FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2005

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of MARK GRAY	: : : : :	
v.	:	Docket No. KENT 2001-23-D
NORTH STAR MINING, INC., and JIM BRUMMETT	: :	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This proceeding involves a discrimination complaint filed by the Secretary of Labor on behalf of Mark Gray under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 815(c)(2) (2000) ("Mine Act" or "Act"), against North Star Mining, Inc. ("North Star") and Jim Brummett.[1] Administrative Law Judge Jacqueline R. Bulluck determined that Gray was not constructively discharged and dismissed the discrimination complaint against the respondents. She also concluded that Brummett did not unlawfully threaten Gray, as alleged, and consequently set aside a settlement agreement between the Secretary and Brummett. 25 FMSHRC 198, 199, 217 (Apr. 2003). The Secretary appealed the judge's conclusion that Brummett did not threaten Gray, and the Commission granted review. For the reasons that follow, we vacate the judge's decision and remand the case for further consideration.

[1] Mike Caudill, who was joined with North Star in the original complaint, is not involved with the remaining issues on appeal, and the parties have dropped him from the case caption in their pleadings.

I.

Factual and Procedural Background

North Star, a contract mining company, operates the No. 5 and 6 mines, underground coal mines located about one quarter mile apart in Leslie County, Kentucky. 25 FMSHRC at 199. Mike Caudill was superintendent of the two mines, and Thomas ("Eddie") Spurlock was assistant superintendent at the No. 5 mine. *Id.* Jim Brummett was a section foreman at the No. 5 mine until May 1, 2000, when he became assistant superintendent at the No. 6 mine. *Id.*

Mark Gray, the complainant, began his employment at North Star on December 21, 1999, as a roof bolter at the No. 5 mine on the second shift, which ran from 3:00 p.m. to 11:00 p.m. *Id.* Brummett, a friend and co-worker of Gray from prior jobs, had referred Gray to the job at North Star. *Id.* Gray's "pinning partner" on the roof bolter was Ray Young, with whom he commuted when they worked together. *Id.* at 199-200. In July 2000, Gray had the opportunity to move from the second shift to the first shift, which ran from 7:00 a.m. to 3:00 p.m., when roof bolter Terry Roark was injured. *Id.* at 199.

In May 2000, MSHA special investigator Gary Harris interviewed Gray at his home concerning alleged smoking, ventilation, and roof support violations at the No. 5 mine. *Id.* at 200. Ray Young was also interviewed. *Id.* As a result of the investigation, MSHA referred the matter to the office of the United States Attorney for the Eastern District of Kentucky, where it was assigned to Assistant U. S. Attorney ("AUSA") Davis Sledd. *Id.* On July 22, Gray and Young received subpoenas to testify, on July 27, before a federal grand jury in London, Kentucky. *Id.* They were the only miners from North Star who were subpoenaed in July; however, several other miners were later subpoenaed and testified on August 31. *Id.*

At the end of the shift following their receipt of the subpoenas, Gray and Young went to Superintendent Mike Caudill's office at the No. 5 mine. *Id.* Also present were Assistant Superintendent Eddie Spurlock and another miner. *Id.* Gray and Young requested permission for leave to testify on July 27. *Id.* In response to the miners' inquiries about the subpoenas, Caudill telephoned AUSA Sledd, who was identified at the bottom of the subpoena. *Id.* Caudill either identified himself as Gray or stated that he was inquiring about the nature of Gray's subpoena. *Id.* Sledd responded that the grand jury was investigating unsafe mining practices at North Star's No. 5 mine. *Id.*

On July 27, Gray and Young reported to the courthouse in London, Kentucky. *Id.* There they met with MSHA investigator Harris and AUSA Sledd. *Id.* Young testified first before the grand jury while Gray remained outside the courtroom. *Id.* At the conclusion of Young's testimony, Sledd concluded that Gray's testimony would be essentially the same as Young's and decided not to call him as a witness. *Id.*

When Gray returned to work after the grand jury proceeding, other miners asked about the investigation, but he declined to say anything about what occurred. *Id.* Sometime later, Assistant Superintendent Spurlock told Gray that Brummett wanted to talk to him at the No. 6 mine at the end of his shift.[2] *Id.* However, Gray went home with Young without seeing Brummett. *Id.*

