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CHARLES FRAZIER V. MORRISON-KNUDSEN
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CHARLES J. FRAZIER, COMPLAINT OF DISCRIMINATION

COMPLAINANT DOCKET NO. WEST 81-329-D

v.

MORRISON-KNUDSEN, INC.,

RESPONDENT

Appearances:

Gary Overfelt Esq.
417 Petroleum Building
Billings, Montana,
for Complainant

Earl K. Madsen Esq.
1717 Washington Avenue
Golden, Colorado,
for Respondent

Before: Judge John J. Morris

DECISION

Complainant Charles J. Frazier, (Frazier), brings this action on his own behalf alleging he was discriminated against by his employer, Morrison-Knudsen Company, Inc., (MK), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), in its pertinent part provides as follows:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding

> under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties a hearing on the merits was held in Billings, Montana on June 7-8, 1982.

The parties filed post trials briefs.

ISSUES

The threshold issues are whether complainant, as a management supervisor, is within the coverage of the Act and, further, whether the complaint was timely filed.

The issue on the merits is whether respondent discriminated against complainant, a safety supervisor, in violation of the Act.

COVERAGE

Respondent contends that complainant does not come within the coverage of the Act since he is a member of management.

The uncontroverted facts establish that complainant was employed as a safety specialist in respondent's surface coal mine operation (Tr. 99, 199). The answer to the coverage issue is found in the Act itself where a "miner" is unambiguously defined as any individual working in a coal or other mine, Section 3(g). Management personnel working in a coal mine are therefore "miners" within section 105(c)(1) and they are accordingly entitled to the protections afforded therein. Accord: Miller v. Federal Mine Safety and Health Review Commission, 687 F. 2d 194, (7th Cir August 1982). Eagle v. Southern Ohio Coal Company, 2 FMSHRC 3728, December 1980, (Merlick, J.). Herman v. IMCO Services, 4 FMSHRC 1540, August 1982 (Morris, J.).

The motion to dismiss for lack of coverage is denied.

TIMELY FILING OF COMPLAINANT

MK asserts the complaint of discriminatory discharge was not timely filed. The discharge occurred on April 28, 1981 and the first notice MK received was when Frazier filed his amended petition in this case on August 25, 1981, approximately four months later.

A review of the sequence of events is necessary to consider this issue. On April 10, 1981, Frazier was permanently assigned to the swing shift (Tr. 46, 74). He considered this assignment to be discriminatory and on April 24, 1981 he filed a discrimination complaint with MSHA. Frazier alleged his transfer was motivated by four different incidents. He alleged these occurred on September 25, 1980, September 30, 1980, April 6, 1981, and April 7, 1981.

On May 12, 1981, in the process of investigating his discrimination complaint, MSHA took a 12 page handwritten statement from Frazier (Commission File).

On June 15, 1981 MSHA advised Frazier that on the basis of their investigation they concluded that no violation of Section 105(c) had occurred. On July 14, 1981 Frazier appealed to the Commission. On August 26, 1981 an "amended complaint" was filed before the Commission alleging Frazier was unlawfully discharged on April 28, 1981 for engaging in a protected activity.

DISCUSSION

It has been held that none of the filing deadlines in the discrimination section of the Act are jurisdictional in nature. Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (1979), Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539, (1981).

All of the above facts indicate that Frazier was pursuing his discimination complaint in a timely manner. To support MK's argument would be to exalt form above substance.

The motion to dismiss for untimely filing of the complaint is denied.

COMPLAINANT'S EVIDENCE

Complainant's evidence consists of the testimony of Charles J. Frazier, Jewell Davisson, and numerous exhibits.

Charles J. Frazier was employed with Morrison-Knudsen as a safety supervisor 2 on April 24, 1979 (Tr. 14, 19, 56). He was terminated April 28, 1981 (Tr. 14). Frazier's initial assignment was at the MK mine in Kemmerer, Wyoming. At that location Frazier reported to Gary Kilstrom, the senior safety supervisor (Tr. 58). Frazier's relationship with Kilstrom developed into a personality conflict (Tr. 58). Frazier was not as severe as Kilstrom (Tr. 62-63).

Frazier was subsequently transferred to the MK Absoloka Mine in Billings, Montana where he worked under Jed Taylor, mine manager (Tr. 19). He also reported to Richard Daly in the home office. Daly was in charge of safety and environmental services (Tr. 19).

