



In the Matter of:

**DANIEL B. ROCHA, SR. and
EDWARD D. ROCHA,**

ARB CASE NO. 07-112

COMPLAINANTS,

**ALJ CASE NOS. 2006-PSI-001
2006-PSI-002**

v.

DATE: June 25, 2009

**AHR UTILITY CORPORATION, AND
SOUTH SHORE UTILITY
CONTRACTORS, INC.,**

RESPONDENTS.

**DANIEL B. ROCHA, SR. and
EDWARD D. ROCHA,**

COMPLAINANTS,

**ALJ CASE NOS. 2006-PSI-003
2006-PSI-004**

v.

**SOUTHERN UNION COMPANY d/b/a
NEW ENGLAND GAS COMPANY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard J. Savage, Esq., *Savage & Savage*, Warwick, Rhode Island

For the Respondent:

**Andrew W. Daniels, Esq., Brian Lewis, Esq., *Hinckley, Allen & Snyder,*
Boston, Massachusetts**

FINAL DECISION AND ORDER

The Complainants, Daniel B. Rocha, Sr. (Dan Sr.) and Edward Rocha, filed complaints with the United States Department of Labor alleging that AHR Utility Corporation (AHR), South Shore Utility Contractors (South Shore), and Southern Union Company d/b/a New England Gas Company (New England Gas) violated the employee protection section of the Pipeline Safety Improvement Act of 2002 (PSIA)¹ by discharging them from employment. After a hearing, a Labor Department Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) recommending that the complaints be dismissed. The Complainants appealed that decision. We affirm.

BACKGROUND

In 2005, the Rhode Island Department of Transportation (RIDOT) was engaged in a construction project to replace the Point Street Bridge Overpass in the City of Providence with a larger bridge that would incorporate upgraded utility pipeline systems (the Project). New England Gas owned the pipeline infrastructure that crossed the bridge. Shire Corporation was the general contractor on the Project, and it hired South Shore to install pipes to carry natural gas and water across the bridge as well as framing to support those pipes.²

Dan Sr. and Edward Rocha are brothers who were employed by AHR, a subsidiary of South Shore. They were qualified to perform certain types of welding on gas pipelines. On August 29, 2005, they began working on the Project. Daniel Rocha, Jr. (Dan Jr.), General Manager of South Shore, assigned Dan Sr. to the Project. Albert Borden, a superintendent with South Shore, supervised the Complainants.³

Federal safety regulations govern welding and installation of gas pipes.⁴ These regulations incorporate the American Petroleum Institute's Standard 1104 (API 1104), which establishes standards for testing a weld.⁵ In their role as "quality control," the

¹ 49 U.S.C.A. § 60129(a) (West Supp. 2005).

² D. & O. at 3-4.

³ *Id.* at 2-3; Hearing Transcript (Tr.) 83.

⁴ See 49 C.F.R. Part 192 (2008).

⁵ D. & O. at 4, citing 49 C.F.R. §§ 192.7(c)(2), 192.227(a), 192.229(c)(1) and 192.241(c).

Complainants were responsible for ensuring that welds on the pipes were “field quality,” i.e., sufficient to pass inspection pursuant to API 1104.⁶

The Complainants’ chief task was to weld sections of 16-inch diameter steel pipe together. When they arrived at the Project worksite on August 29, 2005, they discovered that sections of pipe had been stored outdoors at the worksite for a considerable length of time.⁷ While preparing to make their first weld, they examined one of the pipes and discovered corrosion, rusting, and pitting on the interior walls of the pipe as well as deterioration at the pipe ends.⁸

Later that day, the Complainants informed Philip Hein, a construction inspector for New England Gas, about the condition of the pipe. Dan Sr. testified that he told Hein that the pipe should not be welded because it was “in terrible condition.”⁹ The Complainants also expressed their concerns to Mark Crozier, who was Hein’s supervisor as well as the New England Gas construction supervisor at the Project.¹⁰ The pipeline safety regulations indicate that corroded pipe can be installed if certain remedial measures are taken to “restore the serviceability of the pipe.”¹¹ According to Crozier, corroded pipe could be welded in compliance with API 1104 if the pipe was “ground down and brushed clean to remove rust.”¹²

Hein asked the Complainants to complete one weld, and they welded together two sections of pipe. After they completed the weld (the August 29 weld), Hein asked Dan Sr. for his opinion. Dan Sr. opined that the welded pipe was “terrible” and should not be installed.¹³ The pipe sections containing the August 29 weld were not installed and were put aside for radiographic inspection pursuant to API 1104.¹⁴

⁶ Tr. at 275, 377-80.