When Gray arrived at his home, he had a telephone message to call Brummett at the No. 6 mine. *Id.* Gray then called Young to come to his house. *Id.* at 200-201. When Young arrived, Gray set up a tape recorder to record his conversation with Brummett when he returned the call.[3] *Id.* at 201. During the conversation, Brummett repeatedly asked Gray about the grand jury proceeding in London and whether Gray or Young had testified against him. *Id.* Gray told Brummett that he had not said anything about him. *Id.* At one point during the conversation, Gray told Brummett that he "[didn't] want no hard feelings over it." *Id.* Brummett responded, "No, they ain't no hard feelings, unless you put the screws to me, then I'll kill you." *Id.* The remark was followed by laughter. *Id.* at 212. The conversation concluded with Brummett asking Gray to come by the No. 6 mine with Young the next day and assuring Gray that he should not worry about losing his job. *Id.* at 201, 213-14.

The next day, after they completed their shift, Gray and Young went to the No. 6 mine to see Brummett. *Id.* at 201. Two MSHA investigators were in the mine office investigating a recent roof fall at the mine, and Gray and Young spoke with Brummett outside the office in the mine yard. *Id.* at 201, 215. Brummett spoke to Young and Gray separately. *Id.* at 215. Brummett sought assurances from Gray that Young had not testified against him. *Id.* at 201. Brummett further stated that "if anyone had laid the screws to him that he would whip their ass." *Id.* Gray did not respond to, or question, Brummett about the remark. *Id.* at 215. At the conclusion of the meeting, Gray and Young left, and Gray did not see Brummett again until the hearing in this proceeding. *Id.* at 201. Several days after the meeting, either Caudill or Spurlock told Gray that he was being transferred back to the second shift because Roark, the injured miner whom Gray had replaced, was returning to the roof bolter position on the first shift. *Id.* On August 16, after returning to the second shift for one day, Gray left his job at North Star, without notifying anyone, and went to work for another mining company. *Id.*

Superintendent Caudill and Brummett subsequently were criminally indicted by the U.S. Attorney's office. *Id.* Each of the men entered into plea agreements. On July 13, 2001, Caudill pled guilty to knowingly and willingly violating a health and safety standard by failing to follow the ventilation plan at the No. 5 mine. *Id.*; Gov't Ex. 6. He received probation and was nominally fined. 25 FMSHRC at 201. On October 25, 2001, Brummett pled guilty to violating a

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[2] As the judge noted, there were inconsistencies in the witnesses' testimony regarding the precise date of this event. *Id.* at 200 n.4.

[3] Both the tape of the conversation, Gov't Ex. 9A, and a transcript of the taped telephone conversation, Gov't Ex. 4, were introduced as exhibits at trial. 25 FMSHRC at 208-214.

health and safety standard by knowingly and willingly failing to follow the ventilation plan at the No. 5 mine. 25 FMSHRC at 201; Gov't Ex. 5. He received one-year probation, was fined $250, and was prohibited from directly supervising miners while on probation. 25 FMSHRC at 201-202; Gov't Ex. 5. Both plea agreements required Brummett and Caudill to fully cooperate with the government and to testify truthfully in any related proceedings. 25 FMSHRC at 202; Gov't Exs. 5, 6.

On August 31, 2000, Gray filed a discrimination complaint with MSHA stating that he "was forced to quit because of constant harassment and required to go to second shift because of [his] Grand Jury involvement in an MSHA investigation." Gov't Ex. 2. On November 20, 2000, the Secretary filed a complaint with the Commission, pursuant to section 105(c)(2) of the Mine Act,[4] alleging that North Star constructively discharged Gray because he had been subpoenaed to testify before a grand jury and that Brummett threatened Gray on two occasions. Compl., ¶ 9. Thereafter, a hearing was held before Commission Administrative Law Judge Bulluck.

In its brief to the judge, North Star argued that in the telephone converstation Brummett had used a figure of speech when he threatened to kill Gray and that in the conversation at the No. 6 mine Gray could not have felt threatened or he would have reported it to the MSHA inspectors who were present. N.S. Post-Trial Br. at 5-6. The Secretary argued that both conversations included impermissible threats for which Brummett and North Star were responsible. S. Post-Hear'g Br. at 12-14, 20, 22.

