

**Jim Walter Resources, Inc. and Tim Burchfield.**  
Case 10-CA-29281

November 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND  
HIGGINS

On March 25, 1997, Administrative Law Judge J. Pargen Robertson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations 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, and conclusions only to the extent consistent with this Decision and Order.

About March 20, 1996, the Respondent rejected Charging Party Tim Burchfield's application for employment at its Alabama mine. Although the General Counsel alleged in the complaint, as amended, that this denial of employment violated Section 8(a)(1) and (3) of the Act,<sup>1</sup> the judge found that the General Counsel had "failed to prove that Respondent refused to hire Tim Burchfield because of union or protected activities." The General Counsel has excepted to these findings. For the reasons stated below, we reverse the judge and find that the Respondent's refusal to hire Burchfield was in violation of Section 8(a)(1) and (3).

The evidence shows that Burchfield is a member of the United Mine Workers of America (Mine Workers) and has worked in and around mines since 1977. As background to the Respondent's denial of employment to Burchfield, we note that, between 1991 and early 1996, he worked for Cowin and Company, a mining operator, which has a collective-bargaining agreement with the Mine Workers.<sup>2</sup> Burchfield engaged in both union and other protected concerted activities while employed by Cowin. Thus, Burchfield served as a grievance committeeman for the Mine Workers and met regularly over grievances with Cowin's management official, Richard Cates, who subsequently was employed by the Respondent and who was involved in the denial of employment to Burchfield, as detailed below. It is undisputed that grievance discussions between Burchfield and Cates at Cowin were "heated" at times. In July 1992, Burchfield filed a grievance concerning his own pay rate. Cates denied this grievance at the third step on Cowin's behalf. Burchfield

took the matter to arbitration and won an arbitration award in December 1992. Cates represented Cowin at the arbitration proceeding.

During his Cowin employment, Burchfield also had a disagreement with the company concerning its failure to provide him with the correct overtime meal he had ordered as required by the collective-bargaining agreement. After Burchfield walked off the job to protest this matter, Cates issued him a written warning for leaving the site. Burchfield complained about the discipline to higher management, which rescinded Cates' action and apologized for the error.

The record further shows that Burchfield had meetings with Cowin representatives concerning grievances filed by employee Danny Boyd complaining that Superintendent Simon Comer was threatening Boyd with physical harm. Both Comer and Charlie Hager represented Cowin at these meetings. Boyd's grievance resulted in Cowin's removing Comer from his job.<sup>3</sup>

In another instance, Burchfield complained to Cates that Cowin's insurance company was refusing to pay over \$25,000 in medical costs incurred by Burchfield's son, who had been injured in a hunting accident. Cates replied that Cowin's only responsibility under the contract was to pay the insurance premium. Burchfield subsequently hired an attorney and the insurance dispute was settled to Burchfield's satisfaction.

About July 1995, Burchfield, who was vice president of Mine Workers Local 1867 at the time, filed an application with the Alabama State Employment Office which was advertising on the Respondent's behalf for miners with 3 years' experience. Burchfield included Cates as one of many references on his application. By this time, Cates was the Respondent's number 5 mine safety director, Hager acted as a Respondent foreman at the same mine, and Comer worked as a unit employee at the Respondent's number 4 mine. The State Employment Office referred Burchfield's application to the Respondent, which has a longstanding collective-bargaining relationship with the Mine Workers.

After Rodger Armbruster, the Respondent's personnel manager, received Burchfield's application, he contacted Cates about Burchfield. Cates told Armbruster that Burchfield was a pretty good worker and had a good attendance record.<sup>4</sup> When Burchfield visited Armbruster's office to inquire about his application, Armbruster explained that they were checking on his references. Burchfield left Armbruster's office but returned after a few minutes. Burchfield then asked

<sup>1</sup>We note that the Respondent has not specifically excepted to the General Counsel's amendment of the complaint at the hearing to allege that this conduct independently violated Sec. 8(a)(1).

<sup>2</sup>Although the judge stated in his decision that Burchfield left Cowin in early 1995, Burchfield testified at the hearing that he remained on Cowin's payroll even after he started working full time for the Mine Workers as president of Local 1867 in May 1996.

<sup>3</sup>As described below, Hager and Comer, like Cates, subsequently were working for the Respondent at the time of its refusal to hire Burchfield.

