Guardian Industries Corp. *and* Robert F. Grew. Case 7–CA–36488

October 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On July 20, 1995, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief. 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.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Guardian Industries Corp., Carleton, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[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.

Amy Bachelder, Esq., for the General Counsel.
A. David Mikesell, Esq. (Honigman, Miller, Schwartz and Cohn), of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. On October 19, 1994, Robert F. Grew, an individual, filed the charge in this case against Guardian Industries Corp. (Respondent). On November 30, 1994, the Regional Director issued a complaint wherein it is alleged that Respondent, on August 26, 1994, violated Section 8(a)(1) of the Act at its Carleton, Michigan facility by threatening to discharge Grew, inter alia, because of his attempt to protest Respondent's treatment of a fellow employee by issuing to Grew a written disciplinary warning on August 25, 1994, and by discharging Grew on October 19, 1994, because of his concerted protected activities. The complaint also alleges that Grew's discharge was also a result of his organizing activities on behalf of a labor organization at the Carleton facility and thus violated Section 8(a)(3) of the Act.

Respondent thereafter filed an answer that denied the commission of any unfair labor practice. At trial, Respondent admitted the agency allegations of the complaint. The Respondent's position, as subsequently explicated, does not dispute the concerted nature of Grew's conduct for which he was admittedly issued a formal written disciplinary document known as ''PPC'' under its progressive disciplinary system, but it argues that Grew's concerted activity lost its protection because of its abusive nature, i.e., referring to a supervisor of another shift who participated in a drug test order for an employee on that supervisor's shift as a ''low life'' because of that drug test order. Respondent denies that Grew's union organizing activities were known to its agents who decided to discharge Grew's despite undisputed evidence of certain line-level knowledge or suspicion of such activity. Respondent takes the position that Grew was discharged solely for violation of its plant work guidelines, i.e., rule 15:

> leaving your work place without proper relief or ahead of scheduled time or during working hours without permission.

The General Counsel's position is that Respondent's agents, in July 1994, were aware of Grew's union organizing activities among its employees and that his protest to one employee of another employee's subjection to a drug test in the presence of the responsible supervisor, whether in the context of his union activities or not, was protected and did not lose that protection because he disparaged the responsible supervisor's conduct, not the supervisor himself, i.e., it was a lowlife thing to do. The General Counsel argues that credible, and in part undisputed evidence, proves that Respondent relied on the PPC when it decided to discharge Grew pursuant to its progressive disciplinary system, e.g., positions taken in proceedings before the Michigan Employment Security Commission regarding Grew's claim for unemployment compensation. The General Counsel argues further that Respondent's defenses with respect to the discharge are inconsistent, shifting, and pretextuous and that the credible evidence discloses that Grew did not in fact leave his workplace nor did he ever improperly cease work about 5 minutes before he was allowed to do so pursuant to plant practice. The General Counsel argues that the preponderance of credible evidence proves that Grew was discharged shortly after Respondent was notified of the filing of the union representation petition because of his concerted protected activities, the most preeminent of which was his union organization activities and his concerted protest of Respondent's discipline toward a fellow employee in the context of those union activities.

The issues raised by the complaint and answer were litigated before me at trial in Detroit, Michigan, on April 6 and 7, 1995.

Posttrial briefs were received at the Division of Judges on May 12 and 15, 1995.

On the entire record in this case, including my evaluation of the demeanor of witnesses, I make the following

I. JURISDICTION

At all material times, Respondent, a corporation with an office and place of business in Carleton, Michigan (Carleton facility), has been engaged in the manufacture and nonretail sale of glass products. During the calendar year ending December 31, 1993, Respondent, in conducting its business op-

erations, purchased and received at its Carleton facility goods valued in excess of $50,000 directly from points outside the State of Michigan and sold and shipped from its Carleton facility goods valued in excess of $50,000 directly to points outside the State of Michigan.

It is admitted, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that at all material times Local 283, International Brotherhood of Teamsters, AFL–CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Facts*

1. Background

The Carleton, Michigan facility consists of a single-level plant building of about 1-million square feet over a quarter mile long and several hundred feet wide. Employed in that plant are about 460 full-time and regular part-time production and maintenance employees, including shipping employees, inspection employees, machine operators, and equipment operators. These employees are engaged in a three-shift, 24-hour-a-day ''float glass'' manufacturing process in which a continuously moving line commences at a hot end where roller hearth furnace process ingredients are loaded, mixed, reduced to a molten state of glass in a furnace, cooled by cold air ''quenching,'' hardened, and tempered for strength, coated for insulation, scored, and cut by size. Finally, at the cold end, the glass is taken in lots of 100 sheets from steel A-shaped racks (hearth racks) by employees who load or pack sheets of glass into containers or other steel frame racks called ''I'' frame racks either for delivery to customers or transfer to Respondent's warehouse. A wall divides the hot and cold ends. All employees are assigned to crews that rotate shifts. Each shift is assigned one supervisor. The warehouse crews form a separate entity not involved herein. Cutters and material handlers work in the same crew.

A separate second line constitutes the custom glass production, i.e., special orders cut to customer specification. The custom line normally operates only one shift per day. The regular line glass is scored by automatic machines in preparation for cutting. The custom line requires manual scoring and cutting. Custom glass is loaded into containers or loaded on I-frame racks and separated by paper sheets according to size. Because custom glass sheets are all special order, 10 to 15 orders may run together. Often, glass is found at the load-out or pack-out end to have come through the line scratched, broken, or otherwise defective. Completion of packing, particularly custom orders, must await the recutting of glass to fill the order specified.

