Youngstown Sheet and Tube Company *and* Ronald D. Ellis. Case 13–CA–16220

April 3, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On October 31, 1977, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Youngstown Sheet and Tube Company, East Chicago, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Administrative Law Judge: This case was heard at Chicago, Illinois, on July 18, 1977, based on charges filed February 17, 1977, and a complaint issued April 15, 1977, alleging that Respondent violated Section 8(a)(1) of the Act. The General Counsel and Respondent have filed briefs.

Upon the entire record in the case,[1] including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Respondent, an Ohio corporation, is engaged in the manufacture and distribution of metal products at its place of business at East Chicago, Indiana. During the past calendar year, Respondent has sold and shipped goods valued in excess of $50,000 from its facility at East Chicago to points outside the State of Indiana, and during the same period, it has purchased and received goods at that facility from points outside the State of Indiana valued in excess of $50,000. I find, as Respondent concedes, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. United Steelworkers of America (herein called the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Posture of the Case*

In brief summary, employee Ronald Ellis refused to perform certain repair work on a conveyor chain, invoking the "safety clause" of the contract between Respondent and the Union; Respondent refused to accept Ellis' invocation of the safety clause, sent him home for the remainder (7 hours) of his shift, and gave him a formal reprimand. The General Counsel contends that Ellis was suspended and disciplined for asserting rights under the contract, and that Respondent thereby violated Section 8(a)(1) of the Act. Respondent contends first, that this proceeding should be deferred to the grievance-arbitration procedure set forth in the contract, a procedure that Ellis is "voluntarily pursuing," and, second, that Ellis did not invoke the safety clause in good faith, but rather used that clause as subterfuge for furthering the position of the millrights and riggers in a "jurisdictional dispute" that had existed at the plant for some time.[2]

[1] Respondent's and the General Counsel's unopposed motions to correct the transcript are hereby granted.

[2] Respondent also claims that in any event an individual pursuing an asserted contractual right is not engaged in "concerted" activity protected by the Act. Respondent recognizes, correctly, that Board law is to the contrary, and that I am bound by Board law, but obviously is preserving this point for possible court review of any adverse determination that I or the Board may make. I note, in addition, that there is ample court of appeals support for the Board's view; e.g., *N.L.R.B.* v. *Ben Pekin Company*, 452 F.2d 205 (C.A. 7, 1971); *Roadway Express, Inc.* v. *N.L.R.B.*, 532 F.2d 751 (C.A. 4, 1976). Cf. *N.L.R.B.* v. *Northern Metal Company*, 440 F.2d 881 (C.A. 3, 1971). I note also that the briefs of both the General Counsel and Respondent fairly and thoroughly present the facts and support arguments, and have been extremely helpful in resolving the questions here at issue.

B. *The Facts*[3]

On the morning of October 4, at 7:10 a.m., shortly after employee Ellis' shift began, Supervisor William Riddick gave Ellis a written work assignment to repair a large conveyor chain, approximately 300 feet long, used to transport steel coils between various areas of the mill. The chain is composed of a series of 200 pound links, held together by a shaft. It is similar to a bicycle chain, and rides on a guide track, at floor level, returning on a track about 10 feet beneath the floor. At each end of the chain are gear boxes and sprocket wheels. On occasions, the conveyor chain breaks, and requires repair. The Company has assigned such repair work to both millrights[4] and employees of the Bridge Shop, a centrally located department from which employees are sent to four different mills, including the 84" Hot Strip Mill. The touchstone for these assignments is whether intricate rigging, or merely routine chain repairs, is required. The former is done by Bridge Shop employees; the latter by millrights. At times, both Bridge Shop employees and millrights are assigned repair work, when both types of repair are involved.

For a number of years, millrights (or at least some of them) and Bridge Shop employees have claimed that all conveyor chain repair work should be performed by Bridge Shop employees. A grievance to that effect filed by Nicholas Martinez, a Bridge Shop boilermaker employee, was denied by the Company early in 1976.

