

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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January 25, 2017

MANUEL P. RUIZ,
Complainant,

v.

PINTO VALLEY MINING
CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-0407-DM

MSHA Case No. RM-MD-16-10

Mine: Pinto Valley
Mine ID: 02-01049

DECISION AND ORDER

Appearances: Kevin Harper, Esq. for Complainant, Manuel P. Ruiz

Michael Moberly, Esq. for Respondent, Pinto Valley Mining Corporation

Before: Judge Moran

Introduction

In this discrimination proceeding under section 105(c) of the Mine Act, Complainant Manuel P. Ruiz raised legitimate safety concerns regarding his ability to safely operate cranes at Respondent's mine, concerns which the mine operator tacitly agreed were valid. 30 U.S.C. § 815(c)(2) ("the Act"). Shortly thereafter, Respondent claimed that the Complainant was insubordinate during a line-out meeting in which he was again assigned to operate a crane. The Court finds that this alleged insubordinate behavior did not occur. Even assuming, for the sake of argument, that Ruiz acted as the Respondent claimed, for the reasons which follow, the Court finds that Ruiz's alleged behavior was merely a pretext for his termination and that Respondent's actions were motivated solely by the Complainant's valid safety concerns.

Findings of Fact

A hearing in this matter was held on Tuesday, September 13, 2016 in Globe, Arizona. Testimony began with Complainant Manuel Pena Ruiz.

Testimony of Manuel Pena Ruiz

Ruiz stated that he began working for Pinto Valley Mine (hereinafter “Pinto” or “Respondent”) in 2012. At that time, he was hired for the construction crew. He had worked on the tailings dam and then was promoted to the road crew. Tr. 28. He described the change as a “flow line.” *Id.* It meant more money under the union agreement and Ruiz was, and is, a union member. Not long after he started at Pinto, he became a union steward. In August, 2013, Ruiz was on the tailings dam crew. At that time he received some training on operating cranes and similar equipment, obtaining “NCCCO” certification.¹ Tr. 28-29. The particulars of that training, which are important to understand, were explained by the Complainant:

Most of the people who have -- who took the class have already run the boom trucks and cranes in their previous life. I never had. My supervisor asked that -- he encouraged me . . . that this would be good, you know, something to have under your belt in case Pinto Valley shuts down again. . . . So I said, okay, I'll try it. [However] [w]hen you get there [for the training] your boom truck is already set up for you. Your crane is already set up for you. The instructor -- you have one week in the classroom and then you have three or four days in the field and one day is for training.

Tr. 29.

Ruiz, in further describing the training he received, noted its shortcomings, “[y]ou never actually operate the machinery. You don’t move it. You don’t do lifts.” Tr. 31. Nor, he informed, does one move the boom truck from one location to another location, stating, “[n]o. You don’t drive them. You don’t do any - - any type of lifts with them.” Tr. 31. The training, he asserted, was all geared toward passing the test. Ruiz agreed that he did “good” in the training, as he passed and received the certification. Tr. 32. Unlike some of the other miners who received the boom truck training and had previous experience using that equipment, the Complainant had none of that work history, and while he had the certification training card, he did not feel comfortable operating the equipment. *Id.*

In any event, following his 2013 training and certification, Ruiz was never asked to operate a boom truck or a crane² again until December 2015. Tr. 33. Instead, he went to the road crew. Tr. 37. None of the road crew workers operated cranes or boom trucks. When he

¹ “NCCCO” stands for National Commission for the Certification of Crane Operators. Tr. 17, 28-29, Ex. R-9.

² Ruiz stated that the difference between a boom truck and a crane is that the latter is a much larger piece of equipment. As the name implies a “boom truck” is a truck with a boom. Tr. 33-34.

transferred to the road crew, he began working for Dallas (“Doc”) Hunnicutt, the crew supervisor. *Id.* Ruiz did know Hunnicutt before that transfer, as the road crew and tailings crew are “kind of like” in the same department and there were occasions when Hunnicutt directed the tailings crew when the usual road crew supervisor was off for some reason. Tr. 37.

Though Ruiz did not feel that he knew Hunnicutt well from those brief periods of supervision, he asserted that he did have problems with Hunnicutt. Ruiz described the problems as “union issues,” elaborating that,

[a]nytime [he, Ruiz] had a union issue or [he, Ruiz] had some of [Hunnicutt’s] guys come to [him, Ruiz] for different things or them [sic] doing tailings crew work, [he, Ruiz] would go talk to Dallas [Hunnicutt]. Anytime it was a union issue, [Hunnicutt] was never happy about it.

Tr. 38.

These interactions occurred because the Complainant was the union steward and members of Hunnicutt’s crew would come to him with complaints. Tr. 39. When issues of that nature would arise and be brought before Ruiz as the union steward, his first step would be to talk with Hunnicutt. As he expressed it, “It was always a fight with Dallas [Hunnicutt] anytime there was a union issue. There was always an argument.” *Id.* However, such issues were always resolved and Ruiz never had to escalate the issue to upper management.

Ruiz described his move from the tailings crew to the road crew, and therefore working directly for Hunnicutt, as a “big decision,” since he had concerns about working for him. Tr. 40. However, he expressed that the two seemed to put the contentious past behind them when Ruiz joined the road crew. Tr. 41. As best he could recall, this was during the spring of 2015.

Ruiz had a practice of recording issues in a journal.³ Directed to his journal entry for December 10, 2015, Ruiz stated that at the line-out meeting⁴ Mark Chism was filling in for Hunnicutt. Tr. 45. On that date, December 10th, both the tailings and road crew participated in the line-out meeting. Chism assigned (i.e. “lined out”) Ruiz to run a crane that day, but Ruiz informed him that he didn’t “feel comfortable for the safety of myself and others [and that he had] not never, ever run a crane other than in [his] training.” Chism responded that Ruiz was NCCCO qualified, but Ruiz, acknowledging that was correct, added that he had “never run one, and [didn’t] feel comfortable doing it.” Tr. 47. Ruiz stated that, prior to that event, he had never

³ Shown Ex. C 9, Ruiz identified it as part of the journal he kept. The first page of that exhibit is dated April 24, 2013. The exhibit ends with the date of January 15, 2016. Generally, Ruiz would note in his journal issues that had arisen. Many of these, he stated, were union issues “and issues with [Hunnicutt], some favoritism [Hunnicutt] did with other employees.” Tr. 44. His entries were made as soon as the issues happened or, if not possible, soon thereafter. All entries were noted in less than 24 hours.

⁴ The line-out meeting informs the crew of the job they will be performing that day; safety and other issues are also discussed during that time.

refused any work. Tr. 50. Chism and Hunnicutt's boss, Tim Pearson, relented to his objections and he was then assigned a different task for that day. Tr. 51.

The Court, in an effort to make the record clear, asked questions of Ruiz in order to sum up the situation. Ruiz confirmed that around April or May 2015, he began working on the road crew and from that time until December 10, 2015, when he was told to operate the crane, he had never been asked to operate either the crane or a boom truck. Tr. 48. In addition, Ruiz informed that the assignment was to work with the pipe fitter crew, which is the crew that typically operated the booms and cranes. Tr. 49.

On December 14th, Hunnicutt lined-out Ruiz to run an articulator truck. Ruiz explained that this truck is similar to a dump truck but it articulates in the middle. This is part of the road crew equipment and Ruiz operated it without any issue. Ruiz informed that he regularly operated various pieces of heavy equipment, such as "loaders, backhoes, articulator trucks, blades, dozers, excavators, a couple of small ten-wheel dumb trucks [and] a water truck." Tr. 54. He had no issues or complaints with running any of these pieces of heavy equipment, and he felt both safe and competent to run them. Tr. 54-55. Thus, Ruiz balked only at running the boom truck and crane, with both objections based upon safety concerns.

That same day, December 14th, weather conditions caused Hunnicutt to tell the miners to stop their work. Ruiz was directed to go to the north barn and to meet with Ronnie Gray, who would give Ruiz a refresher on the boom truck operation. Tr. 57. Three other employees, Jay Shoemaker, Bain Grantham, and Brock Cargill, joined them there. Those individuals were the same three who were trained, with Ruiz, during 2013, on the operation of the boom truck. *Id.* Counting Ruiz, they comprised the four individuals who were NCCCO qualified from that earlier training, and all of them had switched from the tailings crew to the road crew.

The training began that afternoon, as they reviewed load charts. This is important to understand the safe operation of the loads that one may lift. Following those, essentially math exercises, a boom truck was located and moved to the Empire build yard for the purpose of practicing the truck's operation. Gray then went over the machine's levers and they proceeded to perform training similar to that which Ruiz had done in 2013. Tr. 60. Ruiz participated in the boom truck refresher training. Following that, because the 120 ton crane happened to be at that location, it was decided to operate that crane. However, Ruiz, fearful of the equipment and, as the crane was twice as large as any crane he had ever practiced on, expressed his worry to Gray, advising him, "I don't feel comfortable. I'm scared of that thing. I don't want to train on that thing." Tr. 61. Gray responded that Ruiz need not worry about it and that he didn't have to operate the large crane. *Id.* Ruiz confirmed to the Court that he had never been trained on a 120 ton crane. *Id.* Ruiz distinguished training from operation of the crane, explaining that he had never *operated* a crane in his life, and that he had never driven one at all. Tr. 62. By comparison, Ruiz stated that he had driven a boom truck. This occurred back in 2012 and although Ruiz *drove* a boom truck to a given location, he never set it up or used it for its designated purpose. Tr. 62-63.

The Court inquired about the makeup of the road crew on which Ruiz was employed. Ruiz stated that the crew consisted of 10 employees and that they worked together as a group during April and May 2015. Within that group of 10, Ruiz stated that three of them were competent to run the boom truck and crane and not afraid to operate that machinery and he identified them by name. Tr. 64-65. The remaining six miners, not counting Ruiz, operated the other pieces of heavy equipment. Further, not one of those other six miners was ever assigned to operate a boom truck or crane. Tr. 65. In fact, as Ruiz expressed, “Up until December 10th nobody was ever required to run a boom truck or crane. *It wasn't part of our job.* [Up until the day he was fired] [w]e just ran the heavy equipment we discussed earl[ier].” Tr. 65-66. Ruiz noted these events in his journal entry for December 10th. Tr. 67.

Asked about his journal entry for December 14, 2015, Ruiz made the entry when he refused to operate the crane on December 10th and he then returned to work next on December 14th. Hunnicutt then again asked Ruiz and others to train on the boom truck and this made Ruiz wary, afraid that something was up. As noted, Ruiz stated that there was a history between Hunnicutt and him as well, which existed prior to the time that Ruiz actually worked under him. Ruiz had heard that Hunnicutt remarked to others that he would find a way to fire him. Ruiz believed this stemmed from union issues, asserting that Hunnicutt did not like dealing with unions, and that he didn't like Ruiz's “union bullshit.” Tr. 68. Ruiz stated that such issues included seniority and safety and generally that anything involving a union issue would bring on a dispute with Hunnicutt.⁵ *Id.*

In Ruiz's December 14th journal entry, he recorded that Sam Clark, a supervisor two levels above Hunnicutt, wanted the third party contractor [Ronnie Gray] to give a refresher course on the boom truck. The contractor was doing rigging training that week, but had no class scheduled that day. Therefore the contractor was asked to do the boom truck refresher training

⁵ Representative of Ruiz's candor and credibility, both of which the Court ranked highly, when asked if Hunnicutt ever made any specific anti-union statements, Ruiz responded that he had not done so *directly to him*, but that he “did tell an employee that if it was up to him he would -- if he was in charge, he would get rid of the union and only have nonunion employees.” Tr. 69. Similarly, regarding Ruiz's raising safety issues, while Hunnicutt would not make specific comments, his face would redden and he would be angry in such matters. *Id.* Ruiz recalled one example where a loader's e-brake (emergency brake) had to be checked to make sure it was functioning properly before operating it. Ruiz pointed out that it had to be tested on a downhill. The brake would not hold when facing the incline, yet Hunnicutt told the employees that was the way it was designed. Ruiz spoke up, asserting that the claim defied common sense. Hunnicutt rejected the remark, retorting that it was so designed and that it was going to be run and not be removed from service. Ruiz then checked with a mine mechanic who advised that the brake must hold in both directions. This dust up occurred close to the end of 2015, not long before Ruiz was fired. Tr. 69-70. The upshot was that Ruiz had to insist upon the loader being fixed *or he would call MSHA.* Tr. 72. That brought about action, as the loader was taken out of service and red tagged. It was still out of service when Ruiz was terminated. *Id.* Ruiz, under cross-examination, later reaffirmed that the dispute about the truck with the faulty e-brake occurred shortly before the boom truck issue came up. Tr. 133-34. This event, *including Ruiz's warning that he would call MSHA*, is one close-in-time example in support of the conclusion that Hunnicutt had contentious feelings towards Ruiz.

and did so and he then proceeded to include the crane operation in that training. As before, Ruiz expressed that he was afraid to operate it, and that Gray accepted his declining to participate in the crane operation part. Tr. 74. Two significant points were made by Ruiz during this exchange. First, he asserted that the mine's practice was to have permission before operating the crane, and no permission was sought to use the crane. By contrast, permission was obtained to use the boom truck. Second, and of more importance, Ruiz stated that the road crew on which he served has neither a boom truck nor a crane, at least that crew did not have either piece of equipment at the time he was fired. Ruiz added that *now* (i.e. post Ruiz's discharge) the road crew does utilize a boom truck or crane. Tr. 75, 76.

As before, Ruiz felt that the training was inadequate, describing it as a "joke." Tr. 77. Although Ruiz was comfortable *driving* a boom truck, he felt he had insufficient training to *perform a lift*, as this is very different from simply driving that equipment. For example, Ruiz stated that there was no "seat time" doing a lift – only the outriggers were deployed with the boom moved in and out. The following day, Hunnicutt informed Ruiz and the other three NCCCO qualified persons that they were going to a rigging training class. Ruiz went to the class and had no problems or issues with that training. Tr. 78.

On December 16th Ruiz returned to work and Hunnicutt informed that he would be running a boom truck that day. Ruiz had been on the road crew for nearly a year at that point and never before been assigned to run a boom truck. *Id.* The circumstances of the event, according to Ruiz, were that on that day the others had been given their assignments and he was *the last person* to be assigned a job. Ruiz again reminded Hunnicutt that he did not feel comfortable operating a boom truck, both for his own safety and that of others. Tr. 79. Ruiz also noted that Hunnicutt had three other workers who were NCCCO qualified, had less seniority than him, and liked running that equipment. According to Ruiz, Hunnicutt became quite angry and the two argued. Tr. 81.

The mine operator contends that the contents of this line-out argument are significant. Ruiz's version of the events was that while arguing Hunnicutt then told Ruiz, "Just shut up. I've had enough. Go to my office." Tr. 81. Ruiz responded, "Come on, Doc [Hunnicutt]. This isn't high school where you send people to the office. We'll just talk after," and Hunnicutt agreed, responding, "Okay. We'll talk after." Tr. 80-81. Ruiz was clear about that exchange, reaffirming that the matter between them had settled down, and that Hunnicutt said "okay." Tr. 85. Ruiz stated that, during the disagreement with Hunnicutt, he (Ruiz) never stood up, standing only after the meeting had ended. Tr. 81. Following the meeting, Ruiz called his union chief steward, Sam Bell, to meet with him and Hunnicutt. When the chief steward arrived, Hunnicutt informed that they were going to Tim Pearson and Kathy Binegar's⁶ offices. *Id.*

Ruiz contended that raising the issue of seniority was reasonable and justified, explaining, he "mentioned seniority because these three -- they're junior to me. Like I said, if you're going -- usually to go do a job *somewhere else outside of our classification*, if they're going to force somebody or whatever, you can usually pull seniority and send the junior guy there. So that was my point." Tr. 82. *Ruiz confirmed to the Court that the order of his objections was first safety*, and then pointing out that others were comfortable operating a boom

⁶ Ms. Binegar is the mine's HR representative. Tr. 229.

truck and only then, last, did he raise seniority. *Id.* Ruiz asserted that the others he named who could operate the boom truck did not object either. Tr. 83. Therefore, not only did the other three miners not object to running the boom truck, but also all had more experience with the truck than Ruiz. Tr. 84.

