Cowin and Company, Inc. *and* **Johnny E. Snow.**
Case 10–CA–29074

February 18, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

On August 29, 1996, Administrative Law Judge William N. Cates issued the attached bench decision. The Charging Party filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings,[1] findings, and conclusions as further discussed below, and to adopt the recommended Order.

We agree with the judge that the Respondent did not violate Section 8(a)(1) of the Act when it discharged employee Johnny Snow for initiating an unprotected work stoppage. Although Snow contends, in his exceptions, that he was merely exercising his right of free speech, we find in agreement with the judge that the evidence clearly shows that Snow knew that his conduct would cause a work stoppage.

Snow performed various types of construction work for the Respondent from August 1988 until August 1995.[2] During that time period, he was often laid off and recalled on different projects. After being laid off in August, Snow visited one of the Respondent's worksites and observed Scottie Sammon, an employee junior to Snow, performing work Snow believed he was entitled to perform. Snow filed a grievance over this issue on or about August 8, and the Respondent denied the grievance at the first step.[3]

In response to the denial, on or about August 10, Snow parked his car at the fork in the road leading to the worksite and placed on his windshield a sign which read "Unfair Labor Practice." Snow arrived at the jobsite prior to the start of the 7 a.m. work shift, and positioned his car where each employee could see the picket sign. When the employees stopped to ascertain what was happening,[4] Snow informed them that he was there on a peaceful protest and was not engaged in a strike or a picket. A few employees went to work after they spoke to Snow and learned he was not striking. However, other employees who stopped and spoke to Snow did not proceed to work until there was a resolution of Snow's dispute. One of these employees, then Local Union President Clifford Thacker, informed Snow and others that he was not crossing the picket sign until he determined what was the problem. Thacker then called the Respondent's office and stated that a meeting needed to be scheduled to resolve Snow's grievance. Thereafter, the Respondent agreed to schedule a meeting with the Union and Snow. Thacker then told the employees that a meeting was scheduled and they reported to work.[5] The Respondent suspended Snow for 5 days subject to discharge for instigating the work stoppage.

The record shows that Snow had instigated a work stoppage on a previous occasion when there was a problem with Snow's paycheck. At that time, Snow persuaded other employees not to return to work after a meal break until he received his paycheck. The record also shows that Snow had previously told employee Scottie Sammon that "if [Sammon] ever went on a job, and [Snow] was laid off, [Snow] would shut down the job."

These facts warrant the inference that Snow was not merely communicating a protest message to his fellow employees, but instead that Snow intended to induce at least some of them to engage in a work stoppage. Snow's intentions were revealed most clearly by his prior statement to Sammon that he would "shut down the job" if Sammon worked instead of Snow. Thereafter, when Snow observed Sammon performing work that Snow thought he should be doing, and when the Respondent denied Snow's grievance at the first step, Snow's response was to place an "Unfair Labor Practice" sign at a spot where employees were sure to see it on their way to the jobsite. These facts clearly show that when Snow put up the picket sign he was merely following through on his previous threat to cause a work stoppage. Snow was well aware from the prior incident concerning his paycheck that putting up a picket sign would likely induce employees to engage in a work stoppage. Although Snow may have suggested to individual employees that they go to work, he knew from past experience that the presence of a

[1] In his exceptions the Charging Party contends, inter alia, that he was not informed that as a party he was entitled to question the witnesses at the trial. Although the better practice would have been for the judge specifically to offer the Charging Party the opportunity to question each witness, we cannot find that the judge's failure to do so warrants a finding that the Charging Party was denied due process. It is not sufficient for the Charging Party to show that an error occurred, but rather, he must also show how he was prejudiced by that error. *Spector Freight System*, 141 NLRB 1110, 1112–1113 (1963). We find that the Charging Party has failed to show how he was prejudiced by the failure to advise him of his right to question the witnesses. Accordingly, we find no merit to the Charging Party's exceptions.