The repair work to which Ellis was assigned was occasioned by a break in the conveyor chain about 20 feet long, which had "burned" and broken off, with a portion falling into the area 10 feet under the floor. Repairing this damage required that the section of chain that had fallen be pulled from the area under the floor, bringing it up over a sprocket wheel, and attaching it to the sprocket wheel. The latter operation would be performed with an overhead crane; the former with either a contract or a crane.[5] When either a crane or a tractor is used, such equipment is manned by an operator, whether Bridge Shop employees or millrights are being used for the repair work. When Ellis received the assignment, he went to the work area to look at the job. He then left, got Ken Zerby (his "griever"), also a millright, to look at the job with him, and went to the maintenance office, where Ellis and Zerby spoke with Riddick and Assistant General Foreman Gerald Purevich, Riddick's superior. According to Riddick and Purevich, Ellis asked Riddick for an explanation of the specific job duties involved. Riddick told Ellis that he was to remove the chain from below the floor, using a crane or tractor to remove it from the hole and lift it over the sprocket to replace it on the track, and then join the two pieces of chain together. Zerby said that the assignment was not millright work, but belonged to Bridge Shop employees, with Purevich replying that the particular work had always been performed by millrights.

After a phone call by Zerby, Ellis said (his own testimony) "We didn't have enough men to do the job safely, and that it was normal riggers work to pull the chain out from under the floor." Purevich responded "No way, millright did it before. They are going to do it again." Purevich then ordered Ellis to perform the assignment. Ellis then picked up his tools and his assigned helper, and went to the jobsite with Zerby. When Purevich, who had left the area temporarily, returned to the jobsite, he asked why the work had not begun. Riddick told Purevich that Ellis "contended it was not his job; it should be a Bridge Shop job," and then Purevich told Ellis "to start the work immediately or he would be sent home for insubordination." Ellis and Zerby then conversed for a few minutes, Zerby telling Ellis that he had spoken with Norman Purdue, president of the Union, and that Purdue had advised that Ellis should invoke the safety clause if he felt he did not have enough people.[6] Ellis then returned to Riddick and Purevich and stated that his time should be stopped, the job was unsafe, and he was invoking the safety clause. When Purevich asked Ellis what was unsafe about the job, Ellis replied, according to him, by walking over to the hole, pointing to the end of the chain, and saying "That is the part that is unsafe." Riddick testified that Ellis said "The job is unsafe." And Purevich testified that Ellis said "Everything in general," that Ellis "just pointed and he said 'That's unsafe, everything.' " Purevich then said that he refused to accept Ellis' invocation of the safety clause and sent Ellis home for the remainder of the shift, also issuing him, the next day, a formal reprimand for "insubordination."

Ellis then, the same day, went to the union hall, meeting with Robert Rospierski, chairman of the Union's grievance committee. That afternoon, Rospierski met with Dave Blazevic, superintendent of the 84" Hot Strip Mill, and looked over the jobsite involved. He refused to rule on the safety question because, as he testified, the Company failed to live up to the agreement and it was then "after the fact for me to rule in any type of way shape or form if the job was in fact, safe or unsafe."

A grievance was subsequently filed asserting that the Company violated the contract by sending Ellis home for insubordination. That grievance, at the time of the hearing herein, had been appealed by Ellis to step III of the grievance procedure.

The next day, Ellis was given another assignment to work on the chain, "omitting the part of pulling the chain from under the floor." He testified that he performed this work. On October 7, Ellis received a work assignment to "Have cables, tools and parts to install #2 conv. on job by 8:00 a.m." He testified that he did not perform this work

[3] There are some conflicts between the testimony of Ellis and that of Company Supervisors Riddick and Purevich as to the precise sequence of events and exactly what was said by these participants in the incident giving rise to this proceeding. For reasons set forth below, I do not regard these discrepancies as particularly significant to a resolution of the issues, although the parties seem to.