In February 1980, Frazier was restricted to his office (Tr.

141).

In March 1980 an MSHA audit found MK in violation of the dust standard (Tr. 32, 125, 126). Frazier complained that MK's dust sampling program was inadequate (Tr. 28). Frazier was reprimanded numerous times and Jed Taylor reprimanded him about the dust and noise violation. Taylor told Frazier that we got away with it and keep your nose out of it (Tr. 31-32). It wasn't Frazier's responsibility to take dust samples (Tr. 127).

In September 1980 MK had a ground control problem in pit No. 4 (Tr. 27-28). MSHA inspector Clayton issued a citation and told Taylor (mine manager) what he expected to be done (Tr. 28). Taylor made the remark that "that's the way the Good Lord meant it to be and there wasn't nothing he could do to change it." Frazier felt this was a poor safety attitude and behavior (Tr. 28).

In September 1980 Frazier reported an unsafe condition to Wunderlick (mine superintendent) in pit No. 4 (Tr. 33). Wunderlick told Frazier he wasn't to be in the pit (Tr. 33).

In December 1980 Frazier gave a company safety citation to Chaps Lix in a local bar (Tr. 89, 158). The union complained and Taylor was upset stating that company business shouldn't be conducted in a bar (Tr. 101). Frazier said he'd apologize to Lix for giving it to him in a bar but he would'nt apologize for the citation. He told Taylor he could "eat it" (Tr. 101).

On one occasion Taylor told Frazier that his [miner] training was inadequate (Tr. 35). Frazier felt the Company's facilities and training aids were inadequate. Frazier made requests for teaching aids from when he arrived until he ceased to conduct miner training which was about four months before he was terminated (Tr. 37). Frazier received no response from his supervisors and no aids except a projector (Tr. 37). The only text books he had were those he had brought from MSHA (Tr. 38).

Frazier and Doug Harper, an MSHA inspector, have a personality conflict. On one occasion Frazier flunked Harper in a mine rescue course. Harper felt Frazier didn't have sufficient education in safety and health (Tr. 40).

In December, 1980, and January, 1981, Frazier was aware that MK and Local 400 of the Operating Engineers were negotiating a labor contract (Tr. 40-41). Frazier hadn't made his union preference known to other miners except about a year before his discharge he told Chaps Lix that he felt for

the money that we were paying for dues and initiation into the Operators Local 400, they weren't getting proper representation (Tr. 42, 43). Frazier did not express any union preference after being advised by MK policy of the supervisors role (Tr. 42, 43). Frazier attended a meeting in January 1981 concerning the necessity of supervisors remaining neutral (in the conflict between the unions) (Tr. 81, 82).

Frazier went to the home office in Boise in midwinter, 1981 (Tr. 41, 42). Taylor said Frazier was being sent to the home office because of a complaint he (Taylor) had received from the Operating Engineers (Tr. 76).

On April 7, 1981 Frazier talked to Dean Gilson in the home office. Gilson told Frazier he'd have to get along with Taylor or his career would be in jeopardy (Tr. 44, 45). Frazier replied he wouldn't take any guff off of Taylor and "to hell with his career" (Tr. 44-45). Frazier isn't overly fond of Taylor (Tr. 149).

On April 8, 1981 Frazier told fellow safety supervisor Barnett that he had no recourse but to go to MSHA (Tr. 46).

On April 10, 1981 (FOOTNOTE 1) Frazier was transferred to the swing shift (Tr. 46). Frazier was told that Barnett was going to do the training. They said Frazier wasn't qualified and Frazier agrees he wasn't qualified (Tr. 46, 47).

On April 11 Frazier went to the home of MSHA inspector Dick Clayton. At that time he listed 12 violations (Tr. 45, 46). [A detailed analysis of the complaints is set forth, infra, pages 13-14.] An MSHA inspection took place on April 24, 1981 (Tr. 47).

About this time Frazier posted the NLRB election decision on the union bulletin board (Tr. 96, R3).

On April 28, 1981 Taylor called Frazier to the office and accused him of preferring one union over the other (Tr. 105). Frazier said he wanted to see his accuser. At this juncture Taylor terminated Frazier (Tr. 105). Frazier then told Taylor he hadn't seen the last of him. Further, he said he had turned MK into MSHA. In addition, Frazier said he had filed a discrimination complaint (Tr. 107).

