CCASE:
MANSEL JOHN SAFFELL V. NATIONAL CEMENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
THE FEDERAL BUILDING
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MANSEL JOHN SAFFELL, COMPLAINANT
v.
NATIONAL CEMENT COMPANY, RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. WEST 90-174-DM

WE MD 90-07

DECISION

Appearances: James E. Millar, Esq., Bakersfield, California, for Complainant;
C. Gregory Ruffenach, Esq., SMITH, HEENAN & ALTHEN, Washington, D.C., for Respondent.

Before: Judge Morris

This case involves a discrimination complaint filed by Mansel John Saffell against Respondent National Cement Company of California (hereafter "NCC"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act").

The applicable portion of the Mine Act, Section 105(c)(1), in its pertinent portion provides as follows:

> Discrimination of interference prohibited; complaint; investigation; determination; hearing
>
> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . 30 U.S.C. 815(c)(1).

Applicable Case Law

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2); that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom.; Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1982). The operator may rebut the prima facie by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miners' unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 198); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 397-413 (1983) where the Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (Nov. 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp. 709 F.2d 86 (D.C. Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

Procedural History

On January 22, 1992, a limited hearing took place in Ontario, California. The purpose of the hearing was to determine whether the protected activities alleged in the complaint were investigated by the Secretary of Labor as required by the Act.

As a result of the evidence received at the hearing, the Judge, on January 31, 1992, issued an order ruling that Complainant had complied with the Act and the Commission ruling in Hatfield v. Colquest Energy, Inc., 13 FMSHRC 544 (April 1991).

Subsequently, after notice to the parties, a hearing on the merits was held in Bakersfield, California, on March 31, 1992. Both parties filed post-trial briefs.

Background

MANSEL JOHN SAFFELL began working at the Lebec, California, plant in 1980. At that time, the plant was owned by General Portland. The plant was later purchased by LaFarge and then by NCC. The plant produces cement powder. (Tr. 54).

Mr. Saffell was hired by General Portland as a production foreman. He continued to work in that capacity both for LaFarge and for NCC. In general, his job involved the supervision of work crews engaged in the production of cement. He conducted inspections, and was responsible for reporting malfunctions and safety conditions at the plant. (Tr. 54, 55).

Prior to his employment with General Portland, Mr. Saffell had worked for Penn-Dixie, also a cement production company, for eight or nine years. He had received specialized safety training relating to the cement industry and was awarded an MSHA instructor's training certificate. This certificate empowered him to train other employees in how to give safety demonstrations and conduct safety seminars, etc. (Tr. 56, 57).

While the plant was owned by General Portland, Mr. Saffell was directly involved in maintaining safety, serving as Chairman of the communications safety committee for two or three years. He continued in this capacity when LaFarge bought the plant.

After NCC purchased the plant in 1987 or 1988, Mr. Saffell noticed a decline in the emphasis on monthly executive safety council meetings, which involved both hourly and salaried employees. The safety council wrote up safe work procedures and discussed various safety items, including potentially unsafe conditions and remedies. Safety awards were given for no-lost-time accidents, no doctor-reported incidents, etc. (Tr. 57, 59).

All of these safety functions ceased when NCC took over. In fact, Mr. Saffell received a grievance from an hourly employee complaining about the company's failure to hold monthly safety meetings. (Tr. 58-60; Ex. C-4).

After NCC took over, Mr. Saffell noted a gradual neglect in maintaining the plant in a safe condition. NCC stopped the previous practice of assigning an electrician to work the 3 p.m. to 11 p.m. and the 11 p.m. to 7 a.m. shifts. For some reason, NCC wanted a lot of lights turned off at night. In particular, the lighting situation began to deteriorate to the point where it became extremely dangerous to work at the plant at night. (Tr. 60).

In May of 1989, Mr. Saffell suffered an industrial injury while digging in a clinker discharge tunnel at night. (Tr. 61; Ex. C-5). The lights in the tunnel had not been maintained and did not work. After Mr. Saffell cleared the discharge tunnel, a hot clinker fell on the ground. Because of the lack of lighting, he could not see that he was standing on the hot clinker, which burned his feet. (Tr. 61, 62).

