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Issue Date: 25 July 2007

In the Matters of

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

v.

AHR UTILITY CORP. and
SOUTH SHORE UTILITY CONTRACTORS, INC.
Respondents

Case Nos. 2006-PSI-00001
2006-PSI-00002

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

v.

SOUTHERN UNION COMPANY d/b/a
NEW ENGLAND GAS CO.
Respondent

Case Nos. 2006-PSI-00003
2006-PSI-00004

Richard J. Savage, Esq.
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For the Complainants

Brian E. Lewis, Esq.
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For the Respondents

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER[1]

This case concerns two complaints brought under the employee protection provisions at §6 of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. §60129 ("PSIA" or "the Act"), and the implementing regulations at 29 C.F.R. Part 1981. Daniel B. Rocha, Sr. and Edward Rocha ("complainants") allege that New England Gas Company urged them to weld and install gas pipelines that complainants believed were unfit to perform the job of safely carrying natural gas at the Point Street Bridge Project in Providence, Rhode Island. Further, complainants allege that upon their refusal, AHR Utility Corporation ("AHR")/South Shore Utility Contractors, Inc. ("South Shore") terminated their employment.

Complainants filed complaints against AHR/South Shore and New England Gas with the Regional Administrator of the Occupational Safety and Health Administration ("OSHA Administrator") in Boston. After investigations, the OSHA Administrator determined that neither AHR/South Shore nor New England Gas violated the employee protection provisions at §6 of the PSIA. Complainants timely requested a hearing with this Office, and the consolidated cases were assigned to me for hearing and decision. A formal hearing was held in Providence, Rhode Island on September 18-20, 2006. Complainants were represented by counsel, and Complainants' Exhibits 1-13 were admitted into evidence. Respondent New England Gas was represented by counsel,[2] and Respondents' Exhibits 1 and 3-11[3] were admitted into evidence. Administrative Law Judge's Exhibit 1 was also admitted into evidence.[4] Nine witnesses, including the complainants, testified. Both parties timely filed post-hearing briefs.

Based on the evidence contained in the record of this proceeding, I conclude that complainants' termination did not violate §6 of the PSIA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Complainants, who are brothers, are welders with over 60 years combined experience in the gas pipeline industry. Daniel B. Rocha, Sr. ("Dan, Sr.") is 65 years old and has worked as a

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[1] Citations to the record of this proceeding are abbreviated as follows: CX – Complainants' Exhibit; RX – Respondents' Exhibit; ALJX – Administrative Law Judge's Exhibit; TR – Hearing Transcript.

[2] At the hearing, counsel for respondents represented that South Shore was in receivership and that they had been instructed by the receiver not to provide any further legal services to South Shore (TR at 5; ALJX 1). Additionally, although AHR has not been formally dissolved, it no longer performs any work or retains any employees (TR at 445).

[3] Respondent's Exhibit 2 was not offered into evidence (*see* TR at 521).

[4] The record was left open so that respondents could submit the *Order Appointing Temporary Receiver* with respect to South Shore (TR at 521). It is received into the record as ALJX 2.

journeyman welder since 1966 (TR at 136-38). He is a master pipefitter and member of the Pipeliner Local 798, the national pipeline workers' union (TR at 137-38, 147-49; CX 8). From 1966 through September 20, 2005, Dan, Sr. worked as a welder for various contractors as a member of the union, as an owner of his own company, Rocha Construction, as an employee of South Shore, a company founded by his son Daniel B. Rocha, Jr. ("Dan, Jr."), and as an employee of AHR (TR at 136-46).

Edward Rocha is 57 years old and has over 30 years experience in the natural gas pipeline industry (TR at 19-21, 88). From 1971 through 1980, Edward worked as a welder for various contractors (TR at 21). Prior to obtaining his welding license from Rhode Island in 2001, Edward had been certified to weld after successfully passing welding tests administered by the gas companies and contractors for whom he worked (TR at 20-21). From 1981 through 2001, Edward worked as a plant operator for New England Gas, where he was responsible for monitoring gas pressure (TR at 19-20). He performed no welding while working for New England Gas (TR at 20).

Both complainants were also "operator qualified" to perform welding work (TR at 116, 126, 147, 180-81). The test by which a welder becomes "operator qualified" requires the welder to perform 71 identifiable tasks established by the Office of Pipeline Safety (*see* TR at 116, 247-49, 355-57). The preparation of the pipe for a weld is among the tasks tested (TR at 409). Measurement of the pipe's wall thickness, however, is not (*id.*). Additionally, both Dan, Sr. and Edward Rocha testified that they understood Federal law concerning pipeline safety as a result of their many years of industry experience (TR at 87, 198-99, 205-07).

