

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

June 28, 1996

WILLIAM F. METZ, : DISCRIMINATION PROCEEDING
Complainant :
 : Docket No. PENN 95-479-DM
 : NE MD 95-06
v. :
 : Millard Lime & Stone
WIMPEY MINERALS and :
TARMAC AMERICA, INC., : Mine ID 36-00017
SUCCESSOR-IN-INTEREST, :
Respondents :

DECISION

Appearances: William F. Metz, Lebanon, Pennsylvania, pro se;
William Doran, Esq., Smith, Heenan and Althen,
Washington, D.C. for Respondent.

Before: Judge Melick

This case is before me upon the complaint by William Metz under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the Act, alleging that Wimpey Minerals discharged him on March 21, 1995, presumably in violation of Section 105(c)(1) of the Act.¹

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 this Act, including a complaint notifying the operator of 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

Footnote 1 Continued

Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

More particularly, Mr. Metz alleges in his May 6, 1995, complaint to the Department of Labor's Mine Safety and Health Administration (MSHA) as follows:

After several attempts to convey to management our concerns about Gene Graham mainly safety related issues they told us that they did not want to here [sic] any problems related to Gene Graham & on or around March 16th I told Roy Lashbrook again my concerns & that I wanted a meeting with James Gregory, Vice President. Roy told Carrol & Carrol came to see me wanted to know what my problem was now I sad [sic] same thing as [illegible] other than that Gene was trying very hard not to flip out on anybody but that was it and you know the things (safety items) are not getting repaired & also telling people to do things they should not be doing (the safe way) he said bill [sic] whats [sic] your problem everything is running I said thats [sic] my problem thing [sic] running that probably shouldn't on March 21st he came to me about 9:00 p.m. & told me I was fired why I asked he said it just wasn't working out. This is just a brief and to the point response to the action I don't believe people should be fired for voicing their concerns about safety & also they should make a mockery of MSHA since you's [sic] are there for are [sic] safety I will get into that with the investigator

I would like to be reinstated to my job with my seniority and back pay from March 21st and unemployment payed [sic] back because if & when I go back if they lay me off I won't have any unemployment you only get 26 weeks and till this is resolve [sic] I might not have any left and Insurance Reinstated from time of firing.

The Secretary declined to pursue the above complaint and Mr. Metz brought this action before this Commission on his own under Section 105(c)(3).

Metz testified at hearing that he began working for Wimpey Minerals in February 1988 as a heavy equipment mechanic and continued to work in that capacity until he was terminated on March 21, 1995. It appears that Metz's difficulties began when Gene Graham took over as Team Leader of the shop in 1993. According to Metz, in late 1993 or early 1994, he observed Graham remove a Atag@ that Metz had placed on the fuel truck because it purportedly had no brakes. Metz claims he told Graham that if the truck went out again (presumably without the brakes being repaired) he would see Graham's supervisor, Gary Nolan. There were apparently no further problems with that truck and Metz

concedes that nothing happened to him as a result of this complaint.

The next relevant incident apparently occurred on April 11, 1994. In the early morning hours of that date Metz and mechanic John Leffew were working together. Metz had previously noted a series of problems with defective steering cylinders on some of the 50-ton haul trucks so he and Leffew went out to the quarry to check on some of the other 50-ton trucks. Checking the trucks with a flashlight around 3:00 or 4:00 in the morning, Metz found what he deemed to be defective steering problems on four of them. He tagged those trucks, thereby, in effect, barring their use until repaired.

When the drivers appeared for work later that morning they inquired of their boss, Lenny Mussar, why their trucks had been tagged-out and Metz responded that it was because of steering problems. Metz then returned to the shop where Graham later inquired about the tagged trucks. According to Metz, Graham asked him to remove the tag from at least one of the trucks and Metz refused. Metz claims that Graham then told him to come to his office where he presented Metz with two warning slips he pulled out of his desk. One warning was for failing to note the time on a meter reading slip and the second was for failing to stop before driving across the railroad tracks. According to Metz, Graham then again asked him to remove one of the tags and when he again refused, purportedly told Metz he was fired. Metz then went home. He was later called by Human Resources Manager Chris Harvan who set up a meeting for the next day.

