FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 2, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LOY PETERS, DONALD GREGORY, & DARRYL ANDERSON, Complainants	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEST 93-652-D
	:	Thunder Basin Mine
v.	:	
THUNDER BASIN COAL COMPANY, Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Margaret Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Complainants;
Laura Beverage, Esq., Jackson & Kelly, Denver, Colorado, for the Respondent.

Before: Judge Amchan

On July 8, 1993, Complainants Loy Peters, Donald Gregory and Darryl Anderson were among 34 miners laid off by Respondent at its Black Thunder mine near Wright, Wyoming (Tr. 402, 466, Exh. R-30 pp. 5-6). These complainants allege that they were laid off, at least in part, in retaliation for the exercise of their rights under the Federal Mine Safety and Health Act. The three men were among nine employees, eight of whom worked in Respondent's pit maintenance shop, whose names appear on a form received by Respondent in October, 1990. This form designates United Mine Workers (UMW) officials Dallas Wolf and Robert Butero, who are not employees of Thunder Basin Coal, as their representatives to accompany MSHA personnel during any inspection of Respondent's mine (walkaround representatives) (Exh. G-1)[1].

[1]Mr. Gregory's name appears on the first page of the designation form as one of eight employees who are alternates for Mr. Wolf and Mr. Butero. Mr. Gregory did not sign page 2 of the document, designating Wolf and Butero as walkaround representatives. The name of Susan Lucero, who signed page 2 of

Complainants contend that Respondent's decision to lay off 14 employees from the pit maintenance shop, and the three of them in particular, was motivated at least partially by Respondent's animus towards them. This animus, they allege, is due in a substantial degree to their designating the UMW officials as their walkaround representatives pursuant to 30 C.F.R. Part 40.

The UMW has been trying to organize Respondent's employees since 1987. Thus far the UMW has been unsuccessful, losing an election conducted pursuant to the National Labor Relations Act by a vote of 307 to 56 in the fall of 1987 (Tr. 420). Complainants are all active supporters of the UMW organizational effort (Exh. R-29, Tr. 67-68, 85, 463). Mr. Peters and Mr. Anderson are leaders among the UMW adherents at the Black Thunder mine. Both sat on the Union side when ballots were counted in 1987 and they were among the seven employees who initiated a new UMW organizing effort at the mine in October 1991 (Exh. R-29, Tr. 463).

Respondent considers the designation of the UMW organizers as walkaround representatives to be an abuse of the Mine Safety and Health Act (Tr. 424, 443, 461). It views that designation as simply an effort to aid the UMW in organizing its mine and has never recognized the Complainants' designation of the UMW personnel as a valid exercise of the Complainants' walkaround rights. One of the individuals so designated, Dallas Wolf, is the primary organizer for the Union in Wyoming's Powder River Basin. The other designee, Robert Butero, is the safety representative of the UMW.

Respondent is very committed to remaining non-union and has exhibited considerable hostility to the UMW and to its supporters amongst the Black Thunder mine workforce (Tr. 421-24, 429-31, 460-61). One reason for this hostility is Respondent's belief that the UMW worked through an organization called the Powder River Basin Resource Council to prevent Thunder Basin Coal from obtaining the lease to an area immediately west of its then existing mine (Tr. 428-31).

At a series of meetings with the entire Black Thunder workforce on approximately December 18, 1991, company President James A. Herickhoff discussed the UMW role in opposing the lease. Mr. Herickhoff testified that:

> We showed the employees a graph which showed the importance of obtaining that lease, and then we also - - or I had told them about information that I

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the form does not appear on page 1. She apparently did not work in the pit maintenance division.

thought they should know about other groups who are - - were trying to prevent us from getting that lease (Tr. 429).

Mr. Herickhoff also testified that he showed the employees the October 10, 1991 letter to him from Dallas Wolf informing Thunder Basin of the renewed UMW organizational drive (Tr. 429 - 431, Exh. R-29). This letter prominently displays the names of seven Thunder Basin employees including Loy Peters and Darryl Anderson. While Mr. Herickhoff testified that "most of the time" the names of the employees was not visible to the employees attending these meetings, I infer from his testimony that for part of the time the names were visible (Tr. 57-59, 430).