In 2000, Anthony Rosciti purchased South Shore from Dan, Jr., who agreed to remain there as the general manager (TR at 110-11, 143). As general manager, it was Dan, Jr.'s responsibility to oversee "day to day" operations, including hiring and firing and assignment of employees to various projects (*id.*). Dan, Sr. agreed in 2000 to work for AHR (TR at 143). Created by South Shore, which was a "union operation," for the purpose of employing non-union employees on various projects, AHR was a company that performed various kinds of utility work (TR at 23, 143, 443-44). Although a member of the union, Dan, Sr., agreed to work "non-union" jobs as an employee of AHR (TR at 143; *see also* CX 9, *Form W-2*, CX 10, *Form W-2*; TR at 6). On May 5, 2002, Edward Rocha joined his brother at AHR, welding on various projects from 2002 through August 2005 (TR at 19, 23-24; *see also* CX 6, *Form W-2*, CX 7, *Form W-2*). In August of 2005, Edward was assigned to work as a welder on a gas pipeline at the Point Street Bridge Project ("the Project") in Providence, Rhode Island (TR at 23, 25).

As part of it series of construction improvements to Interstate 195 in Providence, the Rhode Island Department of Transportation ("RIDOT") contracted with Shire Corporation ("Shire") to replace the existing Point Street Bridge Overpass ("the bridge") with a larger bridge (TR at 260, 262, 417). The existing bridge also carried a number of utility lines over Interstate 95 (TR at 25, 173, 417). New England Gas owned pipeline infrastructure that crossed the bridge, and pursuant to contracts held between New England Gas and Rhode Island, upgraded pipeline systems were required to be installed as part of the new overpass construction (TR at 260-61). As the Project's general contactor, Shire was responsible for hiring subcontractors to complete various Project jobs (TR at 262, 418). Shire hired subcontractor South Shore for the purpose of

completing the installation of approximately 700 feet of 16 inch diameter steel pipe to carry natural gas and 20 inch diameter pipe for carrying water across the bridge, as well as installation of framing that would support both lines (TR at 261-63, 418).

The welding and installation of the steel pipe at the Project was governed by the regulations at Title 49, Part 192 of the Code of Federal Regulations, which establish the minimum safety requirements for pipeline facilities. *See* 49 C.F.R. §192.1. These regulations incorporate by reference the American Petroleum Institute's Standard 1104 ("API 1104"), section 9 of which provides the standards for radiographic testing of a weld. *Id.* §§192.7(c)(2); 192.227(a); 192.229(c)(1); 192.241(c). Further, the regulations governing remediation of corrosion in steel pipes used in the distribution of gas[5] allow corroded pipe to be repaired by a method that "reliable engineering tests and analyses show can permanently restore the serviceability of the pipe." 49 C.F.R. §192.487(a). However, where the wall thickness of steel pipe used in a gas distribution line is either less than that required for the maximum allowable operating pressure ("MAOP," *see* 49 C.F.R. §192.3) of the pipeline or is less than 30 percent of the pipe's nominal wall thickness, the governing regulations require its replacement. 49 C.F.R. §192.487(a); *see also* TR at 275-76.

Mark Crozier, the New England Gas construction supervisor at the Project whose responsibility it was to ensure that New England Gas was in compliance with 49 C.F.R. Part 192 and API 1104 (TR at 253-54), testified that New England Gas "live[d] by" 49 C.F.R. Part 192 and that it was the company's policy to follow the governing regulations (TR at 253-54). Further, Mr. Crozier stated that he wouldn't allow pipe that was not compliant with the Pipeline Safety Act to be installed in a New England Gas transmission line (TR at 276). He explained that "field quality" welds (*i.e.*, welds that would pass radiographic inspection under API 1104) could be produced on corroded pipe if it was ground down and brushed clean to remove rust (TR at 274-75, 319-20; *see also* TR at 184; *see generally* TR at 128). *See* 49 C.F.R. §§192.235. The MAOP for the steel pipe for use at the Project was 99 pounds (TR at 285). It was Mr. Crozier's uncontradicted and credible testimony that pipe as thin as .035 inches would support a 99 pound MAOP (TR at 285-86). The steel pipe for use at the Project was supposed to have a thickness of .25 inches (TR at 201, 286, 302, 313).

