Whitesville Mill Service Co., Inc. a wholly-owned subsidiary of Edward C. Levy Co., Inc. *and* Roy Anthony Hurt *and* Operating Engineers, Local Union No. 841, International Union of Operating Engineers, AFL–CIO. Cases 25–CA–20918 and 25–CA–20929

June 23, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 18, 1991, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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 briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent correctly excepts that there is no evidence that Roy Hurt received vacation pay while on a suspension, as found by the judge. This error, however, does not require any change in the conclusion that Plant Manager Wall was largely indifferent to accidents on the job.

The Respondent also excepts to the judge's inference that Wall ''waited until after the union meeting, which confirmed Hurt's leading role in the campaign'' before discharging Hurt. Although the evidence does not show that Wall had actual knowledge of the union meeting or that Hurt had attended it, the evidence does show that within 48 hours of Wall's learning of Hurt's union involvement Hurt was discharged.

[2] The Respondent argues that the judge erred in recommending that Roy Hurt be reinstated. The Respondent implies that Hurt misrepresented his criminal record at the hearing. A review of the testimony reveals not misrepresentation but, at most, confusion on Hurt's part concerning the crime for which he was convicted 15 years prior to the hearing. Although Hurt falsified his employment application by denying that he had been convicted of a felony, the Respondent did not refute his testimony that he told Plant Manager Wall of this conviction a few months after his hire and that Wall condoned Hurt's misrepresentation by saying, ''It doesn't matter to me. I hire whoever I want around here.'' Thus, we find Respondent's exception urging that we deny Hurt reinstatement and backpay based on his falsification of his employment application to be without merit.

The Respondent also argues that the judge erred in failing to make any findings concerning Hurt's unauthorized review of his personnel file 1 week before his discharge which, according to the Respondent, constitutes misconduct sufficient to bar reinstatement. Preliminarily, we note that the Respondent failed to raise this objection before the judge in its posthearing brief. We also note that, contrary to the Respondent's implication, Hurt did not permanently ''remove'' or purloin any document from his file. He merely examined his own personnel file and returned it to the open file drawer from which he had retrieved it. That conduct is not sufficiently egregious to bar reinstatement with full backpay particularly inasmuch as the Respondent offered no evidence that at the time of the incident it maintained any work rule which prohibited employees' access to their personnel files.

The Respondent excepts, inter alia, to the judge's conclusion that employee Roy Hurt's discharge violated Section 8(a)(3). The Respondent contends that the General Counsel failed to establish a prima facie case of discrimination because antiunion animus was allegedly not established.

In concluding that the Respondent had antiunion animus, the judge relied on Plant Manager Wall's statement that he was ''shocked'' that union activity had surfaced at the plant and that Hurt was a leading union proponent. Although we agree that the Respondent harbored union animus, we find it unnecessary to rely on Wall's testimony at the hearing concerning his shock at discovering union activity in order to infer animus towards the Union. Rather we infer from the pretextual nature of the reasons for the discharge advanced by the Respondent that the Respondent was motivated by union hostility. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). In this regard, we agree with the judge that the Respondent's contention that Hurt was discharged because of accumulated incidents involving damage to equipment and unsatisfactory work was merely a pretext supported by equipment damage reports fabricated after the fact.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Whitesville Mill Service Co., Inc. a wholly-owned subsidiary of Edward C. Levy Co., Inc., Crawfordsville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ann Rybolt, Esq., for the General Counsel.
Ray Blankenship, of Greenwood, Indiana, and *Steven Crist, Esq.*, of Munster, Indiana, for the Respondent.
Roy Hurt, of Crawfordsville, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Indianapolis, Indiana, on May 23 and 24 and July 1 and 2, 1991. The charges were filed respectively on October 5 and 11, 1990, by Roy Anthony Hurt, an individual, and Operating Engineers, Local Union No. 841, International Union of Operating Engineers (the Union).[1] The consolidated complaint, which issued on December 28, alleges that Whitesville Mill Service Co., Inc., a

[1] All dates for 1990 unless otherwise indicated.

wholly-owned subsidiary of Edward C. Levy Co., Inc. (the Company or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly discharged employee Roy Hurt because of his union activities, and further violated Section 8(a)(1) by threats of reprisal. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs.

On the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by General Counsel and the Company, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, an Indiana corporation with its principal office and place of business in Crawfordsville, Indiana, is engaged at that facility in the business of processing slag and related products. In the operation of its business, the Company annually ships goods valued in excess of $50,000 from its facility directly to points outside of Indiana. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Edward C. Levy Co., the parent company, is engaged through some 40 to 50 subsidiaries in the business of servicing steel mills in the United States and Australia. Whitesville Mill Service, the subsidiary here involved, commenced operations in January 1989. It exists for the purpose of servicing a steel mill operated by Nucor Corporation, and is the only Levy subsidiary servicing Nucor. Hugh (Pete) Wall has been plant manager since the inception of operations. He is the only company supervisor at the facility. Wall reports to Levy General Manager James Webber, based in Dearborn, Michigan, who has overall charge of three subsidiaries, including the Whitesville Mill facility. Webber's responsibilities include labor relations and safety. Levy has union relations at some 30 to 35 of its subsidiaries. However, both Nucor and the Company facility are nonunion.

The Company's principal functions are to remove slag, truck it to the plant, screen and process it for sale, and to receive all of Nucor's scrap, process it to various sizes and return it to the mill for remelt. There are at the Nucor plant two slag pits (one for each furnace), a ladle cleanout pit, which also receives molten material, and a tundish pit or bay. Tundish is long steel bars, which the Company will remove if necessary. The Company's own facility consists of a trailer (including its office), a garage, a mechanical garage, and a plant for sorting slag. When Hurt was employed, the Company utilized two front-end loaders on tracks, one (later two) on tires, off-road vehicles (Euclid-type 30 ton dump trucks), and cranes. Company employees removed material from the pits with the front-end loaders, loaded it onto the off-road vehicles, and hauled it to the plant for processing. The Company has been gradually increasing its operations as Nucor has increased production. It presently has 14 employees who are classified as operators. There were about 11 in 1990. They interchangeably operated the loaders and trucks, although now some employees exclusively drive trucks. The employees worked in pairs, with one operating the loader and the second driving the truck. The Company also has one mechanic. Until May 1990 the Company had no clerical employees. In May the Company hired Lisa Cox, who has since served as Wall's secretary. Until mid-September 1990 (about 2 weeks before Hurt's discharge), the Company operated with two shifts, 5 or 6 days per week: the first shift worked from 5 a.m. to 1 p.m. and the second from 5 p.m. to 1 a.m. Since mid-September the Company has operated around the clock (24 hours a day, 7 days a week). Employees work 4 days on and 4 days off, in shifts from 10 a.m. to 10 p.m. and 10 p.m. to 10 a.m. The work is hard, heavy, dirty, and dangerous. Nucor poured molten steel at temperatures of 2800 to 3000 degrees, which hardened in 1 to 2 hours. Company operators sometimes scooped out steel while still in liquid state. Employees were required to move steel pieces weighing as much as 20 tons. Accidents and incidents involving property damage were not unusual. As will be discussed, defects in equipment and unavoidable conditions such as the widespread presence of scrap metal, were at least contributing factors. However, as will also be discussed, Plant Manager Wall invariably placed the blame on human error. Until Hurt's discharge, he did not indicate serious concern about such alleged human failure, unless they involved a complaint from Nucor. Concern about plant safety led to an aborted union organizational campaign among the Company's employees in late September. After Wall discharged Hurt (on October 1), the Company took steps to improve the condition of its equipment and facilities.

