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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
BILLY B. TAYLOR
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. LAKE 92-131-D

Mine No. 24

v.

OLD BEN COAL COMPANY,
RESPONDENT

DECISION

Appearances: Miquel J. Carmona, Esq., Office of the Solicitor,
U. S. Department of Labor, Chicago, Illinois,
for Petitioner;
Gregory S. Keltner, Esq., Old Ben Coal Company,
Fairview Heights, Illinois, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

This case involves a discrimination complaint filed by the Secretary of Labor ("Secretary") on behalf of Billy B. Taylor under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2) ("Act" or "Mine Act"). The complaint alleges that Old Ben Coal Co. ("Old Ben") violated Section 105(c)(1) of the Act when it suspended Taylor from employment for four days in retaliation for Taylor's protected safety complaints. (FOOTNOTE 1) The Secretary seeks by way of restitution a

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finding that Old Ben's suspension of Taylor was the result of unlawful discrimination, back pay plus interest, benefits lost due to the suspension, and the expunging of all disciplinary letters located in Taylor's employment records that relate to the suspension. Finally, the Secretary proposes a civil penalty of \$1,250 for the alleged violation of Section 105(c)(1). Old Ben admits that it suspended Taylor but denies the disciplinary action was motivated by Taylor's protected activity.

A hearing on the merits of the Secretary's complaint was held in Evansville, Indiana. Post-hearing briefs were filed by counsel for both parties.

STIPULATIONS

At the commencement of the hearing counsel for Old Ben read the following stipulations into the record.

1. The Administrative Law Judge has jurisdiction over the proceeding.
2. Mine 24 is an underground bituminous coal mine.
3. During the calendar year preceding the alleged violation of Section 105(c) of the Mine Safety and Health Act, Mine Number 24 had a production of 1,250,636 tons of coal and the controlling entity had a production of 14,918,109 tons of coal.
4. Payment of a penalty as provided by the Mine Safety and Health Act, if a violation were found in this case, would not affect the operator's abilities to remain in business.
5. During the twenty-four month period preceding the alleged violation, Respondent had the following history of violations: (a) number of violations assessed, one hundred ninety-five; (b) number of inspection days, two hundred and three; (c) violations per inspection day point nine-six . . . ; number of previous Section 105(c) violations, zero.

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6. On June 20, 1991, Respondent issued a Notice of Suspension suspending Billy B. Taylor from his employment without pay on June 18 through June 21, 1991.

7. On June 21, 1991, Billy B. Taylor filed a discrimination complaint with the Mine Safety and Health Administration subdistrict in Benton, Illinois.

Tr. 10-11.

COMPLAINANT'S CASE

Billy B. Taylor and Terry Koonce were called to testify.(FOOTNOTE 2)

BILLY B. TAYLOR

Taylor testified that he began working for Old Ben in 1975 and since has continued in Old Ben's employ.(FOOTNOTE 3) At all times pertinent to this case, Taylor stated that he worked at Mine No. 24 as a longwall prop man. Tr. 56-57. On June 18, 1991, Taylor was working on the 4:00 p.m. to 12:00 a.m. shift (the "afternoon shift"). At the start of the shift, Taylor was sent to an area of the mine where the work of setting up a longwall was in progress. Taylor's immediate responsibility was to assist in assembling a longwall stage loader. However, when it was discovered that all of the tools necessary for the job were not on the unit, Taylor was instructed by his immediate supervisor to drive in the manbus to another unit and there to get the needed tools. Sheer operator Dennis Parkhill was told to accompany Taylor. The unit where the men were instructed to go was one where a longwall was being disassembled and moved (a "recovery unit"). Tr. 58.

Upon reaching the mouth of the recovery unit, Taylor and Parkhill encountered what Taylor described as a "massive blockage" of the entry. Tr. 59. According to Taylor, "[T]here was . . . trucks, scoops and diesel scoops and everything. We couldn't go any further. We were stuck there." Id. At this point, Parkhill got out of the manbus and walked the main travelway. When he returned to the manbus he told Taylor that the entry was blocked, that up ahead men were trying to transfer

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a longwall shield from a dolly onto a scoop and that he and Taylor could not proceed further. Tr. 60.