A meeting then ensued with Hunnicutt, Sam Bell, Kathy Binegar, Tim Pearson, Steve Pena and Bob Jordan, the safety man for the company. Ruiz testified that before it began, he informed Jordan about his refusal to operate the boom truck for safety reasons. Jordan had to leave for other business, but reassured Ruiz that if they gave him trouble, he would take care of it. The meeting then began and Ruiz stated his safety concerns arising from the equipment he was asked to run. Referring back to the confrontation between Ruiz and Hunnicutt, Ruiz maintained that Hunnicutt initiated it, by yelling and by embarrassing him at that meeting. Tr. 89. For perspective, Ruiz stated that he had observed, in prior meetings, employees “go at” Hunnicutt, yet no discipline followed. *Id.*

After Ruiz explained his position at the meeting, and asserted that Hunnicutt had it out for him and was picking on him, Binegar denied that was the case. For nearly all of the time prior to this dispute, Ruiz had been the only union steward on his crew. Jeremiah Foster had become a union steward only a few weeks prior to the line-out event. Tr. 90-91.

According to Ruiz, Binegar’s position was that management could assign whichever individual it preferred and that it was “none of [Ruiz’s] business” as to the reason for picking him to run the boom truck. Tr. 91. Binegar also pressed Ruiz, wanting him to name how much time he would need before he would be comfortable using the boom truck. Pearson voiced that they would give Ruiz more time and put him in a location where he couldn’t hurt anyone and that they would add a qualified person to help and watch over him. Significantly, in the Court’s view, Ruiz responded that he was “good with that [arrangement].” Tr. 92. Ruiz later reaffirmed that he was willing to learn how to run the equipment until he became comfortable doing so. Tr. 96. The issue apparently resolved, Ruiz then went to work, running a dozer in the fine ore bins.

According to Ruiz, there was *no* discussion at the meeting relating to the claim that he stood up at the line-out meeting and challenged Hunnicutt, nor was there any claim of, or discussion about, insubordination. Tr. 93. Consistent with that recounting, Ruiz stated that Hunnicutt did not raise the issue either. Thus, no one suggested during the meeting that Ruiz might be disciplined because of his interaction with Hunnicutt. Tr. 93-94.

Another person alleged to have been involved was Sam Clark. Ruiz stated that Clark was also targeting or harassing him. It is fair to state that Ruiz was not reticent to insist upon the union’s rights vis-à-vis Pinto Valley.

As Ruiz expressed it, he

brought issues to Sam Clark before, union issues. He -- I brought to him that there's a few guys that are nonunion on the crew, and they're badmouthing the union and that he needed to do something about it. He never did anything about it. . . . jobs that they were doing that was against contract, I would stop. Of course, all the feedback came back to Sam [Clark]. Doc [Hunnicut] would run and tell Sam. Tim [Pearson] would run and tell Sam.

Tr. 92-93.

Later that same day, in the afternoon, Hunnicutt told Ruiz to come out from his work, stating he needed to trade him out. Hunnicutt then took Ruiz to Binegar's office. Sam Bell was also present. Binegar then announced that there would be no discussion about anything. Instead she handed Ruiz a paper informing that he was suspended with pay. Ruiz insisted that he was at least entitled know the reason for the suspension. *Binegar responded that the suspension was for refusing to run the boom truck.* Tr. 97.

Ruiz was called back by Binegar around the holidays, sometime during December, and a meeting ensued. Ruiz, his chief steward, Hunnicutt, and Bell were in attendance. Oddly, in the Court's view, management first asked Ruiz for assurance that he was not recording the meeting, then asked why he refused to train on the crane and why he refused to run the boom truck. Tr. 99. He elaborated his reasons to Binegar, informing,

that [he] didn't feel comfortable for the safety of [himself] and others. I said Kathy [Binegar] -- I can still remember this so clear. I said, 'Kathy, I've never run a crane in my life.' She goes, 'You've never run a crane?' I says, 'Never in my life other than the NCCCO class where we get to move the levers. We didn't operate it. We didn't do lifts.' Her exact words were, 'That would be kind of like them putting me on a haul truck and say run that haul truck today. I would tell them they're crazy.' I go, 'Thank you. That's exactly where I'm at.'

Tr. 100.

The Court inquired, "You remember that conversation?" Ruiz reaffirmed it had occurred, responding, "Yes." Tr. 101. The Court then asked, "And you remember she said the haul truck analogy?" Again, Ruiz affirmed, "Yes," Binegar was the one who made the haul truck analogy. Tr. 101. Ruiz also referred to his journal entry for December 22, 2015, where he noted the interview above, confirming that Binegar offered the analogy. Tr. 102.

Thereafter, on January 5th, Binegar contacted Ruiz again, in need of another call. When the call occurred, Bell and Clark were present and Clark read Ruiz his termination letter, effective that day, and stating that it was for refusing to run the boom truck and crane. Tr. 103.

Exhibit R 10 is the Complainant's letter of termination. Referring to that letter, Ruiz stated that during his interview with Binegar a week or so earlier, although he was asked about his not participating in the swing cab training and his refusal to operate the boom truck, she did not ask him about the allegation of refusing to leave the line-out meeting. Tr. 106. Therefore, Ruiz confirmed that the letter was the first time the refusal to leave the meeting was claimed as a basis for his termination. Tr. 107. The termination letter refers to Complainant's job classification and that one who occupies that position "must be qualified to operate all equipment connected with tailings dam construction and road maintenance." Ex. R-10. Ruiz did not dispute that the job description so provides. Thus, Ruiz did not then, and does not now, dispute what the job description provides. Tr. 107. However, Clark also asserted that boom trucks and cranes are used in connection with tailings dam construction and maintenance, and Ruiz disputed that, stating that is not true. He informed that in the past, they were used on the tailings dam, but up until approximately the middle of December, they were not used in connection with his job duties. *Id.* Ruiz does not dispute that he had the training in 2013 and received certification for that training. *Id.*

Ruiz's journal entry for December 14th remarks that he refused to participate in the swing cab training, but in his testimony he clarified that he thought it was only boom truck training on that day and that his refusal was only with operating the crane, which he characterized as playing on it. Tr. 30, 108. Instead, Ruiz stated that on that day he told Ronnie Gray that he "did not feel comfortable running the crane, that [he] was scared of them and wanted nothing to do with it." Tr. 109.

Returning to the disputed accounts of the events at the line-out meeting, Ruiz reaffirmed that he never stood up during that meeting. *Id.* However, he acknowledged that he did assert a safety issue regarding his operation of the boom truck and, after that assertion, he added a seniority claim. *Id.* He also acknowledged that he did comment that "this is not high school." Tr. 110. He denied Clark's claim that he told other employees in the meeting to "watch what is going to happen. This is going to get ugly." *Id.* Clark, of course, was never in the line-out meeting. Following his termination, Ruiz filed a termination grievance with the union and, at the date of the hearing in this matter, the union also filed for arbitration. Tr. 111.

Under cross-examination Ruiz agreed that Capstone purchased Pinto Valley from BHP on June 27, 2013 and Ruiz accepted employment with the new owner on July 3, 2013, but the larger point is that he worked for both the old and then the new employer. For Ruiz therefore, with continuous employment, it amounted to a name change in the ownership. Tr. 116. Ruiz agreed that when he was fired, his job classification was "heavy equipment operator on the road maintenance crew." *Id.* He had previously been with the tailings dam construction crew, with the change occurring in the spring of 2015. Tr. 117. He acknowledged that, when with the tailings crew, he did operate some heavy equipment. At an earlier time, the road construction crew and the tailings crew each had their own supervisor. *Id.* Hunnicutt was the road crew's supervisor and a Mr. Gonzalez supervised the tailings crew. Tr. 118. When the crews were combined, Hunnicutt was then in charge of both crews. Under the new configuration, both crews attended the line-out meetings, with the combined number being around 15 employees. Tr. 119.

As he stated earlier on direct examination, Ruiz acknowledged again that he received NCCCO training in August 2013 for the boom and crane; that it consisted of one week of classroom training and one week outside; and that his supervisor at that time, Gonzalez, had encouraged him to sign up for the training. *Id.* He received his NCCCO training card as well, and that card remains valid through August 2018. Tr. 120, Ex. R 9. He was also paid during those two weeks and the company paid for his training. Tr. 120. Ruiz stated that while the terms boom truck and crane can sometimes be used interchangeably, at his work site, they distinguish the two. Tr. 122. Further, while agreeing that he is “certified” for a crane and a boom truck, he stated that he is not “qualified” for any crane. *Id.* The Court would agree that being “*certified*” is not necessarily synonymous with being “*qualified*.” This case is an example of such a distinction. Ruiz added, he has “certification from NCCCO, but [he] wasn't 5023ed on any crane there. 5023 after a year becomes void if you haven't touched that piece of equipment.” Tr. 123.

Ruiz elaborated upon the basis for his fear relating to his lack of being *qualified*, “The *certification* I got in 2013 at the class just shows that I can operate the levers, that I can -- I look at it pretty much like I can do that little rodeo thing we did with the test. I'm not - I have never did a lift with it or ran it, operated it, drove it. So to me, I got this NCCCO card, but I still don't feel like I can run it. I don't even know how to drive it.” Tr. 124-25 (emphasis added).

When asked about the refresher training he received in December 2015, Ruiz did not agree that it was pretty much the same as the original training, stating that they did not do the same things in the refresher training. Tr. 126.

An example, among many, of Ruiz's candor, Ruiz agreed that “[b]etween the time [he] got [his] NCCCO certification in August of 2013 and the time [he] [was] asked to operate a crane on December 10th of 2015, [he] never told anybody that [he] thought his training was deficient,” but added that he “was never asked to run it to even talk about that.” Tr. 128. When asked by Chism to run the crane on December 10th, Ruiz “told him about the safety issue. He said aren't you NCCCO certified, and [Ruiz] said yes, but I don't feel comfortable because I haven't ran it in -- it's close to [a little over two] years.” Tr. 129. He also agreed that he was not required to run the crane that day, that he wasn't taken down to human services, that he wasn't disciplined or threatened to be disciplined that day either. Tr. 130. The Court would note that the answer to that question, posed to show he was not disciplined for expressing his safety concerns, actually helps Ruiz, because it amounts to an implicit admission by Pinto that his declining to operate the equipment was both valid and reasonable.

Regarding the December 14th incident, when Ruiz was operating an articulator truck and the mine's operation was shutting down due to adverse weather, he did not object when Hunnicutt told him he was being assigned for refresher training on the boom truck. He also agreed that he thought it was a good idea, explaining, “None of us were -- I don't know about none of us, but I hadn't touched one in almost two years. As far as I knew, my 5023 was void. Since we hadn't touched one in so long, I thought it would be a good idea to get a refresher on it.” Tr. 136. He agreed that this might have been connected with the events of December 10th as well. Tr. 135.

Ruiz noted that he did not refuse the boom truck training at all; his only refusal that day was to operating the 120 ton crane. Tr. 138. Ruiz signed a 5023 form attesting that he refreshed on the boom truck. Tr. 139; Ex. R 17. The following day Ruiz received rigger⁷ and signalman training and a 5023 form was also completed for that. Tr. 140; Ex. R 18. Whether a boom truck or a crane is involved, one needs to be certified for the role of rigger and signal person. Tr. 140-41.

Interestingly, the day following the rigging and signal training, Ruiz was *the last person* to receive an assignment. Tr. 143. When he was then assigned the boom truck, he reiterated that he had told Pinto that he didn't feel safe doing that, both for the safety of himself and that of others. *Id.* He agreed that the refresher training he received two days earlier did not change that perspective. Ruiz admitted that when he refused to operate the boom truck, he did not know what the actual assignment would be. Further, he advised that there were three persons with less seniority that could operate the boom. Tr. 145. There was some back and forth between Respondent's counsel and Ruiz regarding how he could object to a task before he knew exactly what it involved. At that point, the Court interceded, stating, "So...regardless of the particular task that would be involved using the boom truck or the crane, from your perspective that didn't matter because...[y]ou didn't feel safe operating either of those pieces of equipment regardless of what they asked you to do with them; is that fair?" Tr. 147. Ruiz responded, "Correct. I assumed it was on the day before -- the workday before they had assigned me to go with the pipe fitters and pull a water well on the crane. So when they did it on Monday, I assumed it was the same job." Tr. 147.

To be sure that it understood Ruiz's testimony on this issue, the Court continued, "It really didn't matter from your perspective to know what particular job you had to do with the boom truck or the crane because no matter what they asked you to do you felt you were unsafe to use those two pieces of equipment?" Tr. 147. Ruiz again responded, "Correct." Tr. 147. Later, Respondent argued that, not knowing what the assignment involved with the boom truck, it was unreasonable for Ruiz to object. The Court sees it very differently. As later testimony revealed, Hunnicutt was quite able to explain, *if in fact it was truly the case*, that the assignment was easy to perform. However, lamely, in the Court's view, Hunnicutt maintained there was no opportunity to offer that fear-allaying information. The Court did not find that claim of "no opportunity" to inform Ruiz to be credible.

Respondent's Counsel revisited the December 16th conflict, with Ruiz again stating that the dispute with Hunnicutt and his order that Ruiz go to his office, was resolved. The Court again interceded to clear up this issue, asking, "In fact, isn't it true, based on your testimony, that when you had this go to the office business essentially this individual [Hunnicutt] backed down from that. He didn't still insist that you go to the office. He retreated from that demand and that's where things stood, right?" Tr. 148. Ruiz responded, "Correct. He asked me one time and I said what I said and we were done." Tr. 148. Following the completion of all the testimony on this issue, the Court expressly credits Ruiz's recounting as the credible version.

⁷ A rigger rigs the item to be picked up and signal person gives the signal for what the machine operator is to do. Tr. 141-42. Such training has nothing to do with the operation of any machinery, including the 120 crane. In contrast, Ex. R 17 does deal with the operation of equipment. Tr. 142.

Ruiz maintained that when he was thereafter summoned to Hunnicutt's office, he did not think he was in trouble and that he brought his union steward because that was the practice he was trained to use. Tr. 149. The meeting with Hunnicutt, for which Binegar and Pearson⁸ were also present, only involved Ruiz's issue with running the boom truck and the reasons he was opposed to that task. Tr. 151. Ruiz was asked if the boom truck or crane was unsafe or defective and he responded that he did not believe such problems were present. Tr. 154. Of course that question from Respondent missed Ruiz's main point that, for safety reasons, both to himself and others, he was afraid to operate either piece of equipment. As Respondent's counsel expressed it, and to which Ruiz agreed, "[his] position was simply [that] personally [he was] not comfortable with [his] qualification to operate it." Tr. 154-55. Ruiz added that there was only one boom truck to which he could be assigned anyway because he only had a 5023 for that truck and a separate 5023 is required for each piece of equipment. Tr. 154.

