

**Allen M. Campbell Company General Contractors,
Inc. and Lowell V. Hart.** Case 16-CA-7929

September 28, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On August 22, 1979, Administrative Law Judge Russell M. King, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a motion to reopen the record, and the General Counsel filed a response to Respondent's motion.

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 has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.¹

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 and hereby orders that the Respondent, Allen M. Campbell Company General Contractors, Inc., Tyler, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent's motion to reopen the record for introduction of additional evidence to substantiate its contention that it cannot offer reinstatement to Charging Party Hart is hereby denied, as the evidence sought to be introduced relates to matters which can best be resolved at the compliance stage of this proceeding. See *Sports Coach Corporation of America*, 203 NLRB 145, fn. 1 (1973); *William O. McKay Company, Inc.*, 204 NLRB 388, fn. 1 (1973).

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING, JR., Administrative Law Judge: This case was heard by me in Tyler, Texas, on November 8 and 9, 1978.¹ The charge was filed by the individual on June 5, and the complaint was issued by the Regional Director for Region 16 of the National Labor Relations Board (the "Board"), on behalf of the Board's General Counsel on July 21, alleging that Respondent discharged employee Lowell V. Hart on February 23 because he engaged in protected concerted activities in violation of Section 8(a)(1) of the

¹ All dates hereinafter are in 1978 unless otherwise stated.

National Labor Relations Act (the "Act").² No union or labor organization is involved in this case, and essentially the General Counsel contends that Hart was discharged for making certain safety complaints which the General Counsel contends constituted concerted and protected activity under the Act. Respondent defends by contending that Hart was one of four employees chosen for layoff or discharge for economic reasons because he was slow, incompetent, and insubordinate.

Upon the entire record, including my observation of the demeanor of the witnesses,³ and after due consideration of the briefs filed herein by the General Counsel and Respondent I make the following:

FINDINGS OF FACT

I. JURISDICTION

The pleadings and admissions herein establish the following jurisdictional facts. Respondent is and has been at all times material herein a corporation duly organized under the existing by virtue of the laws of the State of Texas, maintaining an office and place of business in Tyler, Texas, where it is engaged in the business of general contracting in the construction industry. During the representative 1-year period in the course and conduct of its business Respondent performed services to customers outside the State of Texas valued in excess of \$50,000. Thus, as admitted, I find and conclude that Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

*A. Summary of the Evidence*⁴

Lowell V. Hart was employed by Respondent in March 1977 as a carpenter. He was hired by Carpenter Foreman

² At the onset of the hearing counsel for Respondent filed a motion to discuss the complaint for lack of "detail" or the failure of the complaint "to state the attendant circumstances making the discharge unlawful." The motion was also based on the contention that the initiating charge lacked sufficient detail and was thus "defective." After argument I denied the motion, and in Respondent's brief filed herein counsel urges my reconsideration of the denial. Upon further consideration of the matter, including a review of the Board's applicable Rules and Regulations and precedents, I again conclude that my ruling was justified and correct in this case. The pertinent parts of the Act provides as follows:

Sec. 8 (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7

. . . .

Sec. 7. Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

³ The facts found herein are based on the record as a whole and upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction to the findings herein, their testimonies have been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony has been reviewed and weighed in light of the *entire* record.

⁴ The following includes a summary of the testimonies of the witnesses

Granville Griffith. Hart was discharged on Thursday, February 23, 1978, and his discharge slip recites "incompetence" as the reason.⁵ Hart had been a carpenter for several years prior to his employment with Respondent, and on at least one occasion he had been involved in "column" work, which apparently constituted the greater portion of the work in which he was involved when he was discharged.

On Monday, February 21, Hart and his partner, fellow carpenter Robert F. Little, were instructed to "set an outside corner column." They also had the aid of carpenter's helper William Love. Both Hart and Little for several weeks prior to this occasion had not been involved in column work but had been working on a stairwell.⁶ While engaged in setting the outside corner column Hart was actually on the building approximately 16 feet in the air, at the top of the column that was being set.⁷ Hart's fellow worker Little was on the ground. According to Hart, the column forms weighed as much as "an automobile" and were lifted into place by a crane, after which they would be secured by bolts to the existing portion of the structure. In this case the crane that was being used was on the ground below, and Hart was in the process of bolting a portion of the unsecured form to one that had been secured and was apparently using the secured portion to hold on to during this process. Hart did not have his safety belt on at this time, indicating that it was "missing."⁸ While in the process of securing a portion of the column Superintendent Griffin, who was also standing on the ground, called up to Hart and told him to "turn the crane loose."⁹ Hart refused to free the crane, indicating to Griffin that he could not free the crane because that portion of the form had not yet been bolted to the secured portion. According to Hart, Carpenter Foreman Griffith was also in the area and on the ground and pointed out to Griffin that a portion of the column had not

