No. 08-74148

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 17

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

BLUE DIAMOND GROWERS

Respondent-Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

MEREDITH L. JASON
Supervisory Attorney

GREGORY P. LAURO
Attorney

National Labor Relations Board
1099 14th Street, N.W.
(202) 273-2945
(202) 273-2971

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases: **Page(s)**

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

Statutes:

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Other Authorities: **Page(s)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-74148

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 17

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

BLUE DIAMOND GROWERS

Respondent-Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of the International Longshore & Warehouse Union, Local 17 ("the Union") to review a Board Decision and Order dismissing an unfair labor practice complaint issued against the Blue

Diamond Growers ("the Company"). The Board's Order, which issued on September 16, 2008, and is reported at 353 NLRB No. 6, is final with respect to all parties under Section 10(f) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(f)) ("the Act"). (ER 1-7.)[1]

The Board had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the Act (29 U.S.C. §160(a)), which authorizes the Board to prevent unfair labor practices. The Board submits that this Court has jurisdiction over this case under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the Board's Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act, 29 U.S.C. § 153(b). (ER 1 n.2.)[2] The Union's petition for review,

[1] "ER" references are to the Excerpts of Record filed by the Union with its opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. The Union's Excerpts of Record erroneously included materials (ER 1244-59) that were not part of the record before the Board and are, consequently, not part of the record before this Court. Accordingly, the Board and the Company jointly moved to have those non-record materials struck from the Union's record excerpts, and any references to those materials struck from the Union's brief. The Board also partially joined in the Company's opposition to the Union's motion requesting that the Court take judicial notice of those materials. The Court ordered that these motions be submitted for consideration by the merits panel.

[2] In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to

which was filed on September 29, 2008, is timely because the Act places no time limit on such filings. The Company has intervened on behalf of the Board.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably dismissed the complaint, which alleged that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Leo Esparza and Ludmilla Stoliarova to discourage union activities.

STATEMENT OF THE CASE

Upon charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employees Leo Esparza and Ludmilla Stoliarova in order to discourage union membership and activities. After a hearing, the administrative law judge issued a recommended decision and order dismissing the complaint.[3] (ER 5-7.) The judge did so based

---

issue decisions under those circumstances. *See* Quorum Requirements, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

[3] The administrative law judge also recommended dismissing a third allegation that the Company had violated the Act by issuing a written safety warning to employee Cesario Aguirre. (ER 7.) However, neither the Union nor the General Counsel sought review of this dismissal in their exceptions to the Board. Moreover, the Union did not raise this issue in its opening brief to the Court. The Union is therefore barred from challenging that dismissal in these proceedings. *See* 29 U.S.C. §160(e) ("no objection that has not been urged before the Board . . . shall be considered by the Court . . . ."); *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1003 n.10 (9th Cir. 2008) (court barred from considering claim raised for the

on his finding that the General Counsel failed to prove that the employees' protected conduct was a substantial or motivating factor in their discharges, and thus failed to satisfy his initial burden for proving a violation of Section 8(a)(3). The Union and the General Counsel each filed exceptions to the judge's decision. (*Id.*)

The Board adopted the judge's finding that the Company had not violated Section 8(a)(3) and (1) of the Act by discharging Esparza and Stoliarova, and therefore dismissed the complaint. (ER 1.) The Board assumed *arguendo* that the General Counsel met his initial burden, but found that the Company proved its affirmative defense that it would have discharged the employees for their work rule violations even in the absence of their union activities. (ER 1 & n.4.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company processes and sells almonds at its facility in Sacramento, California, where it employs approximately 600 production and maintenance employees. (ER 2.) In early 2005, the Union launched an ultimately unsuccessful organizing campaign at the facility. In an earlier proceeding involving these

---

first time on appeal); *Sparks Nugget v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (holding that a party waived its defense to findings that it did not contest in its opening brief to the court).

parties, the Board—in the absence of exceptions—issued an unpublished decision on May 10, 2006, finding that the Company committed various unfair labor practices. (*Id.*)[4]

B. Company Rules Provide that Employees Are Subject to "Probable Termination" for Removing Any Company Property Without Permission

The Company's employees are subject to the rules in section 4.10 of the employee handbook, which provide that employees are subject to discharge for "misappropriation" of company property. (ER 2; 926-27.) Specifically, rule number 15 of "Section I—house rules" bars "Misappropriation and/or unauthorized possession of [the Company's] or other employees' personal property or attempting to remove such property from [the Company's] premises." The employee handbook expressly states that a first infraction of any Section I rule "will result in immediate suspension and probable termination." (*Id.*)[5] In addition,

---

[4] The Company has complied with the Board's Order in the earlier proceeding, and that Order is not before the Court in the instant proceeding.