Mr. Saffell tried to get NCC to repair the safety defects at the plant by submitting written requests for maintenance work, known as Job Request Tickets ("JRTs") and work orders. (Tr. 62). (Copies of various undated JRTs and work orders are in evidence as Complainant's Exhibit 6). However, he found that some of the necessary work was not being done all the time. (Tr. 67, 68, 101).

Protected Activity

Mr. Saffell attempted to solve the lighting problems at NCC. The JRTs and work orders were assigned to an electrician. The problems that required planning were turned in to Jess Kemple of the electrical department. (Tr. 67). The work was not done all of the time. (Tr. 67-68).

On July 12, 1989, a daily planning meeting (about 6:25 a.m. to 7 a.m.) took place. Present were Byron McMichael (plant manager), Bill Russell (chief electrician), Jim Kemple (electrical

foreman), George Watson (maintenance planner), Carl Hawkins (repair foreman), John Simms (maintenance planner), Phil Messer (production manager), Wally Bingham (repair foreman), and Chuck Luesada (labor foreman). (Tr. 68-69).

Mr. Saffell asked Jim Kemple if the work orders were going to be done. He didn't answer. Mr. Saffell then said that if the company wasn't going to repair the poor lighting around the plant he (Saffell) would get an outside agency, namely MSHA to repair them. (Tr. 69-70).

The next day at a similar meeting, the same men were present. Mr. Saffell brought up the work orders and Mr. Kemple said they were not going to be taken care of. (Tr. 70). Mr. Saffell said if they were not going to be taken care of, he would make a report to MSHA. (Tr. 71).

Mr. McMichael and Mr. Messer made no comment on the subject. (Tr. 71). There was no reaction from anyone in the room. (Tr. 72).

The following day there was another meeting and when Mr. Kemple said the conditions would not be corrected, Mr. Saffell went to his office and called Bill Willson (Supervisor of MSHA, San Bernardino Office). (Tr. 72) Mr. Saffell also filed a written complaint with MSHA. The written complaint dated July 15, 1989, addressed the "lighting situation." The complaint generally recites Mr. Saffell's testimony. (Ex. C-1).

Concerning the discussion of the lighting conditions Mr. McMichael described Mr. Saffell as being hostile and volatile to Mr. Kemple. In addition, Mr. Saffell was dealing with Mr. Kemple without the latter's boss being present. (Tr. 14, 136). In any event, Mr. McMichael talked to Mr. Russell (Mr. Kemple's boss). Mr. Russell showed Mr. McMichael what they were working on and he was satisfied. (Tr. 136). Mr. McMichael felt this was the wrong area to address Mr. Saffell's comments. He felt Mr. Saffell should have seen him and the electrical manager so they could talk privately in detail. (Tr. 136-138).

It is clear that under the Mine Act, Mr. Saffell had a statutory right to voice his concern about safety matters and to make safety complaints to MSHA.

In addition, on October 16, 1989, Mr. Saffell also wrote to Mr. McMichael, the NCC plant manager, complaining about his assignments as relief foreman. Since this letter refers to Mr. Saffell's prior complaints about inadequate lights, I consider it also to be a protected activity. The letter (Ex. 12) is also part of the Commission file. It reads, in part, as follows:

> At this particular time I am assigned to Ron Gibson's shift while he is filling in for Jim Young. Why? If I'm the Relief Foreman, then I'm the Relief Foreman. Why do I get the "junk shift" and not the "gravy." When I was the Relief Foreman the last time, I filled in for Jim Young, and so did Doshier when he worked Relief so I know it's not because of past practice. I accepted this situation at first, but I kept wondering why. Am I going to be assigned to just the shifts that Gibson doesn't want, or what? I never gave it any thought until a couple of the salaried people made the comment that this is revenge for complaining about the lights. They were joking when they said it, but it got me to thinking.

