

Guardian Automotive Trim, Inc. and International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers (IUE), AFL-CIO.
Cases 25-CA-28140-1 and 25-CA-28140-2

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
SCHAUMBER
AND WALSH

On December 31, 2002, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to adopt the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board orders that the Respondent, Guardian Automotive Trim, Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for activities on behalf of, or support for, International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers (IUE), AFL-CIO, or any other labor organization.

¹ In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employees Jimmie Powell and Brian Smith because they engaged in protected activities on behalf of the Union, we agree with the judge that the Respondent failed to show that it would have terminated the employees had they not engaged in union activities. In affirming this conclusion that the Respondent's proffered basis for the discharges was pretextual, we do not rely on the judge's findings that the Respondent conducted an incomplete and skewed investigation of the October 14, 2001 incident involving the employees, or that the discipline imposed by the Respondent was not in proportion to the misconduct engaged in by the employees. We also do not rely on the judge's finding that the Respondent's general animus was demonstrated in an earlier Board case in which the Respondent was found to have violated the Act. *Guardian Automotive Trim, Inc.*, 337 NLRB 412 (2002). As set forth in the judge's decision, we rely particularly on disparate treatment to show the Respondent's antiunion motive for discharging Powell and Smith. It failed to follow its own progressive discipline policy. That is, it did not issue a lesser corrective action to Powell and Smith as it did in regard to other employees disciplined by the Respondent for similar conduct.

In agreeing with his colleagues that the Respondent violated the Act by unlawfully terminating employees Powell and Smith, Member Walsh would adopt the judge's decision in all respects.

² We shall modify the judge's recommended Order and notice to correct inadvertent errors and omissions.

(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 from the date of this Order, offer Jimmie Powell and Brian Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jimmie Powell and Brian Smith whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 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 unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, 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 facility in Evansville, Indiana, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 these proceedings, 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 October 17, 2001.

³ 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."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees for their activities on behalf of, or support for, International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers (IUE), AFL-CIO, or any other labor organization.

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, within 14 days from the date of the Board's Order, offer Jimmie Powell and Brian Smith full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges they previously enjoyed.

WE WILL make Jimmie Powell and Brian Smith whole for any loss of pay or other benefits suffered as a result of our unfair labor practices, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges of Jimmie Powell and Brian Smith, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

GUARDIAN AUTOMOTIVE TRIM, INC.

Belinda J. Brown, Esq., for the General Counsel.
Robert G. Brody and Craig L. Cohen, Esqs. (Brody & Associates, LLC), of Stamford, Connecticut, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The charges in this case were filed by International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL-CIO (the Union) on April 11, 2002. A consolidated complaint was issued on June 27, 2002, alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging at its Evansville, Indiana facility (the facility) employees Jimmie Powell and Brian Smith on October 17 and 19, 2001,¹ respectively.

Pursuant to notice, a trial was held before me in Evansville, Indiana, on October 1 and 2, 2002. The General Counsel and the Respondent were represented by counsel, who demonstrated vigorous advocacy and commendable professionalism throughout. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed posthearing briefs, which have been duly considered.

Employee Relations Manager Jeffrey Evans of the human resources department (HR) testified that Powell and Smith were discharged solely for what happened between them and acting or temporary group leader Kenneth Maikranz Jr. on October 14. More specifically, the events in question took place shortly before the end of the shift that day at the facility's department 23A. All but one of the persons who worked that shift were called to testify: Powell, Smith, Steve Phipps, and Keith Vaughn, by the General Counsel; Maikranz and Kelly Lamica nee Graham, by the Respondent.

Other witnesses called by the Respondent were Jeffrey Evans (also called as a 611(c) witness by the General Counsel), Charles Jones, Tony Settles, and Jeff Winchester.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Evansville, Indiana, where it is engaged in the manufacture of injection-molded plastic automotive parts. During the past 12 months, the Respondent, in conducting its business operations at that facility, sold and shipped from the facility goods valued in excess of \$50,000 directly to points outside of the State of Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The facility is an automotive trim plant engaged in a variety of activities relating to exterior trim parts, including molding, plating, painting, assembling, finishing, and shipping. It now employs about 760-800 employees total, having undergone expansion in recent years.

¹ All dates are in 2001 unless otherwise indicated.

The hierarchy of positions has at all times material been as follows: employee, group leader, supervisor, department manager, shift superintendent, assistant plant manager, and plant manager. The parties agreed that at all times material group leaders were nonsupervisory employees, and by stipulation they voted in the Board election conducted in April 2000. They received a pay differential and had the authority to direct employees and to write them up for misconduct, but their recommendations for disciplinary action had to be reviewed and approved by supervisors. Although the record suggests that there may have been recent changes in their authority, elevating their status, none of the parties have contended that the group leaders should be considered statutory supervisors for purposes of this case.

The Guardian Automotive employee handbook (the handbook) in effect since February 2000² [contains a provision entitled “Corrective Action” (at p. 15)]. The provision provides:

Corrective action is administered impartially and consistent with the nature of the circumstances. Especially serious misconduct such as theft, physical violence or the threat of violence, abusive language or conduct toward a supervisor, destruction of Company property, disregard of workplace safety practices, or violation of Company policies such as the Policy Against Harassment, Substance Abuse Policy, etc., may result in immediate discharge. In most cases, such as those involving below-expectations performance, excessive absences, etc., corrective action will be administered progressively, according to the following steps:

Step 1—Counseling: The supervisor will document the nature of the counseling (First Warning).