On August 28, 2005, Dan, Jr. requested that his father report to weld on the Project the next day; AHR needed another welder to weld with Edward Rocha (TR at 150). On August 29, 2005, Dan, Sr. and Edward Rocha arrived at the Project worksite (TR at 25, 152, 155; CX 1 at 2; *see also* CX 2B). Complainants were to weld about 40 foot sections of the 16 inch diameter steel pipe together (TR at 25, 263, 276). Sections of the steel pipe were stored at the Project worksite in anticipation of installation (TR at 276, 168). This pipe had been at the Project worksite for a "considerable" amount of time (TR at 276-77). New England Gas did not have an inside storage facility, so the pipe was stored outside (TR at 269; *see also* TR at 118, 307).

[5] The gas pipeline at the Project was a distribution line (TR at 271).

In preparing to make their first welds on the steel pipe, complainants examined it and discovered corrosion, rusting, and pitting on the interior wall as well as rusting and scaling[6] at the pipe ends (TR at 29-30, 155; CX 1 at 2). Edward Rocha testified that the pipe was "very rusted … [and] very pitted" and not of high quality "because of the deterioration it had endured … being left out the way it was" (TR at 30). Dan, Sr. described the pipe as being in "terrible condition" and testified that he could not believe that it was to be used in the gas line (TR at 155). Pipefitter Jean Lemieux, on site at the Project to assist complainants in the welding of the pipe, testified that it was "very rusty, very scaly, [and] very pitted" and that this condition was apparent "as far as the eye could see" (TR at 491). Complainants then inspected the pipes that were stored on the other side of the bridge (TR at 167-68). Dan, Sr. observed that mud had run into the pipes, which were sitting on the ground without caps on the ends to prevent water and debris from entering the interior of the pipe (TR at 168; *see also* CX 3F-3K, 3N-3P).

That day, complainants informed Philip Hein, a construction inspector for New England Gas assigned to the Project, and Mr. Crozier (Mr. Hein's supervisor), about the condition of the pipe (TR at 27, 155, 435-35). Dan, Sr. testified that he told Mr. Hein that the pipe should not be welded because it was in "terrible" condition (TR at 155). Dan, Sr. testified that he informed Mr. Rosciti that the pipe was in "terrible" shape and that they should not be welding it (TR at 157). He also testified that Mr. Hein asked that they make one weld, and complainants welded together two sections of the steel pipe (TR at 155-56). After complainants completed the weld ("the August 29 weld"), Mr. Hein asked Dan, Sr. his opinion of the pipe (TR at 159). Dan, Sr. replied that the pipe was terrible and should not be installed (TR at 159-60). The August 29 weld was left for radiographic inspection under API 1104 by Ocean State Technologies ("OST") (TR at 160; *see also* TR at 31, 503-04, 507; RX 8 at 1, dated 9/7/05). Complainants then ceased welding, and from August 30 through September 2, 2005, underwent testing at OST for a tandem welding certification, which they obtained (TR at 29, 159-63, 265, 288-89; CX 1 at 3).

On September 6, 2005, complainants returned to the Project worksite (TR at 31, 163-64). As the August 29 weld had to yet to be x-rayed by OST, from September 6 to 8, 2005 complainants performed two pipe welds and welded a 45-degree fitting and a flange on a length of pipe (TR at 33-34, 163-64; CX 1 at 4-5). On September 8, 2005, complainants learned of the x-ray results on the August 29 weld. OST Technician Robert MacLellan, who is certified to interpret radiographs of welds, informed complainants that the August 29 weld passed inspection (TR at 35, 164, 507, 511-12; *see also* CX 1 at 6; RX 8, Weld Interpretation for W-1, dated 9/7/05).[7] Mr. MacLellan testified that he applied API 1104, the "inspection standard" for welds

[6] "Scaling" in pipes refers to a condition where material from the pipe has become decayed or corroded, but has yet to fall off the pipe (TR at 296).

[7] Although the August 29 weld passed inspection, Mr. MacLellan informed complainants that it only passed marginally (TR at 37, 164, 507). However, as Mr. MacLellan explained, "marginal is a judgment call," and a weld that marginally passes radiographic inspection still passes under API 1104 (TR at 507-08; *see also* TR at 513). Further, in informing complainants that the welds marginally passed inspection, Mr. MacLellan was not asserting that the pipes were only "marginally" safe (TR at 514; *see also* TR at 508).

on the steel pipe, to determine whether a weld passed or failed (TR at 507, 509, 511). Although Mr. MacLellan described the pipe as "rusted" and containing "some debris" and "isolated pitting," he also testified that it was not unusual for welds that he judged acceptable under API 1104 to have imperfections (TR at 506, 516). On or about September 9, 2005, complainants made two more welds, both of which passed x-ray inspection under API 1104 (TR at 38; *see also* CX 1 at 7; RX 8, Weld Interpretation for W-2 & W-3, dated 9/8/05). [8]

