FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 26 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of THOMAS McGARY and RON BOWERSOX	:	
and	:	
	:	Docket No. WEVA 2015-583-D
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:	
v.	:	
THE MARSHALL COUNTY COAL CO., McELROY COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION[1]	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Young, Nakamura, and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), and involve complaints of interference brought by the Secretary of Labor on behalf of six miners pursuant to section 105(c) of the Act, 30 U.S.C. § 815(c).[2] The Respondents are five underground coal mines in West Virginia and associated corporate entities, including the owner and operator of the five mines, Murray Energy

[1] Additional captions are listed in Appendix A to this order.

[2] Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides in pertinent 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 . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this [Act].

Corporation.[3] The interference complaints all involve a largely common fact pattern concerning meetings Respondents held with their miners at each of the five mines. One of the subjects addressed by Respondents at the meetings was miners contacting the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 103(g) of the Act, 30 U.S.C. § 813(g),[4] to alert the agency to perceived safety and health issues at the mines.

In her decision on the complaints, the Judge largely ruled in favor of the Secretary and the complainants, finding that interference with miners' section 103(g) rights had been established. 37 FMSHRC at 2608-10. However, she also dismissed one count of the Secretary's complaint. *Id.* at 2609. The Commission granted the cross petitions for discretionary review filed by the Respondents and the Secretary, and later granted the UMWA's motion to intervene.

I.

Factual and Procedural Background

In December 2013, a subsidiary of Murray Energy acquired the five mines from CONSOL Energy, Inc. Shortly thereafter, MSHA received a number of complaints from miners alleging safety hazards and violations at the mines, which MSHA investigated. At all of the mines, hourly production and maintenance workers are represented by the UMWA through local unions. 37 FMSHRC at 2600.

On April 10, 2014, Robert Murray, the Chief Executive Office of Murray Energy Corporation, wrote to UMWA President Cecil Roberts about that "rash" of complaints from "disgruntled employees" and union officials, which he believed were being made not for safety reasons, but rather to strike back at the mining companies. Mr. Murray took the position that this was a misuse of the section 103(g) process that was wasting the inspection resources of both MSHA and the mines. He stated that while the company would "never interfere with a miner's right to file 103(g) complaints," he went on to request that management "be given the opportunity to also simultaneously be informed [of] safety issues in place of the 103(g) complaints, or afterwards." Gov't Ex. 18.[5]

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[3] As shown in the five case captions, each of the cases was brought on behalf of United Mine Workers of America (UMWA) International Safety Representative Ronald Bowersox and another individual. Each of these individuals is a local UMWA representative at his or her respective mine. 37 FMSHRC 2597, 2599 (Nov. 2015) (ALJ).

[4] Section 103(g)(1) provides that, if a miner or miner representative has reasonable grounds to believe that a violation of the Act or a mandatory standard exists, the miner or representative has a right to obtain an immediate inspection by MSHA. It further provides that the name of the person requesting an inspection shall not be revealed.

[5] Similar letters were sent to each of the local union presidents, safety committee officers, and mine committee officers at the five mines. Those letters requested that miners inform the company of safety issues instead of, or in conjunction with, making a section 103(g) complaint. The letters emphasized that the company did not intend "to chill the exercise by

Two weeks later, Respondents began a series of what they refer to as "Awareness Meetings" at their mines. Miner and management attendance is mandatory at such meetings for each shift at each mine. The five mines employed approximately 3500 workers in total during the time in question. 37 FMSHRC at 2600.

At each of the meetings held at those mines between April and July 2014, CEO Murray would speak while giving a PowerPoint presentation. *Id.* at 2600-01. There were between 69 and 77 PowerPoint slides, including three slides which further addressed the section 103(g) issues Murray had previously raised in his letters. Gov't Ex. 4-7. CEO Murray also sent a copy of the PowerPoint presentation to Cecil Roberts prior to the first meeting. Gov't Ex. 20.

At one of the Marshall County Mine Awareness Meetings, a miner made a recording of CEO Murray's remarks given in conjunction with the PowerPoint presentation, including his remarks regarding the section 103(g) issue slides. Recordings of Murray's statements were not made at the other Awareness Meetings. 37 FMSHRC at 2601-02.

On June 23, 2014, Bowersox filed a discrimination complaint with MSHA with regard to the Awareness Meetings and the letters sent to local union officials, alleging that management at the five mines was trying to intimidate miners and interfere with the miners' right to file section 103(g) complaints with MSHA while keeping their identities confidential. Gov't Ex. 1. On July 21, 2014, the five other complaints were filed with MSHA based upon the same allegations. Gov't Ex. 2.

On March 24, 2015, the Secretary filed with the Commission the five actions on behalf of the six complainants, and on July 14, 2015, amended the actions. The Secretary alleged that Respondents interfered with the exercise of miners' rights at each of the mines by coercively imposing a requirement that miners who make section 103(g) complaints report the same complaint to management. The Secretary argued that this undermined a miner's right to make a section 103(g) complaint to MSHA on a confidential basis. The Secretary further identified the threat of reprisal against the Marshall County miners and the threat to close the Marshall County Mine as a separate count of interference. Discovery subsequently ensued, including Respondents' deposition of each of the six complainants. 37 FMSHRC at 2602.

The witness list which the Secretary submitted for the hearing included three of the six complainants: Bowersox, Michael Payton, and Ann Martin. On the Friday prior to the hearing scheduled for Tuesday, September 22, 2015, Respondents and related mining companies filed a complaint in the United States District Court for the Northern District of West Virginia against the UMWA, its District 31, and Bowersox. The complaint alleged a breach of the National Bituminous Coal Wage Agreement of 2011, the collective bargaining agreement between the UMWA and coal mine operators, including Respondents (hereinafter "CBA"). The court complaint contended that the CBA and past practice under it were being continually breached by miners making section 103(g) complaints to MSHA without first raising the issues with mine

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concerned miners of their rights under Section 103(g)"; rather, the reporting policy was intended to serve "the most effective means to address and correct safety issues." Gov't Ex. 19.

management. The complaint included quotes from the depositions of Bowersox, Payton, and Martin taken in this case. Gov't Ex. 31.

Shortly before the hearing, the Secretary moved to cancel the hearing and submit the case for summary decision, on the ground that the three complaining witnesses were intimidated by the federal court complaint. The Secretary stated, and reiterated at hearing, that the three were not aware at the time of their depositions that their testimony would be used in a separate law suit filed against the union, and subsequently did not wish to testify further. Tr. 16-18.[6] Consequently, at the hearing no witnesses were called by either the Secretary or the Respondents, and Joint Stipulations of Fact and 28 agreed-to exhibits were admitted into the record by the Judge, along with four exhibits admitted over Respondents' objections.