<sup>4</sup>The record reflects that Cates gave Burchfield this favorable recommendation at the time of Burchfield's July 1995 initial application for employment with the Respondent.

for his application and tore it up while stating, "I don't want to work for you people anyway."<sup>5</sup>

On August 30, 1995, Burchfield filed a new application with the Alabama State Employment Office, which the agency again referred to the Respondent. Armbruster eventually contacted Burchfield in March 1996<sup>6</sup> and arranged a job interview for him at the Respondent's number 4 mine. On March 20,<sup>7</sup> Burchfield went to that mine, where Mike Hall, the Respondent's industrial relations supervisor, interviewed him. Mine Manager Jess Cooley briefly introduced himself at the interview and told Burchfield that he looked forward to Burchfield's coming to work at the number 4 mine along with Burchfield's brother, who already worked there. After the interview ended, Hall phoned Armbruster and told him to process Burchfield's application. Armbruster testified that Hall's comment meant "thumbs up" on the application.

When Burchfield arrived at Armbruster's office following the interview with Mike Hall, Armbruster's secretary said that she was getting the paper work ready for Burchfield's physical examination and that Burchfield should give his current employer at least a week's notice to avoid hard feelings between that employer and the Respondent. Burchfield then took the papers the secretary gave him and reported to the medical clinic for a physical.

Mike Hall then made some reference checks on Burchfield. Hall contacted another Respondent supervisor, Ladew Hall,<sup>8</sup> whom Burchfield had also listed as a reference on his application. Ladew Hall had supervised the Respondent's washer area at its number 4 mine at a time years earlier when Burchfield worked there as an employee of Steel Erectors Contracting. During the Halls' discussion about Burchfield, Ladew Hall said that although he did not supervise the applicant he was glad not to have had this responsibility because Burchfield "ran his mouth a lot."<sup>9</sup> After Mike Hall also received an unfavorable reference on Burchfield from former Cowin supervisor Comer, he phoned Armbruster and said that they might want to hold up on hiring Burchfield because of the negative references Hall had received. However, Mike Hall also mentioned to Armbruster that Burchfield had been given positive references too. Armbruster then decided

<sup>5</sup>The Respondent does not assert that Burchfield's action in tearing up his application had anything to do with the Respondent's subsequent refusal to hire him.

<sup>6</sup>All subsequent dates are in 1996, unless otherwise noted.

<sup>7</sup>Although the judge stated that the Burchfield's interview was held on March 17, the record reflects that the interview was postponed from March 17 until March 20.

<sup>8</sup>Mike and Ladew Hall are not related.

<sup>9</sup>Burchfield testified that in 1983, while he worked for Steel Erectors, he attempted to organize some nonunion employees who were also working at the Respondent's number 4 mine. According to Burchfield, Ladew Hall approached him later that day and took him to the Respondent's main office to discuss the situation.

that he would again contact Cates about the applicant. Cates reiterated his earlier comments that Burchfield was a good worker with no attendance problems, but this time Cates added that Burchfield "talked a lot and ran his mouth a lot."<sup>10</sup> Cates said that Burchfield complained and griped a lot about everything, "it seemed like everything that came along it was some kind of Company conspiracy to get at him," and he "generally had a bad attitude."<sup>11</sup> According to Armbruster, he and Cates did not discuss the Union or Burchfield's union activities as a Cowin employee.

Based on the negative references, Armbruster and Mike Hall decided not to hire Burchfield. Mine Manager Cooley, who had the final authority, accepted the personnel officials' determination.

Thus, the Respondent admittedly refused to hire Burchfield because he "griped," "ran his mouth a lot" and "had a bad attitude." In finding that this refusal did not violate the Act, the judge concluded that "[t]he complaints received by Respondent from its supervisors, come close to involving protected activity." Contrary to the judge, we specifically find that, as shown on this record, Burchfield's complaints to Cowin about his wages, discipline, insurance coverage, and overtime meal constituted both union and protected concerted activities under *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), because they all involved contractual subjects and Burchfield was functioning in his role as Mine Workers' grievance committeeman. It is also well established that Burchfield's meetings with Cowin representatives pursuant to the contractual grievance procedure, including his "heated" discussions with Cates, were activities protected by Section 7 of the Act.<sup>12</sup>

The Respondent's supervisor, Cates, was clearly aware of the specifics of Burchfield's "gripes" and complaints at Cowin. Those gripes and complaints involved conduct constituting protected Section 7 activity. Although the Respondent's hiring officials, Cooley, Mike Hall, and Armbruster, may not have known about the specific nature of Burchfield's activities at Cowin, they nevertheless relied on Cates' negative recommendation in making the final decision not to hire Burchfield. Under Board and court precedent, the knowledge and animus of a supervisor making a report about an employee on which an employer relies in making an adverse employment decision are imputable

<sup>10</sup>This testimony was supplied by Armbruster. Cates did not testify.