On September 12, 2005, Dan, Sr. again voiced concerns to Mr. Hein about rust and scaling on the ends of the steel pipe, and Mr. Hein informed Mr. Crozier of Dan, Sr.'s concerns (TR at 436-37). That morning, Mr. Crozier came to the Project's worksite and discussed their concerns about the pipe's condition and internal corrosion (TR at 39, 169, 297; *see also* CX 1 at 8; RX 6 at 11). According to Dan, Sr. Mr. Crozier agreed the pipe was in poor condition (TR at 169). Complainants then cut two and a half feet off of each end of the pipe, but discovered that the remaining pipe contained too much internal corrosion to make an acceptable weld (TR at 39, 169, 297). Dan, Sr. asked Mr. Crozier what they should do with the pipe, and Mr. Crozier responded that complainants were "quality control" and were to do what they had to do, to which Dan, Sr. responded that the pipe was not fit to weld (TR at 170).[9] Mr. Crozier then told complainants he would get back to them concerning remedial measures that could be implemented to prepare the pipe for welding (TR at 170, 297-98). Prior to meeting with Mr. Crozier, complainants had met with Albert Borden, then a Superintendent for the Project with South Shore (TR at 40, 170; RX 10 at 6, 8-10).[10] Complainants informed Mr. Borden that the pipe was rusted and pitted and voiced their concerns regarding the "safety aspect" of working with such pipe (TR at 41). Mr. Borden informed complainants that he would get back to them after checking with New England Gas or Mr. Rosciti (TR at 41). After complainants had cut back on the pipe ends, Mr. Borden took pictures of the pitting and corrosion in the pipes (TR at 41-46; CX 2D-F, G-H)

Mr. Crozier discussed complainants' concerns with New England Gas's Design Engineer, Director of Engineering and Assistant Vice President of Operations (TR at 298-99; *see also* CX 12 at 2). Around 5:00 P.M. on September 12, Mr. Crozier returned to the Project site and measured the ends of the pipe that complainants had cut with his micrometer, a device that measured the wall thickness of a pipe (TR at 301, 357-58; *see also* TR at 299-300). Mr. Crozier testified that this pipe was a "good piece" because the pitting and corrosion were not present around the whole circumference of the pipe (TR at 301). At its top, the pipe measured .25 inches

[8] Again, Mr. MacLellan informed complainants that these welds marginally passed inspection (TR at 38, 166-67). *But see supra* note 7.

[9] As quality control, complainants were responsible for ensuring that welds on the pipe were of field quality (TR at 377, 380). If complainants decided that a weld was not fit for radiographic inspection, they could cut it out of the pipe (TR at 377-78). Further, if complainants felt that the pipe was too corroded to produce a field quality weld, they could decide not to weld it (TR at 381). According to Mr. Crozier, upon deciding not to weld the pipe, complainants were to cut the pipe ends back in an attempt to find a better section upon which to weld (TR at 380-81).

[10] Edward Rocha testified that Mr. Borden was complainants' boss at the Project (TR at 83).

(TR at 301-02). At its "worst location," the pipe measured .215 inches, for a loss of 14 percent (TR at 301-02; *see also* RX 6 at 11).

On September 13, 2005, Edward Rocha met with Mr. Hein, Mr. Borden, and Paul DelCioppio, the Senior Civil Engineer for the RIDOT at the Project worksite (TR at 47, 55, 416, 420-21; *see also* CX 1 at 9). Mr. DelCioppio testified that they "put [their] heads together" and decided that the ends of the pipe should be cut back until a "viable" section of pipe suitable for welding could be found (TR at 421). No limit was established, and complainants were authorized to cut back on the pipe ends "as far as they wanted" to ensure a field quality weld that would pass inspection under API 1104 (*id.*).

Around 1:00 P.M. that afternoon, Mr. Crozier, Mr. DelCioppio, Mr. Borden and Mr. Rosciti met at the Project worksite to discuss complainants' complaints and concerns with respect to the pipe (TR at 303-04, 307; RX 6 at 11). Mr. Crozier had researched the issue of the quality of the pipe with "the engineering department" and determined that it was acceptable to use (TR at 384). It was compliant not only with the governing regulations at 49 C.F.R. Part 192 but also with New England Gas's more stringent safety policy for wall thickness loss, a policy under which pipes with less than 70 percent remaining nominal wall thickness were generally repaired or replaced (TR at 275-76, 323-25). However, given that the majority of the pipe at the Project contained worse corrosion at its ends than in the interiors, it was agreed at the 1:00 P.M. meeting that complainants could 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 (TR at 307, 317-18, 323, 319). This decision would allow complainants, who were quality control responsible for the submission of a field quality weld, to weld only on areas of pipe that they found acceptable (TR at 384). Mr. Crozier explained that after installation, the inside of the pipe would then be treated with a "poly-pig," a device that would scrape "on a molecular level … all [of] the crap out of the pipe" as well as some surface metal (TR at 324-25, 396-97).