Employees wear protective gloves and kevlar covering on their front torso and upper legs that are fastened by wrap-around extensions with hooks and metal buttons on the top part and Velcro fasteners on the lower body and leg harnesses. Unsnapped, the garment drops to the floor, and is rolled up for storage near the work area.

2. 1992 union representation rejection

Grew was hired into the fabrication department as a striker replacement during a strike and picketing conducted by the Union at the Carleton plant in 1986. What prior bargaining relationship it had with Respondent, if any, is not clear. In 1992, however, the production and maintenance unit employees voted in a 1992 Board-conducted election that resulted in a vote for nonrepresentation. Prior to that election, Grew assisted Respondent's active campaign to discourage union representation by operating a video camera and by participating in the videotaped interviews that discouraged union representation.

By August 1993, Grew had attained the status of an employee in such good standing that in his personnel file there is memorialized a commendation as to his above-average performance in ''attendance, safe work practices, leadership and cooperation,'' and his qualification ''in all aspects of material handling, packaging and quality assurance methods.'' Furthermore, it was noted that Grew was ''frequently hired [by Respondent] to provide his expertize in photography at company functions.'' Finally, he was praised for his ''positive attitude, willingness to tackle any job assignment, and ability to adapt to various situations within a manufacturing environment,'' which it was noted ''made him a valuable asset to our work group.''

3. The progressive discipline system and Grew

Respondent maintained at all material times a progressive discipline system, i.e., ''Guideline for Corrective Action'' involving the following steps:

> Step One—Documented Performance Counseling
> Step Two—Written Counseling Statement
> Step Three—Formal Investigation/Personal Positive Commitment (PPC)
> Step Four—Termination Hearing

With respect to step three—PPC, a meeting is held between employee, supervisor, shift superintendent, and human resources manager. A PPC form is issued to the employee who is given paid leave for the day to return home and fill in the reminder of the PPC form with a statement ''in which he/she specifically commits to resolve the performance related problem and abide by all company guidelines.'' The guideline specifies that employee non-PPC compliance would result in termination.

The fourth step in the guidelines provides:

> Termination hearing involves a review of all pertinent facts by several levels of management who make a separation determination.

Any corrective action may be removed from an employee's file at the employee's request after 1 year and is automatically removed after a life of 2 years. There are 25 rules of prohibited conduct set forth in the guidelines. The following is appended to the rules:

> Violation of established plant guidelines will result in corrective action. Depending on severity, such action could be discipline up to and including termination.

On September 29, 1993, Grew received a step-one written warning signed by his supervisor, Curtis Fucqua, as a result of absenteeism, part of which preceded his August 12, 1993 commendation. On March 15, 1994, he received a second-step warning for absenteeism. Grew testified without contradiction that after his last absenteeism in March 1994 due to his father's illness, he corrected his attendance record. He, however, was now vulnerable to a step-three discipline for any work problem or misconduct during the file life of the prior disciplinary documents.

4. 1994 union activity

At the end of June and early July 1994, while Grew was assigned to the roller hearth load end, he decided that Respondent's management had not kept its promises to employees made during the 1992 union representation election campaign. Grew testified that he discussed this conclusion with employees in the plant and that, in consequence, he contacted the Union's office located near his residence and became the initiator of the 1994 organizing drive. He testified that he obtained union representation authorization cards for which he solicited employee signatures at Respondent's facilities in July and August and returned them to the Union that used them to support a new petition for representation. The petition was later filed with the Board on October 17, 1994, the notice of which was received by Respondent only hours before Grew was notified of his discharge. During these summer months, Grew discussed organizing strategy with union representatives. As testified to by the General Counsel's witness, closeup department employee Dana Michael, Grew became identified by employees as the chief union contact in the plant. During this time, Grew testified that he wore a T-shirt that boldly set forth the union logo and words of ''it's Union time'' in 3-inch letters. He claimed that he wore that shirt to work for an entire shift once a week in July and August and for a week in September.

The Respondent agents who testified claimed that they neither saw that shirt nor were aware of Grew's union activities, i.e., Supervisor Tom Veresh who supervised another crew, Supervisor Salvatore Pallone who supervised Grew's crew in October 1994, and Assistant Human Resources Manager Richard Zeff. Grew's supervisor in August 1994, Carl Fucqua, did not testify as did no other Respondent agent, including Human Resources Manager Michael Pavlos, Plant Manager James Wilkirson, Shift Superintendent Jerry Miller, and Closeup Department Supervisor James Wesson. Respondent's witnesses did acknowledge awareness that employees were wearing union shirts and union buttons. Zeff acknowledged that employees and supervisors reported to him the distribution of union cards, some of which were turned over to him.

It is Michael's uncontradicted and credible testimony that the union activity in the plant, particularly Grew's, was known or suspected by at least one, if not two, of Respondent's agents. Michael assisted in the solicitation of union cards. According to him, there was a lot of traffic consisting of employees picking up union cards in the closeup department. Wesson did not see what they were doing. On one occasion, in mid-July, Wesson approached Michael and asked him what was ''going on.'' Michael feigned ignorance and asked what Wesson meant. Wesson said, ''I hear there's some union activity going on?'' Michael continued to plead ignorance. Wesson said, ''Well, I heard somebody over at roller hearth was having a little union activity.'' Michael again disclaimed knowledge. Wesson said, ''Well, I heard it was Rob Grew.''