<sup>11</sup>Cates also told Armbruster that Burchfield "whined about how his former employer was mistreating him" but, contrary to the judge's apparent finding, Cates did not tell Armbruster this until after the Respondent had interviewed Burchfield.

<sup>12</sup>See, e.g., *Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979), and *Hawaiian Hauling Service*, 219 NLRB 765 (1975).

to the employer.<sup>13</sup> Thus, the knowledge of Supervisor Cates regarding Burchfield's union and protected activities at Cowin and his conclusion that such activities reflected a "bad attitude" were imputable to the Respondent's officials who made the hiring decision based on the information given them by Cates.<sup>14</sup>

Contrary to the judge, we find Respondent animus toward Burchfield's Section 7 activities. As noted above, the Respondent's agent, Cates, complained about the fact that Burchfield "griped" and "ran his mouth a lot" while at Cowin. Thus, the evidence indicates that the Respondent was negatively disposed toward Burchfield by reason of his Section 7 activities.

Therefore, based on the evidence showing the Respondent's knowledge and animus, and the timing of its action, we conclude that the General Counsel has met his *Wright Line*<sup>15</sup> burden of showing that Burchfield's union and protected Section 7 activities were a motivating factor in the Respondent's refusal to hire him. Although the judge suggested that it was also the General Counsel's burden to show that "Burchfield's complaints were exclusively union or protected concerted complaints," we stress that this was not the General Counsel's burden in order to meet the requirements of *Wright Line*. Rather, once the General Counsel showed that protected complaints were a motivating factor, the burden shifted to the Respondent to demonstrate that it would not have hired Burchfield even in the absence of his union and protected concerted activities. The Respondent asserts that Burchfield's "gripes" were not about matters within the ambit of Section 7. However, the Respondent did not present Cates, Comer, or any other witness to support this assertion. It is well settled that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue.<sup>16</sup> Such an adverse inference is warranted in the instant case, where Cates was apparently still a mem-

ber of management at the time of the hearing.<sup>17</sup> We therefore infer that Cates would have testified that Burchfield's "gripes" and complaints were based on Section 7 matters. Thus, the Respondent has failed to establish that there was any unprotected activity whatsoever in which Burchfield participated that could have constituted a legitimate basis for refusing to employ him and which it, in fact, relied on in not hiring him. Because the Respondent has failed to meet its burden here, we conclude that the Respondent, by refusing to hire Burchfield, has discriminated against him in violation of Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. Jim Walter Resources, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to hire Tim Burchfield because of his union and other protected concerted activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because the Respondent discriminatorily refused to hire Tim Burchfield because of his union and other protected concerted activities, we shall order that the Respondent offer Burchfield immediate employment in the position for which he applied or, if that job no longer exists, to a substantially equivalent position to which he would have been entitled if he had not been discriminated against by the Respondent, without prejudice to his seniority or any other rights or privileges. Further, we shall order that the Respondent make Burchfield whole for any loss of earnings and other benefits he suffered as a result of the Respondent's unlawful refusal to hire him, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, Jim Walter Resources, Inc., Brookwood,

<sup>13</sup> *JMC Transport v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985), and cases cited there. Accord: *Springfield Air Center*, 311 NLRB 1151 (1993). See also *Pinkerton's Inc.*, 295 NLRB 538 (1989).

<sup>14</sup> The Respondent's reliance on *VOS Electric, Inc.*, 309 NLRB 745, 754 (1992), and *Guarantee Savings & Loan*, 274 NLRB 676, 679-681 (1985), for a contrary result is misplaced because there was insufficient evidence in those cases to demonstrate that the respective employers had knowledge of the applicants' prior Sec. 7 activities.