[5] A separate set of "Section II—house rules" provide that a violation of those rules will result in a written warning. (ER 2-3; 927-28). Under these rules, an employee may be subject to termination for receiving 2 or more written warnings within a year, or 6 or more written warnings within 3 years. (*Id.*) The enumerated Section II rules include: (1) failure to comply with the Food and Drug Administration's "Good Manufacturing Practices," (2) failure to report an on-the-job injury immediately to your supervisor, and (3) failure to report a disease or condition which may endanger the health of employees or contaminate any company products. (*Id.*)

the Company maintains a written policy that bars employees from removing any scrap materials without first having obtained written authorization from company management. (ER 3; 929.) During the period from 2001 through May 2006, there had been 76 incidents in which employees were disciplined for violating Section 1 rules, 43 of which resulted in discharge. (ER 4; 710-11.)

C. Prior to Esparza's Discharge, the Company Applied the Misappropriation Rule to Discarded Materials, and Reminded Employees that Permission Was Required To Remove Such Items

Employee Leo Esparza was an open union supporter. At the time of his discharge in September 2005, he had 20 years of service working the swing shift at the Company's distribution center as a lift-truck operator. (ER 3.) His immediate supervisor at the relevant times was David Nichols, the distribution center section manager who was under the direction of Warehouse Manager Jerry Spain. Esparza received a copy of the handbook, which contained the misappropriation rule. (ER 4; 1049.)

Prior to Esparza's discharge, the Company had applied the misappropriation rule to discarded materials, and reminded employees not to take anything, including trash, without permission. For example, in Spring 2003, about a year prior to the union campaign, the Company terminated employee Noberto Gutierrez for taking discarded cans of almonds from the trash without permission. (ER 3; 192, 507-11, 430, 723-25, 981, 1207.) Around that same time, the Company

discharged at least three other employees for violating this misappropriation rule. (ER 4; 739-40, 778, 975-78, 1017, 1214.)

After Gutierrez's termination, Jim Sahaj, the Plant Manager at the time, issued a June 3, 2003 memorandum to all supervisors, reiterating that any removal of any company property in any situation is unacceptable, "will not be condoned without exception," and may result in discharge. (ER 4; 192, 511-13, 1053.) After receiving this memorandum, Warehouse Manager Spain held a meeting, attended by Esparza, in which Spain discussed the misappropriation rule and explained that nothing, including items found in the trash, could be removed without authorization. (*Id.*) Consistent with these instructions, prior to Esparza's discharge, employees frequently sought permission before removing broken or discarded items. (ER 3-4; 710-11, 1038, 1054, 1096-1200.) For example, in 2005, Esparza sought permission to remove a broken chair from company premises. (ER 4; 520-21, 568-69, 945, 1047.)[6]

[6] Indeed, the Company had issued hundreds of property release forms signed by employees between 2001 and May 2006, through which the employees had properly obtained permission to remove broken or discarded items. (ER 4; 710-11, 1038, 1054, 1096-1200.)

D. The Company Discharges Esparza Because He Violated the Misappropriation Rule By Taking Company Property from the Trash Without Permission

On August 31, 2005, Esparza removed several items from one of the Company's trash dumpsters. Specifically, he took a weed whacker with a severely ruptured gas tank, an empty cardboard roll that held the residue of shrink wrap plastic, and a broken broom handle. (ER 3; 1210.) Company security personnel stopped him as he attempted to take these items from company property to his personal vehicle. Esparza admitted to security that he had taken these items from the dumpster and that he had not received permission to do so. Security instructed him to return the items until he received the proper authorization, and it reported the incident to management. (ER 3; 1047, 1210.) The security department incident report, which was circulated to management, recited the events just noted, including confirmation that the weed whacker had been disposed of by a company gardener due to a severely ruptured gas tank. (*Id.*)

On September 1, company managers Nichols and Spain met to discuss the incident. Esparza approached them. Esparza admitted during subsequent interviews that he knew he should have obtained permission to take these items, but had failed to so. (ER 3-4; 299, 340, 515-16, 565, 581, 733, 945, 1047, 1211-13.) Further, during these interviews, Nichols noted that Esparza had previously sought permission to take a broken chair. (ER 3-4; 568, 945, 1047.)

