



**Supplemental Material
Received at the Meetings of
City Council
Redevelopment Agency
Housing Authority
Financing Authority
for
November 9, 2006**

Item 22: Resolution Supporting Employees of Blue Diamond Growers

1. Correspondence:

- a. Douglas D. Youngdahl, President, Chief Executive Office-Blue Diamond Growers
- b. Support Blue Diamond Workers –signed by various City and State representatives
- c. Leonard Carder, LLP-Unfair Labor Practice Charges against Blue Diamond Growers by International Longshore & Warehouse Union, Local 17 (AFL-CIO)
- d. International Longshore & Union Warehouse Union (AFL-CIO) Media Advisory-Acto City Council puts Blue Diamond workers on the agenda (11-08-06)
- e. International Longshore & Union Warehouse Union (AFL-CIO) Media Advisory –Blue Diamond faces hearings on new labor law violations (10-25-06)
- f. SN&R News Review. Com -Blue Diamond Battle on two fronts
- g. International Longshore & Union Warehouse Union (AFL-CIO)-Bulletin Neutrality Makes a Fair Vote Possible (10-13-06)
- h. International Longshore & Union Warehouse Union (AFL-C)-Bulletin Background on the National Labor Relations Board's Decision and Petition for Injunction Against Blue Diamond Growers-March 2006 (6-50-06)

22a



Blue Diamond Growers

DOUGLAS D. YOUNGDAHL
PRESIDENT
CHIEF EXECUTIVE OFFICER

VIA HAND DELIVERY

November 7, 2006

Honorable Mayor Heather Fargo and
Members of the City Council of the
City of Sacramento
915 I Street - City Hall
Sacramento, CA 95814

Re: Proposed Resolution Number 22

Dear Mayor Fargo and Members of the Council:

A concerned citizen just provided me with a copy of a resolution under consideration by the Sacramento City Council at their November 9, 2006 meeting. The resolution is entitled "Supporting Employees of Blue Diamond Growers."

Since Blue Diamond Growers has not been advised by the City of Sacramento about the resolution nor have we been asked to provide any input, I would like to provide the following:

1. In light of our long working relationship with the City of Sacramento, Blue Diamond Growers is greatly disappointed that the City Council would consider adopting such a resolution without consulting us.

Consideration of this resolution is made more difficult because the Sacramento City Council is reviewing the resolution without advising or asking Blue Diamond Growers for input. In our democratic society, I find it difficult to understand why elected officials would want to consider such an action without input from all involved parties. The key issue being discussed is the right of employees to choose to be represented or not to be represented. It is imperative that Blue Diamond's position on this matter be understood.

2. Blue Diamond believes strongly in our workers' right to choose whether or not to be represented by a labor union.

Our belief is so strong that in April 2005, Blue Diamond Growers petitioned the National Labor Relations Board (NLRB) for a representation election so our employees could decide if they did or did not want to be represented. As a result of this action, the International Longshore & Warehouse Union (ILWU) filed a letter with the NLRB that stated that they had no interest in representing workers at Blue Diamond's Sacramento facility. This meant that an election was not conducted and our employees were denied the right to make a choice.

3. Blue Diamond believes that our employees' freedom to choose should be conducted through a secret ballot election process.

The use of a neutrality agreement and card check procedure takes away an employee's right to choose. A neutrality agreement and card check procedure is a contract between a union and a company that bypasses the election process. It also means that an employee can be asked to

Mayor Fargo and
Members of the City Council
Re: Proposed Resolution Number 22
November 7, 2006
Page 2 of 2 Pages

execute a signature card in front of others. A secret ballot election supervised by the NLRB allows the employee to make his/her choice freely without intimidation by anyone in the privacy of a voting booth.

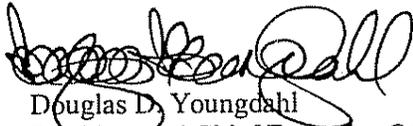
4. The resolution itself is flawed.