RESPONDENT'S EVIDENCE

Respondent's evidence consists of the testimony of William Harper, Elwood Burge, Robert Whempner, David Camden, Robert Wunderlick, Jeffrey Barnett, Howard Clayton, Bruce Zimmerman, George (Chaps) Lix, James Vanderslott, Dean Gilson, Jed Taylor and numerous exhibits.

Frazier's first assignment was at the Kemmerer, Wyoming mine where he reported to Gary Kilstrom (Tr. 407, 417). Problems with Frazier at the Kemmerer Mine included tardiness, an odor of alcohol, and failure to stay awake (Tr. 418).

MSHA inspector Doug Harper, a safety trainer, first inspected MK in 1979. He evaluated the training and except for first aid he concluded that the miner training was insufficient (Tr. 175-180). Charles Frazier was conducting the training (Tr. 76). Harper prepared a written report which was dated December 18, 1979 (Tr. 178, 179, R7). The final report and conclusion was issued on January 9, 1981 by Walter R. Schell, MSHA training administrator located in Denver, Colorado (Tr. 178, R7). The MSHA report states, in part, that use should be made of the large body of information, visuals, films and tapes available (R7).

Harper had never received any training from Frazier although he had spent four to five hours monitoring Frazier's class as an observer (Tr. 186, 195).

On May 31, 1979 Bruce Zimmerman, MK's training manager, in a interoffice memorandum to his supervisors reviewed the on going training and program development to meet the requirements of MSHA at three MK mines (Tr. 357, R13). The memorandum states in part: "In addition Charlie [Frazier] has a vast resource library of overheads, handouts and written material" (R13, Tr. 367, 368).

Dean Gilson, MK's manager for safety and training, asked that the MSHA report be withheld until MK could improve its training (Tr. 426). Bruce Zimmerman was sent to work with Frazier in an effort to change the negative comments on his performance (Tr. 427). At a meeting on January 9, 1980 Zimmerman related the feelings of George Herman and Doug Harper (MSHA personnel) to Frazier (Tr. 364). Zimmerman further suggested that Frazier should be less confrontive and less antagonistic. Frazier agreed (Tr. 365). About the first of December, 1980, the local union, Operating Engineers Local 400, was negotiating with the company over the terms of labor contract (Tr. 322). At this time workers complained to David Camden, a union stewart, about Frazier's efforts to influence union representation at the mine. Frazier was advocating that the MK workers weren't getting representation from Local 400. Further, Frazier was advocating that Local 400 should be kicked out and the workers should vote in the United Mine Workers (UMW) (Tr. 261, 332). There were approximately 15 such complaints over an eight to ten month period (Tr. 264-265). Camden and Mike Pascal reported these conversations to David Whempner, an official of Local 400 (Tr. 226, 232-233, 263). At that time Whempner complained to mine

manager Jed Taylor, who suggested that the matter be tabled (Tr. 233-234). On the same day Whempner talked to worker Chaps Lix who told

Whempner that such conversations were taking place in neighborhood bars (Tr. 234). Whempner again told Jed Taylor to have it stopped (Tr. 235).

On January 6, 1981 Elwood Burge, MK's assistant director of Industrial Relations, came to the Absoloka Mine from the home office in Boise, Idaho. The visit was because of complaints MK was receiving from Whempner that Frazier was showing his preference for the United Mine Workers over Local 400 (Tr. 200-201, 205-208, 322). There were a number of meetings discussing the company policy that MK was to remain neutral between the two unions. Frazier was present at the January 6, 1981 meeting. Whempner, a union official and Taylor, mine manager, identified Frazier at the meeting (Tr. 207-208, 276-277).

A week or two later Camden told Whempner that Frazier and Lix had been in an argument in a bar about the union. At that time Frazier wrote Chaps Lix a company safety violation in a local bar (Tr. 235). Lix brought the citation to Camden. Whempner in turn went to the mine and "raised hell" with the Board of Adjustments and threatened Jed Taylor with an NLRB unfair labor charge. Specifically, the stewards had been telling Whempner that Frazier was telling everybody that Local 400 had given away over half of their labor contract. In addition to "raising hell" with Jed Taylor Whempner contacted his boss, Vince Bosch, in Helena, Montana and "raised hell" with him (Tr. 238). Bosch indicated that unfair labor charges would be filed by Local 400 against MK (Tr. 240). [No such charges were in fact ever filed (Tr. 241).]