At the meeting on the next day, April 12, Harvan, Gene Graham and the Complainant met. As a result of this meeting Harvan presented Metz with a letter (Complainant's Exhibit No. 1) indicating that his suspension with intent to discharge was reduced to a three-day suspension without pay and 90-days probation. Harvan did not testify but, according to Graham, this was based on the warning notice he issued on April 11, 1994 after the Atag-out@ confrontation (Respondent's Exhibit No. 3) because Metz was Aloud@, Ainsubordinate@, and Athe biggest thing was his threatening statements@ that AI am going to become your worst nightmare.@ Graham acknowledged that he also gave Metz two other warning notices after the April 11 confrontation (Respondent's Exhibits No. 1 and 2). Graham further acknowledged that the Aconversation got out of hand@ only after he asked Metz to reverse his decision about tagging-out the trucks. Both Graham and Carroll Laufmann claim that Metz's suspension was not based however on his tagging-out the trucks.

Metz claims that he also complained at the April 12 meeting about Graham's prior removal of warning tags and was told not to confront Graham about anything. He noted that "Everybody" was having verbal exchanges with Graham who, according to Metz, "kept going nuts" and was always arguing about something.

Metz also testified that there had been a meeting between January and April, 1994, at which Graham's supervisor, Carroll Laufmann, told a group consisting of Metz and co-workers, Ted Gress, Jim Shirk, John Leffew, and Feliciano "Chico" Rivera, that "I do not want to hear anything negative to do with Gene Graham, safetywise or otherwise." Laufmann acknowledges that he wanted the mobile equipment shop crew to stop looking at all the negative things Graham was doing as a supervisor but could not recall telling them not to bring safety issues regarding Graham to his attention.

Metz further testified that his discharge on March 21, 1995, was preceded by a meeting with Laufmann on March 16, 1995. Metz described the meeting in the following colloquy:

[Complainant Metz]: He [Carroll Laufmann] walked in and said, "What's your fucking problem now," and that's a quote.

And I said, "Same thing it's been, just a few more incidents.:"

And he said, "What's your fucking problem? Everything's running."

And I said, "That's my problem. Everything's running, and things that shouldn't be running."

And at that point, he just sat there and looked at me. I said, "You've either got to do something [or] I'm going to [c]all MSHA and let them deal with it because I can't take it no more."

BY JUDGE MELICK

Q. This is what Carol said?

A. No, I told this to Carol. And as he walked up, he got up and walked out and didn't say nothing more to me. And I told him, "By the way, tell James I'm the one that sent the letter." And that's all I said to him.

Q. Who is James?

A. James Gregory, I guess he's the vice president. At that time, I guess he was the vice president of Wimpey USA. I don't know what his -- he's some kind of president.

Q. And did Carol know what this letter was? Did you discuss the letter in this conversation?

A. No.

Q. Well, how would he know what this letter was then if he didn't know, if you didn't discuss it?

A. I don't know if he knew or not. The person that the letter was sent to -- and I can only speculate that the day he go it --

JUDGE MELICK: Well, I don't want speculation. Unfortunately, we can only have what you know.

THE WITNESS: Well, I'm the guy that sent the letter.

BY JUDGE MELICK:

Q. Well, what letter is this, by the way?

A. It was a letter of a conversation I'd overheard between Gene Graham and Dave Douville. I was standing right there. Gene was telling me about it. Dave Douville walked in.

Q. Who is Dave Douville?

A. Do you want me to tell you what was said in that conversation?

Q. Well, I'm just wondering what the relevance of this letter has to do with --

A. Well, a guy died.

Q. A guy died?

A. Yes.

Q. And what did the letter have to do with the guys' death?

A. The letter had to do with two weeks prior to the guy dying, Gene Graham and Dave Douville that works for Tire Centers, Incorporated, walked across the same grating and fell through it; didn't fall through it, but almost fell through it.

