

California Almond Growers Exchange d/b/a Blue Diamond Growers and International Longshore and Warehouse Union, Local 17, AFL-CIO.
Cases 20-CA-32930 and 20-CA-33195

September 16, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On May 31, 2007, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel filed a reply brief.¹

The National Labor Relations Board² has considered the decision and the record in light of the exceptions³ and briefs and has decided to affirm the judge's rulings, findings,⁴ and conclusions and to adopt the recommended Order.

¹ On June 19, 2008, the Board denied the Respondent's motion to strike the General Counsel's exceptions.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

³ No exceptions were filed to the judge's recommended dismissal of the complaint allegation pertaining to the written warning of Cesario Aguirre.

⁴ The General Counsel and the Charging Party have 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.

In discussing the discharges of employees Leo Esparza and Ludmilla Stolarova, the judge misstated the Board's test in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel bears the burden of showing that protected conduct was a substantial or motivating factor in the adverse employment action. The elements required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *Intermet Stevensville*, 350 NLRB 1350, 1358 (2007). If the General Counsel makes the required initial showing, the burden then shifts to the employer to show, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. See *Manno Electric*, 321 NLRB 278, 280 *fn.* 12 (1996). Chairman Schaumber observes that the Board and the circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *Ameri-*

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

David B. Reeves, Esq. and *Matt Peterson, Esq.*, for the General Counsel.

Raymond Lynch, Esq. and *Molly Lee, Esq.* (*Hanson, Bridgett, Marcus, Vlahos & Rudy*), of San Francisco, California, for the Respondent.

Kate Hallward, Esq. (*Leonard Carder*), of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial in Sacramento, California, from January 16 through 19, 2007. On March 20, 2006, International Longshore and Warehouse Union, Local 17, AFL-CIO (the Union) filed the charge in Case 20-CA-32930 alleging that California Almond Growers Exchange d/b/a Blue Diamond Growers (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Union filed the amended charge on October 23, 2006. On this same date, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(1) and (3) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

On November 6, 2006, the Union filed the original charge in Case 20-CA-33195 and amended this charge on December 20, 2006. On December 26, 2006, the Acting Regional Director for

can Gardens Management Co., 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 *fn.* 4 (2003), since *Wright Line* is a causation standard, Chairman Schaumber agrees with this addition to the formulation.

In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by discharging Esparza and Stolarova, Member Liebman finds it unnecessary to pass on the judge's finding that the General Counsel failed to satisfy his initial burden under *Wright Line*. Assuming arguendo that the General Counsel met his threshold *Wright Line* burden, Member Liebman finds, in light of the judge's credibility resolutions, that the Respondent demonstrated that it would have discharged the employees for their rule violations even in the absence of their union activity. Although Chairman Schaumber agrees with the judge that the General Counsel did not meet his initial *Wright Line* burden, he also agrees with Member Liebman that, assuming arguendo that the General Counsel met that burden, the Respondent demonstrated that it would have discharged the employees in any event.

Member Liebman finds *Johnson Technology, Inc.*, 345 NLRB 762 (2005), in which she dissented, to be distinguishable. In that case, Member Liebman disagreed with the majority's finding that the employer did not violate Sec. 8(a)(1) of the Act by warning an employee because he used company scrap paper to prepare a union meeting notice. There, the use of the company scrap paper was directly related to union activity, and there was no evidence that the employer had a rule or policy in place prohibiting the use of scrap paper. Here, in contrast, the use of the trash was unrelated to any protected activity; the Respondent maintained a misappropriation rule; and it showed that it had in the past applied this rule to trash in the dumpster, and that it had informed employees that permission was required to remove items from the trash.