On September 6, after his investigation confirmed these facts, Spain spoke to George Johnson, the company director of employee services, and recommended that Esparza be suspended pending further investigation. Johnson agreed and continued the investigation. (ER 4; 518-22, 733, 945, 1047.) Johnson spoke with Esparza on September 9, and Esparza again confirmed that he knew permission was needed to take the items in question. (ER 4; 733, 1211-13.) Esparza also acknowledged that he had previously sought permission from supervisors to remove discarded or broken items. Esparza's explanation for failing to get permission this time was that, when he was ready to leave work, he could not locate his supervisor in order to obtain his permission. (*Id*.)

On September 12, Johnson met again with Spain and Nichols, each of whom recommended that Esparza be terminated. Johnson then met with two senior company managers--General Manager Kim Kennedy and Manager of Scheduling and Warehousing David Hills--to review the incident. (ER 4; 736-41, 1047, 1211-13.) After considering the reports of the investigation and the history of the Company's enforcement of the misappropriation rule, they decided to terminate Esparza on September 21 for violating its misappropriation rule. (*Id.*) Specifically, senior management explained that the Company discharged Esparza because he knew or should have known that he was violating this rule; the Company had strictly enforced this rule and had recently discharged another

employee for similar misconduct; and the damaged weed whacker with a ruptured gas tank taken by Esparza was dangerous and could therefore have subjected the Company to liability. (ER 3-4; 734-35, 1047, 1211-13.)

E. On April 21, 2006, the Company Holds a Meeting To Remind Stoliarova and Other Employees that Permission is Required To Remove Any Items, Including Trash

Employee Ludmilla Stoliarova was an open union supporter who began working for the Company in 2001. She received a copy of the employee handbook, which included the misappropriation rule. (ER 4; 1050.) On April 21, 2006, Stoliarova attended a meeting at which Area Manager Don King reminded her and other employees that they must obtain permission before removing anything from company property, including items found in the trash. (ER 5; 376-77, 598, 607-08, 618). Accordingly, employees knew, prior to Stoliarova's discharge, that permission was required to remove discarded items. (*Id.*)

F. On April 27, Just Days After Being Warned Not To Do So, Stoliarova Takes Discarded Property Without Permission, and Is Consequently Discharged for Violating the Misappropriation Rule

On April 27, 2006, Stoliarova took two cardboard boxes from a janitor who was taking them to a trash bin. She did not seek permission to do so. When other employees observed her removing these items, they reminded her that she needed company permission or else she could be terminated. (ER 4; 609, 754, 1062; *see*

also ER 95-96, 364, 398, 440.) Despite these warnings, Stoliarova proceeded to remove the items without obtaining permission. (ER 4; 364, 398, 1062.)

The employees who witnessed this incident reported it to their lead person who, in turn, reported it to Area Manager King. When King spoke with Stoliarova, she admitted that she had not obtained permission to remove the boxes. King replied that he had just reminded her not to take anything without permission. (ER 4-5; 627, 1062.) Accordingly, when King presented the issue to senior management, he did so based on his understanding of the misappropriation rule and his belief that Stoliarova had violated it. (ER 4-5, 627-28, 639, 644, 1062.)

On May 4, after further investigation confirmed these facts, the Company's senior managers decided to discharge Stoliarova for violating company rules by removing items without permission. (ER 5; 468-69, 633-34, 907-22, 968-71, 1062, 1221-28.) Specifically, General Manager Kennedy explained that the Company discharged Stoliarova because the investigation revealed that she was clearly aware of the rule, having been reminded of it near the time of the incident, and should have known she was violating it. (*Id.*) Accordingly, company reports and testimony from the investigation all focus on these facts. (*Id*.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman) agreed with the administrative law judge and dismissed the complaint

allegation that the Company violated Section 8(a)(3) and (1) of the Act by discharging Esparza and Stoliarova. (ER 1.) Unlike the judge, however, the Board assumed *arguendo* that the General Counsel had met his initial burden, but found that the Company had proved its affirmative defense that it would have discharged the employees for their rule violations even in the absence of their union activities. (ER 1 & n.4.)

SUMMARY OF ARGUMENT

The Board properly dismissed the complaint allegation that the Company had unlawfully discharged Esparza and Stoliarova. The Board assumed *arguendo* that the General Counsel had met his initial burden in unlawful discharge cases, but reasonably found that the Company proved its affirmative defense that it would have discharged the employees for violating the Company's misappropriation rule even in the absence of their union activities. Specifically, the record demonstrates that the Company acted in a manner consistent with its past practice of discharging employees for taking discarded items without permission, and that it warned employees, including Esparza and Stoliarova, not to do so. Indeed, Esparza admitted that he knew he needed to obtain permission to take the items in question, but had failed to do so. And Stoliarova, in turn, admitted taking items without permission even though the record shows that the Company had just reminded her not to do so.