Taylor stated that he and Parkhill sat in the manbus approximately 20 minutes, at the end of which time they were approached by Ronald Smart, the section boss of the recovery unit. Taylor asked Parkhill if he had observed any vehicles that could be used for transportation outby in case of an emergency, and Parkhill indicated he had not. Taylor then asked Smart, "Hey Ron, did [sic] you have any kind of transportation outby this mess[?]" Tr. 61. Taylor testified that Smart did not answer and that he again asked Smart the same question. Taylor stated that once again Smart did not respond but rather walked around the corner of a rib where Taylor could not see him. According to Taylor, he got out of the manbus and walked to where he could see Smart, and he asked Smart, this time in a louder voice, "Have you got any transportation outby?" Id. Smart turned and came toward Taylor, and Taylor said again, "[H]ave you any transportation outby?" Id. According to Taylor, Smart pulled out a notebook and said, "I'm telling you to work, are you refusing to work, if you are I'm going to stop your time and send you out of the mine." Tr. 62. Taylor replied that he was not refusing to work, that everything was blocked and he could not do anything. Taylor also stated that he may have again asked about transportation outby, and that Smart replied in a louder tone for Taylor to get in the manbus and to leave the area. Tr. 62.(FOOTNOTE 4)

Shortly thereafter the travelway was opened and Taylor testified that he stepped into the manbus and told Smart, "This is not over . . . We'll settle it on top if I have to get the Union, Federal, and State involved." Tr. 63, See also Tr. 76.(FOOTNOTE 5) Smart then came toward Taylor and told him to get off the manbus, that Smart was stopping Taylor's time and was sending Taylor out of the mine. Id.

Taylor testified that he then asked Parkhill to take him back to the unit from whence they had come so that Taylor could retrieve his dinner bucket. Smart told Taylor to stay put, and Smart sent for the acting mine manager, Joe Ronchetto.

When Ronchetto arrived, Taylor stated that Smart explained that he had stopped Taylor's time and that Taylor had threatened

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him. Taylor claimed he responded, "I said, what [?]," and Smart repeated that Taylor had threatened him. Tr. 65. Ronchetto then took Taylor out the mine.(FOOTNOTE 6)

Taylor maintained that during the June 18 incident he never refused a direct work order from Smart, that his work at that time involved being in the manbus and that he was right where he should have been. Tr. 66. Further, Taylor maintained that during the incident he did not direct abusive language at Smart, although, at some point during the exchange, he may have placed his hands in a prayer-like position and said, "Please, please send me out of the mine." He explained that if he had said it, to Smart it was "in a situation in the mine where . . . Smart was very belligerent toward me and trying to make me feel that I didn't have the right to ask any of the questions, and it was just my way of saying . . . you don't have to badger me." Tr. 67.

Taylor claimed that when he inquired of Smart whether there was transportation outby he did so out of concern for the safety of himself and his fellow miners. As a former union safety committeeman he was aware that past practice at the mine was to have such transportation available when heavy equipment -- such as longwall shields -- was being moved. The transportation was on the scene because of the possibility that the transporting equipment could break down. Tr. 68-69. He explained that outby transportation was needed because if someone was injured and the travelway was obstructed by broken down equipment, the injured person could be placed on the outby transportation and be quickly removed from the mine. Tr. 84-86.

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In addition, Taylor stated that prior to and at the beginning of the afternoon shift on June 18, the underground telephone system had been working only intermittently. When he and Parkhill left their section, the phones were not working. When they arrived in the vicinity of the blockage, they saw a man repairing a telephone, and he told them he thought the phones now had been fixed. Tr. 66. Taylor stated that the unreliability of the telephone system on June 18 added to his safety concerns and made it even more important to have transportation outby, since if someone were hurt, a telephone call to the top for assistance could not be assured. Tr. 84, 101-102.

Once Taylor was on the surface, he stated that he was told by the union safety committeeman at the mine to go home and that the committeeman would see if he could find out "what's going on." Tr. 78. When Taylor did not hear from the safety committeeman, Taylor returned to the mine on June 19 and the committeeman told Taylor that Taylor had to talk to Mine Superintendent Koonce before Taylor could return to work. Taylor stated that this led to a brief discussion between himself and Koonce in which Koonce stated that there were serious charges against Taylor (Taylor thought Koonce said "You threatened your boss." Tr. 79.) and that Koonce would have to further investigate the charges. Tr. 79.

The following day, according to Taylor, he met with Koonce and others at the mine. Taylor stated that he did not remember everything that was said because the meeting went "on and on" but as best he could recall, Koonce said that Taylor had been charged with abusive language, threats to Smart and his family and refusing a direct work order. Tr. 81-82. Koonce also told Taylor that the charges were "founded." Tr. 81. At the close of the meeting, Koonce handed Taylor a letter advising Taylor he was suspended from June 18 to June 21. (FOOTNOTE 7)

DENNIS PARKHILL

Parkhill essentially corroborated Taylor's testimony. He stated that subsequent to being assigned to assemble a stagel loader for a longwall section, he and Taylor were asked to take the manbus and to go to the longwall recovery unit to get some missing tools. Tr. 111. Parkhill testified that he and Taylor proceed to the mouth of the recovery unit where Parkhill found miners in the process of taking a shield off the shield dolly and loading it onto a scoop and where the route they had to travel was blocked. Therefore, he and Taylor were forced to wait until the roadway cleared. Tr. 113-114.