[4] With respect to the particular chain here involved, these millrights would be maintenance personnel regularly assigned to the department where it is located, the 84" Hot Strip Mill.

[5] The parties differ as to whether a crane could be used for this part of the operation; the General Counsel contending that only a tractor would be feasible for pulling the chain from under the floor. Based on a schematic (not to scale) diagram, and on all the testimony, I am inclined to agree with the General Counsel, although my decision in no way turns on a resolution of this difference.

[6] The testimony of Ellis was a bit confusing as to the precise sequence of events. I would imagine that the phone call by Zerby referred to earlier must have taken place about this time, and that Zerby called Purdue.

because Superintendent Blazevic did not show up. According to Purevich, two millrights and a helper later performed the part of the job involving pulling the chain from under the floor, and it took all or part of three shifts to complete.[7]

The discrepancies between the testimony of Ellis and that of Riddick and Purevich concerning how many times, and where, Riddick explained the details of the job to Ellis, and whether Ellis in fact asked for an explanation, are both matters which, in agreement with the General Counsel, I consider of "no moment," and whether Riddick specifically told Ellis to pull the chain with a tractor (as Ellis testified), or with a tractor or a crane (as Riddick testified), I consider, in agreement with Respondent, as "totally irrelevant."[8]

The third discrepancy is relevant to whether or not Ellis was invoking the safety clause "in good faith." Thus Ellis testified that when he first went to the maintenance office he told Riddick and Purevich that there were not enough men to do the job "safely." Riddick and Purevich claim that Ellis said only that the job should be assigned to Bridge Shop employees. And the testimony of these three witnesses differs as to precisely what Ellis responded to Purevich's subsequent query as to what was unsafe about the job, although all agree that he at least pointed in general to the chain, with Ellis claiming that he pointed to the specific portion of the chain that was below the floor. I do not believe that any of the three deliberately tailored his testimony in these respects. All three witnesses, in fact, impressed me as credible and forthright. For reasons fully explicated below, in connection with resolving the key question of whether Ellis was in good faith when he invoked the safety clause, I conclude that Ellis did in fact refer to the work as belonging to Bridge Shop personnel, but that he also mentioned that there were not enough men to do the job safely while in the maintenance office, and was at least intending to point to the part of the chain beneath the floor when he said "That's the part that's unsafe."

As noted above, the contract between Respondent and the Union contains a detailed grievance-arbitration procedure, and there is no dispute but that the instant controversy is cognizable thereunder. The "safety clause" in the contract (article IX, sec. 3) is also crucial to the issues herein, and I therefore set it forth in full, as follows:

ARTICLE IX

Safety and Health

Section 3. If an employee shall believe that there exists an unsafe condition, changed from the normal hazards inherent in the operation, so that the employee is in danger of injury, he shall notify his foreman of such danger and of the facts relating thereto. Thereafter, unless there shall be a dispute as to the existence of such unsafe condition, he shall have the right, subject to reasonable steps for protecting other employees and the equipment from injury, to be relieved from duty on the job in respect of which he has complained and to return to such job when such unsafe condition shall be remedied. The Management may in its discretion assign such employee to other available work at the plant or works. If the existence of such alleged unsafe condition shall be disputed the Chairman of the Grievance Committee of the Union at the Plant or works and the Management's representative or his designee shall immediately investigate such alleged unsafe condition and determine whether it exists. If they shall not agree and if the Chairman of the Grievance Committee is of the opinion that such alleged unsafe condition exists, the employee shall have the right to present a grievance in writing to the Management's representative or his designee and thereafter to be relieved from duty on the job as stated above. Such grievance shall, if requested by the authorized representative of either of the parties in Step III of the grievance procedure, be reviewed at a meeting between such representatives held promptly and in no case later than the next working day following the request. If the grievance is not withdrawn or resolved at the meeting or if the meeting is not held by the next working day following the request therefor, the grievance shall be presented without delay directly to the impartial arbitrator under the provisions of Section 3 of Article III of this Agreement, who shall determine whether such employee was justified in leaving the job because of the existence of such an unsafe condition. Should either Management or the Arbitrator conclude that an unsafe condition within the meaning of this Section 3 existed and should the employee not have been assigned to other available equal or higher-rated work, he shall be paid for the earnings he otherwise would have received.