yet been secured, to which Griffin replied, "To hell with safety . . . turn it [the crane] loose anyway." Hart testified that he then explained that he would not do anymore work under such unsafe conditions, further indicating that if he was fired for the refusal he would go to "OSHA."¹⁰ Hart apparently then came down from the building, whereupon he and Griffin had words, Hart refusing to work on the form in its present condition and Griffin thereafter remaining angry and, according to Hart, "kicking" 2-by-4s and "throwing his hat down and kicking it." In cross-examination Hart further conceded that not only did he threaten to go to OSHA if he were fired, but that he in fact definitely indicated that he was going to complain to OSHA about the safety hook.¹¹

On Wednesday mornings Respondent normally conducted "safety meetings" for all employees. The day following the column and crane incident was Wednesday, February 22, and as was normally the case Hart attended the morning safety meeting. Although Foreman Griffith was present the meeting this particular morning was conducted by Safety Engineer Fletcher Smith. At this meeting Hart indicated that he made a complaint about the "hook that [he] had for [his] safety belt." According to Hart, the main point of his complaint was that his safety hook lacked a "safety latch," causing the hook to come free and exposing him to falling as much as 60 feet at times. Foreman Griffith, in turn, made a comment that he felt the hook was of sufficient strength to hold him even though it was "hand fashioned" or a rebar hook instead of a regular safety hook. Hart apparently took Griffin's response as conveying the opinion that the hook itself was adequate. Later in the day, when he and fellow carpenters Ray Becker, U.S. Belcher, and Robert Little were together in the parking lot, Griffin approached them and informed them that Griffin was going to "lay off" four men, further explaining that Griffin had asked him for a list of four names of those to be laid off. According to Hart, Griffin indicated that he had given the list of four names to Griffin, but that Hart was not on the list, and when Griffin saw the list he indicated that he only wanted three names because he was going to fire "that son-of-a-bitching Hart" himself. Griffin further indicated that he had done everything he could do to help Hart, and that he felt Hart was a good carpenter, but that Griffin was determined to fire him for "agitation." The following morning, February 23, Hart again spoke to Foreman Griffith, who reconfirmed Griffin's intentions of discharging him, and later on that afternoon Hart was given his final check and discharge slip.

Hart testified that he felt he was a good carpenter, and that he and his partner Little were often called upon to correct the mistakes of others and to do more difficult "corner work." Hart related that he had received no complaints about his work and had been commended on one occasion for an innovative idea while working on a different and earlier project. Hart testified that in the past he had set

appearing in the case. The testimonies will appear normally in narrative form, although on occasion some testimony will appear as actual quotes from the transcript. The narrative only and merely represents a summary of what the witnesses themselves stated or related and does not necessarily reflect my ultimate findings and conclusions in this case.

⁵ Two copies of the discharge slip itself were admitted into evidence. There are various blocks on the slip which can be checked for the reason for discharge. Hart's discharge slip definitely reflects that the block captioned "incompetence" was checked. A very light mark also appears after the block captioned "insubordination." Respondent's copy definitely reflects both blocks were checked, and Respondent in this case argues that "insubordination" was an additional reason for the discharge.

⁶ Hart's fellow carpenter, Little, subsequently died before this case was heard, and carpenter's helper Love did not testify.

⁷ To "set" columns there is a process which begins with the formation or construction of the column form, followed by placing the form in proper position on the partially completed structure, and thereafter attaching the form to the structure. Occasionally, only half of the column is actually formed and then placed into position, followed by the positioning and securing of the second half. In such cases not only does the column form often require securing to the super structure of the building, but each half requires attachment, usually by bolting. When the form is placed it is then poured, and when dry the form is removed.

⁸ These safety belts contained a safety hook, and the belt with the hook was frequently used to insure that the carpenter was actually secured to a previously attached portion of the building.