Complainants were at the Project worksite that day and observed the meeting from about 50 feet away (TR at 172, 209-10). Mr. Crozier testified that he communicated to Mr. Rosciti and Mr. Borden that he found the pipe "acceptable" (TR at 325-26). Mr. Borden also informed complainants that New England Gas thought the pipe was good (TR at 203-05, 408; *see also* TR at 125, 454-55, 473, 494). As the additional cutting and grinding work was not within the scope of the original contract held between South Shore and Shire, Mr. DelCioppio introduced a "Report of Change" (RX 9) (*i.e.*, a method by which new work could be introduced into a contract), so that South Shore would be compensated for labor expended and equipment used (TR at 307-09, 423-26).

On September 14, 2005, before arriving at the Project worksite, complainants visited South Shore's offices to voice their concerns about the pipe with Mr. Rosciti (TR at 173 -74; CX 1 at 10). Dan, Sr. testified that he told Mr. Rosciti that complainants refused to further weld any pipe "in the condition that it's in" (TR at 173). Dan, Sr. testified:

> [I]t's a safety factor, there's gas running through this on an overpass over Interstate 95…. [I]t shouldn't be put on it, the pipe isn't fit to be put on…. [I]t's rusted, it's pitted, I called you the first day, you said you were going to get back to

> me and you haven't, I want you to know now and in front of Al and Danny, all of you to know, this pipe is not safe to put on the bridge.

(*id.*; *see also* TR at 47-48). Edward Rocha testified that Mr. Rosciti urged complainants to complete their welding of the steel pipe and that if it failed to pass radiographic inspection or a pressure test, it would be cut out of the gas line, allowing South Shore to make more money (TR at 48-49; *see also* TR at 174; CX 1 at 10). Concerned about the "safety aspect" of welding such pipe, complainants reiterated that the pipe was in "bad shape," refused to weld it any further, and left the office (TR at 48, 174). According to complainants, a welder was never supposed to grind down the inside of the pipe for a fear of reducing the pipe's wall thickness and rendering it unsafe to install and use in a gas line (TR at 49-50, 127-28, 183-84).

Upon returning to the Project worksite, complainants met with Mr. Hein (TR at 175, 438-39; CX 1 at 10). Dan, Sr. asked him what had been decided with respect to the pipe (TR at 175). He said that Mr. Hein was instructed by Mr. Crozier to tell complainants to grind, brush, and weld the pipe and then "push" it into position for installation (*id.*). Complainants claim that Mr. Hein told them not to cut back on the pipe ends because of concern over a shortage of available pipe in the yard (TR at 176; *see also* TR at 493). Mr. Hein testified, however, that he did not remember telling them that they could not cut back the pipe (TR at 439). Later, Mr. Borden came to the Project worksite, and complainants informed him that they would not be welding any more of the gas pipe (TR at 177). Mr. Borden then assigned complainants to weld the tracks for the water pipeline (TR at 51, 177-78; CX 1 at 11). Complainants welded track for the water pipeline for the remainder of the week, and no further welding was performed on the gas pipeline (TR at 51, 177-78; CX 1 at 11-13).

On September 20, 2005, Dan, Jr., who was not present for the 1:00 P.M. meeting on September 13, met with Mr. Rosciti, Mr. Borden, and Mr. Crozier (TR at 117, 119, 330-31; CX 1 at 15; RX 6 at 13). Prior to the meeting on September 20, Dan, Jr. had gone to the Project worksite and observed the condition of steel pipe (TR at 117-18). Dan, Jr. observed that the pipe was "horrible," "full of dirt," and was improperly stored (*id.*). He. stated that the pipe was "junk" and that complainants were not comfortable welding it (TR at 331). Mr. Crozier then stated that he thought the issue had been "straightened out last week," as the parties at the 1:00 P.M. meeting had decided to allow the welders to cut and grind the pipe as needed (TR at 331). Pipefitter Lemieux testified that Mr. Borden had come to the Project worksite prior to September 20, 2005 to okay the cutting of the pipe (TR at 494). Dan, Jr. then became upset and reiterated to Mr. Rosciti that complainants were not going to grind the ends of the pipe and weld it (TR at 33-35, 120, 458). In response, Mr. Rosciti testified that he said "well, what do you want me to tell you, we have to get other welders" (TR at 458). Dan, Sr. testified that Mr. Rosciti told Dan, Jr. that "we have nothing else for them, let them go" and that Dan, Jr. then instructed complainants to gather their belongings and leave the Project worksite (TR at 179-80; *see also* TR at 52; CX 1 at 15; RX 10 at 20). Complainants did so and then left the Project (TR at 180).