⁷ *Id.* at 277.

⁸ *Id.* at 29-30, 155-56.

⁹ *Id.* at 155.

¹⁰ D. & O. at 5, citing Tr. at 27, 155, 435-35.

¹¹ 49 C.F.R. § 192.487.

¹² Tr. at 274-75.

¹³ *Id.* at 155-65, 159-60.

¹⁴ *Id.* at 31, 160.

Between August 30 and September 2, the Complainants suspended their work at the Project to obtain a tandem welding certification. They returned to the Project on September 6, 2005, and completed three welds between September 6 and 8.¹⁵ On September 8, Robert MacLellan, a Non-Destructive Examination Technician for Ocean State Technologies, informed the Complainants that the August 29 weld had “marginally” passed inspection.¹⁶ On or about September 9, the Complainants made two more welds which passed inspection under API 1104.¹⁷

On September 12, Dan Sr. again complained to Hein about “rust and scaling on the ends of the steel pipe.” Hein informed Crozier of Dan Sr.’s concerns and, according to Dan Sr., Crozier agreed the pipe was in poor condition.¹⁸ Crozier told the Complainants to “do what you have to do,” and they proceeded to cut approximately two feet from each end of the pipe.¹⁹ After they cut back on the pipe ends, Borden, their supervisor, took pictures of the pipe.²⁰

The Complainants concluded that the remaining pipe still contained too much corrosion to complete an acceptable weld.²¹ Dan Sr. asked Crozier what they should do next. Crozier “told complainants he would get back to them concerning remedial measures that could be implemented to prepare the pipe for welding.”²²

At around 5:00 P.M. on September 12, Crozier used a micrometer to measure the ends of the pipe that the Complainants had cut that day. A micrometer is a device that measures the wall thickness of pipes. Crozier testified that this pipe was a “good piece” because, at its worst location, the pipe measured .215 inches in thickness, and the pipes being installed at the Project could have a minimum wall thickness of .035 inches.²³

¹⁵ *Id.* at 33-35.

¹⁶ D. & O. at 6, citing Tr. at 35, 164, 507, 511-12; Respondents’ Exhibit (RX) 8. In informing the Complainants that the welds had “marginally” passed inspection, MacLellan was not asserting that the pipes were only “marginally” safe. D. & O. at 5, n.7.

¹⁷ Tr. at 38; RX 8.

¹⁸ *Id.* at 169, 436-37.

¹⁹ *Id.* at 39.

²⁰ *Id.* at 41-46; Complainant’s Exhibit 2D-2G.

²¹ *Id.* at 39, 169, 297.

²² D. & O. at 6, citing Tr. at 170, 297-98.

²³ Tr. at 285-86.

On September 13, 2005, Edward Rocha met with Hein, Borden, and Paul DelCioppio, the Senior Civil Engineer for RIDOT, at the Project worksite.²⁴ DelCioppio testified that during this meeting, they all decided that the ends of the pipes the Complainants were to install should be cut back until “viable” sections of pipe suitable for welding could be found. He stated that “a limit was not established” and the Complainants “could cut back as far as they wanted” to satisfy their concerns.²⁵

At around 1:00 P.M. that same day, Crozier, Borden, and DelCioppio met with Anthony Rosciti, one of South Shore’s owners, to discuss the Complainants’ concerns about the pipes.²⁶ Crozier testified that he had examined the quality of the pipes and concluded that they were acceptable for use. But he also concluded that “the majority of the pipe at the Project contained worse corrosion at its ends than in the interiors.” The meeting attendees agreed to allow the Complainants to “cut the length of the pipe and grind corrosion from the inside walls as necessary to allow for a ‘field quality’ weld under API 1104.”²⁷

