

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, Suite 9500  
Washington, D.C. 20001

March 6, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of DANNY FOUST,	:	Docket No. KENT 2002-203-D
Complainant	:	BARB CD 2001-15
v.	:	
	:	Preparation Plant
MANALAPAN MINING COMPANY,	:	Mine ID 15-12602
Respondent	:	

**DECISION**

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant,  
Susan C. Lawson, Esq., Lawson & Lawson, P.S.C., Harlan, Kentucky, For Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by the Secretary of Labor on behalf of Danny Foust under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (“the Act”). The Secretary alleges that Manalapan Mining Company (“Manalapan”) discriminated against Foust by terminating his employment on May 31, 2001, as a result of his complaints about safety. A hearing was held in Harlan, Kentucky. Following receipt of the hearing transcript, the parties submitted briefs. For the reasons set forth below, I find that Respondent did not discriminate against Foust and dismiss the complaint.

**Findings of Fact**

Manalapan has produced coal in and near Harlan County, Kentucky for many years. After closing a facility at Brookside, Kentucky in 1997, it operated two facilities, the Highsplint Division and RB Coal, both consisting of underground mines, preparation plants and load-out facilities. Over the years, reductions in the market price of coal and decreasing quality of mineable coal have resulted in constriction of Manalapan’s operations. The Highsplint operation effectively closed on September 14, 2002. Tr. II 88-89; ex. R-11.<sup>1</sup>

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<sup>1</sup> The transcript of the hearing consists of two volumes. The transcript of the first two days is referred to as “Tr.” The separately numbered transcript for the third day is referred to

Danny Foust had been employed at a coal preparation plant owned by Great Western Coal, and was laid off when that operation shut down in 1995. In 1997, he began working for Manalapan, operating a bulldozer loading coal in the mines at Highsplint. Later, he worked on the crusher. When a vacancy occurred in a foreman's position at the Highsplint preparation plant, Foust, who had indicated an interest in such a position and was certified as a foreman and electrician, was selected for the job. Duane Bennett, Manalapan's chief executive officer, had heard reports that Foust was a hard worker and wanted to give him a chance at the position. Foust became the preparation plant foreman on the day shift in July of 2000. The foreman of the day shift was also in charge of the second shift, which had its own foreman. As a certified electrician, Foust was responsible for performing monthly electrical inspections and signing the "electrical book." Foust received an increase in pay and later became a salaried worker, earning \$700 a week. In addition he became eligible for higher bi-yearly bonuses and Bennett agreed to make half of the payments for a new truck that Foust purchased.

The preparation plant was a critical component of Manalapan's mining operation. All of the coal produced by the mines had to be processed through the plant to remove rock, clay and other impurities. Coal had been mined at Highsplint for almost 100 years and the quality of that remaining had declined considerably. Manalapan's most recent reject rate was as high as 50-60%, i.e., less than half of the raw product produced by the mines was marketable coal. The preparation plant, often referred to as a "washer," used water and chemicals to separate the marketable "clean coal" from the waste, or "sludge." Raw coal was crushed and combined with water and a chemical, "magnetite," which "floated" the useable coal from the sludge suspension. The clean coal was then dried, passed through screens where it was sorted by size, and transported by belts to stockpiles in the load-out area. Much of the water used in the process was recirculated. It was routed to a large tank called a "thickener" where a chemical, "Nalco", a cationic, was added to help cause the clay and other suspended impurities to settle. The sludge was moved to the tank's center by rotating "rakes," and was then pumped to a large impoundment area. Water that was not reused was discharged into a ditch that fed down into a series of settlement ponds. There was also a creek that flowed near the plant, roughly parallel to the ditch. Foust and other foremen were periodically directed to add Nalco to the water in the ditch and the creek. Trucks forded the creek making it muddy, and the Nalco settled the mud as the water flowed down into a large settlement pond and eventually into an adjoining river.

The Highsplint plant was an old facility, part of which had been re-built in conjunction with the installation of the present washer in 1987. It was designed to be operated by four men. Tr. II 33. Portions of the old plant were inactive, and some machinery had been removed. As recently as 1997, the plant had operated with three shifts, two running production, and the third performing maintenance. By the time Foust became foreman, the plant was operated on only two shifts. The primary responsibility of the day shift was to process coal. However, repairs often had to be made when equipment failures forced curtailment of plant operations. The primary responsibility of the evening shift was to perform repairs and maintenance that could not be done

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as "Tr. II."

while the plant was operating. However, the second shift typically processed coal for several hours before shutting the plant down, especially if the first shift had experienced significant down time. The respective foremen or members of their crews made daily notes of production and repair/maintenance tasks in a book. Ex. C-4. The first shift listed repair or maintenance tasks to be performed on the second shift, and the second shift checked the listed items as they were completed. If an item was not able to be addressed by the second shift, the first shift might do it, or it would be listed again the following day.