The Board carefully considered any contrary evidence and made balanced findings based on the evidence on the record as a whole. It noted, for example, that the Company's security and lower-level supervisors had not always strictly enforced the misappropriation rule, but reasonably found that the senior managers who made the final discharge decisions had. The Board also thoroughly examined each step leading to the discharges and reasonably found that company security and the low-level supervisors had lawfully referred the incidents to senior management based on their view of the misappropriation rule and their belief that it had been violated. The Board further found that once the issue came before senior management, it lawfully discharged Esparza and Stoliarova based on its strict enforcement of the misappropriation rule.

The Union failed to meet its heavy burden of establishing that the Board's findings are unsupported by substantial evidence. It erroneously asserts that the Board ignored testimony that some supervisors had not strictly enforced the misappropriation rule. In fact, the Board credited that testimony but reasonably found that the senior managers who made the final discharge decisions had strictly applied the rule. Likewise, the Union errs in claiming that the Board failed to attribute the conduct of company agents to the Company when the Board attributed every agent's action—from security through low-level and senior management—to the Company. Finally, the Union misses the mark in claiming that the Board erred

in failing to find that the General Counsel had demonstrated antiunion animus. To the contrary, this simply ignores that the Board assumed *arguendo* that the General Counsel had made that showing.

ARGUMENT

THE BOARD REASONABLY DISMISSED THE ALLEGATION THAT THE COMPANY VIOLATED SECTION 8(a)(3) OF THE ACT BY DISCHARGING ESPARZA AND STOLIAROVA

A. Applicable Principles and Standard of Review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Accordingly, an employer violates the Act by discharging or taking other adverse actions against employees for engaging in union activity.[7] As explained below, however, an employer does not violate Section 8(a)(3) where, as here, it shows that it would have taken the same actions even in the absence of its employees' protected activities.

The legality of the employer's adverse action typically depends on its motivation. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397,

---

[7] Section 8(a)(1) establishes that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under Section 7 of the Act. A violation of Section 8(a)(3) results in a "derivative violation" of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

401-03 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination cases first articulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enforced 662 F.2d 899 (1st Cir. 1981). The Board's *Wright Line* test gives effect to Section 10(c) of the Act (29 U.S.C. §160(c)), which provides that the General Counsel carries the burden of establishing an unfair labor practice by a preponderance of the evidence.

To prevail under the *Wright Line* test, the Board's General Counsel must demonstrate that antiunion considerations were a "motivating factor" in the employer's adverse action. The employer may then demonstrate, as an affirmative defense, that it would have taken the same action even in the absence of union activity. If the employer establishes that defense by a preponderance of the evidence, the Board must dismiss the case, notwithstanding any union animus. *Transportation Management Corp*., 462 U.S. at 395; *see also Merillat Industries*, 307 NLRB 1301, 1303 (1992).

An employer may, for example, defend a discharge by showing that the employee would have been terminated, even in the absence of protected activity, for violating a lawfully maintained work rule. *See George L. Mee Memorial Hospital*, 348 NLRB No. 15, slip op. at 6–7 (2006), 2006 WL 2826438 (employer lawfully refused to rehire employee who walked off the job in violation of policy); *Krystal Enterprises*, 345 NLRB No. 15, slip op. at 2–3 (2005), 2005 WL 2094918

(discharge for sexual touching lawful where consistent with past practice and sexual harassment policy providing for discipline up to and including discharge). Such a defense does not fail simply because not all of the evidence supports it or because some evidence may tend to refute it. *Merrilat Industries*, 307 NLRB at 1303. Rather, the Board may still find that the evidence taken as a whole shows that the employer would have taken the same action even absent the protected conduct. *See id.* (noting the employer is merely required to prove its defense by a preponderance of the evidence).

This Court will not disturb the Board's factual findings—such as its finding here that the Company had informed employees that they must have permission to take items found in the trash—if substantial evidence supports the Board's inferences and conclusions, "even if the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord NLRB v. Bighorn Beverage Co.*, 614 F.2d 1238, 1240 (9th Cir. 1980). Further, this Court has long held that the Board's credibility determinations "are given great deference, and are upheld unless they are inherently incredible or patently unreasonable." *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995). Finally, this Court will defer to the Board's interpretation of the Act unless the Board's view is irrational or inconsistent with the Act. *Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006, 1008 (1985).