Q. So who did you send the letter to?

A. I sent it to Bob Furlong.

Q. Who is Bob Furlong?

A. And also sent a copy to George Brandt's wife.

Q. Well, who are these people; Bob Furlong and somebody's wife?

A. Bob Furlong was the president of the company.

Q. This was not then sent to the Mine Safety and Health Administration or any government agency?

A. I don't think so.

Q. So then what happened after this conversation with Carol Laufmann?

A. I can only go by their dates. I wasn't writing stuff down. But I believe it was three days later, I started at, like, 8:30. It was about 9:00. He walked up.

Q. When you say "he," is that Mr. Laufmann?

A. Yes. He told me he wanted to see me in the office. I walked in. He set down. He told me he was going to have to ask for my resignation. I told him I was in no position to give him my resignation nor did I want to.

He asked me again, and I said, "Well, what's the problem? What did I do?" I said, "I asked for a meeting and all of a sudden, I got fired." I said, "I'm using your grievance procedure." They have it right here in a book. And all of a sudden, I got fired because I'm

making one more safety complaint about Gene Graham.

And it wasn't just about that letter that I wanted to talk to him about. I never got to tell him anything.

Q. And then what happened at that point?

A. Well, then I was fired because I wouldn't give him my resignation. He followed me up to my toolbox. I took all my personal stuff and left.

Q. Now, I guess we're going to have to get a little more information. When you said you had made a safety complaint about Gene Graham, when did you make this safety complaint?

A. We made many -- we attempted to.

Q. Did you, in fact, ever make a safety complaint?

A. They wouldn't let us. (Tr. 15-19).

Laufmann's description of the March 1995 events leading to the Complainant's discharge is set forth in the following colloquy:

Q. And Mr. Metz was discharged March 21 of 1995. Was there a specific incident that led to his discharge at that time?

A. Yes, there was.

Q. Could you describe that incident for me, please?

A. The incident began a couple days earlier when John Leffew approached Roy Lashbrook, who at this time had been substituted in the sort of chain of command between Gene Graham and myself. John came to Roy and said that Bill had requested that Roy set up a meeting with James Gregory.

Roy suggested that he go back and tell Bill that he needed to go through the chain of command, rather than jumping over Roy and myself directly to James. And I believe Roy, at that time, also sent back the message that he would meet with Bill the next morning at 5:30.

Q. To your knowledge, did Roy meet with Bill?

A. Yes. To my knowledge, that meeting did indeed take place.

Q. Did Roy talk to you after that meeting?

A. Roy talked to me after that meeting and said that he hadn't been able to satisfy Bill, that Bill was still asking to meet with James Gregory and suggested that, to follow the procedure outline, that I come in early the following morning to meet with Bill and see if I could answer Bill's question or problem.

Q. Did Roy explain to you or present any issues to you that Mr. Metz had raised?

A. Not in any detail, no.

Q. Did you meet the next day with Mr. Metz?

A. Yes, I did. I came in, arrived at the quarry site at approximately 5:30 the next morning and went to find Bill. I located Bill and told him that I was there to discuss the situation. Bill was fairly noncommunicative.

I said, "Look, we've got to follow the procedure. I need to know what the problem is, so I can carry it on to James, tell him what I know about it and arrange a meeting."

So I pressed Bill again. I said, "What is the problem?"

Bill finally said, "It's the same old thing. Gene Graham's blowing smoke up your ass."

Q. What did he mean by that?

A. I am not sure what Bill meant by that.

Q. Did you ask him what he meant by that?

A. No, I did not.

Q. Did you ask what the "same old" problem was?

A. I continued to say, "Let's elaborate more on

this situation. Again, I don't recall exact -- that exact phrase sticks in my mind, but after that, I don't recall exact words. It came out something to the effect that it was Gene Graham -- that Bill could just no longer work with Gene.

I said, "Bill, this is directly 180 degrees against what we put in the letter in April of '94, that was sort of the letter that had saved his job at that time. I said, "Bill, if it's that bad, why didn't you take the opportunity to bid on the job posting to get into the line plant?"