The Court notes that Ruiz was not making a blanket refusal to ever operate a boom truck or a crane, as this exchange demonstrates when he was asked, "[y]ou testified about the discussion that took place during that meeting in Mr. Pearson's office about getting you some additional -- and I think you've used the expression 'seat time' or operating the boom truck to try and get comfortable?" Tr. 155. Ruiz affirmed that was true, adding that such seat time would need to be in a "nonproductive area." Tr. 156. Though he acknowledged that, as Respondent's counsel framed it, he "didn't know how much training that would take before [he would be] comfortable," the Court views that as a practical and sound response, as Ruiz could not be expected to be clairvoyant. Tr. 155. As Ruiz noted, he couldn't give a prediction; he had never done lifts before. Tr. 155. Ruiz added that at the conclusion of the meeting, "[i]t was stated [he] would be given more training in a nonproductive area with a qualified person to watch over [him] and that he was okay with that arrangement. Tr. 156. As noted, following that meeting, Hunnicutt assigned Ruiz to run a bulldozer in the fine ore bins. *Id.*

⁸ A Mr. Pena was apparently also in the meeting but Ruiz stated that individual said little or nothing. Tr. 151-52.

Curious, the Court inquired of Ruiz what brought about the change so that the road crew duties suddenly included the use of boom trucks and cranes. Ruiz responded,

From what I understand . . . it is a regular duty now and only the three other guys that were NCCCO qualified -- from what I understand, something happened on property with a pipe fitter who was running a boom truck. He destroyed the boom truck or put some damage to it. They terminated him. He was terminated. His name was Jeff Osborn, I believe. He was terminated.⁹ So from then on, they said no more people can run it unless they're NCCCO qualified. So the company, from what I understand, said from today forward if anyone runs a boom truck they have to be NCCCO qualified, which is -- we're not doing it for our job. We're doing it for pipe fitters. They're pulling us with our NCCCO certification to other classifications because those classifications don't have NCCCO people because they couldn't pass the test.

Tr. 163-64.

Clarifying the new development with when he last worked, the Court then asked, “[y]ou performed your duties with the road crew and there might have been work done by the boom truck or the crane but not while you were there working with the road crew; is that right?” Ruiz confirmed that was true. The Court continued, “So it wasn't like these things [boom truck and crane] were never at the scene? It just wasn't part of the road crew's duties to run those things?” Ruiz also confirmed that was true. Tr. 164.

Apart from whether it was fair to assign the boom truck and crane operation to Ruiz, the story he related underscores that his safety concerns were well-founded and that it was not simply reasonable, but sound in terms of safety for him to decline the operation of such equipment until such time as he felt competent to do so.

Testimony of Abe Romero

The Complainant then called Abe Romero, who is a current employee at Pinto Valley. Employed there for four years, he is a member of the mine's road crew. He has known the Complainant for some 20 years. Romero transferred to the road crew from the tailings dam crew at the same time as Ruiz. Like Ruiz, both worked for the same supervisor, Hunnicutt. Tr. 166. Romero was aware that Ruiz received NCCCO certification to run a boom truck and a crane in 2013, “Because a group of people were asked in our group who was going to go and he -- actually, the supervisor then appointed people by seniority who was going. I was at the bottom so I didn't go.” Tr. 168. Romero affirmed that if one had a “5023,” they could run a crane or boom truck. While Romero had experience operating the crane, he lacked certification, at least for Pinto Valley. He was assigned to run cranes and boom trucks.

⁹ Need the Court mention that, with Ruiz's awareness of an employee being fired for a boom truck mishap, that knowledge would only underscore his concern about his lack of being truly qualified to operate that equipment. Accordingly, for him, it was a lose-lose situation: termination for balking at the boom truck assignment or termination if he had mishap, through inadequate competency.

Romero maintained that although one would rarely be assigned to run such equipment, typically one would volunteer for the duty. Tr. 170. Romero could not remember a December 10, 2015 meeting led by Chism involving work assignments, but he did recall the December 16th meeting led by Hunnicutt. He recounted the event,

Well, of course, [Hunnicutt] gave the safety meeting, and then he started the line out. We were all sitting at the table. It was, actually, two other employees and Manny Ruiz and myself. They made the line out on everybody else, and then he asked Mr. Ruiz if -- he asked Mr. Ruiz to go on the crane. I looked at him and I looked around and I seen his expression on his face like that. . . . [he, Romero] looked at him and [saw] the panic mode. I looked at him and I looked at him.

Tr. 171.

The look of panic on Ruiz's face did not surprise Romero, "Because the time that we worked together, I used to tell him, '[h]ey, you went to the crane school. It's your turn.' He goes, 'I'm not getting on that. It's unsafe.'" Tr. 171-72. Ironically, as just mentioned, Romero is not certified to run the crane either, describing himself as "just a 5023." In fact, supporting the fact that operating a crane is potentially dangerous, he revealed that he "had an accident with the other company that I ran a crane, and since then I -- I was being broke in. I felt very uncomfortable running it when I do run it." Tr. 172. He confirmed that, even with his experience, he still feels uncomfortable running a crane. *Id.* Romero elaborated, "it's like anything you never operated or done in your life and you're expected to do it. It takes hours. It takes time to learn a crane. You can't learn it in a month. You can't learn it in a year. It takes a long time." Asked if one could learn how to operate a crane in a week of classes, he informed, "No sir. No way." Tr. 173.

Romero continued his observations, which were informative about Ruiz's state of mind, relating that Ruiz stated,

I don't want to run it. I have seniority. I looked at him when he said seniority, and I know that wasn't the word he was looking for. I -- it's like they threw him in a lake, and he didn't know how to swim. He was looking for the right word without getting embarrassed by everybody else by him saying that.

Id.

Describing Ruiz as no slacker, Romero stated, that "on the equipment that I seen Manny [Ruiz] run, he has mastered every single one except that one." *Id.*

Continuing with his recollection of the meeting that day, Romero stated, "[Hunnicutt] said, 'Well, you're going to go on the crane.'" Tr. 174. Romero confirmed that Ruiz was the last one to receive an assignment that day. Tr. 176. Subsequently, Romero was interviewed by HR about the event. At that meeting Frankie Brocamonte, the union rep, was there along with Binegar and Hunnicutt. Tr. 178.

Regarding that HR meeting, Romero affirmed that he found it intimidating because it was,

the first time I see a front line supervisor sit with the human resource. It made me kind of nervous. I didn't really want to say anything about it. I didn't want to make it worse. I was trying to stay neutral is what I was trying to do. I didn't want to say anything bad.

Tr. 178.

Following the meeting, Romero asked for another interview with HR because "I wanted to express my feelings - because I had worked with him -- of what the issue really was, that he -- *that he had panicked, and then I knew that he couldn't run that boom truck. He was afraid of it.*"

Tr. 179. Romero agreed that his purpose was to express that Ruiz had the safety concern. *Id.*

Romero stated that he also had concerns with the training imparted by Ronnie Gray. Gray is the trainer who certified the individuals for the crane operation, and he also conducted rigging classes. Gray did a rigging class with Romero. However, he had issues with Gray's training in that class, expressing that "he had made a hoist -- a homemade hoist to put the block on to be able to lift the beam that he was lifting, and I brought it up that he could not use that because it was against MSHA using that kind of hoist." Tr. 180-81. Romero then complained to the company, stating that one must use a ladder, not a chair, to connect a hoist. Tr. 181.

As for the issue of the confrontation between Hunnicutt and Ruiz, Romero affirmed that he heard Hunnicutt tell Ruiz to go to his office. *Id.* He could not remember Ruiz's response to that. However, he did recall Ruiz making a remark that this wasn't high school. *Id.* Romero stated that he did not recall any discussion that "this is going to get ugly or anything like that." Tr. 182.

Upon cross-examination, Romero agreed that multiple meetings had been a little heated, and accordingly that such an atmosphere was not simply limited to the meeting in issue in this case. Tr. 182-83. Respondent's counsel posed questions from Binegar's notes to Romero.¹⁰ Romero expressed that people were not getting along and he attributed much of the blame to the supervisor, Mike Gonzalez. Tr. 183-184. Romero agreed that the two crews had conflicts over "things like job assignments." Tr. 184. Gonzalez then left Respondent's employment. Following that, the crews were consolidated, with Hunnicutt in charge of both, and all being

¹⁰ There were times when the Court concluded that Mr. Romero was mixed up with the questions posed and that as a consequence some answers were unclear as to his intended response. For example, when he was advised that Respondent's counsel had "a copy of Ms. Binegar's notes from when she - . . . [s]he asked you a question that said, 'Do you feel Manny is being singled out?' She wrote down no. Is that an accurate reflection of what you told her in that interview?" Romero answered, "Yes, I did." Accordingly, it was unclear if Romero meant that he agreed that Ruiz *was not* being singled out or whether his "Yes, I did," meant he was being singled out. Respondent's Counsel did not clear this up, moving immediately to a new topic, stating, "And then you talked about -- I'm going to go on and I'll do this quickly, but it says, "had problems with cone heads when Mike G. was there." Tr. 183.

designated as part of the road crew. *Id.* However, this did not, in Romero's view, bring about harmony, as he stated there was still "a lot of drama." Tr. 185. As a whole, the Court finds that Romero's testimony supports Ruiz's recounting of the line-out meeting and Ruiz's genuine fear of operating the cranes.

Testimony of Samuel Bell

Samuel Bell was also called by the Complainant. Bell has been employed by the Capstone Mine, Pinto Valley, for the past nine years. He has known Ruiz since 2012, when Ruiz began working there. Formally, his job title is environmental water facility operator. Among the workers at the mine, they are known as the "environmental pump men." Tr. 188. Though he has never worked with Ruiz on either the tailings dam crew or the road crew, he knows Ruiz because he is a union steward. Bell agreed that he is Ruiz's "go to" union steward, in that if a problem arises Ruiz will come to him. Tr. 189. Consistent with that practice, Ruiz has called Bell to sit in and participate in disputes with Hunnicutt. *Id.* As to the matter at hand, which arose on December 16, 2015, Bell was called by Ruiz regarding an incident on that date. *Id.* He related that on that date Ruiz asked him to meet at the North Barn trailer and that he needed Bell to be there as a steward. Tr. 191. Upon arriving, Ruiz briefed him about the verbal exchange he had with Hunnicutt. Without reviewing Bell's recounting of Ruiz's account, Ruiz reiterated to Bell that he felt uncomfortable running the crane. Tr. 192. Hunnicutt and Steve Pena met them and they then proceeded to Kathy Binegar's office. The meeting included Ruiz's expressing the reasons for his qualms about running the equipment. His expressions included that his 5023 MSHA training form was over a year old and that the refresher training he was given was inadequate. Ruiz apparently also asserted that the "refresher course that they had him sit in on was inadequate to refresh his training and make him feel comfortable running that piece of equipment around bystanders and that he felt he needed more time, more experience with the equipment prior to being able to run it competently and safely." Tr. 193. According to Bell, the meeting ended productively, as

[t]owards the end of the meeting, in [Bell's] opinion, [they] had come to a verbal agreement between [Bell], Mr. Ruiz and the company that they would give [Ruiz] some more seat time, give him an isolated area and a qualified operator to renew his qualifications and to become more comfortable with the piece of equipment and be able to operate it safely.

Tr. 193-94.

However, the meeting was not entirely without friction. According to Bell, Ruiz had some discussions with Binegar,

about some previous incidents where [Ruiz] had felt like he had been harassed and targeted for not only his union participation but for his race and that he didn't feel he was being treated fairly, felt he was being singled out by his supervisor. [Binegar] disagreed and said there hadn't been any proven issue with that, that they looked into that issue in the past and hadn't discovered any discrimination. The exchange got slightly heated on both sides, you know, disagreement. [Bell

added that he did] remember [Binegar made] the comment that they could suspend him and independently investigate the situation rather than the settlement that we had agreed to, if he preferred [and in response Ruiz said] no, that he'd rather just take the extra [training].

Tr. 194-95.

In any event, Bell's understanding, pursuant to the meeting, was that the matter had been resolved. However, Bell learned that later that same day Ruiz was called back for another meeting at which he was informed that he was suspended, pending investigation. Gary Wright, another union steward, was present at that subsequent meeting. While Bell tried to learn the details of the planned investigation, he was advised that there would be no further discussion and it was left that Ruiz was "suspended pending further investigation." Tr. 196. Some two to three weeks later, an investigatory interview was held. Bell and Ruiz attended. Following that, there was a "termination meeting" via telephone and several grievance meetings after that. A grievance was filed the same day as the termination. Ruiz expressed his belief that he was being singled out. Tr. 197. During the termination meeting call, Binegar and Clark were together and Clark read the termination letter to Ruiz and Bell, with Ruiz acknowledging that he heard and understood it. Tr. 198.

Testimony of Dallas Hunnicutt

The Complainant having rested, Dallas Hunnicutt was then called by the Respondent as its first witness. He is a supervisor at Pinto Valley, employed by that entity since 2013. Tr. 203. In that role, he is responsible for two crews: a road maintenance crew and a tailings construction dam crew. Tr. 209. While he was in charge of one crew originally, around April 2015 he began supervising both crews. Tr. 210. Mike Gonzalez had been in charge of one of the crews, but then was let go. Ten persons are on the road crew and five on the tailings crew. Hunnicutt's immediate supervisor is Tim Pearson and his superintendent is Sam Clark. He interacts with both men daily. *Id.* Ruiz was originally part of the tailings dam crew and then was moved to the road crew.

Hunnicutt didn't know former supervisor Gonzalez well, as there was not much interaction between the two crews. However, Hunnicutt stated there was some tension between the crews. The road crew apparently felt that the tailings crew "was doing bits and pieces of their job." Tr. 211. Those disputes ended with the consolidation of the crews. *Id.* When Ruiz worked for Hunnicutt he was an equipment operator. Tr. 212. Equipment operators "run blades, loaders, dozers, dump trucks, articulators, track hoes, water truck, just overall different equipment." *Id.* Shown Exhibit R 21, Hunnicutt identified it as the contract between the company and the bargaining unit union employees. Tr. 213. Referred to Article 7 of that contract, Hunnicutt agreed that it described the heavy equipment operator position. *Id.*

Turning to the events of December 16, 2015 line-out meeting, Hunnicutt offered his version of it, stating,

We had our line-out meeting, did our safety topic and stuff, started lining everybody out. When we got to [Ruiz], I asked [him] to get with Steve Pena, which is a supervisor on one of the other crews, to run a boom truck for him. [Ruiz] told me that he wasn't going to run the boom truck. [Ruiz] said there's three junior seniority people there that could run that boom truck, and I explained to him that seniority didn't have anything to do with job assignments. ... I asked Manny [Ruiz] to go to the office, and we would discuss it after the meeting. After we was done with the line-out meeting, we could talk about it. [Ruiz] told me that -- he said, 'This ain't high school. I don't have to go anywhere.' [Ruiz] was standing up at the time when he said it. He sat back down and looked at the guys at the table and said, 'Watch this, it's going to get real ugly.' [Hunnicutt continued] [a]t that point I told him if he's going to be disruptive he needs to go ahead and leave the meeting. [Ruiz] told me he wasn't being disruptive or insubordinate and he didn't need to go anywhere. At that time I ended the meeting and proceeded to go into the office.

Tr. 214-15.

Referring to the sign-in sheet, Ex. R 23, Hunnicutt stated that it reflects those present when Ruiz allegedly said it's going to get ugly. Tr. 216. The meetings typically discuss safety issues, after which the line-out job assignments are given and people then go to work. Tr. 215. Continuing with his testimony about the events of December 16th, Hunnicutt agreed that he assigned Ruiz with the operation of the boom truck assisting Mr. Pena. Tr. 218. Asked why he gave Ruiz that assignment that day, he stated,

They had just went through a refresher, and he was -- he said he needed more seat time. It was a simple job from the way Steve explained it to me for what they were doing. It seemed to me like it's a good time to put somebody there to give them training.