In her opinion, the judge examined Gray's allegation of harassment, including his charge that Brummett had threatened him. 25 FMSHRC at 207-16. In reviewing Brummett's telephone call to Gray, the judge noted that it was important to view the alleged threat in the context of the broader conversation. *Id.* at 208. The judge stated, "The question presented . . . is whether Brummett meant the literal meaning of the words, 'I'll kill you,' or whether he was speaking figuratively, as in, 'I'll *really* be upset with you.'" *Id.* at 214 (emphasis in original). The judge further noted that Brummett testified that he never meant to threaten Gray, although Gray *"believed* Brummett had threatened him." *Id.* at 215 (emphasis in original). The judge examined Gray's concerns, which he told Brummett about, in being subpoenaed to testify before the grand

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[4] Section 105(c)(2), 30 U.S.C. § 815(c)(2), provides in pertinent part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person . . . may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . Upon receipt of such complaint, the Secretary . . . shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . and propose an order granting appropriate relief.

jury. *Id.* She further noted that Brummett, in response to Gray's concerns, reassured him that he was not in danger of losing his job. *Id.* The judge concluded that, because of Brummett's protective behavior toward Gray and because of interspersed laughter during the telephone call, "Brummett's statement amounted to no more than an exaggerated expression, commonly used between friends who expect loyalty from one another." *Id.*

With regard to Brummett's statement to Gray on the following day at the No. 6 mine, the judge generally discredited Brummett' testimony. *Id.* She was persuaded that the comment ("if [he found] anybody laid the screws to [him] . . . [he'd] whip their ass") was directed at Young, rather than Gray, and that "it was no more than an exaggeration like the telephone 'threat,' rather than an intent to harm anyone." *Id.* at 215-16. The judge added that, as with the telephone conversation, Gray believed that he had been threatened. *Id.* at 216.

Based on these credited facts, the judge, noting that the issue of Brummett's alleged threats was fully litigated, concluded that "no threat occurred." *Id.* at 217. The judge further concluded that Gray was not constructively discharged. *Id.* She, therefore, dismissed the section 105(c) complaint against North Star, Mike Caudill, and Jim Brummett. *Id.*

The Secretary filed a petition for discretionary review limited to the dismissal of the complaint against North Star and Brummett because the judge concluded that Brummett did not harass or threaten Gray. PDR at 1-2. The Commission granted the Secretary's petition. Subsequently, the Commission issued an order directing the parties to address "whether the issues contained in the Secretary of Labor's Petition for Review were sufficiently raised before the judge to allow review by the Commission." Unpublished Order dated July 1, 2003.

II.

Disposition

The Secretary asserts that the judge had an opportunity to pass on the issue raised before the Commission, i.e., whether Brummett's threats to Gray violated section 105(c)(1) of the Act.[5] S. Br. at 27-29. In support, the Secretary asserts that she presented two separate theories regarding a violation of section 105(c)(1) to the judge: the first involving Brummett's threats to Gray and the second involving the threats that led to Gray's constructive discharge. *Id.* at 29.

[5] Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), provides in pertinent part:

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such a proceeding . . . .

The Secretary further argues that the judge's decision specifically addressed Brummett's threats when she disapproved the settlement agreement and stated that "no threat occurred." *Id.* at 31-32. With regard to the merits, the Secretary argues that the Commission has long recognized that coercive interrogation and harassment constitute prohibited interference under section 105(c)(1) of the Act. *Id.* at 12. The Secretary further contends that the judge erred when she examined Brummett's intent in making the statements at issue, and, moreover, even if she properly examined his intent, the statements were inherently coercive. *Id.* at 13-16. The Secretary continues that Brummett's statements should be examined under a "totality of the circumstances," an approach largely developed under the National Labor Relations Act. *Id.* at 16-19. The Secretary argues that the judge erred when she failed to apply that test, and that under the test the record evidence compels the conclusion that Brummett's statements would tend to have a coercive effect. *Id.* at 21-27. The Secretary contends that the Commission should hold that North Star and Brummett violated section 105(c)(1) of the Mine Act, reverse the judge's disapproval of the settlement agreement, approve that agreement, and remand the case to the judge to assess an appropriate penalty against North Star. *Id.* at 35-36.