<sup>15</sup> See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>16</sup> *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

<sup>17</sup> The Respondent does not contend that Cates was no longer employed by it as a management official at the time of the instant hearing.

Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire employees because of their union and other protected concerted activities.

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

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

(a) Within 14 days of this Order, offer Tim Burchfield immediate employment in the position for which he applied or, if that job no longer exists, to a substantially equivalent position to which he would have been entitled if he had not been discriminated against by the Respondent, without prejudice to his seniority or any other rights or privileges.

(b) Make Tim Burchfield whole for any loss of earnings and other benefits he suffered as a result of the Respondent's unlawful refusal to hire him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the refusal to hire, and within 3 days thereafter notify Tim Burchfield in writing that this has been done and that the discriminatory refusal to hire will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Brookwood, Alabama facility copies of the attached notice marked "Appendix."<sup>18</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 20, 1996.

<sup>18</sup>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 refuse to hire employees because of their union and other protected concerted activities.

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

WE WILL, within 14 days, offer Tim Burchfield immediate employment in the position for which he applied or, if that job no longer exist, to a substantially equivalent position to which he would have been entitled if he had not been discriminated against by the Respondent, without prejudice to his seniority or any other rights or privileges.

WE WILL make Tim Burchfield whole, with interest, for any loss of earnings and other benefits he suffered as a result of the our unlawful refusal to hire him.

WE WILL, within 14 days, remove from our files any reference to our unlawful refusal to hire Tim Burchfield and within 3 days thereafter notify him in writing that this has been done and that our discriminatory conduct will not be used against him in any way.

JIM WALTER RESOURCES, INC.

*John D. Doyle Jr., Esq.*, for the General Counsel.  
*James Alexander, Esq.* and *Matthew Miller, Esq.*, of Birmingham, Alabama, for the Respondent.  
*Robert M. Weaver, Esq.*, of Birmingham, Alabama, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Birmingham, Alabama, on January 21, 1997. The charge was filed on April 25, 1996. The complaint issued on December 2, 1996, and was amended on January 21, 1997.

The Respondent, Charging Party, and the General Counsel were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On consideration of the entire record and briefs filed by Respondent and the General Counsel, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The record evidence showed that Respondent is an employer engaged in the business of mining coal with facilities

located in Alabama including a central mining office in Brookwood, Alabama. Respondent admitted that it purchased and received goods in excess of \$50,000 directly from suppliers located outside Alabama during the 12-month period immediately preceding the filing of the complaint. In view of the full record, I find that Respondent has been an employer at material times within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act).

## II. LABOR ORGANIZATION

Respondent admitted that United Mine Workers of America (Union) is a labor organization within the meaning of Section 2(5) of the Act.

### Supervisory issues

The parties stipulated that Charlie Hager is a supervisor at number 5 mine. Respondent admitted that Rodger Armbruster and Mike Hall are its agents for purposes of hiring.

### The unfair labor practice allegations

The General Counsel alleged that Respondent refused to hire Tim Burchfield since February 1, 1996, because of his union activities.

### Burchfield's application for employment

Tim Burchfield is employed as president of Union Local 1867. Before becoming president in May 1996, Burchfield was vice president from May 1995. Before that he was on the mine committee for the Union since 1993. He has been a union member since 1977. He is also a hard rock miner in mine construction.

On August 30, 1995, Burchfield filed a job application with the State Employment Office in Tuscaloosa, Alabama. The agency was advertising on behalf of Respondent for mine workers with a minimum of 3 years experience. Burchfield had worked in and around mines since 1977.

Burchfield listed as references on his resume which was attached to his application some 15 names including Ladew Hall, foreman #4 Jim Walters Mine, C. A. Squires, foreman #5 Jim Walters Mine, Tom Wagner, employed at dryer #4 Jim Walters Mine, Gary Blackerby, retired superintendent at #4 washer, Larry Jordan, trainer at Jim Walters Training Center, Gene Trammel, Long Wall #7 Jim Walters Mine, Jim Steadman, maintenance supervisor # 5 Jim Walters Mine, Gerald McCree, foreman #3 washer, Jim Walters Mine, Jerry Bankston, works out of CO office, and Richard Kates, safety director #5 Jim Walters Mine.

Tim Burchfield admitted that before he filed his August 30, 1995 application he tore up an earlier application in front of Rodger Armbruster. Armbruster worked for Respondent at its central mining office.