⁹ At this time the cable of the crane was apparently holding the unsecured portion of the column in place, awaiting the securing of that portion by Hart. The expression "turn the crane loose" was, in effect, an instruction or directive to Hart to disengage the crane cable from the unsecured portion of the column in order that the crane could then be used for other construction purposes.

¹⁰ The term "OSHA" appears throughout the record in this case and refers to the Occupational Safety and Health Administration of U.S. Department of Labor.

¹¹ Several days after Hart was discharged, on February 27, Hart in fact did file a complaint with OSHA, and a copy of the complaint was admitted into evidence in this case.

columns of a different type while working with another contractor, and that while working for Respondent a representative of the manufacturer of the forms Respondent was using came to the project site and gave Respondent's carpenters, including himself, instructions and training regarding their particular columns, how to handle them, and how to provide for their repeated use. Hart did concede that when he started to work for Respondent he did not possess "heavy construction skills" or knowledge as to how to construct the column forms that were used by Respondent but could not recall whether he actually told either Griffith or Griffin about his lack of such "skills" before he was hired in March 1977. In addition to his complaint with OSHA, Hart related that he also filed an additional complaint with the "Texas Employment Commission" over his discharge, but he indicated and conceded that it was his understanding the "four carpenters" who were to be laid off were to be replaced with carpenters more experienced in column work or building column forms.

Ray R. Becker was also employed by Respondent in March 1977, and several months prior to his testimony in this case he had been discharged by Respondent. Thereafter, he was employed by another larger construction company, where Hart also later became employed. Becker testified that at this larger company he became a carpenter foreman, and that Hart became the "best hand" that he had, thereafter also rising to the position of a carpenter foreman. Becker had been a carpenter for 28 years, 20 years of which he had spent apparently in heavy construction work. During February 1978 he served as a carpenter and "form setter" with Respondent but later became a labor foreman and a concrete foreman after Hart's discharge and before his own discharge. Becker testified that he normally worked between 10 to 15 feet from Hart, and that Hart and Little usually set the larger 16-inch corner columns, which were the hardest columns to work with, as opposed to the smaller 12-inch inside columns.

Becker was approximately 10 to 14 feet away when the February 21 crane incident occurred between Hart and Griffin. According to Becker, Griffin told Hart to turn the crane loose, after which both Hart and Little refused, indicating that a portion of a column had not been completely bolted. Becker went on to relate that Griffin got mad, threw his hat down, cursed "a time or two" and again stated that he wanted "that damn crane turned loose." Becker testified that during this interchange Griffin also said something about "forget safety," to which Hart replied that if he was fired over an unsafe practice, he was going to OSHA. Becker described the incident as "very much an argument," adding that Griffin got "awfully mad." Becker also attended the earlier morning safety meeting the following day, February 22, and testified that at this meeting Hart complained about safety hooks, and that he (Becker) joined in with this complaint. Several days later, after Hart was discharged, Respondent purchased and handled out new safety hooks. Becker was also in the parking lot with Hart in the afternoon of February 22 and corroborated Hart's testimony that Foreman Griffith approached them and indicated that Griffin was going to see to it that Hart was fired.

Algaeal Griffin testified as the construction or project

superintendent for Respondent, the position which he held when Hart was discharged. He had been involved in construction work for 30 years, and he had been a superintendent for the last 22 years. Griffin conceded that when Hart was hired he had explained that he lacked experience in setting forms and in concrete work but was willing to try. In Griffin's opinion, Hart was working "out of his field." Throughout his testimony Griffin gave various reasons for discharging Hart, which included "dogging the job," "killing time," "he didn't think he was competent," his "work wasn't always right," and "a time or two . . . he was insubordinate."¹² Griffin's testimonial reason for keeping Hart until his discharge was the nonavailability of other more qualified carpenters, adding that he had concluded as early as May 1977 that was in fact incompetent.