North Star does not address whether Brummett's threats to Gray were properly before the Commission on review. Nevertheless, in its brief to the Commission, North Star repeats a notice argument, which was made to the judge, that the discrimination complaint did not give fair notice that Gray was claiming a threat of physical violence as a result of Brummett's phone call. N.S. Br. at 5-7. With regard to whether Brummett's threat to Gray violated the Mine Act, North Star asserts that Gray did not perceive that he had been threatened, that the use of the word "kill" was a figure of speech, that Brummett's subsequent threat of physical retaliation was made in the proximity of mine inspectors, and that, if Gray had felt threatened, he would have reported it then. *Id.* at 13-14. North Star further states that the judge's comment in her decision regarding the "comradery" between Brummett and Gray exhibited at the hearing was a consideration that had to be weighed in evaluating Brummett's threat. *Id.* at 14.

A. Whether the Issue Before the Commission Was Adequately Raised Below

Section 113(d)(2)(A)(iii) of the Act provides, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). The Commission has eschewed an application of this section that would produce a "procedural straitjacket." *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320 (Aug. 1992). "However, a matter must have been presented below in such a manner as to obtain a ruling in order to be considered on review." *Id.*

The complaint filed by the Secretary against North Star alleged that Gray had been constructively discharged as a result of having been subpoenaed to testify before a grand jury. Compl., ¶ 9. The complaint alleged that prior to and after the grand jury proceeding Gray had been harassed and intimidated by Mike Caudill and Jim Brummett. *Id.* Finally, the complaint also alleged: "Additionally, Jim Brummett threatened to kill Gray on two separate occasions if

Gray had testified against Brummett during the grand jury proceedings." *Id.* In his separate answer to the complaint, Brummett denied the allegations of discrimination in the complaint and also responded that "at no time herein did he threaten, intimidate, or harass . . . Mark Gray . . . ." Answer, ¶ 2. Caudill and North Star jointly answered the complaint and generally denied the allegations of discrimination and harassment and further stated that any "wrongful conduct" that may have occurred at the hands of other individuals was done without their knowledge or consent. Answer, ¶ 3, 4.

Gray and Brummett both provided testimony at trial concerning the threats, and the tape and transcript of Brummett's telephone conversation with Gray were introduced into evidence. Gov't Exs. 4, 9. Both the Secretary and North Star submitted post-trial briefs that addressed the threats. S. Post-Hear'g Br. at 12-15, 22, 26, 32; N.S. Post-Trial Br. at 4-8; N.S. Reply Br. at 4-6. Finally, and perhaps most significantly, the judge separately addressed the threat allegations in her decision. Thus, the judge thoroughly analyzed Brummett's remarks and their impact on Gray. 25 FMSHRC at 207-216. In addressing the Secretary's settlement agreement with Brummett, the judge stated: "The issue of Brummett's alleged threats was fully litigated in the Secretary's claim against North Star, and I have found that no threat occurred." *Id.* at 217.

In sum, the record indicates that the issue of whether Brummett's statements were impermissible threats or harassment in violation of section 105(c)(1) was litigated by the parties, decided by the judge, and is properly before the Commission on review.

B. Whether the "Threats" Violated Section 105(c)(1) of the Mine Act

Section 105(c)(1) of the Act 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." The report of the Senate Committee on Human Resources, which largely drafted the bill that became the 1977 Mine Act (*Sec'y of Labor on behalf of Bennett v. Emery Mining Corp.*, 8 FMSHRC 1391, 1395 (Aug. 1983)), states that "[i]t 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." S. Rep. 95-191 at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (hereafter "*Leg. Hist.*").