Vince Bosch, Whempner's boss, contacted Burge (Industrial Relations for MK), after Whempner complained. The problems ceased. Frazier was temporarily transferred to the home office in Boise, Idaho on January 28, 1981 where he remained until March 10, 1981 (Tr. 241, R1). Problems for Whempner resumed when Frazier returned to the mine (Tr. 241-242).

After he returned from Boise Taylor assigned Frazier to the second shift (Tr. 468). The shift assignment was no different from any other assignment (Tr. 468). The notice to Barnett and Frazier dated April 10, 1981 states "It is not beneficial to have rotating shift in the Safety Department at this time because of our busy schedule and various activities such as training sessions and meetings. Therefore, we will continue to operate on "straight" shift until further notice. Should you have any question on this, please do not hestitate to call me" (R2).

In the meantime the United Mine Workers had petitioned the NLRB requesting an election between the UMW and Local 400 (R3). The order directing the election was entered on April 13, 1981 and the notice was timed stamped as received by MK on April 16, 1981 (R3). Shortly thereafter union steward Camden called Whempner and told him that Frazier was passing around the notice of the election at the mine site and urging the miners to vote for the "right outfit" (Tr. 243, 401-403). Whempner "raised

hell" (Tr. 244-245). Whempner's complaint were that Frazier was passing the election notice around in the lunchroom and change room (Tr. 248). The

NLRB order wasn't posted on the union bulletin board until about three or four days later (Tr. 269). Whempner was in a huff because Frazier, a company man, was passing the election around before the union knew about it (Tr. 256). Whempner could handle criticism of himself but he couldn't discipline a company man (Tr. 251-252).

James Vandersloot testified that Frazier came into the lunchroom with the NLRB order and he said they should vote for the right outfit so "you can get some representation out there" (Tr. 403). At this time the whole swing shift was in the lunchroom (Tr. 403).

Whempner again tried to get Frazier removed and he called Burge, (Industrial Relations), who told him to review the problem with mine manager Jed Taylor (Tr. 209-210, 246).

Robert Wunderlick, the mine superintendent, told Taylor that Frazier was in the lunchroom with the [NLRB] petition. Further, he related to Taylor that Frazier was claiming the contract was no good, that there was going to be a new election, and that everything that had been done was no longer good (Tr. 469-470). Taylor called his superiors in Boise who told him to immediately fire Frazier. Taylor said he wouldn't fire Frazier until he verified the report of Frazier's activities (Tr. 470-471). Taylor asked Wunderlick to double check the facts. He did. Camden told Wunderlick that Frazier had presented the paper to the workers (Tr. 278). Taylor had called his supervisors at the home office because home office concurrence is necessary to discharge a safety supervisor (Tr. 410). Burge, (Industrial Relations) and Dean Gilson, manager of safety and training, concurred with Taylor that his decision to terminate was appropriate (Tr. 210-216, 435-436).

Frazier was called to the office on the same day and terminated for union involvement and for not following instructions (Tr. 470-471). He had been told three or four times to remain neutral (Tr. 474, 486-487). Frazier asked Taylor who was accusing him (Tr. 472).

When he was terminated Frazier said MK hadn't heard the last of him (Tr. 477). Taylor didn't know of any MSHA charges brought by Frazier (Tr. 478).

The safety record at the Absolka mine is excellent. It has two years without a lost time acident for 500,000 man hours (Tr. 438-440, R19). The mine incident rate is 0.0 compared with the average for the coal industry of 3.5 (Tr. 440, R20).

DISCUSSION

The Commission established the general principles for analyzing discrimination cases under the Mine Act in Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC (October 1980), rev'd on other grounds

sub nom, Consolidation Coal Co., v. Marshall, 663 F. 2d 1211, (3d Cir. 1981), and Secretary ex rel Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases the Commission ruled that a complainant, in order to establish a prima facie case of discrimination bears a burden of production and persuasion to show that he was engaged in protected activity and that the adverse action was motivated in any part by the protected activity. Pasula, 2 FMSHRC 2799-2800; Robinette, 3 FMSHRC at 817-818.

