Mid-Mountain Foods, Inc. *and* United Food and Commercial Workers Union, Local 400.[1] Case 11–CA–17684

August 13, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On May 22, 2001, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief. The General Counsel filed exceptions, a supporting brief, and 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,[2] and conclusions only to the extent consistent with this Decision.

I. INTRODUCTION

The General Counsel alleged that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by interrogating employee Brian Blevins,[3] and that it violated Section 8(a)(3) and (4) of the Act by discharging Blevins on August 22, 1997. The judge concluded that the alleged interrogation never occurred, and he dismissed that allegation. Nevertheless, he found that the Respondent unlawfully discharged Blevins in violation of Section 8(a)(3) and (4). For the reasons stated below, we reverse and dismiss the complaint in its entirety.

II. FACTS

In the Union's 1996 organizing campaign, Blevins distributed authorization cards to employees and wore a union T-shirt to work. In February 1997, he testified on behalf of the General Counsel at the hearing in *Mid-Mountain Foods*, 332 NLRB 229 (2000), enfd. 219 F.3d 1075 (D.C. Cir. 2001) (*Mid-Mountain I*). In that case, the Board found, inter alia, that the Respondent made a number of unlawful preelection statements, and discriminatorily disciplined a member of the Union's organizing committee because of his union activity. The Board also found that the Respondent had unlawfully interrogated Blevins in June 1996. The Board relied on these violations, also alleged as objections, to set aside the election in *Mid-Mountain I*. Ultimately, however, the Board found that the unfair labor practices were "few in number, relatively isolated, and not pervasive" and did not justify imposing a remedial bargaining order.

In March 1997, the Respondent issued a new employee handbook changing its progressive discipline procedure from a three-step to a two-step procedure. Under the new policy, discharge is warranted following a second written warning.[4]

On July 18, 1997, Blevins received a first written warning. The warning documented two infractions. First, the warning faulted Blevins for co-opting "pick labels"—which are used to designate product to be shipped to customers—to spell out a prounion message on a shipment slated for delivery.[5] The warning also cited Blevins for sending out a customer order that was seven cases short. The July 18 warning was designated as a final warning, and stated as follows:

> Due to the fact that you committed the second violation [shorting a customer] before we could address your first violation [misuse of pick labels], this letter will serve as your FINAL WRITTEN WARNING. Any violations within the next twelve months will result in your termination of employment with Mid-Mountain Foods. Had you been forewarned about the first violation, this second violation would have resulted in termination of employment at this time.

Significantly, the judge concluded that the Respondent's July 18 final warning to Blevins was lawful, and we agree.

On July 29, and again on August 1, Blevins improperly stacked and wrapped products sent to a store. In both instances, customers were required to restack the pallet before they could unload and sort damaged product. As a result of these incidents, Blevins' supervisor, Mark Hartzog, conducted a counseling session with Blevins, but delayed issuing a warning until he had a chance to examine Blevins' personnel record. On August 16, before Hartzog had reviewed Blevins' record, Blevins shipped another order to the wrong store. Blevins was suspended and received a written warning for this inci-

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

[2] The General Counsel 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.

We do not rely upon the judge's inference, based on employee Daniel Cruey's failure to testify, that Cruey's testimony would not corroborate employee Brian Blevins' account of his alleged interrogation.

[3] We adopt the judge's recommended dismissal of this allegation.

[4] The complaint did not allege that the new procedure was unlawful.

[5] The General Counsel did not contend that Blevins' actions constituted protected activity.

dent.[6] When Hartzog reviewed Blevins' record and discovered that Blevins had already received a final warning, he discharged Blevins.[7]

III. JUDGE'S DECISION

The judge found that the Respondent discharged and failed to reinstate Blevins because he engaged in union and other protected activities, including distributing authorization cards, wearing a union T-shirt to work, and testifying on behalf of the General Counsel in *Mid-Mountain I*, supra. All of that conduct was apparent to the Respondent, and the judge inferred animus from the Respondent's maintenance of a list of employees who had signed union authorization cards and from the violations found by the Board in *Mid-Mountain I*, supra, and *Mid-Mountain II*.[8] Having concluded that the General Counsel satisfied his prima facie case under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge then determined, largely because of perceived inconsistencies in the Respondent's disciplinary practices, that the Respondent failed to satisfy its rebuttal burden under *Wright Line*.

IV. ANALYSIS

Assuming arguendo that the General Counsel satisfied his prima facie case, we conclude, contrary to the judge, that the Respondent successfully demonstrated that it would have discharged Blevins even in the absence of his protected conduct.

Preliminarily, we note that the judge erred with respect to the standard of proof necessary to meet the rebuttal burden under *Wright Line*. The judge described the Respondent's burden as one of establishing that Blevins' discharge was "inevitable or almost inevitable under the circumstances." However, *Wright Line* simply requires a respondent to establish by a preponderance of the evidence that it would have discharged the employee even absent the employee's union or other protected activity. By imposing an "inevitability" criterion, the judge improperly heightened the applicable burden of proof.

Applying the appropriate *Wright Line* standard, we find that the Respondent met its rebuttal burden. As described above, the Respondent's current progressive disciplinary system provides for discharge after two written warnings, and there is no challenge to the lawfulness of that policy. The judge explicitly found that the written warning issued to Blevins on July 18 was legitimate. This warning emphasized that it was a final warning and that any further violations by Blevins would result in discharge.

Shortly thereafter, Blevins made two separate stacking errors, for which he was counseled pending further review of a written warning. The judge acknowledged that the record evidence was sufficient to support a reasonable belief on the part of the Respondent that Blevins committed the stacking errors in question. Then, a short time later, while his supervisor's decision on the warning was still pending, Blevins committed yet another shipping error for which he received another written warning and suspension. Thus, pursuant to the express terms of the Respondent's disciplinary policy, Blevins was, upon receipt of the second warning, subject to immediate termination. Given that the General Counsel does not allege that this second written warning (or the suspension) was itself unlawful, and given that the first warning was expressly found to be lawful, it follows that the discharge pursuant to the express terms of the Respondent's policy was lawful absent evidence of disparate treatment.

The judge noted some inconsistencies in the Respondent's administration of discipline for shipping errors. While that may be true, the record in *Mid-Mountain I* also contained "numerous other occasions" in which employees were warned or even discharged for misshipments similar to Blevins.[9] Stated another way, the Respondent showed that it had issued numerous warnings to employees for infractions akin to Blevins. Moreover, Blevins, unlike some other employees who received lesser discipline, committed several infractions over a very short period of time. Thus, contrary to the judge, we find that the warnings issued to Blevins were consistent with the Respondent's established disciplinary practices. Because neither the General Counsel nor the judge identified *any* instances in which the Respondent disparately applied its newly implemented two-warning policy (i.e., discharge after two written warnings), we conclude that the Respondent established that it would have issued Blevins his second warning and discharged him even in the absence of his protected conduct. We therefore reverse the judge's finding that Blevins' discharge violated

[6] Neither this warning nor the suspension was alleged to be unlawful.

[7] The Respondent's discharge memo to Blevins noted his final warning of July 18 and his additional infractions of July 29, August 1 and 16.