[2] All dates are in 1995, unless stated otherwise.

[3] Snow filed the grievance pursuant to the collective-bargaining agreement between the Respondent and the Union, United Mine Workers District 20. The agreement contained a "Settlement of Disputes" clause that culminated in final and binding arbitration.

[4] Snow testified that when the employees saw his picket sign, they "stopped to visit him" and that no one proceeded straight to work.

[5] The work stoppage caused the employees to be about 15 minutes late to work.

picket sign could cause a work stoppage.[6] By engaging in this conduct Snow intended to, and did, instigate an unprotected work stoppage. The Board has held that such conduct warrants disciplinary action against an employee. *Midwest Precision Castings Co.*, 244 NLRB 597, 599 (1979) (respondent did not violate the Act by disciplining union steward for inducing employee participation in an unauthorized illegal work slowdown in direct violation of contractual no-strike, no slowdown clause); *Chrysler Corp.*, 232 NLRB 466, 474 (1977), affd. mem. 125 LRRM 3063 (D.C. Cir. 1979) (Mere participation in or active leadership of an unauthorized work stoppage "is in and of itself sufficient grounds for removal."). See also *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 699 fn. 6 (1983) ("[E]mployees who instigate or provide leadership for unprotected strikes may be subject to more severe discipline than other employees."). For these reasons, we agree with the judge that the Respondent did not violate the Act by discharging Charging Party Snow for instigating a work stoppage in violation of the implied no-strike clause in the collective-bargaining agreement between the Respondent and the Union.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[6] As the judge found, this was a "clear signal to anyone coming to work" not to cross the picket line.

John D. Doyle Jr., Esq., for the General Counsel.
John W. Hargrove, Esq., for the Company.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. At the close of a 1-day trial in Birmingham, Alabama, on August 13, 1996, I rendered a Bench Decision in favor of Cowin and Company, Inc. (the Company) and recommended dismissal of the allegation the Company violated 29 U.S.C. § 158(a)(1) when, on or about August 14, 1995, it discharged and/or removed from its hiring panel employee Johnny E. Snow (Snow). This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (exceptions) to the National Labor Relations Board (the Board). I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, I found, contrary to contentions by counsel for the General Counsel (the Government), that Charging Party Snow, an individual, had not engaged in informational picketing on or about August 10, 1995, at the Company's Alabama worksite, but rather had initiated and engaged in an unprotected work stoppage. More specifically the evidence established that the applicable collective-bargaining agreement between the Company and United Mine Workers of America (the Union), pursuant to which employee Snow was covered, contained a "Settlement of Disputes" clause culminating in final and binding arbitration. I concluded the contract's grievance/arbitration provision gives rise to an implicit "no strike" agreement. See *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 (1962), and, cf. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 382 (1974). Snow, who utilized the grievance/arbitration procedure related to his concerns with the Company, picketed at the Company at the beginning of the work shift on or about August 10, 1995. Snow's picketing activities resulted in a partial, albeit somewhat short, work stoppage. Under the circumstances, I concluded Snow's picketing was unprotected conduct and further concluded the Company did not violate the Act when it thereafter discharged and/or removed Snow from its hiring panel. Compare: *Nabisco, Inc.*, 267 NLRB 1236, 1237–1238 (1983).

I recommended the complaint be dismissed in its entirety.

I certify the accuracy of the portion of the trial transcript, as corrected (p. 113, L. 14 to p. 124, L. 5, inclusive) containing my Bench Decision. I attach a copy of that portion of the transcript, as corrected, as an "Appendix" hereto.

