ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

MARK A. FRANKS, Complainant v. EMERALD COAL RESOURCES, LP, Respondent.	)))))))	Docket No. PENN 2012-250-D
RONALD M. HOY, Complainant v. EMERALD COAL RESOURCES, LP, Respondent.	)))))))	Docket No. PENN 2012-251-D

BRIEF OF THE SECRETARY OF LABOR AS *AMICUS CURIAE*

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INTRODUCTION

The above-captioned consolidated cases arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act" or the "Mine Act"), 30 U.S.C. § 815(c), are before the Commission for review of the administrative law judge's ("ALJ's") finding of a violation of Section 105(c). As explained below, Section 105(c) creates two separate causes of action: (1) intentional discrimination against miners because of their exercise of protected activity and (2) unjustified interference with the exercise of protected activity. Before the ALJ, the complainants presented both interference and intentional discrimination claims. *See* Compl. at 8-10; Post-Hr'g Br. at 11-22. The ALJ, however, confined her decision to the discrimination claims,

and did not adjudicate the interference claims. The complainants continue to assert their interference claims before the Commission on appeal, and have requested that those claims be adjudicated either by the ALJ or by the Commission. Resp. Br. at 34-35; Oral Arg. Tr. at 79-80.

For the reasons set forth in this *amicus curiae* brief, the Secretary submits that the complainants' interference claims are colorable and that they should be adjudicated. *See United States v. Sarabia*, 661 F.3d 225, 229 (5th Cir. 2011) ("A claim is colorable if 'there is some possible validity to the claim.'") (quoting *Richardson v. United States*, 468 U.S. 317, 326 n.6 (1984)); *Salaheen v. Holder*, 618 F.3d 957, 961 (8th Cir. 2010) (same). Furthermore, the Secretary requests that the Commission adopt and apply his interpretation of the basic elements of a Section 105(c) interference violation. In the Secretary's view, a Mine Act interference violation occurs when

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

Part I of this brief discusses general principles of statutory interpretation and deference. Part II discusses the interference cause of action under Section 105(c) in general, including the Secretary's interpretation of the basic elements of a violation. Part III explains why, based on the facts in this case, the complainants' interference

claims are colorable and should be adjudicated. The Secretary takes no position on the ultimate question of whether interference violations occurred.

I.

PRINCIPLES OF STATUTORY INTERPRETATION AND DEFERENCE

This case involves questions of statutory interpretation in the administrative context, so the two-step *Chevron* analysis applies. The analysis begins with a reading of the statute itself, including its language and overall design, to determine whether "'Congress has directly spoken to the precise question at issue.'" *Sec'y of Labor v. Simola*, 34 FMSHRC 539, 542 (Mar. 2012) (quoting *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute provides a clear and unambiguous answer to the question presented, courts must give effect to that plain meaning. *City of Arlington v. FCC*, __ U.S. __, 133 S.Ct. 1863, 1868 (2013) (citing *Chevron*, 467 U.S. at 842 (1984)); *Simola*, 34 FMSHRC at 542.

If the statute is silent or ambiguous with respect to the question presented, the court must determine "'whether the agency's answer is based on a permissible construction of the statute.'" *City of Arlington*, 133 S.Ct. at 1868 (quoting *Chevron*, 467 U.S. at 843); *Wolf Run Mining Co. v. Fed. Mine Safety & Health Review Comm'n*, 659 F.3d 1197, 1200-01 (D.C. Cir. 2011). The Secretary's reasonable construction of the Mine Act "'must be given weight by both the Commission and the courts.'" *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 5-6 (D.C. Cir. 2003) (quoting *Sec'y of Labor ex rel. Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989)). *Accord Simola*, 34 FMSHRC at 543. The Secretary's

reasonable interpretation is entitled to deference when it is expressed in the form of an *amicus curiae* brief. *See Chase Bank USA, N.A. v. McCoy*, __ U.S. __, 131 S.Ct. 871, 881 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)) (deferring to a reasonable interpretation advanced in an *amicus curiae* brief because "'there is no reason to believe that the interpretation advanced by the Board is a '*post hoc* rationalization' taken as a litigation position'"); *Talk America, Inc. v. Mich. Bell Tel. Co.*, __ U.S. __, 131 S.Ct. 2254, 2261 (2011) ("[W]e defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.") (citations and internal quotations omitted). *Cf. N. Fork Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 691 F.3d 735, 742-43 (6th Cir. 2012) (according *Skidmore* deference to the Secretary's litigating position); *Vulcan Constr. Materials, LP v. Fed. Mine Safety & Health Review Comm'n*, 700 F.3d 297, 316 (7th Cir. 2012) (same).

The Mine Act is a workplace safety statute that should be "construed broadly" to effectuate its remedial purpose. *Pattison Sand Co., LLC v. Fed. Mine Safety & Health Review Comm'n*, 688 F.3d 507, 513 (8th Cir. 2012) (citing *Cannelton Indus.*, 867 F.2d at 1437). *See also Long v. Tommy Hilfiger, U.S.A.*, 671 F.3d 371, 375 (3d Cir. 2012) ("[R]emedial legislation should be construed broadly to effectuate its purpose."). In particular, Congress directed the courts to "expansively" construe Section 105(c) "to assure that miners will not be inhibited in

any way in exercising any rights afforded by the legislation." S. Rep. 95-181, at 36 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3400, 3436 ("S. Rep."); *see Sec'y of Labor ex rel. Gray v. N. Fork Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005) ("'The legislative history of the Act makes clear the intent of Congress that protected rights are to be construed expansively.'") (quoting *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994)).

II.

UNJUSTIFIED INTERFERENCE WITH PROTECTED ACTIVITY UNDER SECTION 105(c) OF THE MINE ACT

1. The Mine Act Establishes a Cause of Action For Unjustified Interference With the Exercise of Statutory Rights

Section 105(c) establishes distinct causes of action for (1) intentional discrimination against members of the protected class because of their exercise of protected rights, and (2) unjustified interference with the exercise of protected rights by members of the protected class. Historically, the majority of Section 105(c) cases litigated before the Commission have involved claims of intentional discrimination, which are evaluated under the *Pasula-Robinette* framework, an intent-based, burden-shifting analysis that determines whether an adverse employment action was motivated in any part by the exercise of protected activity and, if so, whether the operator[1] can establish an affirmative defense, i.e., establish

[1] The Secretary uses the word "operator" in this brief as shorthand for any "person" subject to Section 105(c), since operators are more frequently charged with Section 105(c) violations than are other covered "persons" and since an operator is the respondent in the present case. *See* 30 U.S.C. § 802(f) (defining "person"); *Meredith v. Fed. Mine Safety & Health Admin.*, 177 F.3d 1042, 1053-56 (D.C. Cir. 1999) (discussing "persons" covered by Section 105(c)). Similarly, the Secretary uses the word "miner" in this brief as shorthand for any

that it would have taken the same adverse action even in the absence of protected activity. *Cumberland River Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 712 F.3d 311, 317-18 (6th Cir. 2013) (citing *Sec'y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir.1981); *Sec'y of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981)). However, in addition to prohibiting intentional discrimination, Section 105(c) also prohibits unjustified interference with the exercise of Mine Act rights.