Region 20 issued an order consolidating the two cases and a consolidated complaint and notice of hearing alleging, in addition to the above allegations, that Respondent also violated Section 8(a)(1), (3), and (4). Respondent filed a timely answer to the consolidated complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses¹ and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation with an office and place of business in Sacramento, California, has been a grower-owned cooperative engaged in processing and selling almonds and almond products on a nonretail basis. During the 12 months prior to issuance of the complaint, Respondent sold and shipped goods valued in excess of \$50,000 directly to customers located outside the State of California. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The consolidated complaint alleges that Respondent unlawfully discharged employees Leo Esparza and Ludmilla Stoliarova in order to discourage union membership and activities in violation of Section 8(a)(3) and (1) of the Act. The consolidated complaint also alleges that Respondent unlawfully issued a written warning to employee Cesario Aguirre in order to discourage union membership and activities in violation of Section 8(a)(3) and (1) of the Act and, because Aguirre testified for the Union before the National Labor Relations Board in violation of Section 8(a)(4) and (1) of the Act. Respondent avers that Esparza and Stoliarova were discharged and Aguirre was issued a written warning for violations of company rules and not for any reasons prohibited under the Act.

B. Background

Respondent, a California corporation, is a cooperative of almond growers with a manufacturing facility in Sacramento, California. It is engaged in the business of processing and selling almonds and almond products on a nonretail basis. There

¹ The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

are approximately 600 production and maintenance employees at the Sacramento facility.

Following an organizing drive by the Union on April 28, 2005, Respondent filed a representation petition in Case 20-RM-2857 and a charge in Case 20-CP-1078 seeking an expedited election in a unit of its Sacramento facility employees. Thereafter, the Union disclaimed interest in representing the employees and the petition and charge were dismissed on May 9, 2005.

In a prior decision involving these parties, JD(SF)-14-06, based on a hearing held during the period December 5 through 8, 2005, issued on March 17, 2006, and adopted by the Board in the absence of exceptions on May 10, 2006, I found that Respondent in 2005, in response to an organizing campaign by the Union, unlawfully threatened employees with loss of scheduled wage increases, loss of benefits including pension benefits, threatened plant closure and loss of employment and unlawfully interrogated employees about their union activities. In addition, I found that Respondent discharged two employees and warned a third employee for rule violations by applying its rules more strictly in order to discourage the employees' union activities and union membership.

Respondent's handbook for hourly employees provides, at section 4.10 rules of conduct, various rules applicable to employees. Included in these rules is "section I-house rules." Respecting these rules, the handbook states:

The first infraction of the House Rules under this section will result in immediate suspension and probable termination. In the unusual event of a written warning issued in lieu of termination, the written warning will count under the discipline standards established under the Section II-House Rules.

The enumerated section I rules include:

15. Misappropriation and/or unauthorized possession of Blue Growers' or other employees' personal property or attempting to remove such property from Blue Diamond Growers' premises. [Sometimes referred to as the misappropriation rule.]

The rules also include "section II-house rules" which are explained in the handbook as follows:

A violation of rules in this section will result in a written warning. You will be subject to termination for receiving any of the following:

1. Three (3) or more written warnings in any 12 working month period, or
2. Six (6) or more written warnings in any 36 working month period, or
3. Two (2) written warnings in a season at the outside receiving stations

NOTE: These limits do not apply to employees during their introductory period and do not bind the Company to any progressive discipline process in any case where the Company deems such process to be inappropriate.

The enumerated section II rules include:

1. Failure to comply with the requirements of the Food and Drug Administration's "Good Manufacturing Practices."
2. Failure to report an on-the-job injury immediately to your supervisor.
3. Failure to report a disease or condition which may endanger the health of employees or contaminate any Blue Diamond Growers products.

Respondent also maintains a written policy respecting the "disposition of surplus property" which reserves the disposition of all such property to the discretion of management. Scrap materials under the policy may be given away without charge to employees upon request by completing a specific form dealing with release of surplus property. Scrap materials may not be removed from the premises without a proper authorization form approved by an appropriate manager. Defective and or dangerous items may not be sold but rather should be destroyed.

Finally, Respondent has at relevant times maintained a rule, at section 7.21 of the employee handbook under the subheading "personal safety equipment" which provides:

Wear safety glasses, goggles, or face shields whenever there is exposure to injury from flying particles or splash. Eye protection is required when grinding, cutting, welding or using air tools, including blowing down.

C. Facts

1. The discharge of Leo Esparza

a. The events respecting Esparza

In the summer of 2005, Leo Esparza was an employee with over 20 years of service working swing shift in Respondent's distribution center as a lift-truck operator. His immediate supervisor at relevant times was David Nichols, the distribution center section manager who was under the direction of Warehouse Manager Jerry Spain. In Esparza's work area, Respondent maintained a dumpster. It was Esparza's habit to look in the dumpster before depositing items in the dumpster.