[8] *Mid-Mountain Foods*, 332 NLRB 251 (2000), enfd. 11 Fed. Appx. 372 (4th Cir. 2001).

[9] In finding that the Respondent did not rebut the General Counsel's prima facie case, the judge cited the Board's finding in *Mid-Mountain II* that the Respondent "has not invariably used a written warning for a mis-shipment." While we accept that there may have been past occasions in which the Respondent did not automatically warn an employee for an instance of misshipping, as noted above, there is also evidence of employees being warned or discharged for this infraction.

Section 8(a)(3) and (4) of the Act and dismiss the complaint.

ORDER

The complaint is dismissed.

Donald R. Gattalaro, Esq., for the General Counsel.
Ronald Tisch, Esq. (Littler, Mendelson), of Washington, D.C. and *Eric W. Reecher, Esq. (Elliot, Lawson & Pomrenke*), of Bristol, Virginia, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on April 16 and 17, 2001 in Abingdon, Virginia. After the parties rested, I heard oral argument, and on April 18, 2001, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The remedy, conclusions of law, Order, and notice provisions are set forth below.

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, including reinstatement of its employee Brian Blevins, making him whole for all losses he suffered because of the unlawful discrimination against him, and posting the notice to employees attached hereto as "Appendix B."

CONCLUSIONS OF LAW

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

2. The Charging Party, United Food and Commercial Workers Union, Local 400, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1), (3), and (4) of the Act by discharging its employee Brian Blevins, and refusing to reinstate him, because he joined, supported and assisted the Charging Party, engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and because he participated in Board proceedings and gave testimony under the National Labor Relations Act.

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

5. The Respondent did not engage in any other unfair labor practices alleged in the complaint.

[Recommended Order omitted from publication.]

APPENDIX A

This is a bench decision in the case of Mid-Mountain Foods, Inc., which I will call the "Respondent," and United Food and Commercial Workers Union, Local 400, AFL–CIO, CLC, which I will call the "Charging Party" or the "Union." The case number is 11–CA–17684. This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

I find that Respondent unlawfully discharged its employee, Brian Blevins, as alleged in Complaint paragraph 9, 10, and 11, but that it did not unlawfully threaten and harass Blevins as alleged in Complaint paragraph 8.

This case began on September 24, 1997, when the Charging Party filed its initial charge in this proceeding. On March 5, 1998, after investigation of the charge, the Regional Director of Region 11 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing the Complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

The hearing in this case began before me on April 16, 2001 in Abingdon, Virginia. The General Counsel and Respondent presented evidence on April 16 and 17, 2001 and on April 18 gave oral argument. Counsel also submitted legal memoranda, which I have considered. Today, April 18, 2001, I am issuing this bench decision.

Before discussing the facts of the present case, I will summarize two previous cases involving the same parties. In 1996, the Union conducted an organizing campaign at Respondent's facility in Abingdon, Virginia. Pursuant to a petition filed by the Union in Case 11–RC–6147, the Board conducted an election on August 1, 1996.

The Union, which did not receive a majority of the votes cast, filed objections. Additionally, the Union filed a number of unfair labor practice charges alleging that Respondent violated the Act during the Union organizing campaign.

After an investigation, the Regional Director for Region 11 issued a complaint and ordered the cases consolidated for hearing. On September 21, 2000, the Board issued a decision in these cases. The Board found that Respondent's supervisors had made a number of statements which violated Section 8(a)(1) of the Act. It also found that Respondent had issued a written warning to an employee in violation of Section 8(a)(1) and (3) of the Act. The Board ordered Respondent to remedy these unfair labor practices. It also set aside the August 1, 1996 election and ordered that a new one be conducted. See *Mid–Mountain Foods, Inc.*, 332 NLRB 229 (2000). I will refer to this decision as *Mid–Mountain I*.

On the same date it issued this decision, the Board issued another decision involving the same parties, but arising from different charges raising different factual allegations. These allegations concerned events which took place after the events in *Mid–Mountain I*.

[1] The bench decision appears in uncorrected form at pages 386 through 410 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this Certification .

In the second case, which I will call *Mid–Mountain II*, the Board found that Respondent unlawfully had discharged three employees and had imposed other unlawful discipline on four other employees. The Board ordered Respondent to remedy these violations of Sections 8(a)(1) and (3) in part by reinstating the three unlawfully discharged workers with backpay, and by rescinding the unlawfully imposed discipline. See *Mid–Mountain Foods, Inc.*, 332 NLRB 251 (2000).

The present case concerns allegations that Respondent interrogated an employee in violation of Section 8(a)(1) and later discharged him in violation of Sections 8(a)(1), (3) and (4) of the Act. This employee, Brian Blevins, was not one of the individuals whom the Board found to be victims of unlawful discrimination in the two previous cases.

Before addressing the contested allegations in this case, I will first discuss the allegations which are not contested. In its Answer to the Complaint, Respondent has admitted the allegations contained in Complaint paragraphs 1, 2, 3, 4, 5 and 6. I find that the government has proven these allegations. More specifically, I find that the charge was filed and served as alleged in Complaint paragraph 1, that Respondent conducts business as described in Complaint paragraphs 2, 3 and 4, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, as alleged in Complaint paragraph 5. Further, I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act, as alleged in Complaint paragraph 6.

Respondent's Answer also admits portions of Complaint paragraph 7. Based upon Respondent's Answer and the record as a whole, I find that at all material times, the following persons were Respondent's supervisors within the meaning of Section 2(11) of the Act: President Jesse Lewis, and Team Leaders Mark Hartzog, Alvin Olinger, Jim Phipps, Paul Widener, Tony Lawson, David Leland and Jeff Malone.

The Complaint does not allege that Manager Buddy Honaker is Respondent's supervisor. From the record as a whole, I find that Manager Honaker was, at all material times, Respondent's supervisor within the meaning of Section 2(11) of the Act.

Respondent's Answer admits that Respondent discharged employee Brian Blevins on August 22, 1997, as alleged in Complaint paragraph 9, but Respondent denies that this discharge violated the law. Based upon Respondent's admission, I find that it discharged Blevins on August 22, 1997. From the record, I find that Respondent has not reinstated Blevins.

Respondent has denied other allegations raised by the Complaint. I will begin by addressing allegations raised in Complaint paragraph 8. This Complaint paragraph alleges that since on or about March 24, 1997, Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act.

The Complaint identifies only one act which allegedly constitutes such unlawful interference, restraint and coercion. That act allegedly took place, not on March 24, 1997, but three and one–half months later, on July 13, 1997. Specifically, Complaint paragraph 8 alleges that on July 13, 1997, Respondent, by Supervisor Mark Hartzog, interrogated and harassed its employees regarding their union sentiments.

Employee Brian Blevins testified that on July 13, 1997, Supervisor Hartzog approached him about quitting time. According to Blevins, another employee, Daniel Crue, also was present. In Blevins' version, Hartzog asked him, out of the blue, why Blevins thought he needed a union. Blevins quoted Hartzog as continuing, "Seriously, why do you think you need a union?" According to Blevins, he replied that there were a lot of reasons and when Hartzog asked what these reasons were, Blevins said that he had to do.