The statutory text establishes that Section 105(c) creates a cause of action for unjustified interference that is distinct from intentional discrimination. The Mine Act repeatedly addresses prohibited "interference" under Section 105(c), and consistently employs the disjunctive when describing discrimination "or" interference. *See North Carolina v. EPA*, 531 F.3d 896, 910 (D.C. Cir. 2008) (construing "or" in accordance with the canon "'that terms connected by a disjunctive be given separate meanings unless the context dictates otherwise....'") (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)); *United States v. Saybolt*, 577 F.3d 195, 199-200 (3d. Cir. 2009). First, Section 105(c)(1) makes it unlawful for a person to "discharge or in any manner discriminate against or cause to be discharged *or otherwise interfere with the exercise of the statutory rights* of any" miner. 30 U.S.C. §§ 815(c)(1) (emphasis added). Second, Section 105(c)(2) grants to miners the right to file a complaint of discrimination with the Secretary if

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member of the protected class, which includes miners, their representatives, and applicants for mine employment. 30 U.S.C. § 815(c)(1).

he "believes that he has been discharged, *interfered with*, or otherwise discriminated against..." 30 U.S.C. § 815(c)(2) (emphasis added). Third and fourth, Sections 105(c)(2) and 105(c)(3) authorize the Secretary or complainants, respectively, to file a complaint with the Commission alleging "discrimination *or interference*." 30 U.S.C. §§ 815(c)(2); 815(c)(3) (emphasis added).

Congress's intent to create a separate cause of action for unjustified interference with protected rights is also reflected in the legislative history of Section 105(c). The Mine Act's predecessor statute, the Coal Mine Health and Safety Act of 1969 ("the Coal Act"), prohibited "discharg[ing] or in any other way discriminat[ing] against" a miner or representative of miners because of the exercise of statutory rights, but it made no mention of prohibited "interference." 30 U.S.C. § 820(b) (1976) (quoted in *Munsey v. Fed. Mine Safety & Health Review Comm'n*, 595 F.2d 735, 736 n.2 (D.C. Cir. 1978)). Then, "[f]ollowing a number of tragic mining accidents in the 1970s, Congress conducted a comprehensive examination of the then-existing laws governing our nation's mines and the miners who worked in them," *Vulcan Constr.*, 700 F.3d at 302, and in 1977 it enacted the Mine Act. The new Section 105(c) enhanced the Coal Act's discrimination provision by adding the language that prohibits "interference with the exercise of statutory rights," and that authorizes Commission complaints alleging discrimination "or interference." *Compare* 30 U.S.C. § 820(b) (1976) *with* 30 U.S.C. § 815(c).[2] The

[2] Section 105(c) also expanded the Coal Act's discrimination provision by adding (1) applicants for mine employment to the protected class and (2) an "illustrative" list of protected activities "to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S.Rep. at 35-36. The Coal

Senate Committee Report confirms that the Congress acted intentionally to create a new cause of action for interference when it added the "interference" language:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the *more subtle forms of interference, such as promises of benefit or threats of reprisal.*

S. Rep. at 36 (emphasis added). "So clear a statement in the principal committee report is powerful evidence of legislative purpose." *Miller v. Fed. Mine Safety & Health Review Comm'n*, 687 F.2d 194, 195 (7th Cir. 1982) (holding, based on the same Senate Report, that Section 105(c) establishes a miner's right to refuse work that he reasonably and in good faith believes to be unsafe, even though the Act does not "explicitly" establish such a right).

Although the Commission's case law does not expressly refer to a cause of action for "interference" under Section 105(c), the Commission has implicitly recognized the existence of such a cause of action in cases involving threats and interrogations by supervisors regarding the exercise of protected activities by miners. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982) (interrogation); *Gray*, 27 FMSHRC at 8 (interrogation and threats). In those cases, the Commission found that Section 105(c) was violated because "the natural result" of supervisors' statements "may be to instill in the minds of employees fear of reprisal or discrimination" sufficient to "chill the exercise of protected rights by the directly affected miners" or "cause other miners, who wish to avoid similar

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Act had not protected job applicants and had protected only three kinds of statutory activity: notifying the Secretary of a violation or danger, instituting a Coal Act proceeding, and testifying in such a proceeding. 30 U.S.C. § 820(b) (1976).

treatment, to refrain from asserting their rights." *Moses*, 4 FMSHRC at 1478-79; *Gray*, 27 FMSHRC at 8 (quoting same). As the Commission recognized, the analysis it used to find violations in those cases is different from the *Pasula-Robinette* analysis that applies to claims of intentional discrimination. *Gray*, 27 FMSHRC at 8 n.6 ("The Commission's approach to the analysis of operator statements stands in contrast to its analysis of discrimination against miners who have exercised their rights under the Mine Act. .... This latter analysis is generally referred to as the *Pasula-Robinette* test."). And as will be seen in the next section, the analysis used in the *Moses* and *Gray* decisions – focusing on the tendency of an operator's action to "chill the exercise of protected rights" – echoes the test for interference violations arising under an analogous anti-interference provision, Section 8(a)(1) of the National Labor Relations Act ("NLRA Section 8(a)(1)"). 29 U.S.C. § 158(a)(1). Interpreting Section 105(c) to establish a separate cause of action for interference is therefore consistent with both the statutory text and Commission precedent.[3]

[3] Nothing in the text of the Mine Act suggests that interference liability may only be based on threats or interrogations. *Moses* recognized that interrogation is "among" the "'forms of interference'" prohibited by the Act. 4 FMSHRC at 1478-79 (quoting S. Rep. at 36). As will be discussed in Part III, many forms of interference besides interrogation and harassment are recognized under NLRA Section 8(a)(1), including surveillance, polling, coercive work rules, and promises of benefit if employees refrain from protected activity. *See Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002) ("*Allegheny II*") (interference "does not depend on the formal nomenclature" of employer actions, but rather on "their practical effect") (quoting *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1360 (D.C. Cir. 2002) ("*Allegheny I*")).