The preparation plant was a highly complex processing facility. There were numerous conveyor belts, vibrators and screens, motors, pumps, pipes and other devices, all of which experienced significant wear and tear in handling the abrasive coal and waste products. Continued efficient operation of the plant required substantial ongoing maintenance and clean-up. After Foust assumed his foreman position in July of 2000, the preparation plant was experiencing frequent breakdowns, coal spills, leaking pipes, and other problems, all of which impacted adversely on the production of marketable coal. The inability of the plant to process coal had caused the raw coal stockpile to grow to excessive proportions, almost ten times what it should have been, which threatened to force curtailment of mining activities. Tr. 507-08.

Bennett was increasingly concerned about the lack of production from the plant and the resulting inability to ship sufficient quantities of coal to maintain the economic viability of the Highsplint operation. In an effort to ascertain the causes of the problems at the plant, Bennett assigned Earl L. Goins, a foreman at the RB Coal preparation plant, to make an assessment of the Highsplint operation. Beginning in April 2001, Goins visited the facility during the day shift, two or three times a week for several hours. Tr. 551-53. He did not have extensive discussions with Foust about the operation, but did advise him of the purpose of his visits. Based upon his observations over a period of two weeks, he compiled a list of 12-14 problems that he felt needed to be addressed. He could not recall the specific items on the list, but described them as leaking pipes that needed to be repaired or replaced, damaged or worn chutes that caused substantial spillage, and similar items. Tr. 513-16. While he had concerns about Foust's ability to "boss" or manage the plant, he did not include any personnel issues on the list. *Id.* At least some of the second shift miners reacted with hostility to Goins' presence. He described "childish" things, e.g., a crude drawing of a man in a noose labeled with his name.

As Goins related his findings at the hearing, the plant was in a state of chaos. There were a "huge" number of leaking pipes and large amounts of coal spillage. In his words, the plant "just wasn't being took care of." Tr. 509-10. His concerns about Foust's management capabilities were based upon what he viewed as a lackadaisical attitude by the men under his supervision. "If something broke, the men weren't getting there to fix it." Tr. 511. He described an incident where a failure of a bearing required that a belt be shut down. Foust went to the problem and worked on it - but only one other man came to help, after approximately 15 minutes. Goins then went to look for the other men and found them just loafing or "piddling around." Tr. 548-49. Larry Ellis, the Highsplint surface foreman, made similar observations. Tr. 569.

In an effort to remedy the production problems, it was determined to try switching the personnel on the respective shifts. This move effectively demoted Foust, because the foreman of the first shift was also responsible for the second shift. Goins and Bennett testified that the switch was tried just to see if things would improve, and because they didn't want to do anything drastic to the men, i.e., discharge them. Tr. 533; Tr. II 83. There was some improvement in the first shift's production following the switch, and considerable improvement in the response to breakdowns. Tr. 544. However, the plant continued to experience too much down time to meet production goals. Tr. II 136.

Foust, who was a certified electrician, had inspected the plant's electrical system monthly, and through April 2001, had signed off on the electrical book. As Foust explained the purpose of the book, both MSHA and the State of Kentucky required that electrical equipment and circuits be inspected monthly and that the results of the inspections be noted in a book.<sup>2</sup> He would list any deficiencies and the date that repairs were made. Tr. 288-89. In late May 2001, about a week before the end of the month, Foust decided that he would no longer sign the electrical book, i.e., make the monthly certification that the electrical circuits of the plant met applicable standards.<sup>3</sup> Tr. 31-32; Tr. II 82. He did not want to be responsible for the electrical circuits, and feared that he might go to jail if someone got hurt. Tr. 210-11.

Foust's primary concern was overloaded circuit breakers located near the thickener. Tr. 211. The circuits for pumping sludge to the impoundment had become overloaded because a larger motor, and then a second motor, were added. Tr. 468-70. In order to keep the circuits closed and the pumps running, the doors to the breakers were left open and a fan was used to blow cool air to the breakers. He testified that this posed a serious threat of electrocution because a miner in the area might inadvertently contact one of the conductors carrying 480 volts. A miner might also be struck by pieces of the equipment in the event of a catastrophic failure. The condition was noted by a Kentucky State mine inspector, who threatened to shut the plant down. However, it was allowed to operate on the condition that the breaker boxes be closed and locked, with only a qualified electrician being in possession of the keys. Tr. 470-78.

Larry Shakelford, the Highsplint operation's shop foreman and chief electrician, had overseen the addition of the pump and had ordered new circuit breakers to handle the increased load. The breakers, which cost about \$35,000, required about six weeks for delivery. Tr. 468-72, 603. Six new boxes were delivered to the plant shortly after the Kentucky inspection, and were promptly installed by Shakelford. As far as Ellis was concerned, the problem with the breakers was Shakelford's, and he was "talked to" about that.

