" *Id*. To which, again by McNary's accounting, Emig said, "No, just for now." *Id*. At that point, the two had no further conversations. Thus, in the Court's view, even accepting for the moment the veracity of McNary's testimony, something which the Court ultimately declines to do, McNary admitted that Emig had walked back his earlier remark. Therefore, by McNary's own accounting, Emig had almost immediately walked back his improper remark, whatever it exactly was.

McNary's attorney, describing the exchanges between McNary and Emig as "interaction," asked McNary if he ever told Emig that he, McNary, was "in charge here. You're [i.e. Emig] not in charge." McNary denied making those remarks. Tr. 149. Asked again, but with a more expansive question, whether he ever told "Emig in any way that he wasn't in charge of the situation," McNary responded, "[n]o." Tr. 150. Nor, McNary asserted, did he ever tell Emig that he [McNary] was "conducting an investigation" or that "This is [McNary's] investigation." *Id*. Further, McNary denied telling Emig that Emig doesn't direct the work force, that he, McNary, directs the work force. Tr. 150. McNary also denied that he told Emig that he "didn't have to listen to what [Emig] said." Tr. 151.

Instead, McNary stated, "[t]he only thing I told [Emig] was Kelly [Grones] was coming out there to help him assess the situation and he blew up." Tr. 150. Thus, again by McNary's

testimony, he admitted that he had done an end run around Emig, an act that was beyond his charter as a miners' rep and as a miner. Further, McNary's earlier testimony reveals that he sought out Grones, not to help Emig assess the situation, but rather to replace Emig, because, while he also had doubts about Grones, he believed she would be the more concerned person to deal with the issue. McNary also denied that Emig ever said anything to him to the effect that he, Emig, had already contacted her. Tr. 151.

Although McNary, per his request, hoped that Medina had contacted Grones, he testified that he could not be sure that Medina had been successful in reaching her. While he stated that he could not be sure if Grones ever got the message which he directed Medina to deliver, in his next breath McNary then stated "*But I told Steve* [Emig] *that she was called and she was on her way out there*." Tr. 151 (emphasis added). The Court observes that something does not fit with that claim. McNary, if he truly did not know whether Medina had reached Grones, as he claimed, could not have asserted that he told Emig that Grones was on her way.

In any event, Grones did arrive. At the time of Grones' arrival, McNary stated that Delgado and Barrick were present, and he, McNary, "was already walking off." Tr. 151. The Court would comment that McNary's claim that he would walk off when Grones arrived is quite odd, given his expressed concern and the steps he took to have Grones arrive at the site of the problem. Thus, one would think that, as he was the initiator to have Grones come to the site, McNary would stay.

Although McNary's Counsel asked "[h]ad anybody at the plant in management ever told you before *in discussing a safety situation* that 'This is not your business' or 'You shouldn't be involved in this,'" McNary responded that he had never been in a situation like that … [it was] the first time that [he'd] ever been in that situation with management." Tr. 153. Thus, McNary admitted it was more than unusual; it had never happened before. This prompts the question what were the unique circumstances which brought this about? As set forth below, the Court concludes that, under the totality of the circumstances, *it was McNary's own conduct* which brought about the exchange with Emig.

The Court would note again that, in its view, it is a mischaracterization to label McNary's actions and statements with the words used by his Counsel, as *discussing* a safety situation. McNary was not discussing a safety situation. Rather, he was making assertions about Emig's conduct and attempting to orchestrate which management official would control the event. This was far beyond his legitimate purview.

McNary also stated that no one had to physically restrain him during this event and he denied swearing or cussing. Tr. 153. McNary's Counsel asked about Delton Luhn and McNary confirmed that Luhn died a few months before this hearing. Tr. 154. McNary was presented with Complainant's Exhibit P 5, an affidavit made by Luhn. McNary stated that he and Luhn "put these affidavits together," as McNary knew Luhn was a witness who "heard everything … from the beginning to the end." Tr. 155. Thus, McNary stated that Luhn was present, along with Delgado and Emig, during the interaction which is the subject of this proceeding. Tr. 155. McNary identified the affidavit as bearing Luhn's signature. The affidavit was then sent to the

Court and this occurred at a time before McNary had legal counsel. Tr. 157. The Court comments upon this affidavit below.

Respondent, Alcoa's, cross-examination began with Luhn's affidavit, Ex. P 5. McNary stated that he and Luhn drafted the affidavit together, along with the secretary at the union office. Tr. 158. Alcoa's Counsel noted that Delgado prepared an "almost identical affidavit," and McNary acknowledged that to be true, advising that he, McNary, Delgado, and the union secretary did Delgado's affidavit too. Tr. 159. Presenting R's Ex. 17 to him, McNary acknowledged that was the affidavit they prepared with Delgado. Tr. 159. Though not certain, McNary, who noted again that he was acting pro se at that time, believed the two affidavits were created in separate meetings, stating, "I believe so. I'm not too sure but I know they came over two different times because *we had to talk about the -- the details about what they actually heard and whatever, you know*." Tr. 159 (emphasis added). McNary did state that Delgado was not present when Luhn and McNary prepared the Luhn affidavit and, similarly, Luhn was not present when Delgado and McNary prepared the Delgado affidavit. McNary could not recall which affidavit was created first. He also could not state whether the language from the first affidavit was used for the second one. Tr. 161.

The Court has reviewed the Luhn and Delgado affidavits. In addition to the fact that they bear the same issuance date, it is true that they largely mimic one another and therefore have an air of being rehearsed. Both affidavits state "Said operator Agent Steve Emig, in a loud aggressive tone did threaten to terminate Mr. McNary from the Alcoa Alumina Point Comfort Mine. Steve Emigs [sic] demeanor and verbal communication displayed threats of reprisal, intimidation, discrimination, and interference with the miner's statutory rights." Ex. P 5; Ex. R 17. The mimicking also represents the substance of Luhn's and Delgado's claims. Beyond that, the Court observes that it has the hearing testimony of Delgado, which is more valuable than his affidavit in terms of evaluating the totality of the circumstances. Luhn, now deceased, was not subject to examination of his claim by Alcoa. Perhaps of greatest concern, McNary's testimony about the creation of the affidavits is simply not credible, as one does not by mere happenstance arrive at the common language shared in them. Finally, drawing back from the words in the affidavits, though there are differences in exactly was what said, there is no dispute that McNary and Emig had words with one another. The key is the Court's determination of what words were exchanged and how those should be understood within the totality of the circumstances.

Directing McNary to January 8, 2014, McNary confirmed that <u>his first conversation with Emig involving this matter</u>, was when he gestured with his head for Emig to come over to McNary was located. Tr. 163. McNary then agreed that *the first thing* he told Emig was that he had called Kelly Grones. *Id*. McNary next agreed that Emig's response was "You did what? You shouldn't have called anyone." *Id*. McNary then agreed that Emig *seemed* very upset that he had called Grones. *Id*. However, McNary would not agree that Emig was upset about McNary's act of calling Grones, stating that, as he could not read Emig's mind, he could not know that. Tr. 163.

McNary denied that Emig told him that McNary was not directing the work force, and denied that Emig told him "that they were, in fact, in the process of assessing the issue to determine what to do next." Tr. 164. McNary also denied that he told Emig that Emig could not

tell him what to do. Tr. 164-65. However, McNary acknowledged that *if* he had said that, *Emig would have been justified in being annoyed at him*. Tr. 165.

McNary agreed that Emig was the superintendent of digestion, and as such McNary's supervisor. Therefore, while McNary agreed that it would have been inappropriate for him to tell Emig that Emig couldn't tell him what to do, McNary denied having said that, stating, "it didn't happen." Tr. 165. *Over the objection of McNary's Counsel*, the Court permitted Alcoa's Counsel to ask, if McNary had made that remark, *whether Emig would have been justified in telling McNary to get out of the area*. McNary's response was,

> "[t]hat depends, Mr. Bacon.[16] I think when – when you have a situation -- when miners' safety and health is put in a position and on the same token you have management that's putting those miners or the operators in that position, as an MSHA rep it's not exactly my job to turn my face and act like I've never seen something like that happening. But the way you're explaining it, it didn't ever happen that way.

Tr. 166.

The Court then questioned whether McNary had been responsive to the question. Tr. 166. Upon review, the Court finds that McNary was not responsive.

Another attempt to get a responsive answer from McNary was then made. McNary was asked, "*if you had told him that he did not -- he could not tell you what to do, would he have been in his right, in your mind, to have asked you to leave the area.*" McNary responded, "*Yes.*" Tr. 167 (emphasis added).

McNary then confirmed that it was his belief that Emig's request for McNary and Luhn to get tape for the Tyvech suits was motivated to get McNary out of the area. McNary admitted that it was Emig's purpose was "to keep me away from what was getting ready to happen."[17] Tr. 167-68. However, McNary acknowledged that Emig asked him to get the tape *before* McNary later beckoned Emig to come over to speak with him, answering, "He asked for the tape before I

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[16] As a reminder to the reader, Christopher Bacon is Alcoa's attorney in this case.

[17] At that point McNary's Counsel commented that he would like to note that McNary raised this issue when he was acting pro se and that the Complainant, now with counsel, had withdrawn that issue. Therefore, McNary's Counsel, unsure where Alcoa's attorney was going with that issue, asserted this was no longer an issue before the court in this case. Tr. 168. The Court acknowledged the remark from McNary's Counsel, but overruled the contention that the matter was not an issue. *Id*. As McNary continued to assert during his testimony his theory that Emig had sent him on a "wild goose chase," the Court finds that, under the totality of the circumstances, the claim certainly remained relevant to appreciating what transpired in his interactions with Emig. Therefore, whether strategically claimed to be withdrawn or not, it reflected McNary's view and is instructive in appreciating the totality of the circumstances.

called him." Tr. 168. Further, McNary admitted that at that point he had not had any conversation with Emig "about what was going on," agreeing that up to that point, he was only observing. Tr. 168-69. The Court finds that if McNary truly believed that Emig's aim was to remove him from the area, or that what "was getting ready to happen" was hazardous to miners, he again had the opportunity invoke the stop job.