2. The Secretary's Test for Evaluating Section 105(c) Interference Claims

Under the Secretary's interpretation of Section 105(c), a Mine Act interference violation occurs if

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

As discussed below, this interpretation derives from Mine Act authority, including the Commission's decisions in *Moses* and *Gray*, and from case law arising under NLRA Section 8(a)(1). *See Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1998) (articulating the NLRA interference test as whether (1) "an employer's action can be reasonably viewed as tending to interfere with, coerce, or deter (2) the exercise of protected activity, and (3) the employer fails to justify the action with a substantial and legitimate business reason that outweighs the employee's [statutory] rights"). A*ccord United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 912-13 (D.C. Cir. 2004) ("*U.S.A.A.*").

It is appropriate to rely on NLRA Section 8(a)(1) interference case law in this context. The Commission has already recognized that the test it used to determine violations in *Moses* and *Gray* "has its genesis in section 8(a)(1) of the NLRA," *Gray*, 27 FMSHRC at 9-10, and, in *Gray*, it relied on factually-similar NLRA interference cases to find a Section 105(c) violation, *id.* at 11 n.10, n.11, n.12. Reliance on the NLRA is justified because the text and legislative history of the Mine Act track the

text of the NLRA and the legal test for finding NLRA interference violations. Just as Section 105(c) makes it unlawful to "interfere with the exercise of statutory rights" of any miner, NLRA Section 8(a)(1) makes it unlawful to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [NLRA Section 7]." 29 U.S.C. § 158(a)(1).[4] Just as the Mine Act's legislative history expresses an intent to prohibit "subtle forms of interference" in Section 105(c), including "promises of benefit or threats of reprisal," S. Rep. at 36, substantially identical language appears in the NLRA and its case law. *See* 29 U.S.C. § 158(c) (permitting the expression of views, argument, or opinions regarding concerted labor activity unless the expression contains a "threat of reprisal or force or promise of benefit"); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (holding that an employer's communication regarding protected activity violates Section 8(a)(1) if it amounts to a "threat or reprisal" or "promise of benefit"); *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 930-31 (D.C. Cir. 2012). And just as the Mine Act's legislative history instructs that Section 105(c) be "construed expansively to assure that miners will not be *inhibited in any way in exercising any rights* afforded by the legislation," S. Rep. at 36 (emphasis added), similar "inhibits the exercise" language guides NLRA Section 8(a)(1) appellate decisions dating from the time of the Mine Act's enactment in 1977 until the present day. *See Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1144 n.18 (3d Cir. 1977) ("Surveillance which suggests coercion, or which

[4] Section 7 of the NLRA establishes the statutory rights of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

inhibits the exercise of s[ection] 7 rights, violates s[ection] 8(a)(1)."); *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 476 (6th Cir. 2002) (finding a violation where the employer's conduct "inhibits employees from invoking or participating in effective Board proceedings") (citation omitted); *Albertson's, Inc., v. NLRB*, 161 F.3d 1231, 1238 (10th Cir. 1998) (finding a violation where the conduct "could tend to inhibit employees in the exercise of their protected rights").

a. *Prong One –Tendency to Interfere with the Exercise of Protected Activity*

Prong One of the Secretary's formulation requires a showing that the challenged action "can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights."

The "tendency to interfere" standard derives from NLRA Section 8(a)(1) case law and Commission precedent. NLRA cases applying the "tendency to interfere" standard are legion, *e.g., Flagstaff Med. Ctr.*, 715 F.3d at 930; *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 481 (1st Cir. 2011); *Spurlino Materials, LLC v. NLRB*, 645 F.3d 870, 878 (7th Cir. 2011); *NLRB v. Air Contact Transp., Inc.,* 403 F.3d 206, 212 (4th Cir. 2005); *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005), and the Commission applied the same or an equivalent standard in both *Gray* and *Moses*. *Gray*, 27 FMSHRC at 9 (evaluating "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of [protected] rights") (quoting *Am. Freightways Co.*, 124 N.L.R.B. 146,

147 (1959)); *Moses*, 4 FMSHRC at 1578-79 (holding that conduct which would "chill the exercise of protected rights" violates Section 105(c)).

The "totality of the circumstances" language contained in Prong One of the Secretary's formulation is also reflected in both Commission and NLRA precedent. In *Moses*, the Commission affirmed a Section 105(c) violation involving an operator who interrogated and harassed a miner regarding an anonymous Section 103(g) complaint to MSHA. In reaching its decision, the Commission clarified that it was not creating a bright-line rule in which "an operator may never question or comment upon a miner's exercise of a protected right." 4 FMSHRC at 1479 n.8. Instead, "[w]hether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by circumstances surrounding the words and actions." *Id.* More recently, *Gray* reaffirmed the "totality of the circumstances" approach. 27 FMSHRC at 9-10 (citing *Standard-Coosa Thatcher Carpet Yarn Div. v. NLRB*, 691 F.2d 1133, 1137 (4th Cir. 1982); *TRW, Inc. v. NLRB*, 654 F.2d 307, 313 (5th Cir. 1981)). Likewise, under NLRA Section 8(a)(1), the "tendency to interfere" is evaluated based on the "totality of the circumstances." *W&M Props. of Conn. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008). *Accord Medeco,* 142 F.3d at 745; *Fleming Cos. v. NLRB*, 349 F.3d 968, 974 (7th Cir. 2003).

The requirement that the tendency to interfere with protected rights be evaluated from the perspective of miners also derives from Commission and NLRA precedent. In *Gray*, a case involving threats by a supervisor, the Commission explained that the interference inquiry must "'take into account the economic

dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.'" 27 FMSHRC at 10 (quoting *Gissel Packing*, 395 U.S. at 617). NLRA Section 8(a)(1) jurisprudence confirms that the tendency to interfere is evaluated from the point of view of a reasonable employee. *See Allegheny II*, 301 F.3d at 176 (describing the interference analysis as "an objective test in which the employer's intent is irrelevant and the proper inquiry is the impression of a reasonable employee"); *Beverly Health*, 297 F.3d at 476 (assessing tendency to interfere "from the point of view of the employees") (citations omitted); *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 545 (D.C. Cir. 2006) (finding an interference violation where "employees, ... in this context, ... could reasonably perceive a direct connection between union activities and job loss").

It may be helpful to highlight what is *not* required in order to satisfy Prong One of the interference test.