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that it has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

JUDGE CATES: First, let me take this opportunity to thank the parties for their presentation of the case. I think that both of you have done a commendable job. It's a pleasure to hear a case when you come in and simply have to do that, just hear the case. If you'll recall, I have asked no questions of the witnesses because each of you have known on behalf of the client you represent what you wanted to present. You have done so and you have done so in a commendable manner. Both of you are a credit to the positions that you represent. It has been a pleasure to be here in Birmingham, Alabama and some time ago, the Board set up a procedure whereby its Judges could render bench decisions on cases that the Judge felt was appropriate for a bench decision. And this case, after reading the complaint and answer, and after discussing it with counsel in the pretrial conference, I alerted the parties that I thought a bench decision would be appropriate in this case because the parties were informing me in the conference call that it did not appear there would be a great deal

of factual discrepancy. I asked the parties to provide me with legal citations supporting their position and to—if they did so, to serve their opposing counsel with that list of cases. And both of you did so and I had an opportunity to review those cases. I asked that you engage in opening and closing arguments and both of you have done that and have presented the evidence. And pursuant to the Board's change in rules and regulations which permits me to render a bench decision, I shall do so. First, I find that the charge in this proceeding was filed by Mr. Snow on February 12, 1996, and that it was served timely on the company by the National Labor Relations Board. Further, I find that the company is an Alabama corporation with an office and place of business in Birmingham, Alabama, where it is engaged in the contract construction services for the coal mining industry. With respect to those allegations, the complaint alleges the company admits, the evidence establishes, and I find. I further find that the company, during the past twelve month period from the date of the issuance of the complaint, had purchased and received at its Alabama facility goods valued in excess of $50,000 directly from sources outside the state of Alabama. I say all of that simply to say that I find the company is an employer engaged in commerce within the meaning of Section 2 paren, 2 paren, 6 paren, and 7 of the Act. Although not specifically alleged in the complaint, I find based on evidence submitted in trial that the United Mine Workers of America and District 20 are labor organizations within the meaning of Section 2 paren 5 of the Act. Next, let me address an issue raised by the Respondent's answer which I had in front of me just a moment ago. With respect to your seventh defense, as, as set forth in your answer to the complaint, in your seventh defense, you ask that the matter be deferred to the grievance and arbitration procedure of the collective bargaining agreement applicable to the parties. I shall deny your motion in that respect. With respect to your eighth defense, in which you contend that the charging party's claim is barred by collaboral ** estoppel res judicata and/or accord and satisfaction. I shall deny your motion to have the matter dismissed on those grounds. Then we come to the situation that surrounds the actions in early August of 1995. Whether the action took place on August 10, 11, 12, 13, or 14, I find to be inconsequential and so I shall address the matter as though it took place in early August, 1995, as the complaint was amended early on in the beginning of the trial. Let me briefly summarize the facts for you so that you can know the facts from which I am basing my decision. Mr. Snow goes to the company's work site and observes a Mr. Sammon, I believe it was, whatever the gentleman's name was, he observed a carpenter performing work that was junior to him and he felt he was entitled to be performing that work. So he immediatley filed a grievance which was denied. And sometime later, I believe probably the next day, Mr. Snow goes out to the site with a sign that he places on the windshield of his automobile which reads "Unfair labor practice." Mr. Snow backs his car up into sort of a fork in the road where each of the employees that are going to be going to work will pass by his car. And it is that action of Mr. Snow that really is the gist of this case. Was Mr. Snow engaging in informational type picketing that is protected by Section 7 of the Act, of which I don't think either of you dispute that if the—if what Mr. Snow did constitute—constituted information picketing, then he could to so. Or was Mr. Snow engaging in an illegal strike in the face of a collective bargaining agreement that contains a settlement of disputes provision as well as a discharge procedure which is set forth at Articles 21 and 22 of the, of the parties collective bargaining agreement. If Mr. Snow's conduct constituted an illegal or unlawful strike, then I don't think there's any dispute from the parties that his conduct would not be protected by Section 7 of the Act, and that the company would be privileged to take whatever action was appropriate with respect to the collective bargaining agreement. And in that regard, the company issued a note to Mr. Snow advising him that he would have a five day suspension subject to discharge so that Mr. Snow could advance his case, if he elected to, through the grievance and arbitration procedure outlined in Articles 21 and 22 of the collective bargaining agreement. And that's exactly what Mr. Snow did. He pursued his matter through the grievance and arbitration procedure. The matter was taken to stop three of the grievance procedure where the parties arrived at a settlement of that grievance. The parties, including the company, the union and Mr. Snow, all agreed that certain terms would apply that would constitute the settlement and that it would be reduced to writing the following day for the signature of the various participants as called for in the collective bargaining agreement. Although the union's District 20 representative, Mr. Hyche, I believe it was, he could easily recall three of the terms but he had a little trouble recalling the fourth and I don't know if it was an unwillingness on his part to recall or that he could not recall but I'm persuaded that the four elements of the agreement were that Mr. Snow would a: remain on District 20's panel; b: that his long term insurance coverage would continue; c: that the company would take no action to intervene or stop his drawing unemployment; and d: he would be removed from the employer's panel. That agreement was reduced to writing the following day and signed by the company. Mr. Snow came by the company's facility and advised the company that he had changed his position on the settlement and would not sign it. There is no indication in this record before me that the union ever executed the settlement. Mr. Hyche said there was absolutely no doubt in his mind that a resolution of the matter was arrived at. I'm outlining all of that for this reason, if I should be in error that the matter should have been deferred to arbitration, which I'm thoroughly convinced that it should not be deferred, then I have outlined the evidence that I was aware of at the time that I denied deferring the matter to arbitration. The key question then comes what was Mr. Snow's conduct on the morning that he proceeded to the work site and put the picket sign on the front of the automobile that he did and the action that I have somewhat described and will describe more thoroughly in a moment. Let me just lay to rest