At this point is appropriate to consider the status of Frazier's activities. The vast majority of discrimination claims arising under the Act are generated by miners engaged in duties other than those of a safety inspector. But I find nothing in the text of the Act nor in the legislative history that indicates Congress intended to exclude a safety inspector from the protection of the discrimination portion of the Act. An operator's safety inspector bears an important function in helping fulfill the purposes of the Act since his duties will ordinarily seek to promote safety and health. Under Pasula and Robinette and their progeny I conclude that good faith complaints of unsafe and unhealthy conditions by a safety inspector in the ordinary course of his duties are protected under the Act.

Having resolved Frazier's status we will go to the Commission's further ruling in Robinette: to rebut a prima facie case a operator must show either that no protected activity occurred (in view of the ruling as to Frazier's status MK cannot establish that defense) or that the adverse action was in no part motivated by protected activity, 3 FMSHRC 817-818 and N. 20. If an operator cannot rebut the prima facie case in the foregoing manner it may nevertheless defend by proving that it was also motivated by the miner's unprotected activities and that it would have taken the adverse action in any event for the unprotected activities alone, Pasula, 2 FMSHRC 2799-2800.

The operator bears an intermediate burden of production and persuasion with regard to these elements of defense. Robinette, 3 FMSHRC at 818 N. 20. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. The Commission made clear in Robinette that the ultimate burden of persuasion does not shift from the complainant in either kind of case. 3 FMSHRC at 818 N. 20. The foregoing Pasula-Robinette test is based in part on the Supreme Court's articulation of similar principles in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, U.S. 274, 285-87 (1977).

In Sec. ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981), the Commission affirmed the Pasula-Robinette test, and explained the following proper criteria for analyzing an operator's business justification for adverse action:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained. The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

3 FMSHRC at 2516-17. Thus, the Commission first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext. Second, the Commission held that once it is determined that a business justification is not pretextual, then the judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action.

By a "limited" or "restrained" examination of the operator's business justification the Commission does not mean that an operator's business justification defense should be examined superficially or automatically approved once offered. Rather, the Commission intends that its Judges, in carefuly analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. As the Commission recently stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982).

With the Commission directives in mind we will examine the proferred business justification asserted by MK. The defense is that Frazier was fired for showing a preference for the United Mine Workers over Local 400. As herein noted I find MK's version of the facts to be generally credible. The credibility of the business justification is established by activities predating Frazier's termination. Burge came to the Absoloka Mine and all supervisors were told to remain neutral. This visit came about because MK was receiving complaints from the union official. After this Frazier was transferred to the home office. Taylor, the mine superintendent told Frazier he was being transferred because of complaints by Local 400. Prior warning of unsatisfactory conduct is one of the criteria mentioned in Bradley v. Belva Coal Company. I accordingly conclude MK's business justification is clearly credible. Having made that determination the next issue is whether MK was motivated as claimed. Yes. The mine manager heard about Frazier's actions involving the NLRB petition. He had the facts verified by Wunderlick and Frazier was terminated that very afternoon. In the midst of two unions struggling to represent its workers company neutrality would be normal practice. In short, Frazier was fired for violating MK policy.

Frazier's post trial brief asserts that MK discriminated against him when he was transferred to the swing shift and thereafter terminated.

A vital element of a prima facie case is a showing that adverse action was motivated in any part by the protected activity. If there is no direct evidence then the Commission suggests four criteria to be utilized in analyzing the operator's motivation with regard to adverse personnel action. This criteria includes knowledge of the protected action, hostility toward the protected activity, coincidence in time between the protected activity and the adverse action and disparate treatment of the complainant, Johnny N. Chacon v. Phelps Dodge Corporation.

Guided by the above case law we will review Frazier's initial contention that he was transferred because he was overzealous in the enforcement of safety regulations. I disagree with Frazier's position. I do not find it credible, and no evidence supports the view, that MK waited until April 1981 to take adverse action against Frazier for events in March 1980 (dust sampling program), in September 1980 (problems in pit #4), and December 1980 (citation issued in a bar).(FOOTNOTE 2)

In short, there is no coincidental timing as required by Johnny N. Chacon v. Phelps Dodge.