According to Mr. Herickhoff, the reason the letter was shown to Respondent's employees was that:

> Well, it was so ironic to me that on the one hand you had this group of employees from the UMW trying to organize our employees and, on the other hand, they were taking actions through the Powder River Basin Resources Council to stop us from getting this lease. It made no sense to me, and I thought our employees should know it (Tr. 430).

Respondent submits that the termination of Peters, Gregory, and Anderson had nothing to do with their designation of the UMW officials as walkaround representatives, any other safety activity, or union activity. Thunder Basin contends that considerations such as the falling price of coal, increasing costs, and a shift from the shovel and truck method of removing overburden to a dragline operation, made the lay off necessary. Respondent further contends that the lay off was accomplished in an objective and nondiscriminatory manner (Tr. 358-9, 371, 373-92, 504-08, 546, 562-69, Exh. R-30).

Pursuant to the procedural rules of the Commission, 29 C.F.R.§ 2700.45(d), the issue in a temporary reinstatement hearing is limited to whether the miner's complaint was frivolously brought. The Secretary of Labor has the burden of proving that the complaints were not frivolous. Although section 105(c)(2) of the Statute and the Commission's rules indicate that it is frivolousness of the miner's complaint that is scrutinized in a temporary reinstatement proceeding, the legislative history of the Act and relevant case law indicates that it is the Secretary's decision to seek temporary reinstatement that is to be examined. Senate Report 95-181, 95th Cong., 1st Sess. (1977) at 36; Jim Walter Resources, Inc. v. Federal Mine Safety and Health Review Commission, 920 F.2d 738, 747 (11th Cir. 1990).

The legislative history of the Act provides that the Secretary shall seek temporary reinstatement "[u]pon determining that the complaint appears to have merit." The Eleventh Circuit

in Jim Walter Resources, Inc. v. FMSHRC, supra, concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. 920 F.2d 738, at 747. Further, that court equates "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit" 920 F.2d 738, at 747 and n. 9. I am ordering the temporary reinstatement of the complainants in this case because I conclude that the complaints are not frivolous and that it is possible, although by no means certain, that the Secretary could prevail in a discrimination proceeding.

For reasons stated below, I conclude that Respondent has established, at least for purposes of this proceeding, that it had a legitimate business reason for the July 1993 reduction-in-force. I also find that there is substantial evidence that Respondent had legitimate non-retaliatory motives in laying off 14 of the 38 employees in the pit maintenance department.

Nevertheless, there are some troubling aspects regarding the impact of the lay off on the pit maintenance department which give some credence to the Secretary's allegations. Moreover, there are even more troubling issues regarding the selection of employees within that department for lay off. Rather than relying on seniority, or on prior performance evaluations, Respondent selected the employees for lay off by instituting a "Forced Ranking" of the employees in the pit maintenance area. This ranking was done by six supervisory employees the day before the discharge of the complainants (Tr. 405-08, 473, 517-18, 522, 578-79, 583-94).[2]

The ranking of the 38 employees in the pit maintenance department in 30 different tasks was accomplished in 5-1/2 hours (Tr. 588). The scores of the individual employees were determined by a consensus opinion of the six supervisors, but it is apparent that in some cases the opinion of some individuals carried more weight than others (Tr. 439, 542, 586). It is an open question whether some of these supervisors bore an animus towards the complainants as a result of their protected activity (Tr. 46-7, 54, 55-6, 60-62, 65-67, 76-77, 79-80, 81-83, 263). It is however clear that the scores given to Peters, Anderson, and Gregory in the forced ranking are facially inconsistent with many and possibly all prior evaluations of their job performance (Exh. G-8, G-9, G-12, G-14, G-16, G-17, Tr. 62, 172, 263-4).

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[2] Pursuant to the request of Respondent's counsel, several exhibits pertaining to the forced ranking, G-13, G-15, the last four pages of R-30, and R-33, have been sealed and are to be treated as confidential.

The completely subjective criteria used in selecting the complainants for lay off, when objective criteria existed, raises a serious issue as to whether the selection of complainants for lay off was retaliatory. Although Respondent tried to establish that the selection process was fair and non-retaliatory, it has not satisfied me to the extent that I can conclude that, on the basis of this record, that the Secretary's case is frivolous. Without compelling evidence that the reduction-in-force was carried out in a fair and objective manner, I conclude that the Secretary's Application for Temporary Reinstatement was "not frivolously brought." See Rivera v. Installation Club System, 623 F. Supp. 269 (D.C. Puerto Rico 1985).