In addition to the broad protections offered against adverse actions, the scope of miner rights protected by the Act is equally broad. Section 105(c)(1) extends the protection of the Mine Act to any miner who "has instituted or caused to be instituted any proceeding under or related to [the] Act *or has testified or is about to testify in any such proceeding*." 30 U.S.C. § 815(c)(1) (emphasis added). The report of the Senate committee provides:

> The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends to include not only the filing of complaints seeking inspection under Section [103(g)] or the participation in mine inspections under Section [103(f)], but also the refusal to work in conditions which are believed to be unsafe or unhealthful . . . , or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

S. Rep. No. 95-181 at 35, *reprinted in Leg. Hist.* at 623. In analyzing this legislative history, the Commission has commented, "[T]he legislative history of the Act makes clear the intent of Congress that protected rights are to be construed expansively." *Swift v. Consolidation Coal Co.,* 16 FMSHRC 201, 205 (Feb. 1994). Finally, the Commission has noted that "the . . . Mine Act was drafted to encourage miners to assist in and participate in its enforcement." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2789 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981).

In the seminal case of *Moses v. Whitely Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), the Commission held that an operator's coercive interrogation and harassment violated section 105(c)(1) when such conduct interfered with the miner's exercise of protected rights. *Id.* at 1478-79. The Commission reasoned:

> A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act.

Id. (footnote omitted).

Whether an operator's question or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act "must be determined by what is said and done, and by the circumstances surrounding the words and actions."[6] *Id.* at 1479 n.8. A judge's findings with respect to the coercive nature of a mine

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[6] The Commission's approach to the analysis of operator statements stands in contrast to its analysis of discrimination against miners who have exercised their rights under the Mine Act. In analyzing allegations of employment discrimination, the Commission has generally examined: (1) whether the miner was engaged in protected activity under the Mine Act ; and (2) whether the

operator's statements are reviewed under a substantial evidence standard,[7] and, if these findings are supported by credibility resolutions, they will not be disturbed on review. *Id.* at 1479.

The Commission's test for evaluating operator statements that was formulated in *Moses* has its genesis in section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce" an employee's protected rights.[8] The National Labor Relations Board ("NLRB") has stated the following test for determining whether a section 8(a)(1) violation has been committed:

> interference, restraint, and coercion under Section 8(a)(1) of the [NLRA] does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA].

American Freightways Co., 124 NLRB 146, 147 (1959), *quoted in* THE DEVELOPING LABOR LAW, at 82 (Patrick Hardin & John F. Higgins eds., 4th ed. 2001). *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964) ("Over and again the Board had ruled that section 8(a)(1) is violated . . . despite the employer's good faith . . . "). Further, under the NLRA, it is generally a violation for an employer to threaten an employee with reprisal for engaging in union and other concerted activity protected by the NLRA. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). "[I]n determining whether a statement is an impermissible threat . . . language used by the parties . . . must not be isolated nor analyzed in a vacuum, but must be considered in light of the circumstances existing when such language was spoken." *TRW, Inc. v. NLRB*, 654 F.2d 307, 313 (5th Cir. 1981); *accord Standard-Coosa Thatcher Carpet Yarn Div. v. NLRB*, 691 F.2d 1133, 1137 (4th Cir. 1982) (the Board, in making this decision, considers whether "the conduct in

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adverse employment action was motivated in any part by the miner's protected activity. *Swift v. Consolidation Coal*, 16 FMSHRC at 204-205. This latter analysis is generally referred to as the *Pasula-Robinette* test. *See Pasula,* 2 FMSHRC at 2797-800; *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

[7] When reviewing an administrative law 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 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[8] The Commission has previously looked to the case law interpreting analogous provisions of the NLRA for guidance in construing Mine Act provisions. *See Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1368-69 & n.11 (Dec. 2000).

question had a reasonable tendency in the totality of the circumstances to intimidate."). Finally, as the Supreme Court noted, in approving a "bargaining order" to remedy an employer's unfair labor practices that had made an NLRB-conducted election impossible, an evaluation of employer speech 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." *Gissel Packing Co.*, 395 U.S. at 617.

Here, the judge analyzed Brummett's statements primarily from the perspective of what he intended. "The question presented . . . is whether Brummett meant the literal meaning of the words, 'I'll kill you,' or whether he was speaking figuratively, as in, 'I'll *really* be upset with you.'" 25 FMSHRC at 214 (emphasis in original). With regard to both the telephone conversation with Gray and the threat to kill, and the face-to-face conversation with Gray at the No. 6 mine and the threat of bodily or other harm, the judge concluded that the statements were exaggerated expressions, rather than threats. *Id.* at 215-16. She arrived at this conclusion based on Brummett's intent. *Id.*