Step 2—The employee will be issued a written record of the issue and the measures needed for improvement (Second Warning).

Step 3—Suspension: The employee must complete a written statement committing to improve with regard to the issue at hand before returning to work (Final Warning).

Step 4—Termination of employment.

The Company reserves the right to modify this policy as appropriate. Factors that are considered in deciding on appropriate corrective action include an employee’s past work record, length of service, and other mitigating circumstances.

Jimmie Powell was employed at the facility for nearly 11 years; Brian Smith for almost 4 years. In October, they both regularly worked in department 23B, Powell as a relief operator and Smith as a rack changer. The evidence of record reflects that they each received but one warning prior to October 14: Smith received a first warning for attendance in August 2000, and Powell received the same in July 2001.³ Inasmuch as the sole basis for the discharges was what occurred on October 14, these warnings need not be addressed further.

The Union lost the April 2000 election. Both Powell and Smith were known union supporters and engaged in preelection and postelection handbilling at the facility. They wore union paraphernalia and talked about the Union to other employees on the job, and they also appeared at a postelection unfair labor practice proceeding, although they were not called to testify. Evans testified that it was common knowledge at the plant that they were recognized union adherents and, thus, management’s knowledge of their union activities is not disputed.

For background evidence of animus, the General Counsel offered evidence concerning two conversations occurring prior to October 14, 2001.⁴ One was between Powell and Department 23B Paint Supervisor Winchester, with Vaughn also being present; the other was between Winchester and Vaughn.

Thus, Powell testified that in September 2001 he told Winchester that he wanted some leadership opportunities in the department, to which Winchester responded, “My God, I’d love to have you as a supervisor, but I can’t because of where you stand” (Tr. 57). Powell asked if he meant because of Powell’s union shirts and activity, and Winchester said “yes.” Vaughn testified that he was present at a conversation between Powell and Winchester after the election (April 2000), but could not recall the date. He testified that Powell asked Winchester if he had found out anything about Powell becoming a group leader. Winchester responded that Powell knew how the Company felt on his stand with the Union, and that’s why Powell could not become a group leader.

As to the second conversation, Vaughn could not recall whether it was before or after he became group leader. According to Vaughn, Winchester stated that as a group leader Vaughn could not wear union shirts, hats, or buttons. Vaughn further testified that he did not change his support for the Union or his behavior as a result of the conversation.

I credit Powell and Vaughn that the conversations took place. I do not believe that they fabricated the incidents, particularly when they did not allege any other conversations demonstrating management animus.

However, as to the conversation between Powell and Vaughn, I am not convinced it took place in September 2001, as Powell testified. By that time, I am certain that he would have notified the Union and filed an unfair labor practice charge. I find it significant that when he received a First Warning in August 2000, he wrote in response, “I will fight for a UNION until I retire or die.”⁵ Vaughn candidly could not recall when the conversation took place, and I believe it much more plausible that it occurred considerably prior to September 2001. Without any confidence in the date and whether the conversation occurred before or after Vaughn was promoted to group leader, even though he was a known union adherent, I cannot give the conversation much weight in establishing animus relevant to Powell’s discharge in October 2001. Germane to both conversations, although group leader was not considered to be a statutory supervisory position within the meaning of the Act, they did have more status and authority than other employees,

² GC Exh. 5.

³ R. Exhs. 5 and 7. Evidence was adduced that Powell received discipline in 1994 and 1995, but no documentation or details were provided.

⁴ Both occurred over 6 months prior to the filing of the charges and thus outside the 10(b) period.

⁵ See R. Exh. 5.

and Winchester may have erroneously concluded that it was a supervisory position at the time.

With further regard to the second conversation, Vaughn could not remember whether it was before or after he was promoted to group leader, so the date it occurred cannot be ascertained. In any event, Vaughn testified that he did not change his pronoun behavior as a result of the conversation, and he either became or continued to be a group leader, with no evidence that the Respondent retaliated against him for continuing to demonstrate support for the Union. Accordingly, I find that this conversation is of de minimis evidentiary value in determining the issues before me.

In arguing background animus, the General Counsel has also cited *Guardian Automotive Trim, Inc.*, 337 NLRB 412 (2002), and quoted the portion of the handbook dealing with unions.

The above-cited decision stemmed from postelection objections and a concomitant unfair labor practice charge filed by the Union. The Board found numerous violations of Section 8(a)(1) committed by the facility's plant manager, Michael Birch, on March 23 or 24, 2000, and interference by Supervisor Floyd Tresler in employee handbilling, on April 20, 2000. The Board further determined that the Respondent had interfered in the election process by its conduct and ordered a new election, which has not yet taken place. In determining the impact of antiunion animus in the disciplinary actions taken against Powell and Smith, it is appropriate for me to consider unfair labor practices committed by the highest level of management at the same facility. See *Stark Electric, Inc.*, 327 NLRB 518 (1999).