In a discrimination hearing, the Secretary establishes a prima facie case by showing that the complainant engaged in protected activity, and that an adverse action was motivated in part by the protected activity. The operator may rebut the prima facie case by showing that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981).

In this case, the Secretary has established that each of the complainants engaged in protected activity. Most significantly, Peters, Gregory, and Anderson were among eight employees who designated UMW personnel as their representatives on MSHA inspections (Exh G-1). Although Respondent regards such designation as an abuse of the walkaround provisions of the Mine Safety Act, the Commission has concluded that employees at another non-union mine were entitled to designate Mr. Wolf and Mr. Butero as their walkaround representatives. Kerr-McGee Coal Corporation 15 FMSHRC 352 (March 1993).

The Complainants allege other protected activity as well. Some of this activity relates to an effort by Respondent to enjoin MSHA from requiring Thunder Basin to honor the designation of UMW officials Wolf and Butero as walkaround representatives under the Mine Act.[3] In July 1991, Respondent moved to depose all nine employees whose names appeared on the October 1990

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[3]The injunction requested by Respondent was granted by the United States District Court for the District of Wyoming (No. 91-CV-0050-B). The Court of Appeals for the Tenth Circuit reversed the District Court on jurisdictional grounds Thunder Basin Coal Co. v. Martin, 969 F.2d 970 (10th Cir. 1992). The injunction remains in effect pending consideration by the United States Supreme Court, which granted certiorari in the case (No. 91-8029).

walkaround designation (Exh. G-2). Peters, Gregory, and Anderson were deposed (Tr. 33-4, 178, 255-56). In October, 1991, MSHA subpoenaed all three to testify in the United States District Court regarding Respondent's request for an injunction. Although only Peters actually testified, Gregory and Anderson notified their supervisors that they had received the Secretary's subpoenas (Tr. 37, 178-9, 259-60).

Loy Peters has also engaged in protected activity in filing a number of discrimination complainants alleging several previous instances of retaliation for his role in designating the UMW personnel as walkaround representatives. Peters, Gregory, and Anderson also allege that they have made a number of safety complaints to Respondent.

There is no question that the three complainants have experienced an adverse action. All three lost their jobs at Thunder Basin Coal Company on July 8, 1993. Mr. Peters had worked for Respondent for 14-1/2 years; Mr. Gregory had worked at Thunder Basin for 14 years; and Mr. Anderson had been employed there for 12-1/2 years. The real issue is whether there is any relationship between the complainants' protected activity and their discharge.

As an initial matter, I note that I am not charged with jurisdiction to decide matters arising under the National Labor Relations Act. Clearly, the organizational effort of the UMW is at the core of this case. Nevertheless, the complainants' choice of Mr. Wolf and Butero to be their walkaround representatives is protected by section 105(c) of the Mine Safety and Health Act.[4]

There is simply no way to completely separate the animus of the Respondent towards complainants due to their union organizational activities and their designation of Wolf and Butero as walkaround representatives. I conclude that Respondent bore considerable ill will towards the complainants for designating the UMW officials as walkaround representatives and the degree and ongoing nature of this animus may create the necessary inference for purposes of this hearing to establish a

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[4]Even if the Commission's decision in Kerr-McGee is reversed, complainants had a good faith belief that they were entitled to designate Wolf and Butero as walkaround representatives. This good faith belief renders their designation to be protected activity even if they ultimately turn out to be wrong on this issue.

relationship between their protected activity and their selection for discharge.[5]

Respondent contends that the Secretary has not established or even sufficiently alleged that the termination of the Complainants was motivated or caused by, or in any way related to, their alleged protected activity. Respondent's Memorandum Of Law In Support Of Motion To Dismiss. The Application for Temporary Reinstatement states that complainants alleged that they were discharged because they signed a miners' representative form and other protected activity. The Application also states that the Secretary has found these allegations to be "not frivolously brought." I find that the Application is a sufficient pleading to state a claim.