First, as the Commission has held, it is not necessary to prove that a miner was actually interfered with in the exercise of a protected right. *Gray*, 27 FMSHRC at 9 (noting that the interference inquiry "does not turn on ... whether the coercion succeeded or failed" but instead focuses on the "tend[ency] to interfere with the free exercise of employee rights") (quoting *Am. Freightways*, 124 N.L.R.B. at 147). *See also Nat'l Steel & Shipbldg. Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998) ("*NASSCO*") ("An employer violates § 8(a)(1) if its actions have merely a tendency to

coerce, regardless of their actual impact.") (citation omitted); *Allegheny II*, 301 F.3d at 176 ("[T]he inquiry focuses on whether the solicitations would 'tend to create' an impression that the company was trying to discern union sentiments, not whether they actually created such an impression.") (citations omitted). *Accord Hosp. Cristo Redentor, Inc. v. NLRB*, 488 F.3d 513, 517 (1st Cir. 2007); *Beverly Health*, 297 F.3d at 476.

Second, it is not necessary to show that a complainant engaged in protected activity in order to prove an interference violation; interference may exist "even if an employee has yet to exercise a right protected in the Act." *Medeco*, 142 F.3d at 745. As discussed above, the focus of the interference analysis is the tendency to interfere with the prospective exercise of rights. *See* S. Rep. at 36 (directing that Section 105(c) be "construed expansively to assure that miners *will not be inhibited* in any way in exercising any rights afforded by the legislation") (emphasis added). *Cf. Beverly Health*, 297 F.3d at 476 (assessing the "likely impact of employer conduct on the exercise of employee rights" in order to "gauge whether the employer's threat of discharge for failure to answer a questionnaire inhibits employees from invoking or participating in effective Board proceedings") (citation omitted).

Third, it is not necessary to show that an operator acted with improper intent in order to prove an interference violation. In *Gray*, the Commission reversed and remanded a no-violation finding because the ALJ had improperly focused on whether a mine supervisor intended to threaten the miner when, instead, "the judge

should have analyzed the totality of circumstances surrounding [the supervisor's] statements to determine whether they were coercive and violative of section 105(c) of the Mine Act." 27 FMSHRC at 8. As the Commission noted, the principle that intent to interfere is not required to prove an interference violation is well established under NLRA Section 8(a)(1). *Id.* at 9 ("[I]nterference, restraint, and coercion under Section 8(a)(1) of the NLRA does not turn on the employer's motive...," and "section 8(a)(1) is violated despite the employer's good faith.") (quoting *Am. Freightways*, 124 N.L.R.B. at 147; *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964)). *See Allegheny II*, 301 F.3d at 176 ("'[W]hether this consent solicitation would constitute an unlawful interference with § 7 rights does not turn on the malevolence or innocence of the employer's *intent* in seeking the employees' consent; rather the relevant question is whether the solicitations would tend to create among the employees a reasonable *impression* that the employer was trying to discern their union sentiments.'") (emphasis in original) (quoting *Allegheny I*, 104 F.3d at 1362). *Accord Medeco*, 142 F.3d at 747 (collecting cases).

b. *Prong Two – Pretext and Balancing Tests Regarding Operator's Asserted Business Justification*

The interference analysis does not end with a finding under Prong I that the operator's action tended to interfere with protected activities. Instead, in order to find an interference violation, Prong II requires that the operator has "failed to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to protected rights." For this reason, it may be more

descriptive to refer to a Section 105(c) cause of action for "*unjustified* interference" instead of simple "interference."

Prong Two contains both a pretext element regarding the "legitimacy" of the proffered justification and a balancing test regarding the "substantiality" of the justification. Both of those elements derive from NLRA Section 8(a)(1). *See Medeco*, 142 F.3d at 745 (articulating the "substantial and legitimate business reason" prong of the interference analysis); *U.S.A.A.*, 387 F.3d at 913; *NLRB v. Autodie Intern., Inc.*, 169 F.3d 378, 384 (6th Cir. 1999) ("[d]etermining whether an asserted business justification is bona fide, and if so, whether it outweighs the harm done to employee rights").

A "legitimate" justification under NLRA Section 8(a)(1) is one that is honestly held and not pretextual. *See U.S.A.A.*, 387 F.3d at 916; *Autodie*, 169 F.3d at 384 (employer must show justification is "bona fide"); *NASSCO*, 156 F.3d at 1272-73 (finding an interference violation where the evidence showed that the employer's justification was untrue). If the company's asserted business justification is a pretext, the inquiry ends and there is no need for the court to engage in a balancing of competing interests. *U.S.A.A.*, 387 F.3d at 916 ("The Board did not fail ... to strike an appropriate balance between the company's asserted business justifications and its interference with [an employee's] exercise of her section 7 rights" where the company "admi[tted] its unlawful motive for inquiring into its employees' concerted activity.")

The Commission already performs a pretext analysis when evaluating affirmative defenses in intentional discrimination cases, and the same methods of discrediting an affirmative defense would be probative of pretext in the interference context. *See, e.g., Cumberland River Coal*, 712 F.3d at 319-20 (dismissing as pretextual an affirmative defense that was "out of line with the operator's normal business practices"); *Cordero Mining LLC v. Sec'y of Labor ex rel. Clapp*, 699 F.3d 1232, 1237 (10th Cir. 2012) (rejecting affirmative defense based on negative cr- lit- findings); *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 93 (D.C. .. 1983) (rejecting affirmative defense based on inconsistent and disparate t).

If, however, the operator's asserted justification is "legitimate," the analysis und ong Two continues to the balancing test: whether the justification is "substantial" enough to "outweigh the harm caused to protected rights." *See Air Contact Transp.*, 403 F.3d at 214 n.2 ("It is only when the interference with [protected] rights outweighs the business justification for the employer's action that § 8(a)(1) is violated.") (quoting *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965)). *Accord Indep. Elec. Contractors of Hous., Inc. v. NLRB*, 720 F.3d 543, 553 (5th Cir. 2013). As articulated in the context of NLRA Section 8(a)(1), the goal of this test is "'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *U.S.A.A.*, 387 F.3d at 913 (quoting *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967)).

The Commission itself has implied that evaluating Section 105(c) interference claims requires a balancing of competing interests. In *Moses*, the seminal case involving interrogation of a miner regarding who reported an accident to the government, the Commission indicated that not all questioning by an operator regarding a miner's exercise of a protected right necessarily violates Section 105(c). "Such question or comment may be innocuous or even necessary to address a safety or health problem," the Commission explained, "and, therefore, would not amount to coercive interrogation or harassment." 4 FMSHRC at 1479 n.8. Prong Two of the Secretary's test makes explicit *Moses*'s implicit holding that Mine Act interference claims are subject to a balancing test.