Of final relevance here is the testimony elicited at the hearing concerning the procedures under article IX, section 3, which comports generally with the language thereof (as it naturally would), but more importantly, shows the parties' understanding and the practice to be in conformance. The procedure in the contract is that the employee who believes an unsafe condition exists is first "to notify his foreman of such danger." Riddick testified that when an employee contends something is unsafe, "usually it wouldn't get to the part where he invokes the safety clause. If I also see the job, I see that something is unsafe, if I see that it is unsafe, then I get the safety hazards repaired or fixed before the employee does the job. If I disagree, I tell the man as far as I am concerned, the job is safe, and that he will do the job." If the employee is still unwilling to do the job, "then he invokes the safety clause." Dennis Fillippo, the Company's superintendent of industrial relations, testified that "when an employee feels that he had a belief there is an unsafe condition . . . he goes to his foreman and registers a

[7] There is again some ambiguity in the record. As nearly as I can gather (and this is the only resolution that fits all the testimony), Ellis must have performed some of the work on October 5, apparently did not perform the work of removing the chain, assuming that the assignment meant that on October 7 because Blazevic was not there, and the latter portion of the work was done several weeks later by other millrights working during three different shifts.

[8] The General Counsel argues that "simple common sense" shows a tractor would necessarily have to be used because of the position of the chain under the floor. He may well be correct, but I see no necessity for resolving this question.

complaint. If there is a dispute with respect to whether or not there is an unsafe condition, then the employee calls the Chairman of the Grievance Committee who comes out to make a determination along with management representative, safety representative, and if the parties disagree as to the existence of the unsafe condition, then the employee must file a grievance in writing, present it to myself and is thereafter relieved of duty."

C. *Discussion*

1. The deferral argument

Respondent's claim that the instant proceeding should be deferred because of Ellis' pending grievance at step 3 at the time of the hearing, rests on its construction of the *Dubo Manufacturing Corporation* case (142 NLRB 431, 1963), where the Board deferred action on alleged 8(a)(3) violations "pending completion of the arbitration directed by the district court, and notification thereof to the Board." Respondent contends that the recent Board decision in *General American Transportation Corporation,* 228 NLRB 808 (1977), although holding that the Board would no longer defer to the existence of a grievance-arbitration procedure alleged violations of the Act involving interference with employees' Section 7 rights under Section 8(a)(1) or (3) of the Act, does not affect deferrals under *Dubo,* which itself preceded the Board's *"Collyer* doctrine" (192 NLRB 837, 1971), overruled in part by *General American, supra.* Respondent derives its view from the following language in then Chairman Murphy's "swing" opinion in *General American:* "I believe that deferral to an arbitrator's award is appropriate under the *Spielberg* guidelines where all of the parties, including the affected employee, have voluntarily submitted their dispute to the arbitrators. I will not, however, compel an unwilling party to go to arbitration if that party charges that employee *Section 7 rights have been violated."* The following footnote in that opinion is also quoted by Respondent: "Indeed, I would honor an arbitrator's award under the *Spielberg* guidelines even if the award resulted from deferral by our Regional Offices under the prevailing *Collyer* policy." Respondent also points to NLRB General Counsel John Irving's memorandum 77-58, issued May 25, 1977, stating that: "The *GAT* decision did not alter the distinction between *Dubo* and *Collyer;* nor did it undermine the validity of *Dubo* deferrals."