Esparza was listed on the Union's list of 58 in-plant union organizers provided Respondent in April 2005. He was also one of the few employees on his shift in his work area to wear a yellow shirt on Fridays indicating support for the Union. He testified that his support for the Union was known to at least some of Respondent's agents.

Respondent's security staff had observed Esparza on the evening of August 30, 2005, placing something in the trunk of his car which seemed suspicious and determined to place him under observation. The following night, August 31, 2005, during a work break, Esparza discovered and removed from the dumpster a broken weed wacker, a broken broom handle, and a cardboard tube or spindle which held residue of shrink wrap plastic. He had them in an area of the premises and discussed the operability of the weed wacker with other employees. Later that evening Esparza had a brief conversation with lead person Linda Carter. He told Carter he had found a weed wacker and

asked Carter if she had any use for such an item. Carter told him she already had one.

Esparza thereafter proceeded to his car with the items. Respondent's security staff confronted Esparza by his car and discovered he had the noted items. Esparza readily noted he had taken the items from the dumpster. He was asked if he had gotten permission to take the items and he said he did not have permission. Security, in the absence of Supervisor Nichols who was working a split-shift schedule during this period and was not then at work, contacted Carter who also met with security. Esparza was instructed to return the items taken until proper authorization to remove them was obtained. Security thereafter prepared an incident report which was circulated to management. The security department's "miscellaneous incident/observation report" dated September 2, 2005, in essence recited the noted events, including a confirmation that the weed wacker had been disposed of by a gardener due to a severely ruptured gas tank.

On September 1, 2005, David Nichols and Jerry Spain testified they met to discuss the incident and Esparza approached them. They spoke with Esparza. According to an e-mail that Nichols sent later to Spain, Esparza acknowledged that he knew he needed permission to take items and he should have asked before taking the item. Further, Nichols recalled one prior unspecified instance in which Esparza asked for permission before taking Respondent's property. Esparza recalled that he spoke with Nichols that day. Nichols asked him if he knew he needed permission to take the items and Esparza answered that the items were trash and that he did not have permission to take the items. Esparza conceded that he told Nichols he knew he needed to get permission to take the items but had not done so. At the end of the conversation, after Esparza left, Spain told Nichols to conduct an investigation.

Esparza testified to a litany of interviews with management agents regarding the matter in which the same theme was repeated, that he should have gotten permission to remove the items and that he had not done so. He recalled the events were reduced to writing and he signed the writing. He insisted however that in fact he did not believe he had been obligated to obtain permission before removing the items and that he made such statements during this process "to save my job."

Nichols reviewed the security tapes involved, spoke with Linda Carter and asked her to prepare a summary of the events and e-mail it to him. She did so. On September 6, 2005, after having spoken to Carter and considering the matter Spain informed George Johnson, director of employee services, that he was suspending Esparza pending further investigation by employee services. Spain directed Nichols to suspend Esparza that afternoon and he did so.

Johnson interviewed Spain and Nichols on September 8, 2005, and spoke with Esparza on September 9. Esparza recalled that he was asked if he had received permission to take the items and said he had not. He had little further recollection of the meeting other than remembering he was asked to sign a document. Johnson testified that Esparza told him that he knew permission was needed, that he had obtained such permission from supervisors on previous occasions, and offered no excuse

for his conduct other than that he could not find a supervisor at the time.