The handbook (at p. 3) contains a section entitled, "Our Position Regarding Unions." It states, inter alia, the following:

As a Company employee, no third party charges you dues, tries to speak for you, or interferes with the successful relationship we are working to achieve.

We are also convinced that where there are unions, there frequently is trouble, tension, and hostility—and the ever present possibility of strikes.

.....

Our customers believe in us. We continually tell them that they can count on us to deliver on time, that our people work together to solve their problems, and that we are free from labor strife, outside controls, strikes, or even the threat of strikes.

An employer has the right to oppose unionization of employees, provided the employees' Section 7 rights are not violated, and to engage in legitimate antiunion propaganda, free of threats or promises of benefits, during an organizing campaign and preceding an election. See *John W. Hancock Jr., Inc.*, 337 NLRB 1223 (2002). Furthermore, this provision was in effect at the time of the election in April 2000, but it was neither raised by the Union as a ground for objection to the election nor found by the Board to constitute an unfair labor practice. Accordingly, I decline to find the above section of the handbook evidence of unlawful animus.

III. EVENTS OCCURRING ON OCTOBER 14, 2001

As stated earlier, the series of events, which occurred near the end of the shift at department 23A on October 14 constitute the sole basis for the discharges of Powell and Smith.

Among the six persons, including Powell, Smith, and Maikranz, who testified about what happened that evening, there were considerable variations in testimony; indeed, no two versions were identical.

Undisputed facts reflect that on the 10 a.m. to 6 p.m. shift for department 23A on October 14, Maikranz, who had been employed less than 2 months earlier (August 22), was the temporary group leader and serving in that capacity for the first time. Employees working that shift included Powell, Smith, Phipps, Vaughn, Graham, and Skinner. The department received more than one batch of defective parts toward the end of the shift, with the result that Maikranz more than once gave orders to stop loading and take the parts off the line, and he finally closed the line down for the day. It is company policy and practice that a work area at the end of the shift is supposed to be clean for the next shift, as reflected in the CANDO program.⁶ Temporary group leaders possess the same authority as regular group leaders.

Powell testified that prior to October 14, he had worked weekends in department 23A for 6 or more months, under group leader McClure, who allowed employees to leave the loading area at the end of the shift once they quit loading, provided that the area was clean.⁷ When Maikranz shut the line down for the day at approximately 5:50 p.m., the work area was in fine condition and did not need cleaning up. Powell and Smith left the area to have a cigarette. Maikranz, who was only a few feet away, said nothing as they left. Powell and Smith returned to the work area at about 5:58 p.m., to punch out. Powell testified that he did not observe Maikranz and Graham cleaning up the loading area when they returned. Right after he and Smith punched out, Maikranz approached them and said "We don't do things like that in our department." Powell replied that he did not know what Maikranz was talking about, but they could discuss it next weekend.

Powell later gave a written statement to Evans (R. Exh. 1). Consisting of one short paragraph, it is not inconsistent with Powell's testimony but lacks detail.

After the discharges, union flyers⁸ were distributed. Signed respectively by Powell and Smith, they were essentially self-serving statements that the two had not been fired for good cause, but instead, presumably on account of their union activities. In both flyers, it is stated that neither men had received any disciplinary warnings prior to their being discharged. Although such statements were inaccurate, the flyers were essentially propaganda on behalf of the Union, and I do not consider any

⁶ See R. Exh. 18. When asked about the CANDO program on cross-examination, both Powell and Smith professed an ignorance of the general program, which seemed hard to believe of long-term employees.

⁷ McClure confirmed this policy. Vaughn, too, testified that when he was a group leader in department 23B, he also followed this practice. McClure further testified that Powell and Smith received a lot of overtime work on weekends because they were high in seniority and that he never experienced any problems with them.

⁸ R. Exhs. 3 and 5.

misstatements of fact contained in them to reflect negatively on the credibility of either Powell or Smith. Similarly, inconsistencies between their testimony and what was stated in the flyers as to what occurred on October 14 will not be deemed significant for the same reason.

On cross-examination, Powell acknowledged that in his affidavit to the Board agent, he mentioned being disciplined in 1994 and 1995 but did not mention the first warning in July 2000. The series of questions and answers, which followed (Tr. 88–89) are set forth below.

Question: Why didn't you tell them about that discipline?

Answer: I didn't recall it.

....

Question: You recalled the discipline from 1995, but you didn't recall one from 2000?

Answer: That's right.

Question: Do you remember the discipline you received in 2000?

Answer: No, sir.

....

Question: Does a warning constitute discipline in your mind, Mr. Powell?

Answer: Not really, because I felt like I was a real good employee there.

Question: Okay. Now you received it, though, right?

Answer: Yes.

Unlike material distributed for propaganda purposes, a sworn statement before a government agent requires an affiant to be as truthful and accurate as possible. Therefore, I find Powell's failure to mention the July 2000 first warning in a sworn statement damaging to his credibility. Lending even further doubt as to his reliability was his evasive and unconvincing testimony, set out above. As counsel for the Respondent indicated, it is very odd that Powell would have remembered discipline in 1994 and 1995 but allegedly could not recall discipline occurring in 2000, several years more recently. I note also that his testimony professing ignorance of the general precepts of the CANDO program was hard to accept from an employee with so many years of experience (over 11). I additionally note that Powell's testimony at various times seemed evasive and that some of his answers were generalized and vague rather than specific. Therefore, I find him only partially credible.