B. The Board Reasonably Found that the Company Would Have Discharged Esparza and Stoliarova Even Absent Their Protected Activity

Applying the foregoing principles, the Board assumed *arguendo* that the General Counsel had met his threshold *Wright Line* burden of showing that protected conduct was a substantial or motivating factor in the discharges of Esparza and Stoliarova. (ER 1 n.4.) It nevertheless reasonably found that these discharges were lawful because the Company demonstrated that it would have discharged these employees even absent their protected activities. (*Id.*) Accordingly, the Board dismissed the complaint. As shown below, the Board's findings are supported by substantial evidence on the record, and must therefore be affirmed.

1. The Company would have discharged Esparza even absent his protected activity

The Board reasonably found that the Company demonstrated that it would have discharged Esparza for violating the misappropriation rule even absent his protected activities. The Board's finding is well supported.

As shown above **(**pp**.** 5-7), it is undisputed that the Company maintained a misappropriation rule, which required employees to receive permission before removing any company property from the facility. The Company's handbook expressly provides that employees will face "probable termination" for a first violation of the rule. (*See id.*) Esparza acknowledged having received a copy of

these rules, as did all the hourly employees. (ER 3; 1049.) Therefore, there is no dispute that the Company could have lawfully discharged Esparza for violating the misappropriation rule. *See* cases cited above at pp. 15-16 (holding that employer may lawfully discharge employees for violating lawfully maintained work rules).

In addition, the undisputed facts developed by the Company's investigation show that it discharged Esparza for violating that rule. Thus, it is undisputed that Esparza attempted to remove discarded items from company property without permission. Moreover, he admitted that he knew he was required to get permission to remove these items and that he had erred in failing to do so. He also acknowledged that he had previously sought permission to take a broken chair. (ER 3-4; 299, 340, 515-16, 565, 581, 733, 945, 1047, 1211-13.) Furthermore, it is also undisputed that the Company consistently focused throughout the entire investigation on Esparza's violation of the misappropriation rule, and that his union activities did not come up during that investigation. (*See, e.g.*, ER 3-4; 515-21, 524, 732-41, 945, 1047, 1211-13.)

The Board carefully examined each step in the investigation that led to the discharge and reasonably found that each was driven by Esparza's violation of the rule, not his protected conduct. (ER 3-4, 6.) Thus, as shown above (pp. 7-9), security referred the issue to management after Esparza admitted that he had attempted to remove company property without permission. Likewise, the lower-

level supervisors (Nichols and Spain) referred the issue to senior management after Esparza admitted that he should have obtained permission before removing these items. (*See* p. 8, above). Thus, the issue reached the level of senior management benignly. And, once the issue reached the senior managers, their strict enforcement of the misappropriation rule led to their decision to discharge Esparza. (ER 4, 6; 732-41, 945, 1047, 1211-13.)[8]

Further buttressing the Board's finding that the Company had proved its *Wright Line* defense, substantial evidence shows that the Company had in the past applied the misappropriation rule to discarded items, and had informed Esparza and other employees that they must have permission to remove such items. *See* cases cited above at pp. 15-16 (fact that employer's conduct is consistent with past practice may support its *Wright Line* defense). Thus, in 2003, during Esparza's tenure and a year before the union campaign, the Company discharged employee Noberto Gutierrez for failing to obtain permission before removing items discarded in a company dumpster. (ER 4; 511-13, 723-25, 981, 1207; *see also* note 8, above.) Shortly thereafter, the Company met with employees, including Esparza,

[8] Thus, the senior managers noted that, in addition to having plainly violated the misappropriation rule by taking items without permission, Esparza removed an item that could be dangerous and subject the Company to liability, namely, a weed whacker with a severely ruptured gas tank. (ER 3-4; 735, 1210.) The Union cannot, therefore, distinguish Esparza's discharge from Gutierrez's discharge in 2003. Rather, the items taken by Gutierrez (discarded almonds that could have been contaminated) and those taken by Esparza are alike in that both could subject the Company to liability.

to remind them that they needed permission to remove any items from company premises, including from dumpsters. (ER 4; 511-13, 1053.) Accordingly, Esparza and other employees had previously sought permission before removing discarded items, evincing their understanding that the misappropriation rule applied to such items. (ER 4; 520-21, 568-69, 1038, 1047, 1054, 1096-1200.)