We conclude that the judge examined Brummett's statements too narrowly by considering largely, if not exclusively, Brummett's intent or motive in making the statements. In the judge's words, the presence or absence of a violation of section 105(c) of the Mine Act turned on whether Brummett literally intended by his words to cause physical harm to Gray or any other miner who testified against him during the grand jury investigation. However, rather than considering only Brummett's intent, the judge should have analyzed the totality of circumstances surrounding Brummett's statements to determine whether they were coercive and violative of section 105(c) of the Mine Act. *See Moses*, 4 FMSHRC at 1479. *See also Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 634-37 (5th Cir. 2003) (propriety of employer's statement under section 8(a)(1) of the NLRA is based on an examination of the circumstances surrounding the statements). Brummett's statements could be coercive, even if he did not mean to literally kill or cause physical harm to Gray or other miners who testified against him. Indeed, the Commission's decision in *Moses* makes it clear that threats of reprisals or of employment discrimination can be coercive and in violation of section 105(c). Given Brummett's supervisory position and his ability to impact the employment relationship of Gray (whom Brummett assisted in getting a job at North Star), Young, and other miners who might testify against him, the judge should have considered the effect of Brummett's statements in this broader context and what other meanings could be reasonably inferred from them, rather than limiting her consideration to their literal meaning and what Brummett intended.[9]

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[9] The Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the 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." *Id.*; *accord Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989).

Among the judge's findings that the Commission found relevant in determining the coercive nature of the operator's statement in *Moses* were the "persistence with which the subject" of the miner's protected activity was raised and the "accusatory manner in which it was done." 4 FMSHRC at 1479. As the Commission stated in *Moses*, its consideration of those factors led it to conclude that a miner would have logically feared reprisal and would be reluctant to exercise his rights in the future. *Id.* In the circumstances of this case, both of these factors may be pertinent and should be considered by the judge in determining the legality of the statements under section 105(c)(1) of the Act.

In addition to those factors surrounding Brummett's statements, there are other considerations that should be weighed in determining whether the statements were coercive. Those circumstances include where the statements were made (an at-home telephone call and a meeting outside the mine office);[10] the nature of Brummett's and Gray's relationship (the two were friends and Brummett helped him secure a job at North Star, and Brummett was a supervisor at North Star);[11] the fact that the statements were made along with inquiries about Gray's and Young's testimony in a confidential grand jury investigation into alleged criminal actions at the mine,[12] and the fact that, on each occasion when Brummett spoke to Gray, he apparently sought to isolate him and talk to him one-on-one.[13]

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[10] *See, e.g., House of Raeford Farms, Inc.*, 308 NLRB 568, 571, 141 LRRM 1057, 1060 (1992) (locus of supervisor's remarks considered in determining whether they were violative), *enf'd*, 7 F.3d 223 (4th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

[11] The judge has previously noted the "comradery" between Gray and Brummett. 25 FMSHRC at 207. However, in an NLRB case on appeal involving a violation of section 8(a)(1) of the NLRA, a reviewing court has indicated that "[t]he fact that these statements were made during a private conversation between . . . close personal friends outside of work, is not determinative of whether the statements were . . . coercive." *Tellespen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 564 (5th Cir. 2003). *Compare TRW*, 654 F.2d at 313 (court could not sustain finding of violation that a statement was a threat of reprisal for engaging in union activity where the statement "was merely one . . . in a chain reflecting the continuing hostility between the two men").

[12] *See also NLRB v. Brookwood Furniture, Div. of U.S. Indus.*, 701 F.2d 452, 461 (5th Cir. 1983) (in enforcing an NLRB order, court considered interrogations as well as an employer's opposition to unionization in determining whether a conversation was coercive).

[13] The judge considered it significant that Brummett's "whip ass" statement to Gray at the No. 6 mine was directed at Young, rather than Gray. 25 FMSHRC at 215-16. However, that fact is not determinative of whether, under the circumstances, the statement may have tended to coerce Gray in the exercise of *his* Mine Act rights. *See Moses*, 4 FMSHRC at 1478.