Smith testified that three batches of bad parts were received that afternoon and that when Maikranz ordered the line shut down for the third time Smith asked him if it was for real that time, and Maikranz said, "Yes." After putting the defective parts into boxes, he washed his hands and then went with Powell to smoke a cigarette. Maikranz stood a few feet away while Smith was washing his hands. Smith testified that he believed Powell said something to Maikranz at that time. Maikranz did not say anything when Powell asked Smith if he wanted to go smoke a cigarette or when they left the area at about 5:50 p.m. They returned to the work area at about 5:57 p.m. Maikranz did not say anything to him after he returned to punch out. The work area was clean when they went out for a cigarette.

Smith's statement to Evans⁹ was more detailed than Powell's. Although generally consistent with his testimony, it was inconsistent on a critical point: whether Maikranz said anything when they were leaving the area. Thus, Smith stated to Evans that before they left to smoke, "Ken said something. He did not pursue anything. I looked at Jimmie and asked was he talking to me or you [Jimmie]." When asked about this statement on cross-examination and why it was not consistent with what he stated in his affidavit to the Board agent, Smith replied, "He didn't say anything to me, period. When I'm saying to me, it wasn't nothing that I heard that was directed to me" (Tr. 124). He eventually stated on cross-examination that he could not recall Maikranz saying anything before they left. There was an additional inconsistency between his testimony and his statement to Evans: Smith testified that he asked Maikranz if they were really through this time, whereas he stated to Evans that he asked the question of Powell, making no mention of any question to Maikranz.

Smith acknowledged that in his affidavit to the Board agent, he stated, contrary to his account to Evans, "I did not hear anyone say anything to Powell and me as we left the area to go smoke. I do not recall anything being said when we came back in at about 5:58 p.m." (Tr. 122.)

I find unconvincing Smith's attempted explanation for his prior inconsistent statement (R. Exh. 2) regarding whether Maikranz said anything. In addition to his testimony being impeached by a prior statement, his unsatisfactory explanation further damaged his credibility. As with Powell, I again note my reservations about his professed ignorance of the CANDO program, but this is a relatively minor consideration in my overall finding that he was not fully credible.

The General Counsel called two other witnesses to testify about what occurred in department 23A on October 14: Steve Phipps and Keith Vaughn.

Phipps, an open supporter of the Union, has been employed by the Respondent for 9–1/2 years, and in October 2001 regularly worked in department 23B under Vaughn. He testified that on October 14, after receiving two loads of bad parts, Maikranz shut the line down for good at about 5:30 p.m. When asked on direct examination what condition the work area was at that time, Phipps replied, "It was already pretty clean" (Tr. 185). According to Phipps, when Powell and Smith said they were going outside to smoke a cigarette, Maikranz was about 25 feet away. Phipps did not hear Maikranz say anything to him. When they left, Phipps was in the process of finishing sweeping, while Vaughn was holding the dustpan. No one else was cleaning because the area was "pretty well" cleaned up (Tr. 186). When Powell and Smith returned, Maikranz said, "We don't do that in this department" (Tr. 187). The employees were standing in line to punch out, and Phipps did not know whom he was addressing. Phipps was not interviewed by Evans or asked to give a written statement.

Vaughn started with the facility in 1992, was a group leader in department 23B in October, and was terminated in January 2002. He testified that when the line was shut down early on October 14, at 5:30 or 5:45 p.m., he stood around and did not

⁹ R. Exh. 2.

engage in any cleaning because “[t]here wasn’t anything to do, really” (Tr. 194). Once the line was shut down, Powell and Smith said they were going to go smoke a cigarette. Maikranz was about 5 to 6 feet away. He did not hear anyone say anything to them. They returned to clock out. Vaughn was interviewed by Evans, who did not ask him to provide a written statement.

Maikranz was hired on August 22 (see GC Exh. 13), and October 14 was the first time that he served as temporary group leader. He testified that at the end of the shift on October 14, he told Powell and Smith, as well as everyone on the line, to clean up. Powell and Smith proceeded to walk off. Maikranz told them that “we need to clean up” (Tr. 293), but they went ahead and left the area, even though it was dirty. Graham and Maikranz then cleaned the area, along with one other person whose name Maikranz could not recall. Other employees also engaged in cleaning work. Powell and Smith returned and stood by the timeclock. Maikranz walked over and told them, “[W]e don’t walk off the line without the line being clean, we don’t do that on this line,” to which Powell replied, “[Y]eah, yeah. I’ll see you next weekend or I’ll see you” (Tr. 295). Maikranz replied, “[N]o, you won’t.” Upset, Maikranz immediately reported the incident to the paint line supervisor and then to Shift Superintendent Settles.

Maikranz submitted a statement to Evans.¹⁰ It was generally consistent with his testimonial version, other than it stating that when he told Powell and Smith to help clean up, Powell said, “Yeah, yeah, whatever.”