After Grew's discharge in October or early November, line one's cold end cutting and packing supervisor, Phil Bardoni, and Michael were discussing a production incident. Reference was made to the Union and Grew's discharge. Michael stated that he thought that it was a ''major'' mistake to discharge Grew because ''everybody'' knew Grew was the inside organizer for the Union. Bardoni responded by silently nodding his head in the affirmative.

In view of Respondent's past history of having experienced union election campaigns and its organized opposition to union representation, it is most probable that it wanted any such information about any renewed efforts reported to it. Therefore, it is most unlikely that its line foreman did not report it to higher supervision. Zeff admitted having received such general reports. Furthermore, the fact that the rumor of Grew's leadership role was widespread among employees, to such an extent that supervisors of other crews knew or suspected it, supports a strong inference that higher management must have been aware of it as it occurred in July 1994, and I so conclude. I find the disclaimers of Respondent's agents who did testify to be unconvincing, improbable, and disingenuous.

5. The August reprimand

On August 23, Grew's crew was working the afternoon shift, i.e., 3 to 11 p.m. It was the customary practice to start work at 5 minutes to the hour and to depart the work area at 5 minutes to the hour, with some ramifications to be discussed later in the decision. Grew appeared at the assigned work area at 2:50 p.m. as was also customary. He observed Cosby and Cosby's supervisor, Veresh, walking to the front of the plant. Cosby worked the day shift. As they approached, Cosby told Grew, ''nice working with you Rob.'' Grew told him, ''you better get a good lawyer.'' Veresh scowled at Grew. It was Grew's assumption that Cosby was being disciplined for an incident that occurred a week earlier, i.e., Cosby had reportedly been out in the plant parking lot during breaktime, which is contrary to company policy. That evening, Grew spoke to Cosby on the telephone. Cosby told Grew that he had received a PPC for suspected drug abuse during breaktime (not for taking his break outside the plant) and was being sent by Respondent to a drug screen test. Grew told Cosby that he ought to fight it because it was his perception that such action was warranted only if an employee damaged Respondent's property while under the influence of drugs.

The next day at 2:50 p.m., Grew and Ernest Gladwell, a day-shift roller hearth fabrication department employee, stood together at the pack-out end of the roller hearth near the computer. The mutually corroborated testimony of Grew and Gladwell is for the most part uncontradicted. Gladwell was putting his gear away. He had already taken off the protective kevlar, known as ''yellows,'' and was preparing to leave. Grew had come to the bench where he stood and was putting on his own yellows. Gladwell asked Grew about Cosby. Grew testified that he responded that:

> It was a low life thing to send a man out to a drug screen without cause at all, trying to ruin his life after . . . wife just having a baby.

According to Gladwell, Grew said that what had happened to Cosby was a ''pretty worthless thing to do . . . to a guy when he didn't even do anything and that just shows you the way management works around here.'' Grew and Gladwell were about 6 feet apart. Also in another direction 6 feet away, together, were Cosby's crew supervisor, Veresh, and Grew's crew supervisor, Fucqua, who was wearing earplugs because of the high noise level in the plant. Veresh heard Grew's comments. Veresh testified that Fucqua did not hear what was said. Fucqua later told them that he did not hear the conversation. Fucqua did not testify, and the record only contains hearsay testimony about whether Fucqua could have been able to corroborate Veresh or Grew. Veresh testified that he became upset on hearing Grew's comments. According to Veresh's testimony, which he qualified as to the best of his recollection, Grew stated in a ''fairly loud,'' angry voice, while looking in Veresh's direction, ''we have some real low lifes working for this company [to] send people for a drug screen without good or probable cause.''

According to Gladwell's credible testimony, Veresh addressed Grew in a ''stern,'' louder than conversational voice. By all accounts, Veresh asked Grew, ''Are you talking to me Pal,'' Grew responded that, no, he was not and that Veresh was not his pal.

Veresh testified that he became upset over the comment because he subjectively perceived a ''low life'' to mean ''scum of the earth.'' Despite the variation of adjectives between Veresh's and Gladwell's testimony, they are mutually corroborative as to the essence of what Grew said, i.e., Grew disparaged management and the managerial act of discipline as a lowlife or worthless action and not the person of Veresh, of that Gladwell was certain. I find Gladwell to be a disinterested and convincing witness. I credit him as to the essence of what was said and discredit Veresh's version. Clearly, however, Veresh identified himself as management and took that criticism of management discipline with emotional resentment. Furthermore, that criticism had occurred in the midst of a renewed union organizing campaign by the Union's chief organizer who was previously Respondent's showcase, antiunion, video star. Respondent attempted in the brief to depict Veresh as an easygoing, laid-back fellow who was justifiably incensed by the insult of being called a lowlife. There is no evidence, however, in the record to establish that Respondent's supervisors and employees were of such a benighted, spiritual, or esthetic superiority that they did not tolerate the normal rough and tumble of loud, salty language ordinarily endemic in modern American industrial life.

Veresh, however, did not proceed to any immediate disciplinary action. Indeed, he did not even admonish Grew on the spot for the allegedly abusive comment, nor did he warn Grew nor indicate to him in any way that he was in trouble. Discipline, however, followed after Veresh consulted his superiors.