When "striking the proper balance" between competing interests, courts consider the importance of the interest asserted by the employer compared with the interference caused with the exercise of protected rights. A justification that provides a marginal or speculative benefit to the employer will not ordinarily "outweigh" in importance the harm caused to protected activity. *See NASSCO*, 156 F.3d at 1271 (finding a surveillance violation where sufficient security measures were already in place and "the minimal additional security that videotaping may have provided ... was outweighed by its tendency to coerce"); *Cal. Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1100 (9th Cir. 1998) ("Photographing in the mere belief that something might happen does not justify [the] employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity.") (quoting *F.W. Woolworth Co.*, 310 N.L.R.B. 1197,

1197 (1993)).[5] On the other hand, if the harm caused to protected activity is tenuous or speculative and the employer's justification is legitimate and substantial, the interference with protected activity is justified. *See Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 25-29 (D.C. Cir. 2001) (rejecting the argument that a commonplace rule against "abusive and threatening language" interfered with protected activity because "union campaigns sometimes spawn intemperate language").

When the competing interests are each substantial, the question becomes whether the employer's action was sufficiently tailored to advance its business justification without causing unnecessary harm to protected rights. For instance, a company work rule unjustifiably interferes with protected activity if the company fails to show that it is "'narrowly tailored to achieve the employer's purpose without chilling protected activity.'" *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 376-77 (D.C. Cir. 2007) (quoting *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088 (D.C.Cir. 2003)). If a "more narrowly drafted provision would be sufficient to accomplish" the company's purpose, the overbroad provision violates the Act. *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011) (citing *Cintas Corp. v. NLRB*, 482 F.3d 463, 470 (D.C. Cir.2007)). Similarly, in cases involving employer interrogations, unjustified interference occurs if the scope of the questioning "exceed[s] the necessities of the legitimate purpose" for the interrogation. *Overnite*

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[5] *A fortiori*, an asserted justification for company action that provides *no* legitimate benefit to the company is considered a pretext. *See U.S.A.A.*, 387 F.3d at 916 (justification for interrogating an employee was pretext where the employer already knew the answers to the questions it was asking of the employee).

Transp. Co. v. NLRB, 280 F.2d 417, 434 (4th Cir. 2002) (en banc) (citations omitted). *Accord ITT Auto. v. NLRB*, 188 F.3d 375, 390 (6th Cir. 1999).

III.

THE COMPLAINANTS HAVE ASSERTED COLORABLE CLAIMS OF INTERFERENCE THAT SHOULD BE ADJUDICATED

For the reasons set forward below, the Secretary believes that the complainants in this case have asserted interference claims that are at least colorable, i.e., they have "'some possible validity.'" *Sarabia*, 661 F.3d at 229 (quoting *Richardson*, 468 U.S. at 326 n.6); *Salaheen*, 618 F.3d at 961. Part III discusses the facts and procedural history of the case, how the interference analysis could apply to the facts, and why the colorable interference claims should be adjudicated, as the complainants have requested. The Secretary does not take a position on the ultimate question of whether unjustified interference occurred.

1. Miners Have A Protected Right to Make Safety Complaints to MSHA on a Confidential Basis, Especially When Requesting MSHA Inspections Pursuant to Section 103(g)

The Mine Act grants miners the right to make safety-related complaints to MSHA and the right to request that MSHA conduct a "special inspection" of a mine based on perceived violations and hazards. 30 U.S.C. § 815(c)(1) (protecting from discrimination miners who have "made a complaint under or related to this Act" or who have exercised "any statutory right afforded by this Act"); 813(g) (giving miners "a right to obtain an immediate inspection by MSHA by giving notice to the Secretary of what he reasonably believes to be an imminent danger or a violation of

the Act and its mandatory standards").[6] As the legislative history explains, Section 103(g) "carries over an important right granted to miners under the Coal Act, the right to request inspections by the Secretary of mines which the miners have reasonable grounds to believe to be dangerous." S. Rep. at 29. Congress enacted Section 103(g) "based on the Committee's firm belief that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." *Id.* at 30. *See also Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974) (observing that "sporadic federal inspections can never be frequent or thorough enough to insure compliance," and "miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws").

An express or implied promise of confidentiality generally accompanies a miner's private communications with MSHA regarding safety hazards or violations

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[6] Technically, the "right to obtain an immediate inspection" only vests if the miner's notification is "reduced to writing" and "signed by the representative of the miners or by the miner." 30 U.S.C. § 813(g)(1). Nevertheless, the making of an unsigned, anonymous complaint is a protected activity, since it remains a "complaint under or related to the Act" under Section 105(c)(1). Furthermore, the Mine Act's principal committee report clarifies that the Secretary may initiate Section 103(g)(1) investigations in response to unsigned complaints:

> While Section [103(g)(1)] requires that such complaints be written, and signed by the complaining party, the Committee does not intend to preclude the Secretary's response to unwritten or unsigned complaints. The Committee notes that [MSHA] currently maintains an inward WATS line (an "800" number) for the express purpose of receiving complaints about hazardous conditions in mines. The Secretary must respond to appropriate complaints under Section [103(g)(1)], but he need not necessarily follow up on complaints that do not meet the requirements of that section.

S. Rep. at 29-30. Thus, the Secretary must conduct a Section 103(g) inspection pursuant to a signed complaint, and may conduct an inspection pursuant to an unsigned complaint.

of the Mine Act. *Cf. U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 179-80 (1993) (explaining how "confidential source" status under the Freedom of Information Act may be implicitly established where a government informant would face reprisal if his identity were disclosed). Under the government's "informant privilege," MSHA may withhold the identity of a source "'who has furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law, including a possible violation of the Mine Act.'" *Sec'y of Labor v. Asarco, Inc.*, 12 FMHSRC 2548, 2553 (Dec. 1990) (quoting *Sec'y of Labor ex rel. Logan v. Bright Coal Co.*, 6 FMSHRC 2520, 2525 (Nov. 1984)). *See also* 29 CFR § 2700.61 (prohibiting Commission judges from ordering the disclosure of the identity of persons furnishing information of violations of the law except in "extraordinary circumstances"). The informant privilege is based on the "common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation." *Dole v. Local 1942, Int'l Bhd. of Elec. Workers*, 870 F.2d 368, 372 (7th Cir. 1989) (involving a civil investigation by the Department of Labor).