Parkhill stated that after he found that the roadway was blocked, Taylor several times asked Smart if transportation was available on the outby side, and that Smart ignored the questions. Parkhill also stated that Smart directed Taylor to get into the manbus and to leave, which Taylor and Parkhill could not do because the roadway was blocked, and that ultimately Smart told Taylor that his time was being stopped and that he was being sent out of the mine. Tr. 114.

After the roadway opened, Smart directed Parkhill to get the tools, which Parkhill did. Tr. 123.

TERRY N. KOONCE

Mine Superintendent Koonce stated that he was not present at the June 18 incident but that he investigated it by discussing the matter with Taylor and Smart. Koonce said that he did not interview Parkhill because Parkhill stayed on the manbus and did not come into the area where the conversation between Taylor and Smart took place. Tr. 24, 28. According to Koonce, the conversation between Taylor and Smart concerned whether or not the telephones were operational and Taylor's concern that the travelway may have been blocked. Koonce believed that Smart told Taylor that the travelway was not blocked and to go back to the manbus and to his work assignment. Koonce stated that this conversation was repeated several times. Tr. 18.

Koonce maintained that by continuing questioning about the roadway after having been told it was not blocked, Taylor was insubordinate. Tr. 19. Koonce also maintained that Taylor told Smart he would go back to the manbus "whenever he got good and G-D ready." Tr. 21. Koonce further stated that during the conversation Taylor held his hands in a praying fashion in front of Smart's face and said, "[P]lease take me our of the mine, please take me our of mine." Tr. 19. Koonce termed this "threatening or abusive" language and stated that the use of such language was a violation of Old Ben's work rules. Id.

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Finally, according to Koonce, after Taylor was told by Smart that his time had been stopped, Taylor made statements to Smart in which he threatened Smart's family and said he would damage Smart's personal vehicle. Koonce agreed however that Taylor denied making these statements. Tr. 26.

In Koonce's view, the fact that Taylor got "in the section foreman's face with his hands in a praying motion during [the] heated conversation [and said], ["Please take me out of the mine, please take me out of the mine['']," was an action sufficiently abusive to warrant Taylor's suspension. Tr. 31. Koonce further explained that Taylor was disciplined for the way in which he spoke to Smart and for his motions, "I just don't think that it's right that an employee or an employer has to get up in someone's face, nose to nose, and act in that kind of manner. It's just not professional." Tr. 50. He further stated that he believed that Taylor had no reason to start the conversation because Taylor was not even in his own work area at the time. Id. Taylor was not discharged because "he hadn't had that much [prior] discipline." Tr. 36.

Koonce stated that, in general, if there is one way in and out of an area and the way is blocked, then transportation must be provided on the outby side, regardless of whether or not telephones are working. Koonce further acknowledged that at Mine No. 24, once or twice a month, a rockfall would block a travelway and that two or three times a week a piece of equipment would break down and block the travelway. Tr. 51. However, Koonce maintained that in this particular instance, outby transportation was not required because the equipment in the travelway was operational and energized, and it would have taken but "a matter of minutes" to move it out of the way. Tr. 36, 39-40.

With regard to Taylor's safety concerns, Koonce agreed that Taylor was questioning whether the type of transportation required by Section (0)(4) of the Bituminous Wage Agreement of 1988 was available. Tr. 43.(FOOTNOTE 8)

Finally, regarding the incident of June 17, Koonce stated that Taylor's scoop could have inadvertently pinned Smart and that no separate internal investigation was taken by Old Ben in response to the incident. Tr. 49.

RESPONDENT'S CASE

Joe Ronchetto, David Stritzel, Mark Cavinder, and Ronald Smart were called to testify.

JOE RONCHETTO

Ronchetto stated that on June 18, 1991, he was the Acting Mine Manager in charge of production at Mine No. 24. He also stated that at approximately 9:00 p.m., while underground, he received a call from Smart requesting that he, Ronchetto, come to the mouth of the recovery area. When he reached the area, Smart told him that Taylor and Smart had gotten into a dispute and that Smart had stopped Taylor's time because Taylor had refused two or three direct orders to return to work. Ronchetto added that Taylor denied he had refused to return to work. Tr. 138. Ronchetto also stated that he asked Taylor if any equipment had broken down, that Taylor said he did not know, and that Ronchetto responded, "If we don't have anything broken down we're not required to have a ride outby." Tr. 138-139, see also Tr. 140. Ronchetto added that if shields were being moved, outby transportation was not required. Tr. 140.

Ronchetto described Taylor as a good worker who usually followed orders "very well." Tr. 141.

DAVID STRITZEL

Stritzel, the Director of Health and Safety for Ziegler Coal Company, stated that he is involved in the majority of direct contacts between MSHA, the state inspection agency and the company. He testified that he was not contacted by anyone from MSHA or the state regarding the issue of whether transportation is required outby while shields are being loaded. Tr. 143.