Id.

Hunnicutt claimed that he had not discussed that assignment *with anyone* prior to giving it to Ruiz. *Id.* The Court finds that upon the totality of the evidence, Hunnicutt's claim was not credible. He knew that Ruiz had recently gone for refresher training, stating, "I knew he had went to refresher training on Monday for crane and boom truck refresher, and on Tuesday we sent him for rigging and hand signal refresher." Tr. 219. He knew this, he stated, because they had a record of it. In fact, Hunnicutt was the one who sent him, although he added that he was asked to send Ruiz to that refresher training by Sam Clark. *Id.* Hunnicutt also knew at the time he gave the assignment that Ruiz was certified by the National Commission for Certification of Crane Operators. *Id.* Four people on the tailings dam crew were certified by NCCCO. Tr. 220. Prior to December 16th, Hunnicutt had assigned Jay Shoemaker, Bain Grantham, and Brock Cargill to work on boom trucks, as recently as a few weeks before December 16th. Running the

boom trucks was, in Hunnicutt's words, "an on-and-off thing for us." *Id.* He added that around the 16th, the demand became heavier. Before that, the road construction crew really hadn't been using the boom trucks and cranes. Tr. 221.

As noted, around the spring of 2015 the two crews came under Hunnicutt's supervision. Tr. 221. Hunnicutt maintained that once the crews were consolidated, and through December 2015, he assigned people to run a boom truck and crane, "[q]uite often. Sometimes two or three guys a week." *Id.* However, during that time he had never assigned Ruiz for those jobs. When asked why he had never assigned Ruiz during that time, Hunnicutt stated, "Manny was doing some other dirt work projects for us, and he was doing really good on the dirt work projects." Tr. 221-22.

Hunnicutt essentially stated that the boom truck task he was assigning Ruiz was a simple task that had very little traffic around. However, he did not tell Ruiz about the nature of the assignment because he, (i.e. Hunnicutt) "didn't make it to that point." Tr. 223. Instead they went right to the office. *Id.* While he agreed with Respondent's counsel's suggestion that he never had a chance to describe the assignment at the line-out meeting, even after that he never described it to Ruiz. Tr. 223. Hunnicutt, responding to a question about the role of seniority in making assignments, stated that seniority has no role in those matters and that Article 7, paragraphs 2 and 3 speak to that point. Tr. 223, *see also* Ex. R 21-3.

It was Hunnicutt's claim that, when Ruiz refused the assignment, the crew members acted shocked. Hunnicutt then terminated the line-out meeting. Instead of safety concerns, Hunnicutt asserted that Ruiz's only claim at the meeting was that he could object to the job of running the boom or crane based on his seniority, "At the meeting -- all I got out of the initial meeting was the seniority. There was [sic] three junior seniority people there that can run that and I'm not running it." Tr. 231.

The meeting with management officials, Hunnicutt and Ruiz then followed. As noted earlier, attending were Bell, Steve Pena, Binegar and Tim Pearson. Hunnicutt maintained that Ruiz's assignment "happened to be the last one that day" and that it was "just coincidence" that it occurred that way. Tr. 225. The Court did not find those claims to be credible.

At the meeting, Hunnicutt acknowledged that Ruiz expressed that "he didn't feel comfortable running it, that he felt he needed more seat time." Tr. 226. He added that there was a discussion about giving Ruiz more seat time. Hunnicutt, when asked if he was surprised upon hearing that Ruiz felt unsafe operating the boom truck, echoed that he was surprised that Ruiz expressed that feeling, because he "didn't hear that mentioned at the line out meeting." Tr. 229. Of interest, Hunnicutt allowed that Ruiz *could have* expressed his safety concerns and that he simply didn't hear them. Tr. 230. He repeated that he *didn't remember* hearing such a concern expressed at the line-out meeting. *Id.* Despite those concessions, Hunnicutt asserted that his first recollection of Ruiz expressing safety concerns about operating the boom truck was at the meeting in Pearson's office.¹¹

¹¹ Ruiz has not claimed that the equipment itself, the boom truck or the crane, was unsafe. Tr. 231. The issue is his competence to operate it safely.

Hunnicuttt maintained that no decision to provide additional seat time was made at the meeting and no resolution to the dispute was made. Instead, by his account, the meeting ended and management decided to have discussions among themselves. Tr. 228.

Hunnicuttt's view of Ruiz not being comfortable about operating the boom or crane was,

In my mind if you're comfortable enough to run it and comfortable enough to sign your 5023, you probably should be okay.... If you're not comfortable running it, you probably shouldn't be signing the paper saying that you - - you're qualified to do it. Once you sign that piece of paper, that's admitting that I'm good to run this.

Tr. 230-31.

Hunnicuttt agreed that he relies upon such forms being signed as showing that the individual can run the equipment. Tr. 230-31.¹²

Hunnicuttt reaffirmed that he knew that Ruiz received refresher training and signed a 5023 two days before Hunnicutt assigned the boom truck job. Tr. 232. Hunnicutt also affirmed that Ruiz received refresher rigger and signalman training at the same time as the crane and boom training.

In acknowledging that rigger and signalman training, Hunnicutt revealed that the entire nature of the work he was assigning to Ruiz was inherently hazardous, stating,

It's real important when you're on signalman training that your operators of your boom trucks or your crane knows and the crane operator themselves are both on the same page with their hand signals. Safety reasons. Rigging class is real important for your crane operators and your boom truck operators because they're responsible for the load. If they know how their rigging should be, they should be able to look at their rigging and know that it's okay. *There's been -- things happened in the past where you had riggers that didn't know what they were doing and the rigger can get you in trouble, absolutely.*

Tr. 232-33 (emphasis added).

Again acknowledging that the meeting in Pearson's office included discussion of providing Ruiz with additional seat time, Hunnicutt then stated that, with management deciding to talk privately among themselves, he then took Ruiz to begin work on a dozer in the fine ore. Tr. 233. Hunnicutt then returned to the site of the meeting and had a discussion with Clark about the recently concluded meeting. Clark had not attended that earlier meeting. *Id.* Agreeing with

¹² The Court commented that Hunnicutt's view about the effect of signing the 5023 form is a legal determination for the Court and therefore Hunnicutt's view does not necessarily rule the day. Tr. 231.

counsel's characterization that he "debriefed"¹³ Clark about the meeting, Hunnicutt stated that Clark then instructed him to get Ruiz and bring him back down to Binegar's office. Tr. 234.

Hunnicutt maintained that upon receiving that instruction he didn't know the purpose behind Clark's order for a new meeting, "At the time I didn't know. Once we got to [Binegar's] office, Manny was suspended pending investigation of the incident." *Id.* This claim too, the Court finds, is not credible.

Among other incredible claims of Hunnicutt, he stated that he was not involved in the decision to suspend Ruiz, nor did he recommend it. Tr. 234-35. Ruiz was then suspended with pay. Hunnicutt's subsequent involvement with the matter included sitting in as a witness when the company conducted interviews of the members of the two crews. Hunnicutt stated that the interviews were done by Binegar and him, although he again asserted that he "was instructed to sit in on the interviews conducted by [Binegar]." Tr. 236. Asked about his involvement other than "sitting in" during the interviews, Hunnicutt was asked if he asked questions during those interviews, responding, "*Not that I remember*. If it was, it would have been for a clarification matter, but *not that I remember* did I ask a whole lot of anything."¹⁴ *Id.* (emphasis added).

Asked what happened at the conclusion of the investigation, Hunnicutt maintained he didn't know. *Id.* He only heard that Clark made the decision and that he, Hunnicutt, neither made, nor was he consulted about, the decision, nor did he recommend it. Tr. 237. He did not object to the decision upon learning, after the fact, that Ruiz was fired. *Id.* The Court wanted to be sure of Hunnicutt's answer, asking "So you never urged that Mr. Ruiz be terminated?" Hunnicutt replied, "No." Tr. 238. Asked who told him of the firing, Hunnicutt stated he *didn't remember* exactly who informed him. Tr. 237 (emphasis added). Asked if he discussed the matter at some point with Clark, Hunnicutt responded, "Not that [he] *remember[ed]*."¹⁵ Tr. 238 (emphasis added).

¹³ Using the neutral and professional term "debriefed" is a testament to the skill of legal counsel to employ words which put their client in the best possible light. However, the Court notes that it would be naïve to view Hunnicutt as the detached professional simply giving Clark an executive summary of the events at the line-out meeting. Instead the Court finds that the only reasonable conclusion is that, far from a sterile "debriefing," Hunnicutt played the role of instigator before Clark. As Binegar would later admit, Clark was "spun up" about something after speaking with Hunnicutt. Tr. 285.

¹⁴ Frankie Brocamonte, a union representative, was present during the interviews. Tr. 236

¹⁵ Having heard Hunnicutt's version of the events, the Court expressed its thoughts on the issue of the line-out meeting, remarking, in effect, that it would have to determine which individuals actually did recommend Ruiz's termination and "the basis for their recommendations if they were not present during the line-out meeting when we have different versions about what happened, about whether Mr. Ruiz stood up or made comments about watch, this is going to be trouble." Tr. 238.

Hunnicutt then expressed that his problem,

wasn't so much about the not running the piece of equipment as it was the -- I felt it was more of an insubordination thing in the meeting than it was over the equipment when I asked him to go to the office and he refused to go to the office. Just the way it all fell out was more my concern than the actual boom truck situation itself.

Id.

Counsel translated the remark, asking if Hunnicutt takes insubordination seriously. Unsurprisingly, Hunnicutt responded, yes. Tr. 239.

Upon cross-examination, Hunnicutt agreed that the line-out meeting on December 16th was "a little heated." Tr. 239. Hunnicutt maintained that Ruiz's objection to running the boom truck was solely based on seniority, contending that Ruiz said, "There's three junior, less seniority people here that can run that truck. I'm not running it." Tr. 240. While Hunnicutt believed that Ruiz could not object to the job assignment based on his seniority, he was then asked by counsel for the Complainant, if it was assumed for the moment, that really was the basis for Ruiz's objection, but that he was mistaken about the right to invoke seniority, whether such a mistaken belief could be a basis for firing? Hunnicutt avoided answering the question. Tr. 240-41. The Court noted that the question was not complex, and remarked to Hunnicutt,

It's a pretty plain question. You made a judgment. You talked about your determination, about when you feel such behavior is insubordination and not insubordination. He asked you a very simple question. He's asking you, since you've offered your opinion previously in your testimony about insubordination, would that kind of reaction in your view constitute insubordination, yes or no?

Tr. 241

Finally, Hunnicutt answered, stating, "I would say yes." *Id.* He then held to that view, that simply making a mistake about the effect of seniority on job assignments was a basis to fire Ruiz. Tr. 242.

Hunnicutt affirmed that when he told Ruiz to leave, he made the remark about this was not high school. Tr. 242-43. Hunnicutt maintained that after that remark, made while Ruiz was seated, he told Ruiz that if he was going to be disruptive, he would need to leave the meeting. Tr. 243. However, Hunnicutt again avoided answering a question about the events following his remark about Ruiz leaving the meeting if he was going to be disruptive. Counsel for Complainant inquired, "After you said that, he wasn't disruptive, right? He didn't say anything else, right?" Tr. 243. Hunnicutt again avoided answering the question, responding, "After I said that we ended the meeting, and we all got up and left." Tr. 244. The Court intervened again, remarking, "But the question was: Did he say anything else?" *Id.* Again, Hunnicutt balked at a direct answer, "I didn't give anybody a chance to say anything else. We got up and left." *Id.* Asked if Ruiz said anything else to him after that, Hunnicutt provided a non-answer, remarking,

“He talked to the guys on the way out the door.” *Id.* The Court persisted, “He didn't say anything else to you after that?” *Id.* Finally, Hunnicutt answered the question, “Not to me after that.” *Id.* Hunnicutt then acknowledged that, even under his version, Ruiz “could not have disrupted the meeting any further - because [he] ended the meeting at that point.” *Id.*

Hunnicutt continued to be vague in his recounting of the events. He admitted that after the meeting ended he went to HR and to Pearson’s office there. Tr. 244. However, when asked if there was any discussion about Ruiz having stood up at the meeting, Hunnicutt answered, “I don’t remember.” *Id.* Asked next if there was any discussion about Ruiz having (allegedly) said this is going to get ugly, again Hunnicutt responded “I don’t remember.” Tr. 245. Next, asked if there was any discussion about Ruiz having (allegedly) refused to leave the meeting, Hunnicutt answered, “I don't believe that we had that discussion. I had talked to Kathy [Binegar] and Tim [Pearson] previous to Manny [Ruiz] coming in.” *Id.*

In the Court’s view, Hunnicutt continued to create a difficult situation for himself with the follow-up question about his previous discussion with Binegar and Pearson, acknowledging the meeting was about finding some resolution for Ruiz's safety concerns, responding “Yes.” *Id.* Nor did Hunnicutt dispute that “a person can be certified to run equipment but still have safety concerns about running it,” acknowledging, “Oh, yeah.” *Id.* Further, Hunnicutt admitted that such concerns can still be recognized, “[e]ven *if they've got a 5023 form or an NCCCO certification.*” *Id.* Hunnicutt also conceded that he had testified earlier that he was purposely giving Mr. Ruiz an easy assignment that day so that, as Respondent’s Counsel suggested, “he would have some opportunity to learn” and that, again as expressed by Respondent’s Counsel, the “easy assignment was because of what [Hunnicutt] had heard about [Ruiz’s] objections” the week before. Tr. 245. In fact, Hunnicutt admitted his knowledge on this issue, stating,

From what I had heard, he felt uncomfortable. That was the purpose of sending him back through the training that we sent all four guys back through. For me, if we're sending him back through, there's no better time to start getting them into it than when they first come out of the training.

Tr. 246.

Given Hunnicutt’s claimed sensitivity to Ruiz’s fears, Counsel for the Complainant naturally followed up, asking why, “[w]hen he objected to the assignment at the line-out meeting on the 16th, why didn't you respond and tell him that this was some kind of additional training or that this was an easy job?” Tr. 246. Hunnicutt claimed that “[w]e didn't get to that point. When it started getting heated, I just went ahead and shut it down and we went to the office.” *Id.* The Court finds that this assertion doesn’t add up because Hunnicutt claimed the meeting was over at that point.

Counsel for the Complainant continued, inquiring, if that were so, then “[w]hy didn't you tell him that in the subsequent meeting in Tim Pearson's office?” The Court finds Hunnicutt’s answer equally unconvincing, as he asserted, “[a]t that point they had started asking their questions.” Tr. 246. With responses such as these, overall the Court did not find Mr. Hunnicutt’s testimony to be credible.

