

CCASE:  
MICHAEL J. GRAFTON V. NATIONAL GYPSUM  
DDATE:  
19900112  
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

MICHAEL J. GRAFTON,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. LAKE 89-72-DM

v.

MD 89-34

NATIONAL GYPSUM,  
RESPONDENT

Shoals Mine

DECISION

Appearances: Ron G. Spann, Independent Workers of North America,  
Paducah, Kentucky, for Complainant;  
Dennis C. Merriam, Esq., Gold Bond Building  
Products, a Division of National Gypsum, Charlotte,  
North Carolina, for Respondent.

Before: Judge Weisberger

Statement of the Case

In this action Complainant alleges that Respondent discriminated against him in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). Pursuant to notice, a hearing was held on this matter in Indianapolis, Indiana, on October 11, 1989. Michael J. Grafton, Charles Dant, Leon Joseph Brothers, Norman D. Mundy, and John Mathias testified for Complainant. James Allan Houston and Mark Allen testified for Respondent. Subsequent to the Hearing, time was reserved to allow the Parties to file Post Hearing Briefs and Proposed Findings of Fact. Complainant filed a Brief on November 21, 1989. Respondent filed Proposed Findings of Facts, and a Memorandum of Law on December 11, 1989.

Issues

1. Whether the Complainant has established that he was engaged in an activity protected by the Act.
2. If so, whether the Complainant suffered adverse action as the result of the protected activity.
3. If so, to what relief is he entitled.

Findings of Fact and Discussion

Michael J. Grafton was employed by Respondent as a roof bolter in December 1988. On December 18, 1988, Grafton's supervisor, Rick Magstadt, asked him to operate a Number 4 Loader. Before Grafton used the loader he let it run 5 minutes, and then checked the oil pressure and water temperature gauges and both "checked out all right" (Tr. 26). He indicated that he started to drive and use the loader, and at about 7:30 a.m. it started to lose power. He got off and checked behind him and did not see any steam and did not smell anything. He also indicated that he checked the gauges, and ". . . they seemed to rest all right" (sic) (Tr. 102). He informed Norman Mundy, another truck driver, that he was going to take the loader to the maintenance shop to have it checked out. When he was approximately 200 to 500 feet away from the shop, he looked over his shoulder and saw flames "shooting out of the motor," and "shooting out the sides of that loader on the motor" (Tr. 75). He indicated that he did not attempt to put it out as he was afraid, and his main concern was to alert other miners to the danger. He indicated that when he saw the loader on fire, Walter Dages came by and he yelled that the loader was on fire.

Grafton then went to the shop and yelled to the mechanic, Bryan Newland, that the loader was on fire, and Grafton turned on the fire alarm. Magstadt then came by and talked with Dages at the maintenance area. Grafton indicated that he asked Magstadt "don't you think we should go North to the main air shaft to get us some fresh air?" (Tr. 31). Magstadt then went to the air shaft along with Grafton, but according to Grafton, he did not act like he knew where the air shaft was.

Grafton testified, in essence, that he told Magstadt that he (Magstadt) did not know the safety procedures. In this connection, Grafton testified that he had been told by his co-workers that once an alarm has been sounded the procedure is to shut off the machinery, and wait to be picked up by the supervisor who is to take the workers to the air shaft. Grafton indicated that, to the contrary, Magstadt stopped at the shop, and stayed there for approximately 2 to 5 minutes, if not longer.

Grafton indicated that the following day he met with Mine Superintendent Mark Allen along with Charles Dant and Leon Brothers. At that time Grafton questioned whether Magstadt was properly trained in evacuation procedures, and Allen indicated that he would try to train him in the proper procedures. On December 20, 1988, Grafton was served with a warning notice informing him of "defective work" which occurred on December 18, 1988. It was alleged that on December 18, 1988, he did not check the appropriate gauges that would have indicated a high operating temperature on the loader, and "continued to operate it while it was running hot rather than shutting the machine down." (Joint Exhibit 1). It was also alleged that he failed to check the

~65

loader before operating it. His conduct was termed "negligence," and it was indicated that further problems of this nature would lead to disciplinary action.

On February 7, 1989, Grafton was assigned to work on a roof bolter along with Gary Jones, who had been working on the bolter for only two days. Grafton was told by the foreman, Edgar Quinn, to put up roof hooks, and was further told that the electrician would tell him where to place the hooks. Ron McKibben, the electrician, told Grafton where to place the hooks. Grafton testified he then asked McKibben if he thought there was enough cable, and McKibben answered "I believe you will have more than enough" (Tr. 55). Grafton asked Jones to watch the cable while he moved the bolter. When moving the bolter from the third to the fourth hooks, Grafton heard a bang and the lights went out. Grafton saw that the electrical box had been pulled off the wall. He indicated it had been attached with two bolts, and was not anchored. He described the method of attachment as a temporary attachment.