Veresh testified that later in the day, he reported the incident to Department Head Al Recknagel Jr., and told him that he felt it was ''poor'' that a supervisor had no recourse and that the next day he, Department Head Recknagel, and Human Resources Manager Michael Pavlos took time to engage in a high-level managerial consultation to discuss Grew's criticism of management. Veresh testified that ''they'' concluded that if Veresh wanted, he could discipline Grew with the third-step PPC. Prior to that meeting, Gladwell had approached Veresh and apologized for having started the conversation and disclaimed knowledge that Grew would go ''ballistic.'' Gladwell testified in cross-examination by Respondent that he feared retaliation lest he be perceived as a responsible participant in Grew's conduct, i.e., criticism of management's discipline of a coworker. Thus, before the disciplinary decision was made, what was clearly visible to Veresh had been confirmed—Grew and a coworker had been discussing management's discipline of a third employee, the consequence of said joint discussion was Grew's espousal of the third employee's cause and his strong criticism of management's disciplinary decision.

Veresh testified that it was his decision to issue a PPC to Grew. He is uncorroborated by Recknagel and Pavlos, both of whom did not testify.

Mark Olander is a Hi-lo driver who occasionally worked with Grew in the roller hearth operation in October 1994 and who testified as a General Counsel witness with respect to the circumstances of Grew's later discharge. He and Grew both waited for each other to leave the plant together. The implication is that they are friends and appeared to be perceived as such by Veresh. The record is unclear as to the degree of their friendship. There is no evidence of Olander's degree of commitment to the Union, if any. I conclude that he is a relatively disinterested, convincing, credible witness.

Olander testified that the day after Grew had received the PPC, Veresh encountered Olander at the pack-out end of the custom line and stated to him the following:

> I'm sorry it had to turn out this way. I didn't intend for it to turn out this way, but I was mad that day, and I was in a rush. I was pissed off. I went to the office and talked to my superior . . . .

Veresh went on to explain to Olander that after that point, it was ''out of his hands'' and had become a matter over that he had ''no control.'' Olander, in turn, told Veresh that he was sorry but that he had considered both Veresh and Grew to be his friends.

Veresh did not contradict Olander. In the face of noncorroboration by Recknagel and/or Velos, I conclude that Veresh's apology to Olander undermined his credibility as to the responsibility and the motivation for the PPC decision.[1]

On August 25 before the shift started, Veresh gave Grew the PPC and sent him home to meditate the error of his ways. The PPC stated:

> YOU ARE EXPECTED TO COMPLY WITH ALL ESTABLISHED COMPANY RULES AND GUIDELINES. YOU MUST IMPROVE YOUR CONDUCT SPECIFICALLY TOWARDS MANAGEMENT AND ANY DEROGATORY REMARKS AND COMMENTS YOU MAKE IN AN EFFORT TO UNDERMINE A MANAGEMENT TEAM MEMBER'S EFFECTIVENESS.

[1] I consider that testimony that Velos was ''out of town'' to be a meaningless nonexplanation for his failure to testify.

Grew later entered his commitment that stated that he always had and always will follow Respondent's rules and that the conversation he had with an employee 10 minutes prior to his shift's start was not meant to undermine management or any manager but that the PPC discipline was an unwarranted, unjust harassment. He concluded the PPC statement with the assertion that the conversation he had with a fellow employee was private and that Veresh had grossly misunderstood what he had heard.

On August 26, Grew returned the PPC in a meeting with Recknagel, Veresh, Fucqua, Zeff, and Shift Superintendent Tom Yuman in the personnel office. After a private caucus, the managers returned and rejected Grew's PPC response. He was ordered by Recknagel to rewrite his response or be terminated as not complying with the intent of the PPC process. At one point, Grew was reduced to tears. He rewrote his PPC response that was accepted. His new response amended the written PPC conclusion by eliminating the exculpation and accusation of PPC nonjustification and added an apology to Veresh and a promise that ''this type of matter will never happen again.'' With the disclaimer of intent to act again in the manner in which he, in effect, had done in criticizing management's disciplinary treatment of a coworker in a joint discussion of that treatment, Grew's PPC was accepted and he was not discharged. The PPC was, however, added to his file under the progressive discipline system as step three. The next level, step four, entailed discharge as the correlative corrective action.

6. The discharge

Grew testified that he had ongoing conversations with union agents with respect to the Union's need for more authorization cards to support the filing of a petition with the Board's Regional Office for employees in the above-described production and maintenance unit. Finally on October 17, 1994, the Union filed the petition in Case 7–RC–20465.[2] Zeff testified that a copy of that petition was received by Respondent and seen by him on the afternoon of October 18.

Grew started his shift on the custom line at 10:55 p.m. on October 17 and it is not disputed that he was, pursuant to policy, entitled to leave his work area at 6:55 a.m., i.e., 5 minutes to the hour, i.e., before the 7 a.m. shift.[3]

Grew was also scheduled to return to perform 4 hours of overtime from 7 p.m. (i.e., actually 6:55 a.m. appearance) to 11 p.m. (i.e., actually 10:55 p.m.) on October 18 in maintenance work. At the beginning of the 11 p.m., October 17 shift, Grew worked at the beginning or load in section of the line, i.e., loading raw materials onto the line. Halfway through the shift, he was transferred to the custom pack-out end when he and other workers, including Jeff Bollenberg and Dave Meyers, loaded custom glass onto the I-frames or into containers. Employee Connie Caldwell was transferred from her job in the quench air tempering function to work with the above three loaders for the last 2 hours of the shift until, she testified, about 6:50 a.m. Periodically, during the shift, Olander was in and out of the custom pack-out area with his Hi-lo vehicle and was present there, he testified, and observed Grew at about 6:53 or 6:52 a.m.

It is the testimony of Grew, Caldwell, and Olander that by 6:50 a.m., Grew and Bollenberg and all packers had run out of custom glass to start another I-rack load because of a backlog of custom glass to be run through the furnace and recut and, in consequence, Grew was standing with Bollenberg by an I-rack at about 6:50 a.m. as they just finished packing it or were about to finish.