Q. And what's that? Explain that to me. What's the job posting at the line plant?

A. The job postings at Millard are done if a vacancy occurs anywhere on the Millard site. The job, the rate and description are put up in our change building, left up for a week or two. I forget which exactly the time is.

And during that time, people can stop in at our plant office, sign up, put their name on a list of people to be evaluated for filling that position. The advantage to this position was that it would have been a transfer. I believe the two jobs paid the same. So it wouldn't have been -- they're both right at the top of the pay scale at Millard. There wouldn't have been the problem with taking a pay cut or something.

Q. Let me ask you, you had mentioned that you said to Mr. Metz that this was a contravention of his agreement that he made in April of '94.

Can you describe to me what you mean there? What agreement are you talking about?

A. Again, as I said earlier, I had actually made the decision that Bill should be discharged twice. The time in April of '94 was overruled, if you will, I think largely because the person I was working for was brand new to Millard, had only been there three or four weeks, really didn't know me and really didn't know the situation well.

Q. And who is that?

A. James Gregory. He really didn't know me well. I knew part of the reason maybe he was there was because the previous administration, if you will, maybe hadn't been as cautious in all cases and maybe should have been in some of these instances. And he wanted to be very sure he was doing the right thing.

So he basically said, "Let's go back and see if we can't find a way to keep this person's job."

Q. And what did you do at that point?

A. At that point, Chris Harvan and I, who at that point was human resources director, I believe, set down and over a series of a meeting or two hammered out what we felt were the minimum requirements that it would take for me to be willing to keep Bill Metz on his job.
(Tr. 308-312)

Q. Focusing back on your decision to discharge Mr. Metz, at any time in making your decision -- well, first of all, let me ask you, did you consult with anyone else in making your decision?

A. In March of '95 now?

Q. That's right.

A. Yes, I basically made the decision. I called my supervisor, the vice president of -- I'm sorry. I'm getting the two instances confused. Let me start over.

In March of '95, once Bill had told me that, number one, that he thought the letter of agreement from April of '94 was "bullshit" and that he could -- and had also made the statement that either he or Gene Graham was going to have to go, I didn't feel like I had any choice. Once Bill made those two positions very clear to me, I thanked him and left, said I would set up a --

JUDGE MELICK: This was at the meeting you had with him in March of '95?

THE WITNESS: This was when I came into the job site at 5:30 in the morning in March of '95, that's correct.

JUDGE MELICK: And he told you at that time that the --

THE WITNESS: He told me at that time that this letter that he unfortunately didn't sign and return was a bunch of bullshit, that he had never agreed to it in the first place and didn't agree to it now.

JUDGE MELICK: Wait a second. That was at the prior meeting? This was not in March of '95?

THE WITNESS: This was in March of '95, again, bringing up the fact that he did not ever agree to the letter, despite the fact that we had set in Chris

Harvan's office and agreed that this was the terms and conditions he was going to come back to work for. And in March of '95, he's saying it's bullshit, that he never agreed to it, still doesn't agree to it and basically refused to agree with it.

BY MR. DORAN:

Q. If I can ask you a question, this is the meeting the day after he met with Roy Lashbrook?

A. This is a meeting the day after he met with Roy Lashbrook, yes.

JUDGE MELICK: He had said at that meeting then, again, that the letter of April of '94 was bullshit?

THE WITNESS: Was bullshit, he didn't agree to it then and doesn't agree to it now.

Q. And the decision to discharge Bill Metz was not given to him on that date; is that correct?

A. That's correct. I left that meeting. I thanked Bill for his time. I said I would set up the meeting with James Gregory, contacted James, told him what had transpired, said that I just couldn't see any option any longer and that I felt that we had to terminate Bill. And that was my recommendation.

At this point, James has worked with me for a year. I'm permanent in my position. James has a better

feel for the plant and people and basically agreed with my recommendation.

Q. And did you communicate that decision to Mr. Metz?

A. Yes, I did. It was not intended for me to communicate that decision to Mr. Metz. There was a date set for Bill to talk to James Gregory. James and I had agreed that, unless something came up during that meeting that didn't come up during my meeting with Bill, that at the conclusion of that meeting, that James would inform Bill that he was terminated.