The last witness to testify about the incident was Kelly Lamica nee Graham, employed at the facility since May 2001. She testified that at the end of the shift, she saw Maikranz talk to Powell and Smith but did not hear what he said. They then walked off. Maikranz came over to her, “cussing and carrying on about how they wouldn’t listen. He told me to clean up and he was really pissed off” (Tr. 308). She and Maikranz then cleaned up; she did not remember if anyone else was cleaning. Powell and Smith returned at about 5:53 or 5:54 p.m. and went over to the timeclock. Maikranz went over to talk to them, but she did not hear what he said; “[H]e was waving his hand while he was talking. He looked like he was mad” (infra).

Graham gave a written statement to Evans.¹¹ Her statement was not fully consistent with her testimony. Thus, the statement mentions nothing about seeing Maikranz talk to Powell and Smith before they left. Further, it states that she had left the immediate area and when she returned, Maikranz was cleaning the line by himself, so she started helping him clean. As they were cleaning, Maikranz told her he did not want Powell and Smith back.

V. THE INVESTIGATION AND OUTCOME

Evans testified that when Maikranz came to his office and reported the incident, “He was pissed because they disrespected him . . . Ken was a fill in group leader. Ken’s a young guy, too” (Tr. 268). Maikranz explained that he had asked them to do something, and they just totally disregarded what he said.

¹⁰ R. Exh. 15.

¹¹ R. Exh. 16.

Evans thereafter conducted an investigation and, based thereon, he made the decision to discharge Powell and Smith, solely for what occurred on October 14, effective October 14.¹²

On October 15, Evans had Powell and Smith called in separately to his office, where he told them they were being suspended and asked them for written statements. On October 17, Evans terminated Smith at the HR office, with HR Manager Chris Handy present; on October 19, by telephone, Evans terminated Powell. Each man asked for a copy of his written statement, but Evans refused to provide it.

Evans testified initially on rule 611(c) examination that they were discharged because they “walked off the job and insubordination” (Tr. 23), consistent with their discharge notices.¹³ He later testified that the direct order they disobeyed was to help clean up the line and that they abandoned their job. At another point (Tr. 37), he stated that he considered Powell and Smith to have used “abusive conduct” toward a supervisor.

Evans testified that he could understand why Maikranz had been so angry. He also did not believe that Powell’s and Smith’s statements that they did nothing for 15 minutes made any sense. In addition to taking statements from Powell and Smith, he called in Skinner, Graham, Elliot, and Vaughn. He requested and obtained written statements from Powell, Smith, Skinner, and Graham, but not from Elliot and Vaughn, because they said they did not see anything. When asked why he did not speak to all of the witnesses, he replied, “I believed what Ken told me. I had support for what he said” (Tr. 270). When asked specifically why he did not speak to Phipps, he answered, “I mean I had support for what Ken had already said” (infra). I note here that Graham’s version, as we have it in writing, was only partially supportive of Maikranz’ version, and that Skinner’s statement was but one short paragraph long.¹⁴

In sum, Evans’ testimony reflects that he made the determination to discharge Powell and Smith based on Maikranz’ depiction of the events, partially supported by Graham and Skinner, without taking into consideration Vaughn’s account and without even interviewing a witness named by Maikranz.

I do not find satisfactory the reasons Evans proffered for not taking a written statement from Vaughn and for not even interviewing Phipps at all. Assuming Vaughn’s statements to Evans

¹² His later testimony (Tr. 262) strongly suggests that others besides him were involved in the ultimate decision to discharge Powell and Smith. Thus, he testified that Tony Settles called HR in “for guidance.” When asked who made the decision to discharge them, he replied “HR did.” The next question was, “And what involvement did you have in that?” to which Evans responded, “I also suggested that they be fired” (emphasis added). Still later (Tr. 286), Evans testified that he “consulted” with HR Manager Chris Handy in the decision to terminate Powell and Smith. Handy was not called to testify. I will give Evans the benefit of the doubt on this and not find these statements inconsistent with his initial unequivocal testimony that he was the one to make the decision to discharge Powell and Smith.

¹³ GC Exhs. 2 and 3.

¹⁴ Skinner’s four-line statement to Evans (R. Exh. 17) was admitted solely for the purpose of showing what Evans relied on in making his determination to discharge Powell and Smith. Skinner could not be located by the Respondent to be a witness, and I sustained the General Counsel’s hearsay objection as to admitting the document for the truth of what was asserted.

were consistent with Vaughn's testimony, they in large measure corroborated Powell and Smith and, at the very least, would have tended to show that Maikranz had blown the situation out of proportion. Evans' failure to obtain a written statement that would have favored the alleged discriminates, while asking for and obtaining written statements from the two witnesses whose versions tended to support Maikranz, must be deemed suspicious and to lead to the conclusion that the investigation was not conducted in a fair and impartial manner, especially when Vaughn at the time was a regular group leader.

Similarly, it is very suspect that, when there was a disagreement about the events of October 14 and the cleanliness of the work area, that Evans did not even bother to speak to Phipps, who was named in Maikranz' written statement as a witness. It strikes me as not coincidental that Phipps was an open union supporter. Accordingly, the failure to even interview Phipps also supports the conclusion that the investigation was not conducted fairly and impartially.