In my view, the General Counsel correctly contends that *Dubo* "is simply distinguishable on its facts from the instant case." In *Dubo,* as noted, the district court had already ordered the company to arbitrate the dispute at the time the case came to the Board, and such arbitration was pending. Here, even though Ellis has pursued his grievance to the third step of the grievance procedure, the matter has not been submitted to arbitration, and there is no particular reason to believe that it would be. The fact that Ellis filed charges with the Board, indeed, strongly suggest that he has chosen this forum, rather than the arbitral process, for ultimate resolution of his dispute. And, as the General Counsel notes, Ellis, not the Union, which alone would have power to compel arbitration, is the Charging Party herein. The concurring opinion of former Chairman Murphy in *GAT* does not support Respondent's view, in my opinion. She states that deferral would be appropriate where "*all* of the parties . . . *have voluntarily submitted their dispute to the arbitrators.*" (Emphasis supplied.) That is hardly the situation here, with no arbitration pending.

Respondent draws some strength from the General Counsel's memorandum to his Regional Directors, in which he opines that the *GAT* case "did not alter the distinction between *Dubo* and *Collyer;* nor did it undermine the validity of *Dubo* deferrals." As I view *Dubo* itself as distinguishable from the instant case, General Counsel Irving's statement to that effect is not itself helpful to Respondent. But his further statement that "if the Charging Party is in the grievance-arbitration channel and *voluntarily* elects to stay there, after having been apprised of his 'entitlement' under *GAT* to a General Counsel or Board determination, there is nothing in *GAT* that suggest that his case cannot be deferred under *Dubo* so long as he opts to continue in that channel. To the contrary, former Chairman Murphy's concurring opinion in *GAT* suggests that such deferral would be appropriate," is more helpful. However, as the General Counsel also points out, a memorandum from the General Counsel to his staff is not binding on either the Board or an Administrative Law Judge. Furthermore, there is no indication here that Ellis was ever "apprised of his entitlement" to a Board determination, and made any conscious election to forego that right, by remaining in the grievance-arbitration process.

I do not find it necessary to pass on the General Counsel's alternative argument herein, that the instant case would not be appropriate for deferral even under *Collyer* because it involves an alleged interference with Ellis' right to use the grievance procedure itself,[9] in view of *GAT's* reversal of *Collyer* insofar as it could otherwise apply.

2. The argument that Ellis did not invoke the safety clause "in good faith"

Respondent's contention that Ellis did not invoke the safety clause in good faith is predicated on the following: (1) Ellis did not invoke that clause immediately, doing so only after consultation with Zerby, who had earlier spoken with Perdue, the Local's president; (2) The existence of the jurisdictional dispute regarding such types of work assignments on repairing the conveyor chains; (3) the fact that Ellis' claim that insufficient men had been assigned to the job "is the essence of" that jurisdictional dispute; (4) the fact that Ellis allegedly did not follow the proper procedure, because he did not call the chairman of the grievance committee; (5) the fact that the job was "not unsafe and was subsequently performed by other millrights;" (6) the fact that Rospierski, chairman of the grievance committee, "refused to rule on Ellis' safety claim;" and (7) the sequence of events, and Ellis' statements (as testified to by

[9] Predicated on Respondent's refusal to permit the invocation of the safety clause, which in turn precluded Ellis from using the grievance procedure in conjunction with the "unsafe" claim. The General Counsel's argument in this respect is ingenious, although I am inclined to regard it as somewhat circular, in view of Ellis' undoubted right to use the regular grievance procedure, as he did, with regard to his suspension and reprimand.

Riddick and Purevich), prior to Ellis' invocation of the safety clause.