Subsequent to September 20, 2005, South Shore/AHR retained other welders to complete the welding on the Project's gas line, which was ultimately installed at the bridge at the Point Street Overpass and is currently in service (TR at 121-22, 284, 336-37, 459). The other welders had to make cuts on the ends of the pipe, grind it and clean it in preparation for welding (TR at

336-37 399-400); and because a substantial portion of the pipe at the construction site had to be cut off, additional pipe had to be obtained from New England Gas's own inventory (*id.*). By letter dated October 13, 2005, Edward Rocha informed the RIDOT of complainants' belief that the rust, pitting, and "degradation of the pipe" rendered it a hazard to the safety of the public (CX 4; *see also* TR at 63-65, 67, 184-85).

Overview of the Employee Protection Provisions of the PSIA

Section 6 of the PSIA prohibits employers from retaliating against employees because they: provided information to the employer or the Federal government relating to violations or alleged violations of Federal law relating to pipeline safety; refused to engage in any practice made unlawful under Federal law relating to pipeline safety; filed, testified, assisted in a proceeding against the employer relating to any violation of any Federal law relating to pipeline safety; or are about to take any of these actions. 49 U.S.C. §60129(a); 29 C.F.R. §§1981.100(a); 1981.102. The PSIA provides protections and burdens of proof similar to those provided to whistleblowers under the Energy Reorganization Act of 1974, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, and the Surface Transportation Assistance Act of 1982. *See* Procedures for the Handling of Discrimination Complaints under Section 6 of the Pipeline Safety Improvement Act of 2002, Interim Final Rule, 69 Fed. Reg. 17,587 (Apr. 5, 2004).

For complainants to prevail, they must demonstrate that they engaged in behavior or conduct protected by the PSIA and that the protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in their complaints. 49 U.S.C. §60129(b)(2)(B); 29 C.F.R. §§1981.104(b); 1981.109(a). As this case was fully tried on the merits, it is not necessary for me to determine whether the complainants have presented a *prima facie* case of unlawful discrimination.[11] *See, e.g., Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (Sept. 30, 2003). Instead, I review the record to determine whether complainants have prevailed on the ultimate question of liability, namely, whether they engaged in PSIA-protected activity, whether respondents knew about complainants' protected activity and took unfavorable personnel action against them, and whether complainants' protected activity was a contributing factor[12] in the unfavorable personnel action alleged. 49 U.S.C. §60129(b)(2)(B); 29 C.F.R. §109(a); *see also, e.g., Kester*, *supra*; *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004). Relief under the PSIA (*see* 49 U.S.C. §60129(b)(3)(B); 29 C.F.R. §1981.109(b)) may not be granted to the employee if the

[11] *See* 29 C.F.R. §1981.104(b)(1) for the elements of complainants' *prima facie* showing.

[12] A "contributing factor" is any factor which, alone or in connection with other factors, tends to affect the outcome of the employer's decision, and complainants are not required to prove that their protected activity was the sole, the substantial, or even the motivating factor in respondents' decision to take the unfavorable personnel action. *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

employer demonstrates by clear and convincing evidence[13] that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 49 U.S.C. §1029(b)(2)(B)(iv); 29 C.F.R. §1981.109(a).

The PSIA prohibits an employer from retaliating against an employee because the employee:

> refused to engage in any practice made unlawful by this chapter [*i.e.*, chapter 601, subtitle VIII of title 49 of the United States Code] or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer[.]

49 U.S.C §60129(a)(1)(B). An employee is not required to establish that the allegedly illegal practice in which he has refused to engage actually violated Federal law relating to pipeline safety. *See* Procedures for the Handling of Discrimination Complaints Under Section 6 of the Pipeline Safety Improvement Act of 2002, Final Rule, 70 Fed. Reg. 17,889, 17,890 (Apr. 8, 2005) (citing *Gilbert v. Fed. Mine Safety & Health Review Comm'n*, 866 F.2d 1433, 1439 (D.C. Cir. 1989)). 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." *Id*. at 17,891 (citing *Liggett Industries, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 923 F.2d 150, 151 (10th Cir. 1991)); *see Eltzroth v. Amersham Medi-Physics, Inc.* ARB No.98-002, OALJ No. 97-ERA-31 (Apr. 15, 1999)). Unreasonable work refusals will not qualify for protection. *Amersham*, ARB No. 97-ERA-031, at 10. Whether an employee is reasonable in his belief that a violation of Federal pipeline safety law exists depends on the knowledge available to a reasonable person in the circumstances with the employee's training and experience. *Pensyl v. Catalytic, Inc.*, 83-ERA-2, at 4 (Sec'y Jan. 13, 1984); *Stockdill v. Catalytic Indust. Maint. Co., Inc.*, 90-ERA-43, at 2 (Sec'y Jan. 24, 1996).