In her decision, the Judge found that miners had a protected right under section 103(g) to make anonymous complaints to MSHA regarding health and safety violations at the five mines, and that under section 105(c), CEO Murray's presentations at the Awareness Meetings constituted unlawful interference with the miners' exercise of that right. She further concluded that in this case the harm to the miners' protected rights was not outweighed by the mine operators' asserted interests. 37 FMSHRC at 2603-08. As relief, the Judge ordered that a number of remedial measures be taken, some of which are at issue on review. *See id.* at 2609.

II.

Disposition

A. Whether Interference Was Established

Section 105(c) of the Mine Act contains multiple references to the prohibition against interference with miners' protected rights. Section 105(c)(1) states that "[n]o person shall discharge or in any manner discriminate against . . . *or otherwise interfere with* the exercise of the statutory rights of any miner." 30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(2) permits the filing of a discrimination complaint by a miner, applicant, or representative of miners "who believes that he has been discharged, *interfered with*, or otherwise discriminated against," and states that the Secretary's complaint to the Commission may allege "discrimination or interference." 30 U.S.C. § 815(c)(2) (emphasis added). Section 105(c)(3) also permits an individual to file a complaint charging "discrimination or interference" in violation of section 105(c)(1). 30 U.S.C. § 815(c)(3).[7]

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[6] The suit was recently dismissed by the federal district court on the ground that the subject matter of the complaint is subject to arbitration under the CBA. *See Consolidation Coal Co. v. United Mine Workers of America*, Civ. Action No. 1:15CV167, 2016 WL 3248427 (N.D.W.Va. June 10, 2016).

[7] The legislative history of the Mine Act expressly mentions that section 105(c) reaches interference. *See* S. Rep. 95-181 at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) ("It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal.").

The statutorily protected right at issue in this case is the right of a miner, under section 103(g)(1) of the Mine Act, to contact MSHA in writing with concerns about the safety of his or her working conditions and to have MSHA investigate those concerns without the mine operator learning the miner's identity.[8] The legislative history of the Mine Act makes clear that section 103(g) was adopted as a means of protecting miners who make safety-related complaints, in addition to the protection provided by section 105(c). S. Rep. 95-191, at 29, *Leg. Hist.* at 617 ("While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under Section [103(g)(1)] is absolutely essential.").

1. The Appropriate Test for Interference

In evaluating whether the miners here had established interference with their statutory rights, the Judge applied the two-step test articulated by Chairman Jordan and Commissioner Nakamura in their opinion in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2104-19 (Aug. 2014) (hereinafter "*Franks* interference opinion").[9]

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[8] Section 103(g)(1), 30 U.S.C. § 813(g), states:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

[9] A majority of Commissioners in that section 105(c)(3) case upheld the decision of the same Judge that the two complaining miners had been discriminated against. However, because the majority split as to the rationale for the affirmance, the decision was vacated and remanded by the court of appeals. *See Emerald Coal Res. LP v. Hoy*, 620 F. App'x 127 (3rd Cir. 2015). The Commission thereupon remanded the proceedings to the Judge "to conduct the interference analysis in the first instance." 38 FMSHRC 226, 228 (Feb. 2016). The Judge applied the same

See 37 FMSHRC at 2603-08. The test, suggested by the Secretary in his amicus brief in that case and drawn from National Labor Relations Board precedent, provides that interference is established when

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

36 FMSHRC at 2108.[10] Here the Secretary reiterates his support for the test, and the UMWA endorses it.

Respondents argue that the *Franks* interference opinion two-step test is not binding upon the Commission, because it has not been approved by a Commission majority. They contend that until it is, the Commission only has its prior interference cases on which to rely. R. Reply Br. at 2-3 (citing *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005); *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985)). We conclude that the *Franks* two-step test is consonant with the Commission's decisions in *Gray* and *Moses* and thus it was not error for the Judge to apply it in this instance.

The language of the first prong of the *Franks* interference opinion test is entirely consistent with *Moses* and *Gray*. In *Moses*, the Commission concluded that the operator's conduct constituted interference because it would "chill the exercise" of miners' protected rights. 4 FMSHRC at 1478-79. Consequently in *Gray*, the Commission analyzed "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of [protected] rights." 27 FMSHRC at 9 (citation omitted).

The second prong of the *Franks* interference opinion two-step test is similarly grounded in Commission precedent. In *Moses*, the Commissioner recognized that an operator may have

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test she applied in this case, and found interference. 38 FMSHRC 799, 804-10 (Apr. 2016) (ALJ). The parties subsequently filed a joint petition for review of the Judge's decision and settled the case. *See* Decision Approving Settlement (May 17, 2016).

[10] The Commission has drawn on case law interpreting analogous provisions of the National Labor Relations Act for guidance in construing Mine Act provisions. *See Sec'y on behalf of Bernardyn v. Reading Anthracite*, 23 FMSHRC 924, 934 n.8 (Sept. 2001); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1368-69, n.11 (Dec. 2000). Here the analogous provision is section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of" rights by the NLRA. Threats of reprisal, force, or promise of benefits can be considered to constitute interference, restraint, or coercion. 29 U.S.C. § 158(c).

legitimate and substantial reason for its conduct in question. *See* 4 FMSHRC at 1479 n.8 ("This is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem . . . .").[11]

2. A Reasonable Miner Would View the Operator as Having Interfered with His Rights in This Instance.

a. Miners' Rights Under Section 103(g)

In her decision, the Judge ably summarized the rights that section 103(g) provides miners and their representatives, and the policy reasons behind those rights. *See* 37 FMSHRC at 2604-05. Beginning with the Federal Coal Mine Health and Safety Act of 1969, a miners'

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[11] Commissioners Young and Althen do not find it necessary to settle upon a final, specific test of interference in this case. They find that in *Secretary on behalf of Pepin v. Empire Iron Range Mining Partnership*, 38 FMSHRC ____, 2016 WL 3226148, Docket No. LAKE 2015-386-DM (June 6, 2016) (ALJ) (not appealed to Commission), the Commission Judge wrote a thoughtful analysis of the specific wording of section 105(c) in the context of interference claims. Based upon his analysis and the differing management-employee contexts of the NLRA and Mine Act, the Judge formulated a test for interference that would require the Secretary to show the alleged interfering actions were motivated by the exercise of protected rights. In this case, the filing of complaints under section 103(g) clearly motivated the offending portions of the Respondent's presentations. Consequently, the elements of the test formulated in *Empire Iron* are present, and it is not necessary to adopt the *Franks* test. Because of the procedural posture in *Franks*, the issue was not briefed before the Commission in that case — and in fact, the issue never has been fully briefed to the Commission. Under the circumstances, Commissioners Young and Althen do not believe it is appropriate to settle upon a specific test of interference in this case in which either of competing tests would arrive at the same result.