MARK CAVINDER

Cavinder, the manager of three Old Ben mines, including Mine No. 24, stated that he has the "final say" on whether discipline will be implemented at the mines. In that capacity he reviewed Taylor's case and agreed that a four day suspension was appropriate. Cavinder stated that Taylor was disciplined because of the manner in which he approached Smart, specifically for failing to comply with a direct work order to return to work and for intimidating-type remarks. Tr. 149-150. He further stated that although a supervisor typically is required to respond to a question concerning safety, in this instance he would not second-guess Smart, who, he believed, was trying to defuse a hostile situation. Tr. 157. He added that to comply with the work order all Taylor would have had to do was to return to the manbus. Tr. 160.

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Further, he stated that in the usual situation, transportation is not required outby when longwall shields are being moved, and that the momentary 5 to 10 minute interruptions in the use of a travelway when moving shields are not considered blockages requiring outby transportation. Tr. 151, 160.

RONALD SMART

Smart first testified about the incident on June 17. Smart stated that on June 17 he had concerns about how shields were being unloaded, and he discussed his concerns with Taylor's foreman. Smart believed that the process was taking too long. According to Smart, Taylor, who was there and who was running a scoop, became belligerent and cursed the company and Smart. Smart remembers that Taylor insulted him three times before Smart approached Taylor's scoop and asked Taylor what he had said. Smart said to Taylor, "What did you say?" and Taylor responded, "You heard me Goddamnit." Tr. 168. At that point, Taylor started the scoop and pinned Smart's legs. Smart stated that as a result he became irate and had words with Smart's foreman over the foreman's lack of control of his workers. Smart also stated that he was reprimanded later for his conduct toward the foreman. Tr. 168.

Smart also described the loading of the shields on June 18. Smart stated that two large diesel scoops were transporting the shields from the old panel, down the travelway, to the point where the shields were transferred to dollies. (The dollies were being pulled by two smaller scoops.) The distance from the old panel to the transfer point was approximately 1,000 to 1,500 feet. Also, there was a battery powered scoop in the vicinity that would load the shields onto the dollies. If the dollies were not at the transfer point when the diesel scoops arrived, the scoops would drop the shields off in the roadway and leave. Tr. 169. The shields are steel and are approximately 5 to 6 feet wide and 20 feet long. Tr. 171.

At the time of the incident with Taylor, the crew was loading shields in the travelway. One of the smaller scoops was loaded and ready to go, but the scoop operator was eating dinner. One of the diesel power powered scoops arrived, and the crew commenced to load the second dolly rather than put the shield on the ground. Smart told the small scoop operator to pull the dolly out of the travelway. Smart stated that at this time the travelway had been blocked "maybe fifteen minutes," Tr. 172, but that if the travelway had to have been cleared this could have been done in five minutes. Tr. 182.(FOOTNOTE 9) Smart then observed Taylor

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coming toward him down the travelway. Tr. 172, 180. According to Smart, when he first saw Taylor, Taylor was out of the manbus. Smart claimed he did not know why Taylor and Parkhill had stopped the bus. Tr. 206.

Taylor was no closer to 25 feet from Smart when he asked Smart in a very loud voice, "Do we have a bus or truck outby where we're loading these shields?" Tr. 180. Smart explained, "[W]ith what happened the night before and the travelway no longer blocked I said, ["]Now Bill, go on, I don't want to argue with you, go on back to your bus, got to work.["] Tr. 181-182. According to Smart, Taylor responded, "I want to know if there's a goddamn truck or a bus outby when you're loading shields?", and Smart replied, "Bill, I'm telling you, go back to work. The travelway is no longer blocked, I want you to go back to the bus and go on about your job." Tr. 182, See also Tr. 184.(FOOTNOTE 10) Taylor responded that he would go when he got "a goddamned answer," and Smart stated that he again told Taylor to go back to the bus and to work. Id. It was at this point, according to Smart, that Taylor clasped his hands about a foot from Smart's face and stated "Please stop my time, I'll have your goddamn job." Tr. 183. After this statement, Smart stopped Taylor's time.

Smart testified that Taylor returned to the manbus and asked Parkhill to take him back to the setup section to get his dinner bucket. Smart told Taylor to remain in the area, and he told Parkhill to leave and get the needed parts. Taylor responded that since he was no longer on Old Ben's time, Smart could not tell him what to do. Smart then called Ronchetto. Tr. 185.