In March 1996, Burchfield was phoned by Respondent (Rodger Armbruster). Burchfield went to Respondent's number 4 mine and was interviewed by Mike Hall on March 17, 1996. Mine Manager Jess Cooley dropped by for a minute during the interview and shook hands with Burchfield. Cooley joked about Burchfield and Burchfield's brother who was employed by Respondent at that time. After the interview Mike Hall sent Burchfield to Rodger Armbruster's office. When he arrived, Armbruster's secretary told him that she was getting the paper work for his physical. She told

Burchfield that they wanted him to give his current employer, at least a week's notice to avoid hard feelings between Respondent and that employer. Burchfield took the papers given him by the secretary and went to Brookwood Clinic where he had a physical examination.

Michael Douglas (Mike) Hall was called by the General Counsel. Hall testified that he is employed by Respondent as industrial relations supervisor at number 4 mine. His duties include employment. Hall testified that Respondent's procedure for employing a job applicant starts with the applicant applying with the State Employment Office. From there the application is sent to Respondent's central mining office (CMO) in Brookwood, Alabama. The application is screened by the central mining office. At a later point when a mine site asks for potential employees the application may be sent to that mine site. The parties stipulated into evidence the August 30, 1995 application of Tim Burchfield for employment with Respondent.

The General Counsel called Rodger Armbruster. Armbruster is Respondent's personnel manager. He explained that he receives applications from the State Employment Office. His office screens the applications including reference checks. When one of the mines asks for personnel his office forwards the screened applications to the mine. Armbruster identified a number of job applications showing that he contacted different people regarding references for applicants. Those people included Richard Cates. Cates, Respondent's number 5 mine safety director, formerly worked with Cowin and Co. and was contacted when some former Cowin employees applied with Respondent. That was the case with Tim Burchfield. Armbruster admitted that he contacted Cates regarding Burchfield's application. Armbruster recalled that Burchfield destroyed the first application he made with Respondent and that application included a form showing that Armbruster had contacted Cates. He did not prepare another form to show his contact with Cates on receipt of Burchfield's second application.

Armbruster recalled that Richard Cates told him that Tim Burchfield "whined about how his former employer was mistreating him." Armbruster reported that to Mike Hall. Hall interviewed Burchfield.

On an earlier occasion in 1995, Armbruster talked with Tim Burchfield and explained they were checking his references on his application. Burchfield left then, after a few minutes, returned and asked for his application. Burchfield tore up the application and said, "I don't want to work for you people anyway." Approximately a month or so later Burchfield submitted his application dated August 30, 1995. According to Armbruster, Burchfield has not submitted another application since August 30, 1995.

Armbruster testified that he and Richard Cates did not discuss the Union regarding Tim Burchfield.

Rodger Armbruster testified that he examined his applications in file and determined that occasionally he handled reference findings verbally and on other occasions he made written reference to the checks.

On Burchfield's first application, Burchfield tore up the application before Armbruster had a chance to refer the application to a mine. On the second occasion, the August 30 application, Armbruster referred the application to number 4 mine. After Armbruster's office lined up an interview for Burchfield with Mike Hall, Hall phoned and told them to

process Burchfield's application. According to Armbruster, that means thumbs up on the application and to send the applicant for a physical. That was done.

After sending Burchfield for his physical, Mike Hall phoned Armbruster and said they might want to hold up on hiring Tim Burchfield. Hall said that he had received a couple of negative references on Burchfield. Hall said that he had talked to Ladew Hall who said that he had not supervised Burchfield but he was glad he had not because Burchfield "talked a lot, and ran his mouth a lot." Mike Hall also said that he had some positive references on Burchfield. Armbruster suggested that he would revisit his "reference and Richard Cates."

Armbruster called and Cates told him that Burchfield was a pretty good worker and his attendance record was good but he talked a lot and ran his mouth a lot. Burchfield griped a lot about everything, and that—it seemed like everything that came along it was some kind of company conspiracy to get at him. He said he just complained and griped a lot, and generally had a bad attitude.

Michael Burchfield, Tim's brother, is employed by Respondent at its number 4 mine. He testified that he talked with Mike Hall about his brother on two occasions. On one occasion he asked Hall about hiring his brother Tim. Hall told him that he thought they may be able to hire Tim.