I also find that the affidavit attached to the Application, in the absence of any other evidence, would be sufficient to withstand a motion to dismiss. While the affidavit could have explained the Secretary's case more clearly, it does allege that complainants were engaged in protected activity (paragraph e), that Respondent displayed an ongoing animus towards complainants as the result of that activity (paragraph f), and that Peters', Gregory's, and Anderson's claims that they were discharged as the result of that activity is not frivolous (paragraph 4).

It is true that there is no direct evidence establishing a link between complainants' discharge and their designation of Wolf and Butero as walkaround representatives. However, circumstantial evidence may be sufficient to establish this link. Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980) cert. denied, 450 U.S. 1040 (1981). In this case, the circumstantial evidence of a relationship between the walkaround designation and the complainants' discharge is established by the strong and continuing animus of Respondent's management, including the company President, towards complainants, as the result of their union activities, of which the walkaround designation was a significant part. At a minimum, this circumstantial evidence is enough to establish a prima facie case that the Application for Temporary Reinstatement was not frivolously brought.[6]

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[5]The complainants' deposition testimony, Mr. Peters' trial testimony, and the prior discrimination complaints are merely outgrowths of the walkaround designation. I do not see any indication that complainants' safety complaints, absent their union activity and walkaround designation, were a material factor in their discharges.

[6]I decline to make any credibility resolutions between controverted testimony in this proceeding. For example, I will not make a finding as to whether Mr. Herickhoff did or did not

My conclusion that the allegations of retaliatory discharge are not frivolous rests primarily on the apparent incompatibility of the forced ranking used by Respondent in selecting the complainants for lay off with their previous performance appraisals. The employees in the pit maintenance department were rated from 1 to 5 in 30 categories. A score of 1 was the best and 5 was the worst. A rating of 4 was defined as "Inconsistent performance which is generally below the requirements for competency in the work." A score of 5 is defined as "Unacceptable performance which falls far short of the requirements for competency in the work." (Exh. G-14)

Mr. Peters received the second worst score of the 38 employees in the pit maintenance department (Exh. G-15, R-33). His overall score was 4.29. In 13 categories under the heading of "Heavy Mechanic", which accounted for 30 percent of his score he received 12 "5"s and 1 "4". In seven categories under "Equipment/Machinery" which accounted for another 20 percent of his ranking, Mr. Peters was received 7 "5"s out of 7 (Exh. G-8). These scores indicate that Mr. Peters was totally incompetent in performing much of his work. Yet in 14 years as an employee of Respondent, Mr. Peters received performance evaluations of "Meets Expectations" or "Exceeds Expectations" on all occasions save one (Tr. 62).[7]

Although Respondent contends that the six supervisors who participated in the forced ranking were tough scorers in general, the disparity between Peters' performance appraisals and his scores in the forced ranking raise a substantial issue as to whether that ranking was in some part a result of his protected

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fn. 6 (continued)
refer to the complainants as "cronies of Dallas Wolf" or whether Mr. McCreary, who oversaw the forced ranking procedure, had called the complainants "crony bastards", or told Mr. Peters that he would last a lot longer if he got out of "this political process." (Tr. 34-5, 60, 184, 261, 263, 430-31, 599-603) It may be that additional evidence introduced in a discrimination proceeding will provide a basis for making such determinations.

[7]The one "Does Not Meet Expectations" rating Peters received is an issue in this case in that Peters was evaluated by Foreman Doug Freeland, whom he contends demonstrated animus towards him as a result of his protected activity (Tr. 61-62, 65-67). Moreover, that rating was received in January 1992, a month after company President Herickhoff commented publicly about the potential effects of the UMW organizing effort on the company's future and identified Peters as a union supporter (Tr. 428-31). This rating was also received 3 months after the UMW renewed its organizing drive (Exh. R-29) and 2 months after Mr. Peters testified on behalf of MSHA concerning the walkaround representative dispute (Tr. 37, 421-24, 442-43).

activity. On this basis alone I would find the Secretary's decision to proceed with Peters' complaint to be "not frivolous."

With regard to Mr. Anderson, a serious question regarding the alleged discriminatory nature of his discharge arises even before one considers his forced ranking score. Mr. Anderson had been temporarily assigned to the Truck Maintenance shop 6 months prior to the lay off (Tr. 258, 535). Respondent knew before the forced ranking that it would not lay off anyone in the truck maintenance shop (Tr. 637, Exh. R-30 pp. 5-6).[8] Nevertheless, Anderson was rated with the pit maintenance employees and two employees temporarily assigned to the pit maintenance shop were rated with the Truck Maintenance workforce. This procedure may, to some extent, suggest that Anderson, a prominent union advocate and signer of the UMW walkaround form, was transferred back to pit maintenance so that Respondent would have a better chance of getting rid of him.