Roy Hurt began working for the Company as an operator on May 12, 1989. About September 21, 1990, Hurt called Union Business Agent James Fox, telling him that the employees were interested in a union. Fox subsequently contacted Hurt and arranged for Fox and Union Organizer Norman Hale to meet with Hurt at a restaurant in Covington, Indiana. They met on Friday, September 28, at 8 a.m. They discussed the situation at the plant. Hurt signed a union authorization card. The union representatives gave Hurt additional blank authorization cards. They arranged to have a meeting for employees at a motel in Crawfordsville on Sunday evening, September 30, and a followup meeting on Monday morning, October 1, for those employees who were scheduled to be at work at the time of the first meeting. Hurt reported to work at 10 a.m. and worked Friday and Saturday. He distributed authorization cards and told the employees about the Sunday meeting. Hurt and other employees attended the Sunday evening meeting. Hurt did not work on Sunday. On Monday at 9 a.m., Plant Manager Wall telephoned Hurt at his home. Hurt testified in sum as follows: Wall said he would have to let Hurt go because too much equipment was being torn up, and Hurt burned up a couple of machines in the pit. Hurt responded that that happened months ago, and operator Tim Via also burned up a machine. Wall added that Hurt also tore up a radiator. Hurt answered that was not his fault, and ''we both know what this is

[2] Certain errors in the transcript are noted and corrected.

about.'' Hurt immediately went to the plant and continued the discussion in Wall's office. Hurt asserted that this has to do with the Union. Wall disagreed, insisting that it had to do with equipment damage. Hurt suggested they forget about it and get back to work. Wall ended the discussion by stating: ''If you try to start a union around here, I will lay everybody off and shut this place down and open up a day later under another name and hire all new employees . . . there is nothing I can do, my back is against the wall.'' Earlier, in August, some four employees, including Hurt, John Mills, and Wall's son, Ricky Wall, were together while Hurt was servicing equipment. Wall came into the garage and asked what the hell was going on here. One employee remarked they were having a union meeting. Wall declared ''if you guys are trying to start a union around here, I will fire every f—king one of you.'' In an unemployment compensation hearing arising from Hurt's discharge, he gave a detailed description of his discharge conversations with Wall, which did not include the alleged threat described above. Employee Mills, who was presented as a company witness, testified that he was never present at a gathering as described by Hurt, and never heard Wall make the threat described by Hurt.[3]

Plant Manager Wall, in his testimony, was evasive about whether he knew of union activity at the time he discharged Hurt. He eventually admitted that he knew of some union activity and that Hurt was possibly involved. Wall subsequently admitted that on September 29 he learned of Hurt's union activity from employee Pat Duffy. Wall testified that on Saturday, September 29, about 5:30 p.m., Duffy came into his office and asked if Wall was aware of union activities. Duffy mentioned Hurt and Tim Via. Duffy hastened to assure Wall that he wanted no part of any union. Wall testified that he was ''shocked,'' and so told Duffy. Although Via was called as a company witness, he was not questioned about the union activity, and no witness contradicted the testimony of Hurt and Fox to the effect that Hurt initiated the organizational campaign and was the principal union adherent. Wall testified that he did not make the threats attributed to him by Hurt, either at the alleged gathering of employees or in the discharge conversations. Wall testified in sum as follows: His decision to discharge Hurt was a business decision, based on Hurt's record of incidents involving damage to equipment and unsatisfactory work, and Wall could no longer put up with it. Hurt's union activity had no effect on the discharge. The culminating incident occurred on September 27, and involved damage to a track loader radiator. A subsequent incident on September 29, involving damage to a loader tire, did not figure into Hurt's discharge, because Wall had already decided to discharge Hurt. Wall decided to discharge Hurt at about 5:30 p.m. on Friday, September 28, when he learned the extent of the damage resulting from the September 27 incident. He waited until Monday because he wanted Hurt to complete his shift for the week. Otherwise he would have to pay an unscheduled employee overtime to complete the shift, or do the work himself. However this would not explain why Wall did not discharge Hurt at the end of his shift on Saturday, but instead terminated him on Monday, i.e., after the union meeting. As indicated, Wall was at work and in his office on September 29. Wall further testified that he did not consult with or notify his superior, General Manager Webber, before discharging Hurt. He testified that he did take into consideration prior conversations with Webber concerning Hurt, including one which took place shortly after the September 27 incident, which Wall regarded as reflecting on his management skills unless he terminated Hurt. Webber, who was presented as a company witness, also testified that Wall did not consult with or notify him before discharging Hurt. Webber testified that on three or four occasions he discussed Hurt's work record with Wall, and referred to Hurt as Wall's ''bride,'' meaning a relationship wherein a supervisor gives extra consideration to an employee and keeps the employee on longer than is normal. Webber testified that following the September 27 incident he told Wall ''that it seemed as through everything that has come up in our accident reports lately has involved his bride,'' and, ''how long are you going to tolerate your bride?'' Wall and Webber did not, in their testimony, indicate whether they discussed the matter of union activity. Their testimony concerning the absence of any discussion about Hurt between September 28 and Hurt's discharge on October 1 is incredible. Webber was responsible for labor relations matters. On September 29, Wall was ''shocked'' to learn of an organizational campaign among the Company's employees, and that Hurt was playing a leading role in that campaign. In these circumstances it is unlikely that Wall would proceed ahead and discharge Hurt without first consulting with Webber and obtaining instructions or at least guidance from him. I find that Wall did consult with Webber, and that their discussion was not limited to Hurt's work record, but included Hurt's union activity. As indicated, Webber testified that he said it seemed that ''everything that has come up lately in our accident reports'' involved Hurt. In support of its contention that Hurt was discharged because of accumulated incidents involving damage to equipment and unsatisfactory work, the Company presented in evidence, through Wall's testimony, alleged typed ''equipment damage reports'' involving Hurt. These alleged reports were dated and purportedly signed by Wall as of the date of the incident involved. The General Counsel presented the alleged equipment damage reports in evidence, which involved other employees. No report predated May 13, 1990. Wall testified that the reports were prepared by his secretary within 2 or 3 days of each incident, on the basis of information furnished by him and comments from employees. None of the reports involving Hurt were signed by him, although the forms contain a space for employee signature and date. Only one report predating December 1990 involving any other employee, was signed by the employee (July 15 incident involving Steve Kilgore and damage to a rented tanker truck). Wall testified that the Company is ''now'' starting to have employees sign the reports. According to Wall, the employees knew that the reports were made, although he admitted that he did not always show them the reports. Wall further testified that he did not prepare the reports in all cases involving damage to property, but only cases involving serious damage, and he had no objective standard for determining what constituted serious damage. Wall testified that the cost of damage for incidents involving Hurt totaled $14,806.21, and that the next highest total for any employee