McNary stated that he observed that they were trying to suit people up with Tyvech suits. Tr. 169. He agreed that once Delgado and MSHA inspector Barrick came to the scene, those individuals were talking with Emig about the situation, assessing it. Tr. 170-71. In fact, McNary then approached them, interrupting their discussion, in order to tell them that he believed Emig had sent him away in order to get the tape.[18] Tr. 170.

When McNary was asked if, when he approached the three and interrupted them, he said, "*He* [Emig] *tried to get me out of here by going to get tape*," McNary, in his response, took issue with the question's use of the term "assessing the situation," asserting that, while he was only able to hear bits and pieces of the trio's conversation, it seemed

> like he [Emig] was talking to them about the -- the threats that he had just made to me. And I went to them -- it was Carlos Delgado, Brett Barrick and Steve Emig, they were standing about 10 or 15 [the Court presumes feet] away from me. And I told them, "Tell them about the threats you just made after you sent me to get tape.

Tr. 171 (emphasis added).

The Court remarked that McNary had not answered the question. Tr. 171. Alcoa's attorney then took a different approach, inquiring whether McNary agreed that "the most important thing at that moment was to assess the safety of the situation." Tr. 172. McNary responded, "I think so." *Id*. Thus, McNary agreed that at that point the greatest concern was with the upset and keeping miners safe, remarking "[t]hat's what the whole argument was about." Tr. 172. However, despite McNary's agreement that the most important thing at that moment was safety, he did not agree that the subject of whether McNary had sent him on a wild goose chase was a matter that could wait. Tr. 172. Pressing the issue, Alcoa's Counsel inquired of McNary, "You thought that was more important to address with Mr. Delgado than the safety incident that was occurring." *Id*. McNary, relying upon the "bits and pieces" he heard, answered

> "When -- when I -- when I went back and started talking with them, they wasn't talking about assessing the situation. They were – Steve [Emig] was trying to explain to them that he hadn't threatened me. That's what they were talking about.

[18] Alcoa's Counsel asked McNary, "[y]ou, in fact, went up to them and interrupted them to tell them that you felt that you had been sent away in order to get the tape?" McNary responded, "[y]es, I did." Tr. 170.

> They weren't talking about assessing the situation. They weren't talking about the valve. They were talking about what they had just walked up to.

Tr. 172-73.

McNary agreed that Delgado told him to go over to where the other operators were, and agreed that in Delgado's testimony earlier during the hearing he heard Delgado tell Emig that they were not going to be sending people in.[19] Tr. 173. When Alcoa's Counsel submitted to McNary that, based on Delgado's testimony, the big issue of concern was the safety emergency they were facing, McNary's Counsel objected to the question because it pertained to events *after* Emig's threat to McNary. Therefore, expressly, McNary's Counsel's stated point was that "*the only issue in this trial is, were the threats made and did it violate 105(c). What happened ten minutes later, you may want to hear it but it's really not relevant to the issue before [t]he Court*." Tr. 174 (emphasis added).

The Court understands that McNary's Counsel would prefer to have the issue so simply circumscribed. If accepted, it is the Court's view that mere utterance of the words allegedly used by Emig would, in a talismanic manner, carry the day for McNary. Certainly, McNary's Counsel has never suggested that there could be any other result but interference upon such an utterance. However, the Court explained that, in applying the "totality of the circumstances" approach, it is looking "at events immediately prior to the events where the alleged remarks were made by -- by Mr. Emig and to the events afterwards. So I'm getting a … continuum." Tr. 174.

Alcoa's Counsel then turned to McNary's accusation that Emig was "directing the miners to go into the line of fire," a characterization to which McNary agreed. Tr. 175. McNary also agreed that Emig took offense at McNary's accusation. However, McNary agreed that Emig told him he "did not direct them to go in," but McNary did not agree that Emig informed him that he told the miners *to come out*. Instead, McNary parsed the words used in the question, stating that Emig's statement to him was that he "*called them out* after they went in." Tr. 175 (emphasis added). Asked whether he felt that it was Emig's fault that the miners were in that area, McNary responded that "Emig was in charge of that area. He was in charge of the safety of those miners at that time." Tr. 175-76.

Asked if Emig really was not responsible for the miners going in, if in fact they went in without his consent and without his control, whether that would have been a reason for Emig to be upset with McNary's accusation, McNary acknowledged that would be a reason, but countered that Emig "was already upset." Tr. 176.

Next, McNary acknowledged that, following the incident, he was part of the investigation into the incident. Tr. 176. In connection with that investigation, *when McNary was asked the important question whether any of the miners told him that Emig directed them to go into the line of fire, McNary's Counsel objected that the question was overbroad and without a proper*

[19] Because McNary is the Complainant, he was present for all the testimony. There is no suggestion by the Court of anything improper by that fact, but simply to note that it is also a fact that McNary heard Delgado's testimony before providing his own testimony.

foundation. That objection was overruled. Tr. 177. With the question repeated, that is, whether "any of the miners who were there working that day [told] [him, McNary], 'Mr. Emig instructed me to go in,'" McNary responded, "No one told me that that day." Tr. 178. Very oddly, in the Court's view, and given McNary's earlier answer that none of the employees told him during the investigation that Emig had directed them to go into the slurry, when McNary's Counsel asked McNary on redirect if he asked anyone, as part of the investigation, whether Emig had directed employees into the slurry, McNary responded, "*No. I did not ask any of them that*." Tr. 185 (emphasis added).

When asked if Delgado requested McNary to move out of the area while he continued to talk with Emig, McNary stated that was not exactly what happened. Instead, McNary demonstrated with a gesture that Delgado raised his hand and moved it a little, while telling McNary to "cool off." Tr. 178-79. McNary did follow the instruction from Delgado, and moved away from the area and then headed back to the breakroom to write his statement. Tr. 179.

Over objections from McNary's Counsel, McNary answered that he was never terminated, nor disciplined and that after the incident he continued to work with Emig on a regular basis. Tr. 180.

On redirect, McNary affirmed that when he interrupted Emig, Delgado, and Barrick, Emig had already threatened him. In fact, McNary stated that Emig had just threatened him, only a matter of five to seven seconds earlier. Tr. 183-84. As noted earlier, McNary's "head reeling" condition did not last long.

The Complainant having rested, the Respondent called Ms. Kelly Grones as its first witness. Grones has a "master's degree in business administration, MBA and a bachelor's degree in safety." Tr. 191. At the time of the hearing she was no longer working for Alcoa, her current employment being with South Texas Electric, as a safety and health manager. That work began in November 2015. *Id*. As for her employment with Alcoa, that began in October 2012 as their environmental health and safety coordinator. Tr. 192.

Turning to the events of January 8, 2014, Grones stated that somewhere between 8:30 and 9:00 a.m. that morning, while she was in a production meeting, she received a call from Emig, notifying her that there was an upset condition and that he needed some advice on "some safety things that was going on in the area." Tr. 193. She then left the meeting and headed to the site of the condition. Tr. 193-94. Upon arriving she saw MSHA's Barrick, who was talking with Delgado and Emig. Barrick was raising his voice and screaming at Emig. She also observed that there was a lot of steam coming off of the pumps and she described it as "pretty messy." Tr. 194. There were a lot of employees gathered there too. She then approached Emig, notifying him that she was there. According to Grones, the exchanges between Emig, Delgado and Barrick were intense. This included Delgado stating,

> You're not sending people in there. Brett's [Barrick] like, 'You're not going to send people in there because you -- you almost fucking killed people last time,' and really, it was very heated. And honestly, [Emig] was very quiet which, you know, I have a lot of history with [Emig] as well. [Emig] is -- at times, he

> definitely says his opinion and he's very open. He's very confident and he's going to tell you if you're wrong. And he makes the decisions in that department and he was very quiet. And I could tell that he was really, really upset, that he -- you know, these individuals, … Delgado, [and] Barrick were saying these mean things to him.

Tr. 195-96.

Grones stated that she did not participate in the heated exchanges. Instead, she told them she needed to learn more about the situation. To that end, that is, to learn from production what was going on, before making any safety decisions, she proceeded inside and spoke to Richard Ratliff, an engineer, and JP Strickland, the latter being the production engineer. Tr. 196-97. Grones was also aware that there was a prior such incident in the area, and that the unit was shut down. She advised that shutting down is not a panacea; that action brings its own set of problems. Tr. 197. Ironically, there was no need to make a decision in the instance associated with this hearing, as the flow stopped. Tr. 197. Had a decision been required, Grones stated that she would have brought Delgado into that. Tr. 197-98.

Regarding MSHA's Inspector Barrick yelling at Emig, Grones related that the inspector asserted, "[l]ast time this occurred, you injured Mike Brown." Tr. 198. Brown, Grones informed, "was the individual that was hurt in the last incident in September." *Id*.

On cross-examination, Grones acknowledged that she did not hear any conversation between Emig and McNary. Tr. 200. Therefore, she could not testify about events prior to her arrival at the site. *Id*. When, on direct, Grones referred to Emig stating that "there are things going on, we're discussing things," that was her interpretation of Emig's remark, not a quote from him. Tr. 200. Grones did remember that Barrick and Delgado were yelling at Emig. Tr. 200. Recapping, Grones agreed that the event which brought her to the site involved, as expressed by McNary's Counsel, a spewing valve that was shooting caustic in the L5. Tr. 201.

McNary's Counsel's made the point on cross-examination that Grones came on the scene after the exchange between McNary and Emig and that this was also after the attempt to control the valve by putting a tarp over it. Tr. 206. As discussed below, the Court does not accept such a narrow construction of the totality of the circumstances. After all, McNary's Counsel had no problem inserting into the record citations that were issued by MSHA after the exchange between McNary and Emig, nor with bringing up the prior burn incident. Unsurprisingly, the perspective of what should be included within the totality will differ between the advocates.