Commissioner Nakamura affirms the Judge's application of the *Franks* text. Regarding the question of whether section 105(c)'s prohibition against discrimination and interference "because of" protected activity" requires a plaintiff to show a retaliatory motive, he observes that the Supreme Court has often recognized that statutes prohibiting discrimination "because of" congressionally designated criteria need not include a motive element. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (stating that proof of discriminatory motive is not needed to demonstrate liability under the Fair Housing Act, even though that statute includes "because of" language, and noting that in prior cases the Court upheld disparate-impact liability under Title VII and the ADEA, which contain similar language); *see also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005). The Court noted that these statutes contained lengthy sentences that, while initially discussing prohibitions on actions taken with discriminatory motivation, also used results-oriented "catchall phrases looking to consequences, not intent." *Tex. Dep't of Hous.*, 135 S. Ct. at 2518-19. The shift in emphasis from the intent of the actor to the consequences of the actor's actions was signaled by the use of the word "otherwise" and implied that intent was not a factor in the analysis. *Id.* Commissioner Nakamura believes that, in light of the text and purpose of section 105(c), this line of Supreme Court cases provides support for the *Franks* test.

representative has had the right, by providing written notice to a representative of the enforcer of that Act (then the Secretary of the Interior), to request an immediate inspection of a coal mine when that miners' representative had reasonable grounds to believe there was a violation of a mandatory health or safety standard, or an imminent danger. Pub. L. No. 91-173 § 103(g); 83 Stat. 742, 750.

With the subsequent enactment of the Mine Act, this right was extended to miners lacking representatives, and to include alleged violations of the Mine Act itself. The legislative history of the Mine Act emphasized that the right to request an agency inspection was based on the firm belief "that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." S. Rep. No. 95-181, at 30 (1977), *reprinted in Legis. Hist.* at 618.

The Coal Act also provided that a miners' representative could request that his name, as well as the names of any miners referred to in the notice, not be included in the copy of the request to be provided to the mine operator. The Mine Act strengthened this right to expressly state that "[t]he name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification." 30 U.S.C. § 813(g)(1). The legislative history of the Mine Act stressed the importance of maintaining confidentiality:

> The Committee is aware of the need to protect miners against possible discrimination because they file complaints, and accordingly, the Section requires that the name of the person filing the complaint and the names of any miners referred to in the compliant not appear on the copy of the complaint which is served on the mine operator. While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under Section [103(g)(1)] is absolutely essential.

S. Rep. No. 95-181, at 29, *reprinted in Legis. Hist.* at 617; *see also* III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 43, at 8 (2003), *available at* http://arlweb.msha.gov/REGS/COMPLIAN/PPM/PMVOL3A.HTM#3 ("Information received about violations or hazardous conditions should be brought to the attention of the mine operator without disclosing the identity of the person(s) providing the information.").

The reasoning behind this right to confidentiality is considered so persuasive that the Commission adopted a version of the right for Commission proceedings, recognizing that witnesses who qualify for it should generally be protected by the informant's privilege. *See Sec'y on behalf of Logan v. Bright Coal Co.*, 6 FMSHRC 2520, 2524-25 (Nov. 1984); *see also* Commission Procedural Rule 61, 29 C.F.R. § 2700.61 ("A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.").

The court in *Dole v. Local 1942, Int'l Bhd. of Elec. Workers*, 870 F.2d 368 (7th Cir. 1989), explained the informant's privilege in a way that is in many respects applicable to miners cooperating in mine safety investigations:

> The doctrine of the informer's privilege is not a recent phenomenon, having its roots in the English common law. . . . The underlying concern of the doctrine is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation. . . . The privilege recognizes the responsibility of citizens to cooperate with law enforcement officials and, by providing anonymity, encourages them to assume this responsibility. With the threat of reprisal real and unprotected against, well-intentioned citizens may hesitate or decline to assist the government in tracking down wrongdoers. The threatened reprisal may be physical, but the privilege also recognizes the subtler forms of retaliation such as blacklisting, economic duress and social ostracism. . . . The most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant's strategic position and also encouraging others similarly situated who have not yet offered their assistance.

Id. at 372 (citations omitted).

In light of the foregoing, we agree with the Judge in this case that "[i]f confidentiality is not guaranteed, a miner is forced to weigh . . . competing interests when deciding whether to report a dangerous condition to MSHA. For a miner to be truly free to exercise his statutory rights under section 103(g), then, confidentiality is essential." 37 FMSHRC at 2605; *see also Moses*, 4 FMSHRC at 1479 (concluding operator interfered with miner's exercise of section 103(g) rights when it repeatedly and accusatorily questioned him as to whether he was the source of complaint to MSHA); *Franks*, 38 FMSHRC at 2095 (opinion of Comm'rs Young and Cohen) (stressing that substance of the section 103(g) confidential reporting right must be preserved, lest it be rendered illusory).

b. Respondents' Interference with Miners' Section 103(g) Rights

In her decision, the Judge applied the first prong of the *Franks* interference opinion test — whether Respondents actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights. Citing the PowerPoint slides from the Awareness Meetings that miners at the Marshall County Mine were required to attend, the Judge was persuaded that a reasonable miner would have left a presentation thinking that mine management was hostile to the section 103(g) complaint process, particularly with regard to how miners were exercising their section 103(g) right at the mine at that time. The Judge found that a reasonable miner would have also concluded that the Marshall County Mine had established a rule requiring that

any section 103(g) complaint be reported to mine management as well, thereby vitiating that miner's right to make such complaints without exposing his or her identity to the mine operator. 37 FMSHRC at 2605-07. Her conclusions applied to the other four mines as well. *See id.* at 2600 n.1 (slides presented at other mines were largely the same, and the ones addressing miners' exercise of section 103(g) rights were identical).

Respondents contend that the Judge failed to properly apply the "totality of the circumstances" test, and thus her finding on the first prong of the *Franks* interference opinion is not supported by substantial evidence.[12] They argue that the overall tenor of the Awareness Meetings reflected the need for mutual trust between miners and mine management, so that the two sides could cooperate to keep the mine safe and economically competitive. According to Respondents, fostering such cooperation in the area of mine safety is consistent with the Mine Act, which calls for involvement of miners and their representatives in the process.

While certain of the slides at the Marshall County Coal Awareness Meetings stressed the subject of miner-management cooperation (Gov't Ex. 4 at slides 3, 6, 48-52, 71-75), the common subject matter of the slides presented there involved the issues that Respondents believed were preventing that mine and other unionized mines from being competitive in the present energy markets, including with non-union mines. The slides outlined Respondents' belief that if such impediments continued, Marshall County miners would eventually lose their jobs in an area in which there is no alternative employment paying nearly as much. *Id.* at slides 14-18. In addition to discussing political, regulatory, and outside economic forces, the slides addressed labor-related topics, such as the inefficiency and lack of productivity of the mine's continuous miner sections, downtime with belts and their slow moves within the mine, poor relations with the UMWA, miner drug and alcohol abuse, and excessive employee absences. *Id.* at slides 34-51, 53-60.