Johnson met with Spain and Nichols again on or about September 12, 2005, sharing his investigatory notes and asking if they were correct. Each said they were and recommended to Johnson that Esparza be terminated. Johnson then met with Plant Manager Kennedy, and Manager Hills in a management review of the situation. Each reviewed the notes and reports and the history of enforcement of the section I, rule 15 or misappropriation rule quoted above. They agreed with the recommendation to terminate Esparza. Respondent terminated Esparza on September 21, 2005. The relevant charge was filed on March 20, 2006.

b. Additional circumstances relevant to the application of the rule to Esparza

Respondent's rules, including the misappropriation rule is part of the handbook for hourly employees which is issued to employees at the time of their hire. Further, after the discharge of the employee Gutierrez as discussed below, Respondent conducted a departmental meeting in which the misappropriation rule was discussed. This meeting was attended by Esparza. Spain testified he informed employees "they had to have written permission to take anything from Blue Diamond including stuff that was found in the trash, that absolutely nothing could be removed without written authorization." Esparza testified respecting the meeting with a less certain recollection and, while his testimony was variant during the examination, concluded his testimony with the position that he did not hear any speaker specifically state the misappropriation rule applied to taking trash from a dumpster.

At the hearing the parties stipulated to the following:

For the years 2001 through 2006, there have been 76 incidents of discipline involving a Section 1 violation. Of these 76 incidents, 43 have resulted in termination, and 33 have resulted in discipline short of termination, i.e. warnings or suspensions.

Between 2001 and May 2006, Dan Ford maintained 407 liability release forms in his files.

The General Counsel adduced evidence that some of the Respondent's employees had taken discarded items home without incident. In some cases employees had been observed doing so by supervisors or security personnel without incident or consequence. There was also evidence offered that oral permission to take home items was sometimes given by Respondent's agents rather than written permission.

Prior to the termination of Esparza, Respondent had discharged four employees for violation of its misappropriation rule. Two individuals were discharged in 2003 and 2005, respectively for fraudulent use of Respondent's credit card and for stealing a book from an employee's office. Another employee was discharged in the summer of 2002 for "taking cans and packets of almonds and placing them in your pockets, as well as opening packets and eating almonds during working hours." A fourth employee, Norberto Gutierrez, was discharged in June 2003, when caught by security attempting to remove 10 cases of 12 ounce cans of almonds that had been

discarded in a trash dumpster at a time he had neither asked for nor received a property pass or permission to take the almonds.

2. The discharge of Ludmilla Stolarova

a. The events respecting Ludmilla Stolarova

Ludmilla Stolarova, became an employee of Respondent in 2001, and was well regarded. She was also at relevant times an open union supporter who wore the union-supplied yellow shirt at the facility 1 day a week.

On April 27, 2006, Stolarova at work noticed a janitor passing by carrying used cardboard boxes which had held vendor product to the trash. She ask for and received two of the boxes from the janitor and placed them near an entrance. She at no time received permission from Respondent's agents to take the items. At the end of her work period, she exited the facility, taking the two boxes with her. During this process she was observed by fellow employee Pearl Ortiz who asked her if she had obtained permission to remove the items. When Stolarova said she had not, Ortiz warned her that she could be fired for taking the items without permission. Other employees observing her exit exclaimed: "Hope she has permission." Other employees shouted to her repeatedly: "You better get permission."

The next morning, April 28, 2006, an employee reported Stolarova's actions to her lead, adding that she thought Stolarova should be fired. The lead received a like report from another employee and in turn reported what she had learned to Manager Don King. King confirmed the reports received and spoke to Stolarova. He described the conversation:

I talked to Ludmilla [Stolarova] and I asked her if she had taken cartons the day before. She told me that she had and that the next statement she told me is, why I care, because they were for the trash. And I talked to her about, you know, that we had just discussed this in our meeting the previous week, that she had to get permission to remove anything from the plant. She again asserted that they were something that was headed towards the trash and she didn't feel she needed permission to take it. . . . She asked me if people needed permission to collect aluminum cans at the plant. . . . I told her I didn't feel that they did, because the aluminum cans were something that employees had dranken [sic] from and set them off to the side, or they had put them in the trash and something that they didn't—that didn't belong to [Respondent].

King then drafted a memo summarizing these events and sent it to George Johnson. King met with Johnson that afternoon. Johnson instructed King to suspend Stolarova pending further investigation by the employee services department. Stolarova had left work at that time, but the next morning upon her return, King and Johnson told her she was suspended. Johnson told her to prepare notes respecting the incident and that he would be in contact with her.