Complainant's Counsel then turned to some of the history between Hunnicutt and Ruiz, inquiring if Hunnicutt recalled that, prior to the line-out dispute, there was "an incident where Mr. Ruiz had objected to using a piece of equipment because of a defective parking brake." Hunnicutt asserted that he didn't remember that. Tr. 246. Probing further, he was asked if he also didn't remember Ruiz "complaining [to him] that he was allowing employees to use the equipment even though the parking brake wasn't working." Tr. 246-47. Hunnicutt's answer was vague, as he asserted that he didn't "remember that directly." *Id.*

Finding his responses incredible, the Court inquired, "You have no recollection of that event at all?" and Hunnicutt answered, "No, I do not." Tr. 247. Further attempts to stimulate his memory were unavailing, with Complainant's Counsel inquiring, "To maybe refresh your recollection, do you recall an issue with a vehicle where the parking brake would engage or function when the vehicle was on a downhill slope but not an uphill slope?" Hunnicutt responded succinctly, "No." Tr. 247. The Court, surprised again by the response, inquired, "[t]hat doesn't jog your memory either?" Again, Hunnicutt answered, "No, it does not." *Id.*

Complainant's Counsel then inquired of Hunnicutt if, "[d]uring the course of your current employment, have you ever been the subject of any formal or informal discipline." Tr. 247. Hunnicutt admitted that he was disciplined one time, for "Removing -- given authorization to remove a red tag on a piece of -- on a track hoe that had a tag on it." *Id.* Counsel characterized it as a red tagged piece of equipment that had been tagged as unsafe. Hunnicutt answered, "[c]orrect." Tr. 247-48. Hunnicutt admitted that he was found to be in error in allowing the red tag to be removed. *Id.*

Hunnicutt agreed that he had assigned three other employees to operate the boom trucks in the months prior to December 2015, each of whom was NCCCO certified. Tr. 248. Asked why he had not on those previous occasions assigned the boom truck to Ruiz, Hunnicutt offered that he "had [Ruiz] doing dozer projects for me at the time." Tr. 249. Hunnicutt agreed that it was simply the "luck of the draw, [t]hey spent a lot more time on boom trucks and stuff previous to them rolling into my crew." Tr. 249. This was at the time that the crews were combined, but Hunnicutt admitted that "You can't bring that many people into a crew and just start breaking them out. *You got to put them somewhere where they're comfortable, knowing that they can do it.*" *Id.* (emphasis added).

Also, Hunnicutt admitted that he knew the other three employees had spent more time on a boom truck and that they all, including Ruiz, possessed 5023 qualifications. *Id.* A 5023 form is valid for one year. Tr. 250. Importantly, Hunnicutt admitted that at the time he assigned Ruiz to the boom truck in December 2015, Ruiz *did not* then have a valid 5023 form. *Id.* Accordingly, Hunnicutt conceded that "before [he] made the assignment on the 16th, [he] knew about the training on [December] 14th and [Ruiz's] objection to using the equipment on [December] 10th." *Id.*

Testimony of Kathleen Binegar

Kathleen Binegar is employed by Pinto Valley Mining Corporation, which is owned by Capstone. At the time of the hearing she was the HR representative for the mine department, but during the events in this case her job was HR business partner for the processing department. She analogized her job then as akin to a field HR person. Tr. 253-56. Prior to the events in issue, she knew Ruiz only casually, but had no adverse interactions with him, and she had a positive impression of him. Tr. 256-57. Her involvement with the matters of December 16th began when Hunnicutt called her at 6:30 in the morning, wanting to speak with her about Ruiz. She could not recall if Hunnicutt expressed the reason for the call but that both he and Ruiz were on their way to speak with her. The meeting then convened with Pena, Bell, and Pearson also in attendance. There was, according to Binegar, a brief meeting with her, Hunnicutt, and Pearson, prior to the meeting with Ruiz. Tr. 259. At that meeting, Hunnicutt advised that Ruiz had been “disruptive,” and that “that they wanted to talk to us about what we can do as far as additional seat time.” *Id.* When the full meeting then followed, according to Binegar, Ruiz raised the seniority issue and the response was that seniority was not a consideration in job assignments. However, she added that Ruiz “talked about safety, and as a group we talked about what we could do to help [Ruiz] feel more comfortable operating equipment. We came to the conclusion that additional seat time is probably what needs to happen next.” Tr. 260. The Court notes that Binegar admitted that *Ruiz was on board with that decision.* *Id.* Binegar stated that the meeting “ended on a pretty positive note,” a change from her description of the meeting’s start, which she described as “very tense.” Tr. 259.

Thereafter, still during the morning of December 16th, Sam Clark superintendent of the area, met with Binegar. She advised that, as a result of the earlier meeting, their plan was “to provide space that wasn't congested for [Ruiz] to have some more seat time.” Tr. 261. However, Binegar added that as the company attorney was on site that day, she wanted to discuss the situation with him, as she considered it to be “a little bit of an unusual case.” *Id.* Clark advised that he wanted to attend that meeting with the company attorney. Clark was frustrated and unhappy with the feedback he received about Ruiz disturbing the line-out meeting. *Id.* Upon meeting with the attorney, it was decided to suspend Ruiz, pending an investigation. Tr. 262. Binegar stated that Sam Clark made that decision. According to Binegar, she started the investigation shortly after that, although the Court would comment that it is difficult to determine just what there was to actually investigate.

In any event, Binegar informed Hunnicutt that she needed to talk with Ruiz. She stated, “We brought [Ruiz] in the office and explained to him that we were going to do an investigation. He would be paid while he was off, and it would be best that he's not on the property and that we would certainly bring him back to get his testimony.” Tr. 264. The Court would comment that at least Binegar recognized that Ruiz should be included in her “investigation.”

Understandably, Ruiz asked why he was being suspended. Not so understandably, Binegar admitted that she “was vague because there were several things that we were looking at the time, and I didn't feel at liberty to tell him exactly.” *Id.* To put it more accurately, Binegar did not really tell Ruiz anything. In the Court’s view, this heralded the start of a biased investigation. The Court noted this, asking Binegar, “You say you were looking at several

things. You were vague. . . . You just said we were looking at several things at that time. What were those several things?” Tr. 264. Binegar responded, “Judge, they brought to my attention -- I wasn't aware until lunchtime about how he refused to operate equipment on the 10th and that he had received additional training, and that's basically what it was. They wanted more information on this line-out incident.” Tr. 264-65. However, based on the testimony received up to that point, it was clear to the Court that the “information” supposedly sought was already well known and that what was really afoot was to look at the line-out meeting as a basis to terminate Ruiz. Moving toward that obvious goal, firing Ruiz, Binegar then began preparing her questions to ask the crew members.

Counsel for the Respondent then turned to Ruiz's interview from Exhibit R 27. Tr. 266. Binegar stated that she interviewed some 12 to 13 members of the crew that were present on December 16th. Among other information Binegar developed during her investigation was Ruiz' NCCCO certification and his refresher training for that equipment. Binegar expressed that the significance of one such as Ruiz signing the forms, is that “if an employee signs, that [means, according to Binegar] they feel comfortable operating that piece of equipment.”¹⁶ Tr. 270-71. The Court noted that Ms. Binegar's view of the effect of signing the form was a legal opinion and accordingly a matter for the Court to decide. Tr. 271. Also within her investigation was a letter from Gray, the NCCCO trainer, who asserted that “Ruiz did not participate when he was conducting the crane training.” *Id.* That letter asserted that Ruiz did not want to operate the swing cab crane. Tr. 272. Binegar expressed that, based upon her interviews and what transpired at the line-out meeting that “the company felt that we had given him training and that he should at least participate in training.” *Id.*

Binegar was then asked about her conclusion on the issue of insubordination. She responded, “[w]hen I interviewed the crew, they felt as a whole that they were uncomfortable, that it was getting hostile, and they couldn't understand why [Ruiz] would deny the job when he didn't even - didn't even know what the job consisted of.” Tr. 272. The Court finds it *very unlikely* that the crew as a whole, or even any individual member of the crew, would entertain such thoughts on their own, unprompted.

Binegar was vague when asked about Ruiz's refusal to leave the meeting, asserting that “[m]ost of them stated that it got uncomfortable, and they were, frankly, very surprised that he didn't obey.” Tr. 272-73. Led by Respondent's counsel inquiring if that was “a consistent theme,” Binegar stated that it was. Tr. 273. On the issue of Ruiz's safety concerns, Binegar stated she “believe[d] Abe Romero and Ralph Holmes mentioned something about safety.” *Id.* However, Binegar admitted that her notes were not verbatim. The Court inquired about the atmosphere surrounding Binegar's investigation, learning that each crew member was interviewed individually, along with the presence of their immediate boss, Hunnicutt, and a union steward. Tr. 273-274. Hunnicutt's presence during the interviews of the crew was inherently intimidating and therefore inconsistent with frank and full disclosures in the

¹⁶ Serendipity no doubt at work, Binegar and Hunnicutt, both non-lawyers, expressed the same view of the legal effect of signing the NCCCO certification by one who had been trained. Yet, as best the Court could determine from the relevant exhibits, the certification itself makes no such pronouncement. *See*, R's Ex. R 9 and R 22.

“investigation,” if comments were critical of Hunnicutt. Binegar’s recollection that Romero and Holmes only mentioned “something about safety” is instructive of the pre-determined result behind her “investigation.” In the Court’s view, Binegar’s investigation notes, which were not verbatim recordings of the words of any crew members, were inherently slanted; the agenda was firing Ruiz.¹⁷

Turning to her investigatory interview of Ruiz, she remarked that the Complainant “felt he needed more seat time. He was cooperative.” Tr. 275. As to the line-out incident, Binegar acknowledged that Ruiz expressed that he believed he had an agreement to stay in the meeting with Hunnicutt. *Id.* She added however, “he seemed to be the only one that felt he had that agreement.” *Id.* She could not *remember* any other crew member feeling that Ruiz had such an agreement. *Id.* It was not until the end of December that Binegar got together with Clark to discuss the matter. The result was Clark making the decision that Ruiz should be fired. Tr. 276. She could not recall if she brought her investigatory notes to her meeting with Clark, nor could she even be sure if she showed her notes to Clark. She summed up her reasons for agreeing with Clark’s decision: “Well, with insubordination at the line out, refusing the training, prior discipline, we just felt that it was justified.” Tr. 277. While she admitted that, in the earlier meeting, there had been, in the words of Respondent’s Counsel, an “informal agreement about additional seat time,” Binegar maintained that was before she knew “about the other. I was not aware.” *Id.* That is, she agreed she was swayed by what she learned during her “investigation.” *Id.* Turning to Exhibit R 24, the Respondent’s rule governing insubordination, the Court remarked that it was not very enlightening. In full, the company rule provides, “Insubordination will not be tolerated.” Rule 19 within Ex. R 24. There is no definition provided of what constitutes insubordination. Tr. 278.

On cross-examination, Binegar was directed to Ex. R 10, the letter of termination for Ruiz. Although she was asked to review the letter, she stated that she did not write it, nor did she have any input in its drafting. Tr. 280. The Court asked if she edited it, and Binegar stated she did *not recall* editing it, then adding that she made no changes, suggestions or alterations to the termination letter. Tr. 281. Complainant’s counsel read from the letter’s first paragraph, which provided, “We investigated your refusal to participate in swing cab crane training, your refusal to operate the boom truck, and your refusal to comply with the instruction to leave the line-out meeting and go to your supervisor's office.” Ex. R 10. Binegar was then asked if those were the three things she investigated. In response, she stated, she “actually investigated the line-out meeting and in doing so, when I was asking for records, we went into the -- it fell into where he was qualified in his training.” Tr. 281-82. However, Binegar agreed those three things led to Ruiz being fired.

¹⁷ This is further demonstrated by Binegar’s looking into prior disciplinary actions against the Complainant. Those had nothing to do with the two issues at hand; Ruiz’s fear of operating the boom truck and crane and the line-out meeting where that concern came to a head. Binegar stated that, as to prior disciplinary actions, she found three in his file. They were for “[h]arassment and f-ing off employees with the finger.” T. 274. Then, her citing of the three instances apparently lost, the three became one, with Binegar advising that “it” was reduced from a written warning to a verbal one. Tr. 274.

Continuing with the termination letter, Binegar agreed that it cites to Rule 19 within Respondent's "Safety and Operating Rules," and its words to the effect that "insubordination will not be tolerated." Ex. R. 24. The letter continues, stating that Ruiz's refusal to do the three identified things (i.e., his refusal to participate in swing cab crane training, refusal to operate the boom truck, and refusal to comply with the instruction to leave the line-out meeting and go to his supervisor's office) were insubordinate. Tr. 282. Binegar was of the view that Ruiz was insubordinate at the line-out meeting. In fact, Binegar agreed that the focus of what she was doing was looking into the line-out meeting. *Id.* Asked what was insubordinate about Ruiz's behavior at that meeting, Binegar stated, "When Doc [Hunnicut] asked him to leave the meeting and he did not. That was basically it." Tr. 283. She then added, "And then he made those side comments about this is not high school and it's going to get ugly." Tr. 283. Binegar agreed that she didn't know about any of those three things until her noon meeting with the company lawyer. *Id.* Accordingly, Binegar was asked if that meant when Hunnicutt and everyone came to the meeting in Pearson's office, Ruiz's behavior was not a topic. Binegar then offered that she knew something had happened at the line-out, but she maintained she had no specifics at that time. *Id.* She agreed that the primary topic at that earlier meeting was Ruiz's concern about safely operating the equipment. However, she added that Ruiz raised the issue of his seniority rights and she advised that was not a legitimate objection. Tr. 283-84. Binegar was then asked the same question which was posed to Hunnicutt, namely would it be insubordination if Ruiz mistakenly believed that seniority was a basis to protect him from running the equipment, and Binegar responded, "Absolutely not." Tr. 284.

Binegar also conceded that when the meeting ended on December 16th, she thought a resolution had been reached on the issue of Ruiz safely operating the equipment. Tr. 284-85. Further, she agreed that she had no reason to think that there would be any subsequent investigation. Tr. 285. This only occurred after the meeting when she then spoke with Clark and following that, when she and Clark then spoke with the company attorney. *Id.* When asked if this new twist occurred because Clark had spoken with Hunnicutt, Binegar stated she did not know, but she admitted that Clark was "spun up" about something. *Id.* The notice of suspension, which Binegar prepared and which notice was signed by Hunnicutt, followed that meeting. Ex. R25; Tr. 285-86.

Elaborating on the December 14th issue of Ruiz's alleged failure to participate in the training, Binegar remarked that Ruiz stayed in a pickup truck. Tr. 287. However, she admitted that she had *no idea* how anyone knew that Ruiz had not participated in some aspect of the training on December 14th, stating she "*did not know any specifics.*" *Id.* (emphasis added). This is further evidence of a slanted "investigation."