Grones stated that the inspector, Barrick, was asserting "mean things" to Emig, accusing him of nearly killing Mike Brown in a prior incident. Tr. 202. Grones agreed that Brown's injuries were significant, involving significant burns over 60% of his body due to spewing hot caustic material. Tr. 203. Grones agreed that it would not be a good idea to send an employee into such a condition without being outfitted with PPE. Tr. 204. As to whether a Tychem suit would provide protection in that environment, Grones stated it would depend on how that suit was rated. Tr. 205. On the day involved with this litigation, Grones did not recall seeing any employee in either a Tyvech or a Tychem suit. Tr. 206. Grones did agree that while Alcoa could

make a decision as to how to deal with the event at hand, the MSHA Inspector, Barrick, could overrule that decision. Tr. 206. However, she could not recall if Barrick issued such an order that day. Tr. 207. Grones also agreed that the Inspector accused Emig of almost getting an employee killed in a similar situation. Tr. 207. While she admitted that Emig never denied the inspector's accusation, her response was that Emig instead remained calm in reaction to the inspector's words. Tr. 207.

Grones agreed that, at Alcoa, any employee can invoke a "stop job," with that term meaning any employee can assert, "Stop this job, it's unsafe." Tr. 207. She also agreed that Emig, under such circumstances, should, in the words used by McNary's Counsel, "accept Mr. McNary's advice to stop that job -- stop it and let's figure out what to do." Tr. 208. However, as has been noted, *the problem for McNary is that he did not invoke the stop job option, though he knew full well about its availability, nor did he make such advice to stop and figure out what to do.*

When asked if a supervisor who doesn't like a miners' rep's opinion has a right to say, "I don't want you anymore. You leave. I'm going to bring another miners' rep in? You've never been trained that a supervisor can do that, have you," Grones responded that "it depends," such as "if the person is being disruptive or if it's in some sort of harassing behavior." Tr. 209. However, if the matter simply involves a miners' rep who disagrees with an action, then Grones agreed that is not cause for a supervisor to replace that miners' rep with another rep. Tr. 209. The Court notes that the problem with this hypothetical is that it did not occur here.

Grones was then shown two orders, Exhibits P3 and P4, which were issued at the relevant time. There was Order Number 8769213, in which MSHA alleged that safe access was not provided to the L5L pump under 32 in digestion. MSHA alleged that miners who entered the area were exposed to being burned by spraying slurry or engulfed in the material. Grones agreed that the citation reflects the inspector's opinion in that regard. Tr. 213-14. Further Grones agreed that the citation also alleges, per Inspector Barrick words, that Emig had "engaged in aggravated conduct because he failed to initiate appropriate actions, provide safe access to the area." Tr. 214. Grones then agreed that Emig was in charge of the digestion department and responsible for the safety of miners who went into the hot slurry. Tr. 214. Grones did not know if Alcoa ever challenged the citation reflected in Ex. P3, nor if it paid a $5,000 civil penalty for that. Tr. 215.

Referring to Ex. P4, Order No. 8769214, which alleges that Alcoa failed to instruct miners regarding what to do should the packing on a pump being brought down if it began to surge or fail, McNary's Counsel asked if Alcoa had trained any operators on how to handle a valve that's spewing slurry, and her response was "no," as "that would be an emergency and we would decide at that moment if we needed to develop a special procedure." Tr. 216.

Addressing McNary's action to contact her, Grones agreed that she never told any miners' rep that they did not have a right to contact her and that she would encourage a miners' rep to contact her if her assistance was needed. Tr. 215. Thus, she agreed seeing nothing wrong with McNary contacting her to come to the L5 area. Grones did not accept the premise of McNary's question as to whether Alcoa did any specialized training after the Brown burn

incident, responding that was a different case, involving a lock out issue and a different task. Tr. 217. However, there was some training in the department, following that incident. Tr. 218.

As to Grones' remark that Barrick was "mean" to Emig, she expressed that there are ways to bring up issues of past accidents. She added that the inspector later apologized for his behavior of cussing and getting mad. Tr. 218-19.

Based on the inspector's remarks, in Order No. 8769214, Ex. P4, under the Condition and Practice section, he required that the "five particular miners are to be withdrawn from pump swaps of this type until they have received required training." Tr. 219. Grones agreed that this meant that they couldn't go into such a situation again until they were given adequate training. Tr. 220. McNary's counsel also debated with Grones that one person's view of "disruptive behavior" could be different from another's view of such behavior. Tr. 220.

Reminded that she discussed with Emig the issue of whether to shut down the digestion unit, she then agreed with the words used by McNary's Counsel that since she "raised the issue of shutting down the digestion unit, Mr. Delgado's raising the issue would not have been inappropriate." Tr. 223.

Audio testimony of Mr. Steve Emig[20]

Emig briefly reviewed his educational background; he has a degree in engineering. Following that, he began working for Alcoa, in January 2007, and he has remained with that employer since that time. Tr. 234. His work with Alcoa began at its Point Comfort facility. Tr. 234. At Point Comfort, Emig was first with the clarification department as a liability mechanical engineer, a position he held for three years. He then became a maintenance coordinator in the digestion department, working at that job for nearly two years. Following that, he was promoted to the department superintendent role within the digestion department and again worked in that capacity for three years. A promotion then followed as the west side manager role. He remained in that job until he transferred, in August 2015, to Alcoa's western Australia facility where he was working at the time of his testimony in this case. Tr. 234-35.

Turning to the events of January 8, 2014, when Emig was the department superintendent for digestion, his immediate supervisor was then Michael Hersoff, the production manager at the

[20] At the time of the hearing, Mr. Emig was working in Australia. Therefore, by the parties' agreement, his testimony was taken via telephone on August 15, 2017. Emig had also been deposed earlier. His first deposition, taken by Alcoa's Counsel, Mr. Bacon, was videotaped and that DVD was entered into the record. Tr. 228. A separate deposition, taken by McNary's Counsel, was also entered into the record. Tr. 228-29. McNary's Counsel requested that the Court view the DVD in-chambers, as they had already viewed it. Tr. 230. Although *McNary's Counsel then offered* that the Court could view the DVD *with Alcoa's Counsel* present but with McNary's Counsel absent, the Court declined the offer, advising that it would view the DVD, but by itself, with *neither* counsel present. Tr. 230. The Court viewed the DVD privately, with neither counsel present.

site. Tr. 235-36. Emig spoke to the problem with the valve in the L5 digestion area, stating that Joe Nevlud, who was a retired contractor, but working at the support department, told him about a leak in the unit. Tr. 236. This occurred at some time between 7:30 and 8:30 that morning, when Nevlud arrived at Emig's office, reporting the issue. Tr. 236. Upon being informed of the matter, Emig went straight to the area. On his way to the area he called Donnie Broussard, who was at that time the production area supervisor or "PAS." Upon arriving at the site of the problem he came into contact with other people who were responding to the situation. Tr. 237. He then saw operators putting on gear, and a supervisor directing the crew. Tr. 238. Emig also could see the problem, noting that "there was a considerable amount of slurry/liquor and spewing, spraying out in the valve area behind the pumps that are located there. The -- the area seemed quite inundated with that material at the time." Tr. 238. As noted, he saw some operators donning suits. Though he couldn't be sure, he thought they were donning paper suits or Tyvech[21] suits. Some might have been using rain coats. *Id*. Also, some operators were assembling canvass material for use in draping the leak, to contain the spray. When he arrived, the attempt to drape the leak with canvass had already not been successful. Tr. 239.

Following this initial view of the situation, Emig stated that he

> just tried to get involved to understand what they were doing to keep themselves protected from any of the caustic or slurry. It would have been at temperature as well [as] making sure that when they were putting on gloves and suits that they – that would be, you know, a sealed area, to not let anything pass through. I would have had conversations with the supervisor to understand how the unit was operating. So I would have a conversation also with Donnie Broussard when he arrived to the area to make sure that the unit was pressured up or in a state that it was -- it was going to shut itself down basically.

Tr. 240.

Asked if he knew "if there had been any efforts to shut down the valve" before he arrived, Emig responded that he could not remember clearly about that, but thought that the valve had been partially closed. *Id*. No one could work the valve until the pressure had died off, so he expressed that the valve would have been partially closed prior to his arrival. *Id*.

A critical question posed to Emig was whether "during the time that he was there, did [he] instruct any of the miners who were there to try to access the valve?" Tr. 241. Emig responded that he "did not." Tr. 241. However, while he was there he did observe miners trying to access the valve. He saw that the operators had some protective equipment on and were trying to get close enough to the valve to drape the canvas on it, an attempt which, as he noted earlier in his testimony, did not succeed. At that point, Emig stated, they were in "a somewhat of a stand down position." *Id*.

[21] Emig stated that a Tyvech suit is more appropriate to protect from chemicals

Asked again if he instructed the operators to go in, Emig responded that he

> was present. So in the middle of a time-out session to regroup and think about what we were going to do, they had turned the pump back on to try to reduce the pressure, which was successful but that was after I had already said that we weren't going to do anything until we all agreed on the steps. When that happened, they had proceeded into the area in a very quick response because the pressure had died off. But, no, I did not direct them into there. I even -- but then after that -- after I pulled them back out, I said, you know, 'We did not agree to that.'

Tr. 241-42.

Emig stated that after he pulled them out, no operator went in again, adding that "they did not go back in there, but that was because I became more forceful in my language to say, 'We cannot continue to access the area.'" Tr. 242.

Asked if he contacted anyone else, besides Broussard, when on his way to the site, Emig responded,

> "[y]es …[he] called Kelly Grones who was the health and safety manager at the time. .. [he] made her aware of the situation and told her …[and] [a]s [he] was doing the – the time-out session to not proceed any further, [he] asked for her [Grones] support, to come down and help us assess the area so we could put a plan together.