This led into the three slides addressing section 103(g). The first slide stated, in a large font, that "You Must Report Unsafe Situations and Compliance Issues to Management so that they Can Be Addressed By Management." The next slide then stated, in bullet point format, that miners had the right to make 103(g) complaints to MSHA, and that the company "will never interfere with this in any way," but that miners are "Required to Make the Same Report to Management." The final of the three slides alleged that a high percentage of the section 103(g) complaints were resulting in MSHA finding no violations. This supposedly indicated that miners were using the section 103(g) process to get back at management for issues other than safety, which diluted mine and MSHA resources, hurt the company, and threatened the survival of miners' jobs. Many of the underlined terms were highlighted in red or yellow. *Id.* at slides 61-63.

Respondents attack on several fronts the Judge's conclusion that the presentation of the three slides constituted interference with their miners' section 103(g) rights. Primarily they

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[12] When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

question how the Judge could have found that "requiring miners to also inform management of complaints" made to MSHA pursuant to section 103(g) "removes th[e] guarantee of confidentiality." *See* 37 FMSHRC at 2606.

The answer to that is simple. Absent Respondents having a reliable system by which a miner could, without revealing his identity, inform mine management of the conditions that led the miner to make a section 103(g) complaint to MSHA — evidence of which is entirely missing from this record — basic common sense dictates that management can "put two and two together." Respondents could readily learn the identity of a miner making a section 103(g) complaint when that miner "make[s] th[at] same report to management" under Respondent's announced "requirement." Gov't Ex. 4 at slide 62.

Respondents point to the slide that included the statement that they would not interfere with section 103(g) rights (No. 62). That slide, however, was bookended by information from which miners could easily conclude that their right to make confidential section 103(g) complaints was being substantially undercut, and that Respondents viewed the issue of miner section 103(g) complaints to MSHA as one that could have severe consequences for miners' continued employment. Where an interference claim is made, examining in isolation the literal meaning of the language used is contrary to the totality of the circumstances test. *See Gray*, 27 FMSHRC at 8 ("Whether an operator's . . . comments concerning a miner's exercise of a protected right constitute coercive . . . harassment proscribed by the Mine Act 'must be determined by what is said and done, and by the circumstances surrounding the words and actions.'") (quoting *Moses*, 4 FMSHRC at 1479 n.8); *see also Gray*, 27 FMSHRC at 10.

Respondents also argue that what was discussed at the Awareness Meetings did not rise to the level of a company "policy" with respect to section 103(g) complaints made to MSHA. Under the totality of the circumstances test, however, we cannot ignore that all of the Awareness Meetings in question were personally conducted by CEO Murray. Jt. Stips. 20-29. In *Gray*, the Commission stated that one of the most important circumstances in any interference analysis is the position within the company that the communicator of the statements alleged to constitute interference holds relative to the recipients of the communications. 27 FMSHRC at 10.

That consideration takes on even greater significance in a case where the operators' CEO is traveling to the various mines and in essence putting on a PowerPoint-backed "roadshow" that all miners at each mine are required to attend. Presumably, a CEO who takes the time to hold 10 to 20 meetings, each lasting two or more hours, is serious about the points he makes during those meetings. *Cf. Gray*, 27 FMSHRC at 11 n.10 (locus of statements can be important contextual factor).

Respondents nevertheless contend that its miners, being union members, could have confidently ignored the import of CEO Murray's presentation, because the terms of the CBA require that Respondents negotiate with the local union any new work rule, such as a reporting requirement for section 103(g) complaints outlined in the Awareness Meetings. The Judge rejected this argument below on the ground that "[t]he relevant perspective on the issue is that of the reasonable miner, and I find that a reasonable miner would have thought that a statement

made by the CEO of the company at an all-staff mandatory meeting constituted binding company policy." 37 FMSHRC at 2607.[13]

Respondents continue to maintain that their miners would have ignored any new reporting policy, but we find the Judge's reasoning persuasive. Apart from the clear contradiction this position poses to that taken by the Respondents when they instituted their related federal court suit,[14] to accept Respondents' argument would be to assume that an average miner at the mines in question would be so confident in his or her understanding of the applicable CBA that the miner would ignore the clear statements made in the slide presentation given by the company's CEO. Under a "totality of the circumstances" approach, it is simply unreasonable to assume that degree of confidence on the part of a miner.

Moreover, the new reporting policy would only be declared a new work rule under the CBA after the dispute over it had been resolved through the grievance procedure of the CBA. As can be seen from the arbitration decisions appended to the UMWA's brief, under this procedure a miner seeking to vindicate his section 103(g) right by ignoring the reporting requirement would have to wait weeks, if not months, for a decision upholding his position. During that time, miners choosing to ignore Respondents' requirement that they report to management those conditions that prompt them to make section 103(g) complaints to MSHA would be faced with uncertainty. Further, miners would be risking discipline, including loss of pay they may never recover, for failing to comply with Respondents' reporting policy. Expecting miners to take such a risk is patently unreasonable on the part of the Respondents.

In this instance, the chilling effect of the Respondents' reporting requirement was amplified by the PowerPoint slide unequivocally communicating that if the miners did not change their use of section 103(g), the consequence could be loss of the miners' jobs. This slide was not an outlier in the presentation. Many of the slides question whether, without changes, the five mines can continue to employ their present miners. Gov't Ex. 4, at slides 4, 6, 14-18, 21-22, 30, 34-35, 39-42, 54, 59. With regard to the miners' exercise of section 103(g) rights, it was stated that, when a section 103(g) complaint was made but MSHA did not issue a citation, "[i]t Hurts your Company and Job Survival." *Id.* at slide 63.

It would have been quite reasonable for Respondents' miners to conclude that management was linking use of section 103(g) by miners to the future of employment at the mine. Such "threats of reprisal" were specifically identified in the legislative history of section

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[13] Respondents object to the Judge using a "reasonable miner" standard in this instance on the ground "that all of named Complainants in this matter are officials of the UMWA, and have experience and knowledge of not only the provisions of the [CBA], but the actual rulemaking process." R. Br. at 10 n.6. However, each of the complaints those officials filed with MSHA plainly state that the complaints were being brought "on behalf of all miners at the" mine in question. Gov't Ex. 2.

[14] As the Secretary points out, Respondents alleged in the federal court complaint that the CBA already establishes the position Respondents took at the Awareness Meetings with regard to reporting safety concerns to management.

105(c) as a form of unlawful interference. S. Rep. 95-191, at 36, *reprinted in Leg. Hist.* at 624. Thus, in *Gray*, the Commission quoted the Supreme Court's holding that, in the context of an interference case under the NLRA, the analysis "must 'take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.'" 27 FMSHRC at 10 (quoting *NLRB v. Gissel Packaging Co.*, 395 U.S. 575, 617 (1969)). Tying the survival of employment opportunities at the mine to use of the section 103(g) process only when it is vindicated by the issue of a citation by MSHA would tend to discourage a reasonable miner from making a section 103(g) complaint in the first instance.