To the extent that Respondent's contention is based on Ellis' asserted failure to follow the contract's procedures, I find it without merit. The testimony of Riddick, quoted above, shows that actual invocation of the safety clause is not "usually" the procedure followed at the outset. Rather, the employee "goes to his foreman and registers a complaint." I have already concluded that Ellis, although referring to the work as belonging to Bridge Shop personnel at the initial meeting with Riddick and Purevich at the maintenance office, also said, as he testified, that there were not enough employees to do the job safely. His conduct therefore comports with the contract's requirements, and with Riddick's explanation of them. There is nothing inconsistent or mutually exclusive between a claim that the work is "Bridge Shop" work, and a claim that the work is unsafe. Indeed, the jurisdictional dispute that had existed as to this type of work was not a claim *for* work by any of the maintenance personnel, but an assertion that the work should *not* be assigned to them. Furthermore, as the General Counsel points out, Ellis himself had performed work on conveyor chains on numerous occasions, he did not protest the work assignment on October 4 when it was given to him, but only after he went to the jobsite to see what was involved, and he did not protest the next day when assigned to the conveyor chain work without the part he believed to be unsafe. All these factors support Ellis' claim that it was his belief that the particular part of the job involving removing the chain from under the floor was unsafe, rather than the on going "jurisdictional dispute," that motivated him to invoke the safety clause. These same factors furnish a basis for concluding that Ellis did mention the "safety" aspect he was concerned with to Riddick and Purevich.

Indeed, it is difficult to see how the ultimate invocation of the safety clause could have accomplished anything at all in furtherance of the jurisdictional dispute. Assuming that Respondent's officials, although disagreeing that the job was unsafe, had followed through with the article IX, section 3 procedures, and that the chairman of the grievance committee regarded Ellis' claim as valid, an arbitrator would have decided only whether the particular job was safe or not. Ellis would then either have lost his pay for the 7 hours, or received it, depending on the ultimate success of his safety grievance on the specific job at issue. In short, invocation of the safety clause was hardly an efficacious way of furthering Ellis position on the jurisdictional dispute. This is another reason for rejecting Respondent's claim that invoking the safety clause was a subterfuge on Ellis' part.[10]

The other asserted procedural defect by Ellis was his (or Zerby's) failure to "contact Rospierski, the chairman of the Grievance Committee." The contract provides that if there is a dispute about the existence of an alleged unsafe condition, "the Chairman of the Grievance Committee . . . and the Management's representative . . . shall immediately investigate such alleged unsafe condition." Nothing in this language suggests that it is incumbent on the employee invoking the safety clause to call either of the two officials. Although obviously the mandated investigation by those two could occur only if they were called by someone, it would seem more feasible for a company supervisor, Purevich in this instance, to call both, than for the employee, Ellis, to do so. In any event, Purevich, having responded to Ellis' attempted invocation of the safety clause by refusing to accept it, was at that point effectively forestalling any further resort by Ellis to that procedure.

Respondent's claim that "the job itself was not unsafe" does not, of course, even if true, make Ellis' invocation of the safety clause any less protected. As the Seventh Circuit stated in *N.L.R.B.* v. *Ben Pekin Corporation,* 452 F.2d 205, 206 (1971), quoting with approval from the Second Circuit's opinion in *N.L.R.B.* v. *Interboro Contractors, Inc.,* 388 F.2d 495, 500 (1967), " 'an attempt by employees to enforce their understanding of the terms of a collective bargaining agreement is a protected activity. . .if the employees have a reasonable basis for believing that their understanding of the terms was the understanding that had been agreed upon.' " A manifestly frivolous claim would, of course, bring into question the employee's good faith, and suggest that the contract's invocation was a pretext. But the claim does not have to be meritorious to be protected, merely "reasonable," and, as indicated earlier, Ellis' claim here was certainly at least that. Indeed, Arbitrator Charles C. Killingsworth, in deciding a case in many respects similar to the instant one, stated, "It must be strongly emphasized that the Section speaks only of 'belief' and 'opinion' where the employees and the Grievance Committee Chairman are concerned. If the parties had intended that the right to relief from the job should be available only where the employee's belief and the Chairman's opinion are correct or (as the Company puts the matter) are 'based on fact and reason,' they could easily have made this limitation clear." (Grievance No. 1–589–63, Docket No. 1H–474, Decision No. 26, issued April 24, 1964).