The day before the meeting with James was to take place, we internally in the plant talked the decision over with a few of the team leaders, what we thought in private, to get them ready to -- again, we

just don't like to have decisions like this to be made and then the rumor mill get a hold of them before we can make any kind of announcement for the work place. So we told some people ahead of time.

For one reason or another, that information got out into the work force, yet, that afternoon, Bill was scheduled to come to work that night. I believe Roy Lashbrook received the first call at home at 6:00 p.m. or 7:00 p.m. in the evening saying, "The word's out. You guys maybe ought to consider doing something different." Roy called me and told me.

I called James. I said, "I don't think it's a good idea to have Bill on site, unsupervised," because at that point, we didn't have a supervisor on the night shift, "if he gets word that he is to be discharged the next day."

James said, "Yes," he agreed with that. We agreed that, since I lived closer to the mine site, I would drive back, meet with Bill and give him the word that he was being discharged, but also tell Bill he should, by all means, go ahead and call James Gregory and set up a meeting with James to have the meeting that they were to have had the following day.

Q. And did you meet with Mr. Metz?

A. Yes, I did.

Q. And during that meeting, did Mr. Metz express any safety concerns to you?

A. No, he did not. (Tr. 334-338)

Whether safety issues were considered in discharging Metz was discussed by Laufmann in the following colloquy:

Q. [Mr. Doran] Let me ask you one final question here. In making your decision to discharge Metz, did any effort on your part to prevent Mr. Metz from making safety concerns enter into your decision?

A. No. At no time, if anybody comes to me with a safety concern, it's basically between them and I. And again, if somebody comes and says, **A**I need five minutes of your time. Can I close the door and can we discuss a safety concern?@ by all means, we close the door and discuss a safety concern.

Q. Did Mr. Metz at any time during your tenure as stone plant manager ever make any specific safety complaints or safety concerns regarding Mr. Graham?

A. I don't recall Bill ever coming to me with a specific hard fact that Gene had --

Q. Did you ever ask him for hard facts? Did you ever ask him for specific issues?

A. I never went to Bill Metz and said, **A**Bill, can you tell me three things that Gene has done unsafe?@ At every team meeting, there was a period at the end of the meeting that everyone was invited to bring up a safety concern, if they had one.

And there were some minor things brought up there that tended to be more on the line of, **A**Can we do a better job of snow removal,@ or **A**What's the temperature in the shop going to be this year,@ or there's maybe a door that needs to be fixed or something.

But in the way of items that I would say are real true safety, life-threatening or injury-threatening safety concerns, no. (Tr. 340-341)

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), *rev'd on grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra*. See also *Eastern Assoc., Coal Cor. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

It cannot be disputed that Metz's activity on April 11, 1994, in tagging-out Respondent's haulage trucks for steering defects was protected activity. In addition, while not clearly articulated, it is apparent from Metz's credible testimony that he also attempted to report safety issues regarding Team Leader Graham to Graham's supervisor, Carroll Laufmann in early 1994 and again at his meeting with Laufmann on March 16, 1995, five days before his dismissal. At the latter meeting Metz also complained that certain equipment "shouldn't be running" and told Laufmann that "you've either got to do something [or] I'm going to [c]all MSHA and let them deal with it because I can't take it no more," (Tr. 16). It is noted that Laufmann never specifically denied this testimony and was generally evasive on the subject. These too are clearly activities protected under the Act.

As noted, the second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission observed in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected

activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is probably the single most important aspect of the circumstantial case.

In the instant case there is both direct and indirect evidence that Metz's discharge was motivated by his protected activity. The direct evidence is in Respondent's letter confirming the reasons for Metz's dismissal (Complainant's Exhibit No. 2) wherein Respondent cites the April 11, 1994, alleged insubordination as an underlying basis for the dismissal. Insubordination is disobedience or the unwillingness to submit to authority. In the context of the April 11 incident Metz's insubordination was essentially only his refusal to comply with his supervisor's (Graham's) request for him to remove at least one of the danger tags he had placed on the haul trucks at the quarry.