Consequently, we conclude that three section 103(g) PowerPoint slides shown to the Respondents' miners, in the context of the many other slides included in the Awareness Meeting presentations, provide ample evidence to establish Respondents' interference with their miners' rights under section 103(g) to make confidential safety complaints to MSHA. Nothing in the presentations to miners explained how the confidentiality of their section 103(g) complaints could be preserved when miners were expected to make the same report to mine management. Without the guarantee of confidentiality, the protection section 103(g) provides miners becomes little more than a fiction. The Judge was thus correct in concluding that Respondents' PowerPoint presentations would tend to chill the exercise of section 103(g) rights by miners.

In light of our affirmance of the Judge on these grounds, we need not consider the further evidence the Judge considered in this case.[15] Specifically, she found additional evidence of interference from the recording made of CEO Murray. She characterized the tone of his remarks as "serious and at times threatening," and found that he had stated that if miners did not stop disagreeing over issues at the mine and using the section 103(g) process as a way of indicating displeasure, the mine would be closed. 37 FMSHRC at 2606.

By that point in the presentation, however, the slides had made it abundantly clear that closure of the Marshall County Mine could result if certain matters at the mine did not change. Gov't Ex. 4, at slides 4, 6, 14-18, 21-22, 30, 34-35, 39-42, 54, 59; *see also* 37 FMSHRC at 2606 ("Throughout the two-hour presentation, miners were repeatedly reminded that their jobs, futures, and family livelihoods were at risk."). The frequency of the miners' use of section 103(g) was just one of those matters. Gov't Ex. 4, at slide 63. Because the slides alone constitute substantial evidence supporting the Judge's decision that the first prong of the *Franks* interference opinion test had been met, we need not address Respondents' evidentiary arguments regarding the recording.

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[15] The Judge accepted into the record the recording of CEO Murray's remarks at the Marshall County Mine, edited to omit the recording that occurred before and after the presentation, along with a transcript of that portion of his remarks that addressed the section 103(g) complaints being made to MSHA by Marshall County miners. Gov't Ex. 29, 30. With regard to the recording, the Judge had earlier ruled that the redacted version of the recording was admissible, after listening *in camera* to a complete version of the recording. Order Denying Motion to Compel (July 20, 2015) (ALJ); Tr. 23-27.

3. Respondents' Justification for the Reporting Policy Does Not Outweigh the Resulting Interference with Miners' Rights.

Under the second prong of the *Franks* interference opinion, an operator may defend against an otherwise valid interference claim if it offers a "legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." 36 FMSHRC at 2108. The Judge correctly identified Respondents' proffered reason as their right to be informed of unsafe conditions at their mines. 37 FMSHRC at 2607. The *Franks* opinion quoted *Moses*, where the Commission stated that an operator may comment upon a miners' exercise of a protected right when it is "necessary to address a safety or health problem." 36 FMSHRC at 2106 (quoting 4 FMSHRC 1479 n.8). Concern for mine safety or health problems clearly can provide a legitimate motivation for an operator's actions. However, our review of the record does not reveal any evidence that demonstrates that the policy at issue here served the purported goal.

Moreover, Respondents' argument that their justification for this program is supported by Commission case law is unavailing. They maintain that any reporting requirement established at the Awareness Meetings is consistent with the situation in the Commission's decision in *Secretary on behalf of Pack v. Maynard Branch Dredging Co.*, 11 FMSHRC 168 (Feb. 1989), *aff'd*, 896 F.2d 599 (D.C. Cir. 1990). In *Pack*, the Commission found that a mine operator did not discriminate against a mine security guard in violation of section 105(c) of the Act when, in terminating him, the operator took into account that the guard had not notified it of the dangerous mine condition posed by improperly stored explosives. The guard had instead waited more than eight hours after discovering the explosives and then brought the circumstances of their storage to the attention of MSHA, which cited the operator. *Id.* at 169, 171-73.

Pack is distinguishable from the present case because it relied heavily on the fact that Pack was a security guard and that one of his primary duties was to report security breaches to his employer. *Id.* at 171. Moreover, the Commission observed that "[t]he company policy only required employees to report dangerous conditions to the company, and contained no instructions or prohibitions as to employees' actions vis-à-vis MSHA[,] and the Secretary's position fail[ed] to take into account an operator's right to require the reporting of dangerous conditions." *Id.* at 173.

That right of an operator clearly remains legitimate for purposes of an interference analysis under section 105(c), and consequently was affirmed in the *Franks* interference opinion. *See* 36 FMSHRC at 2116 (discussing operators' right under *Pack* to require that miners report "dangerous conditions"). Indeed, it appears from the record that a version of the right is reflected in the CBA governing the relationship between Respondents and their miners. *See* Gov't Ex. 31, at 6 (quoting CBA, an excerpt of which was appended as Exhibit 2 thereto, to require any miner to "immediately notify his supervisor" when he "in good faith believes that he is being required to work under" conditions that are "abnormally . . . dangerous to himself . . . which could reasonably be expected to cause death or serious physical harm before such condition . . . can be abated").

At the same time, however, the Commission in *Pack* was careful to articulate that the right must be accommodated with miners' rights under section 103(g):

> It is important to point out what . . . did not happen here. Maynard Branch did not have a policy that prohibited miners from reporting dangerous conditions to MSHA, a policy that clearly would have been prohibited by the Mine Act. Nor did Maynard Branch have a policy that required miners to notify the company prior to contacting MSHA. . . . . [Thus, t]he specter raised by the Secretary of miners being intimidated from exercising their rights under sections 103(g) or 105(c) of the Mine Act simply is not presented by this case.

11 FMSHRC at 172-73.

In contrast, this case plainly presents an instance in which miners may be "intimidated from exercising their rights under section 103(g)." That is due to both the parameters of Respondents' reporting policy and the circumstances in which it was established. The reporting requirement was not in any way limited to just "dangerous conditions." According to the slide presentation, it extended to "Compliance Issues" and "103(g) Complaints." Gov't Ex. 4 at slides 61-62. Section 103(g) complaints can be brought not just when a miner perceives a dangerous situation, but when he reasonably believes that any violation of the Act or a mandatory health or safety standard exists. 30 U.S.C. § 813(g)(1). Thus, the Judge here correctly observed that unlike in *Pack*, the Respondents' policy placed special emphasis on conditions that miners chose to report to MSHA. 37 FMSHRC at 2608.

Even when an employer establishes a justification under the second step, the operator's actions must be "narrowly tailored" to promote that justification as part of the balancing of the operator's interests with the protected rights of employees. *Franks*, 36 FMSHRC at 2118 n.14 (citing *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 376-376 (D.C. Cir. 2007). The evidence establishes that Respondents did not narrowly tailor their reporting policy to avoid undue interference with the rights of miners. Nothing was presented that indicated that the Respondents were prepared, for instance, to institute a reporting system that preserved a miner's anonymity from the mine operator, as section 103(g) provides with respect to complaints made to MSHA. Indeed, based on the method in which the policy was communicated, it appeared that preserving miner anonymity was not a concern of Respondents at all. The reporting policy as communicated to miners made no mention that it included measures designed to preserve the miners' anonymity guaranteed by section 103(g). In fact, the Awareness Meetings left the opposite impression, when it was stated that, with regard to section 103(g) complaints, miners are "Required To Make the Same Report to Management." Gov't Ex. 4, at slide 62. By requiring miners to make the "same" report to Respondents as miners to do to MSHA, Respondents would entirely eliminate the critical anonymity component in section 103(g).