Frazier complaints about the miner training aids, even if true, could hardly have affected MK's action since Frazier had been transferred from the training duties four months before he was terminated (Tr. 37).

Frazier's evidence is not a model of clarity and the events of April 7, 1981 require special review. Frazier's only evidence is that on April 7, 1981 he talked to Dean Gilson in the home office. Gilson told Frazier he'd have to get along with manager Taylor or his career would be in jeopardy. Frazier replied he wouldn't take any guff off of Taylor and "to hell with his career" (Tr. 44, 45). Dean Gilson testified in the case but neither party inquired into the reason for Frazier's telephone call on or about April 7, 1981 (Tr. 405-444). There is accordingly no evidence establishing that Frazier was engaged in any protected activity on or about that date.

Frazier's post trial brief asserts that there is evidence that Wunderlick [superintendent] ordered Frazier to stay out of safety matters in the pit. This event apparently occurred in September, 1980. It occurred when Frazier reported an unsafe condition to Wunderlick. Frazier took Rob Williamson, the then senior safety officer, down to the pit. Wunderlick told Frazier he wasn't to be in the pit (Tr. 33).

This event, like the other 1980 incidents, lacks coincidental timing as required by Johnny N. Chacon.

Frazier's post trial brief further asserts that whenever a safety violation was issued Frazier was blamed for reporting the violation to MSHA. I have carefully reviewed the record and absolutely no evidence supports this proposition.

Frazier's post trial brief states there are indications that both Taylor and Wunderlick were upset because Frazier went over their heads and contacted the home office about safety. Even if Taylor and Wunderlick were "upset" with Frazier the record fails to establish the prerequisite coincidental timing.

The evidence here shows that Frazier was restricted to his office in March 1980. On this point I credit Wunderlick's uncontroverted testimony that this restriction came about because Frazier wasn't abiding by orders to work out matters of safety with supervisors (Tr. 284, 296). Further, this event occurred in early 1980 and like the other incidents I am not persuaded that it generated adverse personnel action approximately a year later.

Frazier's brief argues that, although there is some dispute as to the exact working, it is clear that Dean Gilson reprimanded Frazier for his "demanding attitude."

I disagree with Frazier's construction of the evidence. It is not indicated that Gilson reprimanded Frazier. Gilson testified Frazier didn't work well with management and he was extremely demanding in things he wanted done. In any event the evidence fails to establish adverse action against Frazier.

I find all of Frazier's contentions to be without merit. I do not find that Taylor's permanent assignment of Frazier to the swing shift was to cloak a discriminatory move. Taylor's stated reason was that "it is not beneficial to have rotating shift in the Safety Department at this time because of our busy schedule and various activities such as training sessions and meetings. Therefore, we will continue to operate on "straight" shift until further notice." (R2). Independent facts support the operator's decision since Barnett, MK's only other safety officer at this mine, had taken over the training duties. I further credit Taylor's testimony that the shift assignment was no different involving Frazier than anyone else (Tr. 468). In short, the proferred business justification here is not plainly incredible or implausible.

It should be noted that Frazier engaged in two additional activities which have been held to be protected under the Act. One protected activity involved Frazier's complaint of discrimination filed with MSHA when he was transferred to the swing shift. But the record here fails to establish that MK knew of Frazier's complaint. If MK didn't know that Frazier had filed a discrimination complaint then that protected activity could not have influenced MK's decision to fire Frazier.

Frazier also contends he was fired because he filed safety complaints with MSHA.

An in depth review of such complaints is in order. The scenario: the day after Taylor made Frazier's swing shift assignment permanent Frazier went to the home of Howard R. Clayton, an MSHA inspector (Tr. 331-332). Frazier's complaints to MSHA's Clayton involved ground control, the mining plan, dust sampling, excessive noise, dust accumulations, oxygen deficiencies, dragline moving over miners, inadequate fire training, superintendent's mining papers, ambulance training, explosives, OSM violations for not dewatering pits, improper ground on a 280 B shovel, all hoists, transformer, watering work roads, keys to electrical unit, and records required to be kept (Tr. 331-345).

MSHA investigated and for various reasons concluded that Frazier's allegations did not support the issuance of any citations except for the alleged violation of the fire training regulations, 30 C.F.R.