one particular item at this point and that is that this collective bargaining agreement which contains a settlement of disputes article as well as a discharge procedure article, both of which culminate in final and binding arbitration that I find based on ample case law, both by the Board, the courts, Circuit courts that is, and by the Supreme Court, that although there is no explicit no strike provision in this collective bargaining agreement, there clearly is an implied obligation not to strike over matters subject to final and binding arbitration and I make that finding. Secondly, if I have no [sic] already stated, I think it should be abundantly clear at this point that if what Mr. Snow was doing was engaging in information picketing, then such would be protected under Section 7 of the Act and the company would not take the action it did without violating the Act. However, I am persuaded that the action that Mr. Snow took was not informational picketing, that it was an illegal strike and I make that finding based on a number of factors. Mr. Snow said when he went out and set up the sign, and I think I'm quoting him at this point, "that everyone stopped to visit with him." No one proceeded straight on to work. Even Mr. Thatcher[1] told him, he said "I'm not going to work behind your sign." Others stayed off from work, all be it for a limited period of time. I believe some of the others that were identified was, in addition to Thacker, was Brown, Whitfield, and others. I am persuaded that Mr. Snow knew that when he went out there and put up this sign, that this was a clear signal to anyone coming to work and anyone I mean by employees on that job, would not cross his picket line without first at least ascertaining what his intentions were. Now I'm persuaded that Mr. Snow may not hide behind the fact that I tell or that he told the folk go on to work, I'm just on an informational picket here with the people. I find that to no avail to Mr. Snow and I do that based on a number of factors. Mr. Snow knew that certain of these employees would not work behind the picket sign and Mr. Snow knew the consequences of what he was doing because he had, for example when his paycheck wasn't right or what he perceived was not the amount of hours that he was entitled to, he told the men in a break area after an evening meal not to return to work and they stayed off work until some resolution was arrived at. In fact, I think the gentleman said he paid him a check, a personal check because no one was there to—or no one was available that could sign a check that would have been by the company. Mr. Snow knew what his actions would do because in the past, he had said and I again I think I'm quoting from Mr. Snow, "I'd shut the job down if he went out and Sammon was working and he wasn't." So he knew that what he was doing was constituting more than just simply informational picketing, that he was going to shut the job down because this other individual was on the, the line. That he knew what he was doing and that the consequences of it is perhaps further exemplified by the testimony of Bennie Williams, for example. William said he stopped because he saw cars there. He wasn't going to go to work until he found out what was happening. And he said no one had to say to him not to go to work, that the mere fact that cars were stopped there was a sufficient indication to him not to go to work until he had ascertained what was happening. Another indication that Mr. Snow was fully aware of what his actions would constitute is it is unrefuted that Mr. Snow had told Mr. Moore, threatened Mr. Moore that he would strike if his check wasn't out there, that he was not going to work without his paycheck being at the job site. It took some persuasion to get Mr. Snow and the others to go to work with the understanding that their checks had left Birmingham and was in route to whatever location it was they were at. So, I am persuaded that this