Because the additional cutting and grinding work was not within the scope of the contract between South Shore and Shire, RIDOT executed a Report of Change, which authorized the addition of new tasks into the contract. The Report of Change ensured that South Shore would be compensated for the additional labor and expenses necessary to complete their tasks.²⁸

On September 14, 2005, the Complainants went to South Shore’s offices to discuss their concerns with Rosciti. Dan Sr. told Rosciti that the Complainants would not weld any more pipe sections “in the condition that [they were] in.”²⁹ Edward Rocha testified that Rosciti told the Complainants to complete their welds, and if those welds failed to pass x-ray inspection or a pressure test, they would be cut out of the gas line and South Shore would “actually make more money doing that.”³⁰

²⁴ D. & O. at 7, citing Tr. at 47, 55, 416, 420-21.

²⁵ Tr. at 421.

²⁶ *Id.* at 303-04.

²⁷ D. & O. at 7, citing Tr. at 307, 317-18, 323, 319.

²⁸ RX 9; Tr. at 423-27.

²⁹ Tr. at 173.

³⁰ *Id.* at 48-49, 174; Complainants’ Exhibit (CX) 1 at 10.

The Complainants then went to the Project worksite and asked Hein what had been decided about the pipes during the 1:00 P.M. meeting the previous day. According to the Complainants, Hein told them that they should grind, brush, and weld the pipes, and that they should not cut any more pipes because of a concern over a shortage of available pipe in the yard.³¹ Hein, however, testified that he did not recall telling the Complainants that they could not cut the pipes.³² But according to the testimony of Dan Sr., Hein did not have the authority to direct the Complainants' "means and methods" of installing pipe.³³ Jean Lemieux, a South Shore pipefitter working at the Project, testified that Hein told the Complainants not to cut more sections of pipe.³⁴ Though Lemieux also testified that Borden had come to the Project worksite to okay the cutting of the pipe, Borden's authorization to cut pipe occurred before Hein's alleged instruction not to cut the pipe.³⁵

Borden, the Complainants' supervisor, then came to the Project worksite, and the Complainants told him that they would not weld any more gas pipes. In response, Borden assigned them to weld tracks for the water pipeline that would cross the bridge. Between September 14 and 19, 2005, the Complainants welded tracks for the water pipeline. During this period, no one performed any work on the gas pipeline.³⁶

On September 20, 2005, Dan Jr. met with Rosciti, Borden, and Crozier. Dan Jr. had not participated in either of the meetings that took place on September 13, 2005. He had gone to the Project worksite to observe the condition of the pipes, and he concluded that the pipe had been improperly stored and was in "horrible" condition.³⁷ He told the others that the Complainants were not comfortable welding the pipes.³⁸ Crozier testified that he and Rosciti told Dan Jr. that they thought the issue had been "straightened out last week," referring to the 1:00 P.M. meeting on September 13 that Edward Rocha had attended.³⁹ Rosciti testified that he did not instruct the Complainants not to cut the pipes.⁴⁰

³¹ *Id.* at 175-177, 493.

³² *Id.* at 439.

³³ *Id.* at 215.

³⁴ *Id.* at 493-494.

³⁵ *Id.* at 494, 499-500.

³⁶ D. & O. at 8.

³⁷ Tr. at 117-18.

³⁸ *Id.* at 119.

³⁹ *Id.* at 331.

Dan Jr. told Rosciti that the Complainants were not going to grind the ends of the pipe to complete their weld. Rosciti testified that he told Dan Jr., “[W]hat do you want me to tell you, we have to get other welders.”⁴¹ Meanwhile the Complainants had joined this meeting. According to Dan Sr., Rosciti told Dan Jr., “[W]e have nothing else for them, let them go.” In response, Dan Jr. instructed the Complainants to gather their belongings and leave the Project worksite, which they did.⁴² The Complainants took this instruction to mean that they were terminated from employment with AHR.⁴³