[3] In its brief, the Company stated (p. 4) that Union Business Agent Fox testified that Hurt told him that he was fired for destroying equipment. That is not a correct description of the testimony. Fox testified that Hurt told him ''that *they said* it was because he destroyed equipment down there. (Emphasis added.)

was $952.49 (James Scott). Hurt testified that he saw his personnel file 4 or 5 days before his discharge, and the file did not contain any equipment damage reports or anything else critical of his work.

On consideration of the purported equipment damage reports, and related documents and testimony, it is evident that the reports involving Hurt are fabrications prepared after Hurt's discharge, in an effort to rationalize that discharge. The latest alleged incident (September 29) is illustrative. The pertinent report indicated that while cleaning out the ladle pit Hurt ran over a sharp object and damaged the loader's left front tire. According to the report, Hurt used poor judgment by parking the machine without checking it for damage (although this would be after the damage had occurred). The Company did not present any witness who allegedly observed the incident. Hurt testified in sum as follows: He finished digging out the slag pit and parked the loader alongside the road. Wall, who was standing nearby, commented that he heard something. They walked over to the tire and saw that it was losing air. Wall said he would call the tire company, and he did not reprimand or criticize Hurt. Flat tires are common because of the presence of scrap steel everywhere. This was the first time Wall had a flat tire, although some employees had as many as two flat tires in 1 week. Hurt testified as to the names of employees who had flat tires on the job. Employee Russell Wethington, a General Counsel witness, and employees Via and Scott, who were called as company witnesses, corroborated Hurt's testimony in this regard. Via, the Company's best and most experienced operator, testified that flat tires were more common on trucks than loaders, but that on one or two occasions he had flat tires on the loader, including one in the summer of 1990, due to his carelessness, in which he ran over a piece of pipe. Wall verbally reprimanded him about the incident. Scott testified that flat tires were common during the summer of 1990, as many as three or four per week, mostly on trucks but also on loaders. Wethington testified that Wall became angry about damage incidents, including flat tires, and would say he ought to get rid of the employee, but that the employees did not take him seriously. Notwithstanding the frequency of flat tires, the Company's alleged equipment damage reports do not include incidents of flat tires prior to Hurt's discharge. It is evident that Wall did not regard such incidents as serious. Wall testified that the September 29 incident cost the Company $1640.67 for a recapped tire. (He initially testified that it also cost $437.12 for a slick cap and repair, but subsequently admitted this was an unrelated charge.) The invoice indicates that the Company ordered the tire on September 21, 8 days before the incident. I credit Hurt. I find that Hurt was not at fault in the incident, Wall knew he was not at fault, the Company failed to show what if any damage it sustained in the incident, and the incident casts doubt on the validity of the alleged equipment damage reports involving Hurt.

A purported equipment damage report involving Hurt dated July 17, is particularly demonstrative of the contrived nature of these reports. The reports indicate that the Company purported to number the reports involving each employee in chronological order, by date of incident. For example: for employee James Scott there are reports numbered 1 through 4, dated respectively July 19, September 18 and 26, and December 17; for Hurt, the July 17 report is numbered 2; two other reports, both allegedly involving incidents on June 28, are numbered 3 and 4; and the next purported report, numbered 5, is dated August 30. Wall did not explain this discrepancy. It is evident that Wall was reaching back into his memory to dredge up anything and everything he could think of to impugn Hurt's record. As will be discussed, one of the alleged June 28 incidents actually occurred about 3 months earlier, when Wall had no secretary and did not even claim to have such a thing as equipment damage reports.

Alleged report 2 (dated July 17) states that Hurt ran over and smashed a 55-gallon drum with the loader, rendering it unusable. According to the report, Hurt was not paying attention to his surroundings while operating the drum was owned by Tri-County Petroleum, and the Company ''will be responsible for the damages.'' Wall, in his testimony, admitted that he had no personal knowledge of the incident. He initially testified that to his knowledge the drum was damaged very severely and the contents (antifreeze) were not used. He subsequently testified that possibly some of the contents were used after the incident. (If as indicated by the purported report, the drum was ''smashed,'' there would be nothing left to use.) According to Wall, the barrel cost $187 and drum core $20. However the Company presented no evidence that it purchased another drum or reimbursed Tri-County Petroleum for the cost of a drum. Hurt testified in sum as follows: He is not sure of the date, but recalls the incident. He was backing up a tire loader when he struck and slightly dented the top of the barrel. A small amount of antifreeze spilled out, but otherwise the contents were undamaged. He offered to reimburse Wall for the barrel, but Wall laughed it off, and did not criticize Hurt. Hurt subsequently gave the Company four abandoned barrels which he found in good and usable condition. Employee Tom Via testified that on one occasion during Hurt's tenure, he (Via) struck and destroyed a 55-gallon oil drum. The contents were lost. Wall verbally reprimanded Via about the accident. There is no equipment damage report for this incident. If Wall did not write up Via, then it is difficult to see why he would make a written report for the Hurt incident. I credit Hurt. I find that Wall attached no significance to the barrel incident, did not reprimand Hurt verbally or in writing, and that the Company sustained no loss as a result of the incident.