was not a case of informational picketing, that the facts defy such an indication on the part of the government's position and if I have not said, let me simply add that Mr. Snow's actions and his picket sign and the actions of his fellow workers, which we have clear evidence in the record that they did not report to work, even a vast majority of them, until fifteen, perhaps twenty minutes late because no one was going to—or few was going to cross the picket line until such time as there was a resolution or at least an understanding with respect to Snow. And the only reason at that point the Mr. Thacker instructed the people to go on to work, all be it late, was he was convinced that there had been a meeting set up with Mr. Snow, someone was on their way down from Birmingham to the location to meet with Mr. Snow on his problem at the picket site. I don't think it's any advantage to Mr. Snow or his position or the government's position that at least one employee went on in after visiting with Mr. Snow and I think that was Doug Riddle. Mr. Riddle says he comes up ask Mr. Snow what's going on, Mr. Snow says "really, I, I just—this is just informational picketing and go on to work," and Riddle in fact went on to work. At that point, Mr. Thacker had not made the scene yet. Mr. Riddle said that Mr. Thacker was not there. Mr. Thacker certainly viewed it as a strike rather than informational picketing because he went immediately to work to try to resolve the matter in some manner that he could get the men back on the job. So, with respect to the allegations as outlined in paragraphs five through eight of the complaint, particularly paragraphs five, six and seven, that the company discharged or removed from its hiring panel Mr. Snow because he engaged in protected concerted activities, I shall dismiss the complaint on that part. And I make no distinction in dismissing the complaint between the terms "discharged," "terminated," and "removed from the hiring panel of the company," because I view all three to be speaking to the same thing. One final thing that I say more with respect to any review that might be made of this decision, there was testimony and I believe it came from Mr. Snow himself that Mr. Thacker said he was not going to go behind the picket sign or was not going to cross the picket sign and go to work. Mr Thacker's recollection was not as clear on that. I don't know if Mr. Thacker could not recall specifically that or whether Mr. Thacker didn't want to recall that particular part

[1] The correct spelling is Thacker and is corrected hereinafter without further noting.

but I believe that based on Mr. Snow's testimony and on the actions of Mr. Thacker, that he in fact did say as I believe Mr. Snow testified he did, that he would not go behind the, the sign because his actions somewhat speak louder than his words did. Other than that, I didn't find any credibility resolutions that I deem pertinent to this case. I think that, for example, that Mr. Snow testified as he saw the situation. Unfortunate from his point of view, I have concluded that his actions constituted an illegal strike as opposed to informational picketing and I shall accordingly dismiss the complaint. Now the procedure that follows this is that the Court Reporter, within ten days, will provide my office and any party that requests a copy for which I understand you have to pay, a copy of the transcript. I will then certify those pages of the transcript that constitutes my decision to the Board in a cover to my decision and it is my understanding that any appeal period for review of this decision runs from that date. However, please do not rely on my understanding but follow the Board's rules, regulations and procedures. But it is my belief that the time for review runs from that period. Again, let me thank Mr. Court Reporter, you for being here and taking the matter down, for the various counsel for being here. And this hearing is closed.