The Complainants filed one complaint against AHR and South Shore and a separate complaint against New England Gas with the Regional Administrator of the Labor Department’s Occupational Safety and Health Administration (OSHA). They alleged that the Respondents violated the PSIA by discharging them because they refused to weld “gas pipe that was not fit to be used to carry natural gas.”⁴⁴ After investigations, OSHA concluded that the Respondents had not violated the PSIA. The Complainants requested a hearing before an ALJ. As noted earlier, after a formal hearing in Providence, Rhode Island on September 18-20, 2006, the ALJ recommended that the complaints be dismissed, and the Complainants appealed.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ’s D. & O.⁴⁵ As in cases arising under the employee protection provisions of the environmental and nuclear whistleblower statutes, the ARB, as the Secretary’s designee, acts with all the powers the Secretary would possess in rendering a decision.⁴⁶

⁴⁰ *Id.* at 455

⁴¹ Tr. at 458.

⁴² *Id.* at 131. Dan Jr.’s testimony does not indicate that he discussed the option of cutting the ends of the pipe with Rosciti.

⁴³ Tr. at 52, 185. South Shore and AHR do not contest that they terminated the Complainants.

⁴⁴ Complaint at 5.

⁴⁵ 49 U.S.C.A. § 60129(b)(3); 29 C.F.R. § 1981.110 (2008).

⁴⁶ See Administrative Procedure Act, 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8 (2006). See also Secretary’s Order No. 1-2002, 67 Fed. Reg. 64, 272 (Oct. 17, 2002) (delegating to the ARB the Secretary’s authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

The Board reviews the ALJ's findings of fact under the substantial evidence standard.⁴⁷ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴⁸ In ruling on the substantiality of evidence, the Board "must take into account whatever in the record fairly detracts from its weight."⁴⁹ If substantial evidence in the record supports the ALJ's findings of fact, they shall be conclusive.⁵⁰ The ARB engages in de novo review of the ALJ's conclusions of law.⁵¹

DISCUSSION

A. Governing Law

Congress passed the PSIA to enhance the safety of the nation's pipeline systems. The employee protection provision of the PSIA prohibits discrimination against an employee who engages in certain types of protected activity:

(1) In general.--No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(A) provided, caused to be provided, or is about to provide or cause to be provided, to the employer or the Federal Government information relating to any violation or alleged violation of any order, regulation, or standard under this chapter or any other Federal law relating to pipeline safety;

⁴⁷ 29 C.F.R. § 1981.110 (b).

⁴⁸ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

⁴⁹ *Id.* at 488.

⁵⁰ *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

⁵¹ *See* Administrative Procedure Act, 5 U.S.C.A. § 557(b).

(B) refused to engage in any practice made unlawful by this chapter or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer;

(C) provided, caused to be provided, or is about to provide or cause to be provided, testimony before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or any other Federal law relating to pipeline safety;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or any other Federal law relating to pipeline safety;

(E) provided, caused to be provided, or is about to provide or cause to be provided, testimony in any proceeding described in subparagraph (D); or

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or any other Federal law relating to pipeline safety.^[52]

To prevail, the Complainants must “demonstrate” that they engaged in activity that the PSIA protects and that the activity “was a contributing factor in the unfavorable personnel action” the Respondents took against them, i.e. the discharge.⁵³ “Demonstrate” means to prove by a preponderance of the evidence.⁵⁴ A “contributing factor” is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [unfavorable personnel] decision.”⁵⁵

⁵² 49 U.S.C.A. §60129(a).

⁵³ See 49 U.S.C.A. § 60129(b)(2)(B)(iii).

⁵⁴ *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004) (interpreting “demonstrate” in employee protection section of Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West Supp. 2005)).

B. The ALJ's Decision.

The ALJ concluded that the Complainants engaged in protected activity when they complained to the Respondents about the condition of the pipes that were stored at the Project worksite and then refused to install the pipes.⁵⁶ But he also found that, by investigating these complaints and then allowing the Complainants to cut back the pipes to achieve field quality welds, the Respondents addressed the Complainants' concerns and provided them with a solution that ensured safe installation of the pipes. He concluded that, because the Complainants did not provide further justification for their work refusal after they were presented with a solution, their continued work refusal was not protected. As a result, their termination did not violate the PSIA.⁵⁷

C. The Complainants Engaged in Protected Activity But Their Continuing Refusal to Weld the Pipe Lost Its Protected Status.