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<sup>2</sup> See, e.g., 30 C.F.R. §§ 77.800-1 and 77.800-2, requiring that written records be kept of monthly testing and examination of circuit breakers.

<sup>3</sup> Foust decided to cease signing the electrical book rather than make notations of the problems, because he felt that "they would never be fixed and they would shut us down." Tr. 290.

On May 30, 2001, the second shift commenced work at 3:00 p.m. and the plant was not operating. There were several major problems that needed to be addressed, and the crew worked overtime until about 2:00 a.m., on May 31, 2001. When the day shift arrived and powered-up the plant, it ran for a few minutes, but had to be shut down because of major damage to the clean coal conveyor belt. A strip, approximately a foot wide, had torn and become entangled in the structure, extending the tear to approximately 300 feet. Goins, Ellis and Gary Smith, then the first shift foreman, felt that the belt had been deliberately cut and tied off so that it would rip when the conveyor was powered-up. Tr. 522-23. Other individuals believed that the belt could have been damaged in the normal operation of the plant, e.g., by a piece of metal falling from the structure or mixed in with the raw coal. Tr. 83-85, 104-05. Bennett viewed this breakdown as the “last straw,” since he was paying the second shift men considerable overtime but couldn’t get any production. Tr. II. 85, 130-32. Bennett decided to discharge Foust and the miners on the second shift. Goins had advised him that he didn’t think Foust could control the men, and Bennett felt that Foust and the second shift were largely responsible for the plant’s problems. Tr. II 84-86, 107, 133. Ellis came back to him and asked to be able to move one of the men, Tommy Napier, to the first shift, which was short-handed, and he agreed. Tr. II 133. Foust and Derek Hensley were laid-off on May 31, 2001. Ex. C-19A. The other second shift miner, Robert Gross, worked two additional days.

The plant was shut down while a piece of belt from another conveyor owned by Manalapan was secured and spliced in. Operations resumed, but the plant continued to be plagued with breakdowns. More extensive maintenance work was normally performed at the beginning of July, when miners were on vacation. Bennett had hoped to be able to operate the plant until the July break, but was forced to alter that plan. A few days after the plant resumed operations, about June 11, 2001, when returning from an inspection of the impoundment, Bennett and John Phillips, Manalapan’s engineer, observed that the rakes in the thickener tank were not turning. The inability to pump sludge from the thickener dictated that the plant be shut down. There was a build-up of sludge on the bottom of the thickener, and attempts to rotate the rakes resulted in failure of the drive gears. The sludge pumps also failed. The water in the tank was dipped out and the built-up sludge, which had become quite dense, was removed with a small front-end loader. An old coat, a gear wrapped in a piece of brattice cloth, and a piece of metal railing were discovered in the tank. The gear had migrated to the center of the tank and blocked the opening to the sludge pumps. It appeared that the gear, and perhaps the other items, had been deliberately placed in the tank.

Bennett determined to shut the plant down for extensive repairs. He had not realized that it was in as bad a shape as it was. Even though parts needed for the normal summer shut down repairs had not been ordered, Manalapan commenced a major repair effort. As described by Phillips, pipes, chutes and beams were replaced. Feeders were out of level because the springs were broken and had not been replaced, which caused the metal to deform. Chute liners, which should be replaced as they wear out, had not been replaced, causing the chute itself to wear through. He estimated that the conditions were the result of many months of neglected maintenance. Tr. II 65, 73. R.T. Welding & Fabrication, a contractor that had done extensive

work at the plant in the past, was retained to perform some of the repairs. From June through October, R.T. Welding performed repairs costing over \$68,326.75. Tr. II 51-52; ex. R-10. The plant was operational after a couple of weeks, but repairs and maintenance continued through the summer as ordered parts arrived. By September, the plant was running efficiently with a crew of four men. The raw coal stockpile was virtually eliminated, and the plant eventually needed to operate only three days a week to process the coal produced by the mines. As noted previously, the Highsplint operation, including the preparation plant, was closed for the foreseeable future, as of September 14, 2002.

On June 11, 2001, Foust filed a complaint of discrimination with MSHA, alleging that he had been laid-off “due to complaining about unsafe work conditions at the Prep Plant.” Ex. C-12. The following day, MSHA initiated an inspection of the Highsplint preparation plant. Inspections continued to early September. A total of 102 citations were issued for various alleged violations. Ex. C-1.