Anderson's overall score of 3.9 placed him tenth from the bottom in the forced ranking of the 38 pit maintenance employees (Exh. R-33). He received a "5" in 11 of 13 categories under "Heavy Mechanic" and 5 "5"s out of 7 under "Equipment/ Machinery."(Exh. G-12) As Anderson never got a performance evaluation below "Meets Expectations" in his 12-1/2 years with Respondent (Tr. 263-4), I find his forced ranking score facially inconsistent with Respondent's prior evaluation of his performance, and, thus, suspect.

In Anderson's performance evaluation for February 20, 1990 through February 9, 1991, he received a rating of "Meets Expectations" (Exh. G-16). The narrative of the evaluation is totally at odds with the numerous "5" ratings Anderson received in the forced ranking. Some of the relevant comments were as follows:

> "Quality of work is excellent. Completes work with little direction. Tools and equipment are used proficiently.
>
> Conveys accurate information pertaining to structural failures and makes repairs accordingly. Ingenuity is used in the design and construction of equipment that is used to make jobs easier and safer.
>
> Uses sound judgement in planning jobs. Has strong convictions seeing a job through to completion and that is (sic) been proven beneficial in use.

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[8]One employee in light vehicle maintenance was laid off but his duties were apparently not comparable to Anderson's (Exh. R-30, p. 5, Tr. 534-5).

> Excellent fabricator of materials. Weld repairs are made in a quality manner. Actively seeks more work as assigned job is complete.
>
> Darryl has shown me that he is a conscientious employee and I am sure this will continue. His skills, knowledge and willingness to share information about certain jobs has proven to be an asset to myself and others.

Anderson's evaluation for the period July 26, 1991 through February 9, 1992, was not as favorable, although he did receive a rating of "Meets Expectations." This evaluation followed not long after the October 1991 reinitiation of the UMW organizing campaign and the hearing on Respondent's suit to enjoin the UMW walkaround designation, but is still inconsistent with the forced ranking scores (Exh. G-17). Among the relevant comments are:

> Quality of work is excellent. Use of time has improved to an acceptable level and is expected to be maintained . . . .
>
> Excellent fabrication skill are utilized. More initiative can be applied in making some repairs. Troubleshooting on general mechanical repairs is improving with increased exposure.
>
> Has strong knowledge of weld repairs. Mechanical knowledge is improving and I will make more assignments on mechanical repairs so that experience can be gained.
>
> Darryl is a conscientious employee who applies a lot of creative thinking to his work. I appreciate his candidness in discussions we've had and recently noticed a stronger line of communication building with others in management...

In 14-1/2 years Gregory received evaluations of "Meets Expectations" on all but one occasion in 1988 or 1989 (Tr. 172). He received the fourth lowest score in the forced ranking (Exh. G-14). Under the category of "Heavy Machinery" Gregory received all "5"s except one 4 (Exh. G-9) The Secretary's case on behalf of Gregory is weaker than is his case on behalf of Peters and Anderson. First of all, Gregory was not nearly as prominent in union affairs as the other two complainants. He signed neither the walkaround designation form nor was he listed on the October 1991 notice to Respondent about the renewed organizational campaign (Exh. R-29, G-1, p. 2).

Nevertheless, Gregory is listed as an alternate walkaround representative to Mr. Wolf and Mr. Butero (Exh G-1, p. 1). He

was deposed by Respondent in July 1991, and was subpoenaed to testify for MSHA in October 1991. Upon receipt of a reprimand shortly thereafter he filed a discrimination complaint with MSHA. (Tr. 184). He has also given depositions on Mr. Peters' behalf regarding discrimination claims under section 105(c) of the Mine Safety and Health Act (Tr. 67-68, 85). Given the absence of any indication that Respondent previously considered Gregory as poor an employee as suggested by his forced ranking score, I conclude that the Secretary's case on his behalf in "not frivolous" as well.[9]

The entire forced ranking process is conceivably tainted by retaliatory motivation. Terry Walsh, Respondent's Operations Manager and Robert McCreary, Respondent's Maintenance Superintendent for the pit maintenance area, testified that the reason the company could not rely on performance evaluations in conducting the lay off was that they wouldn't allow Respondent to differentiate among the employees in the pit maintenance department (Tr. 517-18, 578-79). This suggests that there may not have been sufficient disparity in the performance of the workforce to make selections for lay off on this basis.