Tr. 242.

Emig added that around that same time he also spoke with Jeff Jimenez, who was the former PAS (process area supervisor), and told him about the situation in order to get his support. Tr. 243. After Emig spoke with him, Jimenez then came to the area. *Id*.

Regarding the presence of an ambulance at the site of the problem, Emig informed that when mechanic Tim Ables came by the area and inquired if it would be a good idea to have the ambulance there on standby, Emig agreed. Tr. 243.

Speaking to the central, but not exclusive, issue in terms of the totality of the circumstances in this matter, Emig was asked when he first saw McNary that morning. Emig responded that it was not long after he, that is to say, Emig, arrived at the scene. Tr. 244. He recalled his conversation with McNary at that time occurred when "the operators were putting their suits on, I had gone to – [McNary] and Mr. Delton Luhn, who was next to him, and asked if either one of them had any duct tape." Tr. 245. The duct tape was for the purpose of sealing the glove and arm section of the suits. *Id*. Both advised that they did not have any tape and so Emig asked if "either one of them would possibly get some duct tape for the operators." *Id*. He could not recall if either acknowledged his question. *Id*. The purpose of the tape was to seal up the PPE. Emig stated that he did not instruct the operators to wear the Tyvech suits. *Id*. Instead, he

said it was probably Broussard who issued that direction. *Id*. In fact, Emig stated that the tape was not his idea either. Someone else mentioned it and Emig did not disagree. *Id*.

Emig's next conversation with McNary occurred "after [he, Emig] finally got the full time-out session to where nobody was finally going back into the area, [and] Mr. McNary c[a]me over and asked to speak to[him, Emig]. So -- so from there, [he, Emig] walked away from the group and had a one-on-one conversation [with McNary]." Tr. 246. According to Emig, McNary's "first approach was that he [McNary] had contacted some people to come down and assess the situation to instruct [Emig] on what to do." *Id*. Emig stated that, in response, he let McNary

> know that, Hey, we were in a full stand down mode and that [he, Emig] had contacted [Grones] as well to come down. We were assessing it. [Emig] then -- because [he] had felt that [McNary] was trying to control the situation, [Emig] let him know that -- that [he, Emig] was directing the group, [but that McNary] could be involved if he [McNary would] like.

Tr. 247.

Again, by Emig's recounting, McNary's

> first response was he didn't have to listen to me [Emig], which caught [him, Emig] by surprise. [Emig] wasn't quite sure why [McNary] said that, and [he, Emig] asked him what he [McNary] meant by that. And [McNary] said, 'Well, not in this role,' and [Emig] still didn't know what [McNary] was referring to. And [he, Emig] said, 'What role is that?' He [McNary] said, 'The MSHA representative role.' So from there, [he, Emig] began to explain to [McNary] – [telling him] 'Well, you have to listen to me [Emig] as an employee of my [Emig's] department and the department superintendent.' So from there, he -- he [McNary] didn't appreciate that comment and still reiterated, he [McNary] didn't have to listen to [him, Emig]. [He, Emig] told [McNary] – [he] explained to him [McNary] that, yes, he [McNary] did. And, ultimately, his behavior became unsuitable and irate and [he, Emig] hustled him [McNary] up and had him [McNary] removed from the area.

Tr. 247.

Alcoa's Counsel asked if, upon learning from McNary that he had called people to come and assess the situation, if he told McNary that he should not have done that or that he had no business doing that. McNary responded, "No, not at all." Tr. 249.

The Court believes this interaction between McNary and Emig was a critical moment in understanding the totality of the circumstances. Yes, a miners' representative has rights, significant rights, but they are not boundless. Here, having considered the testimony of McNary and Emig, the Court finds that McNary overstepped those bounds and Emig's statement to him, made in the heat of the moment, and at a point where McNary had been insubordinate, must be

understood in that context. Further, very shortly thereafter, only moments after Emig's spontaneous remark in reaction to McNary's improper remarks, (a mere five to seven seconds later, according to McNary), Emig regained his composure and did not take what was essentially baiting on McNary's part, to get Emig to reaffirm his excited utterance. To be specific, for this moment, which involves an important credibility determination, and having heard Emig's and McNary's versions of their interaction, the Court finds Emig's recounting to be the more credible telling.

Continuing with his testimony, Emig related that after he had McNary removed from the area, there was

> a brief argument regarding whether or not [he, Emig] had a right to do that, and [Emig] told [McNary] that, Well, [he, Emig] did … have the right if [he, Emig] felt it necessary, [Emig] explained to him, to have him removed from the area. And if it came down to it, I'd have to have stood down fully and even from the plant as we would have done for anybody else, but it created a hostile environment.

Tr. 248.

From there, "the conversation kind of abruptly" ended about the time three other individuals, Delgado, Barrick and Medina, showed up. *Id*.

Before McNary entered that conversation, Emig stated that he was replaying the context of the situation up to that point with the other three. Tr. 249. Emig expressed that, because of the "way that the conversation ended between [himself] and Mr. McNary, [he, Emig] began to fill Carlos Delgado in on the situation, which he was the site MSHA rep." *Id*. By Emig's characterization of that interaction, the conversation with those three "didn't end well."[22] *Id*.

[22] When Delgado, Barrick, and Medina arrived, Emig confirmed that Delgado was the person talking at the outset. However, Barrick then spoke and Emig stated that Barrick "presented himself to be very angry [about] the situation. He [Barrick] had made accusations toward … [him, Emig asserting] that [Emig] had already burned five other people from an incident that had happened the prior year. He was pretty irate. He used some very strong language." Tr. 253. Emig could not recall verbatim what Barrick said at that moment, but it was "something to the effect of, you know, 'I don't know what you're talking about but you're not going to send anybody in there.' And he used some profanity. He said he wanted to know how the canvass material got onto the valve and then that's when he stopped. That was pretty much what he said." Tr. 253-54. Emig acknowledged that the incident Barrick was referring to was the event in September 2013 involving Mr. Brown in which employees had been burned. Tr. 254. In that regard, Emig was asked if he was supervising or directing Mr. Brown at that time when that accident occurred. Emig answered that he "was the department superintendent" but he "was not directing Mr. Brown." Tr. 254. Further, Emig stated that he had not directed Brown to do the task which injured him. *Id*. Emig was present that day, but responded that the "task would have been one of many involving the restart of that unit." Tr. 254. On the day of Brown's injury, Emig "was standing inside of the unit some distance away from where Mr. Brown was." *Id*.

Primarily, he was addressing Delgado during this conversation but telling all of them "what [he, Emig] knew at that point as far as the valve and it was spraying out, how the -- how we got to where we were as far as the operators responding to that and depressurize the area by the pump coming online." Tr. 250. Emig stated that Delgado said he was "sorry." Tr. 250. Emig added that, after explaining the situation, Delgado "very quickly just said to shut down the unit." *Id*. Emig saw matters differently, expressing that shutting down those units can present "quite a few safety risks in and of itself, not the operator's task but also the mechanics. … [Emig] had started an explanation with [Delgado] but [he, Emig] didn't get very far in that at all." Tr. 251.

Further, McNary jumped into the conversation too and this occurred before Grones showed up. Thus, Emig stated that McNary interjected himself into that conversation and made some accusations about his, Emig's, behavior. Tr. 251. This included McNary alleging to those assembled that Emig had sent him on a wild goose chase to get duct tape. McNary, according to Emig, said, that Emig "had directed [McNary] specifically to leave the area. He [McNary] had also accused that [he, Emig] directed the operators into the valve area." Tr. 252. Emig responded that he "did neither" of those things. *Id*. At that point, by Emig's telling, McNary argued back "Yes, you did." McNary argued back in his own defense. *Id*. Emig then determined that the

> conversation escalated to a point where [he, Emig] made the decision that [he] didn't want -- I felt -- I felt it was an extremely bad shelling. As we were trying to handle this crisis, so to speak, [and he is] sitting there taking accusations [from] McNary. Because of that, [he, McNary] removed [him]self and Mr. McNary from the area at the time.

Id.

Thus, it was Emig's testimony that, as the conversation was "going nowhere," he put Jimenez in his, Emig's role, to assess the situation and complete the assessment once Grones arrived. *Id*.

Emig acknowledged that he also made a statement to McNary directly that he "was through with him at that time 'cause he had -- he had pushed me to a point that I did not think it was going further in a positive direction anyway." Tr. 252. Emig elaborated that McNary

> had said, 'Oh, you're through with me for good? I said, 'No, I'm not through with you for good. I'm just through with you for right now' because of the point it had gotten to. He [McNary] said, [again] 'Oh, you're through with me for good?' And that constant reiteration was extremely frustrating and I said, 'No, just right now.'

Tr. 253.

Emig related that Grones arrived at a time not long after he had begun his discussion with Delgado and Barrick. Tr. 255. When Grones arrived, he filled her in as to what had transpired and she asked about the options in shutting down the unit. Tr. 255. The conversation did not proceed much further because Barrick became irate and that had the effect of preventing Emig from continuing his conversation with Grones. Tr. 255.[23] After Barrick walked off, those remaining watched "the last activities those operators had taken to seed off the valve. The pressure was dying off and there -- there really wasn't much discussion beyond that. It appeared that it was becoming resolved." Tr. 256. Emig's direct exam concluded with his statement that he never removed McNary from the site. Tr. 257. The Court notes that no one, McNary included, contends otherwise.

Under cross-examination, Emig was questioned about his conversation with McNary after he "suggested about the duct tape." Tr. 260. Per the words used by McNary's Counsel, Emig agreed that McNary accused him of *allowing*[24] employees to go into the valve that was spewing the hot slurry. Emig conceded that he held the supervisory position and was the chief person in the digestion department and that the employees that entered the slurry were under him in the chain-of-command. Tr. 261. McNary's Counsel then stated, "you could have directed them not to go back into that hot slurry, couldn't you?" *Id*. Emig responded, "I did." *Id*. That is, Emig stated that he instructed the employees not to go back in. Tr. 261-62. Emig explained, "After I seen [sic] that they were not going to be able to safely access that area, I then told them that we were going to take a time-out and not go back in that area until we figured out the appropriate solution." Tr. 262.