Alleged damage report 3 states that Hurt damaged the left door, left door mirror, and bracket assembly of a truck owned by another firm. The report asserts that the accident was caused by Hurt's negligence, in that he was not paying enough attention to his surroundings in order to give himself enough room to clear the semitruck while driving around the parked truck. The report states that the paperwork for payment of the damage ($260.01) was processed on August 20, a strange notation for a report allegedly prepared within 3 days of June 28. Report 4 states that on the same day (June 28) a track loader ''caught on fire, doing severe damage to wiring, hoses and radiator which costs a considerable amount to repair.'' According to the report Hurt used poor judgment while operating the loader inside the furnace pits, because he was warned ''numerous times'' of the danger in driving equipment over the top of hot material, and had prior knowledge of the proper procedure, ''which is push up all hot material and not to drive up on top of it.'' As with most of the alleged reports involving Hurt, they constitute diatribes against Hurt, replete with accusations of negligence and poor

judement, and assertions that Hurt was repeatedly warned about specific improper procedures. These reports ostensibly date back to May 13. The reports are particularly strange and suspicious when one considers that according to General Manager Webber, Hurt was Wall's ''bride.'' If so, then it is difficult to see why Wall would place such denunciatory reports in Hurt's personnel file. This is particularly true when one compares the alleged reports involving Hurt with the much more moderate language used in reports involving other employees. As will be discussed, a file memo concerning employee Steve Kilgore, is a more accurate reflection of Wall's attitude toward Hurt. In fact, the Company had no safety procedure or systematic method of informing employees of proper or safe procedures. Employees informally learned from other employees on the job. No witness testified that the Company issued written safety instructions to its employees. Russell Wethington testified that he never received formal safety instructions or safety rules. James Scott testified that other operators told him to check fluid levels, but no one told him to check the radiator guard. I do not credit the assertions in the alleged equipment damage reports that Hurt was repeatedly warned about various improper procedures.

With regard to report 3, Plant Manager Wall testified in sum as follows: He questioned Hurt about an incident on June 28 involving damage to a vehicle. Hurt was driving an off-the-road vehicle. Semitrucks (not belonging to the Company) were parked along the roadway within Nucor's premises. A piece of steel hanging off the side of Hurt's truck tore off a mirror and damaged the door of a parked vehicle. Wall does not recall Hurt offering to pay for the damage (which cost $260.01). Despite prodding from company counsel, Wall was noncommittal about whether he reprimanded Hurt, testifying as follows:

> Q. Did you discipline Mr. Hurt as a result of the damage he did on June 28th?
>
> A. I questioned him of the damage done to the vehicle and I think he admitted that he used poor judgment in doing that.
>
> Q. You counselled him, would that be an accurate to describe it?
>
> A. I investigated the accident.
>
> Q. You did not issue him any written reprimand or suspension as a result of this?
>
> A. Just a verbal.

Hurt testified in sum as follows: He was removing a large piece of steel from the ladle cleanout pit to the slag processing area, operating a dump truck. The steel piece, about 20 feet wide, was overhanging about 10 feet on his right (blind) side. At that time there was only a one-lane road around Nucor's premises. Hurt thought he had enough clearance, but the steel piece caught the mirror of the semitruck, pulling it off. Hurt reported the accident to Wall, who told him to get necessary information from the operator of the semitruck. Hurt offered to pay for the damage, but Wall declined the offer, telling Hurt: ''don't worry about it, be more careful.'' The Nucor road was subsequently widened. I credit Hurt. I find that Wall felt Hurt could have exercised more care, but did not regard the matter as important, attaching significance to it only after he discharged Hurt.

Regarding the matter of alleged fires involving Hurt, the Company's testimony and purported records were hopelessly confused and contradictory. General Manager Webber testified that Hurt was involved in three fires (although he had no personal knowledge of any of them). In the unemployment compensation hearing, Plant Manager Wall testified that Hurt was involved in two fires, one on June 28 and the second on August 30. The alleged equipment damage reports involving Hurt refer to only two fires, allegedly on June 28 and August 30, respectively. The only reference to the date of July 17 concerns the drum of antifreeze. Nevertheless Wall testified that Hurt was involved in two fires, the first on June 28 and the second on July 17. He did not witness either fire. Wall testified in sum as follows: With regard to the first fire, he learned about it by investigating and discussing it with Hurt and employee Steve Kilgore (who was not called as a witness in this proceeding). Hurt said that the track loader caught fire when he was removing material from the ladle cleanout pit. On the basis of what Wall learned from Kilgore, he concluded that Hurt should have moved the loader farther away from the pit when Nucor was pouring molten steel. Instead Hurt parked within the doorway of the pit, about 10 feet from the pit, where sparks and chunks of metal were flying, and this caused the fire. The loader did not have a cracked fuel tank, although another loader, not involved in a fire, did have a cracked fuel tank. Wall did not reprimand Hurt, but put an equipment accident report in his file. The second fire occurred at the south slag pit. Hurt told him that the machine caught fire. Wall concluded, from observing Hurt at work, that Hurt drove upon the hot material instead of keeping it in front of him. In such circumstances the steel tracks carry the hot material to the engine compartment of the loader, where it falls into the engine compartment, and could thereby cause a fire. Wall then warned Hurt not to do this. The loader may have had a fuel line leak. Wall's description of the first alleged fire was similar to that contained in the alleged equipment damage report dated August 30, except that Wall never testified that he warned Hurt ''numerous times'' about not moving equipment completely out of the ladle cleanout pit. Wall's description of the second alleged fire is similar to that contained in the alleged report dated June 28, except that Wall never testified that Hurt ''had been warned numerous times'' of the danger in driving equipment over top of hot material. In support of its varying assertions, the Company produced purported records of the costs incurred in connection with the fires. These included use of a fire extinguisher service on July 9. One invoice purported to involve inspection of a fire on June 29, but no work was performed at that time. Another invoice included installation of a new radiator on July 5. Another invoice indicates that hoses, fire sleeves, and related equipment were shipped to the Company on August 29 (1 day before the alleged August 30 fire). Other invoices are dated on August 30 or in early September. Employee Tim Via testified that in the spring of 1990 his loader caught fire, caused by a fuel leak. As a result he was briefly hospitalized, and the loader lines were slightly burned. Wall did not blame him. There is no reference to that incident in the alleged equipment damage reports. If all this proves anything, it is that equipment fires were not unusual at the Company, and that they did not all involve Hurt.

Hurt testified in sum as follows: He was involved in two fires. The first probably occurred in early March, and the second probably on August 30. With regard to the first, Hurt was operating a track loader in the slag pit, digging up slag, when he saw fire behind him. The fuel tank was burning. Hurt found a vertical crack in the tank, extending about 60 percent of the height of the tank, and the tank was leaking fuel. Russell Wethington, who was then acting mechanic, subsequently told Hurt not to fill the tank more than halfway, because of the crack. The employees continued to operate the loader with the crack, because Wall told them simply not to fill the fuel tank more than halfway. Hurt never discussed the fire with Wall. It is not possible to avoid hitting hot slag, because the slag crumbles into small pieces. All the operator can do is to clean out the pit as quickly as he can. Russell Wethington substantially corroborated Hurt's testimony. Wethington testified in sum as follows: The fire occurred about April 1. Wall asked him to check into it. Wethington examined the loader, and found a crack in the fuel tank. He was not previously aware of the crack. He concluded that the fire was caused by fuel running out of the tank, and so informed Wall. There was no damage to the loader. After the fire the employees were instructed to fill the tank only halfway. The Company continued to use the loader with the crack, and was still using it when Wethington quit his job (June 14, 1990). I have no reason to question Wethington's credibility. I find that the fire occurred about April 1, that it was caused by a leak in the fuel tank, that Wall knew this to be the cause, but continued the loader in use, and that Hurt was not involved in any other fire until August 30. Wall had no secretary at the time of the first fire, and therefore would not have prepared an ''equipment damage report'' even if he were inclined to do so.