However, an employee's refusal to work loses its protection after the perceived hazard has been investigated by responsible management officials and, if found safe, is adequately explained to the employee. *Amersham*, ARB No. 97-ERA-031, at 5; *Stockdill*, 97-ERA-43, at 2. In so doing, the employer must address the employee's concerns in a manner that reasonably quells his fears. *See Gilbert*, 866 F.2d at 1441; *see also Blackburn v. Metric Constructors*, 86-ERA-4, at 14 (Sec'y June 21, 1988). But once an employer has investigated the perceived danger and adequately explained the results of that investigation to the employee, it has fulfilled its duty to respond to the employee's good faith work refusal. *Amersham*, ARB No. 97-ERA-031, at 10. At that point, absent either some further explanation from the employee as to why his continued work refusal is justified or some further inquiry into the results of the employer's investigation, the employee's work refusal loses its status as protected activity. *See Stockdill*, 90-ERA-43, at 3.

[13] "Clear and convincing" evidence is evidence that "indicat[es] that the thing to be proved is highly probable or reasonably certain," (*Black's Law Dictionary* 596 (8th ed. 2004)) and is an evidentiary standard that is higher than a preponderance of the evidence but less than beyond a reasonable doubt. *See Peck, supra*.

Discussion

Before proceeding, it should be pointed out that this is not a case pitting the "good guys" against the "bad guys." As I discuss here, complainants honestly believed that the pipes they were being asked to weld were unsafe regardless of whether they seemed to meet the applicable safety standards. I am equally convinced that the representatives for respondents and the RIDOT believed that the pipes complied with all applicable safety standards and were safe to weld and install in the gas line. The fundamental question presented by this case is how such a stalemate is resolved.

Complainants argue that they had a good faith belief that if they installed the steel pipe as requested by AHR and New England Gas, they would be installing pipe that posed a safety risk to the public. They allege that they were terminated in retaliation for their refusal to install the pipe in violation of the PSIA and seek back wages and compensatory damages as well as reinstatement for Edward Rocha. Respondents allege that complainants were never asked to violate Federal law relating to pipeline safety and that they could not have had a reasonable belief that the steel pipe was unsafe or that they were being asked to violate Federal pipeline safety law in welding it. Further, they assert that even if complainants had a reasonable belief that the steel pipe was unsafe, respondents addressed their concerns in a reasonable manner by instructing them to grind and cut the pipe.

It is undisputedly clear that the steel pipe for use at the Project contained some internal corrosion and was rusted, scaling, and pitted in both the interior and on the ends. Complainants described the corrosion in detail (*see* TR at 29-30, 39, 42, 44-45, 62, 66-67, 88, 155-56, 166-68, 173, 182, 231), and their credible testimony was corroborated by the testimony of Dan, Jr., Mr. Lemieux and Mr. MacLellan (TR at 116-18, 128, 491, 505-06; *see also* TR at 497-98, 516). Additionally, respondents' other witnesses testified to the scaling, pitting and corrosion that were present in the pipe (TR at 295-97, 301, 317-78, 323, 399, 407, 419, 421, 425, 437, 454; RX 10 at 9; *see also* TR at 307, 310; RX 9). While it is true that complainants did not employ a micrometer or a pit meter to measure the depth of the pitting in the pipes or the amount of any suspected wall loss, they determined, based on their familiarity with pipes, a familiarity borne out of many years of experience in the pipeline industry (TR at 19-21, 87-88, 116, 126, 136-49, 180-81, 198-99, 205-07), that the steel pipe was unsafe to install in the bridge's gas line. Their concerns were of an interconnected nature. As quality control responsible for the submission of field quality welds (TR at 39, 170, 239-40, 286, 295, 297, 377-81; *see also* TR at 274-75), complainants did not wish to weld on pipe ends that contained such rusting, scaling, and corrosion. Further, given that their September 12 cut on the ends of the pipe yielded an interior with continued corrosion, complainants were certainly reasonable in their beliefs that they might not have been able to produce field quality welds on the remaining supply of such seemingly poor pipe. Further, on the basis of their training and experience, complainants did not wish to grind corrosion from the inside of the pipe interior for fear of thinning it and altering its integrity and strength (TR at 49-50, 92). And although Mr. Crozier credibly explained the process by which the pipe interior would cleaned by the poly-pig device (TR at 324-25, 396-97), it was complainants credible belief that a welder would grind only the fittings in preparation for a weld, not the entire pipe. Finally, complainants diligently reported their safety concerns with respect to the pipe to representatives of respondents and the RIDOT on August 29, September 12,