In addition, the Respondents justified the reporting policy to miners on the ground that "High Percentages" of section 103(g) complaints were not resulting in citations to the Respondents, which indicated to Respondents that miners were using their section 103(g) rights as a way of addressing matters other than mine safety. *Id.* at slide 63. Without more in the way

of evidence supporting this claim, we can only conclude that Respondents were motivated more by the effect that Respondents' reporting policy would have on miners than in actually objectively justifying the policy.

If any question remained at that point in the Awareness Meetings as to whether Respondents were trying to intimidate miners from using section 103(g), it was answered by Respondents' statement to them that, as the right was being used presently, it threatened those miners' "Job Survival." *Id.* We thus agree with the Judge that the foregoing statements "went beyond what was necessary to establish a safe environment at the mine. Rather, they were calculated to discourage miners from using the MSHA complaint process." 37 FMSHRC at 2608.

For the foregoing reasons, we hold that Respondents have failed to justify their actions here with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of miners' protected rights.

B. The Judge's Decision to Dismiss the Second Marshall County Count

The Secretary's complaint in these cases charged Respondents with one count of interference for promulgating their coercive reporting requirement at each of the five mines. It included an additional count for threatening reprisal and mine closure at the Marshall County Mine. Upon her finding that the additional count "involves the same facts and analysis" as the Marshall County Mine reporting requirement count, the Judge held that the additional count merged into the reporting requirement count and dismissed the additional count. 37 FMSHRC at 2609. The Commission granted the Secretary's petition challenging the Judge's dismissal of the second charge of interference against the Marshall County Mine.

The Secretary contends that threats of closure and other forms of reprisal are qualitatively different from an unlawfully imposed rule and thus in this case merits a separate charge of interference against the Marshall County Mine. The Secretary argues that in dismissing the separate threat count, the Judge in essence held for the Respondents on an affirmative defense they did not raise. Respondents counter that the Judge's dismissal was well within her authority to manage the docket before her.

The Secretary's parsing of the evidence does not support overturning the Judge's merging of the second count of interference with respect to the Marshall County Mine into the first. As the Awareness Meeting slides indicate, miners at all five of the mines were threatened with reprisal for exercising their section 103(g) rights. Gov't Ex. 4, at slide 63; 5, at slide 58; 6, at slide 59; 7, at slide 58; 8, at slide 58. In addition, each of the presentations contained numerous statements threatening job losses should miners not cooperate on various issues. *See, e.g.*, Gov't Ex. 4, at slides 4, 6, 14-18, 21-22, 30, 34-35, 39-42, 54, 59. Such threats were also made with respect to the miners exercising section 103(g) rights at each of the mines. Gov't Ex. 4, at slide 63; 5, at slide 58; 6, at slide 59; 7, at slide 58; 8, at slide 58.[16] Of course, broaching the subject of mine closure is another way of threatening miners' jobs.

[16] Below, the Secretary, in arguing in support of the second count against the Marshall County Mine, cited the Awareness Meetings' inclusion of the slide mentioning "job survival."

Accordingly, we find that the evidence submitted regarding Respondents' actions at the Marshall County Mine was not that different from the evidence submitted regarding their actions at the other four mines. In these circumstances, we conclude that the Judge, having considered that evidence, did not err in finding that a separate second count with respect to the Marshall County Mine was unjustified.[17]

C. The Monetary Penalty Issues

The Secretary proposed a civil penalty of $20,000 for each alleged violation. After addressing all six section 110(i) penalty criteria,[18] the Judge held that "a high penalty is appropriate and I assess a penalty of $30,000.00 for each of the five violations" found to have been established. 37 FMSHRC at 2609-10. The Judge found that Respondents are large operators with no history of interference violations, and cited to the stipulations, where the parties agreed that neither the Secretary's proposed penalty of $20,000 for each of six violations, nor an increase in each penalty to the maximum of $70,000, would affect Respondents' ability to continue in business. *Id.* at 2609; Jt. Stips. 34, 35. In finding that interference with a miner's right to make confidential complaints pursuant to section 103(g) to be "a very serious matter that undermines the safety of the mine," the Judge addressed the gravity criterion, and further found that Respondents' negligence was high in this instance. 36 FMSHRC at 2609-10.

"Penalties assessed by Commission Judges can be greater than, less than, or the same as those proposed by the Secretary. . . . When it is determined, based on further information developed in an adjudicative proceeding, that penalties should be assessed which substantially diverge from those originally proposed, Judges must sufficiently explain the bases underlying the penalties assessed." *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1151- 52 (7th Cir. 1984); *Cantera Green*, 22 FMSHRC 616, 622-23 (May 2000)).

S. Post-Hearing Br. at 17. A version of that slide was used not just at the Marshall County Mine, but at all five mines.

[17] We do not agree with the Secretary's characterization here that the Judge raised an affirmative defense on behalf of the Respondents. The Judge's dismissal was not based on separate facts establishing a defense to the charge that Respondents had threatened reprisal against the Marshall County miners, or that such conduct could not violate section 105(c) as a matter of law. Rather, it was based on her view that the Secretary's case, with respect to the Marshall County Mine, could not be broken down to support two separate counts of interference as cleanly as the Secretary contended it could.

[18] In assessing civil penalties, the Commission must consider the operator's history of violations; its size; whether the operator was negligent; the effect on the operator's ability to continue in business; the gravity of the violation; and whether the violation was abated in good faith. 30 U.S.C. § 820(i).

The Judge's increase in the penalties for the individual mines by 50 percent is best explained by her conclusion that

> Respondents did not demonstrate good faith in abating any violation. Instead, they exacerbated the situation by filing a complaint in federal court that named the three individuals the Secretary had named as witnesses in this case. The timing of the filing of the complaint, along with the fact that the deposition testimony taken in this case was attached, tends to indicate that the mine attempted to intimidate the witnesses. The filing of a legal action is an extension of the intimidation at Murray's awareness meetings and shows that Respondents did not wish to make any good faith effort to eliminate the interference.

37 FMSHRC at 2609-10.

Over Respondents' objections, the Judge had accepted into the record the federal court complaint, of which the Judge took judicial notice (Gov't Ex. 31), along with a press release announcing the filing of the suit, put out by Murray American Energy (Gov't Ex. 32). Tr. 27-29. Respondents continue to challenge here the admissibility of that evidence.

Commission Procedural Rule 63(a) governs the admissibility of evidence in Commission proceedings, stating that "relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). A Judge's evidentiary rulings are reviewed under an abuse of discretion standard. *Shamokin Filler Co.*, 34 FMSHRC 1897, 1907 (Aug. 2012), *aff'd*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 1549 (2015); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010). "Abuse of discretion may be found when 'there is no evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC at 1366 (citing *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997)).