Regarding the second fire, Hurt testified in sum as follows: He was operating a track loader in the ladle cleanout pit. The machine had been down. Earlier that day he heard then mechanic Mark Morgan tell Wall there was a leak in the fuel line. Wall told him to have Hurt operate the machine anyway. Hurt proceeded into the pit and was digging out a large piece of steel when the sirens went off, indicating that Nucor was about to pour. Hurt set down the steel and backed out of the pit. Nucor poured hot molten steel on top of the piece of steel. Hurt waited for the steel to cool, and went back into the pit. A construction worker saw fire shooting out from under the machine, and alerted Hurt. Hurt struggled to put down the large piece of steel, but by the time he did so and backed out the machine was engulfed in flames. Hoses were bursting, antifreeze spraying, and Hurt fell from the machine, but was not injured. Steve Kilgore, who was working with Hurt, was able to extinguish the fire. Mark Morgan came to the scene. Hurt told him that the machine had a fuel leak (which Morgan knew), and this caused the fire. When Plant Manager Wall arrived, he told Hurt that Morgan was to blame, because he failed to clean out the belly pan, leaving fuel in it, and that he ought to fire Morgan for this. Morgan, who was presented as a company witness, testified in sum as follows: the fire occurred at the south ladle cleanout pit. He arrived 10 to 15 minutes after the incident. The loader was parked about 20 feet outside the driveway entrance to the pit. To Morgan's knowledge, the loader did not have a major fuel leak, although an insignificant amount of oil might leak out. When Nucor is ready to pour, lights flash and sirens sound, and 8 to 10 minutes elapse before Nucor pours. There is a red line around the pit, and when the sirens sound, the operator should move his machine beyond the red line. Morgan asked Hurt what happened. Hurt said that when the sirens sounded, he was pulling out a large piece of steel. He struggled to move the steel to a safe area, but before he could do so Nucor began pouring. The hot molten steel splattered, hitting the machine, and some hit the fuel line, causing the fire.

I have no reason to question Morgan's credibility.[4] I credit his testimony. I find that Hurt remained too long in the pit area, and this was the principal cause of the fire. However I also credit Hurt's testimony to the effect that instead of blaming Wall's ''bride,'' Wall told Hurt that Morgan was to blame, although he did not intend to do anything about the matter. (As indicated, Wall testified that he did not reprimand Hurt about parking his equipment too close to the pit.) Wall chose to blame Hurt only in retrospect, after he discharged Hurt.

The Company presented in evidence an alleged equipment damage report, dated May 13, involving Hurt. The report states that Hurt, while operating a track loader, cleaning out the ladle cleanout pit, pushed a chunk of material against and over the north bunker wall, causing severe damage to the wall. The chunk landed on a walkway outside the pit. According to the report, the damage was caused by Hurt's poor judgment and unsafe act, in that he ''was warned numerous times about pushing material up against the bunker wall.'' The report states that Hurt was given disciplinary action of ''one week from work without pay,'' and that Nucor was notified of this action. The Company also produced another purported equipment damage report, also dated May 13, involving Russell Wethington. The report states that Wethington was operating a loader when he backed off into a drainage ditch just outside the north furnace pit. According to the report, Wethington attempted to extricate the loader, without asking for assistance, by maneuvering the loader back and forth, and in the process caused considerable damage to Nucor's water system and completely destroyed a water valve box located by the drainage ditch. The report states that Wethington was warned of the seriousness of the damage he caused, given disciplinary action of 1 week from work without pay, and Nucor was notified of the action taken.

Plant Manager Wall testified in sum as follows: On May 13 Nucor notified him of unsatisfactory work and safety precautions not taken, resulting in damage to the wall of the ladle cleanout pit. Concrete was broken and debris and steel pushed over the wall and onto the walkway. He did see the incident, but Hurt told him he caused the damage. The wall had previously been cracked. Employees do not bang the ladle up against the wall in order to remove steel. Wall does not know what Wethington was doing at this time. The damage allegedly involving Wethington was a separate incident. Neither employee was specifically assigned to the loader. Normally when two employees work together, one operates the loader, and the other first wets down the area and afterwards hauls away the slag in the truck. The Company has

[4] Morgan has been convicted of dealing in marijuana, a misdemeanor. I am not persuaded that this impugns his credibility. See Fed.R.Evid. 609; *Ideal Donut Shop*, 148 NLRB 236, fn. 1 (1964).

not yet received an invoice for the alleged damage to the wall. (As more than a year elapsed between the incident and the present hearing, it is evident that the Company did not incur any cost as a result of the incident.) Hurt testified in sum as follows: On the date in question (about May), he and Wethington were working together, with Wethington as loader operator and Hurt as truckdriver. Hurt sprayed down the slag, but Wethington was having difficulty lifting a large piece of steel. Hurt took over the loader and tried, but was also unsuccessful. Wethington returned to the loader and removed the steel by pushing it up and over the wall. The operation did not cause damage to the wall. However the wall had previously been damaged by Nucor employees, who sometimes would bang ladles against the wall to knock off steel pieces which failed to completely fall into the pit. About 3 p.m. that day Wethington said he backed into a ditch and hit the water line, and asked Hurt to help him. Hurt did. As they were working to pull out the loader, Wall came up, visibly angry. He told them ''I can't have this, I am going to have to lay you guys off for a few days.'' Wethington testified in sum as follows: On May 13 he was operating the track loader and Hurt was operating the truck. They were cleaning the ladle cleanout pit. No large chunks came off the wall, although (as testified by Hurt) the wall had previously been damaged. Wethington also testified concerning his backing into a ditch. Without going into detail, it is sufficient to note that Wethington apparently slid in mud around the ditch. (Grass has since grown or been planted around the ditch.) Wethington further testified that Wall suspended him and Hurt for 1 week, allegedly for destruction of Nucor property. However Wall gave them both vacation pay for the week, and consequently they lost no wages.