Regarding Ruiz's alleged earlier disciplinary infractions, Binegar admitted those were not among the reasons given for his firing, but remarked she thought "they were taken into consideration." Tr. 289. This was despite the fact that those earlier matters were not mentioned in Ruiz's termination notice. *Id.*

Asked about her notes and the entry for December 30th regarding her second interview of Abe Romero, Binegar admitted that Romero came back and requested a second interview. Tr. 289-90. Binegar agreed that, among her notes, there is mention about Ruiz being scared and his

need for proper training. Tr. 290. Interestingly, Binegar apparently did not think to ask about whether Hunnicutt's behavior played a role in employees feeling uncomfortable at the line-out meeting, adding that it was "probably both" that contributed to that tense atmosphere. Tr. 292. Binegar asserted that she did not sense that members of Hunnicutt's crew would feel uncomfortable when being questioned about the events, despite Hunnicutt being present during those question sessions. Hunnicutt was present for *every* employee interview. Tr. 293. Hunnicutt, it should not be forgotten, was the crew members' boss. Adding to the oddness and lack of objectivity with her "investigation," Binegar stated that she *never* interviewed Hunnicutt. *Id.* Directed to Ex. R10, and Ruiz's remark to Hunnicutt at the line-out meeting that "this is not high school," there is no dispute that Ruiz made that remark. Counsel for Complainant then inquired about the alleged comment by Ruiz to "watch what is going to happen, this is going to get ugly," asking who told her that remark was made. Binegar couldn't answer that very fundamental question, stating she "would have to check her notes." Tr. 295. Then, asked if it would surprise her that her notes don't record any such remark, Binegar only offered that she "heard it somewhere," an especially odd response for one conducting an "investigation." *Id.*

Continuing with the cross-examination of Binegar and her notes, counsel directed her to the 7th page of Exhibit R 27, where she made a remark that Ruiz was always crying seniority. Binegar remarked that "It just seemed to be a common theme from him," which, according to her, came up whenever Ruiz didn't want to do something. Tr. 297-98. Binegar dug a deeper hole for herself on this issue, displaying the clear predisposition of her "investigation." Though she stated that she was "not sure" if her conclusion was based on events outside of her investigation, and she admitted that other employees *were not* remarking that Ruiz was always crying seniority, Binegar revealed her bias by uttering that Ruiz "was a very outspoken employee." Tr. 298. The Court noted that description was not a compliment and Binegar then admitted that it was, indeed, not expressed as a compliment. *Id.* In fact, then Binegar admitted that the characterization of Ruiz always crying was *her* description. *Id.* Further displaying her predisposition and animus towards Ruiz, she added, "He was very vocal. If there's anything, he would go right to the union steward." Tr. 299. However, despite her claim that he would go to the union steward for "anything," she was unable to "recall specifics right now." *Id.* She then added that such prior issues sometimes ended up in her office. Of this she was clearly not happy that Ruiz brought up issues. Further, the merits of these matters didn't seem to concern Binegar, as she conceded that there were "probably" times when Ruiz was right about a dispute. *Id.*

Regarding Ralph Holmes' second interview on December 22nd, Binegar expressed that Holmes was bothered by the whole line-out event. Hunnicutt, Holmes' boss, was per usual, present again. Binegar admitted that she let Holmes just speak but did not interview him. Tr. 300. Binegar conceded that her notes of Holmes' remarks reflect that the disturbance or contentious atmosphere was attributable to *both* Hunnicutt and Ruiz. Tr. 301. Binegar also conceded that the investigation interviews reflected that the crew felt Ruiz "was a good operator, I don't think they have a problem with him. They know he's vocal." *Id.* Here, contrary to the implication of Binegar's testimony about her view of Ruiz's penchant for speaking up, the Court would note that being vocal is not inherently a flaw. In matters of safety, it is an attribute.

Turning to her notes of her questions for members of the crew, Binegar agreed that, per her notes for Ralph Bearup, they reflect that “Doc [Hunnicut] gave his safety meeting and work assignments. MR [Ruiz] refused job. Responded ‘not going to do it.’ *Not safe*. Doc said come to office. MR responded you keep doing this.” Tr. 302 (emphasis added). Binegar agreed that Bearup mentioned Ruiz’s safety concern at the outset. Tr. 303. Asked if she relayed Bearup’s comments to Clark, Binegar couldn’t “remember specifically.” *Id.* Binegar stated that she gave Clark a summary of her notes. She then stated that it would not surprise her if Clark stated that he read transcripts¹⁸ of her interview. Tr. 303. That meant, Binegar conceded, that Clark would have seen her notes, not just her summary. Further, she stated there were no actual transcripts, only her notes. *Id.* Accordingly, Binegar agreed that if Clark did read her notes, then he would have been aware that Ruiz stated he didn’t feel safe operating the equipment. *Id.* Further, Binegar agreed that if Clark remarked that nobody stated that Ruiz had safety worries about operating the equipment, then he was either lying or he didn’t see the notes. *Id.*

Complainant’s Counsel then moved to Binegar’s first interview of Ralph Holmes. Asked if her notes reflect that Holmes stated, “Manny [Ruiz] was assigned a boom truck, said he’s unsure and he thinks it’s unsafe *and then* he said seniority, right?” Tr. 304 (emphasis added). Binegar agreed. *Id.* Continuing with Complainant’s Counsel’s review of Binegar’s notes, for Abe Romero, those notes reflect that Ruiz brought up both the issue of seniority and then his safety concerns. Tr. 305. Regarding her notes for Jayro Phillips, Binegar admitted that her notation that Phillips stated that Ruiz “doesn’t like it,” referred to Ruiz not feeling comfortable operating a boom truck. Tr. 306. As to Binegar’s notes about the crew’s comments regarding the line-out meeting, when asked if those notes reflected the specifics about the comments of those crew members, Binegar admitted that she “could have been more extensive.” Tr. 307. The Court would comment that a more apt and forthright response to that question would have been, “no, they do not reflect the specifics about the crew members’ comments.” Yet, that was the purported purpose of her investigation – to get the facts. Further demonstrating that Binegar was anything but objective in her “investigation,” regarding her notes for Justin Vickers, when Vickers was asked “do you feel [Ruiz was] being singled out in any way, Vickers responded, “supervisor quick to write him up,” Binegar admitted she failed to ask any follow-ups about why Hunnicutt was quick to write up Ruiz, offering as her excuse that “[a]t the time I was just investigating the line-out meeting.” Tr. 307. However, she then admitted that Ruiz told her at the outset of his interview with her that it was his assertion that Hunnicutt was targeting him and had it out for him. *Id.* Further, she admitted that she did not follow-up on Ruiz’s assertion. Tr. 308.

It was also Binegar’s suggestion that Ruiz receive some additional seat time in a remote area. Tr. 309-310. Significantly, Counsel for Complainant made the probative observation that there was “not one place in any of these notes where [Binegar made] any statement that Manny Ruiz at any time in the line-out meeting stood up or was standing.” Tr. 310. Binegar, lamely in the Court’s view, only replied that she “did not ask that question.” *Id.* She asserted that wasn’t an issue to her. Not only that, Binegar agreed that nobody stated that Ruiz stood up or was standing either. *Id.* As to the claim that Ruiz said this was going to get ugly, the Court inquired

¹⁸ Binegar’s notes were just that, notes, not verbatim records of the questions she asked, nor the answers that were given. Therefore, the term “transcripts” is an inaccurate term as applied to her interviews.

if there was any reference to that assertion in Binegar's notes, per Exhibit R27. Binegar conceded the remark was not present either. Tr. 311-12.

Binegar agreed with Counsel for Complainant's summary of witnesses in her "investigation" that, having just testified about "the interviews [] with Abe Romero, Ralph Bearup, Ralph Holmes, Jayro Phillips and Dustin Vickers, five employees[,] [i]n [her] interviews with them, they all mentioned something about Manny Ruiz saying that he was not comfortable or didn't feel safe operating that equipment." Binegar affirmed that the summary was accurate, responding, "Correct." Tr. 312-13. Asked if she reported that to Mr. Clark, Binegar again responded, feebly, "I don't recall specifically." Tr. 313.

Testimony of Samuel Clark

Samuel Clark is the superintendent of the hydromet and tailings at the Pinto Valley Mine. Tr. 318. He described the road construction maintenance and the tailings dam maintenance, as being,

generally considered under tailings. There's a lot of work that the road crew does that does end up around tailings as well as either on the dam crest, the reclaim area, as well as the catchments below the face of the dam. . . . [together] [t]here are 52 budgeted employees . . . [o]f the 52, 8 of those are on salary and 44 are hourly.

Tr. 321.

Hunnicut and Pearson are within his chain of command with Pearson, the senior supervisor, reporting directly to him and Hunnicutt reporting to Pearson. Tr. 321-22. Clark stated that when he first learned of Ruiz, it "was related to a disciplinary action back in November of 2014, but at the time [he, Clark] wasn't directly over tailings." Tr. 323. However, apart from wedging in a negative remark about Ruiz at the start, Clark admitted he "really didn't have anything to do with [that] discussion at the time," adding that, *from what he heard*, Ruiz's behavior wasn't the best. Tr. 323. The Court notes that, apart from his opening negative comments about Ruiz, the more significant observation regarding that vignette was Clark's admission that the disciplinary matter he cited was dismissed. *Id.*

Regarding the events of December 10, 2015, Clark recounted the stories, told to him by others, that Pearson was overseeing the line-out that day. Hunnicutt had the day off. Pearson told Clark that "as they were going through the line-out that the lead man had asked [Ruiz] to operate a boom truck for pulling one of our wells to do some rehab on it and that [Ruiz] had indicated he didn't feel comfortable doing it." Tr. 324. Clark learned of this because, allegedly, it prevented that job from being done. Tr. 325. The job was done the following week. Tr. 326. In any event, Clark believed that Ruiz was uncomfortable because he hadn't operated a boom truck since his NCCCO training. Following that, Clark and Pearson went to Rose Dibona, the mine's training coordinator, to arrange some training for Ruiz. Arrangements were made to have Ronnie Gray provide some refresher training for Ruiz on his next scheduled work day. *Id.*

Clark stated that NCCCO training is not a legal requirement for persons to operate a boom truck, as long as they had a 5023. However, Clark's understanding was incorrect in that the mine's "internal procedure" required NCCCO training for any crane, including a swing cab or boom truck. Tr. 326. Prior to December 10th, Clark knew of those employees who had the certification to use that equipment. Tr. 327. Training then occurred on December 14th. Clark related that he learned that Ruiz "had refused to operate the swing cab and get refreshed on the swing cab." *Id.* Clark was troubled by the refusal, adding that he wanted to learn why Ruiz "had refused the training and if anyone else had refused the training or what might have occurred at the time." *Id.* The trainer, Ronnie Gray, subsequently provided a statement about the issue. Discussions then ensued with Clark, Pearson and Hunnicutt, as they "wanted to make sure that while [Ruiz's] training was fresh on the cranes that he be provided with some opportunity to have seat time as he had indicated that he lacked [that]," as they did not want much time to elapse between the refresher training and seat time. Tr. 328.

Clark then stated that there was no discussion for potential discipline against Ruiz for refusing to operate the equipment, advising, "[w]e don't discipline for safety." Tr. 329 (emphasis added). Clark reiterated that view, stating that he thanked Binegar and Pearson for addressing Ruiz's safety concerns "because we do want to make sure that people who have safety concerns that we provide them opportunities to overcome them or address them in some way." Tr. 336. However, Clark continued with the theme that Binegar and Pearson, neither of whom, it will be recalled, was present at the line-out meeting, described Ruiz's behavior in a manner that Clark concluded "appeared to be insubordinate and belligerent." *Id.*

Clark noted that the refresher training set for December 15th would include rigging training. As for seat time, Clark identified that they,

had a job on the leach stumps that needed to be done. It was a very simple job lifting a six-inch pipe. We needed to fuse it back together, supporting some fusing of the pipe. It's a fairly remote location, no traffic to speak of, and it would be a simple job that would be good to have Mr. Ruiz perform.

Tr. 330.

Clark could not recall who came up with the idea. Tr. 331. Thus, the Court would note that Respondent knew *exactly* the nature and details of the job that they planned to assign to Ruiz, yet Hunnicutt chose, artfully in the Court's view, to not provide Ruiz that information.

Clark stated that Hunnicutt sent him a text about the line-out meeting at about 6:30 a.m. on the morning of the 16th. The text, Clark described, "[s]imply indicated that Manny [Ruiz] had refused the job." Tr. 332. Clark responded that Hunnicutt and Binegar should talk with him and that they would consider sending Ruiz home for the day.¹⁹ *Id.* Clark added that *the tone* of Hunnicutt's text was that Ruiz's concern was not safety related. Tr. 334. Thereafter, that same

¹⁹ Clark also stated that he was approached that morning by Robert Jordan, a "safety specialist" at the mine. Jordan allegedly told Clark that Ruiz "had told him that he [i.e. Ruiz] was concerned that the company was going to be in big trouble because he thought he was going to get fired for raising a safety concern." Tr. 333.

day, Clark spoke with Binegar and Pearson who told him that Ruiz's claim was that he didn't want to operate the cranes because he had seniority over others who were trained. Tr. 334. Binegar and Pearson then reiterated to Clark that seniority was Ruiz's "first concern." Tr. 335. However, Clark then admitted that Ruiz did in fact raise safety concerns in the meeting and Pearson inquired what it would take to make Ruiz comfortable operating the equipment. *Id.* Both Binegar and Pearson told Clark that Ruiz wanted "more seat time." *Id.* A moving target, in terms of Binegar's and Pearson's shifting story of the events, they told Clark that at the line-out meeting, Ruiz did not raise any safety concerns. Of course, it should not be forgotten that neither Binegar nor Clark was present at the line-out meeting.

Interestingly, Clark admitted that, were it not for the claim of insubordination, the Respondent "would have provided more seat time," thereby acknowledging that Ruiz's safety concerns were valid. Tr. 341. In making his decision, Clark reviewed Binegar's notes of her investigation, although he added that he reviewed, "[p]robably half of them, give or take." Tr. 343. With that odd review practice, Respondent's counsel suggested that he was just skimming the notes, a characterization Clark agreed with. *Id.* Clark's conclusion was that Ruiz had displayed a "pattern of insubordination." Tr. 345. He filled in that description, stating,

[f]irst with the swing cab training, which granted at the time was -- I had asked for some investigation on, *but it wasn't something that I would have terminated someone over regardless of the outcome.* Come the morning of the 16th, he had two actions that were directly insubordinate. One in refusing the job on the grounds of seniority, which are not (sic) a sufficient basis according to our contract or our expired contract, and then his refusal to leave the line-out meeting.

Tr. 345 (emphasis added).

Clark considered those two offenses as equally significant. *Id.* Immediately contradicting himself, he then stated that claiming seniority does *not* constitute insubordination. *Id.* Left then, by his own testimony, with a single basis for the alleged insubordination, in capsulizing his conclusion that firing was the appropriate action, Clark stated, "Quite frankly, I've never known someone to be as blatantly insubordinate to their direct supervisor as [Ruiz] was to [Hunnicut] that morning. [Hunnicut] gave him an opportunity after he refused the job to actually speak with him in private, and he refused that as well." Tr. 348-49. The Court finds that Clark's description of the "opportunity" that Hunnicutt offered to Ruiz is a gross mischaracterization. Clark added that Ruiz "demonstrated every indication that he flat out was not going to do the job, and he didn't care what his supervisor had to say about it." Tr. 349. Clark maintained that Hunnicutt was *entirely neutral* on the issue of Ruiz being terminated, a claim that the Court completely rejects, as the credible testimony clearly shows otherwise.

Ruiz's termination letter was drafted with the assistance of legal counsel, but both Clark and Binegar had input into that letter, since Binegar's "investigation" notes had been provided to counsel. The mine's legal counsel suggested that the mine assert three independent grounds for insubordination but Clark rejected that, feeling that the swing cab training was not a valid basis to assert. Tr. 351.