1. The Complainants Engaged in PSIA-Protected Activity When They Complained About the Condition of the Pipes.

The PSIA protects an employee who provides information to his employer regarding "any violation or alleged violation" of pipeline safety law.⁵⁸ Both Complainants had many years of experience in the pipeline industry. When they first arrived at the Project worksite, they discovered corrosion and rust on the pipes they were assigned to weld.⁵⁹ They informed both Crozier and Hein, representatives of New England Gas, about the condition of those pipes. Respondents AHR and South Shore became aware of the Complainants' concerns no later than September 13, when Edward Rocha, Hein, Borden, DelCioppio, and Rosciti attended meetings to discuss a solution to the Complainants' concerns.

⁵⁵ *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1)).

⁵⁶ D. & O. at 12.

⁵⁷ *Id.* at 10-13.

⁵⁸ 49 U.S.C.A. § 60129(a)(1)(A).

⁵⁹ Tr. at 29-30, 155-56.

Therefore, substantial evidence supports the ALJ's conclusion that the Complainants engaged in protected activity by providing information to the Respondents related to an alleged violation of pipeline safety law.⁶⁰

2. After the Complainants Refused to Weld the Pipe, the Respondents Addressed the Complainants' Safety Concerns and Proposed a Solution that Would Resolve Their Concerns.

The PSIA also protects employees who refuse to engage in any activity made unlawful under that statute or any other Federal law relating to pipeline safety so long as the employee identifies the alleged illegality to his or her employer.⁶¹ An employee who refuses to perform a task because of a pipeline safety concern need not establish that the allegedly illegal practice in which he has refused to engage actually violated a Federal law relating to pipeline safety. He need only prove that his refusal to work "was properly communicated to the employer and was based on a reasonable and good faith belief that engaging in that work was a practice made unlawful by a Federal law relating to pipeline safety."⁶²

The ALJ recognized that although a work refusal may be protected if a complainant has a reasonable belief that the assigned task is unsafe, the refusal loses its protected status after the perceived hazard has been investigated and, if found safe, is adequately explained to the employee.⁶³ The ALJ found that the Respondents and the RIDOT took the Complainants' concerns "very seriously" and investigated to determine

⁶⁰ The Complainants did not allege that their internal complaints contributed to their dismissal, and the ALJ found no evidence to link those complaints to the dismissal. D. & O. at 12 n.14.

⁶¹ 49 U.S.C.A. § 60129(a)(1)(B).

⁶² See Procedures for the Handling of Discrimination Complaints under Section 6 of the Pipeline Safety Improvement Act of 2002, 70 Fed. Reg. 17,889, 17,890-91 (Apr. 8, 2005).

⁶³ D. & O. at 10, citing *Eltzroth v. Amersham Medi-Physics, Inc.*, ARB No. 98-002, ALJ No. 1997-ERA-031 (ARB Apr. 15, 1999) (involving work refusal under employee protection provision of Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 1994)); *Stockdill v. Catalytic Indust. Maint. Co., Inc.*, 1990-ERA-043, slip op. at 2 (Sec'y Jan. 24, 1996) (same); and *Pensyl v Catalytic, Inc.*, 1983-ERA-002 slip op. at 4 (Sec'y Jan. 13, 1984) (same). See also *Harris v. C & N Trucking*, ARB No. 04-175, ALJ No. 2004-STA-037 (ARB Jan. 31, 2007) (affirming ALJ under Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (West 1997)); *Williams v. Baltimore City Pub. Sch.*, ARB No. 01-021, 2000-CAA-015 (ARB May 30, 2003) (under the Safe Drinking Water Act, 42 U.S.C.A. § 3000j-9 (West 1991), the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998), the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995), and the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995)); *Dobreuenaski v. Associated Univs., Inc.*, ARB No. 97-125, ALJ No. 1996-ERA-044, slip op. at 11-12 (ARB June 18, 1998) (ERA).

if the pipe was acceptable. They then presented a solution to the Complainants that allowed them to cut and grind the pipes to achieve field quality welds. The ALJ concluded that, when the Complainants refused to weld after the Respondents offered this solution and did not question the proposed solution, their work refusal lost its protected status.⁶⁴ The following substantial evidence supports this conclusion.