In light of the judge's application of the incorrect legal test to Brummett's statements, we remand this matter to her for further consideration of the facts and circumstances surrounding the statements to determine if they were coercive under section 105(c)(1) of the Mine Act. This is a determination that the judge should make in the first instance. *See Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 307-308 (Mar. 2000) (issue of whether miner's cursing, including an alleged threat, was remanded to judge to view them "in their totality" to determine whether they were within the leeway accorded employees whose behavior is provoked); *accord Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co., LLC*, 23 FMSHRC 981, 992 (Sept. 2001) (issue of whether miner's conduct that was grounds for discharge was provoked by operator in response to miner's protected activity must be viewed in "their totality").

Finally, we note that, in the Secretary's complaint initiating this proceeding, both Superintendent Caudill and Brummett were each separately named as an "operator" under section 3(d) of the Act, 30 U.S.C. § 802(d). The complaint did not designate either Caudill or Brummett as "agents" of North Star under section 3(e), 30 U.S.C. § 802(e). In their answers to the complaint, Caudill and Brummett did not dispute being designated as operators. However, in her post-hearing brief to the judge, the Secretary generally alleged that "[t]he hostile actions and animus toward Gray of . . . assistant mine superintendent Brummett are attributable toward North Star." S. Post-Hearing Br. at 20. Similarly, both in her petition and brief to the Commission, the Secretary specifically requests the Commission to reverse the judge's decision, "hold that North Star and Brummett violated Section 105(c)(1), . . . and remand the case to the judge to assess an appropriate civil penalty against North Star." PDR at 21; S. Br. at 35-36.

Based on the record, it is not clear what is the Secretary's theory of liability against North Star. In light of the Secretary's complaint, it appears that North Star may have no further liability, even if Brummett's statements were found to be coercive. The Mine Act does provide "that an operator, though faultless itself, may be held liable for the violative acts of its employees, agents, and contractors." *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991). However, assessing the employer's liability in this context is complicated by the fact that Brummett was facing individual criminal and civil penalties. He therefore had an interest in Gray's appearance before the grand jury independent of, and perhaps even in conflict with, North Star's interests.

While the pleadings are not dispositive on this issue, the Secretary charged Brummett as an "operator."[14] Furthermore, the record does not seem to indicate the sustained prosecution of

[14] The Secretary's complaint separately named Brummett as an operator, rather than an agent of North Star. We need not address whether Brummett was appropriately charged as an operator, because his potential liability arises from the specific language of section 105(c)(1) of the Mine Act, which provides that "*No person* shall . . . interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has testified or is about to testify in such a proceeding . . . ." 30 U.S.C. § 815(c)(1) (emphasis added). The Secretary's theories of liability

an agency theory imputing liability to North Star. Indeed, the Secretary dropped Caudill from the case on appeal, conceding that he had no further liability in the proceeding in the absence of the constructive discharge allegation. It would appear that North Star's liability ceases for the same reason, i.e., the abandonment of the constructive discharge claim on appeal. Thus, given the constraints of the Secretary's complaint and the limited basis on which she has appealed, the judge should determine whether North Star continues to be a party in this proceeding in the event Brummett's statements are found to be violative.

III.

Conclusion

Based on the foregoing, we vacate the judge's decision and remand this proceeding for further consideration consistent with our analysis.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

seem to preclude treating Brummett as an agent of North Star because he was charged as an "operator."

Commission Jordan, concurring:

I agree with the majority that the question of whether Jim Brummett threatened Mark Gray in violation of section 105(c)(1) of the Mine Act should be remanded to the judge. However, I disagree with the majority's analysis regarding the potential liability of North Star, and thus write separately to address that issue.

It appears from my colleagues' opinion that they have already decided that North Star cannot be liable in this case, even if the judge finds that Brummett threatened Gray. Slip op. at 12-13. This seems to be based solely on the manner in which the Secretary's complaint was drafted – because she named Brummett as an "operator" under section 3(d) of the Mine Act and failed to explicitly designate Brummett as an agent of North Star under section 3(e). *Id*. The majority, citing no authority and providing no explanation, states that the theories of liability included in the complaint appear to preclude treating Brummett as North Star's agent because he was instead charged as an "operator." *Id*. at 12 n.14.[1]