As Congress recognized, a miner's confidential communication with MSHA creates a risk of reprisal when it takes the form of a Section 103(g) complaint. S. Rep. at 29 ("The Committee is aware of the need to protect miners against possible discrimination because they file [Section 103(g)(1)] complaints... and the Committee feels that strict confidentiality of complainants under Section 10[3]([g])(1) is absolutely essential"). "Accordingly," Congress prohibited the Secretary from

providing the "name of the person filing the complaint and the names of any miners referred to in the complaint" when MSHA notifies the operator of a Section 103(g) complaint. *Id. See* 30 U.S.C. § 813(g)(1) ("The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification."). For these reasons, the Commission has held that Section 103(g)(1) grants a miner not only "the right to request an inspection," but the right "to do so anonymously." *Moses*, 4 FMSHRC at 1479.

2. Outline of the Facts

On September 22, 2011, MSHA received an anonymous complaint pursuant to Section 103(g) regarding Emerald Mine. The anonymous source reported that the slope belt at Emerald Mine was "dirty" with coal accumulations, that the C3 longwall belt and the E-district belts were "very dirty with coal," and that, in general, the "beltlines look[ed] like powder kegs." Ex. 1. The anonymous source further stated that MSHA and Pennsylvania state inspectors were not adequately inspecting the mine, and that the mine's firebosses were conducting improper preshift examinations by "rid[ing] 4 wheelers and only stop[ping] at mandoors to check belts." Ex. 1.

In response to the anonymous complaint, MSHA initiated a Section 103(g) investigation. As part of the investigation, MSHA interviewed 34 miners. Stip. 38. Present at the interviews were representatives both of the mine operator and of the local union. Stips. 16, 33. A union official testified at trial that he was present at

the MSHA interviews to protect the interests of the firebosses who were the subject of the anonymous complaint, not the interests of the interviewees. Tr. 149-50.

The complainants were among the miners interviewed by MSHA. During their interviews, it was revealed that Franks and Hoy had information about firebosses who had conducted improper preshift examinations. Stips. 19, 20, 35, 36. When asked to provide the names of those firebosses to MSHA (and, by extension, the operator and union representatives in attendance), Franks and Hoy declined. Stips. 22, 34.

MSHA completed its Section 103(g) investigation on October 4, 2011, and made negative findings regarding the allegations of inadequate inspections by firebosses, MSHA inspectors, and state inspectors. Ex. 2. However, in response to the complaint of "very dirty" coal conveyor belts that "look[ed] like powder kegs," MSHA issued seven citations to Emerald Coal. Ex. 2.

After MSHA concluded its Section 103(g) investigation, Emerald Coal began its own investigation into the firebossing allegations made in the confidential complaint. Stip. 39. Emerald Coal's stated justification for doing so was a desire to "dig a little deeper to see if there was any merit to the complaints." Trial Tr. 76. During the company investigation, various mine managers, including the human resources supervisor, re-interviewed the 34 miners already interviewed by MSHA, as well as approximately 15 additional miners who were not previously interviewed. Stip. 38; Trial Tr. 76.

Between October 20 and November 9, 2011, Franks was called into three interviews with Emerald Coal supervisors and Hoy was called into two interviews. Stips. 40, 42, 43, 45, 48. At each meeting, the managers demanded that Franks and Hoy provide the names and other information regarding firebosses who conducted improper preshift examinations. Franks and Hoy declined. Stips. 40, 41, 42, 43, 45, 48. Mine management then suspended Franks and Hoy for seven days without pay because of their "failure to provide information ... concerning serious allegations of safety violations." Ex. 4; Stips. 46, 49.

3. Procedural History

After the Secretary declined to file a Section 105(c)(2) complaint, the complainants filed a Section 105(c)(3) complaint with the Commission alleging both intentional discrimination and interference violations. Compl. at 8-9. Specifically, the complainants alleged that Emerald Coal interfered with the right to make anonymous complaints to MSHA by (a) attending MSHA interviews with miners regarding an anonymous complaint, Compl. at 9 ¶7, (b) interrogating the complainants regarding the substance of the anonymous complaint, Compl. at 9 ¶5, and (c) suspending the complainants because they declined to provide to company officials information about the allegations made in the anonymous complaint, Compl. at 8 ¶3. The complainants' intentional discrimination claims were based on the seven day suspensions. Compl. at 8-9 ¶¶2, 4. As remedies, the complainants sought compensatory damages for the suspensions and equitable relief intended to reverse the chilling effect on protected activity caused by the interference violations.

Compl. at 11 ¶7 (requesting an order that Emerald "cease and desist order from any interference," including interference with the right to make a safety complaint "without being surveilled, interrogated, harassed or disciplined"); *id.* at 10 ¶3 (requesting an order that Emerald train all miners regarding their rights, including the right "to make anonymous complaints of an alleged danger... and the right to provide information to MSHA about such complaints without being surveilled, interrogated, harassed or disciplined").

Although the complainants continued to assert their interference claims in their post-hearing submission, Post-Hr'g Br. at 11-22, the ALJ did not adjudicate the interference claims. The ALJ alluded to the interference claims in a footnote:

> Complainants, through the UMWA, spent much of their post-hearing brief arguing that the Respondent "interfered" with their rights under the Act. The brief separates the interference into three alleged acts: (1) ... the presence of Emerald managers at the Complainant's meetings with MSHA inspectors; (2) ...interrogating Complainants regarding details of the safety hazard complaints made to MSHA; and (3) ...discriminating against them in violation of Section 105(c)(1) by suspending them from work. While I do not necessarily dispute the alleged separate acts of "interference," I address them together as one.

ALJD 6 n.3. The remainder of the ALJ's decision, however, does not address whether interference violations occurred.

Instead, the ALJ limited the focus of her decision to the lawfulness of the ultimate suspensions of the miners and only evaluated those suspensions under the *Pasula-Robinette* framework for determining intentional discrimination violations. *See* ALJD at 8 (identifying the seven day suspensions as the "adverse actions" under review); *id.* at 6-7 (reciting only *Pasula-Robinette* when setting out the

applicable legal framework). The decision did not consider whether the suspensions of Franks and Hoy were themselves interference violations, as the complainants alleged. Compl. at 8 ¶3, Post-Hr'g Br. at 23-24. Nor did the decision consider whether the operator committed interference violations through the actions that it took before Franks and Hoy were suspended. *Id.* at 8 (treating as "protected activity" "the fact that [Franks and Hoy] were asked by company management to address the allegations contained in the 103(g) complaint, after MSHA had found no violation," but not addressing whether that questioning was itself an interference violation); *id.* at 9 (treating "Emerald's continued questioning and harassment of Franks and Hoy" as evidence of "hostility toward them for making accusations against a fireboss," but not considering whether that questioning and harassment was an interference violation).