The subsequent failure of Rospierski to state whether he viewed the job as unsafe is not germane to the question here. Even assuming that Rospierski could have given his opinion later that day (despite the contractual requirement that he and the management representative "shall immediately investigate . . . and determine"), Ellis had already been taken off the clock and sent home for insubordination, not pursuant to article IX, section 3, invocation of which Purevich refused to accept. There is no basis for assuming that Respondent would have rescinded the 7-hour suspension and reprimand for insubordination had Rospierski made this belated ruling, and substituted therefor a suspension pursuant to the safety clause. Nor was Ellis ever in a position to file a grievance pursuant to the safety clause, as article IX, section 3 provides that an employee is to file a grievance and be relieved from duty *after* disagreement between the chairman of the grievance

[10] Interestingly, the manner in which company supervisors and officials handled the Ellis incident put the Company in a much more difficult position than would have been the case had they accepted Ellis' invocation of the "safety clause." In the latter posture the Company would prevail (and Ellis lose his 7 hours pay) if an arbitrator determined the task in question was in fact safe. In its present posture, the question of the task's safety is not at issue, and the Company cannot prevail by demonstrating to my or anyone elses satisfaction that the job was in fact safe.

committee and the management representative on whether the condition is unsafe. I disagree, therefore, with Respondent's assertion that "in any event no action of the Company prevented Ellis from completing the Article IX Section 3 procedure."

Equally unpersuasive is Respondent's contention that "discipline and even discharge have not prevented employees from exercising their Article IX, Section 3 rights." Respondent relies on the Killingsworth arbitration cited above for this argument, asserting, quite correctly, that "the arbitrator's opinion makes clear that those rights are completely protected even in the face of discharge." But the fact that an arbitrator, as well as the National Labor Relations Board, protects employee rights arising out of Section 7 of the Act by providing a remedy for the breach of those rights, serves more to emphasize the need for protecting the rights than to conclude that the employees are not prevented from exercising them.

For all the foregoing reasons, I conclude that Ellis was suspended and reprimanded for attempting in good faith to invoke the safety clause of the contract, and that Respondent thereby violated Section 8(a)(1) of the Act. I further conclude that this case is not appropriate for deferral to the grievance procedure of the contract.

CONCLUSION OF LAW

By suspending and disciplining employee Ronald Ellis on October 4, 1976, because he attempted to invoke the safety clause of the contract between Respondent and the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

THE REMEDY

I shall recommend that Respondent cease and desist from its unfair labor practices, that it make whole Ronald Ellis for the time lost as a result of his suspension on October 4, 1976, by paying him for the 7 hours lost time, with interest in accordance with the Board's decision in *Florida Steel Corporation*, 231 NLRB 651 (1977), that it rescind the reprimand given to Ellis for his asserted insubordination on October 4, 1976, and that it take certain affirmative action in order to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusion of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

Respondent Youngstown Sheet and Tube Company, East Chicago, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against employees because they have engaged in activities protected by Section 7 of the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Ronald Ellis in the manner set forth herein in the section entitled "The Remedy."

(b) Rescind and expunge from all personnel files and other records of Ronald Ellis the reprimand given to him for insubordination on October 4, 1976.

(c) Post at its place of business in East Chicago, Indiana, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 13, shall be signed by an authorized representative of the Company, shall be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places at all locations where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and becomes its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discriminate against any employees because of their protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by the National Labor Relations Act.

WE WILL pay Ronald Ellis for losses he suffered as a result of our having suspended him in October 1976.

WE WILL expunge from his record the reprimand given to Ronald Ellis in October 1976.

YOUNGSTOWN SHEET AND TUBE COMPANY