#### Conclusions of Law - Further Findings of Fact

A complainant alleging discrimination under the Act typically establishes a *prima facie* case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818, n. 20. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

#### Prima Facie Case - Protected Activity

The Secretary asserts that Foust engaged in protected activity in three ways: his “refusal” to sign the electrical book, which is alleged to be the “primary” reason for his discharge; his raising of concern about putting Nalco into the creek; and his complaints to Ellis about various hazardous conditions at the plant. A complaint made to an operator or its agent of “an alleged danger or safety or health violation” is specifically described as protected activity in section

105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). I find that Foust engaged in protected activity when he stated that he would no longer sign the electrical book because of the overloaded circuit breakers. However, I find that he did not make other complaints about dangers or health or safety violations, and that his expression of concern about the use of Nalco was not protected activity.

Approximately one or two weeks prior to May 31, 2001, Foust determined that he would no longer sign the electrical book because he did not believe that the electrical circuits met applicable standards. His action was prompted by the overloaded circuit breakers near the thickener. Tr. 211; ex. R-6 at 34-36. At the hearing, he emphasized the dangers the overloaded breakers posed to miners, including the risk of electrocution. *Id.* When questioned about why the breakers were not treated as imminent dangers, however, he responded that the men “never [were] around the boxes.” Tr. 404. Gary Smith, who became first shift foreman and was then Foust’s supervisor, recalled him saying that he would no longer sign the electrical book. Tr. 628. Foust testified that he told Ellis he would no longer sign the electrical book. Tr. 210, 436-37. Ellis did not recall Foust stating that he would not sign the book. Tr. 584-85. I find that Foust told both Smith and Ellis that he would no longer sign the electrical book because he believed that the overloaded circuit breakers did not comply with safety standards. Foust, therefore, engaged in activity protected under the Act.

I also find that Foust raised concerns about the use of the cationic “Nalco,” in the creek. He did not refuse to put it in the creek, but sometimes just didn’t do it. Tr. 314. His concerns were the chemical’s toxicity to aquatic life and the effect it might have if it got into the water supply of people that lived downstream, and were largely based upon his mistaken belief that the creek ran directly into the adjoining river.<sup>4</sup> Tr. 216-20, 291. There is no contention that the chemical could not be used safely by him and other miners at Manalapan.<sup>5</sup> He did not express any concern over use of Nalco in the plant’s thickener or its placement into the ditch carrying water discharged from the plant to a series of settlement ponds. Tr. 216-18, 291, 421. Neither Foust nor the Secretary contend that the use of Nalco posed a danger to miners or violated the Act or any of the Secretary’s health or safety standards promulgated pursuant thereto. Foust’s concerns about the environmental impact of that particular use of the chemical were admirable. However, his expression of those concerns was not activity protected by the Act.

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<sup>4</sup> Manalapan introduced a geological survey of the mine property depicting elevations and the layout of the plant and settlement ponds. Ex. R-8. The survey, along with the testimony of Ellis and Phillips, its engineer, establish that the creek flowed into a large settlement pond, “Pond SG-1,” not into the river, and that Manalapan’s use of Nalco was consistent with all regulatory requirements. Tr. 573-74; Tr. II 56, 75.

<sup>5</sup> The label on the product cautioned that it: “May cause irritation with prolonged contact,” and advised that the product should not be allowed to “get in eyes, on skin, on clothing.” Ex. C-20. Foust testified that he read and followed the label’s advice and simply didn’t get it on himself. Tr. 314.

The Secretary argues that Foust also complained about a number of hazardous conditions described by himself and other witnesses. Foust, for example, testified that there were numerous electrical hazards, “guards were rotted off,” the “catwalk was rotted out,” and the “basement was full” of coal spills. Tr. 220-21. The Secretary asserts that Foust complained to Ellis about these various conditions. However, Foust’s testimony about the alleged complaints was very general, lacking as to times, dates and precisely what he complained about, other than lack of manpower. Tr. 213-14, 220, 400-01, 434-35. Foust’s credibility regarding this issue is highly suspect. I find that he did not make complaints about these various alleged safety hazards.

As a foreman who was designated to conduct daily workplace inspections, Foust had the responsibility to report hazardous conditions.<sup>6</sup> He acknowledged his responsibility to conduct preshift inspections, and his duty to report any hazardous conditions that he found. He testified that he did, in fact, note in the preshift reports anything that needed to be fixed, and acknowledged that it was his responsibility to correct hazardous conditions, including those involving the electrical system. Tr. 401-05, 442; ex. R-6 at 23, 25-26, 40-41, 50-51. Yet, an examination of the preshift reports that he authored fails to disclose any significant problems, the only notations being that floors needed to be cleaned. Virtually none of the various unsafe conditions described by Foust or other witnesses were listed in Foust’s preshift reports. Ex. C-3. To explain this inconsistency, he testified that his preshift inspections were quite limited. “Preshift is just checking the floors and the tunnel checking for methane. It’s just a preshift, real fast inspection.”<sup>7</sup> Tr. 403-04. Though he acknowledged that his preshift examination included

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<sup>6</sup> 30 C.F.R. § 77.1713, requires that the plant be examined at least once during each working shift and that a written record be kept of each such investigation “together with a report of the nature and location of any hazardous condition found.”