Direct Evidence of Discrimination

As a threshold matter, it is apparent that the record fails to disclose any direct evidence of discrimination as to Mr. Saffell's protected activity. However, direct evidence is seldom seen. Accordingly, it is appropriate to consider any circumstantial indicia that might be involved in the case.

Knowledge of Protected Activity

NCC admits it knew of Mr. Saffell's safety complaints. The plant manager, Mr. McMichael, was present at the planning meeting when Mr. Saffell confronted Mr. Kemple. (Tr. 168-176).

Hostility to Protected Activity

There was some hostility shown by the electrical manager to Mr. Saffell, but NCC's management showed no hostility whatsoever to him. The statements by Mr. Saffell were treated matter-of-factly. (Tr. 72, 85-86, 114, 117). Compare Hicks v. Cobra Mining, Inc., et al., 12 FMSHRC 563, 568 (Wersberger, J.).

The failure of management to manifest hostility, displeasure, or anger appears to confirm Mr. McMichael's testimony that NCC treats complaints to federal agencies as an exercise of important statutory rights and does not discriminate against employees who exercise such rights. (Tr. 150-151).

Coincidence in Time

On October 16, 1989, Mr. Saffell wrote to Mr. McMichael. The letter principally complains about job assignments to Mr. Saffell as a relief foreman. However, the lighting conditions were mentioned and I consider the letter to be a protected activity. Such activity and the protected activity in July 1989 bear little coincidence in time to adverse action in December 1989. In Larry Cody v. Texas Sand and Gravel Company, 13 FMSHRC 606, 668 (1992), it was held that adverse action was not motivated by a two-week-old safety complaint. See also Ernie L. Bruno v. Cyprus Plateau Mining Corporation, 10 FMSHRC 1049, 1055 (1988).

Disparate Treatment

Mr. Saffell asserts he was subject to disparate treatment when he left work. Specifically, he claims other employees have missed work for extended periods without permission and have not been subject to adverse action. (Tr. 93, 94). In support of the disparate treatment claim, Mr. Saffell introduced into evidence the employment information concerning three hourly employees, namely Robinson, Abbott, and Dunlop. (Ex. C-11, C-12).

However, employment actions relating to hourly employees Robinson, Abbott, and Dunlop are regulated by terms of the collective bargaining agreement. (Tr. 132-134, 150). These rules do not apply to management level employees such as Mr. Saffell. (Tr. 134, 140). In any event, the employment file of Mr. Dunlop received in evidence indicates the employee was discharged for his attendance-related problems. Further, the Abbott personnel file, also received in evidence, involved alleged racial slurs against a Ms. Gloria Robinson. Like Mr. Dunlop's, Ms. Robinson's employment is governed by the terms of the collective bargaining agreement. In any event, Ms. Robinson returned to work the following day with a reasonable explanation for having left work.

The circumstantial evidence frequently relied upon fails to establish an inference of discriminatory conduct by NCC.

Events Involving Job Assignments

After making his complaint to MSHA, Mr. Saffell noticed certain changes in his job assignments that he attributed to the fact that he had made the complaint. Mr. Saffell was working as a relief foreman when he noticed the changes.

As Mr. Saffell explained, the advantage of the relief foreman's job is that when you are not filling in for someone from production, which involves night and swing shifts, you normally work a Monday to Friday schedule, with weekends off. When Phil Messer offered Mr. Saffell the relief foreman's position, these advantages were pointed out to him. When he had previously served as a relief foreman, he worked a Monday to Friday schedule when he was not filling in for someone. (Tr. 74-77).

The first example he gave of adverse changes in his job assignment as relief foreman concerned the procedure for covering a shift when a foreman called in sick. The normal procedure was for the foreman on the preceding shift to work an extra four hours and the foreman on the following shift to report in four hours early, thus covering the eight-hour shift of the absent foreman. After Mr. Saffell complained to MSHA, the company required him to report for work to cover the missing shift. He testified this was "not the standard procedure at all." (Tr. 76, 77).

A further example of adverse job changes concerned working holidays. Normally, a relief foreman had holidays off, absent special circumstances, if he was not filling in for someone on vacation. After Mr. Saffell complained to MSHA, the company required him to work on a holiday and gave another employee, who should have worked the holiday, the day off. As Mr. Saffell testified, "this just wasn't the norm." (Tr. 77-78).