At 6:45 a.m., Caldwell was told that she was needed to make a change of a wedge in the quench operation. She testified that at 6:50 a.m., as she was leaving the custom pack-out location, she encountered Pallone, the roller hearth supervisor of Grew's crew at that time. (Pallone had only been recently appointed to a supervisor's position in August 1994.) According to Caldwell's testimony, not explicitly contradicted by Pallone, Pallone asked her whether she had changed the wedge yet. She told him that she was on the way to do it. The last Caldwell saw of Grew and Bollenberg, they both still wore their yellows. Olander did not recall what they were wearing when he left the custom pack-out area to go to another location. He thought it was at about 6:52 a.m. He did not remain long enough to see Grew's subsequent conversation with Pallone who was approaching the area. The last image Olander had of Grew and Bollenberg is the two of them standing by an empty I-rack either inspecting the pack-out list or preparing for the awaited recut glass. He testified that as he mounted his Hi-lo vehicle, he suggested that they should probably clean the rack.

Bollenberg testified that at 6:50 a.m., he and Grew had just finished packing an I-frame rack, he at one end and Grew at the other. They both had worn yellows up to that point. Grew removed his and rolled them under his arm. Bollenberg explained that he kept his yellows on because he was scheduled to continue working overtime. It is undisputed that yellows are worn whenever glass is being handled but are snapped off and let down to the floor at the earliest moment because they are hot and uncomfortable. Grew admitted that they are expected to be worn when sweeping glass debris from a rack as in when it is commonly prepared for loading. Bollenberg was not certain what he was doing at about 6:50 a.m. when Pallone arrived. He testified that he was either inspecting the packing list for the next frame or that he was sweeping debris from the next frame to be loaded. He was not certain what Grew was doing between 6:50 and 6:55 a.m. when they both left the pack-out work area, i.e., Grew was to deposit his yellows nearby and proceed to change his boots in the locker room and go home with Olander. Bollenberg was to report to Veresh at the load in end for assignment.

It is Grew's testimony that Bollenberg started cleaning the next frame by sweeping glass debris with the single broom

[2] Pursuant to a Stipulated Election Agreement approved on November 2, 1994, an election was held on December 9, 1994. The Union received 222 votes. Votes cast for no representation were 199. There were no challenges. The Respondent filed objections. On March 14, 1995, a hearing officer issued a report recommending that the Union be certified by the Board. Respondent's appeal was pending at the time of trial.

[3] It is undisputed that custom line workers do not have to wait for the appearance of relief workers inasmuch as there is only one shift for custom and when work goes to another shift, the relief is chosen ad hoc at the beginning of the next shift and thus no relief is chosen until after the hour. Regular line workers may leave at 5 minutes to the hour on appearance of relief workers, i.e., next shift, or earlier if the supervisor approves. The October 17 midnight shift was to be followed with overtime custom work because of a large amount of custom rework to be done.

available there for that purpose immediately after the supervisors arrived there. Bollenberg was not able to recall what finished recut glass, if any, was available for packing the next rack. He corroborated the other employee witnesses that the furnace area had backlogged a high volume of custom glass to be recut and that when custom glass has to be recut, the packers are unable to proceed with further packing. Bollenberg testified that as was his custom, he kept a close eye on the department wall clock near the end of the shift and that it was at 6:50 a.m. when Pallone and Veresh arrived and confronted Grew, i.e., he at one end and Grew at the other end of the rack. At that point, Grew did not have his yellows on. Grew testified that there was nothing more for him to do and he had removed his yellows just before Pallone and Veresh arrived, and that he did so at a point when Pallone was discussing the wedge problem with Caldwell. Respondent argues that it must have taken several minutes to unfasten the body and leg harnesses, but that assertion is based on speculation. It is uncontroverted that the garments drop off as they are unhooked and Velcro strips pulled, i.e., possibly in a matter of seconds and not necessarily minutes, especially if the wearer wants to be relieved of the discomfort at the end of the shift.

Pallone testified that he had arrived and discussed the state of production with the next shift supervisor, Veresh. At first, he testified that it was at about 6:50 a.m. that he walked over to Grew. He testified that he had seen Grew at first from the load end of the hearth, about 200 feet away, and at that time he was standing in the aisle, alone, and not working. As he began to approach Grew, he saw that his yellows were removed. In a signed typewritten report to Respondent dated October 18, Pallone stated therein that it was 6:40 a.m. when he and Veresh were walking toward the pack-out end and that when they arrived at 6:50 a.m. according to the wall clock, Grew was standing in front of the desk with his yellows rolled up. In his statement, he claimed that the wall clock registered 6:50 a.m. A hand-printed report, purportedly signed by Veresh, addressed to Pavlos, dated October 18, 1974, recites that at 6 or 7 minutes before ''shift end,'' he and Veresh walked with Pallone up to Grew when Pallone confronted him. That same document began with an assertion that the writer witnessed the confrontation conversation as having occurred at 6:48 a.m. The memo did not define shift end as 6:55 or 7 a.m. Zeff places it at 7 a.m. Thus, according to that Veresh memo, the time that both supervisors walked toward Grew was either an impossible 6:53, 6:48, or 6:49 a.m. Pallone's file memo and testimony reflect that his watch and Veresh's watch were a minute slower than the more relevant plant wall clock. Veresh did not testify at all with respect to the discharge incident.