The Judge in this instance plainly did not abuse her discretion in admitting the two exhibits. The court complaint is a publicly-filed document regarding a dispute over the reporting of mine safety and health hazards at Respondents' mines, an issue that is at the heart of this case. It involves the CBA between Respondents and the UMWA, representing the Respondents' miners. As discussed earlier, Respondents raised the terms of the CBA as relevant to this proceeding.

In addition, the Secretary submitted the federal court complaint as evidence of animus on the part of Respondents. Tr. 27. Respondents contend that operator animus towards the exercise of miner rights is not a consideration in interference cases, citing *Gray*, 27 FMSHRC at 8 n.6. *Gray*, however, only stands for the proposition that evidence of such animus is not necessary to establish interference with those rights. Evidence of operator animus nevertheless remains

relevant under the "totality of the circumstances" approach to determining whether interference with miners' rights occurred.[19]

Respondents take issue with the conclusion the Judge reached with regard to the good faith abatement penalty criterion, in light of the filing of the federal court complaint. The criterion at issue requires that the Commission consider "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i). In reviewing the Judge's factual findings supporting the consideration of the various penalty criteria, the Commission applies the substantial evidence test. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000).

The Judge considered the filing to be nothing more than an extension of the Respondents' interference with miners' protected rights.[20] She drew an inference that Respondents' sole motivation for the filing of the complaint was to intimidate the three witnesses scheduled to testify at the hearing in this case. Inferences drawn by a Judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (citations omitted).

The Judge raised the issue of Respondents' good-faith abatement sua sponte, yet never requested the parties to develop the evidentiary record or even submit argument regarding the extent, if any, of Respondents' "attempt[s] to achieve rapid compliance after notification" of the Secretary's interference complaint against them. We note that the Secretary's complaint was filed in March 2015, and thus six months prior to the filing of the federal court complaint.

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[19] As discussed in their separate opinion, Chairman Jordan and Commissioner Cohen join in affirming the Judge's ruling on the admissibility of the federal court suit exhibits. Slip op. at 22-23. Commissioners Young and Althen would reverse the Judge on this issue. They note that on the day of the hearing, the Judge did not have any evidence or briefing regarding the merits of the federal court complaint filed by Respondents. Without doubt, access to the courts is a fundamental First Amendment right. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983). When disputes arise, all parties have a right to pursue their positions vigorously. Unless the filing of a court complaint is demonstrated to be an unwarranted attempt to harass, it is inappropriate to consider such a filing as facial evidence of animus. Here, there was no evidence that the suit was filed in bad faith. Further, the parties — a major coal operator and the international union representing its miners — are relatively sophisticated, and the suit was grounded on the statute governing their ongoing bargaining relationship. Therefore, it was not relevant to a showing of animus, and Commissioners Young and Althen would rule that the admission of the exhibits was error.

[20] To the extent that the Judge, when she stated that three complainants in this case had been "named" in the federal court complaint meant that the three were listed as defendants to the complaint, she was mistaken. Only Bowersox was named as a defendant; the other two complainants here, Payton and Martin, were not named as defendants, though excerpts from their depositions in this case appear in the federal complaint. Gov't Ex. 31, at 1, 8-10.

Moreover, the Secretary stipulated that, as of September 2015, he was unaware of any of Respondents' miners having been investigated or disciplined for violating the reporting policy in the seventeen months since it was first announced at the Marshall County Mine Awareness Meetings. Jt. Stips. 20, 36-37. This was pertinent to the issue of Respondents' good faith, and thus should have been considered by the Judge. *See Sec'y on behalf of Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 555, 560 (Apr. 1996) (under substantial evidence standard, Judge must consider all evidence relevant to good faith abatement of discrimination violation prior to reaching conclusion on the criterion). Yet she made no mention of it in her "good-faith abatement" analysis.

Given these circumstances, we cannot conclude that the inference the Judge drew in this instance provides sufficient evidence in support of her finding of a lack of good faith on Respondents' part in abating the violation of section 105(c). The Secretary suggests remand to the Judge for further record development, particularly on the issue of whether the federal court suit was baseless or otherwise a sham. He contends that the federal suit may be one of those "objectively baseless retaliatory lawsuits [that] fall outside of the protection of the First Amendment." *See Sec'y on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1106 n.3 (May 2014) (Comm'rs Young and Cohen, dissenting) (citing *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 530-31 (2002)).

In light of the federal court's recent dismissal of the suit on jurisdictional grounds, in favor of permitting the dispute to be decided by the CBA's arbitration procedure, we do not find the Secretary's solution to be feasible at this time. Consequently, we are vacating the Judge's penalty assessments and remanding the case to her to reassess penalties without considering Respondents' filing of the federal court suit.[21]

D. The Details of the Statement to Be Read to Miners

As part of the remedy in this case, the Secretary requested that the Judge order a Murray Energy corporate officer to read a notice to all miners regarding section 105(c) violations, and to order the company to mail that notice to all miners and post it at the mine for one year.

The Judge, relying on section 105(c)(2) of the Mine Act, which authorizes the Commission to require a person who has violated section 105(c)(1) "to take such affirmative action to abate the violation as the Commission deems appropriate," 30 U.S.C. § 815(c)(2), granted the Secretary's request in part. The Judge required Respondents "to post for one year on a document that is at least 8 1/2 by 11 inches in a public and conspicuous place at each mine a notice to all miners detailing the miners' rights pursuant to section 103(g) of the Act and stating that there is no requirement or expectation that miners will make the same complaint to

[21] If the Secretary agrees with the Judge that the filing of the suit constituted an extension of Respondents' interference with miners' protected rights, filing one or more additional complaints alleging that would seem to be a more appropriate method of vindicating miners' rights in this instance. In fact, the Judge suggested as much at hearing, when she stated that the circumstances surrounding the federal court complaint could be the subject of a separate interference complaint by the UMWA to MSHA. Tr. 42-43.

management." She further required CEO Murray "to hold a meeting at each mine in which he shall read a prepared and approved statement notifying miners that they are not required to contact management when making a complaint to MSHA." 37 FMSHRC at 2609.

Respondents challenged the Judge's remedial order on a number of grounds, some of which have been resolved due to a partial stay issued by the Commission. *See* Order dated Feb. 10, 2016. The sole remaining issue involves the details of the "prepared and approved statement" CEO Murray is required to read to miners. The Secretary agrees with Respondents that the Judge's decision with respect to this aspect of the remedy is not clear as to who should prepare and approve the statement Murray is to read,. The Secretary suggests that he prepare it, and that, if necessary, the Judge resolve any disputes and approve the statement. In reply, Respondents complain that this will permit the Secretary to include in the statement material that is beyond the scope of what the Judge's order described. In sur-reply, the Secretary details what he views as the shortcomings of the notice that the Respondents were required to post, and maintains that the Commission needs to clarify the manner in which the statement is to be "prepared and approved."