Finally, while the foregoing evidence amply supports the Board's finding that the Company satisfied its *Wright Line* defense, the Board also carefully considered whether anything in the history of the enforcement of the misappropriation rule could detract from that defense. Thus, the Board reasonably parsed that history into two categories that tracked the Company's decision-making hierarchy. First, it acknowledged the informality of the shop-floor employees and their front-line supervisors, who did not always apply the rule with strict consistency. (ER 6.) This alone does not require a different result because a *Wright Line* defense will not fail merely because not all of the evidence supports it. *See Merillat Industries*, 307 NLRB 1301, 1303 (1992). Second, the Board found that the senior managers, who conducted the formal investigation and made the final decision to discharge Esparza, had strictly and consistently enforced the rule. (ER 6.) Therefore, while the Board fairly recognized that some evidence could go the other way, the bulk of it supported the Company's *Wright Line* defense. In sum, because substantial evidence supports the Board's finding that the Company

would have discharged Esparza even absent his protected activities, that finding must be affirmed.

2. The Company Would Have Discharged Stoliarova Even Absent Her Protected Activity

The Board also reasonably found that the Company would have discharged Stoliarova for violating the misappropriation rule even in the absence of her union activities. Again, the Board thoroughly examined each step taken by the Company in reaching that decision, and reasonably found that it was driven by her rule violation, not her union activities.

Just a few days before Stoliarova's discharge, Supervisor King held a meeting in which he reminded her and other employees that they must have permission to remove anything from company property, including trash. (ER 5; 598, 607-08, 618.)[9] Yet, despite this clear warning, Stoliarova proceeded to take discarded boxes without seeking the permission she had just been told to obtain. When other employees observed this, they once again told her that she needed permission, or else she could be terminated. (ER 4; 609, 754, 1062, 1221-25.)

[9] Stoliarova and a few others claimed not to recall whether King specifically said that permission was needed to take items from the trash. However, several other employees testified that King made that specific statement and that they accordingly knew they needed permission to remove anything, including trash or discarded boxes. (ER 5; 598, 607-08, 618.)

Stoliarova, however, continued to remove the boxes without getting permission. (ER 4; 364, 398, 1062, 1221-25.)

This incident came to the Company's attention when the employees who had warned Stoliarova not to take the boxes without permission reported it to their lead person who, in turn, reported it to Area Manager King. When King met with Stoliarova to discuss the incident, Stoliarova readily admitted that she had not received permission. King replied that he had just reminded her and others not to remove anything, including trash, without permission. Based on this evidence, the Board reasonably found that when King presented the incident to senior management for their investigation, he did so solely based on his understanding of the rule and his belief that Stoliarova had violated it. (ER 4-6; 618-30, 639, 1062.)

Once the matter came before the senior managers, their strict view of the misappropriation rule led first to the broader investigation of the underlying event, and ultimately to their decision to discharge Stoliarova. (ER 7.) Accordingly, all of the reports and evidence resulting from this process focused on Stoliarova's having violated the rule, despite having been reminded of it near the time of the incident. (ER 4, 6; 467-69, 618-30, 757-58, 1062, 1221-25.) There is, moreover, no evidence that company management discussed her union activities during the investigation, much less that those activities were any factor in the decision to discharge her. Given these facts, the Board reasonably found that the Company

would have discharged Stoliarova for violating the misappropriation rule, even absent her union activities.

C. The Union's arguments are without merit

As just shown, the Board assumed *arguendo* that the General Counsel had met his threshold *Wright Line* burden, but reasonably found that the discharges of Esparza and Stoliarova were lawful because the Company demonstrated that it would have discharged them even absent their protected conduct. (ER 1 n.4.) In response, the Union does not deny that the Company maintained a lawful misappropriation rule, or that it could lawfully discharge these employees for violating that rule. Instead, it challenges the Board's finding that the Company would have discharged them even absent their union conduct. To prevail, the Union carries the heavy burden of establishing that substantial evidence does not support the Board's finding. The Union has failed to meet that burden, particularly in light of the Board's meticulous consideration of the entire record, including all arguments to the contrary.

1. The Union's attack on the Board's credibility findings fails

There is no basis to the Union's claim (Br 16-19) that the Board failed to evaluate the credibility of any testimony that conflicted on critical matters or with the Board's findings. This claim fails for at least two reasons. First, it boils down to the false assertion (Br 19-23) that the Board ignored testimony that employees

were sometimes allowed to take discarded items without permission, when, in fact, the Board fully considered that testimony. Second, it is based on the false assertion (Br 19) that the Board made only "boilerplate" evaluations of witness credibility.