Neither memo refers to Grew as having ceased active work earlier than 6:50 a.m. wall clock time. Pallone admitted that in a Michigan Employment Security Commission hearing regarding Grew's claim, he did not testify nor was he asked to testify as to Grew's position prior to 6:50 a.m. Respondent was represented there by Zeff who is also an attorney. At the trial, however, later in his testimony, Pallone attempted to depict Grew as having ceased work when he first observed him 200 feet away at 6:47 (apparently by his watch, i.e., 6:48 a.m. wall clock time) and watched him stand idle for 2 to 3 minutes continuously before he spoke to him.

By all accounts, the verbal confrontation took place at 6:50 a.m., give or take some seconds. Pallone either observed that there were 5 minutes left to the shift (Bollenberg); asked why Grew was leaving early or whether he had a problem and why did he have his yellows off (Pallone testimony) or why did he stop working. It is not disputed what occurred thereafter. Grew responded by asking what work can be done in 5 minutes. Without challenging Grew's explanation of lack of work to his face, nor in any other manner remonstrating with him nor giving him any instructions, Pallone and Veresh walked away. Pallone's attention went to other matters and he paid no attention to Grew. To ''appease'' Pallone, Grew then went and stood beside Bollenberg as Bollenberg read a packing list to review the glass required to be packed on the next rack until 6:55 a.m., when they both left the area.

Despite having failed to rebuke Grew in any fashion at the time of the confrontation, Pallone testified that after the shift ended, he went home, and brooded over Grew's conduct and telephoned Pavlos and complained to him about Grew. He testified that Pavlos ordered him to prepare a report and told him that he would obtain Veresh's version of the facts. Despite Pallone's testimony that he had authority to discharge employees on his own discretion, which is unsupported by the progressive discipline system, the decision to discipline was deferred to Pavlos.

Pallone testified very generally that he was upset with Grew because there was ''plenty of work'' to do; that if Grew did not do his work, other employees must do it; and that Grew ''defied'' his authority by ''just standing'' in front of everybody else, letting everybody else do the work with him just standing there. Pallone made no effort in his testimony to explain just what work was available to Grew that others had to do. He did not contradict or otherwise specifically rebut the employee witnesses as to the lack of packing work due to the custom recutting needed. No other Respondent witness did so. No other witness, particularly Veresh, was called on to corroborate Pallone, despite the fact that Veresh had testified. Neither Caldwell nor Bollenberg was interviewed by Respondent prior to the decision to discharge Grew. Olander testified, without contradiction, that he was interviewed by a management subcommittee as to what he observed and that he told them the facts as he had testified to them, i.e., packing work had run out and at about 6:52 a.m. he last saw Bollenberg, Grew, and others standing around a rack waiting for recut glass. Pallone admitted awareness of card solicitation but denied knowledge of Grew's union activities. Because neither Pavlos nor any other manager testified, it is unknown what motivated their decisions regarding Grew's discharge.

The afore described memorandum was then prepared by Pallone. In that memo, he stated that after Grew responded, ''[W]hat can you do in five minutes,'' Grew walked away and that ''The rest of the pack out crew were still at their assigned work areas working,'' and further, ''It is company policy or Rule 15 that we don't quit, until we are properly relieved or have permission from the supervisor.'' Rule 15 relates to leaving the work area and not malingering. According to all other witnesses, Grew was at his work station, not away from it, neither at the desk nor in the aisle as Pallone inconsistently reported and testified to. There is no evidence of any kind that Grew left his work area before 6:55 a.m.,

nor that he did not stay and help review the pack list, i.e., a seemingly redundant function.

In his testimony, Pallone stated that when Grew finished his response, Pallone immediately turned his head to see if other employees were working and he admitted that he did not see Grew from that point on because other employees had approached him with work questions. Thus, he could not have seen Grew walk away.

Later on the evening of October 18, Pallone returned to the plant. Grew started his overtime shift work at 7 p.m. Pallone testified he met with Superintendent Jerry Miller at about 9 p.m. who read Pallone's memorandum and told him he would contact him later. Pallone testified that he had decided to discharge Grew at about 8 a.m. on the morning of October 18, and he typed his report between 9:30 and 10 a.m., but that it was not until 5 p.m. that he talked to anyone at the plant. Yet, he had also testified that the decision was deferred by Miller. At about 10:45 p.m. at the end of Grew's 4-hour overtime shift, Grew and Pallone were summoned to a meeting with Miller, the midnight shift superintendent, and Pavlos. Grew and Pallone agree that Grew was confronted with Pallone's memorandum report. According to Pallone, Miller asked Grew for his version of the facts, and Grew admitted standing idle but denied that he walked away and left the jobsite. Thus, Pallone's testimony implies that the essence of the complaint against Grew was that he walked off the job, and it was to that that Grew's response was directed. According to Grew, Miller told him that he had broken his PPC commitment and ''we'' had no choice but to terminate Grew. Pallone, however, testified that Miller turned over the decision to Pallone who stated to Grew that it was his decision that Grew's behavior was unacceptable and that Grew had defied his authority by standing in front of everybody else, letting everybody else do the work. Thus, Pallone's testimony shifted the nature of Grew's misconduct from the essence of rule 15 breach, i.e., premature walking away from the work station to malingering for a few minutes in contemptuous insubordination. The insubordination suggestion is, of course, totally insupportable even by Pallone's testimony, as he admittedly had no idea what Grew did as Pallone turned his head away and got involved in other work problems and thus was unable to see whether Grew walked away or was at the rack or anywhere else, nor what Grew did or did not do.