77-1100 (FOOTNOTE 3) (Tr. 331-345). A second citation (FOOTNOTE 4) was issued on the day of the inspection, April 27, 1981. This citation did not result from Frazier's complaints but was initiated by an MSHA priority directive to the inspectors to check guarding underneath new loading shovels (Tr. 333).

Concerning the filing of the MSHA safety complaints: Frazier's argument of discriminatory retaliation fails because no evidence establishes that MK knew Frazier was the informant.

On this record MK could only have learned of the MSHA safety complaints from MSHA inspector Clayton, from Barnett, or from Frazier himself.

Concerning Inspector Clayton: I credit the professionalism of Clayton who observed at the hearing that it was against the law to notify an operator of the identity of an informant (Tr. 346-347). Further, Clayton couldn't recall telling anyone with MK that Frazier was the informant (Tr. 345-346).

Concerning Barnett: Frazier says he told Barnett about going to MSHA. However, no evidence establishes that Barnett communicated this information to his supervisors. I find Barnett's testimony illustrates the situation, namely "I heard from the day I walked on that mine site to [the] day he [Frazier] left that at some time or another "I [Frazier] should file charges with MSHA' or "I'm [Frazier] going to call the feds', or "I'm [Frazier] going to call my friends back in Pittsburg' or whatever, and file charges. That was just a rhetoric of something that went on all the time" (Tr. 354).

Concerning Frazier himself: Frazier does not claim, before he was terminated, to have notified MK supervisors that he was the MSHA informant. In fact, Frazier indicates it was he who told Taylor after his termination that he was the informant (Tr. 107).

In this basic credibility confrontation Frazier objects to the "totem Pole" hearsay of his union activities. Further, he complains that no one with MK interviewed Chaps Lix whom he asserts was the person responsible for making the "original" complaint concerning Frazier's union activities.

Contrary to Frazier's argument it is not important whether the statements concerning Frazier's activities were in fact truthful. The vital issue is whether MK could reasonably believe that such information was truthful. On the basis of the facts previously stated I conclude MK could have such a reasonable brief. I further find MK did not seize on these events as a pretext to cloak a discriminatory move.

Further bearing on a resolution of the credibility in this case are the facts that Frazier agrees he expressed a union preference although he claims this occurred before contrary instructions were issued by MK (Tr. 43). In addition, direct testimony confirms the event that triggered Frazier's discharge: Vandersloot testified Frazier came into the lunchroom with the NLRB order and told the men to vote for the "right outfit" so "you can get some representation out there" (Tr. 401-403). Frazier's testimony itself reflects that he had the NLRB decision (Tr. 96).

The Commission does not attempt to count witnesses but I find that MK's evidence, a combination of witnesses from management, union, and fellow workers, has carried the operator's burden of proof as required in David Pasula. In short, I find that MK would have fired Frazier for his activities preferring one union over the other regardless of any protected activity.

Frazier's final contention that no one from MK interviewed Chaps Lix lacks merit. There is no obligation on MK to seek out Chaps Lix especially where some 15 complaints arose about Frazier's union activities (Tr. 265). In addition, I find that union official Whempner who was the person complaining of Frazier's activities did, in fact, talk to Lix. This occurred at the same time Whempner first went to Jed Taylor in December, 1980 (Tr. 233-234).

Since no discrimination occurred in violation of the Act it is unnecessary to consider Frazier's claim for damages.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

The complaint of discrimination is dismissed.

John J. Morris
Administrative Law Judge

FOOTNOTES START HERE-

1 Frazier's testimony is that he was put on the straight swing shift on April 14 but the manager's memorandum of transfer is dated April 10, 1981 (R2). Frazier was already on the swing shift and management's directive established that the shift would be "non rotating". I accordingly consider Friday, April 10th, 1981 as the first date Frazier knew he would continue on the swing shift.

2 The events of April 7, 1981 is hereafter discussed.

3 Citation 827683 alleges as follows:

> There is no record or indication that the mine operator is complying with 77.1100 of the CFR, in that employees are not being instructed or trained annually in the use of firegighting facilities and equipment.

4 Citation 827682 alleges as follows:

> The opening under the Bucyrus Erie 280B shovel located in 004-0 pit did not have a guard or cover over it. This allowed access in through the frame of the machine to the high voltage collector rings (4160 volts). This is a non-compliance of Article 710-44 of the 1975 National Electrical Code.