On February 9, 1989, Grafton attended a meeting with Allen, Magstadt, and Plant Manager James Allan Houston, along with Brothers and Don Bowling. At that time, Grafton was given a 3 day disciplinary suspension for the incident the day before, and was reduced to plant trainee. He indicated that on the same day, two other bolters, Mundy and Dant, had broken a cable while operating a bolter, and were not disciplined. He also indicated that Houston told him that he was disqualified for mine work due to his "anticipatory refusal" to fight fires (Tr. 62).

The case law that applies to the instant proceeding is well established. The Commission, in *Goff v. Youghiogheny & Ohio Coal Company*, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, *Goff*, supra, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2797-2800; *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-96 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

I.

Based on the testimony of Grafton that has not been contradicted, and has been corroborated by the testimony of Dant and Norman Mundy, who were roof bolters on the same shift, I find that after the alarm had been sounded, Magstadt did not have a flashing light on the pickup truck that he was driving.<sup>1</sup>

I also find, based on the uncontradicted testimony of Grafton as corroborated by Mundy, that once the alarm had sounded Magstadt did not go immediately to pick up the men on the section, and take them to the source of fresh air. Both these actions of Magstadt contravened the evacuation policy procedures as understood by Grafton, Mundy, and Leon Joseph Brothers, a loader operator, who worked 34 years for Respondent. I thus find that when Grafton talked with Allen on December 19, 1988, to voice his concern over the adequacy of training that Magstadt had received in the area of fire evacuation, he (Grafton) was clearly engaged in protected activities.

II.

The warning notice given to Grafton on December 20, 1988, accused him, inter alia, of negligence which resulted in the loader catching fire. Grafton adduced testimony herein to contest a finding of negligence on his part. However, Complainant did not adduce sufficient evidence to predicate a finding that there was any bad faith on the part of Respondent in concluding that Grafton had been negligent. There is no evidence in the record with regard to any of Respondent's actions or words which would indicate that the warning notice issued to Grafton was motivated as a consequence of his protected activities, i.e., complaining to management about Magstadt's failure to properly evacuate miners the day before. I thus conclude, that the warning notice was issued based on management's evaluation of Grafton's conduct with regard to the loader on December 18, and was not motivated in any part by his protected activities.

III.

On February 7, 1989, shortly before Grafton's loader had pulled the electrical box from its connection, Dant was operating a roof bolter along with Mundy when, in turning the bolter around, its electrical cable stretched and broke. The cable was attached to a permanent box that had an anchor. Dant reported this incident to his supervisor, but neither Dant nor Mundy were disciplined.

~67

In essence, Complainant relies on this incident to establish that the 3 days suspension that he received for ". . . overextending the bolter beyond the cable limit. . ." (Joint Exhibit 3), was in violation of section 105(c) of the Act.

Allen indicated that Dant and Mundy were not disciplined, as he considered the damage that they caused to the cable to be an error in judgment, whereas Grafton's action was termed negligence. James Allan Houston, Respondent's plan manager, who made the decision to suspend Grafton, indicated that when he learned that the electrical box had been torn off the wall, he asked the supervisor to tell him what took place, and he tried to assess whether Grafton's conduct was negligence or an error in judgment. He indicated that he also consulted with the Human Relations Department. I find Houston's testimony credible. Thus, I find that the decision to suspend Grafton was based upon a business judgment, and Complainant has not established that it was motivated in any part by his protected activities.

#### IV.

Grafton indicated that, on December 18, 1988, he said that he would not fight a fire. He indicated that the reason for making such a statement was that he was not properly trained in that he had not received any training in fighting a fire, nor had he received any training in the use of a fire extinguisher. He also indicated that he did not know when he bid for an underground job at the mine, that putting out a fire was one of the conditions of employment. In this connection, Grafton indicated that he did not see any film at the 1988 training with regard to fighting a fire or using a fire extinguisher. Dant also indicated that he was not sure whether such instruction was given. However, I find based on the testimony of Allen, who I find to be a credible witness, that in the 1988 training a film was provided showing the use of a fire extinguisher. This also was corroborated by Brothers upon cross-examination. As such, it appears that Grafton was given some training in the use of a fire extinguisher.

On or about February 7, 1989, it was reported to Houston by Allen and MSHA Inspector Donald Bartlett that Grafton had told them that he would not fight any fires in the mine. Grafton does not dispute this, but indicates that he may have told this to Bartlett and Allen sometime in February 1989, prior to February 7, 1989. Houston indicated his response was to disqualify Grafton from working underground in the mine. He was assigned a job above ground as a Trainee Bracket 1 at \$8.93 an hour. I find that the only reason why Respondent removed Grafton from working underground was his stated refusal to fight fires underground. As such, I find that Complainant has not established that his transfer from the mine was motivated in any part by any protected activities.