Evans conceded that the Company has a progressive disciplinary policy, as per the handbook, and that the work records and seniority of Powell and Smith were considered.¹⁵ However, he deemed their misconduct serious enough to warrant immediate discharge. He testified that one of them had an attendance warning, but could not recall which.¹⁶

His testimony about the role of HR in the disciplinary process was confusing and contradictory. He first testified that the Company considers infractions to be minor or major, the latter including such offenses as insubordination, intentional destruction of company property, and fighting. For minor infractions, such as those related to performance, HR should be informed, but for major infractions, the HR gets together with the supervisor and department manager to make a decision about discipline, based on the results of HR's investigation. When Respondent's counsel asked timeframe for this system being in place, he replied "That's been a recent type of thing" (Tr. 228). The following reflects the series of questions and answers which followed (Tr. 228-29):

ALJ: Well, can you be more specific about.

A: Recent meaning within the last--the last three to four months.

Mr. Brody: I'm sorry. Could you repeat the last thing you said?

A: The system of--Excuse me. This system I mean it's been in place, but just never really enforced.

ALJ: When did it start being . . . enforced?

¹⁵ The Respondent provided, in another context, what was apparently Smith's last evaluation, dated August 9 (R. Exh. 19). He was rated in 14 areas by Jeff Winchester. He received his two lowest scores of "2" ("Needs Some Improvement") in productivity and CANDO. However, one of his two highest scores of "4" ("Exceeds Expectations") was in the area of "Team Work--Works well with others; is cooperative. Accepts Instructions well." The Respondent did not provide a corresponding evaluation of Powell.

¹⁶ Both, in fact, did. However, any such warning was not a ground for either termination.

A: It's been like a gradual--I mean, since I've been there. I mean it's just been like a gradual thing. It didn't happen overnight.

ALJ: And you said within three or four months. What was that referring to?

A: Just stricter. Stricter enforcement.

. . . .

Mr. Brody: When you were hired in July of 2001, what was the policy on getting HR involved?

A: There was no--there was no policy set in place about it.

As the above reflects, Evans directly contradicted his own testimony, by first stating that the system he described was in effect when he arrived at the facility, and shortly thereafter testifying that there was no policy at that time. By his own statements, Evans' testimony sheds no light on what kind of role HR played in disciplinary matters in October 2001. Further, his equivocating testimony in this important area struck me as clearly evasive. Accordingly, I find it reflects negatively on his overall credibility.

The record contains various exhibits offered by the Respondent or the General Counsel to show imposition of discipline on other employees as consistent or inconsistent with the terminations of Powell and Smith. I will briefly summarize each of the exhibits.

Respondent's Exhibits 9-14:

a. 9--employee dismissed on December 18, 2001, for insubordination, because a group leader asked her to cover her jewelry, apparently for safety reasons, and she refused.

b. 10--employee terminated on August 30, 2002 (his hire date was June 10, 2002), for refusal to perform assigned work. The employee's own statement confirms that she refused to do it.

c. 11--the narrative portion of this document describing the incident is unreadable and, therefore, I will not consider the exhibit.

d. 12--employee terminated on August 14, 2001, because, when asked to load, she yelled, walked off the job, and left the facility without punching out. Her supervisor assumed (logically) that she had quit.

e. 13 and 14--employee terminated on March 27, 2002 for threatening remarks to his peers and direct supervisor (including telling his supervisor, "F--you" and "I'll hurt you"). During the HR interview, the employee admitted that he had cursed and also stated that, "he was tired of this place."¹⁷

The General Counsel's Exhibits 6-10:

a. 6--employee received a Second Warning on June 5, 2001, for confronting a group leader twice in two weeks about job assignments, actions deemed to constitute insubordination.

¹⁷ I note that it appears that the dates on R. Exh. 14, the supervisor's employee counseling form, were altered and changed from "2/25/02" and "2/26/02" to "3/25/02" and "3/26/02." The supervisor recommended a second warning.

b. 7–employee received a counseling report on December 19, 2001, for repeatedly ignoring directives regarding prioritization of work to be completed.

c. 8–employee received a Final Warning on May 5, 2002, for refusing an instruction.

d. 9–employee received a First Warning on April 17, 2002, for not following instructions.

e. 10–employee received a First Warning on February 15, 2002, for leaving her workstation on a non-designated break without notifying her supervisor.

f. 11–employee received a First Warning on April 29, 2001, for failure to follow instructions, to wit, she went on break without permission and left the premises without punching out.

g. 12–employee received a Second Warning on July 5, 2001, for refusing to stay over onto the next shift, even though her job required her to stay over on short notice.

The situations most similar to that in the instant matter were those reflected in General Counsel’s Exhibits 10 and 11, where employees went on break without permission; and General Counsel’s Exhibits 7–9 and 12, and Respondent’s Exhibit 10, where there were refusals to follow directives. With one exception, the maximum penalty imposed was a final warning. In the one incident where the employee was terminated (R. Exh. 10) for refusal to perform work, he had been employed for only 2-1/2 months.