Johnson continued his investigation, interviewing Stolarova on May 3, 2006. She also provided a written statement. Stolarova in essence repeated her earlier report and noted that she discounted the comments of a fellow employee telling her she needed permission to take the boxes because she believed the

employee was referring to the contents of boxes rather than simply empty boxes. Johnson interviewed the employees who had made comment to Stoliarova. These individuals both confirmed their earlier reports regarding their comments to Stoliarova and confirmed that they each understood that the rule was that an employee had to have the permission of a supervisor to remove anything from the facility.

Thereafter, Johnson met with Plant Manager Kim Kennedy. The two reviewed the matters revealed in the investigation and concluded Stoliarova's conduct violated rule 15, Johnson recommended her termination, Kennedy agreed. Johnson terminated Stoliarova on May 4, 2006. Both Kennedy and Johnson denied having any knowledge of Stoliarova's union activities during these events.

b. Additional circumstances relevant to the rule

A 1-hour safety meeting attended by Stoliarova and her fellow department employees was conducted on April 21, 2006—just days before the Stoliarova events described above. Manager Don King testified he reminded the employees they needed to get permission to remove anything from the plant, including from the trash or dumpsters. Lead Ana Avila testified King told the employees that anything they wanted to take out of the building needed a permission slip. She recalled he mentioned taking cartons, anything out of the dumpster. Other employees testified on behalf of the General Counsel that King said in the meeting that employees needed a permission slip to take anything out of the building, but that he did not specifically mention the trash or the dumpsters.

3. The written warning of Cesario Aguirre

Cesario Aguirre is and has been an employee of Respondent for 28 years as of the time of the hearing. His last 10 years of service has been as a mechanic in the maintenance department. His name was on a list of 58 employees sent to Respondent in mid-April 2005 naming the Union's in-plant union organizers and he wore the union-provided yellow shirt each Friday in support of the Union. Further he testified in December 2005, in the hearing underlying my earlier decision, cited *supra*, concerning a May 5, 2005 conversation with Manager and Safety Trainer Martin Basquez, Maintenance Department Manager Dan Ford, and Chris Silva. His testimony was credited and a violation of the Act sustained based thereon.

In 2002, Aguirre was seriously injured in an on the job accident in the maintenance department. Respondent's witnesses testified this event motivated them to improve safety procedures. In consequence they identified safety issues on the job and instituted an intensive safety campaign. Part of that campaign involved discussion of the required and proper wearing of personal protective equipment such as eye goggles. Employees were instructed to report all safety problems. In addition, various equipment including drill presses were marked with signs noting: "warning-safety glasses or goggles must be worn while operating this equipment." The General Counsel adduced evidence challenging the assertion that the sign was posted before the warning was issued. Respondent's witnesses testified the sign had been up before the event.

On January 9, 2006, Aguirre was operating the drill press wearing safety glasses. He removed his glasses and placed

them on an adjacent table and then inspected the depth of a hole in the item he was drilling. The drill was withdrawn from the item being drilled, but the press was on and the chuck and drill were rotating. Maintenance Department Supervisor Dan Ford observed this event, approached Aguirre and told him to wear his safety glasses. Aguirre replied that he had just taken them off to check the work and forgotten to put them back on. Ford thereafter contacted Basquez, Aguirre's direct supervisor, and reported the matter to him. Basquez in turn contacted department lead Roger Wiseman and instructed him to learn the specifics. Wiseman spoke to Aguirre who reported as above. Basquez asked Wiseman and Ford to prepare statements and wrote one himself. He also contacted his supervisor, Daryl Nelson, to discuss the matter. Nelson and Basquez agreed that Aguirre had committed a safety violation. In consequence Basquez drafted a written warning.

The next day, Basquez called Wiseman, Ford, and Aguirre into his office and asked Aguirre to explain the event. Aguirre stated he wears his safety goggles all the time but had taken them off only for a very brief period to inspect the depth of the hole being drilled and the drill was not engaged. Basquez gave Aguirre the warning and asked him to sign it but Aguirre refused. The warning in the comment portion stated:

On January 9, 2006 at approximately 10:00 am, Dan Ford, Maintenance Manager was walking through the main shop and saw you drilling on the drill press without your safety glasses on. Dan noticed your safety glasses were sitting on the drill press table next [to] you. When he told you that you needed to wear your safety glasses while using the drill press, you stated you had just taken them off. You are required to wear your safety glasses at all times while using the drill press. Not wearing you[r] safety glasses is a violation of House Rules section II number 8 regarding safety rules, signs, or instructions.