In further inconsistency, Pallone testified that the PPC was totally unrelated to the discharge decision. Of course, this is premised on Pallone's testimony that it was his own decision alone to discharge Grew. That testimony appears improbable even in the context of Pallone's own testimony regardless of Miller's direct involvement. Moreover, Pallone is uncorroborated by either Miller or Pavlos. Furthermore, his testimony of PPC nonrelationship is contradicted by representations made to the MESC that clearly cite the progressive discipline system and Grew's PPC as well as the October 18 incident as the cause for Grew's discharge. Moreover, those representations clearly describe Grew's misconduct as walking off the job, something of which there is no evidence whatsoever.[4]

Respondent's lack of corroboration of its witnesses' testimony severely impacts on their credibility. I conclude that the failure of Respondent to call witnesses who must be assumed to be favorably disposed to it necessarily raises an inference that their testimony would adversely affect the Respondent. *International Automatic Machine*, 285 NLRB 1122 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). A fortiori, Respondent's failure to corroborate its witnesses with the testimony of witnesses who testified on other matters necessarily raises an adverse inference. I therefore conclude that Pallone's testimony could not be corroborated by Miller, Pavlos, and Veresh had they testified. I must further infer that they would not corroborate Pallone's disclaimer of Respondent's knowledge of Grew's union activity that culminated in the receipt by Respondent of a copy of the representation petition several hours after the alleged misconduct and before the discharge decision was effectuated. Thus, Grew was terminated about 16 hours after his allegedly intolerable conduct.

Because of Respondent's witnesses' lack of corroboration, internal and external inconsistencies and contradictions, I credit the employee witnesses who were each more spontaneous, certain, and convincing in demeanor.

With respect to Respondent's past toleration of employees who leave earlier than the permissible 5 minutes to the hour, General Counsel witnesses observed numerous employees, particularly cutters, departing earlier. They were unaware of the circumstances, however, e.g., whether the supervisor had given permission or whether, if not, the employees had been disciplined. Respondent witnesses testified that the progressive discipline system is not always followed, particularly if the misconduct is severe. Respondent's records reveal several instances of discharge for violation of rule 15. The circumstances, however, were not shown to be comparable. Those examples involve either probationary employees and/or instances of gross and flagrant conduct, i.e., walking off the job and out of the plant in midshift. There is no precedent for discharging or disciplining an employee on application of either rule 15 or any other rule for standing idle at his work station a few minutes before the departure time, even when work is available to be done. Certainly, there is no evidence of a history of doing so, regardless of whether there is any work to do other than redundant make-work. Finally, there was no effort by Respondent to explain why Veresh who assiduously attended to Grew's conduct on August 24, nor Fucqua, paid no concern to the fact that Caldwell had ceased working at 10 minutes to the hour at shift end to engage Grew in a discussion when he was supposedly only permitted to do so at 5 minutes to the hour.

B. Analysis

Section 8(a)(1) of the Act sets forth as an unfair labor practice an employer's conduct that interferes with their Section 7 rights, inclusive of which is the right to engage in ''concerted activities for the purpose of mutual aid or protection.'' There is no dispute herein that Grew's discussion and criticism with a coworker of management's discipline as it was applied to another employee, in a manner loud enough to be conveyed to a representative of management, con-

[4] Not having access to the MESC hearing record, I do not have any basis to understand contrary conclusions by the hearing officer therein. His conclusions are not binding on me, particularly without benefit of the testimony he evaluated. His decision is based on the conclusion that Grew walked off the job.

stituted concerted activities that, if not done abusively, would have been protected by the Act. I find that Grew's conduct constituted concerted activity from at least two aspects. First, discussions between employees wherein they educate each other as to working conditions, as for example wages or salaries, constitutes concerted protected activities. *Automatic Screw Products*, 306 NLRB 1072 (1992). As observed by the Board in *Triana Industries*, 245 NLRB 1258 (1979), such discussions may be necessary as a prerequisite to union activities and are construed to be protected concerted activities. In this case, Grew's conduct occurred in the midst of union organizing activities and was arguably perceived by Respondent as part of that effort.

From a second aspect, Grew's conduct in effect constituted and was perceived by Respondent's agents to constitute a criticism of its disciplining and subjection to a drug test of a third employee whose cause Grew thereby espoused. Such espousal, even if done by a single employee, is considered to be concerted protected activity. *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502 (8th Cir. 1993), citing *Meyers Industries*, 268 NLRB 493, 497 (1984).

In *Consumers Power Co*., 282 NLRB 130, 132 (1986), the Board observed:

> where an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service.

In this case, Grew was retained in employment and thus concededly ''fit for service.''

In *Health Care & Retirement Corp*., 306 NLRB 66, 65 (1992), citing, inter alia, *Consumer*, supra, the Board summarized the state of applicable law as follows:

> The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves. The Board and courts have found, nonetheless, that an employee's flagrant, opprobrious conduct, even though occurring during the course of Section 7 activity, may sometimes lose the protection of the Act and justify disciplinary action on the part of an employer. Not every impropriety, however, places the employee beyond the protection of the Act. For example, the Board and the courts have found foul language or epithets directed to a member of management insufficient to require forfeiting employee protection under Section 7.

Finally, protection is not denied to an employee regardless of the inaccuracy or lack of merit of the employee's statements absent deliberate falsity or maliciousness, even where the accusatory language used is stinging and harsh. *Delta Health Center*, 310 NLRB 43 (1993).