It is evident from the testimony of Hurt and Wethington that Wethington operated the loader on May 13. Therefore, if there was any fault on the part of an operator (and I need not make such determination) the fault would be that of Wethington. Plant Manager Wall was largely indifferent to accidents on the job, unless they resulted in complaints from Nucor, the Company's bread and butter. Wall sought to appease Nucor by notifying Nucor that he would sternly discipline his employees. However, Wall also recognized the difficulty of the employees' work. He then proceeded to apportion blame between Hurt and Wethington, and administer a token discipline by giving each a week off with pay.

Wall testified in sum as follows: On September 8 Hurt failed to remove slag from the north slag pit. Operators normally remove slag every 3 to 4 hours, with each removal taking 45 to 60 minutes, depending on the amount of production. Although not all slag is removed each time, enough must be removed so as not to interfere with the production of steel. This was not done. Wall was not present at the time. Hurt worked a shift from 5 a.m. to 1 p.m. No company employees were scheduled to work from 1 to 5 p.m., but Nucor probably dumped slag during this period. Shortly after 1 p.m., Nucor left a message at Wall's home. Wall returned the call at about 2:30 p.m. Nucor told him that the pit was not cleaned and slag overflowed, interrupting production. Nucor used its own employees to remove the slag. Wall discussed the matter with employees Hurt and Steve Kilgore. He told them the production interruption was a serious matter, Nucor would not put up with that kind of service, and (gesturing with a finger and thumb about an inch apart), indicated that they were this close to being discharged. If company employees do not finish their job at the end of their shift, they must remain until relieved or the job is finished, including overtime if necessary, because the Company must provide Nucor with service. Hurt had previously done this. The Company identified, as its alleged record, a memo in Kilgore's personnel file dated September 8. The memo stated that Kilgore left work without completing his duties, and that he and another (unnamed) employee failed to thoroughly clean the north and south furnace pits, causing interruption to Nucor's production. The memo stated that both employees were reprimanded with a warning that they were very close to being discharged for their actions. There was no alleged memo or other notation in Hurt's personnel file. Hurt testified in sum as follows: On September 8 he worked his shift from 5 a.m. to 1 p.m. When he completed his shift the pits were clean. Two days later Wall summoned him and Kilgore about the pits. The employees explained that they cleaned the pits, but that Nucor had visitors the previous day. This meant that the Company could not dig slag that day, because of the amount of smoke and dust generated during the operation. As a result the slag hardened, making it more difficult to remove. Nucor poured more steel on top of the existing slag. Nucor shuts down steel production each Wednesday, in order to enable the Company to do a thorough cleaning. (September 8 was a Saturday.) Wall said ''I am this close to sending you guys home.'' He said he would clean the pits himself. Hurt offered to help, but Wall told him not to worry, adding, ''let's forget all about this.'' Wall and two or three other employees proceeded to clean the pits, and 24 hours later they were still working on it. Hurt and Tim Via completed the cleaning. Hurt would normally remain beyond the end of his shift if it appeared that more cleaning was necessary to avoid a problem with mill operation. However, there must be compelling need or else he would get chewed out for taking overtime.

In the absence of testimony from Nucor personnel, Wall's testimony amounts to little more than self-serving hearsay. There is no probative evidence as to what if any interruption to production occurred on September 8. Wall's reaction to the situation was typical of him. He was indifferent about accidents or mishaps on the job unless they involved a complaint from Nucor. In this case, as with the alleged damaged pit wall, he immediately sought to appease Nucor by blaming and purporting to sternly discipline company employees, while simply giving them a slap on the wrist. Wall sought to impress Nucor by placing a memo in Kilgore's personnel file. It is unnecessary to decide whether Wall told the employees he was close to sending them home or close to discharging them. Wall sometimes threatened to fire employees, but no one including himself took such threats seriously. Wall put nothing in Hurt's personnel file, and did not even mention his name in the Kilgore memo. It is evident that as of September 8 Wall regarded Hurt as a valued employee, and did not regard the incident as a reflection on Hurt's qualifications. In June 1990 Wall gave Hurt a day off with pay as a reward for good work. Hurt was neither a personal friend or relative of Wall. If Hurt was Wall's ''bride,'' it was, as indicated because Wall valued him as an employee.

The remaining alleged incident leading to Hurt's discharge is the subject of a purported equipment damage report dated September 27. Even on the basis of Plant Manager Wall's

testimony it is evident that this report was prepared after his decision to fire Hurt. The report states that the radiator of a loader was damaged beyond repair, and the radiator and radiator guard had to be replaced. According to the report, Hurt, while removing slag from the south furnace pit, continued to operate the machine (B-76) after the radiator guard came loose, the guard swung open and shut, caught on the lift arms of the bucket, and the damage was ''severe and costly.'' The report stated that Hurt was warned ''numerous times'' of his responsibility to check the machine before it was operated. As discussed, the Company never gave such warnings. The only arguably relevant repair bill produced by the Company, consisted of a repair bill, dated October 6, from A-1 Radiator, Inc., which included repair to front end of radiator ($50) and building a grill ($225). In sum, on the basis of the Company's own alleged records, the incident cost the Company slightly over one-twentieth of the amount claimed by Wall ($5074.55).

Plant Manager Wall testified in sum as follows: On September 27 Hurt worked the shift from 10 a.m. to 10 p.m. The incident in question occurred at about 8 p.m. An employee called to report that a machine was down due to radiator damage. The next morning Wall came in and examined the vehicle, a track loader. He asked Hurt what happened. Hurt said the radiator guard came loose and he ran into the radiator. Wall believes he asked Hurt if he examined the vehicle before operating it, but does not remember his answer. He believed Hurt was at fault, because (1) Hurt should have checked the machine before operating, and would have seen any missing or loose bolts, and (2) he should have stopped the machine when the guard came loose, and thereby would have prevented the damage to the machine and radiator. He did not discipline Hurt at this time because he did not ''notice how serious it was.'' Wall did not claim that he even told Hurt that he did anything wrong. However, Wall called Webber, who asked him how long he was going to put up with his bride. Brandeis Equipment Company arrived at about 11 a.m., tore down and examined the loader, and about 5:30 p.m. told Wall the extent of the damage. At this time Wall decided to terminate Hurt. He based his decision on accumulated incidents of damage to equipment and unsatisfactory work. In the unemployment compensation proceeding, Wall testified that the September 27 incident, standing alone, probably would not have been grounds for discharge.