It also raises the possibility that the forced ranking process was an attempt to create distinctions where none existed and that the only objective way to differentiate between employees was on the basis of seniority, as Respondent had done once in the past. The forced ranking process may have been an effort to quantify the unquantifiable and may have been, in part, employed in order to avoid using seniority which would have spared all or most of the UMW sympathizers.[10]

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[9]Respondent at page 40 of its brief argues that Gregory should not be reinstated because he is physically unable to perform his job. Although Gregory has had knee surgery, which he considers unsuccessful, there is no indication that he did not perform his job satisfactorily from September 1992, when he returned from the second operation to the day of his discharge (Tr. 187-189). If Mr. Gregory is willing to work despite the pain and discomfort in his knees, he must be reinstated.

[10]I reject the contention that because five of the nine employees whose names appear on the UMW walkaround designation were not laid-off, retaliatory motive has been disproved. It is not necessary to discharge all the union adherents to accomplish a desired result--particularly when two of those laid-off, Peters and Anderson, were clearly leaders of the UMW faction at the Black Thunder Mine. Similarly, the fact that many of those laid off apparently had no connection with the UMW or the walkaround designation, does not necessarily mean the layoff was not discriminatory. On the other hand, both these facts must be considered in a discrimination case. Obviously, a situation in

In addition to the forced ranking process and the disparity between the complainants' rankings and their prior performance evaluations, there is a substantial issue regarding the impact of the lay off on the pit maintenance department. After the lay off, maintenance of the Respondent's rotary drills was transferred from pit maintenance, where most of the UMW faction worked, to the truck maintenance shop, which was spared in the lay off (Tr. 508-09, 533-34).

Respondent has convincingly established that the changeover from the truck and shovel method of removing overburden to a complete dragline operation produced a decreased need for maintenance employees on the trucks and shovels. However, its decision to lay off almost exclusively from the union-infested pit maintenance department is suspect[11].

The truck maintenance shop also was overstaffed as result of the changeover (Tr. 510). Instead of laying-off employees from the truck shop, as well as from pit maintenance, Respondent chose to lay off only from pit maintenance and transfer some of that department's work to the truck maintenance shop. It is not inconceivable that complainants' designation of Wolf and Butero as walkaround representatives had something to do with this decision.

In conclusion, I find that the Secretary has met his burden in establishing that the discrimination complaints of Loy Peters, Darryl Anderson, and Donald Gregory alleging retaliatory discharge on July 8, 1993 are "not frivolous." I also find that the Secretary's decision to seek temporary reinstatement in view of the record before me is "not frivolous."

ORDER

Respondent is hereby ordered to reinstate Loy Peters, Darryl Anderson, and Donald Gregory to the positions from which they

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which all those who engaged in protected activity and/or only those who engaged in protected activity lose their jobs is a stronger case from the complainants' perspective than this one.

[11]Five of the seven employees initiating the union organizing drive (Exh. R-29) and eight of the nine whose names appear on the form designating Wolf and Butero as walkaround representatives worked in pit maintenance (Exh. G-1, R-33).

were discharged on July 8, 1993, or to equivalent positions, at the same rate of pay and with equivalent duties.[12]

Arthur J. Amchan
Administrative Law Judge
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[12]Respondent submits that Complainants' positions no longer exist at the mine. Such is the contention in every situation involving a lay off. The record clearly establishes that there is work at Respondent's mine that complainants can perform (Tr. 623-24). Moreover, Congress, in providing for temporary reinstatement, has determined that when a miner's complaint is "not frivolous" the employer must reinstate the miner regardless of whether it is economically beneficial for the employer to do so. Congress has determined that, when the discrimination complaint is "not frivolous", the employer must run the risk of paying a discharged miner whose claim may ultimately fail, rather than requiring the miner, who may prevail, to go through the discrimination proceeding without income.