Subsequently Jess Cooley told Mike Burchfield that if things worked out Tim Burchfield would be in the next bunch of new employees.

About 2 or 3 weeks after Tim Burchfield was interviewed and had his physical examination, Michael Burchfield phoned Mike Hall from underground mine number 4, during his lunchbreak. He asked Hall why they had not hired Tim. Hall said that Tim had given a good interview. Michael Burchfield asked if Tim's being vice president of the union local had anything to do with their not hiring him. Mike Hall said that was the first he had heard that but no that did not have anything to do with their failure to hire Tim. Mike Hall said that showed that Tim Burchfield had leadership qualities and that was the kind of person they were looking for. Hall said the final say on hiring was not up to the mine but was up to the central mining office.

Tim Burchfield's next contact with Respondent was a phone call he made on April 3. He talked with the secretary and she told him they were waiting for some X-rays. Burchfield was told the same thing by the secretary when he phoned again on April 5.

On April 9 Tim Burchfield stopped by Respondent and talked with Rodger Armbruster. Armbruster told him that his application was being held up at the mine site (number 4 mine) and hiring was left to Jess Cooley. Armbruster said that he did not know whether they had slowed up on hiring or what.

No one ever told Burchfield that tearing up a former application before Rodger Armbruster had anything to do with Respondent not hiring him.

In its case, Respondent called Jess Cooley, number 4 mine manager. He has worked for Respondent for 23 years and has never worked at any location where the employees were not represented by the Union. He recalled meeting Tim Burchfield in Mike Hall's office. Cooley also recalled that either Mike Hall or Rodger Armbruster told him they were not going to hire Tim Burchfield because he had an attitude

problem. Later, during his testimony, Cooley corrected his testimony and said that Mike Hall was the only one he talked to about Tim Burchfield. Cooley recalled no mention of Burchfield being associated with the Union or that Burchfield had filed grievances.

Cooley did not recall any meeting or conversation with Tim Burchfield before meeting Burchfield during his interview with Mike Hall.

Mike Hall was also called by Respondent. He recalled the phone conversation Mike Burchfield testified about when Burchfield phoned Hall from underground. Hall testified that he did not recall the details of that phone conversation and he did not recall anything being said about Tim Burchfield being an officer of the union local.

#### Burchfield's previous encounters with Respondent's personnel

The General Counsel contends that Respondent knew of Burchfield's former union activities because some of its 1995 and 1996 employees formerly worked with Burchfield. Those employees that formerly worked with Burchfield include, admitted, Supervisors Richard Cates, Ladew Hall, and Charles Hager and employee Simon Comer.

Richard Cates is Respondent's safety director of mine number 5. Before his 1995 application with Respondent, Burchfield had been hired by Richard Cates at Cowin and Company in 1991. Cates worked for Cowin until early 1995. Burchfield was on the grievance committee at Cowin. He met with Richard Cates concerning grievances.

In July 1992 Burchfield filed a grievance claiming that he was entitled to receive a higher pay rate. That grievance was denied at step three by Richard Cates. Burchfield took the matter to arbitration and he won an arbitration award on December 24, 1992. Richard Cates represented the employer, Cowin and Co., during that arbitration proceeding. That evidence is not in dispute. Richard Cates did not testify.

Burchfield had a run-in with Cowin and Company (Johnny Cowin Jr.) over a meal he was to receive pursuant to agreement between the Union and Cowin, when he worked a double shift. When Burchfield did not receive the meal he had ordered he and Cowin had words. Cowin refused to supply Burchfield with the salad Burchfield had ordered. Burchfield walked off the job. The following morning Richard Cates brought Burchfield a letter warning him that Cowin and Co. would not put up with his walking off the job. Burchfield talked with Ron Marshall and explained what had occurred. That afternoon Marshall told Burchfield to tear up the warning. Marshall apologized and said that Richard Cates was not aware of their agreement. That evidence is not in dispute.

Tim Burchfield testified that he had heated discussions with Richard Cates during grievance proceedings while he worked for Cowin & Co. That evidence is not in dispute.