McNary's Counsel's point was that when Emig arrived at the scene, employees were putting on Tychem suits and that, at least initially, he did not tell them they were not going to get into the hot slurry. Tr. 262. Emig did not agree that inspector Barrick's accusation was the same as McNary's, asserting that Barrick accused Emig of "forcefully directing them into that area." Tr. 263. Emig then added that McNary accused him of *both allowing and directing* the employees into the area. *Id*. As noted above, Emig's claim on that point is accurate. Emig asserted that allowing and directing are different things.[25]

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[23] Emig expressed that he did not have much of a chance to respond to Barrick's words, but he, Emig, "listened intently and respectfully" and then at the end, his [Barrick's] last comment was forcefully made as he said, 'Before you leave here today' -- He said he -- the canvass had gotten on that valve on accident or whatever. He said, 'Before I leave today, I will find out how that got there.'" Tr. 256. Emig started to explain, but Barrick didn't actually want to hear Emig's explanation and Barrick ended the conversation. Tr. 256. To be blunt, the Court observes that the MSHA inspector's unfortunate interaction with Emig is not pertinent to resolving this interference claim.

[24] Although Emig agreed that McNary so accused him, McNary's actual words were *not* that Emig *allowed* the operators into the slurry, but rather he alleged that Emig "*direct[ed*] those operators into that hot slurry." Tr. 145.

[25] Regarding the presence of the ambulance, a subject the Court considers to be another side issue of no value to the interference claim, Emig agreed that it was Mr. Able's idea to call the

Turning to the events when McNary returned and McNary's testimony that he looked for duct tape, Emig confirmed that McNary told him at that time that "there would be a group of people coming to assess the situation." Tr. 265. Challenged on whether McNary actually only said that Grones would be coming to the site, Emig repeated that McNary stated there would be a group of people and that Grones was coming too; Emig responded, "He did also say he had contacted Kelly Grones, but he did say to me [Emig] that a group of people would come." Tr. 265. Emig agreed that the only specific name mentioned was Grones. Tr. 266. McNary's Counsel asked how an hourly employee like McNary would have the authority to get a group of people to the site, Emig responded that he did not inquire how McNary would gather a group and so he could only speculate that McNary could have phoned people. Tr. 266.

Addressing Emig's view that McNary was trying to tell him what to do, apart from Emig's impressions, Emig agreed that McNary never used the words to Emig that "I'm conducting my own investigation" nor that he told Emig that he was "in charge of this investigation." Tr. 267. However, Emig maintained that McNary implied those things. *Id*. Emig added, as distinct from McNary asserting that he, McNary, had the power to tell him what to do, McNary "did refer to the group that was coming down would tell [him, McNary] what to do." *Id*.

McNary's Counsel then asserted that Emig didn't mind Grones coming down to assess the situation, but rather his problem was that McNary had asked her to come down, an assertion which Emig denied, stating, "[t]hat's not correct." Tr. 268. Emig responded further that his issue was that, by the words he, McNary, used, McNary "was assuming to take control and then direct." *Id*. Though he could not be sure if McNary said "they" or "we," he was inclined to say that McNary said "we," stating that McNary said, "'We'll direct you as to what to do with the situation.' It was that approach that, yes, made me a little upset." Tr. 268.

Turning to Alcoa's "stop job" policy, Emig agreed with the words used by McNary's Counsel that "any employee, whether or not you're a miners' rep or just a regular hourly employee, has the right to stop a job if they think there's an unsafe condition present." Tr. 269. Therefore, Emig agreed that McNary could have said to Emig that he was "stopping this job and you [Emig] are not sending anybody into that L5 valve area." *Id*. Emig qualified his agreement, stating, "[y]es. If he had approached it that way, yes." *Id*.

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ambulance. Able is an hourly employee. Tr. 264. McNary's Counsel, with Emig agreeing, noted that Emig was in charge of Able and that if he had declined Able's idea, no ambulance would have come to the site. Tr. 264. Then, essentially challenging Emig's decisions, McNary's Counsel noted that if Emig had decided to shut down the unit, (*which the Court notes, turned out to be unnecessary*), there would have been no need for an ambulance, nor any need for McNary to go look for tape. Emig responded that the Tychem suits still would have been needed for a shutdown and restart. Tr. 265. The Court reminds that one should not lose sight of the fact that no ambulance services were needed, and that, essentially, Complainant's Counsel was criticizing Emig's decision to be proactive when the suggestion for the ambulance was offered to him.

Elaborating, Emig stated that

> [t]he reason [he, Emig] did not like it was because [he, Emig], in the moment, had already stopped and was pulling everybody out trying to control the crisis. He [McNary] appeared to be oblivious to that, even though he was close enough, and then approached it as if he was getting the people down to then stop and -- and direct. . . . [t]hat's why.

Tr. 269-70.

Further, Emig denied the suggestion by McNary's Counsel that he, Emig, didn't like McNary taking credit for the action, responding,

> No, not a credit. It -- from a – being involved perspective. I had -- I told him that we had stopped and we were assessing it and I had also spoken to [Grones] to come down and to be a part of that. That's why I extended my offer to him to be involved with that as well.

Tr. 270.

Since Emig agreed that McNary, or for that matter, any operator, could have invoked the stop job right, the suggestion was then made by McNary's Counsel that what Emig objected to about McNary's words and actions, accepting for the moment Emig's version of the events, was really no different than if McNary had simply invoked the stop job right. Tr. 271. Understandably, the Court notes that while Complainant's Counsel may wish to equate the two, they are quite different.

Getting to the language that constituted a focal point in this dispute, McNary's Counsel asserted to Emig that he [Emig] "told Mr. McNary [that he, Emig] could remove [McNary] as a miners' rep and bring in another miners' rep in his place." Tr. 271. Emig responded that he "said to him that if [he, Emig] felt the need because of his [McNary's] behavior, even as a miners' rep, [he, Emig] could assume someone like Carlos Delgado as his assistant miners' rep, yes, I told him that." Tr. 271-72.

McNary's Counsel then asked if Emig told McNary that he could remove McNary as a miners' rep and replace him with another miners' rep, and that he told him he could remove McNary from the plant. Emig answered, "yes" to both questions. *Id*. This admission, an indicator of Emig's honesty, is but one part in the analysis of the totality of the circumstances. It is not, in the Court's view, the "be-all and end-all" of this interference claim.[26]

[26] McNary's Counsel then assumed for the moment that McNary did say that he didn't have to listen to Emig, and, in a fanciful question, asked if McNary had called a stop job when the valve was spewing slurry whether that would also be not listening to him. Emig, responded, "Not necessarily." Tr. 272-73. Trying a similar make-believe scenario, McNary's Counsel asked if Emig had directed employees to go into the area and then McNary had said, right in front of Emig, "No, you can't go in, I'm stopping the job," whether that would be going over Emig's

Critically, McNary's Counsel, having established that Emig agreed that an operator and or a miners' rep has the right to express that a situation is unsafe, then asserted, "And he did tell you that that day, did he not? He thought it was dangerous to send anybody into that area?" Tr. 275. Emig's response was plain and direct, "I don't believe he ever expressed that to me." *Id*. Emig knew that McNary was concerned about the safety of the operators, but he stated, "[t]hat's different. I assumed he was concerned as I was for the operators but never once said that he was concerned about them going in there." *Id.* McNary's own testimony supports Emig in this regard; McNary never expressed such a concern *before* he informed Emig of his end run.

The Parties' Post-Hearing Briefs[27]

Both sides presented their respective view of the facts. While the respective views of the parties were considered, the Court's findings of fact, as set forth above, control.

Complainant's Post-hearing Brief

Complainant's Post-hearing Brief summarizes McNary's contention that Alcoa violated McNary's section 105(c) rights

> "when Emig verbally threatened to remove McNary as a representative of miners, threatened to remove him from the digestion unit, and threatened to remove him from the plant, on January 8, 2014, after McNary asked a safety and health manager to assess a hazardous situation in the digestion unit and criticized Emig's handling of that situation.

C's Br. at 1.

The Court, based on the testimony at the hearing, as set forth in this decision, does not adopt the Complainant's characterization of the events.

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direction, Emig again disagreed, responding that "[w]e don't view that as going over my direction but the intent behind a stop job is that you insert exactly that, a stopping point, to then potentially do something different. … we do not view anybody actually exercising these stop job, as we call that as an action, as going over my head. Tr. 273. Turning to yet another scenario, McNary's Counsel asked and Emig agreed that a miners' rep does not have to agree with Emig's assessment of a situation. Emig also agreed that if McNary thought a situation was unsafe and Emig did not feel it was unsafe, McNary still has the right to express his view of the situation. In fact, Emig took it further, responding that such a right extends to an operator, not just to miners' reps. Tr. 274.

[27] This portion of the decision represents the Court's comments on some of the contentions raised in the Parties' Post-Hearing Briefs. The briefs were considered in their entirety. The Court's findings of fact, which deal with many of the contentions, have been set forth earlier in this decision.

In the "Arguments" section of Complainant's Brief, Complainant asserts that Alcoa violated section 105(c)(1) of the Mine Act under both a discrimination analysis and an interference analysis. *Id*. at 23. As this case involves an interference claim, the Court will apply the interference analysis and applicable case law for such a claim. However, a discrimination analysis does not yield a different result for McNary.