In further testimony Griffin indicated that he did not specifically recall any incident of February 21 involving the crane, but he flatly denied that he ever had any argument on that day or any other day in February with Hart. He did, however, remember an occasion around February 21 when he instructed Hart to turn the crane loose. Foreman Griffith was also present, and, according to Griffin, Griffith also joined in this request, and that thereafter Hart did not actually refuse to turn the crane loose but merely took a longer time in releasing it than necessary. He admitted that as a result of holding up the crane he was "a little upset," but he did not recall throwing his hat or helmet down or kicking any lumber. Griffin went on to testify that it was such actions on the part of Hart which caused him to conclude that Hart "didn't work fast enough to suit [him] and turn the crane loose," and this contributed to his decision to discharge Hart. According to Griffin, Hart's main job was setting column forms, along with three other carpenters.

Griffin further testified that he had never discharged any employee for making a safety complaint, although before he discharged Hart he did know of Hart's safety hook complaint made at the February 22 safety meeting. He indicated that later on the day of the meeting, soon after he learned of the complaint, he ordered new safety hooks, and that they did arrive 2 days later.¹³ According to Griffin, Hart's complaint at the safety meeting was the first complaint that he had received from any employee regarding safety hooks, and that all of the carpenters had been using the same type of "rebar" hooks without safety latches, adding that there were six to eight safety belts on the jobsite, which were enough for all column workers. He also conceded that he had knowledge of OSHA regulations which require safety belts for all above-ground workers, adding, however, that during February there were in fact between 10 and 12 such above-ground workers. Griffin indicated that after Hart's discharge production went up and costs

¹² The two discharge slips which were admitted into evidence in this case appear to be virtually duplicate copies except, as noted earlier, one has both "incompetence" and "insubordination" checked, and one lacks a check mark before "insubordination." The discrepancy was never completely resolved on the record, although Hart's copy apparently was a fourth copy (third carbon copy), and this copy was far less clear than the copy furnished by Respondent. Griffin definitely included "insubordination" in his reason for Hart's discharge during his testimony.

¹³ An order invoice admitted into evidence in the case reflects that the safety hooks were in fact ordered February 21.

came down, but he conceded that during January and February production was light because of the weather. He also denied that he ever commended Hart for any work or idea while he was employed by Respondent, but that in December 1977 Hart came to him and asked for a raise, which he denied because in his opinion Hart was not entitled to a raise and he "didn't feel like granting anybody a raise at that time."¹⁴ According to Griffin, after this denial Hart's work "went way down . . . really slowed down."

Griffin testified that he discussed that actual decision to discharge Hart with Foreman Griffith, who agreed with the decision. Griffin first testified that he had been thinking about discharging Hart for "several weeks" and actually came to the decision before the February 22 safety meeting. In later testimony he related that he actually made the decision on the date of the discharge (February 23), and after talking to Griffith on that date, which was also when he received the list of employees from Griffith to be considered for discharge. According to Griffin, Hart's name was on that list. However, in yet later testimony, Griffin again indicated that his actual decision to discharge Hart was made several weeks prior to the actual discharge.

James P. Latham testified as a present crane operator for Respondent. He also was a crane operator in February, although he was not operating the crane during the February 21 incident. Latham testified that he and Hart had disagreed at times as to whether Hart was giving proper signals to him as operator. They also disagreed on at least one occasion about the safety measure of the use of "tag" lines in lifting loads on windy days.¹⁵ Latham testified that Hart had told him he had been a crane operator for some 19 years prior to his job with Respondent, and that he felt equally qualified regarding the operation of the crane. Latham also felt that Hart and Little frequently tied up the crane for an excessive period of time, twice as long as the other carpenter team. Latham also claimed some knowledge about Hart's requested raise in December. He testified that he was outside of Griffin's office when Hart and Little emerged from the office after asking for a raise, and at that time he overheard Hart say that he "got his raise whether or not [Griffin] knew it."

J.N. Matlock testified as the Respondent's executive vice president. Matlock accomplished an analysis of production of the carpenters at the jobsite involved in this case. This analysis covered first the period of December 17, 1977, to February 25, 1978, and then the period of February 25 to April 22. In this analysis a comparison was made regarding the amount of man hours and money required to perform 1 square foot of column work during the two periods. Matlock testified from various documents and ledger sheets which he had used to calculate the results of his comparison, and these sheets were admitted into evidence. The results of Matlock's calculations reflected that during the earlier and first period used the man cost per square foot

amounted to "63.53 cents," as opposed to "50.85 cents" per square foot during the second period, representing a total cost saving of \$2,248.75. Matlock considered this savings to be substantial, especially when taking into consideration the January 1 raise. He attributed such a savings normally to two factors, different personnel or a "change in methods," but he testified that there was no change in methods at the jobsite involved in this case. Matlock conceded that he had no knowledge of how many carpenters at the jobsite were doing column work during the two periods, and he further related that more carpenter hours were put into column work during the second period chosen for comparison. He also agreed that such a decrease in costs would be "hard" to trace to "one person" and further conceded that such factors as weather, hours per week, and the ability or output of the other workers (crane operators, carpenter apprentices, and laborers) would also affect production costs.