After Parkhill left, and before Ronchetto arrived, a scoop passed through the travelway, Smart stated he said to Taylor, "Is that scoop broken down, isn't it going in the travelway, would you consider [the travelway] blocked[?]" . . . " Couldn't [the scoop] get out of the way if something come up on it[?]" Tr. 188-189. Taylor replied, "Yeah, I guess," and Smart asked, "Why do you think I have to have a scoop or transportation outby when I'm loading shields[?]" Smart testified that Taylor responded that "It could mean his goddamn life or something." Tr. 189.

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Smart stated that at this point he decided he could not reason with Taylor, and he walked away from Taylor. Taylor followed him and Smart began taking notes about what was said, as Taylor orally confronted Smart saying, "Go ahead and write, you dumb son-of-a-bitch, I can say what I want, I'm no longer on your time and I ought to just knock your ass off right now." Tr. 189. Smart testified that because he wished to "defuse the situation," he tried to walk away, but Taylor followed and said, "Smart, you're in this mine like the rest of us, and things can happen down here to you . . . or . . . at home to your family." Tr. 190.

Smart testified that at this point Parkhill returned, and Taylor told Smart he was going to ride with Parkhill and retrieve his dinner bucket. Taylor got into the manbus. Smart replied that Taylor was to stay. Taylor again said, "You can't tell me what to do, goddamnit, I'm no longer on your time." Tr. 191. Smart told Taylor that he would "ask about that when Joe [Ronchetto] gets here." Id. When Ronchetto arrived, Smart explained to him that Taylor had threatened Smart and his family, had cursed Smart and that Smart had stopped Taylor's time and wanted Taylor removed from the mine. Tr. 192.

APPLICABLE CASE LAW

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish, (1) that he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of *Pasula v. Consolidation Coal Company*, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom., *Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of *Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (1981); Secretary on behalf of *Jenkins v. Hecla-Day Mines Corporation*, 6 FMSHRC 1842 (1984); Secretary on behalf of *Chacon v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1982). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miners' unprotected activity alone. The operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Company*, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. *Robinette*, supra, See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir. 1982); *Donovan v. Stafford Construction Company*, 732 F.2d 954 (D.C.

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Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). See also *NLRB v. Transportation Management Corporation*, 462 U.S. 393, 397-413 (1983), (where the Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act).

Under this legal framework Taylor's asserted protected activity must be analyzed in the context of the ongoing circumstances in the mine as they appeared to Taylor at the time, provided always that his perception of those circumstances was reasonable.

PROTECTED ACTIVITY

Taylor's safety complaint allegedly arose out of his belief that the travelway was blocked and thus that outby transportation was required to facilitate the removal from the mine of any miner who might have been injured. I fully credit Taylor's testimony that he and Parkhill stopped the manbus at the mouth of the recovery unit because of a reasonable belief that the entry was blocked. Taylor's testimony is corroborated by Parkhill's uncontested statement that Parkhill got out of the manbus, surveyed the situation, and returned to report to Taylor that the entry was blocked. Although Smart testified that he first saw Taylor approaching him, his statement is not necessarily inconsistent with Taylor and Parkhill's testimony that Parkhill left the manbus first to reconnoiter the entry. Smart himself testified that prior to seeing Taylor, the travelway had been blocked, possibly for 15 minutes, and although Smart also testified that he did not know why Parkhill and Taylor had stopped the manbus, Taylor's testimony that he believed he and Parkhill could not proceed further is credible in light of the work that was taking place in the entry.

Further, not knowing the length of time the blockage had existed and would continue to exist, I conclude that Taylor's concern about the presence of outby transportation was reasonable. As a general rule, a miner's safety inquiry, like a miner's work refusal, must adequately apprise the operator of the nature of the feared hazard and must be reasonable under the circumstances of the case. It must also be made in good faith. See e.g., *Secretary on behalf of Pratt v. River Hurricane Coal Company, Inc.*, 5 FMSHRC 1529, 1533-34 (September, 1983).

Taylor's inquiry regarding outby transportation was direct and understandable, as witnessed by the fact that at no time did Smart maintain that he was confused about what Taylor was asking or uncertain as to what Taylor meant. Further, and as noted above, the fact that Taylor reasonably believed the entry was blocked leads me to credit Taylor's testimony that he was concerned that if a miner was injured, transportation would not

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be available to quickly remove an injured miner from the mine. Taylor's history as a former mine safety committeeman and his unrefuted testimony regarding the unreliability of the mine's underground telephones on June 18, in my view, makes it logical that Taylor would have been concerned about assuring as swift an exit from the mine as possible for an injured miner. Thus, I conclude that Taylor, in good faith, inquired of Smart regarding the presence of outby transportation, and that when he did so, he engaged in protected activity.(FOOTNOTE 11)

ADVERSE ACTION AND MOTIVATION

Taylor was suspended for four days and was so advised formally by letter on June 20, 1991. Koonce and Smart maintained that Taylor was suspended both for refusing a direct order to return to work and for abusing and threatening Smart. Tr. 23, 25, 28, 30, 32, 35, 49-50, 182-183, 192. These reasons were also given in the formal Notice of Suspension. Exh. C-1. The testimony of Taylor and Smart is in agreement that this adverse action, although confirmed on June 20, was instituted on June 18, when Smart stopped Taylor's time.