Hurt testified in sum as follows: The incident probably occurred on September 27. He was cleaning out the north slag pit with a track loader. He checked fluid levels and inspected the loader before operating. He saw nothing wrong with the grill, and the guard was not ajar. The machines had places for 4 to 8 bolts per radiator, but were ''real old machines'' and ''pretty well beat up'' and in places so ''twisted you can't get bolts up through it.'' One or two bolts were missing, but could not be replaced because of the twisted grill. The machine had been operated like this for months. As he was backing out of the pit, the air was very dusty and greatly reduced his view. He saw that radiator guard was twisted and caught between the arms of the loader. He lifted the bucket to dump out slag, and saw the radiator had a hole through which fluid was leaking. Hurt twisted the machine around to get it off the road, and asked a subcontractor at the office to notify Wall. Wall said nothing to him about the incident until Wall discharged him. Steve Lewis, who was working with Hurt that day, testified as a reluctant company witness. Lewis testified that Hurt had his bucket in the air, ready to dump slag in Lewis' truck, when both of them saw that the whole grill was off the machine. Lewis testified that he did not know whether Hurt could have avoided the accident. Russell Wethington testified that Wall knew there were track loaders with missing or broken grill bolts. Employee James Scott testified that the Company now has the grills bolted down on both sides, instead of only on one side, thereby preventing the grill from swinging open as it did on September 27.

Whether Hurt could have done anything to prevent the radiator guard from swinging open, or to prevent damage to the radiator once it did so is a close question upon which reasonable persons could disagree. Wall's professed conclusions in this regard were based on speculation. However, Wall's actions were inconsistent with an intent to discharge or even discipline Hurt in whole or in part because of the incident. As of the morning of September 28 Wall knew all he had to know about the matter. On the basis of his own testimony, he was satisfied as of that time that he knew how the accident occurred, and that Hurt could have prevented the accident and the ensuing damage. If Hurt saw that there was a hole in the radiator, then Wall must have also seen it. Hurt did not claim, nor did the Company show, that it received any estimate of repair costs prior to Hurt's discharge. Nevertheless Wall said nothing to Hurt on September 28 or 29 to suggest that Hurt was at fault in any way, or that Wall regarded the matter as serious. After Wall learned of Hurt's leading role in union activity, and his participation in the Sunday union meeting, the incident took on a new life.

I find that the Company discharged Hurt because of his leading role in the union campaign, and for no other reason. As of the afternoon of September 29, Wall had no intention of discharging or even disciplining Hurt, whom he regarded as a competent employee. When Wall learned through his informer of the union organizational campaign, and that Hurt was playing a leading or the leading role in the campaign, Wall was ''shocked.'' Wall immediately notified his superior, General Manager Webber, who for the first time, and because of the union activity, referred to Hurt as Wall's ''bride,'' and demanded to know how long Wall intended to tolerate his bride. Hurt's union activity threatened the nonunion status not only of the Company, but also its customer Nucor. Wall waited until after the union meeting, which confirmed Hurt's leading role in the campaign, and then proceeded to discharge Hurt. Wall used the September 27 accident as an excuse, and dredged up anything and everything he could use as adverse reflection on Hurt's qualifications. Wall prepared the ''equipment damage reports'' in such a way as to suggest that Hurt was an incompetent and careless employee. In fact, as of September 29 there was nothing adverse in Hurt's personnel file.

As indicated by the testimony of the General Counsel and company witnesses, accidents and mishaps were common, and often unavoidable in the Company's operations. It is evident that the purported equipment damage reports involving other employees represented only the tip of the iceberg. There is only one such report involving Tim Via, the Company's best and most experienced employee. However, Via testified as to three or four other incidents, including some which he or Wall attributed to his own fault. Hurt testified

without contradiction as to several instances in which Wall himself damaged equipment or Nucor property, although Wall seldom operated equipment. If Hurt had more accidents than other employees, it was because he had relatively longer tenure, being among the Company's first employees. Nevertheless, Hurt was the only employee ever discharged by the Company. Company counsel strove mightily, prodding his witnesses with leading questions, but no employee witness characterized Hurt as an unsatisfactory employee. Tim Via testified that Hurt's accident record was probably a little worse than others at times, that sometimes he acted like he didn't care, but others also sometimes acted that way, that Hurt was a little hard on equipment, but ''you would have to be that way in some situations,'' and that Hurt sometimes ran his machine in third gear, but that he has also done this (which could cause the machine to take a beating). The Company now has chains on its tire loaders. Steve Lewis testified that he never said that Hurt didn't care, and that he never saw Hurt leave the job without completing his work or leaving a mess for others. Lewis testified that ''we don't have near the problem that we had when Roy was there'' but indicated that this related to new and improved equipment and resolution of grievances. On the basis of the Company's knowledge of Hurt's union activity, the Company's hostility to unionization, as demonstrated by Wall's remark that he was ''shocked'' by the union activity, the timing of Hurt's discharge, and the absence of any evident legitimate grounds for discharge between the time Wall learned of the union activity, and the discharge, General Counsel presented a prima facie case that the Company discharged Hurt because of his union activity.[5] As the Company's asserted reasons for discharge were demonstrably false or pretextual, it follows that the Company failed to meet its burden of establishing that it would have discharged Hurt in the absence of his protected activity. However I do not credit Hurt's testimony concerning the alleged threats by Wall in August and at the time of discharge. As indicated, Hurt gave a different version of discharge interview in the unemployment compensation hearing, and his testimony concerning the alleged August threat was contradicted by John Mills. I have no reason to question Mills' credibility. Therefore I am recommending dismissal of the pertinent complaint allegations.[6]

For the foregoing reasons, I find that the Company violated Section 8(a)(1) and (3) of the Act by discharging Hurt. The Company proffered evidence of an incident occurring on Saturday, March 16, 1991, which is the subject of a pending civil lawsuit by Wall against Hurt for alleged assault and battery. The Company does not discuss the matter in its brief. However, the Company evidently proffered the testimony in order to show that even if Hurt were unlawfully discharged, he should be denied the usual remedy of reinstatement with full backpay. The General Counsel suggested that I could defer the matter for compliance, if the cases should reach that stage. The General Counsel does not contend that I am required to do so. I ruled that I would hear the matter, and I shall now proceed to decide the matter.