The Board expressly considered (and credited) the very evidence that the Union claims (Br 19-23) it ignored. For example, under the heading "circumstances relevant to the application of the [misappropriation] rule to Esparza," the Board specifically credited evidence that supervisors or security had sometimes observed employees taking discarded items home without incident or consequence. (ER 4.) Indeed, it acknowledged (ER 6) that this evidence showed that the Company's first-level supervision had not with strict consistency required permission to remove discards. The Board nonetheless reasonably found that the Company acted lawfully in discharging Esparza and Stoliarova because once any such incidents were brought to the attention of senior management, as they were here, senior management had strictly enforced the rule. (ER 1 n.4, 5-7.)

In these circumstances, the Union cannot rely (Br 16-19) on other cases where, in contrast to the specific findings the Board made here, the fact finder offered only boilerplate credibility findings. *Cf. Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981) (criticizing agency that, unlike the Board here, utterly failed to make any specific findings regarding testimony that conflicted with its

conclusions); *White Glove Building Maintenance Inc. v. Brennan*, 518 F.2d 1271, 1274 (9th Cir. 1975) (fact finder not at liberty to disregard contrary evidence); *K-Mart Corp. v. NLRB*, 62 F.3d 209, 212 (7th Cir. 1995) (similar).[10] Indeed, the Union attempts to avoid this plain distinction by quoting the Board's decision selectively. Thus, the Union focuses solely (Br 19) on one footnote early in the Board's decision (*see* ER 2 n.1), where the Board summarized its credibility determinations, but it conveniently ignores the more specific findings, just discussed, which the Board made later in the decision (*see* ER 3-7). In sum, the Union, having failed to address these credibility findings, cannot meet its burden of showing that they are so "inherently incredible" that they should be overturned. *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995).

2. The Board did not ignore alleged disparities in the Company's enforcement of the misappropriation rule

In a related argument (Br 20-23), the Union attempts to show that the Company disparately enforced its misappropriation rule. However, it does little more than repeat its erroneous claim that the Board ignored the testimony of employees who claimed to have taken trash without permission and without consequence. As just discussed, however, the Board fully considered that

[10] Likewise, the Union cannot rely (Br 16-19) on Board cases addressing situations where, unlike here, the administrative law judge simply ignored testimony that diverged from his conclusions. *See PPG Aerospace Indus., Inc.*, 353 NLRB No. 23 (2008); *St. Francis Medical Center*, 347 NLRB No. 35 at * 1 n.9 (2006).

evidence. Thus, while the Board did find that some lower-level managers had not always strictly enforced the misappropriation rule, it also reasonably found that upper management had, and that the decisions to discharge Esparza and Stoliarova had flowed from the stricter enforcement of the rule by the senior managers who made the final discharge decisions. The Union does not directly address these findings, much less discredit them, because it chooses instead to simply repeat the Board's other finding that some lower-level managers had been less strict in applying the rule. Accordingly, the Union never comes to grips with the other credited evidence, discussed above, showing that the Company had applied the misappropriation rule to discards and had informed employees not to remove trash without permission. [11]

Finally, what the Union styles as "dramatic disparities" (Br 19) turn out to be either immaterial or not disparities at all. For example, contrary to the Union (Br 24 n.15), it is irrelevant that other employees were warned, rather than discharged, for eating almonds on the production line. That conduct is subject to separate rules—"good manufacturing practices"—that call for warnings, not discharges. Likewise, the Union gains little by noting (Br 12) that one lower-level

[11] And even when the Union attempts to rebut this evidence, it actually underscores the reasonableness of the Board's findings. For example, it claims (Br 10, 25) that Gutierrez's discharge in 2003 is inapposite because he took items that may have been valuable or contaminated. As noted above (note 8), however, the Company reasonably believed that Esparza also took a potentially dangerous item that could subject it to liability.

supervisor thought that employees could take discarded soda cans without permission. Even putting aside how this personal view was not official company policy, it was based on the assumption (ER 611) that the cans were owned by the employees themselves, an assumption which clearly does not apply to the items taken by Esparza and Stoliarova.[12]

3. The Board did not fail to attribute the actions of company agents to the Company

As discussed, the Board found that senior management had consistently enforced the rule, even if some lower-level managers had not. The Union misconstrues (Br 23-26) this two-tiered analysis as failing to attribute the actions of company agents (the lower-level managers) to the Company. To the contrary, the Board fully attributed the actions of both lower-level and senior management to the Company. (ER 3-7.) It did so by properly recognizing the place that each of those actors and their actions had within the Company's decision-making process. Thus, the Board found that company security and lower-level managers were responsible for conducting the initial investigation and referring the incidents to senior management, who, in turn, finished the investigation and rendered a final