At issue is whether the suspension was motivated in any part by Taylor's protected behavior? To answer the question it is necessary to view in total the events surrounding the incident of June 18. On that date neither Taylor nor Smart met as strangers. They had come to know one another on June 17. I credit Koonce's opinion that Taylor was concerned about the Zeigler buy-out of Old Ben and about Smart's knowledge of mining operations at Mine No. 24. Tr. 19-20. I also believe it true that Taylor's low regard for the Ziegler management personnel lead directly to his comments on June 17 regarding Smart's direction of the longwall set up and to the subsequent oral exchange between the two of them. Whether Taylor purposefully pinned Smart between the rib and the scoop, or whether it was inadvertent -- Smart admitted he had put himself in a bad position -- it seems certain that Taylor and Smart regarded one another with some degree of hostility when they next met on June 18.

Thus, it may well be that on June 18, when Taylor inquired about outby transportation, in addition to being concerned about his safety and that of his fellow miners, he was also trying to aggravate Smart. However, and this is the essential point, even

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if Taylor had an ulterior motive, he also had a good faith, reasonable belief that the situation in which he found himself presented a possible danger to his and to others' safety. Thus, his questions regarding outby transportation were, under the circumstances in which he found himself, perfectly proper, and it was Smart's duty to meaningfully respond to the specific concerns expressed by Taylor.

Communication of safety hazards and responses thereto are a means by which the Mine Act's purposes are attained, and once a reasonable, good faith concern is expressed by a miner, an operator, usually acting through its on-the-scene management personnel, has an obligation to address the perceived danger. *Boswell v. National Cement Co.*, 14 FMSHRC 253, 258 (February 1992); *Secretary on behalf of Pratt v. River Hurricane Coal Company, Inc.*, 5 FMSHRC 1529, 1534 (September 1983); *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985). Moreover, the operator must address the miner's concern in such a way that the miner's fears reasonably should be quelled. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1441 (D.C. Cir. 1989). If the operator does not address the perceived danger and disciplines the miner, "it does so at its own legal risk." *Metric Constructors*, 6 FMSHRC at 230.

Smart did not meet his obligation to meaningfully respond to Taylor's inquiry. Both Taylor and Parkhill creditably testified that Smart did not respond to Taylor's questions regarding outby transportation. Even under Smart's version of the exchange -- that he ordered Taylor back to work and told Taylor that the travelway was no longer blocked -- Smart's response was patently inadequate. A statement that, "The travelway is no longer blocked." (Tr. 182) or that, "The road's clear now." (Tr. 183), cannot be equated to the kind of communicative response envisioned under the Act. Moreover, Smart's statements appear to have been made after the travelway was opened and after the factual basis for Taylor's concern had ceased to exist.

While it is conceivable that there are circumstances that could mitigate an operator's duty to meaningfully respond; for example, instances in which adverse mine conditions preclude an immediate safety-related discussion or in which an operator may reasonably fear his response will trigger a overtly adverse reaction on the part of his questioner, the obligation to respond to reasonable, good faith safety concerns is -- at least in my view -- so important to the goals and purposes of the Mine Act that I can envision recognizing its mitigation only in the most extraordinary of circumstances -- circumstances that do not exist here. I conclude that Taylor has established that he was suspended because he engaged in protected activity.

AFFIRMATIVE DEFENSE

Old Ben argues that even if Taylor's inquiry about the availability of outby transportation constituted protected activity he was not disciplined for asking questions but for refusing an order to return to work, insubordination and using threatening language and that Old Ben established an affirmative defense by proving that it was motivated entirely by this unprotected conduct. I do not agree.

As I have found, Smart's response to Taylor's inquiries was insufficient under the Act. Moreover, it colored all that followed, for subsequent to Smart's failure to meaningfully respond, the situation deteriorated. Koonce maintained that Taylor told Smart he would go to the manbus "whenever he felt good and G-D ready". Tr. 21, See also Tr. 28. Smart's version is that Taylor said he would go back to the manbus when he got "a goddamn answer." Tr. 183. Taylor asserted that he did not refuse a direct order to return to work because his work assignment required him to proceed inby on the manbus, and the entry being blocked, he could not do so.