An additional example concerned the company's failure to assign Mr. Saffell to cover the vacation of the foreman assigned to the primary quarry. When Mr. Saffell had worked as relief foreman several years before, he had been assigned to the quarry to cover that foreman's vacation. After he complained to MSHA, instead of being assigned to the quarry, where he would have worked ten-hour days, Monday through Thursday, he was assigned to the primary crusher, which involved, among other things, working swing and graveyard shifts. The company gave the more desirable quarry assignment to the primary crusher foreman. As Mr. Saffell explained, no special expertise was required for him to fill in at the quarry. (Tr. 78, 79, 187).

As plant manager, Mr. McMichael would be in a better position than Mr. Saffell to know why assignments were made.

> Mr. McMichael testified that in the fall of 1989 he moved production foreman Ron Gibson up to the quarry to cover for vacationing Jim Young.

> This transfer was made, on the recommendation of Gar Summy, because Mr. Gibson had more quarry experience. At the time, Gar Summy was a quality control quarry raw materials manager. Mr. Saffell had no quarry experience and Mr. Gibson would be better suited to supervise the quarry crew. A relief foreman would not automatically move to fill in for a quarry foreman. (Tr. 145, 146).

The last example concerned Mr. Saffell's permanent assignment to the dust dump. Normally, when a relief foreman was not covering for another foreman on vacation, for example, he would help out with assignments in the maintenance department. After Mr. Saffell complained to MSHA, he was permanently assigned, when not covering a vacation, to spend his eight-hour shift watering the dust in the dust dump. (Tr. 79, 80).

To Mr. Saffell's knowledge, no one had ever been permanently assigned to spend his entire shift watering the dust. He testified it took about an hour out of a regular shift to water the dust. (Tr. 80, 186). As the company's witness, Mr. Gibson stated "it doesn't take eight hours to water the dust down. You set the sprinkler, you can go off for two or three hours, do your other routine job checks that you normally do and come back." Mr. Gibson had never been ordered to stay at the dust dump for eight hours. He agreed that the dust dump assignment is not sought after. (Tr. 129, 130).

After complaining to MSHA, Mr. Saffell was forced to spend all day at the dump and, as he stated, "I was to move the hose all the time, keep it going, keep it moving all the time. By the time I would get it set up in one place, they wanted it to run for 15-20 minutes and then moved to another one, and then moved to another one. This wasn't just for that one day, this was when I was not covering a shift." (Tr. 186). After a time of dragging the hose, Mr. Saffell hooked up a device on his personal pick-up so he could move the hose around without having to drag it. (Tr. 80).

> Mr. McMichael, who would know why assignments are made, indicated the assignment to the dust dump was due to increased environmental awareness at the time. (Tr. 148-149).

On October 16, 1989, Mr. Saffell wrote a letter to Mr. McMichael describing the manner in which the company was discriminating against him in job assignments. (Tr. 84; Ex. C-7). Mr. McMichael claims to have directed one or two other company employees to respond to Mr. Saffell's letter, but he admitted he did not know if they had done so. Mr. Saffell never received any response from the company to his complaints about such discrimination. (Tr. 85, 177, 186).

Mr. Saffell also noticed several other changes at work following his complaint to MSHA. His authority began to be questioned, especially within the electrical department. He was told they didn't work for him. His instructions to the electricians were ignored and the electrical foreman, Mr. Kemple, did nothing about it. (Tr. 80, 81). Mr. Saffell gave an example involving his attempt to call out an electrician to come to the plant. He tried to reach the employee three times by phone, without success. The electrician claimed Mr. Saffell had not called him. Mr. Saffell believed the company had a monitoring device hooked to the phone line that would prove he had made the calls. (Mr. McMichael refused to check the phone log and refused to back Mr. Saffell's authority in the dispute.

At the hearing, Mr. McMichael did not doubt that Mr. Saffell made the telephone call but he stated the phone monitor was not hooked up. (Tr. 81, 138).