<sup>7</sup> Considerable evidence was introduced regarding another reason offered by Foust to explain why he did not correct the various safety hazards he described. He testified that substantial restrictions had been imposed on his ability to obtain parts and supplies, i.e., that every part or supply item that he wanted had to be approved by Ellis or David Patterson, the superintendent. Tr. 216. His testimony was marginally supported by Randy Kelly, who worked in the parts warehouse until he was laid-off by Bennett on February 16, 2001. He testified that the pre-approval policy “seemed” to apply only to Foust, not to the other day shift foremen, but didn’t know whether Gary Smith, then the second shift foreman, was subject to the same restrictions. Tr. 342-43, 355, 364-65. Kelly also explained that the warehouse maintained over \$1 million worth of parts and supplies, and that restrictions had been placed on the availability of some items, especially more expensive items like circuit breakers, because of a theft and concerns about waste and cost control. Tr. 347-48. He agreed that Foust got some of the things he requested, but not others.

Several other witnesses, including Frank Sargent, the warehouse manager, and David Patterson, the surface superintendent, testified that there were no special restrictions applicable only to Foust and described a common sense structure to the expenditure of funds for parts and



checking for all hazards, including electrical hazards, he testified that he only examined the electrical system during the monthly electrical examinations. *Id.* He explained that he had been a foreman for only a short time and that he wasn't familiar with the regulations.<sup>8</sup> *Id.* Despite his explanation, Foust acknowledged that the purpose of the preshift inspection was to prevent the men on his shift from being exposed to such hazards, and that there was never an unsafe condition that he couldn't fix before the men started working. Tr. 402-05, 444-45.

The record is the same with respect to various electrical problems claimed by the Secretary to have existed. Foust testified that he performed a thorough inspection of the electrical system each month, checking all the switches, breakers, and everything electrical. Tr. 288-89. If anything was wrong he would write it down and then enter the date when it was fixed. When he signed the book, he certified that "everything was right" in the electrical system. Tr. 209-10. Despite the claims of numerous electrical hazards, Foust signed off on the electrical book through April, 2001, certifying that there was nothing wrong with the electrical system.<sup>9</sup>

Foust typically described his complaints to Ellis as lack of resources, i.e., "not enough men and not enough time to . . . get all the stuff done" and not "enough men to run that big of a

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materials. Requests for expensive items, e.g. those costing \$500-\$1,000 or more, typically had to be authorized by management. Commonly used parts and supplies that were in stock, were obtainable upon request. Tr. 562-63. Sargent explained that managers initiated a request for parts or supplies by filling out a "Warehouse/Purchase Request" form. Respondent's exhibit 5 consists of a sampling of eight such forms initiated by or on behalf of Foust during February - April 2001. All of the requests bear notations that the requested items were purchased from a supplier. Tr. 667-68.

The weight of the evidence rebuts Foust's claim, and I find that his access to parts and materials was no more restricted than other managers. It would seem that if the availability of such items was as restricted as Foust claims, there would be ample supporting evidence in the form of purchase requests that bore no indication that the items had been ordered. No such documentation was submitted.

<sup>8</sup> Another troubling claim of ignorance by Foust occurred when he was questioned as to why he didn't report the alleged safety violations to MSHA. He answered that he didn't complain to MSHA because he would have been fired. When asked why he didn't submit anonymous complaints (*See* 30 C.F.R. §§ 43.1-43.8), he stated that he was unaware of his right to make anonymous complaints, though he acknowledged receiving training that included the subject of miners' rights under the Act. Tr. 378-79.

<sup>9</sup> As noted, *infra*, MSHA had conducted inspections in the plant during January to March, 2001, and served a number of citations on Foust. Foust was responsible for correcting those conditions, and they presumably were corrected.

washer.” Tr. 213, 434-35; ex. R-6 at 26-27. Moreover, when asked why he was fired, he stated it was because of his complaints about the use of Nalco in the creek and his refusal to sign the electrical book. He did not include the alleged complaints about other safety hazards. Tr. 210, 288, 408; ex. R-6 at 65-68. Ellis testified that Foust had not made any “safety complaints” to him. Tr. 569. Smith testified that Foust talked to him about general things, but did not recall him making safety complaints. Tr. 624-25.