The other employee reportedly present during this conversation, Daniel Crue, did not testify. Supervisor Hartzog denied the statements attributed to him. Therefore, I must determine which testimony better reflects what happened.

The record does not provide a reason for Crue's failure to testify. Absent such an explanation, it is reasonable to infer that Crue's testimony would not support Blevins' version.

Moreover, there is another reason to doubt the reliability of Blevins' testimony. To explain this reason requires some background regarding Blevins' employment. He was an order selector. His work entailed driving a vehicle around Respondent's warehouse, assembling an order, and taking it to the truck for delivery to the store which had placed the order. The vehicle Blevins drove around the warehouse is similar in some was to a forklift, but is bigger. It holds two pallets rather than one.

The record includes both direct and indirect evidence that on July 15, 1997, two days after the reported conversation with Supervisor Hartzog, Blevins was driving a load through the warehouse and on the front of the load, spelled out with adhesive-backed labels used in the order selection process, were the words "Vote Yes 400," apparently a reference to the Union, Local 400. Specifically, Team Leader Tony Lewis testified that on July 15, 1997, he saw Blevins go by with a load on a pallet and that labels spelled out the words, "Vote Yes."

Additionally, one of Respondent's auditors, Gregory Johnson, saw the same "Vote Yes" sign made with labels on a load in the warehouse the same day. Although Johnson did not see Blevins driving this load, he checked the labels against company records and found that Blevins had been assigned to assemble this order. The record includes a photograph of the order with "Vote Yes 400" spelled out with the labels.

Blevins denied putting the labels on the load. However, the record offers no other explanation of how the labels got on the load if Blevins had not used them to spell out "Vote Yes 400."

Moreover, another load had arrived at a store with a "Vote Yes" message spelled out in labels. When management checked the numbers on these labels, records associated them with a load Blevins had been assigned to fill.

Blevins denied putting the labels on the other load. This denial, in the face of persuasive evidence to the contrary, cast doubt on the reliability of Blevins' testimony.

In fairness, it should be recognized that possibly Blevins did not put the labels on the loads to spell out the "Vote Yes" message. Possibly, someone else put the labels on the loads and Blevins was reluctant to report that a pro-union message had somehow appeared on company property within his custody. Indeed, the General Counsel elicited testimony that when

Blevins was driving the machine, he could not see the message on the front of the load.

However, such a possibility is too speculative to be persuasive. The record does not suggest how the messages appeared if Blevins did not put them on there. In these circumstances, I find that Blevins did place the labels on the two loads and that his denial is not credible.

Having reached this conclusion, I am reluctant to credit his uncorroborated testimony that Hartzog interrogated him about the Union on July 13, 1997. Instead, I credit Hartzog's denial and find that the alleged interrogation did not take place. Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph 8.

Complaint paragraph 9 alleges, and Respondent admits, that Respondent discharged Blevins on August 22, 1997. Respondent denies the allegations in Complaint paragraphs 10 and 11, that it discharged Blevins because he engaged in union activities and gave testimony before the Board.

In determining whether Respondent violated the Act by discharging Blevins, I will follow the procedure established by the Board in *Wright Line,* 251 NLRB 1083 (1980). Under that framework, the General Counsel first must establish four elements. Once the General Counsel has established these elements, the presumption arises that the discharge was unlawful. The Respondent may rebut this presumption by proving that it would have taken the same action in any case, regardless of protected activity.

In meeting its burden, the government first must prove that the alleged discriminatee engaged in activities protected by the Act. The record establishes that during the Union's 1996 organizing campaign, Blevins obtained authorization cards and distributed them to other employees. He also wore a Union tee shirt to work and testified for the General Counsel at the hearing in *Mid-Mountain I*. I find that the General Counsel has established the first *Wright Line* element.

Second, the government must prove that Respondent knew about Blevins' protected activities. Respondent clearly knew that Blevins supported the Union because his tee shirt proclaimed it. Moreover, Respondent was present when Blevins testified in the prior Board hearing. I conclude that the General Counsel has proven the second *Wright Line* element.

The government has also established the third *Wright Line* element, that Blevins suffered an adverse employment action. He was discharged and has not been reinstated.

Fourth, the General Counsel must show a link or nexus between Blevins' protected activities and the adverse employment action. As I already discussed, the credited evidence does not establish that Respondent committed the 8(a)(1) violation alleged in Complaint paragraph 8. However, other evidence establishes such a nexus.

In *Mid-Mountain I* and *Mid-Mountain II*, the Board found significant evidence that Respondent harbored anti-union animus. It is appropriate to take notice of these findings and I do so.

Moreover, in the present case, Manager Honaker testified that at one time he had a list of employees who signed union authorization cards. He may have received this information from evidence submitted during the *Mid-Mountain I* hearing. In that case, the General Counsel sought a bargaining order and presented evidence identifying the employees who had signed authorization cards.

Regardless of where Manager Honaker obtained the information for his list, it concerns me that he kept track of which employees signed cards. Even keeping such a list over a period of time raises the possibility of unlawful intent.

Respondent introduced a number of documents to show that it promoted or rewarded some known union adherents. Such evidence does not rebut the other evidence of animus. An employer, obviously, may target some individual union adherents and ignore others, but doing so only focuses the animus rather than eliminates it. Animus is still animus whether it emerges from a rifle or a shotgun.

The fourth *Wright Line* element does not require the government to prove causation. It only requires the government to prove a connection. The General Counsel has carried this burden, and so I find that the General Counsel has established all four *Wright Line* elements.

To rebut the presumption that it discriminated unlawfully against Blevins, Respondent must prove by a preponderance of the evidence that it would have taken the same action against Blevins even in the absence of protected activities. When Respondent discharged Blevins, it issued a memo to him stating the following reasons:

1. On July 18, 1997, Blevins received a written warning for misuse of labels used to identify product for shipment and also for sending a customer a load which was seven cases short of the amount ordered.

2. On July 29, 1997, Blevins improperly stacked and wrapped products sent to a store.

3. On August 1, 1997, Blevins improperly stacked and wrapped products to another store; and

4. On August 16, 1997, Blevins shipped a load to the wrong store.

Respondent asserts that it discharged Blevins in accordance with its progressive discipline system. He had received one written warning on July 18, 1997 and, under Respondent's policy, any further infraction which warranted a written warning would result in discharge.

The first written warning on July 18, 1997 concerned misuse of labels used to identify products to be shipped to a particular store. Respondent refers to these labels as pick labels.

Already, I have discussed the incidents in which Respondent concluded Blevins had misused the labels by spelling out the words "Vote Yes 400" with them. Doing so entailed tearing some of the labels. The evidence does not establish beyond doubt that Blevins took this action but it strongly suggests that he did. I find that Respondent held a reasonable belief, in good faith, that Blevins had used the labels for this purpose.

Spelling out the words "Vote Yes 400" certainly constitutes union activity. However, the government has not claimed that the Act protects this activity. The Complaint does not allege that Respondent violated the Act by issuing a warning to Blevins for using the labels to spell out the pro-union message. The Complaint certainly would have alleged such a violation if the government had considered this activity to be protected.