On appeal, the complainants continue to advance their interference claims and request that those claims be adjudicated. Resp. Br. at 34-35; Oral Arg. Tr. at 79-80 ("Our goal in terms of the interference allegations is to get a full adjudication of those claims and to get findings on whether or not Emerald interfered with the miners' rights... We find that the ways in which Emerald interfered with Franks' and Hoy's rights in violation of Section 105(c) were such substantial violations of their rights, that those claims deserve their own consideration and their findings one way or another."). The complainants expressed no preference on the procedural question of whether the Commission should adjudicate the interference claims during this appeal or, instead, remand to the ALJ. Oral Arg. Tr. at 79.

4. An Operator May Violate Section 105(c) Through Conduct That Tends to Reveal the Identity of Miners Who Make Safety Complaints to MSHA

The Secretary believes that the interference claims advanced by the complainants are colorable because Emerald Coal's actions, when considered under the totality of the circumstances and from the perspective of a reasonable miner, could have tended to reveal the identity of the anonymous informant(s) who contacted MSHA. An operator may violate Section 105(c) by taking an action that instills in miners a reasonable belief that the operator is ascertaining the identity of individuals who engage in protected activity. *Moses*, 4 FMSHRC at 1478 (explaining that the "natural result" of a supervisor asking a miner "if he was the one that called the federal inspectors on that accident" is "to instill in the minds of employees fear of reprisal or discrimination.").

The principle that revealing the identity of individuals who engage in protected activity tends to interfere with protected rights underlies much of NLRA Section 8(a)(1) case law. As the D.C. Circuit has explained, an action that tends to reveal employee sentiments regarding protected rights may be an interference violation "'in itself, and a likely prelude to further and more severe such violations[,] ... because 'an employer cannot discriminate against union adherents without first determining who they are.'" *Allegheny I*, 104 F.3d at 1358-59 (quoting *Struknses Constr. Co.*, 165 N.L.R.B. 1062, 1062 (1967)). A variety of employer actions have been found to interfere with protected activity because, in one way or another, they tend to reveal which employees have engaged in protected activity or are most likely to engage in future such activity. *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99

F.3d 413, 420 (D.C. Cir. 1996) (surveillance of protected activity); *Allegheny II*, 301 F.3d at 176 (polling of employees about their views towards protected activity); *U.S.A.A.*, 387 F.3d at 912 (interrogation about protected activity); *Beverly Health*, 297 F.3d at 478 (requiring employees to provide information pertaining to an unfair labor practice charge, the filing of which is a protected activity).

However, an employer action that tends to reveal who has engaged in protected activity is not a *per se* interference violation, either because such action does not always have a coercive effect or because the employer may have a legitimate justification that outweighs the harm caused to protected rights. *See Moses*, 4 FMSHRC at 1479 n.8 (noting that an operator's question or comment upon a miner's exercise of a protected right "may be innocuous or even necessary to address a safety or health problem"). Instead, when considering the totality of the circumstances surrounding action that would reveal the identity of persons who engage in protected activities, courts have identified a number of relevant, albeit non-exclusive, factors. For instance, in interrogation cases, courts may examine:

> 1) The background, i.e., is there a history of employer hostility and discrimination?
> 2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
> 3) The identity of the questioner, i.e., how high was he in the company hierarchy?
> 4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?
> 5) The truthfulness of the reply.

Perdue Farms, Inc., Cookin' Good Div. v. NLRB, 144 F.3d 830, 835 (D.C. Cir. 1998); *NLRB v. Donald E. Hernly, Inc.*, 613 F.2d 457, 464 (2d Cir. 1980). In addition,

courts may consider whether the employee was given the so-called "*Johnnie's Poultry* warnings" during the questioning. Those warnings are intended to dispel the coercive effect of questioning about protected activity by (1) informing the employee of the legitimate purpose of the employer's questions, (2) guaranteeing that no adverse action will be taken based on the employee's answers, and (3) requesting the employee's consent to participate. *Tellespen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 564 (5th Cir. 2003) (citing *Johnnie's Poultry Co.*, 146 N.L.R.B. 770, 775 (1964)); *ITT Auto.*, 188 F.3d at 389 n.9.

Similar factors are relevant in so-called "polling" cases, which involve employer actions that force employees to make an "observable choice" regarding their attitudes towards protected activity.[7] *Allegheny II*, 301 F.3d at 175-76. As with interrogations, forcing employees to make an observable choice regarding their views of protected rights may tend to reveal which employees have engaged in or support protected activity. Absent "unusual circumstances," a poll of employees regarding protected rights violates NLRA Section 8(a)(1) unless the legitimate purpose for the poll is communicated to the employees, assurances against reprisal are given, employees are given a way to respond anonymously, and the employer has not otherwise created a coercive atmosphere. *Allegheny I*, 104 F.3d at 1359.

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[7] Prohibited polls under NLRA Section 8(a)(1) may take forms "other than formal surveys or conventional voting-preference 'polls'" if employees are compelled to make an "observable choice" regarding protected rights. *Allegheny I*, 104 F.3d at 1360. Thus, polling violations have been found where an employer organized a betting pool for employees on the outcome of an upcoming representation election, *Wellstream Corp.*, 313 N.L.R.B. 698, 698 n.2, 704 (1994); where the agent of an employer personally passed out hats bearing the message "Vote No" to employees before a representation election, *Laidlaw Transit*, 310 N.L.R.B. 15, 17 (1993), and where the agent of an employer asked employees to let themselves be photographed holding anti-union signs, *Fla. Steel Corp.*, 224 N.L.R.B. 587, 588-89 (1976).

5. The Complainants' Interference Claims Are Colorable

The complainants allege that Emerald Coal's conduct during its internal investigation into the firebossing allegation interfered with the right of miners to make anonymous complaints to MSHA under Section 103(g). Compl. at 9 at ¶¶ 5-6; Post-Hr'g Br. at 14-23. Based on the totality of circumstances presented in the record, the Secretary believes that the complainants' interference claims are colorable for several reasons.

First, the background of how the company's internal investigation came about could have created a coercive setting that would deter miners from making future Section 103(g) complaints. As a result of the anonymous hazard complaint, MSHA issued Emerald Coal seven citations for combustible accumulations on conveyor belts. Congress itself recognized "the need to protect miners against possible discrimination because they file [Section 103(g)(1)] complaints," S. Rep. at 29, and miners could have reasonably feared reprisal if they were identified as the anonymous informant(s) who caused MSHA to initiate an investigation that resulted in dozens of agency interviews and the issuance of seven citations. *See generally Sec'y of Labor ex rel. Hyles v. All Am. Asphalt*, 21 FMSHRC 34, 36 (Jan. 1999) (testimony that supervisors said they "would like to know who filed the hazard complaint so they could make it worthwhile for them to leave" employment, and a supervisor "wanted to find out who it was and that he would make it so miserable for them, they would be happy to go work someplace else").