While the Secretary's proposed solution has merit, because this case is being remanded, we will permit the Judge to further clarify what she meant in requiring CEO Murray to read the "prepared and approved" statement. The Judge can then structure the proceedings on remand accordingly and in light of prior experience in this case.

III.

Conclusion

For the foregoing reasons, we (1) affirm the Judge's decision upholding five counts of interference against Respondents and dismissing the second count of interference against the Marshall County Mine; (2) vacate the penalties she assessed for those counts; and (3) remand the penalty determinations and consideration of the statement CEO Murray is to read to miners for further proceedings consistent with this decision.

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Chairman Jordan and Commissioner Cohen, concurring in part and dissenting in part:

We join our colleagues in affirming the Judge's decision that the Respondents interfered with the miners' rights in violation of section 105(c) of the Mine Act. We agree with the Judge's application of the test for interference articulated by Chairman Jordan and Commissioner Nakamura in *UMWA on behalf of Franks v. Emerald Coal Resources, Inc.*, 36 FMSHRC 2088, 2104-19 (Aug. 2014).[22] In addition, we join the majority in affirming the Judge's decision to dismiss the second count of interference against Marshall County Mine, and in directing the Judge to clarify what she meant in requiring CEO Murray to read the "prepared and approved" statement. We write separately, however, because we would affirm the penalties assessed by the Judge in this case.

The Secretary proposed a penalty of $20,000 for each violation. The Judge assessed a penalty of $30,000 for each of the five violations. 37 FMSHRC at 2609-10. Reviewing the statutory criteria for penalty assessments in section 110(i) of the Mine Act against the Judge's findings in this case, we find that the penalties she assessed did not constitute an abuse of discretion.

Congress has conferred broad discretion upon the Commission and its Judges when assessing penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). In concluding that the operators' actions "were calculated to discourage miners from using the MSHA complaint process," 37 FMSHRC at 2608, and in emphasizing that "interference with the right to make anonymous complaints [is] a very serious matter that undermines the safety of the mine," *id.* at 2610, the Judge was well within the bounds of her discretion to significantly raise the penalty. She carefully set forth her findings on all six of the 110(i) criteria (finding, for instance, that the mines and Murray entities were large operators, *id.* at 2609, and determining that the level of negligence was high. *Id.* at 2610).

Our colleagues, however, insist on remanding the case to the Judge. They believe she erred because, after admitting evidence of a federal court complaint that named the three individuals the Secretary had identified as witnesses in the case before her, she drew an inference that Respondents' only reason for filing the lawsuit was to intimidate these three witnesses. She found this to be evidence to support a finding of a lack of good faith in abating the section 105(c) violation.

In analyzing this question, we turn first to the issue of the admissibility of the evidence of the court suit, as that evidence plays a key role in our colleagues' decision to vacate the penalty

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[22] Chairman Jordan joins with Commissioner Nakamura's footnote 11 in the majority opinion. Slip op. at 7 n.11.

Because Respondents did not challenge the application of the *Franks* interference test in the proceedings before the Judge, Commissioner Cohen would apply the *Franks* test in this case. Absent briefing from the Secretary, the regulated community and miners, however, Commission Cohen does not believe it prudent to settle upon a specific test for interference under the section 105(c) of the Mine Act at this time.

assessments. We agree that the Judge did not err in admitting into the record the federal court complaint and a press release announcing the filing of the suit, distributed by Murray American Energy. We review such rulings under an abuse of discretion standard. *Shamokin Filler Co.*, 34 FMSHRC 1897, 1907 (Aug. 2012), *aff'd*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1549 (2015). Under our fairly flexible evidentiary standards, Commission Procedural Rule 63(a), 29 C.F.R. § 2700.63(a), we discern no abuse of discretion in the Judge's ruling.

Turning to the Judge's use of this evidence to support her finding of a lack of good faith abatement, we are unable to agree that vacating and remanding her penalty determinations is warranted. As the Judge noted in her explanation of her penalty assessment, the timing of the filing of the complaint, together with the fact that the deposition testimony in the Mine Act case was included, would lead one to believe that the mine was trying to intimidate the witnesses.[23]

Unlike our colleagues, we consider this a permissible and inherently reasonable inference, with a logical and rational connection between the fact of the federal court case filing and the Judge's inference. The lawsuit was filed on the Friday before the Tuesday when the Commission hearing was scheduled to begin. The lawsuit named Ron Bowersox as a defendant and quoted the deposition testimony of Michael Payton and Ann Martin in this case. Bowersox, Payton, and Martin had all been identified by the Secretary as witnesses in the scheduled Commission hearing. Interestingly, the other three complainants in the Commission case — Thomas McGary, Rick Baker, and Raymond Copeland — were not identified as witnesses on the Secretary's witness list, nor were they mentioned or quoted in the Respondents' federal court complaint. *See* Gov't Ex. 31; S. List of Witnesses & Exhibits. It was certainly reasonable and permissible for the Judge to draw the inference that the Respondents' federal court lawsuit represented a lack of good faith in abating the violation.

We further note that the Judge's increase of the penalties was not predicated solely on the Respondents' filing of the federal court complaint. Near the end of her opinion, the Judge stated, "I find interference with the right to make anonymous complaints to be a very serious matter that undermines the safety of the mine. The negligence is high." 37 FMSHRC at 2610. Negligence is one of the factors identified for the assessment of penalties in section 110(i) of the Mine Act. The Judge's finding of high negligence in this case is based on the Respondents' acts of interference with the right of miners to make anonymous complaints under section 103(g) of the Mine Act. These acts occurred in the Awareness Meetings which constitute the basis for the finding of interference which the Commission affirms, not in the filing of the lawsuit. The Judge's findings of high negligence, together with the other factors she considered separate from the lawsuit, justify her increase in the penalties to $30,000 each.

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[23] Our colleagues are incorrect in asserting that the Judge concluded that the "sole motivation" for the Respondents' filing of the complaint was "to intimidate the three witnesses scheduled to testify." Slip op. at 19. The Judge did not state that intimidation was the "sole reason" for the filing of the lawsuit. 37 FMSHRC at 2609.

For the above reasons, we would affirm the penalties assessed by the Judge, and thus respectfully dissent.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Appendix A

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of RICK BAKER and RON BOWERSOX	:	Docket Nos. WEVA 2015-584-D WEVA 2015-585-D WEVA 2015-586-D WEVA 2015-587-D
and	:	
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:	
v.	:	
OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ANN MARTIN and RON BOWERSOX	:	
and	:	
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:	
v.	:	
HARRISON COUNTY COAL CO., CONSOLIDATION COAL COMPANY MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:	

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of RAYMOND COPELAND and RON BOWERSOX	:
and	:
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:
v.	:
MONONGALIA COUNTY COAL CO., CONSOLIDATION COAL COMPANY MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of MICHAEL PAYTON and RON BOWERSOX	:
and	:
UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor	:
v.	:
MARION COUNTY COAL CO., CONSOLIDATION COAL COMPANY MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:

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