Plant Manager Wall testified in sum as follows: He went to purchase gas and lotto tickets. After getting gas he proceeded to another station (Super Test) to get the tickets. As he was pulling out of the first station, another truck pulled close to his. Hurt was driving. When Wall arrived at the Super Test station, Hurt was sitting in his truck which was parked across the street. Wall went into the station store to purchase his tickets. When Wall came out, he saw Hurt's truck backed in alongside Wall's. As Wall proceeded to his truck, Hurt jumped out of his truck, grabbed Wall by the shoulder and struck Wall in the jaw with his fist. Wall backed away. Hurt said: ''When this shit is over, I'm going to break every f—king bone in your body.'' Hurt began cursing Wall's mother. Wall went back into the station store. Hurt left, and Wall reported the incident to the local police. Hurt testified in sum as follows: He was driving his truck in a northerly direction on Washington Street in Crawfordsville, accompanied by one Dan Surface. Wall was proceeding south when Surface noticed that Wall was giving Hurt the finger. Hurt went around the block and proceeded to the Super Test station because Surface wanted to purchase a lottery ticket (drawing was scheduled for 7 p.m. that evening). He did not go there to confront Wall. He parked parallel to Wall's truck, which was facing the opposite direction about 10 feet from his truck. Surface went into the station store and shortly thereafter Wall came out. Wall came over to Hurt's truck and Hurt got out. Hurt asked Wall ''What's your f—king problem?'' (referring to the finger gesture). Wall came up to Hurt, poked him in the chest and said ''Whitesville Mill is not paying you a fucking dime.'' Hurt then slapped Wall's hand away from him, catching Wall's left cheek with the back of Hurt's left hand. Surface, who had just emerged from the station and was 30 to 40 feet away, saw the slap. Hurt told Wall that if he ''ever laid a hand on me again I'd break every f—king bone in [Wall's]face.'' Hurt said nothing about Wall's mother. Wall did not stumble or fall. He mumbled something and returned to the store. Surface suggested that they go to the police, but Hurt said it was ''no big deal.'' The next day, at police request, Hurt gave a statement. There were no criminal charges.

Daniel Surface, who was presented as a General Counsel witness, substantially corroborated Hurt's testimony to the extent that he observed the events. Surface testified in sum

[5] An employer's opposition to unionization may be considered in a case of alleged discrimination which turns on a question of employer motivation, even if the employer's statement or statements do not in themselves constitute threats, promises, or other unlawful conduct. See *Chicago Rivet & Machine Co*., 275 NLRB 1298, 1301 fn. 7 (1985), and cases cited therein; *West Meat Co*., 244 NLRB 828, 830 (1979). Here, the Company was plainly opposed to unionization, as evidenced by Wall's statement to employee Duffy that he was ''shocked'' by the union activity.

[6] In determining the merits of this case, I have in accordance with Board policy, taken into consideration the decision of the Indiana Department of Employment and Training Services on Hurt's litigated claim for unemployment compensation. In that proceeding the appeals referee held that Hurt was not discharged for just cause and was entitled to compensation benefits. The referee found that Hurt was not at fault in six of the eight alleged instances of damage or unsatisfactory work, and the remaining two did not involve substantial damage or willful negligence. He also stated, without discussion, that the evidence was not persuasive that Hurt was discharged due to his union related activities. This latter finding lacks probative value. During the unemployment compensation hearing Plant Manager Wall, on instructions from company counsel, refused to answer questions concerning his knowledge of union activity. Therefore the referee lacked an adequate record on which to determine the matter.

as follows: He was with Hurt, who was driving his truck north on Washington Street, taking Surface to visit a job. Surface knows Wall well enough to recognize him. Surface saw a red pickup truck go by with a guy in it ''giving us a hand gesture.'' Surface asked who it was. Hurt looked and said he thought it was Wall. Surface asked Hurt to take him to the Super Test station so he could get a lottery ticket. (Surface purchases a ticket there every week.) They did not follow Wall. Hurt parked toward the edge of the station. Surface went into the store while Hurt remained outside. Surface saw the red pickup truck, with no one inside. Wall was in the store, and he left when Surface entered. Surface made his purchase and left. As he turned the corner he saw that Hurt and Wall were exchanging words. He heard Wall say that Whitesville Mill wasn't going to pay Hurt a damn dime. Wall was poking Hurt's chest. Hurt threw up his hand, catching Wall in the face with the back of his hand. Wall ran back to the station, holding his hand to his face. Wall said ''that's what I wanted you to do, you're going to jail.'' Hurt told Surface they had an argument, he was tired of Wall giving him shit, and he would ''bust him in the head and break every bone in his damn face the next time [Wall] tried to put his hands on'' him. It did not look like either Hurt or Wall tried to hit the other.

Hurt and Wall were the principal witnesses in this proceeding. I have found neither to be wholly credible. Neither version of the March 16 incident is inherently incredible. In such circumstances, the testimony of a witness who has no personal interest in the outcome of this case, is particularly significant. Surface is such a witness. I have no reason to question his credibility. I credit his testimony, and consequently I credit Hurt's version of the incident. I find that Hurt did not engage in flagrant or outrageous conduct which would render him unfit for employment. Wall twice provoked Hurt; first by giving him the finger, and a second time by poking him the chest in an insulting manner, which in itself constituted an intentional unwanted touching, i.e., an assault and battery. Hurt acted in reasonable self-defense, with no intent to injure Wall, and he did not injure Wall. Hurt is entitled to the usual remedy of reinstatement with backpay. See *Precision Window Mfg*., 303 NLRB 946 (1991). Compare: *E. I. Du Pont & Co*., 263 NLRB 159 (1982).

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily discharging Roy Hurt, thereby discouraging membership in the Union, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminatorily terminated Roy Hurt, it will be recommended that the Company be ordered to offer him immediate and full reinstatement to his former job or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings and benefits that he may have suffered from the time of his termination to the date of the Company's offer of reinstatement. The alleged ''equipment damage reports,'' placed in Hurt's personal file after his discharge, were part and parcel of the Company's unlawful conduct. I shall recommend that the Company be ordered to expunge from its records any reference to the unlawful termination of Hurt, and all equipment damage reports or other memoranda reflecting adversely on his employment record, to inform Hurt in writing of such expunction, and to inform him that its unlawful conduct will not be used as a basis for further personnel actions against him. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7] The Employer shall be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Whitesville Mill Service Co., Inc., a wholly-owned subsidiary of Edward C. Levy Co., Inc., Crawfordsville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Operating Engineers, Local Union No. 841, International Union of Operating Engineers, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their tenure of employment or any term or condition of employment.

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

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

(a) Offer Roy Hurt immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any

[7] Under *New Horizons*, interest on and after January 1, 1987 is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[8] 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.

other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the termination of Roy Hurt, and all equipment damage reports or other memoranda reflecting adversely on his employment record, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, on 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.

(d) Post at its Crawfordsville, Indiana office and place of business, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[9] If 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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in Operating Engineers, Local Union No. 841, International Union of Operating Engineers, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Roy Hurt 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 losses he suffered by reason of the discrimination against him, with interest.

WE WILL expunge from our files any reference to the termination of Roy Hurt, and all equipment damage reports or other memoranda reflecting adversely on his employment record, and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

WHITESVILLE MILL SERVICE CO., INC. A WHOLLY-OWNED SUBSIDIARY OF EDWARD C. LEVY CO., INC.