I find that, with the exception of the use of Nalco in the creek and the overloaded circuit breakers, Foust did not complain about the various other conditions described by him and other witnesses. He made “general complaints” about limited resources, primarily what he viewed as inadequate time/men to do the job of running the washer. Foust’s general complaints to Ellis were not – were not intended to be – and were not taken as – complaints about dangers to miners or safety or health violations. When he made them, he was not exercising rights under the Act, and was not intending to do so. Rather, he was addressing why he was unable to remedy the frequent interruptions in the plant’s production.

### Adverse Action

Foust clearly suffered adverse action. While the May 31, 2001, notice advised him that he was “laid off,” Bennett intended to discharge him. His departure from Manalapan has been treated as a discharge. In any event, a lay-off or discharge would constitute adverse action for purposes of his present claim.

### Motivation

The principle issue as to Foust’s *prima facie* case is whether the adverse action was motivated in any part by his protected activity. In *Sec’y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999), the Commission acknowledged:

the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. “Direct evidence of [unlawful] motivation is rarely encountered; more typically, the only available evidence is indirect. . . . ‘Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.’” [citing *Chacon*]. In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.* We also have held that an “operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case” and that “knowledge . . . can be proved by circumstantial evidence and reasonable inferences.” *Id.*

As explained below, while Foust was discharged within a week or two of informing Ellis

that he would no longer sign the electrical book, I find that Bennett made the decision to discharge Foust entirely on his own and that he had no knowledge of Foust's protected activity. His decision was solely a product of his frustration with the plant's poor production, which he largely attributed to Foust's inability to manage effectively.

Bennett was Respondent's chief witness at the hearing. He impressed me as a candid individual, whose overriding concern was profitable operation of the Highsplint facility. He testified, without contradiction, that he generally supported his workers, gave them bonuses when times were relatively good and was reluctant to take adverse actions, such as discharges. He also impressed me as a man who believed strongly in "company loyalty," and who would take a dim view of his employees invoking outside forces, such as MSHA, in the operations of the facility. In a telling response to a question about whether Foust was called back to work after being laid-off, Bennett stated: "No, he filed against me," i.e., Foust had filed a complaint of discrimination with MSHA. Tr. II 88. Bennett's expressed hostility toward Foust's post-termination exercise of his right, suggests that he harbored hostility toward miners' exercise of rights under the Act. However, there is no evidence of pre-termination hostility or animus toward Foust because of any of his claimed complaints. Ellis responded to his "complaints" quite benignly, replying "just do [your] job the best [you] could." Tr. 213-14. Foust testified that Ellis was not hostile towards him, made no derogatory comments about him, and that he liked Ellis. Tr. 389-90, 401.

Bennett made the decision to discharge Foust without consulting Ellis or anyone else. Tr. II 130-33; Tr. 571. Smith handed Foust his lay-off slip and didn't know why the decision had been made. Tr. 637-39. Bennett's decision to terminate Foust was the culmination of his increasing frustration with the inability of the plant to process sufficient coal. His concerns had prompted him to have Goins evaluate the operation. Tr. II 80. Goins eventually reported that, while Foust was a hard worker, he was not capable of managing the men. Tr. II 82; Tr. 514-16. As Bennett explained: "I was tired of excuses and I'd get reports, every day I get a report and I'd look at those reports. It would be the same old thing over and over." Tr. II at 80. Adding to his frustration was the fact that production problems persisted despite substantial amounts of overtime being worked by second shift miners. Tr. II 85, 130-31. His frustrations had nearly reached the breaking point prior to the May 31 incident. Tr. II 84, 130-33. That incident caused him to react by ordering the discharge of Foust and the second shift. The plant had been operating poorly, the second shift had worked significant overtime the night before, and the plant was non-functional at the start of the first shift. Tr. II 130-31.

Bennett had no knowledge of Foust's protected activity, i.e., his decision to no longer sign the electrical book. While he had frequent interaction with Ellis, and clearly was aware of Foust's complaints about lack of resources, he regarded them as excuses for Foust's inability to remedy the frequent breakdowns that interfered with the plant's production.

I decline to draw an inference that Ellis informed Bennett of Foust's protected activity, because there are a number of possible reasons why Ellis would not have viewed Foust's action as an event meriting Bennett's attention. Foust did not testify to the exact words that he used to

inform Ellis of his decision. Judging from his demeanor at the hearing, it is unlikely that he did so in an aggressive or hostile manner, and there is no claim that Ellis reacted with hostility toward Foust. Ellis may not have understood Foust's communication as a "refusal" to sign the book, or he may have considered the problem to be a temporary one that would soon be resolved by Shakelford's installation of the upgraded breakers. The fact that Manalapan was subsequently cited for failing to have examinations of the electrical circuits certified for the month of May, suggests that Ellis placed little significance on Foust's action. He neglected to assure that the examination and certification were done, despite the ready availability of other qualified individuals, including Shakelford and Rodney Tipton, a foreman at the R&B plant. Even if the new breakers could not have been installed by the end of the month, the certification could have been done with a notation of the problem of the overloaded breakers, along with the fact that new breakers were on order. Inspectors were not likely to fail to discover such an obvious problem, and it likely would have been better to note it, than ignore it. Inspectors from the State of Kentucky were aware of the problem, and had not shut the plant down.