Complainant brings attention to the fact that "Alcoa had a **stop job policy**, which allowed miners' reps and even hourly employees to override the decisions of supervisors - if they felt that a hazardous condition existed - until all parties could meet and discuss the situation." *Id*. at 24. Complainant notes that "There is a long line of Commission cases - dating back 35 years - that hold that a **threat of reprisal** is an unlawful adverse action under §105(c)(1)." *Id*. (Bold type in Complainant's Brief). The Court does not take issue with that contention but the analysis does not end there. Instead, where claims of interference are asserted, a "totality of the circumstances" analysis must take place.

In the Court's view, while not expressly making the assertion, McNary implicitly suggests that, if made, the utterance of the words ascribed to Emig is the beginning and end of the case; that is, McNary should prevail in his *interference claim* without the need to consider anything else. Thus, as Complainant expressed it

> the Commission made clear that, if true, Emig's comments to McNary - i.e., that he would remove McNary as a MSHA rep, remove him from the digestion department, and remove him from the plant - were threats of reprisal. … Indeed, the Commission ruled that, 'At least two of the three threats were not vague. It may be said that 'removal from the plant' is susceptible to different meanings depending on the length of time of the removal. However, the threats to remove McNary as a miners' representative and to remove him 'from the department' were quite specific.'… Because it is clear that Emig threatened McNary because of his protected activity of calling Grones to the scene of the hazardous leaking valve, and because of his safety complaint regarding Emig's handling of the situation, Emig's actions violated §105(c)(1) under the traditional *Pasula-Robinette* discrimination analysis.

Id. at 25.

Complainant sets up a straw man by claiming

> [w]hen a miners' rep, who is charged with being involved in health and safety matters in order to improve health and safety on the job, is threatened with disciplinary action **for speaking out on the unsafe practices of mine management,** of course that *tends to interfere* with his exercise of his safety rights. It also has a chilling effect on other miners and miners' reps who may be fearful to speak out for safety if they think they will be threatened by mine management as a result.

Id. at 26 (bold text added).

The Court views the Complainant's assertion in this manner because that is not what occurred. McNary did not speak out to Emig about alleged unsafe practices, nor did he invoke his right – a right of which he was quite aware – to assert the mine's stop job policy. Therefore, the Court agrees that, yes, as Complainant notes, McNary had a right to "express a contrary opinion." *Id*. at 27. The problem is that he did not do so.

McNary's Reply Brief

As with the contentions raised in the parties' initial briefs, the Court's findings of fact overtake the factual contentions made by the parties' reply briefs.

McNary's Reply begins by taking issue with Alcoa's claim that McNary waived his discrimination claim, asserting that,

> "McNary was pro se when [the Court] issued [its] summary decision. Mr. McNary filed his own petition for discretionary review with the Commission, and then [Complainant's attorney] filed ... [an] Amended Petition for Discretionary Review, which the Commission granted. In [Complainant's Counsel's] view, this is a discrimination/interference case and we do not agree with [Alcoa's view] that the Commission remanded it for a 'discrete' issue.

C's Reply at 3-4.

Thus, Complainant repeats the argument made in its initial brief, contending that "Emig's threats of reprisal against him violated §105(c)(1) of the Mine Act both under a discrimination analysis and under an interference analysis." *Id*. at 4.

As noted above, the Court has addressed this contention, however a few additional points will be made. In trying to have McNary's Counsel particularize the difference between McNary's discrimination complaint and his interference claim, if there is any difference in this matter, the Court noted that its understanding was that "there was no classic adverse action in the sense that Mr. McNary was not disciplined, he did not have a reduction in pay. There was nothing in the classic tangible sense." Tr. 10. McNary's Counsel replied,

> "If that's what [the Court] consider[s] classic tangible [adverse action], but what the Commission said is that based on the legislative history of the Mine Act and on case law, **a threat of reprisal is an act of discrimination, and you don't have to prove that it was acted upon or carried out. Just the threat of reprisal is discrimination**.

Tr. 10-11; C's Reply at 4 (bold and brackets in Reply.)

Complainant then blurs an important distinction, contending that "Alcoa repeatedly states that Emig only threatened to 'remove' McNary, which is inaccurate." C's Reply at 4 (capitalization and underscoring removed). However, the claimed "inaccuracy" is difficult to

identify with any accuracy. McNary's ire seems to be that Alcoa did not state that Emig *admitted* to making threats to McNary. Complainant then cites to its view of Emig's admissions, followed by Complainant's review of McNary's version of what was said between him and Emig. For good measure, Complainant adds that Delgado confirmed McNary's testimony. *Id*. at 4-5.

Ultimately, as noted, what was actually said is for the Court to determine, a determination which is made upon consideration of the parties' arguments in their briefs, the testimony of the witnesses, and the Court's credibility determinations about that testimony.

Moving to a different contention, speaking to the words between Emig and McNary, the Complainant asserts that,

> "[i]t is one thing for a miners' rep and foremen to engage in a 'robust discussion' about safety and health issues on the job. It is quite another *for a supervisor to threaten a miners' rep for disagreeing with his assessment of a hazardous situation and whether or not miners should be exposed to dangers. That is what happened in this case*, and it is a critical distinction that is apparently lost on Alcoa . . . per its posthearing brief.

Id. at 2 (emphasis added).

As discussed above, the Court considers McNary's claim that Emig threatened a miners' rep *for disagreeing with his "assessment of a hazardous situation and whether or not miners should be exposed to dangers*" to be a gross mischaracterization of the exchange and one that is very much at odds with the facts. C's Reply at 2.

McNary's Counsel also offers its take on what should properly be within the ambit of the "totality of the circumstances." Counsel urges that McNary's prior burn injury from slurry and Mike Brown's burn injury and MSHA's issuing citations regarding the conditions on the date of the incident should all be part of that totality. *Id*. at 6-7. McNary also states that there must be a complete factual account. *Id*. With that last remark at least, the Court agrees and it believes that the findings of fact present such a complete account.

McNary then transitions from the totality issue to its summary of the essence of the case, asserting, "What this case boils down to is that McNary criticized Emig for endangering the safety of his fellow workers - whom he represented as a miners' rep - and, in response, Emig threatened him. That is classic discrimination, as well as interference, under §105(c)(1)." *Id*. at 7. As discussed above, the Court does not buy into this characterization by Complainant; it does not accurately portray what occurred.[28]

[28] Where portions of the briefs descend into competing versions of what witnesses said, and counsels' retelling of what was said, there is a simple response – the Court's findings of fact recount what was said and, having considered the testimony, it then makes findings of credibility where the narratives are competing.

Alcoa's post-hearing brief

Referring to the January 8, 2014 event, Alcoa asserts that, while Emig was trying to deal with the incident, McNary "attempted to direct Emig and take control of the situation." R's Br. at 1. Just as the Court refrained from specifically addressing the Complainant's particular take on the facts, it does so for Respondent as well, leaving the finding of facts to the Court, as set forth above. Alcoa contends that, under the totality of the circumstances, McNary did not prove interference. That contention consists of three parts: that "Emig's statements probably had no effect on McNary, a seasoned MSHA representative accustomed to having heated and robust discussions with Alcoa's management," with Alcoa noting that McNary "stayed in the area after Emig shouted at him, suggesting that he did not really take Emig's statements seriously;" that "Emig had a legitimate and substantial reason for taking the position that McNary should leave the area since Emig was in the midst of handling a crisis situation and McNary's behavior was disruptive;" and that "Emig's decision to order McNary removed was motivated not by McNary's protected activity, but by McNary's difficult, hot-headed, and insubordinate behavior during an emergency situation." Alcoa Br. at 1.

Alcoa also submits that

> "McNary offered no evidence to rebut Emig's testimony. In fact, although lead MSHA representative Carlos Delgado was not present when the miners attempted to access the valve, he did participate in the subsequent incident investigation and testified that no miner had told him that Emig had instructed them to access the valve.

R's Br. 2, n.1.

Alcoa asserts that McNary's action "proceeds only under a theory of interference, and McNary's only claim is that Emig's unfulfilled threats to have him removed from the area interfered with the exercise of his rights under the Mine Act." *Id*. at 6. As noted, McNary's Counsel disputes that this case only proceeds on an interference claim.

Speaking to the totality test, Alcoa cites *Moses v. Whitley Development Corp*., 4 FMSHRC 1475 (Aug. 1982) *aff'd*, 770 F.2d 168 (6th Cir. 1985), ("*Moses*") and *Sec'y of Labor o/b/o Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 7 (Jan. 2005) (quoting *TRW, Inc. v NLRB*, 654 F.2d 307, 313 (5th Cir. 1981), ("*Gray*") for the proposition that "[w]hether an operator's actions amount to interference, however, 'must be determined by what is said and done, and by the circumstances surrounding the words and actions.' 4 FMSHRC at 1479 n.8." and that

> [i]n determining whether a statement is an impermissible threat . . . language used by the parties . . . must not be isolated nor analyzed in a vacuum, but must be considered in light of the circumstances existing when such language was spoken." [and further that] [d]eterminations regarding interference must take into account not just what was said, but also when it was said, how it was said, and how often it was said.

R's Br. at 7 (internal citation omitted).

Noting the views of two Commissioners in *United Mine Workers of America o/b/o Mark A. Franks and Ronald M. Holy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014), ("*Franks*"), Alcoa remarks that those Commissioners expressed that an interference claim is to be examined by whether the challenged actions can be reasonably viewed under the totality of the circumstances as interfering with the protected right and whether the actions can be justified as sufficiently legitimate and substantial to outweigh the harm from the interference. *Id*. at 8.

Alcoa urges that,

> "a reasonable miner would have taken into account the fact that Emig was under tremendous stress when McNary insisted on confronting him. No one would dispute that Emig was dealing with a serious crisis when McNary confronted him. A reasonable miner would have taken this into account or, at least, would not have been surprised when Emig lost patience with him and was no longer willing to deal with his distracting commentary and unhelpful interactions, not to mention his insistence that he did not have to follow Emig's directions. Anyone who continued the confrontation given the circumstances should not have been surprised if his supervisor ordered him removed.