I conclude that using Respondent's labels in this way is not protected. By analogy, an employee may have a statutory right to picket an employer, but he does not have the right to cut up the employer's lunch table and use the wood to build a picket sign.

I conclude that it was lawful for Respondent to issue a written warning to Blevins for misusing the labels. Therefore, it would not be unlawful for Respondent to rely on this discipline as part of its progressive discipline leading to discharge.

The record includes evidence upon which Respondent could form a reasonable belief, in good faith, that Blevins improperly stacked and wrapped product on July 29 and August 1, 1997. Additionally, the record establishes that Respondent reasonably could have concluded that Blevins shipped an order to the wrong store on August 16, 1997.

The question I must decide concerns whether these reasonable beliefs would have caused Respondent to discharge Blevins, even if he had engaged in no protected activities. To make this determination, I look at evidence of how Respondent treated other employees in similar circumstances. Respondent bears the burden of persuasion, and it is substantial.

In *Lampi, L.L.C.,* 327 NLRB 222 (1998), the Board held that to establish such a defense under the *Wright Line* framework, an employer must do more than show that it had reasons that could warrant the discharge of the employee in question. The employer must show that it would have done so even if the employee had not engaged in protected activity.

In assessing whether the employer has established such a defense, the Board looks to the employer's own documentation regarding the employee's conduct, to the employer's personnel policy handbook, and to the evidence of how it treated other employees with recorded incidents of discipline.

Before examining the evidence which Respondent presented to support its defense, it is appropriate to discuss an argument raised by the General Counsel which, if adopted, would significantly limit Respondent's ability to present such evidence and have it considered. The General Counsel's argument invokes the doctrines of collateral estoppel and res judicata.

In *Mid-Mountain II*, the Board addressed the issue of whether Respondent would have issued a written warning to an employee named Nunley because Nunley had made a misshipment of goods. At this point, the government already had established the four *Wright Line* elements, so Respondent bore the burden of showing that it would have issued the warning to Nunley in any event. The Board held, in part, as follows: "The Respondent concedes that it has not invariably issued written warnings for similar infractions. As is noted above, under the *Wright Line* test, it is incumbent on the Respondent to demonstrate not only that it has sometimes issued similar warnings in the past, but that it would have issued a warning to Nunley for his conduct without regard to his Union activity. The Respondent has failed to make this crucial showing."

The General Counsel contends in part as follows: "Board's finding relative to Respondent's practice regarding misshipments is res judicata as to the present matter. That being so, Respondent is collaterally estopped in the present matter from relitigating its practice relative to the issuance of discipline of employees whom it believes caused misshipments."

The General Counsel's argument perhaps may be elaborated in a slightly different way, which might be summarized as follows: The Respondent discharged Blevins because Blevins had received a second written warning and under its disciplinary system a second written warning results in discharge. Blevins received the second warning for making a misshipment. However, the General Counsel argues that the Board already has concluded that the Respondent cannot carry its rebuttal burden of proof in such a case.

More specifically, the General Counsel contends that in *Mid-Mountain II*, the Board found that Respondent was unable to prove that it would have issued the same discipline to an employee for misshipping an order, even if that employee had not engaged in protected activity. Because the Board found that Respondent did not make the showing with respect to employee Nunley, Respondent should be precluded from trying to make a similar showing with respect to employee Blevins.

However, I believe that the General Counsel's res judicata argument rests on too narrow a reading of what Respondent must prove to meet its rebuttal burden under *Wright Line*. General Counsel's argument assumes that a Respondent must demonstrate that it invariably meted out the same discipline for the same infraction. Under this interpretation, if a Respondent showed leniency even once, it could never prove that it would have taken its usual action against an alleged discriminatee in the absence of protected activity.

That interpretation is not my understanding of *Wright Line* and it is not my understanding of *Mid-Mountain II*. As I understand *Wright Line*, the test is not so inflexible. There may be mitigating circumstances in which an employer departs from the discipline it usually imposes for a given infraction, and such a special case will not prevent the respondent from demonstrating that it would have imposed the usual, more severe discipline on a particular employee regardless of protected activity.

In *Mid-Mountain II*, the Respondent simply had not proven that when it departed from its practice of issuing a written warning for a misshipment, special circumstances justified such a departure. Therefore, I do not conclude that res judicata precludes the Respondent from showing that it would have applied the usual discipline to Blevins, even though on some past occasion it had imposed a less severe measure on some other employee.

Nevertheless, I do conclude that I am bound by the Board's finding in *Mid-Mountain II* that Respondent has not invariably issued a written warning for a misshipment. In other words, res judicata does preclude Respondent from arguing here that it always, without fail, has issued a written warning for a misshipment. The Board has found to the contrary in a recent case involving the same parties and the Respondent is bound by this finding.

On the other hand, I believe that res judicata does not prevent Respondent from trying to prove that in the past, special circumstances had justified the exceptions. Stated another way, Respondent still may try to prove that when it gave an employee less severe discipline for a misshipment, that employee was not similarly situated to Blevins and should not be used as a basis for comparison.

In view of the Board's finding in *Mid–Mountain II* that there were occasions when Respondent imposed lesser discipline for a misshipment, Respondent had the burden of explaining away such instances by proving distinguishing circumstances. Respondent has not met this affirmative obligation. It has not identified those instances in which it imposed discipline less than a written warning for a misshipment and it has not presented evidence to distinguish such instances from the circumstances in the Blevins case. For these reasons, I conclude that Respondent has not met its burden of proof.

However, there is another reason, not dependent on res judicata, for reaching the same conclusion. To show that it would have discharged Blevins regardless of his protected activity, Respondent relies on its stated policy of discharging an employee who has received a second written warning. However, Respondent has not demonstrated that it has applied this policy consistently.

The policy itself came into effect only about five months before Respondent discharged Blevins. An April 9, 1997 memorandum indicates that before March 17, 1997, the Respondent applied a three-step progressive discipline system. A new employee handbook changed that system to a two-step procedure.

The record does not reveal many details of the new progressive disciplinary system. Therefore, it is not possible to determine whether the system allowed for exceptions, or whether it had to be applied inflexibly in all instances. Absent such evidence, Respondent falls short of demonstrating that its disciplinary system would lead inexorably to Blevins discharge regardless of protected activity.

Respondent did present evidence regarding certain employees it disciplined for misshipments. Most notably, it introduced records regarding its May 16, 1997 discharge of employee Craig Price. These records indicate that Price made four misshipments. Therefore, the record suggests that Price's work–related problems were more serious than those of Blevins, who was discharged after one misshipment.

It is true that Blevins had been disciplined for other infractions besides misshipments. However, the record suggests that Respondent regarded misshipments as a more serious problem than Blevins' other infractions.

Therefore, Respondent has not established that it considered all of Blevins' infractions taken together to weigh as heavily as all of Price's infractions taken together. Accordingly, I cannot conclude that Respondent would have discharged Blevins simply because it terminated Price.

Respondent also introduced records showing that it had disciplined other employees for misusing pick labels. However, there appears to be a significant difference between the way these other employees misused the pick labels and the way Blevins misused the pick labels.