B. Evaluation of the Evidence and Initial Conclusions

In its brief Respondent characterizes the complaint as alleging that Hart was "discriminatorily" selected for discharge.¹⁶ Such terminology does not in fact appear in the complaint and rightly so, as we are concerned here only with an alleged violation of Section 8(a)(1) of the Act, i.e., the interference, restraint, or coercion of employees engaging in concerted activities for their mutual aid or protection. Although the point may appear minor, it serves to narrow my considerations to three areas, to wit: 1. whether the alleged safety complaints were actually made by Hart; 2. if made, whether they constituted concerted activity under the Act; and 3. whether Hart was discharged because of the complaints.

I find that the complaints themselves were made on February 21 during the crane incident and at the February 22 safety meeting. On February 21 Hart was up on the building structure securing or bolting a portion of a corner column form, which was also being held steady and secure in place by the crane two line. Project Superintendent Griffin approached and directed Hart to free or turn the crane loose. Hart refused, maintaining that the column was not yet sufficiently secure.¹⁷ Griffin again directed Hart to free the crane, exclaiming "to hell with safety," and Hart again refused, further refusing to work under said unsafe conditions and threatening to complain to OSHA if he was discharged because of his refusal. Griffin became extremely upset and angry as a result of Hart's refusal, even in light of Carpenter Foreman Griffith's presence and reminder to him

¹⁶ The term "layoff" also appears throughout this case. The terms discharge and layoff are, in my opinion, interchangeable in this case. Hart's discharge notice in fact is entitled "Employment Termination Record" and provides or recites that he is not eligible for reemployment. Further, the "discharged" portion of the notice, as opposed to the "laid off" portion, was used and checked.

¹⁷ Hart was not wearing his safety belt at this time and thus was not using a safety hook of any type. He testified that his belt was "missing." This fact, in my opinion, poses only unanswered questions or conjecture in this case. Should Hart have attempted the column setting without a safety belt, and if not, why did he do so? Did Hart here tie up the crane for an unduly long period, and if so, was it due to, in part at least, the lack of a belt? The record is insufficient to reach supportable and proper conclusions in these areas.

¹⁴ Hart also mentioned this request in his testimony. All of the employees did receive a planned and expected raise on January 1.

¹⁵ "Tag" lines are additional lines tied to a load to guide and hold it steady when being lifted. They are a safety measure, and according to Latham, on at least one occasion both Hart and Little did not want to use tag lines when Latham thought they should be used.

that that column was not yet secure.¹⁸ The February 22 safety complaint was made at the weekly safety meeting early in the morning. This meeting was conducted by Safety Engineer Fletcher Smith, and Hart complained about the lack of safety hooks equipped with a "safety latch."¹⁹ This complaint of Hart's was and is undisputed in this case and thus deserves no further comment as to its existence.

Next for determination here is whether Hart's complaints constituted concerted activity, that is, for the mutual aid or protection of employees. Respondent employed 20 or more carpenters at this particular jobsite. All carpenters working above ground level were required to wear safety belts with safety hooks, and prior to Hart's February 22 complaint all safety hooks being used were "rebar" hooks without safety latches. The Board has long held that even lacking union representation or a collective-bargaining agreement individual action is protected concerted activity under the Act if the employee is complaining about a matter of common concern to other employees in the same circumstances.²⁰ I find this to be the case here, and I thus find and conclude that Hart's complaints on February 21 and 22 constituted protected concerted activity under the Act.