Id. at 16.

Addressing the second aspect of the interference test, Alcoa contends that "[e]ven if McNary could show interference with his rights, Emig had a legitimate and substantial reason for threatening to remove him, and that reason outweighs any harm caused to the exercise of protected rights." *Id*. at 17 (italics and bold text removed). Alcoa asserts that "Emig did not try to remove McNary from the scene because of his actions as an MSHA representative, as McNary contends, but rather because of his actions as an employee—McNary had become disruptive and confrontational at the very moment when Emig needed to focus on a crisis situation." *Id*. Alcoa concludes that "McNary has failed to show that Emig's threat to remove him constituted interference under the Section 105(c) and, even assuming some level of interference, legitimate and substantial reasons vastly outweigh it." *Id*. at 18. The Court agrees with Alcoa.

Alcoa's Response Brief

Alcoa contends that Delton Luhn's affidavit should be given minimal weight, because "much of the language in Luhn's affidavit was identical to an affidavit prepared by Carlos Delgado." R's Reply at 1, citing C's Exhibit 5 and Respondent's Exhibit 17. Luhn died a few months before the trial. Respondent adds that the nearly identical statements also "sound much more like they were either ghost-written by an experienced advocate who was unofficially helping the pro se McNary or pulled verbatim from some brief that McNary had been given." R's Reply at 2. The Court has spoken to these affidavits, above, but adds that, given the level of

erudition displayed by Delgado and McNary at the hearing, the Court finds that something was going on with these affidavits and that it is appropriate to give Luhn's affidavit only the most minimal of weight.

Alcoa's Reply also asserts that the interference cases cited by McNary are distinguishable. Alcoa Response Br. at 2. In this regard, Alcoa views the *McGary* decision as quite different from this matter. *Id.* The Court agrees; factually the two are not comparable in any useful sense. Alcoa reaches the same conclusion regarding the administrative law judge decision in *Secretary of Labor o/b/o Greathouse, et. Al. v. Monongalia County Coal Co., et. al.*, 38 FMSHRC 942 (May 2016) ("*Greathouse*") and the Court agrees that *Greathouse* is not comparable to the facts here at all. The same observation applies to the *Reuben Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 2352 (ALJ, Aug. 2014) and *Pendley v. Highland Mining Co. and James Creighton*, 37 FMSHRC 301 (ALJ, Feb. 2015) decisions. Beyond the maxim that decisions of fellow administrative law judges have no precedential value, and therefore are useful only for whatever persuasive observations they may contain, the Court finds that, as to that latter potential value, those decisions are not helpful to this matter.

Applicable Case law

Mine Act Discrimination Claims

Section 105(c) of the Mine Act states, in relevant part: 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 [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine. 30 U.S.C. § 815(c). Protected activity often takes the form of complaints made to the operator or its agent of an "alleged danger or safety or health violation. 30 USC § 815(c)(1). Section 105(c)(2) permits the filing of a discrimination complaint by a miner, applicant, or representative of miners "who believes that he has been discharged, interfered with, or otherwise discriminated against," and states that the Secretary's complaint to the Commission may allege '*discrimination or interference*.' 30 U.S.C. § 815(c)(2) (emphasis added). Section 105(c)(3) also permits an individual to file a complaint charging "discrimination or interference"" in violation of section 105(c)(1). 30 U.S.C. § 815(c)(3). *McGary v. Marshall Cnty. Coal Co*., 38 FMSHRC 2006, 2009 (Aug. 26, 2016).

The legal framework for assessing discrimination claims brought under the Act is well-established. A complainant may establish a prima facie case by showing "(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity." *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of proving these elements by a preponderance of the evidence. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803 (Apr. 1981). The Court has found that McNary did not prove his case under the preponderance standard.

An adverse action is any "act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp*., 6 FMSHRC 1842, 1847-48 (Aug. 1984). An adverse action must be material, meaning that the harm is significant rather than trivial. In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington North v. White. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); see also Sec'y of Labor on behalf of *Pendley v. Highland Mining Co*., 34 FMSHRC 1919, 1931 (Aug. 2012).

If a complainant establishes the required elements, the burden shifts to the operator to rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motived by protected activity." *Driessen v. Nev. Goldfields, Inc*., 20 FMSHRC 324, 328 (Apr. 1998).

An operator who cannot rebut the prima facie case may still raise an affirmative "mixed motive" defense by proving that the adverse action was motivated only in part by protected activity, and it "would have taken the adverse action for the unprotected activity alone. *Haro v. Magma Copper Co*., 4 FMSHRC 1935 (Nov. 1982). The operator must prove this defense by a preponderance of the evidence. *Id*., see also *Pasula*, 2 FMSHRC at 2799-800. When evaluating an affirmative defense, the Court follows the two-step analysis outlined by the Commission in *Chacon v. Phelps Dodge. Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508 (Nov. 1981). The first step of the Chacon analysis directs the Court to determine whether "the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive." 3 FMSHRC at 2516. If the Court finds that the justification is not pretextual, it then moves to the second step, which is a "limited examination" of the justification's substantiality, and assesses the narrow question of "whether the reason was enough to have legitimately moved that operator" to engage in the adverse action." *Id.* at 2516-17.

Interference Claims are to be examined under the totality of the circumstances

Just as in this matter, *Wilson v. Fed. Mine Safety & Health Review Comm'n*, 863 F.3d 876, D.C. Cir. 2017 ("*Wilson*"), involved a claim of interference with a miner's statutory rights. The right invoked in *Wilson* was interference with the right to inspect the mine's examination books. There are notable factual differences between *Wilson* and McNary's claim – with the former involving an hourly miner who was alleged to have interfered with Wilson's right as a miners' representative to review the mine's preshift and onshift examination books. Among other things, the miner told Wilson that reviewing those books in order to find violations was interfering with his livelihood and that he should go home. Management then intervened in that confrontation, removed the hourly miner, telling the miner not to interfere with Wilson again. The hourly miner was also suspended for the rest of the day and lost a day's pay. Wilson's interference claim failed.[29]

[29]The D.C. Cir. rejected Wilson's claims, except for one, holding that considering that the miners' rep continued his work after the incident occurred was in error because the Secretary's interference test is objective. The Court did acknowledge that it is appropriate to consider the "'nature of [the parties'] relationship' and whether the respondent holds a 'supervisory

Despite the significant differences between these cases, *Wilson* is valuable because it articulates the appropriate factors to consider for interference claims, as well as those factors which are not appropriate. The D.C. Circuit noted in *Wilson* that "[t]he Commission has instructed that 'rather than considering only [the respondent's] intent, the [ALJ] should ... analyze[ ] the totality of circumstances surrounding [the] statements' to determine whether a violation of Section 105(c) occurred." *Wilson* at 881 (citing *Gray*, 27 FMSHRC at 10).

The Court also noted with approval that "the Commission has instructed, whether 'interference' occurred does not turn 'on the [respondent's] motive or on whether the coercion succeeded or failed.'" *Id*. (citing *Gray* at 9). The Court then noted, with similar approval, that the Secretary's test calls for an objective evaluation of how a reasonable miners' representative would view the alleged interfering conduct, and not whether the person allegedly interfering had a subjective intention to interfere with the miner's statutory rights. *Id*. at 881-82. With that in mind, the Court noted that the encounter lasted only a few minutes. *Id*. at 882. Thus, the D.C. Circuit agreed with the Commission view that "*the relevant perspective on the issue is that of the reasonable miner* [*or miners' representative*], *not the subjective perspective of the complainant*." *Id*. (italics added). Accordingly, even though the judge did not view the miners' rep's behavior as dispositive, it was still error to consider it at all, because that miners' rep's subjective reaction to the allegedly threatening or coercive remark made by the hourly miner is not to be considered, as that is inconsistent with the objective standard to be applied.

Addressing the context of the incident, in *Wilson* the incident occurred in a *public setting*, and the Court approved the administrative law judge's view that such a setting is a mitigating factor, noting that,

> [u]nder the totality of the circumstances, the Commission has observed that a public interaction with witnesses at the mine could be less intimidating than one that occurs in private, for example, through an at-home telephone call [or] a meeting outside the mine office. Here, that was true because the public nature of the incident enabled another employee, who was also a miners' representative, to report the altercation and prompt the mine supervisor to intervene.

Id. at 882 (internal citation omitted).

The D.C. Circuit determined that the judge correctly applied the factors set forth in *Multi-Ad Servs. Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001). Although the judge was incorrect in considering the subjective reaction from the miners' rep, that did not result in a remand because the judge did correctly apply the *Multi-Ad* factors in concluding that no interference occurred, and the judge's improper consideration of actual response of the miners' rep was harmless because that conclusion was made only to reinforce his earlier conclusion, applying the *Multi-Ad* factors. Accordingly, here, McNary's *subjective reaction* to Emig's remarks is not to be considered – the correct test is the perspective of a reasonable miner to those words, with the words being considered in the totality of the circumstances.

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position.'" *Wilson* at 882 (citing *Gray*, 27 FMSHRC at 10–11). In *Wilson*, the employee who challenged the miner's rep did not hold a supervisory position. Here, Emig did hold a management position.

Wilson, though not prevailing overall, won the assertion that, under the totality of the circumstances test, a judge *should not* consider that, following an incident, the miners' rep continued to act in that representative capacity. Again, the DC Circuit emphasized that as the 'interference' test is objective, and "the Commission has instructed that 'the relevant perspective on the issue is that of the reasonable miner [or miners' representative],' not the subjective perspective of the complainant." *Wilson* at 882. Thus, even though the judge did not consider it to be dispositive, he erred in considering the "subjective perspective of the complainant." *Id*.