Burchfield also had meetings with representatives of Cowin and Co. concerning grievances filed by Danny Boyd. Boyd complained that he was being threatened by the superintendent, Simon Comer. Included in the people representing Cowin and Co. in those meetings was Charlie Hager. Hager became Respondent's foreman at their number 5 mine. Simon Comer was eventually laid off because of the grievances of Danny Boyd. Comer now works for Respondent at their number 4 mine. Both Comer and Hager were present at the meetings where the Union asked that Comer be re-

moved from his job with Cowin and Co. That evidence is not in dispute. Simon Comer and Charlie Hager did not testify.

On an occasion while he worked for Cowin and Co. Burchfield had a disagreement with Respondent's insurance company regarding paying over \$25,000 in medical costs. Burchfield's son was shot in a hunting accident. When the insurance company refused to pay, Burchfield talked with Richard Cates. Cates told him that Cowin's only responsibility was to pay the premium. Burchfield hired an attorney and the matter was resolved to Burchfield's satisfaction. That evidence is not in dispute.

In 1983 Burchfield worked for Steel Erectors. He worked on a job they had at Respondent number 4 mine. There were some nonunion contractors on that job. Some of the union employees of Respondent came to Burchfield and told him they needed to do something about nonunion people on the job. Burchfield went to the nonunion employees and asked if they would be interested in talking about the Union representing them. Those employees told him they would be interested in talking about the Union. Later that day Ladew Hall came and took Burchfield up to the main office. Two other employees, Phillip Chris and Richard Slate, were with Burchfield. Some people from Respondent, perhaps Jess Cooley and mine supervision were at the meeting. One of the men had on a Jim Walter supervisor uniform. Someone, who Burchfield believes was Jess Cooley, showed him a dollar sign and explained that was how much it would cost them if "there was a picket line or something brought up." The people from Respondent said they were going "to hold us three liable" if there was a "picket, a strike." During that meeting Burchfield talked with his boss over the phone and assured his boss there would be no problems. Burchfield continued to work on the number 4 mine job for several months. Afterward he returned to work at that mine and Respondent's number 5 mine on several other occasions while working for Steel Erectors and for Cowin and Co.

The above evidence is in dispute and will be discussed below.

#### Conclusions

The full record shows that Tim Burchfield engaged in union activity from around 1983 and that Respondent knew of that activity. However, the record also proved that Respondent processed Tim Burchfield's application despite its knowledge of his prior union activities. Only after initially deciding to hire Burchfield did Respondent change its mind and decide to refuse to hire him. Respondent made its final decision on the basis of recommendations showing that Tim Burchfield ran his mouth too much, it seemed like everything that came along was a company conspiracy to get rid of him, he complained and griped a lot, and had generally a bad attitude.

Whether Respondent illegally refused to employ Tim Burchfield, the Board first routinely considers whether the General Counsel has proved through persuasive evidence that a respondent acted out of antiunion animus in refusing to hire alleged discriminatees. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); and *NLRB. v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Respondent contends there was no showing of animus.

The evidence is not in dispute but that Respondent had a long-term bargaining relationship with the Union.

The issue of animus calls into question the issue of motivation. Was Respondent motivated to refuse to hire Tim Burchfield because of its antiunion animus.

The only evidence that Respondent has ever taken action hostile to a union is as follows.

As shown above Tim Burchfield testified that he worked for Steel Erectors in 1983. He worked on a job at Respondent number 4 mine. There were some nonunion contractors on that job. Burchfield went to some nonunion employees and asked if they would be interested in talking about the Union representing them. Later that day Ladew Hall came and took Burchfield up to the main office. Two other employees, Phillip Chris and Richard Slate, were with Burchfield. Some people from Respondent, perhaps Jess Cooley and mine supervision were at the meeting. One of the men had on a Jim Walter supervisor uniform. Someone, that Burchfield believes was Jess Cooley, showed him a dollar sign and explained that was how much it would cost them if "there was a picket line or something brought up." The people from Respondent said they were going "to hold us three liable" if there was a "picket, a strike." During that meeting Burchfield talked with his boss over the phone and assured his boss there would be no problems. Burchfield continued to work on the mine 4 job for several months. Afterward he returned to work at that mine and Respondent mine number 5 on several other occasions while working for Steel Erectors and for Cowin and Co.

Jess Cooley became number 4 mine manager in October 1995. He testified that he had no recollection of any conversation with Tim Burchfield and other miners regarding the cost of strikes.