There is no direct evidence of unlawful motivation and there is not enough circumstantial evidence to justify a conclusion that Bennett's discharge of Foust was motivated, in any part, by Foust's protected activity. Bennett had no knowledge of Foust's protected activity, the "most important" element of a circumstantial case. There was no animus or hostility toward Foust because of his protected activity. Only a limited coincidence in time, one to two weeks, between Foust's protected activity and the adverse action suggests a relationship between the two. I find that Bennett's decision to discharge Foust was not motivated, in any part, by Foust's protected activity. Therefore, Complainant failed to establish a *prima facie* case of discrimination.

I reach this conclusion based upon all of the evidence and my evaluation of the credibility of the witnesses, chiefly Bennett and Foust. Bennett testified in an open and forthright manner, and was consistent and convincing in his description of the economic problems and frustrations that resulted from the inability of the preparation plant to operate efficiently. His openness was apparent even when it was not to his advantage, e.g., when he expressed his hostility to the fact that Foust had exercised his right to file a complaint of discrimination under the Act.<sup>10</sup> I found highly credible his testimony that his decision to discharge Foust and the second shift miners was motivated by his building frustration with the operation, which was focused on Foust, who had been reported to be a poor manager.

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<sup>10</sup> Seizing on Bennett's statement at the hearing, the Secretary has argued that Manalapan's failure to call Foust back to work was retaliation for his filing of the discrimination complaint. While Bennett expressed hostility to Foust's exercise of his right to file a complaint of discrimination, I do not find that he discriminated against Foust by not recalling him. Bennett had intended that Foust be discharged, not laid-off, and he had no intention of re-employing him. Manalapan's operations were becoming smaller, Ellis explained that they didn't need another foreman, and Bennett felt that putting a former supervisor back to work in a non-supervisory position would have posed problems.

As noted above, I believe that Foust inflated his claims that numerous unsafe conditions existed at the plant and the nature of his “complaints” to Ellis. His overall demeanor was highly deferential, and appeared consistent with that of someone who might not be an effective supervisor. I have no doubt that he was a hard worker, both prior to and after becoming a foreman. However, as foreman, his primary responsibility was making sure that his men worked hard, something that, at least as far as Bennett was informed, he did not do effectively.

I have also considered the many arguments advanced by the Secretary, but find them insufficient to satisfy Complainant’s burden. The Secretary makes much of the fact that Respondent terminated only two of the four second shift miners, Foust and Hensley. She asserts that, while Napier’s move to the day shift was explained, Respondent offered no explanation as to why Gross was not also discharged on May 31, 2001. She argues that Manalapan “forgot to fabricate a reason for Gross’ continued employment after the layoff, further establishing that the stated reasons for the ‘layoff’ were pretextual.” Sec’y’s Br. 93. However, this “theory” was not developed at the hearing. Neither the Secretary, nor the Respondent, probed Gross’ status after the layoffs. The “hours worked” reports for the time period in question, exhibit R-3, establish that Gross worked only two more days. Gross testified that he left the plant voluntarily a couple of days after the lay-offs. Respondent may well have been aware of Gross’ impending departure and may simply have allowed him to work until the date he had chosen to leave, an explanation at least as probable as the Secretary’s.

The Secretary argues that the hiring of additional miners after the lay-offs exposes Manalapan’s explanation as pretext. However, the decision to discharge the second shift was not made as a permanent move to reduce labor costs, it was made because Bennett was not satisfied with the performance of Foust and the men working the second shift. The hiring of additional miners shortly after the lay-offs is consistent with Respondent’s explanation of the reasons for the decision to discharge Foust. Some additional labor was also required for the significant repair effort necessitated by the failure of the thickener, and the need to make other major repairs.

The Secretary also argues that Ellis’ and others conclusion that the clean coal belt had been deliberately cut was an attempt to build a pretextual reason for Foust’s discharge that “fell apart” when the “witnesses didn’t have the heart to accuse Foust” of doing it. Sec’y’s Br. 90. However, as Ellis stated, no one ever accused Foust of cutting the belt and he did not have any idea who might have done it. Tr. 572. 589. Bennett never cited a suspicion or belief that Foust had damaged the belt as a reason for his decision.