The Respondents considered the Complainants' concerns about welds that were completed on August 29 and September 9, 2005, and allowed those welds to undergo radiographic inspection to assure that they were in compliance with API 1104. All of those welds passed inspection.⁶⁵

Federal safety regulations governing the welding and installation of the gas pipes indicate that corroded pipe can be installed if certain remedial measures are taken to "restore the serviceability of the pipe."⁶⁶ According to Crozier, the pipes at the Project could be welded in compliance with API 1104 if the pipe ends were "ground down and brushed clean to remove rust."⁶⁷

Crozier measured the ends of the pipe the Complainants had identified as corroded on September 12 and confirmed with engineering staff that the pipe could be safely welded.⁶⁸ Crozier testified that, at its worst location, the pipe measured .215 inches in thickness, but the pipe could have been installed with a minimum wall thickness of .035 inches.⁶⁹

The record also reveals that on September 13 Edward Rocha met with Hein, Borden, and DelCioppio. The upshot of that meeting was that the Complainants would be allowed to cut the pipe ends as much as necessary to achieve field quality welds.⁷⁰ And later that day, Crozier, Borden, DelCioppio, and Rosciti met and decided that the Complainants could not only cut back the pipe, but also grind the corrosion from inside the pipes, if necessary.⁷¹

⁶⁴ D. & O. at 12.

⁶⁵ RX 8.

⁶⁶ 49 C.F.R. § 192.487.

⁶⁷ Tr. at 274-75.

⁶⁸ Tr. at 301-302, 384.

⁶⁹ Tr. at 285-86.

⁷⁰ D. & O. at 7, citing Tr. at 307, 317-18, 323, 319; D & O. at 12, citing Tr. at 494.

⁷¹ D. & O. at 7, citing Tr. at 303-04, 307; RX 6 at 11.

The record therefore demonstrates that the Respondents addressed and investigated the Complainants' concerns about the pipe and, soon thereafter, proposed a solution that would alleviate those concerns and allow the Complainants to complete their tasks at the Project.

3. The Complainants Were Authorized to Cut the Pipes.

The Complainants argue to us that the Respondents did not provide them with an adequate solution because the Respondents did not tell them that they could cut the pipe and thus allay their fears. The ALJ found that at the September 13 meeting that Edward Rocha attended, "complainants were authorized to cut back on the pipe ends 'as far as they wanted' to ensure a field quality weld."⁷² The Complainants deny that, at that meeting, the Respondents authorized them to cut the pipe. They contend that, between September 14 and 20, the day they were discharged, they were not given permission to cut the pipe. In fact, they claim that on September 14 Hein told them not to cut any more pipe.⁷³ The Complainants made essentially the same argument to the ALJ.⁷⁴

As for the meeting on September 13, the ALJ noted that Edward Rocha met with Hein (New England Gas), Borden (South Shore), and DelCioppio (RIDOT). Edward Rocha testified that he was at that meeting but argues that he was not informed that he could cut the pipe.⁷⁵ The ALJ nevertheless credited DelCioppio's testimony about what happened at that meeting:

Essentially, we put our heads together to come up with a solution that satisfied everyone there, how to keep the project moving forward and satisfying the concerns of the welders about the ends of the pipe. And we as a group decided that the ends of the pipe that were corroded would be cut back until a viable end could be established. And they could cut back as far as they wanted. I mean, that was never - - a limit was not established.^[76]

According to Dan Sr., Hein told them on September 14 that his supervisor, Crozier, was concerned about a shortage of pipe and, therefore, they were not to cut any

⁷² D. & O. at 7.

⁷³ Complainants' Brief at 4-16.

⁷⁴ Post Hearing Brief of Complainants at 14, 24-26.

⁷⁵ Tr. at 47, 55; Complainants' Brief at 4.