I do not credit testimony showing that Jess Cooley was involved in the above incident. Instead I credit Cooley's testimony that he does not recall that incident. I make that finding on the basis of Cooley's demeanor and the full record which shows that Cooley was not employed at number 4 mine in 1983, 1984, or until October 25, 1985.

I am bothered by Burchfield's testimony to the extent it shows that Respondent was involved in that incident, in part because it is clear from the record that Respondent has no opportunity to rebut those allegations. All Burchfield did to identify an agent of Respondent, was testify about unidentified supervision including someone that was possibly Jess Cooley. That testimony does not present Respondent with a realistic basis to rebut the evidence. To the extent Respondent was given information as to an identified agent, it did rebut by having Jess Cooley testify.

Burchfield did identify Ladew Hall as the one that walked him to the meeting. However, Hall could not contribute any evidence regarding the meeting since, according to Burchfield's testimony, Ladew Hall was not present during the meeting.

Respondent was faced with defending an allegation of an incident involving unidentified agents that occurred as much as 13 years before it refused to hire Burchfield. There was no showing that anyone representing Respondent has ever made a hostile remark about the Union at any time after that incident. In view of the full record I am unable to credit the testimony of Tim Burchfield to the extent it would show that

agents of Respondent threatened to hold three employees liable if there was a strike or picket line.

In view of the full record and my above mentioned findings, I conclude that the record failed to show that Respondent has ever expressed hostility toward the Union. In addition to that lack of evidence, I also consider the un rebutted testimony showing that Respondent had a long-term relationship with the Union. The Union is the recognized representative of Respondent's employees.

The General Counsel argued that Respondent's refusal to hire Burchfield because he ran his mouth a lot, had a poor attitude, and whined about how his former employer was mistreating him and its showing that Burchfield engaged in protected and union activities with that employer establishes prima facie proof that Respondent's refusal to hire Burchfield was an illegal action. The General Counsel cited *Redding Industrial Electric*, 275 NLRB 615 (1985).

However, I note that the situation was somewhat different in *Redding Industrial Electric*, supra. There the alleged discriminatee was told at a layoff that the layoff was because he had caused problems by calling OSHA. The evidence showed that the alleged discriminatee had contacted OSHA in his role as union steward. Here, there was no direct evidence showing that Respondent ever threatened or took any action against Tim Burchfield because of his union or protected activities. Instead, as argued by the General Counsel, Respondent offered evidence that it refused to hire Burchfield because he ran his mouth a lot, he griped about everything, everything that came along was some kind of company conspiracy to get rid of him, he whined about how his former employer was mistreating him, and he generally had a bad attitude.

The complaints received by Respondent from its supervisors, come close to involving protected activity. However, it does not, in and of itself, evidence union activity as the source of the supervisors' poor recommendations. Moreover, those complaints in and of themselves, fail to establish that the poor recommendations stemmed from Tim Burchfield engaging in protected concerted activities.

Logically the participation of grievances proceedings would involve complaining or griping. However, complaining or griping are not exclusive to grievance proceedings or

other union or protected concerted activity. An employee may complain or gripe without being involved in union activity or without being involved in protected concerted activity.

The record failed to establish that Tim Burchfield's complaints were exclusively union or protected concerted complaints. The record failed to show that Respondent refused to hire Burchfield upon knowledge or belief that Burchfield's complaints were union related or that they involved protected concerted activity. The evidence failed to show that anyone recommended against hiring Burchfield because of his union or concerted activity.

Respondent cited *Vos Electric, Inc.*, 309 NLRB 745 (1992); and *Guarantee Savings & Loan*, 274 NLRB 676 (1985). In those cases no violations were found even though the employer rejected applicants because of their "attitude," being identified as a "troublemaker," and an "instigator" and that the employer would not touch the applicant with a "10-foot pole."

As shown above, the Act protects employees from retaliation motivated by antiunion animus. The instant record does not include any credited evidence that Respondent demonstrated either antiunion or anticoncerted activity animus.

In view of the full record I find that the General Counsel failed to prove that Respondent refused to hire Tim Burchfield because of union or protected activities in violation of either Section 8(a)(1) or Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. Jim Walter Resources, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not fail and refuse to hire Tim Burchfield in violation of Section 8(a)(1) or 8(a)(3) of the Act.

4. Respondent has not violated the Act in a manner alleged in the complaint.

[Recommended Order omitted from publication.]