Second, the way in which Emerald Coal sought information during its internal investigation into the firebossing allegation could have created a coercive atmosphere from the point of view of a reasonable miner. Emerald Coal managers asked miners directly whether they had information about the firebossing allegation contained in the anonymous hazard complaint. The miners' responses were immediately observable by management, and a reasonable miner could have believed that the practical effect of an affirmative response would be to suggest to management that the interviewee agreed with, and perhaps made, the anonymous complaint to MSHA. *See Allegheny I*, 104 F.3d at 1359 ("'[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee *if he replies in favor of unionism* and, therefore, tends to impinge on his Section 7 rights.'") (emphasis added) (quoting *Struksnes*, 165 N.L.R.B. at 1062).

Third, the responses that miners gave during the company interviews could suggest that a coercive dynamic was at play. Given that MSHA had just issued seven citations in response to the allegations that the conveyor belts were "very dirty with coal" and "look[ed] like powder kegs," Ex. 2, it would be reasonable to expect that, in an atmosphere free of coercion, at least a few of the roughly 49 miners who were interviewed would have provided some information that tended to support the anonymous hazard complaint. According to the testimony of Emerald Coal's witness, however, "other than these gentlemen [Franks and Hoy], everyone else gave very favorable comments" about the mine's firebosses during the company

investigation. Tr. 98. Indeed, one interviewee praised the firebosses as the "best firebosses I have seen in any of the mines I worked at." Tr. 98. Such effusive replies could be significant, since untruthful or evasive answers to employer questions may themselves be probative of a coercive atmosphere that has inspired a fear of reprisal if the employee gives the "wrong answer." *See U.S.A.A.*, 387 F.3d at 917; *Midland Trans. Co. v. NLRB*, 962 F.2d 1323, 1329 (8th Cir. 1992); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

Along the same lines, the ALJ found that a miner named Mark Cole told MSHA investigators that inadequate belt examinations did occur, but then "recanted" during the company investigation and claimed that he "didn't see anything." ALJD, at 6; Tr. 77-79. And one of the complainants, Franks, gave apparently evasive answers during his interviews with management, including the excuse that his children had taken his personal records containing the name of the deficient fireboss. Stip. 28. Evidence that employees are "dummying up" may show that the circumstances are coercive. *Oil, Chem. & Atomic Workers*, 547 F.2d at 586.

Fourth, it does not appear from the record that Emerald Coal took steps to minimize the potential chilling effect of its questioning on hazard reporting to MSHA. It did not inform miners that cooperation with the company investigation was voluntary, nor did it appear to provide a way for miners to anonymously provide feedback regarding the firebossing allegations contained in the hazard complaint. To the contrary, Emerald Coal required miners to provide information in face-to-face meetings with supervisors, and suspended Franks and Hoy when

they "fail[ed] to provide information you have concerning serious allegations of safety violations." Exs. 3, 4. A rule that requires employees to provide information during employer investigations of unfair labor practice charges or other protected activities may violate NLRA Section 8(a)(1). As the Sixth Circuit has explained, such rules may

> 'have the reasonable tendency to discourage employees from engaging in protected activity, which might bring them under the employer's scrutiny during an unfair labor practices investigation. Alternatively, it could discourage them from exercising their protected right to file unfair labor practice charges for fear of becoming embroiled in such an investigation.'

Beverly Health, 297 F.3d at 478 (quoting with approval *Beverly Health & Rehab. Servs.*, 332 N.L.R.B. 347, 349 (2000)). A colorable argument exists that a reasonable miner would be deterred from making an anonymous Section 103(g) complaint to MSHA if he knew that the operator would respond by requiring the miner, under threat of discipline, to provide information regarding the anonymous complaint.

6. The Interference Claims Should Be Adjudicated

Under the Federal Rules, which guide the Commission on procedural questions not regulated by the Act or the Commission Rules, *see* 29 CFR § 2700.1(b),

> any order or other decision, however designated, that adjudicates fewer than all the claims ... does not end the action as to any of the claims... and may be revised at any time before the entry of a judgment adjudicating all the claims...

FRCP 54(b). Because the complainants advance both colorable discrimination and colorable interference claims, a Commission decision that only addresses the discrimination claims does not end the action.

Because they are separate and distinct causes of action, the discrimination claims and the interference claims must each be adjudicated, as the complainants have requested. Resp. Br. at 34-35; Oral Arg. Tr. at 79-80. As discussed in Part II, discrimination violations and interference violations are not mutually exclusive, do not share the same elements, and establish distinct legal rights. Furthermore, they often (but not always[8]) rely on different employer actions, as is true in this case, *see* Compl. at 8-10 (alleging interference violations based not only on the ultimate suspensions but also on Emerald's actions prior to the suspensions). Finally, discrimination violations and interference violations may require different remedies to reverse distinct harms caused to protected activity. *See* Compl. at 10-11 (seeking make-whole remedies for Franks and Hoy because of the seven day suspensions, but also seeking a cease and desist order regarding interference and an order to train miners regarding their rights to engage in

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[8]Independent discrimination and interference violations may be based on the same employer action. To use the present case as an example, the suspensions of the complainants would be *prima facie* intentional discrimination violations if they were motivated by the operator's suspicions that the miners had made protected complaints to MSHA. But the suspensions could also be independent interference violations if they stemmed from a coercive interrogation or an unlawful company policy requiring miners to provide information related to anonymous protected activity. *See U.S.A.A.*, 387 F.3d at 917 (holding that an employee may not be disciplined for giving evasive or untruthful answers during an interrogation that is itself unlawful); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1259 (10th Cir. 2005) ("[A] disciplinary action for violating an unlawful rule is itself a violation of the NLRA."); *Ne. Land Servs.*, 645 F.3d at 484.

protected activity without being unlawfully surveilled, interrogated, or harassed).

CONCLUSION

Although he does not take a position on the ultimate question of whether interference occurred, the Secretary believes that the complainants have advanced colorable claims of Mine Act interference and that those claims require separate adjudication. The Secretary requests that the Commission perform or direct such adjudication and, in doing so, adopt and apply the Secretary's test for finding Section 105(c) interference violations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of the Secretary of Labor as *Amicus Curiae* was served by electronic mail, facsimile, and U.S. Mail this 5th day of February, 2014, on:

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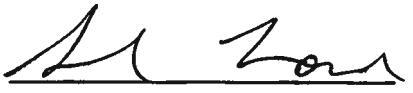

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