⁷⁶ Tr. at 421; D. & O. at 7

more pipe.⁷⁷ The ALJ noted this testimony and also Lemieux's testimony confirming that Hein told "us" not to cut more pipe.⁷⁸ But the ALJ also noted that Hein testified he did not remember telling the Complainants not to cut the pipe.⁷⁹ Hein testified that, per Crozier's instructions, he told the Complainants they could "either wire-brush it more, grind it down and/or cut back on the pipe."⁸⁰

Along the same lines, the Complainants point to Dan Jr.'s testimony that, on September 20, Rosciti told him that the pipe should not be cut.⁸¹ Actually, Dan Jr. did not mention cutting but testified only that Rosciti told him that Crozier and Borden "wanted to grind the ends of the pipe and weld them."⁸² And Rosciti undercuts the Complainant's argument because he testified that he did not tell the Complainants that they could not cut the pipes.⁸³

We find that the ALJ considered all of the evidence as to whether the Respondents made the Complainants aware that they could cut the pipe in order to comply with API 1104. To be sure, the record contains conflicting evidence on this issue. Credibility findings would have been helpful. But the evidence on the Complainants' side of this issue does not overwhelm evidence favorable to the Respondents. Therefore, substantial evidence supports the ALJ's finding that the Complainants were offered a solution that would quell their fears about the safety of the pipe.

4. The Complainants Did Not Challenge Crozier's Finding that the Pipe Was Safe or the Suggestion to Cut the Pipe.

The record fully supports the ALJ's finding that the Complainants never presented the Respondents with data or other evidence that controverted Crozier's

⁷⁷ Tr. at 175-177. The ALJ apparently did not consider evidence that Hein did not have authority to tell the Complainants how to prepare the pipe for welding. Tr. at 82-83, 213-215. The Respondents argue that even if Hein did tell them not to cut the pipe, the Complainants "should not have followed his instructions." Respondents' Reply Brief at 21-23.

⁷⁸ D. & O. at 8.

⁷⁹ *Id.* citing Tr. at 439.

⁸⁰ Tr. at 438.

⁸¹ Complainants' Brief at 5-6, citing Tr. at 120.

⁸² Tr. at 120.

⁸³ *Id.* at 455.

findings that the pipe was safe. Nor did they indicate that cutting the pipe would not satisfy their concerns.⁸⁴ They argue that Crozier never informed them about his findings.⁸⁵ This argument is not effective because, as the ALJ noted, Crozier testified that he told Borden that the pipe was acceptable, and Dan Sr. testified that Borden told him that the pipe was good.⁸⁶ Moreover, in acknowledging that the welders that replaced them on the Project needed to cut the pipe (and did cut the pipe), the Complainants admit that the solution that the Respondents offered to them was satisfactory.⁸⁷

CONCLUSION

To prevail on their complaint that the Respondents violated the employee protection section of the PSIA, the Complainants had to prove by a preponderance of the evidence that they engaged in activity that the PSIA protects and that that activity contributed to the decision to discharge them. Substantial evidence supports the ALJ's finding that the Complainants' protected internal complaints about the condition of the pipe did not contribute to their firing.

Substantial evidence in the record as a whole also supports the ALJ's finding that the Respondents investigated the safety of the pipe, determined that it was safe, informed the Complainants that the pipe was safe, and offered to permit them to cut the ends of pipe to further ensure safe welds. Since the Complainants did not challenge the Respondents' finding that the pipe was safe or their proposal that they cut the ends of the pipe to be certain of safe welds, substantial evidence supports the ALJ's finding that the Complainants' continuing refusal to weld was not protected activity.

Therefore, the ALJ correctly concluded that when South Shore/AHR discharged the Complainants for continuing to refuse to weld the pipe on the Project, they did not violate the employee protections of the PSIA. Accordingly, we **AFFIRM** the ALJ's recommended decision and **DENY** the complaints.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

⁸⁴ D. & O. at 12.

⁸⁵ Complainants' Brief at 7.

⁸⁶ D. & O. at 7, citing Tr. at 325-26, 203-05.

⁸⁷ Complainants' Brief at 6; D. & O. at 8-9.