Smart's testimony in this regard is more detailed than Taylor's and is, in my opinion, more believable.(FOOTNOTE 12) Thus, I find that Taylor did, in fact, refuse to return to the manbus until he got "a Goddamn answer" and even after being told that the entry had been cleared. I also credit Smart's testimony that Taylor held his hands up in Smart's face in a prayer-like fashion and asked, in effect, that he be suspended from work. I further find that after Parkhill left, the conversation became more heated, with Taylor telling Smart the lack of transportation outby could "mean his [meaning Taylor's] goddamn life" and that Smart "had f__ked with the wrong person," and Taylor ought to "knock [Smart's] ass off." Tr. 189.(FOOTNOTE 13) I do not, however, credit Smart's testimony that Taylor told him, "You're in this mine like the rest of us, and things can happen down here to you . . . or it can happen at home to your family." Tr. 190. Taylor denied making such threats and Smart's version was not corroborated by Ronchetto, the first person from management with whom Smart spoke after the "threats." In recounting his conversation with Smart, Ronchetto could recall being told only that Smart had stopped

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Taylor's time because the two had gotten into a dispute and Taylor had refused Smart's orders to return to work. Tr. 138. It is reasonable to assume that had the acting mine manager been told that Taylor had in this manner threatened his foreman and the foreman's family, Ronchetto would have remembered it and have recounted it. Further, while it is true that Koonce stated Smart told him Taylor threatened Smart and his family, the "abusive and threatening language" (Exh. C-1) for which Taylor was disciplined was, according to Koonce, in the nature of Taylor holding his hands up to Smart in a praying fashion and pleaded with Smart to stop his time and send him out of the mine. Koonce also stated that the objectionable nature of the language lay not so much in what Smart said but in "the way in which it was said and the motions." Tr. 50.(FOOTNOTE 14)

The following colloquy between counsel for the Secretary and Koonce reveals Koonce's thoughts:

Q. So what was the reason for the suspension?

A. The reason for the suspension: Refusing a direct work order and using threatening and abusive language.

Q. How do you know there was abusive language?

A. Mr. Taylor admitted to doing exactly what he was accused of.

Q. What is it exactly Mr. Taylor told you that he said to Mr. Smart?

A. During the conversation he admitted the conversation was a heated conversation. He admitted to getting into Mr. Smart's face, with his hands in a praying motion, saying, ["]Please send me out, please send me out.["]

Q. Is this the only thing he said to Mr. Smart?

A. There were some other things that, that was said that Billy didn't admit to. Mr. Smart advised me that Mr. Taylor had threatened his kids, to do damage to his personal vehicle, and -- but Mr. Taylor didn't admit to that.

Tr. 25-26, See also Tr. 19.

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Thus, while I credit Smart's testimony that Taylor refused an order to return to the manbus and spoke to Smart in a heated and at times profane manner, I view Taylor's refusal and his comments as a direct result of Smart's failure to address in a meaningful way the danger Taylor perceived. As such, they could not form a valid basis for Taylor's suspension, and I conclude that in disciplining Taylor, Old Ben acted "at its own legal risk." Metric Constructors, 6 FMSHRC at 230.

Nor does Taylor's oral response to Smart's failure to meaningfully respond strip protection from Taylors' safety inquiry. Taylor's "praying" to be suspended and his telling Smart that he (Taylor) should "knock [Smart's] ass off," were entwined with and the result of his protected activity. Just as in the collective bargaining context, where the courts have been reluctant to find language to be so opprobrious as to carry the speaker "beyond the pale" of statutory protection, I do not believe that the interest of the Act in promoting safety-related dialogue between miner and management is served by the external imposition of a rigid standard of proper and civilized behavior. See Lee Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 729-730 (5th Cir. 1970). Threatening harm to Smart and his family might well be another matter, but, as noted, I do not credit Smart's testimony in this regard.

CONCLUSION

ACCORDINGLY, I conclude and find that Taylor engaged in activity protected under the Act when he inquired of Smart whether there was transportation outby and that Old Ben suspended Taylor for this activity. I further conclude and find that Taylor's subsequent refusal to return to the manbus and his "abusive and threatening language" toward Smart does not provide Old Ben with a valid basis for adverse action nor remove from Taylor the protection of the Act. Therefore, I hold that in suspending Taylor, Old Ben violated Section 105(c)(1) of the Act.

ORDER

1. Old Ben is ORDERED to pay Taylor within thirty (30) days of the date of this Decision all back wages and benefits from June 18, 1991 through June 21, 1991, with interest thereon in accordance with the Commission's Decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (October 1988) calculated proximate to the time payment is actually made.

2. Old Ben is ORDERED to expunge from Taylor's personnel records all reference to the incident of June 18, 1991, and Taylor's subsequent suspension.

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3. Old Ben is ORDERED to pay to the Secretary within thirty (30) days of the date of this Decision a civil penalty of \$500.(FOOTNOTE 15)

David F. Barbour
Administrative Law Judge

FOOTNOTES START HERE-

1. Section 105(c)(1) of the Act provides as follows:

"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, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to the [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise of such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act]."