In the period from March 2004, through January 11, 2006, Respondent had issued written warnings to five other employees for failure to wear safety eye covering and had also issued oral warnings. In some cases the written warnings were issued after oral warnings.

D. Analysis and Conclusions

1. The discharge of Leo Esparza

In cases involving dual motivation, the Board employs the test set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). Initially, the General Counsel must establish by a preponderance of the credible evidence that antiunion sentiment was a "motivating factor" for the discipline or discharge. This means that General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line*, *supra* at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004). Al-

ternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services*, supra:

To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

If the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line*, supra at 1088 fn. 11.

The General Counsel has established both Esparza's union activities and the knowledge or constructive knowledge of those activities by Respondent. There is no doubt that Esparza took the actions for which he was terminated. The issue as to Esparza is whether or not the conduct was the reason for the discharge rather than his protected union activities. It is therefore the termination process that must be examined. The termination of Esparza involved multiple steps and multiple actions by the agents of Respondent involved. Each must be evaluated under the standard set forth above.

First, I find that the actions of the security personnel did not involve disparate treatment of Esparza compared to other employees. Thus, I find that the initiation of the meetings respecting the incident was not improper. I further find that the investigation of events as described above followed consequentially from the actions of security and the issuance of a security report and was not evidence of disparate treatment of Esparza or evidence of actions taken against him because of his union activities or to discourage the union activities of others.

Having gotten past the investigative process, scrutiny must fall on the discharge recommendations of Respondent's agents, as described above, that ultimately caused the discharge. Here the arguments regarding the misappropriation rule and its application both historically and as applied to Esparza ripen. I have considered the demeanor of the witnesses, the arguments of the parties on brief and the record as a whole on this critical issue. I find that the General Counsel has not met his initial burden to show that antiunion sentiment was a "motivating factor" for Esparza's discharge.

I reach this conclusion because I parse the history of enforcement of the misappropriation rule into two rough catego-

ries. The first category of rule application is the shop floor informality of employees and leads or first-level supervision who, as the General Counsel's evidence shows, did not with strict consistency require written or even oral permission to allow employee removal of discards from the premises. The second category of rule application is the actions of higher management when confronted with more formal post investigation situation such as that presented herein. At that secondary level—and I have found that the Esparza incident reached that level benignly and not by improper actions of Respondent—Respondent has demonstrated that the rule is enforced more strictly and consistently. Considering the context, I find that the General Counsel has not been able to demonstrate by a preponderance of the credible evidence that the discharge recommendations involving Esparza were based on antiunion sentiment. Finally, given the recommendations made, I find there was no antiunion animus in the final discharge decision taken or its being carried out as set forth above.

Given this finding, it follows that the General Counsel has failed to prove that Esparza was fired for union activities as alleged in paragraph 6 of the complaint. Therefore I shall dismiss those complaint paragraphs that apply to Esparza.

2. The discharge of Ludmilla Stoliarova

My analysis of the discharge of Stoliarova applies the same analytical framework used to consider the discharge of Esparza. I find the General Counsel has established her union activities and that her union activities were known to Respondent's first level supervision and therefore constructively known by higher management even given the testimonial denials noted above.

Stoliarova's circumstances involved Respondent's actions in several steps. Considering the events up to the point King was involved, I find there is no evidence that antiunion or protected conduct informed the process. Thus I find that it must be the actions of King and beyond that are to be scrutinized.

Considering the testimony of the witnesses and their demeanor as well as the arguments of the parties and the record as a whole, I find that King took the actions he did based on his understanding of the rule and his belief that Stoliarova, who attended the earlier meeting and heard what King said about misappropriation, knew or should have known she was breaking the rule in behaving as had been reported to him.

I further find that, once the matter was placed before the higher management agents by King, and for the same reasons as set forth in my analysis of the Esparza discharge supra, their strict view of the misappropriation rule led first to the broader investigation of the underlying event and then to recommendations to discharge Stoliarova and the subsequent decision to discharge her. I credit the testimony of the decisionmaker that their conduct turned on their application of the misappropriation rule. I therefore find that the General Counsel failed to establish consistent with the analytical framework set forth above, that Stoliarova was discharged in violation of the Act.