I now reach the question as to whether Hart was discharged because of the complaints. Absent this motivation Respondent of course was free to discharge Hart for any reason or for no reason at all. Superintendent Griffin claimed that he discharged Hart for "incompetence" and "insubordination."²¹ He was directly involved in the February 21 incident, and by his own admission he knew about Hart's complaint at the February 22 morning safety meeting prior to the discharge of February 23. On the afternoon of February 22 Foreman Griffith told Hart, in the presence of carpenter Becker, that Griffin had instructed him to list

¹⁸ Superintendent Griffin testimonially and essentially denied this portrayal of this incident. I discredit completely the relevant portions of Griffin's testimony in this case. In addition to Respondent's unexplainable failure to call Respondent's Foreman Griffith to testify and corroborate Griffin's testimony, Griffin was himself indifferent, vacillating, and indefinite throughout. He was even unable to settle on a date on which he decided to discharge Hart. His testimony was at such variance from time to time that its narrative summary appearing earlier herein proved most difficult to draft into understandable yet objective form. Regarding the February 21 crane incident, although Hart's partner Little had since died Hart's testimony was additionally and creditably corroborated by fellow carpenter Ray Becker, who was working 10 to 14 feet nearby.

¹⁹ The hooks with safety latches were in fact ordered immediately and arrived at the jobsite several days later. Hart also conceded in cross-examination that he made complaints at about half of all the safety meetings. On this occasion (February 22), fellow carpenter Becker joined in with Hart in making the complaint.

²⁰ *Hugh H. Wilson Corporation*, 171 NLRB 1040 (1968), enf. 414 F.2d 1345 (3d Cir. 1969), cert. denied 397 U.S. 935 (1970); *Ohio Oil Co.*, 92 NLRB 1597 (1951); *Hulseley W. Taylor Co.*, 145 NLRB 425 (1963); *Guernsey-Muskingum Electric Cooperative, Inc.*, 124 NLRB 618 (1959), enf. 258 F.2d 8 (6th Cir. 1960).

²¹ Although insubordination was a stated reason, the record curiously contains no evidence of this allegation, with exception of the February 21 crane incident itself and Griffin's testimony that Hart was insubordinate "a time or two." Griffin expanded the term "incompetence" to include slow working and tying up the crane too long, which was corroborated by crane operator Latham. Latham was not only employed by Respondent at the time of his testimony, but also he and Hart were at times at odds about his ability or competence as a crane operator and the use of "tag" lines. As in the case of Griffin, I credit the testimony of Hart (and Becker) over that of Latham in this case, and here again the absence of testimony from Carpenter Foreman Griffith is puzzling.

four men to be laid off, and that later Griffin had said he only wanted three names because he was going to fire "that son-of-a bitching Hart."²² Foreman Griffith added that he felt Hart was a good carpenter and had tried to change Griffin's mind, but that Griffin was determined to fire him for "agitation."²³

Respondent further makes a somewhat indirect and curious economic defense to Hart's discharge. Griffin wanted to lay off or discharge four employees, one of whom was Hart. He asked Carpenter Foreman Griffith to list an additional three names. There was no actual reason given by Griffin in testimony for his intentions to discharge four men, except in the case of Hart for incompetence. Griffin then follows by indicating that after Hart was discharged production went up and costs came down, yet conceding that during January and February production was low because of the weather.²⁴ Respondent's Executive Vice President J.N. Matlock attempted in testimony to support Griffin's production cost linkage to Hart's discharge by comparing the square foot column production costs with the periods December 17 to February 25, and February 25 to April 22. According to Matlock, the cost per foot during the earlier period was approximately 63 cents as opposed to 51 cents during the later period. However, Matlock further indicated that more carpenter man hours went into column work during the later period, and that he had no knowledge of how many carpenters at the jobsite were actually engaged in column work during either period. Matlock also conceded that other factors affected column production costs, including weather, number of hours worked per week, and the ability to output of such other employees as crane operators, carpenter apprentices, and other laborers. Matlock also agreed that it would be "hard" to trace a decrease in such costs to one person. Indeed, I find that it was far from accomplished here in this case. Although Matlock's figures were essentially undisputed, they were derived from records and facts

²² Although Hart was apparently told by someone that "four carpenters were coming that could build forms," there is no actual or direct evidence in the case to indicate who the other employees on the list were, if they were in fact "laid off" or "discharged," and if so, for what reasons. Nor does the evidence reflect that the other names on the list were actually carpenters, notwithstanding the fact that "carpenter" Foreman Griffith was given the task of providing the list. Additionally, there is further lack of evidence of any actual replacements.