September 13 and September 14.[14] That they continued in their belief that the steel pipe was unsafe even after Dan, Jr. requested that they leave the Project is evidenced by Edward Rocha's October 13 letter to the RIDOT and complainants' testimony (CX 4; *see also* TR at 63-65, 67, 184-85).

On the basis of all of the foregoing, I find that complainants held their belief that the pipe was unsafe to install in the gas line in good faith. Further, I find that a reasonable person in the above-noted circumstances with complainants' experience and training would have believed that the pipe was unsafe to install in the gas line. *See Pensyl*, 83-ERA-2; *Stockdill*, 90-ERA-43; *see also Gilbert*, 866 F.2d at 1439. Complainants repeatedly and diligently reported their good faith and reasonable concerns not only to representatives of their employer, but to representatives of New England Gas and the RIDOT.

However, the record also makes clear that representatives of respondents and the RIDOT took complainants' concerns very seriously (*see* TR at 78, 90-91, 124-25, 298, 437, 447-48). Mr. Crozier, who was the New England Gas representative responsible for ensuring the company's compliance with API 1104 and the governing regulations, not only measured the ends of the pipe that complainants identified as corroded, but confirmed with engineering staff that the pipe was acceptable (TR at 384). He reported this information to representatives of the RIDOT, New England Gas and South Shore, and Mr. Borden informed complainants either that the pipe was good or was not bad (TR at 203-05, 408; *see also* TR at 125, 454-55, 473, 494). Yet, although the pipe was acceptable, the parties at the 1:00 P.M. meeting on September 13 authorized complainants to cut back on the pipe ends without limit so that they could exercise their judgment as quality control responsible for the submission of a field quality weld. This authorization was communicated by Mr. Borden prior to September 20 (TR at 494).

In resolving this stalemate, I note that complainants never came forth on September 20, or at any other time after their initial refusals to weld the steel pipe, with any data or other evidence that would controvert Mr. Crozier's determination that the pipe met all applicable standards and was acceptable to weld and install. Additionally, there is no indication from the record that they made any further inquiry into the adequacy of respondents' proposal that they cut the pipe ends as much as needed. *See Stockdill*, 90-ERA-43, at 3. Such proposal appears to have met complainants' safety and quality concerns with respect to the steel pipe. Accordingly, respondents were unaware why complainants were continuing to refuse to weld. In addition to putting forth no new evidence that would contradict Mr. Crozier's testimony, they brought forth no additional reasons to explain why respondents' authorization for complainants to cut the pipe without limit would not solve their safety and quality control concerns. Having found the pipe to be compliant and having offered complainants a solution that would assuage their fears about the pipe's safety, respondents fulfilled their duty to respond to complainants' good faith work refusal. *Amersham,* ARB No. 97-ERA-031, at 10. Accordingly, any protection complainants would have had for their work refusal ceased when they failed to give further explanation or

[14] In voicing their concerns, complainants engaged in activity protected by the PSIA. 49 U.S.C. §60129(a)(1)(A). However, I find nothing in the record to suggest that complainants' internal safety complaints contributed to their terminations.

make a further inquiry into the adequacy of respondents' response to their concerns. *See Stockdill*, 90-ERA-43, at 3.

Since the complainants were unwilling to perform the work for which they were hired, and since they were the only welders on the Project, respondents had little choice other than to replace the complainants with welders who would do the work. Complainants dismissal under these conditions did not violate the employee protection provisions of the PSIA. Thus, when Dan, Jr. instructed complainants to leave the Project after Mr. Rosciti noted the need for other welders, no violation of the employee protection provisions at §6 of the PSIA occurred. Therefore, these claims are denied.

ORDER

IT IS ORDERED that the complaints of Daniel B. Rocha, Sr. and Edward Rocha under the Pipeline Safety Improvement Act of 2002 are **DENIED**.

A

JEFFREY TURECK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. §§1981.109(c) and 1981.110(a) and (b). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders to which you object. A failure to object to specific findings and/or conclusions of the administrative law judge shall generally be considered waived. Once an appeal is filed, inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties and the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. Copies of the Petition and briefs must also be served on the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §1981.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§1981.109(c) and 1981.110(b). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of

Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §1981.110(b).