To examine this difference, it is helpful to begin by looking at the purpose of pick labels. In one sense, they are like work orders. When an order selector receives pick labels they define his work by telling him what merchandise to take from the warehouse and send to a customer. The pick labels also help management keep track of the delivery of the merchandise to the right places.

An employee seeking to avoid work may hide the pick labels assigned to him or throw them away. Such action creates a very serious problem. It prevents merchandise from being delivered to the customer who ordered it and also interferes with the record-keeping process. Obviously, hiding or discarding or even just losing a pick label is just as serious a problem as a misshipment, because it results in a misshipment or, more accurately, it results either in a delayed shipment or no shipment at all.

However, Blevins did not misuse the pick labels in this manner. His labels stayed with the orders as they were supposed to do, but were stuck on the shipment in an unauthorized way to spell out a message. Such use of the labels violated the rules, but it did not necessarily result in a misshipment. Indeed, one customer reported that his store received the shipment as it had been sent, with the message visible on the package.

To summarize, it appears that Blevins' misuse of the pick labels may not have interfered with deliveries to the same extent that hiding or destroying or losing the labels would have. Therefore, it is not clear that, in the absence of protected activity, Respondent would have treated Blevins' misuse of the labels as seriously as it dealt with other types of label misuse.

The harm caused by a work rule violation certainly may be considered in assessing the penalty imposed for the violation. *Mid-Mountain II* provides a good example. In that case, Respondent had discharged an employee named Orfield after two accidents.

The first of these accidents had caused greater damage. Orfield, driving a forklift-type machine, had knocked over a rack, causing tons of butter to fall onto his machine. One supervisor estimated the damage at $4700. Respondent gave Orfield a suspension and a final warning, stating that any further improper conduct would result in termination. Orfield had a second, albeit less serious accident, and Respondent discharged him.

The Board held that Respondent had met its burden of showing that it would have discharged Orfield under any circumstances, even in the absence of protected activity. In reaching this conclusion, the Board took into account the significant cost of Orfield's first accident.

In one respect, Respondent's discharge of Blevins resembles its discharge of Orfield. Like Orfield, Blevins had received a final warning, penultimate to the infraction which prompted his discharge. Specifically, Respondent had issued Blevins a final warning on July 18, 1997. This warning appeared in a memorandum concerning use of the pick labels to make a "Vote Yes" message. The memo also stated that on this same occasion, Blevins' load had been seven cases short. This memorandum informed Blevins that "any violations within the next 12 months will result in your termination of employment with Mid-Mountain Foods."

Because both Orfield and Blevins were on final warning status at the time of the infractions resulting in their termination, it certainly may be argued that if Respondent lawfully could terminate Orfield it also lawfully could terminate Blevins. However, I do not have authority to decide whether discharging Blevins was reasonable or logical. Rather, I must determine whether such a discharge was inevitable or almost

inevitable under the circumstances. Respondent must prove not merely that it could have discharged Blevins under its disciplinary standards, but that it *would* have, even absent protected activity.

Considering that Orfield's first accident cost Respondent $4700, and considering that Orfield continued to demonstrate accident proneness, the evidence clearly establishes that Respondent would have discharged Orfield in any event. These factors are not present in Blevins' case. Therefore, I conclude that Respondent has not carried its burden of proof.

In sum, I find that Respondent discharged and failed to reinstate Blevins because he engaged in union activities, to discourage other employees from engaging in union and concerted activities, and because Blevins participated and gave testimony in a Board proceeding. Therefore, I conclude that Respondent violated Sections 8(a)(1), (3) and (4) of the Act, as alleged.

When the transcript of this proceeding has been prepared, I will issue a Certification of Bench Decision which will include an appendix containing this bench decision. It will also contain provisions relating to Remedy, Conclusions of Law, Order, and Notice. When this Certification is served on the parties, the time period for filing an appeal will begin to run.

I appreciate the civility and professionalism which counsel have shown throughout this proceeding. The hearing is closed.

BENCH DECISION TRANSCRIPT

I would submit Hartzog—Mr. Gattalaro, in his opening comments, said well Hartzog did nothing but deny it. What else can you do? What else can you do but deny that which did not happen? And why didn't it happen, it's not listed in two or three affidavits, it occurred out of the blue according to this, and I would say it's very convenient and betrays the inherent weaknesses in the Board's case.

Thank you, Your Honor.

JUDGE LOCKE: Thank you both very much.

I will deliver my Bench Decision at 3:00 this afternoon, so we'll be in recess until 3:00 p.m.

(OFF THE RECORD)

JUDGE LOCKE: On the record.

This is a Bench Decision in the case of Mid-Mountain Foods, Inc., which I will call the Respondent, and United Food and commercial Workers Union, Local 400, AFL–CIO, CLC, which I will call the Charging Party, or the Union.

The case number is 11–CA–17684.

This decision is issued personally to Section 102.35(a)10 and Section 102.45 of the Board's Rules and Regulations.

I find that Respondent unlawfully discharged its employee, Brian Blevins, as alleged in Complaint paragraph nine, ten and eleven, but that it did not unlawfully threaten and harass Blevins as alleged in Complaint paragraph eight.

This case began on September 24, 1997 when the Charging Party filed its initial charge in this proceeding.

On March 5, 1998, after investigation of the Charge, the Regional Director of Region 11 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the Complaint.

In issuing the Complaint the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the General Counsel or as the Government.

The hearing in this case began before me on April 16, 2001 in Abingdon, Virginia.

The General Counsel and Respondent presented evidence on April 16 and 17, 2001 and on April 18 gave oral argument. Counsel also submitted legal memoranda, which I haven't considered.

Today, April 18, 2001 I am issuing this Bench Decision.

Before discussing the facts of the present case, I will summarize two previous cases involving the same parties.

In 1996 the Union conducted an organizing campaign at Respondent's facility in Abingdon, Virginia, pursuant to a Petition filed by the Union in case 11–RC–6147. The Board conducted an election on August 1, 1996.

The Union, which did not receive a majority of the votes cast, filed objections. Additionally, the Union filed a number of unfair labor practice charges allegedly that Respondent violated the Act during the Union organizing campaign.

After an investigation the Regional Director for Region 11 issued a Complaint and ordered the cases consolidated for a hearing.

On September 21, 2000 the Board issued a Decision in these cases. The Board found that Respondent's supervisors had made a number of statements, which violated Section 8(a)1 of the Act. It also found that Respondent had issued a written warning to an employee in violation of Sections 8(a)1 and 3 of the Act.

The Board ordered Respondent to remedy these unfair labor practices. It also set aside the August 1, 1996 election and ordered that a new one be conducted, see Mid-Mountain Foods, Inc. 332 NLRB Number 19, September 21, 2000.

I will refer to this Decision as Mid-Mountain One.

On the same date it issued this Decision, the Board issued another Decision involving the same parties, but arising from different charges, raising different factual allegations. These allegations concerned events, which took place after the events in Mid-Mountain One.

In the second case, which I will call Mid-Mountain Two, the Board found that Respondent unlawfully had discharged three employees and had imposed other unlawful discipline on four other employees.