During cross-examination Clark backed away from his earlier responses, expressing that Ruiz's actions regarding the December 14th swing cab training was "*potentially* insubordinate" and "*mildly* insubordinate," but *not* a basis to fire Ruiz. Tr. 352 (emphasis added). Asked if he had information from Ruiz about why he refused to participate in the training, Clark answered that he had Binegar's notes and from those it was clear that Ruiz "indicated that the swing cab scared him." Tr. 354. Thus, Clark, who earlier stated that safety issues are not a basis for insubordination, knew of Ruiz's safety-related fears. Further, Clark did not know how involved the swing cab training was and he conceded that Ruiz did not refuse to participate in it, nor did he refuse to participate in the training the next day. *Id.* In fact, Clark admitted that he knew that Ruiz was objecting because of safety, not seniority. *Id.*

Turning to the grounds for insubordination that Clark did rely upon, he agreed that one was Ruiz's refusal to accept the boom truck assignment. Tr. 355. The basis for Clark's determination that the refusal was insubordinate was that Ruiz "did not have valid grounds to refuse the task." However, that created a testimonial quandary for Clark, because his conclusion rested upon his finding that Ruiz's refusal was based on seniority. *Id.* Asked if he had any information that Ruiz had other grounds for not accepting the assignment, Clark answered, "[n]one that I saw or was told of." *Id.* Inconsistently, Clark then admitted that he knew less than a week earlier of Ruiz's safety concerns about operating a boom truck. Tr. 355-56. Trying to thread the needle, Clark maintained that Ruiz did not bring up the same safety concern again on the 16th. *Id.*

Inconsistently with his own testimony, Clark concurred with the characterization that Ruiz was simply using seniority to get out of running the boom truck. Tr. 357. Asked if he ever sat down with Ruiz to hear his concerns, Clark responded that he did not participate in the "investigation," nor did he know if Hunnicutt sat down with Ruiz to talk about his concerns. Tr. 358. Clark revealed that when he told Hunnicutt that they needed to assign Ruiz the job of operating the boom truck and crane, Hunnicutt "indicated the he flat out didn't think [Ruiz] would accept the job." Tr. 359. Thus, before the assignment was made, Clark and Hunnicutt decided to assign the job to Ruiz ostensibly so that he could get seat time. *Id.* Asked if there would be any reason that Hunnicutt could forget that he and Clark had that meeting and developed the plan to assign the boom truck to Ruiz, and that Hunnicutt's version, claiming that he, Hunnicutt, just decided to assign the job to Ruiz, was incorrect, Clark answered, "[p]ossibly, yes." Tr. 360. Therefore, Clark agreed that in advance he and Hunnicutt created a plan that they would be assigning the boom truck job to Ruiz. To be clear, the Court finds that Hunnicutt's version, contradicted by Clark, was false. The details of the job they planned to assign Ruiz, a job which was, in Clark's estimation, a "simple job," were never provided to Ruiz. As Hunnicutt and Clark knew of the simplicity of the job assignment, they could have easily informed Ruiz of this at the time. Though only Clark and Hunnicutt knew of the claimed simple nature of the boom truck assignment, Clark, seeing things differently, believed that the onus was on Ruiz and that he would have learned of its simple nature if Ruiz "actually had gone into the supervisor's office for that discussion that he refused to do." *Id.*

As to the other claimed act of insubordination, Clark conceded that Hunnicutt *had an opportunity to inform Ruiz that the job was an easy one.* Tr. 362. This is consistent with the Court's earlier observation. Importantly, as to whether the line-out confrontation occurred as

Clark described it, his understanding was based on his discussions with Hunnicutt, Binegar and Pearson. Of course, only Hunnicutt's account was firsthand, as Binegar and Pearson were never in that meeting.

Clark then admitted that he first learned of the dispute during the line-out meeting with Ruiz from Hunnicutt, not Binegar. Tr. 363. Thus, the version Clark bought into from the start was Hunnicutt's retelling of the event. Oddly, Clark asserted that Hunnicutt's version was "substantiated in notes that [he] read from [Binegar's] interviews." Tr. 364. When confronted that Binegar's notes make no mention of Ruiz standing up at the meeting with Hunnicutt, Clark admitted that would surprise him as his recollection was different. Tr. 365. He then admitted that, since it was not mentioned in Binegar's notes, *the story had to have come from Hunnicutt alone. Id.* The same was true for the claim that Ruiz allegedly said "[t]his is going to get ugly." That is, those words also do not appear in Binegar's notes, *and Clark then conceded the source was, again, Hunnicutt. Id.* When Ruiz responded at the meeting to Hunnicutt that they were not in high school, a remark that Clark stated he was aware of being made, he could not recall what Hunnicutt's response was to that. Tr. 366. Thus, Clark *could not recall* if Hunnicutt responded to Ruiz by answering 'okay' or 'we'll talk about it later,' or anything else. Tr. 365.

In summarizing his review of the line-out meeting, Clark maintained that *at no time* did Binegar tell him "that multiple employees had mentioned that in the line-out meeting Manny Ruiz had said he felt that it was unsafe for him to operate the boom truck."²⁰ Tr. 367. Significantly, when asked if he had known about those fears held by Ruiz, if that would have changed his decision to terminate him, Clark avoided a direct answer, stating he'd "have to see what -- if there was that information, [he'd] have to review it, of course." Tr. 368. Pressed further, when asked if Ruiz,

had in the meeting behaved -- let's assume he behaved as you thought he had behaved and he had incorrectly raised seniority and that issue was dismissed but then he had explained that I don't feel safe operating this equipment as I've told you guys before, would that have impacted your decision to terminate his employment,

Tr. 368.

Clark then answered without equivocation, "Yes, . . . [because] it's not [his] practice to terminate someone for raising safety concerns." *Id.* Further, Clark admitted that the first person he spoke with was Bob Jordan and that Jordan told him of Ruiz's safety concerns and accordingly Clark conceded that he had "multiple interactions in the days *leading up to the line-out meeting* and

²⁰ Clark's memory let him down on this: As noted above, when asked, "And at any time did [Binegar] tell you that multiple employees had mentioned that in the line-out meeting Manny Ruiz had said he felt that it was unsafe for him to operate the boom truck, Clark answered, "[n]o. . . [n]ot that I recall." Tr. 367. He gave the same response of "[n]o, I don't recall that" when asked if Binegar informed Clark that Ruiz had concerns about operating the boom truck and that he felt uncomfortable about it. Nor could he recall if her notes made any mention of those fears and concerns held by Ruiz. *Id.*

then shortly after the line-out meeting where [he, Clark] knew [Ruiz] had some safety concerns.” Tr. 369.

Discrimination Claims under the Mine Act

This discrimination complaint is brought under section 105(c)(3) of the Mine Act, alleging a violation of section 105(c)(1), which 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).

In this instance the Secretary decided not to bring Ruiz’s complaint of discrimination on his behalf. In such circumstances, Section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, “the complainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination.” 30 U.S.C. § 815(c)(3). As the Commission stated in *Jaxun v. Asarco*, “[t]he Mine Act, the Administrative Procedure Act (‘APA’), and the Commission’s Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation.” *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007).

The legal framework for assessing discrimination claims brought under the Act is well-established and clear. 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).

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). However, the Commission and the courts have recognized that other activity, including a miner’s refusal to work in conditions that he or she reasonably believes to be hazardous, is also protected under the Act. *See Bryce Dolan*, 22 FMSHRC 171, 176-77 (Feb. 2000), and cases cited therein. Often, the Court will be called upon to consider indirect evidence of a discriminatory motivation for the adverse action.²¹

²¹ The Commission has stated that “[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Sec’y of Labor on behalf of Chacon v. Phelps*

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.²² 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 and when a complainant has established 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 motivated 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. At no point in this analysis is the Court sitting in judgment of the merits or demerits of the operator’s business decisions.

Dodge Corp., 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: “(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.” *Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.*

²² *Burlington N.*, 548 U.S. at 68 (quoting *Rochon v. Gonzales*, 428 F.3d 1211, 1219 (D.C. Cir. 2006)) (“[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which [in the context of Title VII retaliation claims] means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”). Although discrimination may be subtle, it “does not mean any action which an employee does not like.” *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981).

Discussion

Respondent contends that “[i]n this instance, Ruiz’s conduct at the December 16, 2015 line-out meeting was unprotected under applicable Commission precedent, and even if some of his conduct was protected, the Company has established that it terminated his employment for engaging in unprotected activity that it reasonably deemed to be insubordinate.” R’s Br. at 14. The Court has found otherwise. It rejects Pinto Valley’s claim that Ruiz’s employment was terminated for engaging in unprotected activity that it reasonably deemed to be insubordinate.

The Respondent notes that Ruiz initially refused an assignment to operate a crane on December 10, 2015, despite having volunteered for and received two weeks of training at the Company’s expense that resulted in his being NCCCO-certified to operate that piece of equipment. R’s Br. at 14. It is unfortunate that the training didn’t work out for both Pinto and Ruiz, but there is no suggestion that Ruiz entered the training with an intent to defraud Pinto. Instead, Ruiz’s fears and his articulated bases in support of his view that the training was inadequate caused him to speak up, lest a serious mishap occur. Especially with regard to the latter basis, a problem made worse by the long period between Ruiz’s NCCCO certification, and the demand that he run the crane, and the lack of seat time, those factors reasonably led him to voice that he felt incompetent to operate the cranes.

If one were to accept Respondent’s rationale, Ruiz, knowing that he was unskilled and afraid to operate the crane, still would have been required to accept the assigned task. If, as he feared would happen, an accident then occurred, with damage to the equipment, other miners or himself, Ruiz would have been responsible for the event. Holding a certificate is not the equivalent of genuine competency to operate the equipment the certificate relates to, where an employee is aware of his fear and lack of competency. Respondent’s citation to an OSHA press release is misplaced because it merely states that it will recognize NCCCO documentation as demonstrating that a certified operator meets OSHA’s requirements for crane operator proficiency; the piece of paper cannot outweigh the evidence that a certified person is not sufficiently skilled and consequently afraid to run a crane. Even the cited press release makes clear that it is the underlying ability, not the piece of paper that controls, “The ability of crane operators to safely operate mobile cranes plays a significant role in overall safety on most construction sites,” said OSHA Administrator John Henshaw. Therefore, it is very important that these crane operators are well trained.” R’s Br. at 15, quoting from the OSHA press release. Ruiz, it will be recalled, credibly testified both that the training was insufficient and that he was not confident he could safely operate the equipment.

The Respondent’s brief seems to acknowledge that it is proficiency, not paper, that controls, citing “the Company’s sensitivity to Ruiz’s safety concerns and its overall ‘commitment to . . . safety.’” *Id.* at 16, citing again to the OSHA press release. Respondent then effectively concedes that Ruiz’s concerns were valid and not motivated by an excuse to avoid a particular job, noting that it “initially assigned Ruiz another task, and then . . . ‘address[ed] the perceived danger in a manner that reasonably should have resolved the miner[’s] fears’” by sending Ruiz (and three other NCCCO certified crane operators) to refresher training. *Id.* Thus, it cannot be disputed that at least up through the time that the Respondent mine determined that refresher training was needed, Ruiz was not fit to run that equipment.

Respondent also points to *Secretary of Labor ex rel. Bush v. Union Carbide Corp.*, 5 F.M.S.H.R.C. 993 (1983), wherein the Commission held that where a miner's work refusal was not objectively reasonable, it was unprotected. R's Br. at 17. But here, the case is inapplicable, as Ruiz's work refusal has been found by this Court to have been objectively reasonable. As just noted, the Respondent's own actions support this finding.

The Respondent further asserts that, "In an observation that has equal application to Ruiz's case, the Commission stated: 'Where . . . the necessary communication between the miner and operator has occurred and management has taken corrective measures at some point repetition of the same complaint and work refusal loses the protection of the Mine Act.' *Bush*, 5 F.M.S.H.R.C. at 998." R's Br. at 18. The problem with this claimed analogy is that the situations are dissimilar, as the facts do not support the premise. To the contrary, the Respondent had taken some corrective measure by scheduling the refresher training, upon Ruiz's reasonable objection when assigned crane work after a significant dormancy, some two years after his initial NCCCO training. But "corrective measures" require that there has been a correction. Here, the one day event that Ruiz and others took could not shake off for him the great interval between the initial training and the decision to force Ruiz to operate that equipment. Here again, the Respondent acknowledged this – in the meeting following Ruiz's balking at the assignment during the line-out dispute, it was decided that Ruiz indeed needed, as he requested, more seat time to reach a point of competency and confidence so that he could run that equipment without creating a serious safety risk. That the Respondent subsequently tried to recast the conclusion reached at that meeting – that they would indeed provide Ruiz with the additional training so that he could do the job safely – is rejected. In effect, the Respondent reversed itself, at what the Court concludes was Hunnicutt's instigation, thereafter deciding that it would rewrite the meeting's conclusion to provide needed seat time, refashioning it as tentative and not final.

The Court notes that the Respondent's brief shifts back and forth between its claims that Ruiz unreasonably refused to operate the crane and its claim that he was insubordinate in the line-out meeting. It is noteworthy that less than a week elapsed between the crane events. As Respondent admits, on December 10th, 2015, when he refused to operate the boom truck, it neither compelled him to do so, nor did it discipline him. Instead, as just observed, the Respondent, admitting the validity of Ruiz's safety worries, arranged for refresher training four days later, on December 14th. When Ruiz was again assigned to operate the crane two days after the refresher training, the circumstances of that assignment had the odor of a set-up. The plan was set in motion before that meeting and the Court, considering the testimony as a whole, and its determination that Hunnicutt's credibility was low, did not conclude that it was mere happenstance for Ruiz to have been the last miner assigned a job that day.

From Respondent's view, with Ruiz having received the refresher training, he was estopped from asserting to Hunnicutt that he didn't "feel comfortable for the safety of [himself] and others running that equipment." R's Br. at 18, quoting Tr. 79-80. Accordingly, Respondent claims that the refresher training made Ruiz's repeated work refusal unprotected. R's Br. at 19. However, as stated above, the Court has already addressed this argument in two ways. A piece of paper, whether derived from the initial NCCCO training or through a refresher session, does not necessarily imbue a trainee with actual competency. Second, related to this observation, is the Respondent's recognition of this truth. After all, at the meeting post the line-out event, it was decided to give Ruiz more training, this time in a practical setting, described as seat time. It can

be stated that had the Respondent actually believed that Ruiz was competent to operate the equipment it would not have then acceded to additional, allegedly unnecessary, training.

Respondent also cites to *Braithwaite v. Tri-Star Mining*,²³ 15 F.M.S.H.R.C. 2460 (1993) and *National Cement Co. v. FMSHRC*,²⁴ 27 F.3d 526 (11th Cir. 1994) (“*National Cement*”) in support of its position. Quoting from the statement in *National Cement*, that “‘If the work refusal is not objectively reasonable, there is no protected activity,’” Respondent further notes that decision held that,

[t]he employee’s activity was not protected under this standard, . . . because the record indicated that the employee “had adequate experience with the bobcat to safely perform the activity’ as originally assigned, and even if that had not been the case, his supervisor’s suggestion that he use the wheelbarrow rather than the bobcat ‘was a reasonably safe alternative.’”

R’s Br. at 21, citing *National* at 533.

Respondent argues that the analysis in *National* is “*directly applicable.*” *Id.* It is not. The record fully supports the finding that Ruiz did not have adequate experience to operate either crane safely, nor was Ruiz offered any of the other equipment operator tasks which he was both competent and unafraid to perform. In effect, the Respondent admits this by turning to the refresher training to demonstrate that, after that short training, he suddenly became competent and safe to run the crane. The Respondent’s assertion that “[a]t no point did Ruiz assert that the training he received was deficient, or that the boom truck he was assigned to operate was defective or unsafe,” is a half-truth, because, as set forth above, Ruiz *did* assert that the training, including the refresher session, was inadequate. R’s Br. at 22. Adding the makeweight remark that Ruiz never asserted that the *equipment* was defective or unsafe is a distraction because Ruiz’s claim has always been that *he* was unsafe and deficient to operate the equipment. Again, the Respondent conceded his incompetency to operate the crane by putting Ruiz through refresher training and his continued insufficiency to run such equipment by agreeing, post the

²³ As the Respondent concedes, “The claimant in *Braithwaite* did not specifically reference safety as the reason for his discomfort in operating the larger truck, nor did he request additional training on the truck.” R’s Br. at 20, n. 8. However, Respondent then contends that Ruiz acted in a similar fashion. In making that claim of similarity, Respondent shifts from Braithwaite’s *failure to reference safety* to Ruiz’s *failure to request additional training*, as if the two failures are interchangeable and equivalent. They are not, and Ruiz did repeatedly raise his safety worries, as discussed above. Not helpful to the Respondent’s position, again citing *Braithwaite*, is its acknowledgement that “the employee still refused to perform [the job] [with the consequence that] the employer disqualified the employee from his job, although the employee was permitted to exercise his seniority to ‘bump’ another worker and remain employed in a lower grade position.” *Id.* Respondent had ample other qualified employees to run its cranes but, exercising exceedingly poor judgment, through Hunnicutt, it opted for an unnecessary approach that was antithetical to safety.