One aspect of the *Wilson* decision helps McNary, while another aspect does not. Helping McNary is that, in his case, management does bear responsibility for the conduct involved. Indeed, the alleged violative conduct came directly and only from management, through Mr. Emig. Hurting McNary's side of the argument is that, in *Wilson*, only a single isolated incident was involved. That is what happened to McNary; there was but a single, isolated, *and quite brief*, instance. Evaluating the totality of the circumstances also means considering that Emig's words occurred in the heat of the moment, as the mine was trying to deal with a serious equipment failure.

Wilson did refer, approvingly, to the Commission's decision in *McGary*[30] *v. Marshall Cnty. Coal Co.*, 38 FMSHRC 2006 (Aug. 26, 2016). *McGary* involved complaints of interference brought by the Secretary of Labor on behalf of six miners pursuant to section 105(c) of the Act, which pertained to meetings Respondents held with their miners. The meetings included the subject of miners contacting MSHA about perceived safety issues. The Secretary alleged that Respondents interfered with the exercise of miners' rights at each of the mines by coercively imposing a requirement that miners who make section 103(g) complaints report the same complaint to management. Of value to this matter, the Commission set forth in *McGary* the "Appropriate Test for Interference." *Id*. Referring to the views of Chairman Jordan and Commissioner Nakamura, as expressed in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2104-19 (Aug. 2014) ("Franks"), the Commission in *McGary* concluded that the *Franks* two-step test is consonant with the Commission's decisions in *Gray and Moses.*

That test

> provides that interference is established when (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

McGary at 2011.

[30] To avoid any understandable, potential, confusion, the Court wishes to highlight that this case involves McNary, while the name of the Complainant was ***McGary*** in Commission's August 2016 decision. What were the chances!

In this matter, the Court finds that McNary did not establish the first element and that Alcoa did establish the second.

In *McGary* a Commissioner noted "that an operator may have legitimate and substantial reason for its conduct in question," and, consistent with that, rejected the idea that an operator may never question or comment upon a miner's exercise of a protected right.[31] *McGary* at 2012 (citing *Moses v. Whitley Dev. Corp*., 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985)).

It is fair to state that the Commission and the D.C. Circuit agree that the first prong of the test is to inquire "whether Respondents actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights." *Id.* at 2015. As just noted, the Court finds that, applying the first prong, McNary failed to establish it. Further, also as just noted, the Court finds here that such legitimate and substantial reasons were present for Alcoa and, of equal importance, that McNary had not yet exercised a protected right at the time when Emig reacted. Accordingly, consistent with the Court's findings of fact, the Court concludes that McNary failed to establish the first prong.

McGary also noted, quoting *Moses,* "[w]here an interference claim is made, *examining in isolation the literal meaning of the language used is contrary to the totality of the circumstances test*." *McGary* at 2016 (emphasis added)(quoting *Moses*, 4 FMSHRC at 1479 n.8); *see also*, *Gray*, 27 FMSHRC at 8; 10 ("Whether an operator's… comments concerning a miner's exercise of a protected right constitute coercive… harassment proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions."). The Court has adhered to this. It did not examine Emig's words in isolation.

It should also be noted that, in evaluating this case, the Court is aware of, and fully considered, the Commission's remark in *McGary* "that one of the most important circumstances in any interference analysis is the position within the company that the communicator of the statements alleged to constitute interference holds relative to the recipients of the communications." *Id*. at 2017. However, the Court observes that although the position of the communicator is one of the most important circumstances, that does not supplant the required analysis of the totality of the circumstances.[32]

The Commission then addressed the second prong of the interference test. Under the second prong of the *Franks* interference opinion, it was remarked that an operator may defend against an otherwise valid interference claim if it offers a "legitimate and substantial reason

[31] Though mentioned before, the Court believes that it is important to bear in mind that in the present case McNary *did not* exercise his stop job right.

[32] In fact, the Commission reiterated the "totality of the circumstances" approach three paragraphs after its remark about the position of the communicator. *Id*.

whose importance outweighs the harm caused to the exercise of protected rights." Citing *Franks*, 36 FMSHRC at 2108. Thus, *Franks* stated that "an operator may comment upon a miners' exercise of a protected right when it is 'necessary to address a safety or health problem.'" *Id*. at 2019. That statement, in *McGary*, doesn't fit exactly in this case, but under the circumstances of McNary's behavior and his words, which informed Emig about McNary's behavior, it does explain and, in the Court's view, permitted Emig's understandable ire. However, that ire was not directed at any protected activity by McNary, but rather the ire was aimed at McNary's insubordinate actions.

Therefore, as the Court has found, McNary did not invoke his protected right to address any safety issue vis-à-vis Emig. Further, even assuming for the moment that he did invoke a safety issue, Emig, focused as he was on a safety issue surrounding the event, was justifiably angered when McNary told him that he had engineered a de facto takeover of the incident by seeking to have Grones supplant Emig. Further, Emig rapidly regained his composure.

Further Discussion

While McNary asserts that his 105(c) discrimination claim is distinct from his 105(c) interference claim, his post-hearing brief speaks almost exclusively in terms of interference. There is only a gauzy, indistinct, additional discrimination claim. Thus, while Complainant states that a prima facie 105(c)(1) claim must show engagement in protected activity and an adverse action motivated in any part by such protected activity, matters about which the Court does not take issue, the question here still comes down to examining those elements vis-à-vis McNary's claim of interference.[33] As set forth in the findings of fact, the Court has determined that McNary did not exercise a protected right in his interaction with Emig. Rather, he attempted to commandeer which management official would be in charge of dealing with the incident.

As mentioned, nearly all of McNary's post-hearing brief, following the brief's "Facts" section,[34] deals with his claim of interference. Thus, while McNary speaks of "threats of reprisal" as within section 105(c) protection, in this case the elements in an interference claim control. McNary seems to recognize this, noting that

> [t]he existence of a distinct cause of action for interference was explicitly recognized … by the Commission in the plurality opinion of Chairman Jordan and Commissioner Nakamura in *UMWA o/b/o Franks & Hoy v. Emerald Coal Resources, 36 FMSHRC 2088 (August 2014) … vacated and remanded 620 Fed Appx. 127 (3rd Cir. 2015).*

C's Br. at 19 (italics in brief).

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[33] While the Court believes that the distinction McNary now attempts to make is without a real difference, at the hearing it was ruled in effect that both theories would be examined. Tr. 13. They were so examined.

[34] McNary's Post-hearing Brief pages 18-27.

Complainant then identifies from *Franks* the two part test for interference – that

> a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights and [that] [t]her person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

C's Br. At 20, citing *Franks* at 2108.

As noted, the Court has determined that McNary failed to establish such interference and that Alcoa justified Emig's brief outburst.

Although McNary then notes that the Commission's decision in *Sec of Labor o/b/o McGary & Bowersox et al. v. Marshall County Coal Co. et al.* overtook *Franks* because it represented the view of the full Commission, *McGary* essentially reiterated the *Franks* interference test.[35] Complainant asserts that "the 'harassment proscribed by the Mine Act 'must be determined by what is said and done and by the circumstances surrounding the words and actions.'" *Id*. The Court agrees and, in line with that approach, it has determined what was said and done and it also considered the surrounding circumstances, all in concluding that McNary's claim is deficient and, beyond that, Alcoa's action, through Emig's words of exasperation, was justified.

When McNary's brief turns to its "Arguments" section, the distinction between the discrimination claim and the interference claim remains blurred, as McNary states that "the Act's anti-discrimination/interference provision" is part of the remedial nature of the Mine Act and therefore must be "liberally construed to effectuate the Act's safety-enhancing purpose." *Id*. at 21-22. In the Court's assessment, the Complainant is implicitly asserting that Emig's words alone are fatal to Alcoa. It does so indirectly, because it realizes it is too much to claim this directly.

Although McNary asserts that Alco violated 105(c) under both a discrimination and interference analysis, this part of its brief is simply a repetition of its view of the facts. C's Br. at 23-24.[36] The Brief then transitions to citing a string of cases which stand for the proposition that "hold that a **threat of reprisal** is an unlawful adverse action under §105(c)(1)." *Id*. at 24 (bold in

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[35] Mc*G*ary is useful only for the application of the interference test because the facts in that case are worlds' apart from those in Mc*N*ary.

[36] At the hearing, the Court asked Complainant's Counsel what damages or remedies he is seeking should he prevail. He responded, "[a] posting, probably, at that store. Because, for instance, there are still miners' reps at the plant right now. Mr. McNary was a miners rep, and, of course, anytime there's a violation of 105(c), there has to be a fine." Tr. 12. Attorney Oppegard agreed that the remedy would include having the Secretary seeking a civil penalty, should Complainant prevail. *Id.* Complainant would also seek "an order that management personnel would have to undergo training on miners' rights; particularly the rights of representatives of miners." Tr. 13.

original). The problem with that is no one is asserting that threats of reprisal are okay. Clearly they are not. Again, Complainant's argument seems to infer that a threat of reprisal carries the day. However, under Commission and Federal Court of Appeals law, the matter is more involved, as threats must be analyzed under the totality test.

Concluding Remarks

As the D.C. Circuit stated, a judge is to analyze the totality of the circumstances *surrounding the statements*. Such an analysis is not to be open-ended. For that reason, looking to past events, that another miner had been burned at the mine and that McNary himself had been injured, though discussed *supra*, are not part of *the circumstances surrounding the statements*. Instead, the circumstances began that day when the incident occurred and from that point the actions and words of McNary and Emig are to be measured. The Court, in a close analysis of those events, upon examining that totality, has found that McNary failed to carry his burden as he did not establish his interference claim. Nor has any other independent theory of discrimination been established by the Complainant. In contrast, applying the same totality test, the Court has found that Alcoa provided justification for Emig's brief words.

Accordingly, consistent with the foregoing, the Court finds that Complainant McNary failed to establish by a preponderance of the evidence that Alcoa discriminated against him in any manner under section 105(c) of the Mine Act, including under his predominant theory of interference. Therefore this matter is **DISMISSED**.

SO ORDERED.

William B. Moran
Administrative Law Judge

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