Although it is not disputed that Cosby failed the drug screen test, there is no evidence nor contention that Grew's comments were maliciously calculated or uttered in anything but a good-faith belief in Cosby's cause. I conclude that the epithet of ''low life'' even if directed at Veresh personally, which it was not, not only was not egregious but, in fact, constituted a rather mild epithet insufficient to deprive Grew of the Act's protection. No evidence was adduced as to any past history of discipline for similar epithets to supervisors. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint by issuing the PPC discipline document to Grew on August 25, 1995, and by threatening to discharge him on August 26. I find that the threat to discharge him if he did not amend his PPC response was patently calculated to cause Grew to desist from similar concerted protected activities, particularly in the context of his known union activities, and to force him to recant his protected concerted criticism of management's treatment of a coworker.

If the General Counsel proves by a preponderance of evidence that concerted protected activity motivated even partially the discharge, the burden of proof applies as set forth in *Wright Line*, 251 NLRB 1083 (1980). The burden then shifts to Respondent to prove by a preponderance of evidence that it would have discharged the employee even in the absence of the protected activities, Respondent does not satisfy that burden merely by demonstrating the existence of a legitimate reason for discharge. *Health Care & Retirement Corp*., supra.

In this case, the Respondent's uncorroborated witness, Pallone, testified that he decided to discharge Grew solely because of the October 18 incident. I have discredited his testimony that is internally inconsistent and externally contradicted by Respondent's representation to the Michigan Employment Security Commission. According to those representations, Grew's discharge was the culmination of its progressive disciplinary system.

Respondent's position about the reason for Grew's discharge was inconsistent, shifting, and false, i.e., Grew never walked off the job. Respondent has failed to prove that Grew would have necessarily been discharged solely for his failure to find work at 10 minutes to the end of the shift. Accordingly, I conclude that Respondent violated Section 8(a)(1) by relying on Grew's August 25, 1994 PPC in application of its progressive disciplinary system, i.e., in effect because Grew engaged in concerted protected activity in the context of union organizing activities.

The preponderance of evidence further establishes that Grew was also discharged because of his union activities. Respondent historically opposed union representation of its employees. Respondent was aware of Grew's transfer of allegiance to the Union and his leading union role as inside plant contact and organizer. Its hostility to Grew's union activity is necessarily implied by virtue of its manifest hostility to Grew's concerted protected criticism of management in the context of his union organizing efforts. Respondent proffered shifting, inconsistent, and false reasons for his discharge. Compare *Williams Contracting, Inc*., 309 NLRB 433 (1992), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966), which holds that a trier of fact is constrained to infer unlawful motivation when the proffered nondiscriminatory motivation is false even in the absence of direct evidence of motivation.

By virtue of my conclusion that Respondent's proffered reasons for the discharge were pretentious, I necessarily conclude that Respondent did not meet its *Wright Line* burden of proof. I therefore find that Respondent also violated Section 8(a)(1) and (3) of the Act by discharging Robert Grew on October 18, 1994.

CONCLUSIONS OF LAW

1. As found above, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, Respondent violated Section 8(a)(1) of the Act on August 26, 1994, by threatening its employee, Robert Grew, with discharge and on August 25, 1994, by issuing to him a written PPC disciplinary warning and on October 18, 1994, by discharging him because of his concerted activities engaged in with other employees for their mutual aid and protection under the protection of the Act.

3. As found above, Respondent violated Section 8(a)(1) and (3) of the Act on October 18, 1994, by discharging Grew because of his sympathies for and activities on behalf of Local 283, International Brotherhood of Teamsters, AFL–CIO, and because of the above-described concerted activities protected by the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged its employee, Robert Grew, on October 18, 1994, I recommend that Respondent be ordered to offer him immediate and full restatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings suffered as a result of its unlawful conduct by payment to him of a sum equal to that which he would have earned absent the discrimination against him, with backpay and interest computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent unlawfully issued to employee Robert Grew a disciplinary PPC warning, I recommend that it be removed from his files and from any other files maintained by Respondent and be considered null and void.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Guardian Industries, Inc., Carleton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge or disciplining them because of their concerted activities engaged in by them for their mutual aid and protection under the protection of the National Labor Relations Act.

(b) Discharging its employees because of their concerted activities protected by the National Labor Relations Act, or because of their sympathies for and activities on behalf of Local 283, International Brotherhood of Teamsters, AFL–CIO, or any other union.

(c) 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) Offer to its employee, Robert Grew, whom it unlawfully discharged on October 18, 1994, immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings suffered as a result of its unlawful conduct in the manner set forth in the remedy section of this decision.

(b) Remove from Robert Grew's personnel file and from any other file the disciplinary PPC warning issued to him on August 25, 1994, and the discipline of October 18, 1994, or any copy thereof, and render that discipline null and void.

(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 under the terms of this Order.

(d) Post at its Carleton, Michigan facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, 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 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.

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

[5] 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.

[6] 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 threaten our employees with discharge or discipline them because of their concerted activities engaged

in by them for their mutual aid and protection under the protection of the National Labor Relations Act.

WE WILL NOT discharge our employees because of their concerted activities protected by the National Labor Relations Act, or because of their sympathies for and activities on behalf of Local 283, International Brotherhood of Teamsters, AFL–CIO, or any other union.

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

WE WILL offer to our employee, Robert Grew, whom we unlawfully discharged on October 18, 1994, immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings suffered as a result of our unlawful conduct.

WE WILL remove from Robert Grew's personnel file and from any other file the disciplinary PPC warning issued to him on August 25, 1994, and the discipline of October 18, 1994, or any copy thereof, and render that discipline null and void.

GUARDIAN INDUSTRIES CORP.