The Respondent’s other exhibits, set out above, involved incidents where an employee’s failure to follow an instruction apparently related to job safety; an employee not only refused to follow an instruction but yelled, walked out, and left without punching out; and an employee who used obscenities to and threatened his supervisor. The conduct of Powell and Smith on October 14 can hardly be equated to any of these in terms of egregiousness.

Thus, the evidence pertaining to the treatment of other employees demonstrates that an employee’s failure to follow instructions or to go on break without permission has rarely resulted in termination. Further, there is no evidence that employees with the length of service of Powell and Smith (11 and 4 years, respectively) have ever been terminated for such reasons. Since Powell and Smith’s offenses—insubordination and walking off the job, according to Evans—were integrally related, they constituted one act of misconduct. It would be disingenuous of the Respondent to argue that two separate acts of misconduct were involved; that each justified separate discipline; and that together, “piggy-backed,” they justified termination.

Analysis and Conclusions

Direct evidence of an anti-union motive in discharge cases is rare and, for that reason, reliance on circumstantial evidence, and reasonable inferences derived therefrom, is appropriate and often necessary. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75–76 (8th Cir. 1969). Thus, “Illegal motive has been implied by a variety of factors such as ‘coincidence in union activity and discrimination’ . . . general bias or hostility toward the union’ . . . ‘variance from the employer’s

normal employment routine’. . . and ‘an implausible explanation used by the employer for its action’” 419 F.2d at 75.

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer’s proffered basis for its action is the actual one, rather than a pretext to disguise antiunion motivation. *Detroit Paneling Systems*, 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

If the General Counsel establishes a prima facie case of discriminatorily motivated action by an employer against an employee, the next step is to determine whether the action would have occurred had the employee not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Here, the Respondent has conceded knowledge of Powell and Smith’s open support for the Union prior to July 18. Moreover, evidence of the Respondent’s general animus was reflected in the Board’s decision in *Guardian Automotive Trim, Inc.*, 337 NLRB 412 (2002), in which violations were found to have been committed by high-level management at the facility. Both Powell and Smith were long-term employees (11 and 4 years, respectively), as reflected by their being afforded the opportunity to work considerable overtime hours on the basis of seniority. Despite their many years of tenure, their discharges were based solely on one act of insubordination. I find in these circumstances that the General Counsel has established a prima facie case of 8(a)(3) discharge. Having found the first prong of *Wright Line* satisfied, I now turn to the second step of the inquiry: determining whether Powell and Smith would have been discharged absent their union activities. Regarding the events of October 14, we have six different accounts of what occurred, none of which are fully consistent. Complicating the matter is the fact that the written statements provided to Evans were unfocused narratives rather than detailed, step-by-step accounts of what occurred. Thus, omissions of certain facts and potential discrepancies between witnesses are more difficult to analyze in terms of determining who was credible and who was not.

For a number of reasons, I find most reliable Maikranz’ version of what occurred and, to this extent, I agree with the position taken by the Respondent’s counsel in its posthearing brief (at p. 4). There is nothing in the record to give me reason to doubt his reliability as a witness. He appeared sincere and candid in his testimony; of all the witnesses who gave written statements to management, his testimony and statement were the most consistent; he was later terminated by the Respondent and would now have no reason to be biased in its favor; and, finally, I believe that he took very seriously his role as a first-time temporary group leader on October 14. I am convinced that, of all the persons on the scene that evening, he at the time was the most concerned about what was taking place on the job. Therefore, I believe his account of the incident was the most reliable, and I credit it where it differs from the other accounts, particularly those of Smith and Powell. For reasons I have previously stated, I do not find that they were fully credible.

I further believe, however, that Phipps was also a reliable witness, in agreement with the General Counsel’s position in its brief (at p. 11). He seemed sincere and candid and did not ap-

pear to try to tailor his testimony to benefit either side. Thus, he testified twice that the area was “pretty” clean, rather than stating that it was fully clean, as Powell, Smith, and Vaughn testified, and he further testified that he heard Maikranz tell Powell and Smith, “We don’t do that in this department.” I credit his testimony on these points where it diverges from the testimony of Powell, Smith, and Vaughn. I also believe Phipps’ testimony is probably the most accurate as to the state of the loading area in terms of cleanliness, objectively speaking. It was “pretty” clean, meaning that there could be a genuine difference of opinion on how much cleaning remained to be done.

Graham was not fully consistent with her written statement, and I accept her testimony only to the extent that it corroborates Maikranz’ testimony that she assisted him with cleanup and that he was agitated over what Powell and Smith had done.

Based on the totality of credited evidence and putting together a composite picture of what occurred, I make the following factual conclusions regarding the October 14 events.