The Secretary argues that the citations issued during MSHA’s inspection of the plant after Foust’s departure confirmed the existence of numerous safety violations at the time Foust allegedly made his complaints to Ellis. Complainant’s exhibit 1 consists of copies of citations issued at the preparation plant from May 31 to September 6, 2001. However, it is far from certain that most of the conditions cited existed for that length of time. MSHA had a somewhat constant presence at the plant, and had conducted recent inspections. A number of citations had

been served on Foust in January, February and March, 2001.<sup>11</sup> Ex. R-4. While many of the citations issued in the summer of 2001, were similar to those issued earlier, they were cited as new violations. There were a number of “accumulation” violations, an ongoing problem at the plant. Many of the guarding and electrical violations appear to have been within Foust’s ability to correct, even with limited resources. In some instances, guards had simply not been replaced. In others, guards were extended to cover small openings, which may have been of recent origin.

### Respondent’s Affirmative Defense

Even if Bennett had been aware of Foust’s decision not to sign the electrical book, and that knowledge somehow played a part in his decision to discharge him, I find that he would have taken the same action based solely upon Foust’s unprotected activity, i.e., Bennett’s perception that Foust was an ineffective manager, largely responsible for failing to remedy the frequent breakdowns that plagued the plant.

In *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), the Commission explained the proper criteria for analyzing an operator’s business justification affirmative defense:

Commission judges must often analyze the merits of an operator’s alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak discriminatory motive.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operators’s business judgment our views on “good” business practice or on whether a particular adverse action was “just” or “wise.” The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner’s protected activities. If a proffered justification survives pretext analysis . . . , then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge’s or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was

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<sup>11</sup> It was Ellis who appeared to be most concerned about those violations. Foust testified that Ellis was “on him” to make sure that the violations were abated, which they presumably were. Tr. 388-89.

enough to have legitimately moved that operator to have disciplined the miner. (citations omitted).

The Commission further explained its analysis in *Haro v. Magma Copper Co*, 4 FMSHRC 1935, 1938 (Nov. 1982):

[T]he reference in *Chacon* to a “limited” and “restrained” examination of an operator’s business justification defense does *not* mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or sense of “industrial justice” for that of the operator. As we recently explained, “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.*” (citations omitted).

Respondent, through Bennett, advanced a credible business justification for discharging Foust. Bennett was extremely concerned about the frequent breakdowns that interfered with the plant’s production of marketable coal. The raw coal stockpile had grown to excessive proportions and threatened to negatively impact the other mining operations. This occurred while Foust was foreman in charge of the first shift, essentially in charge of the plant. Bennett’s concerns caused him to assign one of his trusted managers, Goins, to conduct an evaluation of the operation of the plant. Goins reported that there were a lot of problems with what appeared to be deferred maintenance items, and that Foust did not appear to have control of his men. Bennett switched the first and second shifts, hoping to avoid more drastic action. All of this occurred prior to Foust’s protected activity, which is alleged to be the “primary” reason for his discharge. Things did not improve significantly. Bennett’s frustrations built to the point that the incident of May 31, 2001, prompted him to discharge Foust.

As noted above, I have found that Bennett was not motivated, in any part, by Foust’s protected activity, of which he had no knowledge. Even if it could be said that Foust’s discharge was based in some part on his protected activity, I find that Bennett would have taken the adverse action against Foust based solely upon legitimate business reasons.<sup>12</sup>

To some extent, Foust may have been unfairly blamed for the plant’s problems. As Bennett stated, he hadn’t realized that the plant was in as bad a shape as it was. Tr. II 124. With the accumulation of deferred, or poorly performed, maintenance, breakdowns were frequent and production was impaired. While Foust had significant responsibility for maintenance, his

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<sup>12</sup> I would reach the same conclusion with respect to Foust’s expression of concern over the use of Nalco in the creek, if that action were deemed to be protected activity.

protests about limited resources may have had some legitimacy.<sup>13</sup> On the other hand, if Foust had been a more effective manager, maintenance tasks might have been better performed. It is not the function of this Administrative Law Judge to resolve the ultimate fairness of whether Foust should have borne the brunt of Bennett's dissatisfaction with the plant's poor operation. I am convinced that it was reasonable for Bennett to have concluded that Foust bore enough responsibility for the problems that he should be discharged, for that reason alone.

### **ORDER**

For the reasons stated above, I find that Bennett's decision to discharge Foust was not motivated in any part by Foust's protected activity. Alternatively, I find that, had Bennett been aware of Foust's protected activity, he would have made the same decision based solely upon legitimate business considerations. Accordingly, the Complaint of Discrimination is hereby **DISMISSED**.

Michael E. Zielinski  
Administrative Law Judge

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<sup>13</sup> Although the Secretary's argument that Manalapan had decided not to spend money on the plant fails to recognize that it maintained over \$1,000,000 in parts and supplies and had spent over \$75,000 for work by R.T. Welding during the year 2000.