While Graham testified that Metz's discipline in April 1994, was also based on his loudness and the fact that he said to Graham "I will be your worst nightmare", neither factor under the circumstances of this case would warrant the subsequent severe disciplinary action and discharge.² No physical threat was cited by Graham in his testimony and Metz's spontaneous reaction may reasonably be construed as having been provoked by Graham's efforts to have Metz submit to his authority and allow at least one of the trucks Metz found hazardous to operate without repair. A miner does not forfeit his rights to Mine Act protections under such circumstances.

As noted, the latter complaints and threat to call MSHA were made only five days before Metz was discharged and were made to the same person, Laufmann, who had already concluded that Metz should have been fired for his April 11, 1994, protected activity and to the same person who again recommended Metz's discharge.³

² While the subject dismissal letter states that Metz also said to Graham "I will get you Gene", Graham testified only that Metz said "I will be your worst nightmare". Graham's testimony under oath is accorded the greater weight and is deemed to be the more accurate version of what he claims was said. (Tr. 233-234)

³ While Metz acknowledged on cross examination that he did not in March 1995 make safety complaints to management, this testimony is not necessarily contradictory. Metz apparently did not construe as safety complaints his threat to call the Mine Safety and Health Administration (MSHA) if certain equipment was

It may reasonably be inferred therefore that Respondent was also motivated by these protected activities in discharging Metz. Metz has accordingly established a *prima facie* case of discrimination that is unrebutted.

In accordance with the *Pasula* analysis the issue then is whether Respondent has affirmatively defended by proving that it would have taken the adverse action in any event on the basis of Metz= unprotected activity alone. In this regard Respondent= evidence is insufficient. Again, looking to the April 21, 1995, letter setting forth the reasons for Metz= termination, it is noted that the warnings for incidents on April 7 and April 8, 1994, were not issued to Metz until after he had engaged in the April 11 protected activity and, according to witnesses, were trivial incidents others had also committed without repercussion. The April 12, 1994, *Agreement@* or *Asecond chance@* was clearly premised on Metz= protected activity on the day before and cannot therefore be considered a non-protected basis for subsequent action. The undisputed charges that Metz ignored his Team Leader, avoided acknowledging instructions from him and often did not complete his paperwork in a timely fashion and the October - November 1994 instances of *Apoor conduct@* where Metz was reportedly *Aextremely arrogant and argumentative@* and when he was overheard by an outside vendor= employee, Charles Vlasic, *Ashout abusively at his Team Leader for about five minutes@* (Tr. 218) clearly provided legitimate and non-protected grounds for disciplinary action but no action was then taken. If this behavior was considered sufficiently serious to warrant dismissal, such action should then have been taken. Here no action was taken until Metz engaged in additional protected activity on March 16, 1995.

Finally the alleged ultimatum, in which Metz purportedly said that either Graham or he would have to go, is credibly denied by Metz. This denial is also corroborated by the testimony of employee James Shirk who was given contradictory reasons for Metz= dismissal by Wimpey Vice President James Gregory. In addition, if such an ultimatum were in fact presented then it may reasonably be concluded that Metz would in fact have resigned.

Under the circumstances Respondent has failed in its burden of proving an affirmative defense. Complainant has established that he was discharged in violation of the Act.

allowed to continue operating.

ORDER

The parties are directed to confer regarding reinstatement, costs, damages and interest and are directed to report to the undersigned on or before July 16, 1996, regarding whether such issues can be stipulated. If such issues cannot be stipulated by that date, further hearings will be held on these issues on July 25, 1996, in Harrisburg, Pennsylvania. This decision is accordingly not final and a final decision will not be issued until such issues are resolved. *Boone v. Rebel Coal co.*, 3 FMSHRC 1900 (August 1981)

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Mr. William F. Metz, 2404 Long Lane, Lebanon, PA 17046 (Certified Mail)

William Doran, Esq., Smith, Heenan & Althen, 1110 Vermont Ave., N.W., Washington, D.C. 20005 (Certified Mail)

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