The Board ordered Respondent to remedy these violations of Sections 8(a)1 and 3, in part, by reinstating the three unlawfully discharged workers, with back pay, and by rescinding the unlawfully imposed discipline, see Mid-Mountain Foods, Inc. 332 NLRB Number 20, September 21, 2000.

The present case concerns allegations that Respondent interrogated an employee in violation of Section 8(a)1 and later discharged him in violation of Sections 8(a)1, 3 and 4 of the Act.

This employee, Brian Blevins, was not one of the individuals whom the Board found to be victims of unlawful discrimination in the two previous cases.

Before addressing the contested allegations in this case I will first discuss the allegations which are not contested.

In its Answer to the Complaint Respondent has admitted the allegations contained in Complaint paragraphs one, two, three, four, five and six.

I find that the Government has proven these allegations. More specifically I find that the charge was filed and served as alleged in Complaint paragraph one, that Respondent conducts business as described in Complaint paragraphs two, three and four, and that it is an employer engaged in commerce within the meaning of Section 2, 6 and 7 of the Act, as alleged in Complaint paragraph five.

Further, I find that the Charging Party is a labor organization within the meaning of Section 25 of the Act, as alleged in Complaint paragraph six.

Respondent's Answer also admits portions of Complaint paragraph seven. Based upon Respondent's Answer and the record as a whole, I find that at all material times the following persons were Respondent's supervisors within the meaning of Section 211 of the Act, President Jesse Lewis and Team Leaders Mark Hartzog, Alvin Olinger, Jim Phipps, Paul Widener, Tony Lawson, David Leland, and Jeff Malone.

The Complaint does not allege that manager Buddy Honaker is Respondent's supervisor. From the record as a whole, I find that manager Honaker was, at all material times, Respondent's supervisor within the meaning of Section 211 of the Act.

Respondent's Answer admits that Respondent discharged employee Brian Blevins on August 22, 1997, as alleged in Complaint paragraph nine, but Respondent denies that this discharge violated the law. Based upon Respondent's admission, I find that it discharged Blevins on August 22, 1997. From the record I find that Respondent has not reinstated Blevins.

Respondent has denied other allegations raised by the Complaint. I will begin by addressing allegations raised in Complaint paragraph eight.

This Complaint paragraph alleges that since on or about March 24, 1997 Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section Seven of the Act.

The Complaint identifies only one act, which allegedly constitutes such unlawful interference, restraint and coercion. That act allegedly took place, not on March 24, 1997, but three and one half months later on July 13, 1997.

Specifically, Complaint paragraph eight alleges that on July 13, 1997, Respondent, by supervisor Mark Hartzog, interrogated and harassed its employees regarding their Union sentiments.

Employee Brian Blevins testified that on July 13, 1997 supervisor Hartzog approached him about quitting time. According to Blevins, another employee, Daniel Crewey, was also present. In Blevins' version Hartzog asked him, out of the blue, why Blevins thought he needed a Union. Blevins quoted Hartzog as continuing, 'seriously, why do you think you need a Union?' According to Blevins he replied that there were a lot of reasons and when Hartzog asked what these reasons were, Blevins said that he had to go.

The other employee reportedly present during this conversation, Daniel Crewey, did not testify. Supervisor Hartzog denied the statements attributed to him.

Therefore, I must determine which testimony better reflects what happened. The record does not provide a reason for Crewey's failure to testify. Absent such an explanation it is reasonable to infer that Crewey's testimony would not support Blevins version. Moreover, there is another reason to doubt the reliability of Blevins' testimony. To explain this reason requires some background regarding Blevins' employment. He was an order selector. His work entailed driving a vehicle around Respondent's warehouse and assembling an order and taking it to the truck for delivery to the store which had placed the order. The vehicle Blevins drove around the warehouse is similar in some ways to a forklift, but is bigger. It holds two pallets rather than one.

The record includes both direct and indirect evidence that on July 15, 1997, two days after the reported conversation with supervisor Hartzog, Blevins was driving a load through the warehouse and on the front of the load, spelled out with adhesive backed labels used in the order selection process were the words, Vote Yes 400, apparently a reference to Union, Local 400.

Specifically Team Leader Tony Lewis testified that on July 15, 1997 he saw Blevins go by with a load on a pallet and that labels spelled out the words, Vote Yes.

Additionally, one of the Respondent's auditors, Gregory Johnson, saw the same Vote Yes sign made with labels on a load in the warehouse the same day. Although Johnson did not see Blevins driving this load, he checked the labels against Company records and found that Blevins had been assigned to assemble this order.

The record includes a photograph of the order with the Vote Yes 400 spelled out with the labels.

Blevins denied putting the labels on the load. However, the record offers no other explanation of how the labels got on the load if Blevins had not used them to spell out Vote Yes 400.

Moreover, another load had arrived at a store with a Vote Yes message spelled out in labels. When management checked the numbers on these labels, records associated them with a load Blevins had been assigned to fill.

Blevins denied putting the labels on the other load. This denial, in the face of persuasive evidence to the contrary, cast doubt on the reliability of Blevins' testimony.

In fairness it should be recognized that possibly Blevins did not put the labels on the loads to spell out the Vote Yes message. Possibly someone else put the labels on the loads and Blevins was reluctant to report that a pro-union message had somehow appeared on Company property within his custody.

Indeed the General Counsel elicited testimony that when Blevins was driving the machine, he could see the message on the front of the load.

However, such a possibility is too speculative to be persuasive. The record does not suggest how the messages appeared if Blevins did not put them on there.

In these circumstances I find that Blevins did place the labels on the two loads and that his denial is not creditable.

Having reached this conclusion I am reluctant to credit his uncooberated testimony that Hartzog interrogated him about the Union on July 13, 1997. Instead I credit Hartzog's denial and find that the alleged interrogation did not take place.

Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph eight.

Complaint paragraph nine alleges, and Respondent admits, that Respondent discharged Blevins on August 22, 1997. Respondent denies the allegations in Complaint paragraphs 10 and 11 that it discharged Blevins because he engaged in Union activities and gave testimony before the Board.

In determining whether Respondent violated the Act by discharging Blevins, I will follow the procedure established by the Board in Wright Line, 251 NLRB 1083, 1980.

Under that framework the General Counsel first must establish four elements. Once the General Counsel has established these elements, the presumption arises that the discharge was unlawful. The Respondent may rebut this presumption by proving that it would have taken the same action in any case regardless of protected activity.

In meeting its burden the Government first must prove that the alleged discriminatee engaged in activities protected by the Act. The record establishes that during the Union's 1996 organizing campaign Blevins obtained authorization cards and distributed them to other employees. He also wore a Union tee shirt to work and testified for the General Counsel at the hearing in Mid-Mountain One.

I find that the General Counsel has established the first Wright Line element.

Second the Government must prove that Respondent knew about Blevins protected activities. Respondent clearly knew that Blevins supported the Union because his tee shirt proclaimed it. Moreover, Respondent was present when Blevins testified in the prior Board hearing.

I conclude that the General Counsel has proven the second Wright Line element.

The Government has also established the third Wright Line element that Blevins suffered an adverse employment action. He was discharged and has not been reinstated.

Fourth, the General Counsel must show a link or nexus between Blevins protected activities and the adverse employment action. As I already discussed, the credit evidence does not establish that Respondent committed the 8(a)1 violation alleged in Complaint paragraph eight.