> According to Mr. McMichael, the telephone call incident involved one of several occasions when he was less than satisfied with Mr. Saffell's performance as a management employee. When this incident arose, Mr. Saffell was very hostile, violent, and abrasive. A meeting was held to discuss the problem. (Tr. 81, 138). Present at the meeting were Mr. McMichael, Mr. Russell (electrical supervisor manager), Mr. Kemple (electrical supervisor), and Tony Burn (instrument man). Mr. McMichael felt the meeting should have been handled in a pleasant, formal, and professional environment. Instead, Mr. Saffell became very hostile, ran out of the room saying, "You haven't heard the end of this." Mr. McMichael stated he wouldn't accept such behavior from his children. (Tr. 139).

Discussion

Under different circumstances, the described adverse job assignments might be considered the evidence of discriminatory intent. However, Mr. Saffell was a relief foreman. It is uncontroverted that he was to fill in "for vacation and/or extended absences." The very nature of his job as relief foreman indicates Mr. Saffell could have anticipated many changes in his work assignments. As he stated in his letter dated January 10, 1991 (Ex. 17), as relief foreman he covered for the following people:

Foreman	Assignment	cheduled Shift
Chuck Luesada	Finish Silo/Yard Foreman	7 a.m. - 3 p.m. Monday - Friday
Jim Young	Quarry/Primary Foreman	7 a.m. - 5:30 p.m. Monday - Thursday
All Maintenance Foreman	Maintenance	7 a.m. - 3 p.m. Monday - Friday
All Production Foreman	Production	Various Shifts
Ray McPherson	Garage Foreman	7a.m. - 3 p.m. Monday - Friday

In sum, I credit Mr. McMichael's testimony that there was nothing unusual nor abnormal about Mr. Saffell's jobs. (Tr. 149).

Further, I credit Ron Gibson, the NCC production foreman and a relief foreman himself, who indicated it is the company's discretion as to what the relief foreman does.

Mr. Saffell further described the company's attitude after he complained to MSHA, "It was like I was there but I didn't really exist." The company's treatment of Mr. Saffell finally forced him to seek the help of Dr. Kellawan. (Tr. 84, 86; Ex. C-8). Dr. Kellewan diagnosed Mr. Saffell as suffering from stress due to the events at work.

Further Discussion and Findings

The evidence of job assignments fails to establish any discriminatory intent by NCC after Mr. Saffell filed his MSHA complaint.

As a threshold matter, NCC did not unilaterally appoint Mr. Saffell to the relief foreman job. Rather, Phil Messer offered him the position. (Tr. 77).

A portion of the evidence concerns what Mr. Saffell considers to be adverse job assignments while he was serving as the relief foreman. It is true that different jobs were assigned. However, the very nature of the relief foreman's job is to cover for many foremen who may be on vacation. (See Ex. 17 for list of individuals for whom the relief foreman could substitute.) As Mr. Saffell himself stated: "When you work the relief job, when you are not assigned as vacation relief, you work Monday to Friday, weekends and holidays off, unless special circumstances." (Tr. 77). "I covered the vacations and the production, and I covered them in the other areas." (Tr. 78). There were two other relief foremen and "we were more or less assigned daily to whatever come up that needed to be taken care of." (Tr. 78, 79).

In sum, no credible evidence supports the view that NCC discriminated against Mr. Saffell in job assignments when he was the relief foreman.

Events of December 27, 1989

Things finally came to a head on December 27, 1989. Mr. Saffell had been away from work for several days due to the illness and death of his wife's mother. On December 27, he was ordered to attend a meeting with Mr. McMichael and another company employee, Phil Messer. Mr. Saffell recounted what happened at the meeting as follows:

> I sat down and Phil made the comment, "I am sorry to hear about your mother-in-law--my mother in-law had passed away--I am sorry to hear about your mother-in-law, you should have gotten in touch with me directly." I said, "Phil, I tried about 12 different times to get a hold of you." And Byron jumped in and said, "Bullshit, you know where we are all the time, you could have gotten a hold of us at any given time." I didn't know what the hell was coming off. I took my radio

and I put it on Phil's desk. I said, "Byron, I just went through this with Tony Burk and you are calling me a liar, and I can't . . . " I said, "Byron, I have been seeing a doctor because of the stress over filing this Goddamn grievance." I said he told me if I can't handle it, that I should walk away from it now. I was in no condition to stay around the plant. His attitude was just--I couldn't deal with it. It was the final straw.