²³ This represents a summary of Hart's testimonial description of the incident, generally corroborated by Becker. The actual incident was not specifically remembered by Griffin in his testimony; thus, many of the remarks were not specifically denied by him. And here again, the lack of testimony from Foreman Griffith adds to the conclusion of total reliability of Hart's recollection and rendition of the incident. Becker, in his testimony, did manifest some animosity towards Respondent and praised Hart's abilities. Both had obtained jobs with the same company and had received promotions. Notwithstanding Becker's feelings about Respondent and Hart, I credit him completely in this case, as indicated earlier. His testimony and manner were direct, forthright, and certain. He had the air of a good and hard working construction man of above average intelligence, who seemingly took the oath far more seriously than many others. Hart, whom I have also credited in this case, was obviously not blessed with the intellectual skill levels of some. He appeared to be of the approximate age of 50 and admitted that he could not read well. Thus, his testimony, when viewed from the cold pages of the transcript only, occasionally appears uncertain and evasive. Such was not the case, for frequently there was a need for repetition or clarification of questions put to Hart before their subject matter came through.

²⁴ Somewhat inconstant with this concession was Griffin's reason for keeping Hart so long—the nonavailability of more qualified carpenters at the time.

that were subject to a multitude of variables, uncertainties, and contingencies and thus fall far short of even raising a slight inference that the cost decrease resulted even in part from Hart's discharge.

Hart's safety complaints may well have been considered by Griffin as "agitation," which was the reason he gave to Foreman Griffith for wanting to discharge Hart. No matter what the label or how they were taken by Griffin, I find that Hart was discharged because of the complaints in violation of Section 8(a)(1) of the Act as alleged in the complaint.

Upon the foregoing findings of fact, initial conclusions, and upon the entire record I hereby make the following:

CONCLUSIONS OF LAW

1. That Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. That the safety complaints made by employee Lowell V. Hart on February 21 and 22, 1978, constituted protected concerted activity under Section 7 of the Act.

3. That on February 23, 1978, Respondent violated Section 8(a)(1) of the Act by discharging employee Lowell V. Hart for engaging in the protected concerted activity described in 2. above.

4. That the improper act and conduct concluded in 3. above, and found herein affected commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom²⁵ and take certain affirmative action as set forth below designed to effectuate the purposes and policies of the Act.

Having found that Respondent violated Section 8(a)(1) of the Act by unlawfully discharging employee Lowell V. Hart, I shall recommend that Respondent offer him immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

I shall further recommend that Respondent make Hart whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment of a sum of money equal to that he normally would have earned from the date of discharge to the date of its offer of reinstatement, less net earnings, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).²⁶

²⁵ I shall also recommend that the additional "cease and desist" provision of the Order be of the narrow variety, which I feel to be more appropriate in this case. See *Hickmont Foods, Inc.*, 242 NLRB 1357 (1979).

²⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In his brief the General Counsel has requested that a remedial interest rate of 9 percent per annum be imposed on the backpay for which Respondent is liable due to the violations found herein, a percentage which is at variance with the Board's current policy of calculating interest according to the "adjusted prime rate" utilized by the Internal Revenue Service for interest on tax payments. This request is denied. See *Southern California Edison Company*, 243 NLRB No. 62, fn.1 (1979).

It will also be recommended that Respondent preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amount of backpay due and all the rights of reinstatement under the terms of these recommendations.

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

ORDER²⁷

The Respondent, Allen M. Campbell Company General Contractors, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for engaging in concerted activity for their mutual aid or protected by making safety complaints.

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

2. Take the following affirmative action:

(a) Offer Lowell V. Hart immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as a result of his unlawful discharge in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security records and reports, and all other records necessary to analyze the amount of backpay due herein.

(c) Post at its office and place of business in Tyler, Texas, copies of the attached notice marked "Appendix."²⁸ Copies of said notice, on forms to be provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of receipt of this Decision, what steps have been taken to comply herewith.

²⁷ 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 become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

²⁸ 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

After a hearing in which all parties had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to carry out the order of the Board.

WE WILL NOT discharge employees for engaging in

concerted activity for their mutual aid or protection by making safety complaints.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Lowell V. Hart immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of pay which he may have suffered as a result of his unlawful discharge, with interest.

ALLEN M. CAMPBELL COMPANY GENERAL CONTRACTORS, INC.