However, other evidence establishes such a nexus. In Mid-Mountain One and Mid-Mountain Two the Board found significant evidence that Respondent harbored anti-union animus. It is appropriate to take notice of these findings and I do so.

Moreover, in the present case manager Honaker testified that at one time he had a list of employees who signed Union authorization cards. He may have received this information from evidence submitted during the Mid-Mountain One hearing. In that case the General Counsel sought a bargaining order and presented evidence identifying the employees who had authorization cards.

Regardless of where manager Honaker obtained the information for his list, it concerns me that he kept track of which employees signed cards. Even keeping such a list over a period of time raises the possibility of unlawful intent.

Respondent introduced a number of documents to show that it promoted or rewarded some known Union adherents. Such evidence does not rebut the other evidence of animus. An Employer, obviously, may target some individual Union adherents and ignore others, but doing so only focuses the animus rather than eliminates it. Animus is still animus whether it emerges from a rifle or a shotgun.

The fourth Wright Line element does not require the Government to prove causation. IT only requires the Government to prove a connection. The General Counsel has carried its burden and so I find that the General Counsel has established all four Wright Line elements.

To rebut the presumption that it discriminated unlawfully against Blevins Respondent must prove by a preponderance of evidence that it would have taken the same action against Blevins even in the absence of protected activities. When Respondent discharged Blevins, it issued a memo to him stating the following reasons:

One, on July 18, 1997 Blevins received a written warning for misuse of labels used to identify product for shipment and also for sending a customer a load which was seven cases short of the amount ordered;

Two, on July 29, 1997 Blevins improperly stacked and wrapped products sent to a store.

Three, on August 1, 1997 Blevins improperly stacked and wrapped products to another store; and

Four, on August 16, 1997, Blevins shipped a load to the wrong store.

Respondent asserts that it discharged Blevins in accordance with its progressive discipline system. He had received one written warning on July 18, 1997, and under Respondent's policy, any further infraction which warranted a written warning would result in discharge.

The first written warning on July 18, 1997 concerned misuse of labels used to identify products to be shipped to a particular store. Respondent refers to these labels as pick labels.

Already I have discussed the incidents in which Respondent concluded Blevins had misused the labels by spelling out the words, Vote Yes 400, with them. Doing so entailed tearing some of the labels. The evidence does not establish beyond the doubt that Blevins took this action, but it strongly suggests that he did.

I find that Respondent held a reasonable believe in good faith that Blevins had used the labels for this purpose.

Spelling out the words, Vote Yes 400, certainly constitutes Union activity. However, the Government has not claimed that the Act protects this activity. The Complaint does not allege that Respondent violated the Act by issuing a warning to Blevins for using the labels to spell out the pro-union message.

The Complaint certainly would have alleged such a violation if the Government had considered this activity to be protected.

I conclude that using Respondent's labels in this way is not protected. By analogy an employee may have a statutory right to picket an employer, but he does not have the right to cut up the employer's lunch table and use the wood to build a picket sign.

I conclude that it was lawful for Respondent to issue a written warning to Blevins for misusing the labels. Therefore, it would not be unlawful for Respondent to rely on this discipline as part of its progressive discipline leading to discharge.

The record include evidence upon which Respondent could form a reasonable belief in good faith that Blevins improperly stacked and wrapped product on July 29 and August 1, 1997. Additionally the record establishes that Respondent reasonably could have concluded that Blevins shipped an order to the wrong store on August 16, 1997.

The question I must decide concerns whether these reasonable beliefs would have caused Respondent to discharge Blevins, even if he had engaged in no protected activities.

To make this determination I looked at evidence of how Respondent treated other employees in similar circumstances. Respondent bears the burden of persuasion and it is substantial.

In Lanty LLC 327 NLRB No. 51, November 30, 1998, the Board held that to establish such a defense under the Wright Line framework an employer must do more than show that it had reasons that could warrant the discharge of the employee in question.

The employer must show that it would have done so, even if the employee had not engaged in protected activity.

In assessing whether the Employer has established such a defense the Board looks to the Employer's own documentation regarding the employee's conduct, to the Employer's Personnel Policy Handbook, and to the evidence of how it treated other employees with recorded incidents of discipline.

Before examining the evidence, which Respondent presented to support its defense, it is appropriate an argument raised by the General Counsel, which, if adopted, would significantly limit Respondent's ability to present such evidence and have it considered.

The General Counsel's argument invokes the doctrines of collateral estoppels and race judicata. In Mid-Mountain Two the Board address the issue of whether Respondent would have issued a written warning to an employee named Nunley because Nunley had made a mis-shipment of goods. At this point the Government already had established the four Wright Line elements so Respondent bore the burden of showing that it would have issued the warning to Nunley in any event.

The Board held, in part, as follows: "The Respondent conceives that it has not invariably issued written warnings for similar infractions. As is noted above, under the Wright Line test, it is incumbent on the Respondent to demonstrate not only that it has sometimes issued similar warnings in the past, but that it would have issued a warning to Nunley for his conduct without regard to his Union activity. The Respondent has failed to make this crucial showing."

The General Counsel contingent part as follows: "The Board's finding relative to Respondents practice regarding misshipments is race judicata as to the present matter.

That being so, Respondent is collaterally estopped in the present matter from relitigating its practice relative to the issuance of discipline of employees whom it believes caused misshipments."

The General Counsel's argument perhaps may be elaborated in a slightly different way, which might be summarized as follows: The Respondent discharged Blevins because Blevins had received a second written warning and under its disciplinary system a second written warning results in discharge. Blevins received the second warning for making a mis-shipment. However, the General Counsel argues the Board already has concluded that the Respondent cannot carry its rebuttal burden of proof in such a case.

More specifically, the General Counsel contends that in Mid-Mountain Two the Board found that Respondent was unable to prove that it would have issued the same discipline to an employee for mis-shipping an order, even if that employee had not engaged in protected activity.

Because the Board found that Respondent did not make the showing with respect to employee Nunley, Respondent should be precluded from trying to make a similar showing with respect to employee Blevins.

However, I believe that the General Counsel's race judicata argument rests on too narrow a reading of what Respondent must prove to meet its rebuttal burden under Wright Line.

General Counsel's argument assumes that a Respondent must demonstrate that it invariably meted out the same discipline for the same infraction. Under this interpretation, if a Respondent showed leniency even once, it could never prove that it would have taken it's usually action against an alleged discriminatee in the absence of protected activity.

That interpretation is not my understanding of Wright Line and it is not my understanding of Mid-Mountain Two. As I understand Wright Line, the test is not so inflexible. There may be mitigating circumstances in which an employer departs from the discipline it usually imposes for a given infraction, and such a special case will not prevent the Respondent from demonstrating that it would have imposed the usual, more severe discipline on a particular employee regardless of protected activity.

In Mid-Mountain Two the Respondent simply had not proven that when it departed from its practice of issuing a written warning for a mis-shipment, special circumstances justify such a departure.

Therefore, I do not conclude that race judicata precludes the Respondent from showing that it would have applied the usual discipline to Blevins, even though on some past occasion it had imposed a less severe measure on some other employee.