My colleagues recognize, however, that in *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991), the Commission ruled that the Mine Act's scheme of liability provides "that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents, and contractors." Slip op. at 12. In the complaint, Brummett was described as a foreman (Compl., ¶ 5), a designation that North Star admitted. Answer of North Star Mining, Inc. and Mike Caudill, ¶ 5. I thus frankly fail to see how Brummett cannot be either an "employee, agent or contractor" of North Star.[2] I note further the majority's acknowledgment (slip op. at 12) that in her post-hearing brief to the judge, the Secretary stated that "[t]he hostile

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[1] The judge did not need to reach the issue of whether Brummett was in fact an operator, and the majority chooses not to address it, stating that Brummett's "potential liability arises from the specific language of section 105(c)(1)." *Id*. This refers to language in that section which provides that "[n]o person shall . . . interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has testified or is about to testify in any such proceeding. . . ." 30 U.S.C. § 815(c)(1). It appears that the majority believes that Brummett's liability, if any, stems from Brummett's status as a "person" under section 105(c)(1), and not from his status as an operator. If this is the case, I fail to see why simply naming Brummett as an operator in the complaint – when his ultimate liability does not appear to hinge on that designation – automatically prevents North Star's liability on an agency theory. In any event, with no explicit findings in the record as to whether Brummett was acting as an agent for North Star or on his own individual behalf, it appears premature to discount an agency theory of liability at this point.

[2] My colleagues speculate that Brummett's potential individual liability under section 110(c) might have placed him in such conflict with North Star's interests so as to preclude an agency relationship. Slip op. at 12. Instead of suggesting that North Star be absolved of liability, the Commission should permit the judge, in the first instance, to make findings on this question. *See Dacotah Cement,* 26 FMSHRC 461, 468 (June 2004).

actions and animus toward Gray of . . . assistant mine superintendent Brummett are attributable toward North Star." S. Post-Hearing Br. at 20. This appears to allege an agency relationship between the two. In any event, I am reluctant to create a new standard hinging an operator's liability on the specificity of the section 105(c) complaint's allegations. This would be particularly difficult for the many pro se complainants who seek relief under section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3).

The Commission's decision in *Bryant v. Dingess Mine Service*, 10 FMSHRC 1173 (Sept. 1988), demonstrates the importance of examining the actual relationship between parties working at a mine site, which I believe is the proper course in this case as well. In *Bryant*, the judge held a contractor, Dingess Mining Service ("Dingess"), liable for discriminatory actions in violation of section 105(c), but found no liability against Mullins Coal Co. ("Mullins"), the lessee of the coal at the mine, nor against Winchester Coals, Inc. ("Winchester"), the lessor of the mining equipment and machinery. *Id*. at 1173-83. The Commission determined that Dingess' status as an independent contractor existed in name only and that in fact his relationship was akin to being an on-site, supervisory agent for Mullins and Winchester. *Id*. at 1180. Reversing the judge, the Commission found Mullins and Winchester liable under section 105(c) for Dingess' discriminatory acts. *Id*. In so finding, the Commission acknowledged that the judge did not expressly rule that Dingess was acting as an agent, but stressed that the factual findings that he did make led inevitably to this conclusion. *Id*. at 1179. We emphasized that Dingess worked as a manager and supervisor on behalf of the operators, and that our disposition "turn[ed] upon an examination of the true nature of the relationship existing between the parties." *Id*. at 1178. We stated that:

> Mullins and Winchester were in actual control of the mine at which Bryant worked. As a result, this case is not unlike the more typical situation where a mine foreman or supervisor is endowed with a certain degree of responsibility in the operation of a mine, but whose sphere of control is always subject to the operator's ultimate right to direct the supervisor's work performance in order to ensure compliance with the requirements of the Mine Act. Within this latter framework, it has been consistently held that mine operators are liable for the discriminatory acts of their agents under section 105(c)(1) of the Act. *See e.g.*, . . . *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (1982) *aff'd sub nom*. *Whitley Development Corp. v. FMSHRC*, 770 F.2d 168 (6th Cir. 1985) (operator held liable for foreman's illegal discharge of miner) . . . .

Id. at 1179-80 (footnote omitted).

Accordingly, I would remand this case to the judge to determine the nature of the relationship between Brummett and North Star and to ascertain North Star's liability, if any, if Brummett's statements are found to be coercive.

Mary Lu Jordan, Commissioner

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