[12] Moreover, the Union is wrong to the extent it suggests that the lower-level supervisory conduct at issue here is at odds with the strict application of the misappropriation rule that led to the discharges of Stoliarova and Esparza. Rather, as noted, Stoliarova's first-line supervisor had just reminded her and other employees not to take anything, including trash, without permission. Likewise, Esparza had previously sought permission from his front-line supervisor prior to removing discarded or broken items.

disciplinary decision. The Board then carefully analyzed each step that management took in dealing with the Esparza and Stoliarova incidents and reasonably found that the decision-maker at each step was motivated by the employees' rule violations, and not their protected conduct. (ER 3-7.)[13]

4. The Board did not fail to consider evidence of animus from *BDG I*

Finally, the Union (Br 26-30) misses the point when it attacks the administrative law judge's finding that the General Counsel failed to establish the third element of his prima facie case: that the Company's actions were motivated by antiunion animus. The Board assumed *arguendo* that the General Counsel had met his burden of showing animus, but found that the Company had met its *Wright Line* burden by showing it would have discharged the employees even absent their union activities. Thus, contrary to the Union's assumption, the issue of making a prima facie showing of antiunion animus is not before the Court. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (once employer

[13] The Union also errs to the extent that it suggests (Br 7, 8, 24) that lead person Linda Carter was a supervisor who knowingly allowed Esparza to remove the weed whacker without permission. First, the record shows that Carter was not a supervisor in 2005, the time period in question, and did not have authority to permit Esparza to remove such items. (ER 516, 526-27.) Second, Carter explained that she did not know that Esparza had found the weed whacker on company property, and that Esparza had not asked her for permission to remove any such item. (*Id.*)

establishes *Wright Line* defense, the Board must dismiss the case, notwithstanding any union animus).

Moreover, and in any event, the findings in *BDG I* (ER 817-37) are perfectly consistent with the Board's findings here. In *BDG I*, the administrative law judge found that the Company violated the Act by discharging two other employees months before the discharges at issue here. In that case, unlike here, the credited evidence showed that the Company had not lawfully terminated those employees for violating company rules. Regarding the first discharge in *BDG I*, the judge found that a union and nonunion employee committed the same violation of "good manufacturing practices," which, as noted, is subject to a warning. (ER 823-24, 830-32.) Yet, the union employee was discharged and the nonunion employee received no discipline at all. The judge found that the Company's sole explanation, that the union employee had intentionally contaminated product, lacked any basis in fact and was therefore pretextual. (*Id*.) Regarding the second discharge, the judge found that the Company's claim that it terminated an employee for "sleeping on the job" was pretextual because it conflicted with its supervisor's report of the incident. (ER 833-34.) The opposite is true here, where the Company's thorough investigation of the incidents involving Esparza and Stoliarova, and the past application of the misappropriation rule, all support the

finding that the Company would have discharged them even absent their protected conduct.

In sum, the Board's finding that the Company had met its *Wright Line* burden by showing it would have discharged Esparza and Stoliarova even absent their union activities is supported by substantial evidence and must therefore be affirmed. Accordingly, the Board properly dismissed the complaint and the Court should dismiss the Union's petition for review.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Union's petition for review.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

s/Meredith L. Jason
MEREDITH L. JASON
Supervisory Attorney

s/Gregory P. Lauro
GREGORY P. LAURO
Attorney
National Labor Relations Board
1099 14th Street, N.W.
(202) 273-2945
(202) 273-2971

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board
January 2009
h:\acbcom\Blue Diamond Growers final brief mjgl

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 17	*	
	*	No. 08-74148
Petitioner	*	
	*	Board No.
v.	*	20-CA-32930
NATIONAL LABOR RELATIONS BOARD	*	
Respondent	*	
and	*	
BLUE DIAMOND GROWERS	*	
Respondent-Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,057 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Dated at Washington, DC
this 23rd day of January, 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 17	*	
	*	No. 08-74148
Petitioner	*	
	*	Board No.
v.	*	20-CA-32930
NATIONAL LABOR RELATIONS BOARD	*	
Respondent	*	
and	*	
BLUE DIAMOND GROWERS	*	
Respondent-Intervenor	*	

CERTIFICATE OF SERVICE

I, GREGORY P. LAURO, certify that this brief is identical to the version submitted electronically on January 30, 2009, pursuant to Rule 6(c) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases.

s/Gregory P. Lauro
Gregory P. Lauro
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2971 (Phone)
(202) 273-0191 (Fax)

Dated at Washington, DC
this 9th day of February 2009