Given this finding, it follows that the General Counsel has failed to prove that Stoliarova was fired for union activities as alleged in paragraph 6 of the complaint. Therefore I shall dismiss those complaint paragraphs that apply to Stoliarova.

3. The written warning of Cesario Aguirre

The General Counsel has established Aguirre's union activities, his testimony in the earlier unfair labor practice proceeding and the fact that his testimony was not supportive of Respondent in that proceeding. The warning he received is established as well at the circumstances surrounding it. The same analytical approach as undertaken in resolving the earlier allegations applies here.

The parties argued the application of the quoted safety rule to the situation presented. The General Counsel takes the position, as did Aguirre in the disciplinary process, that the rule did not apply to a situation where a drill press, while running in the sense that the drill and chuck were spinning under power, was not running in a manner involving a need for safety if it did not have its drill in contact with the item being drilled. Thus to the General Counsel and the Charging Party, the cited safety rule did not apply to Aguirre's conduct but rather had been, in a sense forced on the situation revealing the false and pretextual nature of the justification. Such an unreasonable and pretextual rationale for the Respondent's actions, the General Counsel argues, supports a finding that the true reason for the warning was the employee's union activities and his testimony at the unfair labor practice hearing.

Considering the testimony of the witnesses and their demeanor as well as the arguments of the parties and the record as a whole, I reject the General Counsel's argument that the safety eye covering rule did not reasonably or logically apply to Aguirre's situation as observed by Maintenance Department Supervisor Dan Ford. Rather, I find in agreement with Respondent, that the safety rule applied to require wearing of safety eye covering during any and all employee actions—even if the drill was not in contact with the item to be drilled on the drill press at any time the drill and chuck are under power and spinning. I find that it was reasonable for Respondent's agents to interpret the rule in that manner and that it was also reasonable for them to believe employees understood the rule in that way. The General Counsel's offered distinctions that eye protection is needful only when the drill is engaged by contact with the item being drilled is not correct as a matter of logic or reason. A spinning drill and chuck are hazardous and a potential risk to propel objects inadvertently put in contact with them into an operator's eyes. Further, the protocol requiring universal at all times when the drill press is under power, has the benefit of simplicity which makes it easier for employees to comply with it consistently. To determine if the Respondent's agents acted benignly in taking the decisions they did I must determine if Respondent's agents involved in the matter interpreted the rule as requiring Aguirre to wear safety eye covering in the circumstances observed. I find that they did. I further find they believed he had violated the rule as written and applied.

Having found the actions of Aguirre were in clear violation of the safety rule, I further find that the issuance of a written warning by Ford was not disparate treatment supporting the General Counsel's argument. The violation occurred under Ford's nose and he reacted immediately. There was no dispute as to what had occurred, only the conclusions respecting whether the conduct was proper, prohibited, or inconsequential. I find that Ford did not find it to be either proper or inconsequential and acted nondiscriminately in reporting it to his superiors. Thereafter the process, as occurred with Esparza and Stolarova, noted supra, took the matter to higher officials who, like Ford, I find viewed the rule rigorously and would be expected to take perceived safety violations seriously. Given these findings I find the written warning was issued based on Respondent's belief the safety rule was broken and the warning was a proper response to such a rule violations. I further find it was not issued for any other reasons.

Given these findings, it follows that the General Counsel has failed to prove that Aguirre was issued a safety warning because of his union activities or because of his testimony in the earlier unfair labor practice hearing as alleged in paragraph 6 of the complaint. Therefore I shall dismiss those complaint paragraphs that apply to Aguirre.

4. Summary and conclusion

The complaint alleges two wrongful discharges and a wrongful written warning in violation of Section 8(a)(1), (3), and (4) of the Act. I have found in each instance the General Counsel has not sustained the allegation. I have further determined the relevant allegations of the complaint be dismissed. It follows and I find that the complaint should therefore be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate the Act as alleged in the complaint.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended²

ORDER

The complaint is dismissed in its entirety.

² All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.