²⁴ In the Court’s view the *National Cement* decision is so dissimilar that it does not advance Respondent’s contentions at all.

line-out meeting, to provide additional seat time. As also noted earlier, Respondent's motives were displayed by the coy approach taken by Hunnicutt, who made Ruiz's assignment to run the boom truck the last assignment at the line-out meeting and by not informing Ruiz when the assignment was made that the task would be a simple one. Had Hunnicutt actually been motivated to give Ruiz the supposedly easy boom truck job, he would have informed Ruiz contemporaneously with the assignment of the nature of the task. Worse, since Clark maintained that safety came first, Hunnicutt would have been quick to provide Ruiz with the controlled conditions they claimed would accompany the assignment and not kept Ruiz in the dark about such details.²⁵

Finally, turning to Respondent's alternative claim that it was actually Ruiz's alleged insubordinate behavior that justified his firing, the Respondent looks to cases which conclude that insubordination is a legitimate basis for firing an employee. R's Br. at 22-23. However, no one disputes that can be a basis for termination, but to state the obvious, it must be determined that insubordination occurred. If the occurrence of insubordination is accepted for the sake of argument, it cannot be invoked where it is a mere pretext for the mine's actual motivation. Respondent asserts that it "terminated Ruiz's employment due to his additional unprotected statements and insubordinate conduct at the December 16, 2015 line-out meeting, including his refusal to leave the meeting when Hunnicutt instructed him to do so." R's Br. at 24. However, Respondent's basis for its claim of insubordination rests upon Binegar's investigation and Clark's conclusions, both of which, as discussed earlier, are seriously wanting. Respondent asserts that it "presented plausible evidence to support its conclusion that Ruiz was insubordinate, and has established that it was this conclusion – and not any discriminatory motive – that led Clark to terminate Ruiz's employment. This is all that is required in order for the Company to avoid liability under the Mine Act." R's Br. at 25.

Presenting "plausible evidence" is not the test. It is the Court that must determine what occurred at the line-out. That determination boils down to an assessment as to whose version of events was more credible. At the end of the day, the line-out meeting came down to Ruiz's accounting of the events and that of Hunnicutt. That determination was not difficult for the Court to reach; Ruiz was by far more credible than Hunnicutt. In fact, the Court was so struck by the lack of credibility with Hunnicutt's version that it so advised the parties at the conclusion of the hearing of that conclusion, in the hope that, aware of that determination, the parties would then settle the matter. The Court would also note that no amount of post-hearing briefing could overturn the Court's credibility determination, as that was made after hearing from Ruiz and Hunnicutt principally, but also upon the conclusion that neither Binegar nor Clark advanced Respondent's version of the events, in the wake of the line-out meeting incident.

In contrast, Counsel for the Complainant contends that the reasons for Ruiz's discharge were mere pretext. C's Br. at 1. In making that argument, Complainant notes that the termination letter cites two violations that were directly related to Mr. Ruiz's safety complaints, a

²⁵ The Court's reference to Respondent's claims that Ruiz's assignment would be an easy one with assistance provided to ensure that it could be safely performed, should not be taken to infer that the Court buys into as a fact that those safeguards were actually part of the assignment. No legitimate finding of fact can be made about the mine's claim in that regard. All that is truly known is that Ruiz was never informed of the claimed protections.

refusal to participate in swing cab crane training and refusal to operate a boom truck, while the third reason advanced was the allegation concerning the line-out meeting. As to the crane operation, the Court agrees with Complainant's Counsel's statement that the training Ruiz received occurred in August 2013 and did not involve moving the trucks/cranes from one location to another, or performing lifts with the equipment. Thereafter, Ruiz was not asked to run a crane until the end of 2015, which was more than two years after the initial training. C's Br. at 3-4. Further, the refresher training on December 14, 2016, whether for the boom truck or the 120-ton crane, did not involve any lifts or driving the vehicles, but only involved setting the outriggers and moving the boom. C's Br. at 5.²⁶ Binegar's own "investigation" notes reveal that other employees, including Ralph Bearup, Jayro Phillips, and Dustin Vickers mentioned Mr. Ruiz's discomfort and/or safety concerns. C's Br. at 9. The record also shows that Clark certainly knew about Ruiz's safety concerns regarding the cranes. C's Br. at 10.

The Court therefore agrees that the only basis remaining for the Respondent is the insubordination claim. As Complainant's Counsel notes, "[a]fter the HR meeting on the morning of December 16, 2015, Ms. Binegar was not aware of any reason that would justify an investigation or suspension of Mr. Ruiz, which materialized only after Mr. Clark spoke with Mr. Hunnicutt, causing Mr. Clark to be 'spun up.'" C's Br. at 8. As to the evidence regarding whether Ruiz actually was insubordinate, a claim based on his alleged refusal to leave the meeting, and for allegedly saying to other employees "watch what is going to happen, this is going to get ugly," Ruiz denied that the events occurred as Hunnicutt claimed and no other witness recalled Ruiz having made that comment. C's Br. at 11. Ruiz's behavior was not even a topic of discussion at the HR meeting, nor was he even asked about it when interviewed by Ms. Binegar as part of her investigation. C's Br. at 15. A further problem for the Respondent, Clark based his conclusion that Mr. Ruiz's refusal to operate the boom truck was insubordinate on his belief that Ruiz had only objected to that assignment based on seniority, not safety. C's Br. at 12.

As Counsel for Complainant observed regarding the affirmative defense that Ruiz was fired for its claimed insubordination, the Commission has stated,

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

4 FMSHRC 982, 993 (June 1982); C's Br. at 15-16.

The Court has concluded that Ruiz's version is the credible accounting of the events at the line-out meeting and that Hunnicutt's telling was not credible.

²⁶ The Court notes that Respondent did not rebut this description of the training, as it presumably could have by presenting testimony from Ronnie Gray.

CONCLUSION AND ORDER

To recap some of the findings by the Court, as discussed in detail above, following Ruiz's original training in August 2013 he was not ever asked to run a crane until more than two years and three months later, in December 2015. Ruiz's recounting of the inadequacy both of the original training and the one day refresher training was not rebutted by any witness. Based on the credibility determinations this Court has made, Ruiz established that Hunnicutt had an animus towards unions generally and to Ruiz as well. While Ruiz did balk at running the boom truck and crane, both objections were based upon his legitimate safety concerns, which concerns were acknowledged by the management for the Respondent. Besides these instances, Ruiz had *never* refused a work assignment, a fact which was also unrebutted by the Respondent. The Court finds that the order of Ruiz's objections at the line-out meeting was first safety, and then pointing out that others were comfortable operating a boom truck and only then, last, did he raise a seniority claim. The Court finds that Ruiz never stood up when questioning the assignment during the line-out meeting, nor did he state at that meeting words such as "watch what is going to happen. This is going to get ugly."

Demonstrating that the Respondent knew that there was a legitimate safety worry advanced by Ruiz, at the meeting which followed Hunnicutt's assignment at the line-out for Ruiz to operate the boom truck, Pearson voiced that they would give Ruiz more time and put him in a location where he couldn't hurt anyone and that they would add a qualified person to help and watch over him. It is noteworthy and instructive that Ruiz advised he was good with that arrangement. The December 16th, post line-out meeting ended with a verbal agreement that Respondent would provide Ruiz with the additional seat time and the matter was resolved. Only after that resolution did Hunnicutt, after sending Ruiz to operate a dozer in the fine ore, return to the meeting location, and then spoke with Clark, fanning anew the matter which had been resolved. It is also informative that when Ruiz was informed by Binegar that he was suspended, and Ruiz responded that he was at least entitled know the reason for the suspension, Binegar answered that it was for refusing to run the boom truck, not for alleged insubordination. The Court rejects Hunnicutt's claim that merely invoking seniority constitutes insubordination.

Ms. Binegar did not advance Respondent's defense either. She was given a private preview by Hunnicutt of his claim that Ruiz had been disruptive at the line-out meeting, but when the meeting actually occurred, *and Ruiz was then present*, the disruptive claim was not repeated before Binegar; only safety and the effect of seniority were discussed and the meeting ended, as Binegar admitted, on a "pretty positive note." In fact Binegar admitted that when the meeting ended on December 16th she thought a resolution had been reached. She also agreed that she had no reason to think that there would be any subsequent investigation. This new twist only occurred after Clark had spoken with Hunnicutt, following which, as she put it, Clark was "spun up" about something. Tr. 285. Clark did not attend that meeting, but he expressed his frustration and unhappiness to Binegar over the feedback he received about Ruiz disturbing the line-out meeting. That "feedback" came from Hunnicutt.

As made clear above, Binegar's "investigation" was anything but objective or fair-minded. The determination about Ruiz's fate was effectively made before the "investigation" proceeded; a sentence followed by the trial, as it were. Symbolic and instructive about her

“investigation,” Binegar admitted that management was vague about the reasons for Ruiz’s suspension. Tr. 264. Although she claimed that the vagueness was justified because they were looking at several things at the time, and didn’t feel at liberty to tell him exactly what those things were, such an approach was hardly consistent with a fair inquiry. *Id.* As this decision notes above, Binegar’s claim that they wanted “more information” about the line-out meeting was simply an effort to find reasons to terminate Ruiz. The course of Binegar’s “investigation” demonstrates its patent lack of objectivity. Binegar’s notes, she admitted, were not an attempt to fully and accurately record the remarks of the crew members. Rather, the notes reflected only what she chose to record, with no standard expressed by her as to what was to be recorded.

Further underscoring the lack of objectivity, Hunnicutt, the crew members’ boss, was present for each interview, a non-subtle impediment to full disclosure by the crew. Thus, the shortcomings in Binegar’s investigation were numerous. Another prime example of the investigation’s lack of objectivity is that Binegar never interviewed Hunnicutt. This serious deficiency existed even though she conceded at the hearing that the tense atmosphere at the line-out meeting was attributable to “probably both” Hunnicutt and Ruiz. The Court will not review each deficiency with the investigation, as they are recounted above. However, even as to a fundamental claim in her “investigation,” that Ruiz was alleged to have uttered, “watch what is going to happen, this is going to get ugly,” Binegar couldn’t answer who informed her that remark was made. Advised that her investigations notes don’t mention the remark, Binegar could only reply she “heard it somewhere.” Nor, she admitted, is there any mention in her investigation notes that Ruiz stood up or was standing.

Though she professed to be neutral about Ruiz, that characterization was belied by her remark that Ruiz was always crying seniority and, clearly implying that it was not a positive quality, she remarked that Ruiz was “a very outspoken employee” and that he would go to the union steward for anything, though the specifics of such matters somehow escaped her.

Binegar, like Hunnicutt, felt that, with Ruiz’s training at the mine’s expense, he was estopped from objecting to running the cranes, their position admitted despite the acknowledgement that Ruiz needed more seat time and despite the fact that his termination ultimately rested on insubordination. Even Ruiz’s termination letter stated that her investigation encompassed Ruiz’s “refusal to comply with the instruction to leave the line-out meeting and go to your supervisor’s office,” evidencing that the refusal to comply was a foregone conclusion, not a fact to be determined. Ex. R 10.

Superintendent Clark’s testimony may be quickly capsulized. He discarded any claim that Ruiz’s safety issues were suspect, as more training was scheduled, and as he remarked, the mine does not discipline for safety matters, adding that the mine wants to make sure that people who have safety concerns are provided with opportunities to overcome them or to otherwise address them. That left Clark with only a claim of insubordination. According to Clark, Ruiz was guilty of a “pattern of insubordination.” That “pattern,” consisting of the swing cab training, his alleged refusal based on seniority and his refusal to leave the line-out meeting when Hunnicutt allegedly told him to do so, quickly disintegrated. Clark himself erased the swing cab basis, advising that wasn’t something that he would terminate someone over, *regardless of the outcome*. Then, he tossed the second basis for his “pattern,” advising that a seniority claim does

not constitute insubordination. Left with Ruiz's alleged failure to leave the line-out meeting, Clark could only assert the broad conclusion that he had never before known of an employee to be as "blatantly insubordinate" that morning with Hunnicutt. But upon what basis did Clark form his conclusion that Ruiz so behaved before Hunnicutt that morning? We know it wasn't from Binegar's investigatory notes or from any other source except for one – that source being Hunnicutt.

Clark agreed that he and Hunnicutt created a plan in advance to assign the boom truck job to Ruiz. The details of the job they planned to assign Ruiz, which was, in Clark's estimation, a "simple job," were never provided to Ruiz. As Hunnicutt and Clark knew of the simplicity of the job assignment, they could have easily so informed Ruiz when it was made. In fact, Clark conceded that Hunnicutt had an opportunity to inform Ruiz that the job was an easy one. As also noted, regarding the question of whether the line-out confrontation occurred as Clark described it, his understanding was based on his discussions with Hunnicutt, Binegar and Pearson, but only one of those three, Hunnicutt, was present at the line-out. Clark admitted that he first learned of the dispute during the line-out meeting with Ruiz from Hunnicutt. Clark also conceded that details, such as whether Ruiz stood up at the line-out and the alleged remark that things were going to get ugly, both came from Hunnicutt, not Binegar. Neither claim was mentioned in Binegar's "investigatory" notes either.

For all of above stated findings of fact, together with the Court's associated reasons and analysis, the Court finds that Pinto Valley unlawfully discriminated against the Complainant, Manuel P. Ruiz, for engaging in protected activity and thereby interfering with his statutory rights, in violation of §105(c) of the Act. Further, Pinto utterly failed to establish any affirmative defense.

The Court directs Pinto Valley to permanently reinstate the Complainant to his former position at the mine, together with any back pay and interest due and with all entitled benefits. All references to the termination of Mr. Ruiz, and the reasons asserted therein, are to be removed from his personnel file.

Within 10 days of this Decision, Pinto Valley Mining Corporation shall post this decision along with a visible notice on a bulletin board at the mine that is accessible to each and every employee, explaining that Pinto Valley has been found to have discriminated against an employee, that such discrimination will be remedied, and that it will not reoccur in the future. The notice shall also inform all employees of their rights in the event they believe they have been discriminated against.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which the Pinto Valley Mine is located so that the Secretary may take the actions required by the rule.

Damages

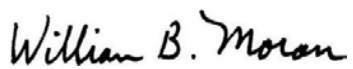
A successful complainant is entitled to be made whole for the entire period of his unemployment, plus interest. *See Local Union 2274, District 28, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988) (“Local 2274”). When a discrimination complainant's claim is granted, Section 105 (c)(3) of the Act provides that the administrative law judge may grant “such relief as it deems appropriate.”

Accordingly, the parties are ORDERED TO CONFER within 21 days of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this case. If an agreement is reached, it shall be submitted within 30 days of the date of this decision.

If an agreement cannot be reached, the parties are FURTHER ORDERED to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations, and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages and relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event of factual disputes requiring an evidentiary hearing, the parties should submit a joint request.

The Court retains jurisdiction of this matter until the specific remedies to which Manuel P. Ruiz is entitled are resolved and finalized, at which time a final decision will be issued. Accordingly, this decision will not become final until an order granting any specific relief and awarding any monetary damages has been entered.

SO ORDERED.


William B. Moran
Administrative Law Judge

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