Nevertheless, I do conclude that I am bound by the Board's finding in Mid-Mountain Two that Respondent has not invariably used a written warning for a mis-shipment. In other words, race judicata does preclude Respondent from arguing here that it always, without fail, has issued a written warning for a misshipment. The Board has found to the contrary in a recent case involving the same parties and the Respondent is bound by this finding.

On the other hand I believe that race judicata does not prevent Respondent from trying to prove that in the past special circumstances had justified the exceptions. Stated another way, Respondent still may try to prove that when it gave an employee less severe discipline for a mis-shipment, that employee was not similarly situated to Blevins and should not be used as a basis for comparison.

In view of the Board's finding in Mid-Mountain Two that there were occasions when Respondent imposed lesser discipline for a mis-shipment, Respondent had the burden of explaining away such instances by proving distinguishing circumstances. Respondent has not met this affirmative obligation. IT has not identified those instances in which an imposed discipline less than a written warning for a mis-shipment and it has not presented evidence to distinguish such instances from the circumstances in the Blevins case.

For these reasons I conclude that Respondent has not met its burden of proof.

However, there is another reason, not dependant on race judicata, for reaching the same conclusion. To show that it would have discharged Blevins regardless of his protected activity, Respondent relies on its stated policy of discharging an employee who has received a second written warning. However, Respondent has not demonstrated that it has applied this policy consistently. The policy itself came into effect only about five months before Respondent discharged Blevins. An April 9, 1997 memorandum indicates that before March 17, 1997 the Respondent applied a three step progressive discipline system. A new employee handbook changed that system to a two step procedure. The record does not reveal many details of the new progressive disciplinary system. Therefore, it is not possible to determine whether the system allowed for exceptions, or whether it had to be applied inflexibly in all instances.

Absent such evidence, Respondent falls short of demonstrating that its disciplinary system would lead inexorably to Blevins discharge regardless of protected activity.

Respondent did present evidence regarding certain employees it disciplined for mis-shipments. Most notably it introduced records regarding its May 16, 1997 discharge of employee Craig Price. These records indicate that Price made four mis-shipments. Therefore, the record suggests that Price's work related problems were more serious than those of Blevins, who was discharged after one mis-shipment.

It is true that Blevins had been disciplined for other infractions besides mis-shipments. However, the record suggests that Respondent regarded mis-shipments as a more serious problem than Blevins's other infractions.

Therefore, Respondent has not established that Respondent considered all of Blevins' infractions taken together to weigh as heavily as all of Price's infractions taken together. Accordingly, I cannot conclude that Respondent would have discharged Blevins simply because it terminated Price.

Respondent also introduced records showing that it had disciplined other employees for mis-using pick labels. However, there appears to be a significant difference between the way these other employees mis-used the pick labels and the way Blevins mis-used the pick labels.

To examine this difference it is helpful to begin by looking at the purpose of pick labels. In one sense they are like work orders. When an order selector receives pick labels they define this work by telling him what merchandise to take from the warehouse and send to a customer. The pick labels also help management keep track of the delivery of the merchandise to the right places.

An employee seeking to avoid work may hide the pick labels assigned to him or throw them away. Such action creates a very serious problem. It prevents merchandise from being delivered to the customer who ordered it and also interferes with the record keeping process. Obviously hiding or discarding or even just losing a pick label is just as serious a problem as a mis-shipment because it results in a mis-shipment or more accurately it results either in a delayed shipment or no shipment at all.

However, Blevins did not mis-use the pick labels in this manner. His labels stayed with the orders as they were supposed to do, but were stuck on the shipment in an unauthorized way to spell out a message. Such use of the labels violated the rules, but it did not necessarily result in a mis-shipment. Indeed, one customer reported that his store received the shipment as it had been sent with the message visible on the package.

To summarize, it appears that Blevins mis-use of the pick labels may not have interfered with deliveries to the same extent that hiding or destroying or losing the labels would have. Therefore, it is not clear that, in the absence of protected activity, Respondent would have treated Blevins mis-use of the labels as seriously as it dealt with other types of label mis-use.

The harm caused by a work rule violation certainly may be considered in assessing the penalty imposed for the violation. Mid-Mountain Two provides a good example. In that case Respondent had discharged an employee named Orfield after two accidents. The first of these accidents had caused greater damage. Orfield, driving a forklift type machine, had knocked over a rack causing tons of butter to fall onto his machine. One supervisor estimated the damage at $4700.00. Respondent gave Orfield a suspension and a final warning stating that any further improper conduct would result in termination. Orfield had a second, albeit less serious accident, and Respondent discharged him.

The Board held that Respondent had met its burden of showing that it would have discharged Orfield under any circumstances even in the absence of protected activity, and reaching this conclusion the Board took into account the significant cost of Orfield's first accident.

In one respect Respondent's discharge of Blevins resembles its discharge of Orfield. Like Orfield, Blevins had received a final warning, ultimate to the infraction which prompted his discharge.

Specifically Respondent had issued Blevins a final warning on July 18, 1997. This warning appeared in a memorandum concerning use of the pick labels to make a Vote Yes message. The memo also stated that on this same occasion Blevins load had been seven cases short. This memorandum informed Blevins that "any violations within the next 12 months will result in your termination of employment with Mid-Mountain Foods'.

Because both Orfield and Blevins were on final warning status at the time of the infractions resulting in their termination, it certainly may be argued that if Respondent lawfully could terminate Orfield, it also lawfully could terminate Blevins.

However, I do not have authority to decide whether discharging Blevins was reasonable or logical. Rather, I must determine whether such a discharge was inevitable or almost inevitable under the circumstances.

Respondent must prove not merely that it could have discharged Blevins under its disciplinary standards, but that it would have even as a protected activity.

Considering that Orfield's first accident costs Respondent $4700.00 and considering that Orfield continued to demonstrate accident proneness, the evidence clearly establishes that Respondent would have discharged Orfield in any event. These factors are not present in Blevins' case.

Therefore, I conclude that Respondent has not carried its burden of proof.

In sum, I find that Respondent discharged and failed to reinstate Blevins because he engaged in union activities to discourage other employees from engaging in union and concerted activities and because he participated and gave testimony in a Board proceeding.

Therefore, I conclude that Respondent violated Sections 8(a)1,3 and 4 of the Act as alleged.

When the transcript of this proceeding has been prepared, I will issue a certification of Bench Decision, which will include an Appendix containing this Bench Decision. It will also contain provisions relating to conclusions of law, remedy, order and notice.

When this certification is served on the parties, the time period for filing an appeal will begin to run.

I appreciate the civility and professionalism which Counsel have shown throughout this proceeding.

The hearing is closed.

(Whereupon, the hearing in the above entitled matter was closed on April 17, 2001 at 3:33 p.m.)

C E R T I F I C A T E

This is to certify that the attached proceedings before the National Labor Relations Board, Region Eleven

In the Matter of:

MID-MOUNTAIN FOODS, INC.

AND

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 400, AFL-CIO

Case No 11-CA-17684

Date:APRIL 18, 2001

Place:ABINGDON, VIRGINIA

were held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

OFFICIAL REPORTER