1. Maikranz was a young and inexperienced employee serving as a temporary group leader for the first time that night. He may have been abrasive in his attitude but, in any event, he took his duties very seriously and was probably overzealous in his attempt to prove himself as a temporary group leader. The employees he supervised that evening, including Powell and Smith, were older and more experienced than he was. They likely harbored some resentment against him for being selected to be a temporary group leader over them and, possibly, for his overbearing attitude.¹⁸
2. There was a genuine difference of opinion between Maikranz and Powell and Smith as to how clean the work area was prior to the end of the shift and punchout time at 6 p.m. Powell and Smith were used to the policy and practice of group leaders who were more lenient and less stringent as far as what constituted a clean work area and who allowed them to leave the work area if they were done working, and the area was clean. Powell and Smith did not take seriously Maikranz’ instruction to remain in the work area and clean, if they even listened carefully to what he said and heard him. Powell and Smith did not listen carefully to Maikranz’ instruction or they chose not to follow it, and they left the work area to take a cigarette break.
3. Powell and Smith did not, subjectively speaking, consider what they were doing to amount to insubordination.
4. In issuing a directive to Powell and Smith, and in reporting them to management, Maikranz was not motivated by anti-union considerations. He instructed them to clean the area based on his determination that it needed cleaning, and he reported them because he took umbrage at their ignoring his directive.

¹⁸ In Maikranz’ November evaluation (GC Exh. 13), Supervisor McClure noted that Maikranz had the “Need to improve people skills.” Later, McClure issued a warning to Maikranz for, on December 14, engaging in a lengthy tirade, replete with expletives, when he did not receive a bonus on his check (GC Exh. 14). Maikranz was subsequently forced to resign.

In short, experienced employees Powell and Smith were used to working under group leaders with less stringent cleanup policies, and they did not give proper heed to the instructions of first-time temporary group leader Maikranz, who initiated the disciplinary process for what he perceived as their violation of his directives. I do not believe that he was motivated by anti-union considerations or that management had him set up Powell and Smith.

Turning next to the decision to discharge Powell and Smith, I find it significant that the Respondent, through HR, conducted an incomplete and skewed investigation. Thus, Evans ignored the oral statement of regular group leader Vaughn indirectly supporting Powell and Smith as to what occurred, and he failed to even question another witness, Phipps, who was mentioned by name as a witness by Maikranz. I reach this conclusion whether or not Evans was aware in October 2001 that Maikranz had problems dealing with others, as reflected in Supervisor McClure’s November 2001 evaluation.¹⁹ The Board has consistently held that an employer’s failure to conduct a fair and complete investigation gives rise to an inference of antiunion animus. *Publishers Printing Co.*, 317 NLRB 933, 938 (1995); *Burger King Corp.*, 279 NLRB 227, 239 (1986); *Syncro Corp.*, 234 NLRB 550, 551 (1978); and *Firestone Textile Co.*, 203 NLRB 89, 93 (1973).

In discharging Powell and Smith, the Respondent did not follow the progressive discipline policies outlined in the handbook. Even though they were terminated solely for insubordination on October 14, and for no other reasons, they were not given first-or second-step warnings or suspensions, as per the progressive disciplinary system in place. Instead, they were fired, despite the fact that the handbook specifically cites work record and seniority as considerations to be taken into account in deciding the appropriate corrective action. Although the Board does not impose on employers an obligation to promulgate a progressive disciplinary system, it has held that if an employer does maintain such a system, failure to follow it frequently indicates a hidden motive for imposing more severe discipline. *Fayette Cotton Mill*, 245 NLRB 428 (1978); *Keller Mfg. Co.*, 237 NLRB 712, 713–714 (1978); *Taylor Bros., Inc.*, 230 NLRB 861, 868 (1977).

Further, the discipline imposed on Powell and Smith was out of proportion to the gravity of the offense—one act of minor insubordination directed toward a first-time acting group leader. The insubstantial nature of the misconduct is appropriately considered in determining whether the discipline was legitimate or pretextual. *Detroit Paneling Systems*, supra; *Nep-tune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977). The discipline was also harsh compared with discipline imposed against other employees, another factor leading to the inference that their terminations were motivated by animus and not legitimate employment reasons. *Burger King*, supra at 239; *Moore Co.*, 264 NLRB 1212 (1982); *Fayette Cotton Mill*, supra at 429; *Keller Mfg. Co.*, supra at 713–714. As the Board stated in *Moore Co.*, 264 NLRB at 1214:

¹⁹ GC Exh. 13.

Respondent's demonstrated union animus coupled with its knowledge of Mack's union sympathies and its harsh disparate treatment of her warrants the inference that her refusal to work scheduled overtime was not the true reason for her discharge but was instead used to mask respondent's intent to rid itself of a union adherent.

Such statement appears to apply here to Powell and Smith. In summary, after a flawed investigation, two employees with long tenure and good work records were discharged because they failed on one occasion to follow cleanup instructions from a first-time temporary group leader. The imposition of the penalty of discharge was not consistent with the handbook or with company practice toward other employees. Accordingly, although there is nothing to suggest that management instigated Maikranz' complaint against Powell and Smith, I find that management did take advantage of the incident to retaliate against them because of their union activities.

Therefore, I find that Powell and Smith would not have been discharged but for their protected activities on behalf of the Union. Accordingly, their terminations violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

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

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

3. By discharging Jimmie Powell on October 17, 2001, and Brian Smith on October 19, 2001, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. By the above discharges, the Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discharged employees Powell and Smith in violation of Section 8(a)(3), it must offer them reinstatement and make them whole for any loss of earnings and other benefits, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1980), with interest computed as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As part of the remedy it seeks, the General Counsel requests expungement from employee records of any mention of the discharges.

[Recommended Order omitted from publication.]