30 U.S.C. 815(c)(1).

2. Koonce, the superintendent of Mine No. 24 at the time of the alleged discrimination, was subpoenaed to testify by the Complainant.

3. Old Ben became a subsidiary of Zeigler Holding Co. on July 20, 1990, when Zeigler purchased all of Old Ben's properties. Tr. 142. The acquisition resulted in some changes in management personnel at Old Ben's mines, including the transfer to Mine No. 24 of section foreman Ronald Smart, the foreman involved in this case. Smart previously had worked for Ziegler.

4. Taylor believed that he could have asked Smart about outby transportation up to five times. Tr. 97. In any event, however many times he asked, he maintained that Smart never answered his questions.

5. On cross examination Taylor admitted that subsequent to his conversation with Smart, he never spoke with the union safety committeeman about the situation, nor to a state mine inspector and that he contacted MSHA only after he had been handed a notice of suspension. Tr. 86-87.

6. On cross-examination, Taylor stated categorically that during the incident of June 18, he never threatened Smart. Tr. 99. However, during his direct testimony, Taylor indicated that he and Smart had a prior run-in. According to Taylor, on June 17, in his regular working section and while in the process of setting up a longwall, he had observed Smart "screaming and hollering" at the section foreman about the way the work was proceeding. Taylor claimed that he said to his helper, "These people [meaning the former Zeigler bosses] never saw a longwall . . . until . . . a few weeks ago, and now all of a sudden they are experts on how to set a longwall up." Tr.73. Smart, who overheard Taylor, responded that he did not have to take Taylor's "abusive language" and that he would "write up" Taylor for the incident. Tr. 73-74. Taylor claimed that Smart continued to holler at the section boss. Taylor, who was sitting in a scoop, with his back to the where Smart was standing, energized the scoop. Taylor claimed he did not know that Smart had moved between the rib and the scoop. The scoop lurched toward the rib and pinned Smart. Smart, who was not hurt, told Taylor's section foreman that Taylor had tried to run over him. Tr.74. Taylor denied he had tried to hit Smart or that he knew Smart was in a position where he could have been endangered by the scoop. Taylor stated that he was not reprimanded for the incident but that he found out later Smart had been reprimanded for the manner in which he had addressed the foreman. Id. This was confirmed by Smart. Tr. 168.

7. The letter states in part:

An investigation reveals that on June 18, 1991, while working the 4:00 P.M. to 12 midnight shift you were insubordinate and refused a direct order to return to your assigned work after having been instructed to do so by your supervisor on at least 2 occasions.

The investigation also reveals that in violation of Company Rules and Regulations you used abusive and threatening language toward a supervisor and his family.

Old Ben can not and will not condone such action, therefore, you are hereby suspended for a period of four (4) working days without pay (June 18, 19, 20, 21, 1991).

Exh. C-1

8. Section (0)(4) states in part:

"The Employer shall provide quick and efficient means of transporting injured or sick Employees from the mine to the surface."

Joint Exh. 1 at 34-35.

9. Smart also stated that at the mouth of the longwall section there was a crosscut that, in conjunction with an adjacent entry, served as a "runaround" in the area where the shields were being loaded, and that the runaround allowed the loading area to be by-passed if the main travelway was blocked. See Tr. 177-178.

10. Smart stated that he did not respond to Taylor's inquire about outby transportation because Taylor would not accept his answer that there was no transportation outby. Taylor, in Smart's opinion, was putting on a show for Parkhill and was looking for

trouble. Tr. 200.

11. Counsel for the Secretary argues that Taylor engaged in additional protected activity when he told Smart that the discussion regarding outby transportation was not over and that it would be settled "on top" even if he had to involve the union, the state inspectors and MSHA. Because the record lacks even a hint that Taylor's suspension was motivated in any part by his statement, its protected nature need not be assayed.

12. For example, Taylor, who had no trouble recalling the events immediately surrounding his safety complaint, could not recall clasping his hands in a prayer-like manner and as much as daring Smart to send him out of the mine. At most, Taylor would acknowledge the "possibility" that he might have done it. Tr. 67, See also Tr. 96.

13. Although the language is rough, I do not find it unusual. To understate the matter considerably, mining is not an ice cream social, and blunt speech, laced with Anglo Saxon epithets, frequently is the norm.

14. Had Old Ben's management personnel really believed Taylor credibly threatened harm to Smart and to his family, it is hard for me to believe Taylor's discipline would have been restricted to a limited suspension.

15. The Secretary proposed a civil penalty of \$1250 for the violation of Section 105(c) of the Act. I find the proposal excessive. I note particularly that Old Ben had no prior violations of Section 105(c) in the 24 months prior to this violation. I further conclude that Smart, although negligent in failing to respond to Taylor's inquiry, did not deliberately act in derogation of Taylor's Section 105(c) rights.