I left the office and then I went back and I told him at that time, I says he told me I would have to walk away from it if I could. I said, "I've got to walk away from it." I said, "I've got to take sick leave, take official sick leave," and I walked out the door and then I came back in and told him once again. I said, "I am taking official sick leave," and I told him I was going to send a letter to Mr. Unmacht, and I made the comment that I was also going to talk to the Bakersfield, California, reporters who had been asking me to comment on different things going on up there. And I left the plant.
I also told him, prior to leaving, that I was going on official sick leave, and that I would provide the documentation as soon as I could, and I left. (Tr. 87, 88)

Mr. McMichael's version of the meeting is as follows:

A. We sat down in Mr. Messer's office and Mr. Saffell came in and Phil Messer shared his condolences with Mr. Saffell about his mother-in-law, and then I started my list of things that I wanted to talk with Mr. Saffell about, and he became just violent. Threw his radio down and says I don't have to listen to this any more. He says I will give you a doctor's statement that says I can leave work whenever I want to. I thought he was going to get mad, walk out the door, cool off and come back and we are going to talk some more about this, and I waited in the control room for almost an hour. And then I asked some of the guys, I said where did he go? They said he left the plant. I said, really? I didn't believe it.

By way of collateral evidence: When Mr. Saffell left the plant, he believed he was mentally distraught. He didn't call NCC the next morning because he hadn't gathered his information. (Tr. 107, 108).

Mr. McMichael reviewed his notes and Mr. Messer's notes for a couple of days after December 27. He expected Mr. Saffell to come up the next morning with documentation from a medical doctor showing he had been treated and was given permission to take off work whenever he felt stressed. When he didn't show up in a couple or three days, Mr. McMichael decided Mr. Saffell was sincere about resigning. Mr. McMichael made his termination decision around December 31, 1989. (Tr. 183).

On January 2, 1990, Mr. Saffell learned that NCC said he no longer worked there. He had not been contacted by the company nor had he been in touch with them after going on sick leave. (Tr. 91).

Mr. Saffell had never seen a form for sick leave and NCC never offered him an opportunity to return to work. (Tr. 92, 97).

Mr. McMichael felt that Mr. Saffell's actions were insubordinate. Further, he believed Mr. Saffell had intended to resign. John Turner also told NCC that Mr. Saffell intended to resign at the end of the year. (Tr. 141).

In a number of instances, Mr. McMichael was less than satisfied with Mr. Saffell as a management employee. These include the meeting where Mr. Saffell became hostile with electrician Kemple. (Tr. 136). Also, the meeting with the instrument people where Mr. Saffell became hostile, violent, and abrasive. (Tr. 18, 139). In addition, Mr. McMichael had been told Mr. Saffell left the plant on December 12, 1989. This was when he abandoned his post. (Tr. 141). Further, he reported he would be off for his mother-in-law's funeral. (Tr. 141). This report was made to the control operator but Mr. Saffell could have called Mr. McMichael directly. (Tr. 142).

DISCUSSION

On the facts, it appears NCC took adverse action against Mr. Saffell when it refused to reinstate him. However, I conclude such adverse action was not motivated, in whole or in part, by Mr. Saffell's protected activity. Assuming that NCC's actions were motivated in part by Mr. Saffell's protected activities, NCC established by a clear preponderance of the evidence, that it was

also motivated by business reasons and Complainant's unprotected activities, and that it would have taken the adverse actions in any event.

For the foregoing reasons, I enter the following:

ORDER

Complainant failed to establish discrimination under the Mine Act on the part of Respondent and, accordingly, these proceedings are DISMISSED.

John J. Morris
Administrative Law Judge