Blue Diamond believes that the operative language of the resolution is framed in a manner intended to mislead. Recital M and Section 2 of the resolution, in particular, are inflammatory, and frankly quite insulting to a company which has been a mainstay of the Sacramento business community for nearly 100 years.

We are extremely disappointed in the actions taken by the Sacramento City Council in considering this resolution without gaining input from Blue Diamond Growers. Although this action immediately impacts Blue Diamond Growers, it also affects the entire Sacramento business community and threatens the future ability of Sacramento to attract and retain businesses.

I ask that this resolution be dismissed without further consideration.

Respectfully,



Douglas D. Youngdahl
President and Chief Executive Officer

Attachment: Resolution Number 22

c: Ray Kerridge, Sacramento City Manager
Allen Zaremberg, California Chamber of Commerce
Matthew Mahood, Sacramento Metro Chamber
Barbara Hayes, SACTO

RESOLUTION NO.

Adopted by the Sacramento City Council

Date

SUPPORTING EMPLOYEES OF BLUE DIAMOND GROWERS

BACKGROUND

- A. The City of Sacramento's guiding vision is to be the most livable City in America
- B. Achieving the City's vision requires a strong economy with a skilled workforce and good paying jobs.
- C. The City has previously adopted a Living Wage Ordinance and consistently supported the rights of workers to join and support labor unions of their own choosing
- D. Labor unions have traditionally played a vital and historic role in raising the living and working standards of all Americans.
- E. The City values its historic relationship with Blue Diamond Growers, which has been headquartered in Sacramento since its founding in 1910 and is the largest almond processing facility in the world, exporting 70% of its almonds to world markets and relying heavily on its positive brand name identification.
- F. The City entered into a set of agreements in 1995 with Blue Diamond to provide significant economic and operational benefits to Blue Diamond in exchange for their commitment to retain and expand its Sacramento plant, and continue to employ at least 700 full-time equivalent employees in Sacramento.
- G. Blue Diamond has since flourished economically, with its revenues growing by 45% over the last two years, according to recent statistics published in the Sacramento Business Journal.
- H. A number of Blue Diamond employees have joined the International Longshore and Warehouse Union (ILWU) in a campaign to organize the Blue Diamond workforce.
- I. The National Labor Relations Board has issued a ruling finding that Blue Diamond violated over 20 separate counts of federal labor law.
- J. On October 23, 2006, the National Labor Relations Board (NLRB) issued two new complaints against Blue Diamond Growers alleging that: (1) Blue Diamond Growers violated the Act by disciplining a worker due to his union support and for giving testimony during an unfair labor practice hearing; and (2) for discharging an employee due to his union activities.
- K. The National Labor Relations Board specifically ordered Blue Diamond to rehire two fired workers with full back pay plus interest.

L. The National Labor Relations Board has ordered Blue Diamond to post a signed notice throughout its plant for a period of sixty days to inform employees of the company's violations and responsibilities under the law.

M. Blue Diamond has admitted no wrongdoing, but some of their workers report that they continue to feel intimidated and threatened.

**BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL
RESOLVES AS FOLLOWS:**

Section 1. The Council supports the workers of Blue Diamond Growers in their efforts to gain a voice at their workplace, and

Section 2. The Council expresses its disappointment with Blue Diamond for waging an aggressive anti-union campaign and violating the National Labor Relations Act; and

Section 3. The Council calls on Blue Diamond to enter into a neutrality agreement with the ILWU and allow the workers of Blue Diamond to make a decision about unionization through a card check procedure.

PLEDGE TO

Restore Workers' Freedom to Form Unions

I pledge to the people of my state, district, and/or community and to the American people that I will work to restore workers' freedom to form unions.

I will:

- Fully support the principle that all workers are entitled to freedom of association at work, as recognized by the International Labour Organization, and I support the right of workers to form a union and bargain collectively in an environment free of interference, intimidation, coercion, harassment, reprisals or delay.
- Publicly support workers who are forming unions by reaffirming the importance of unions to our communities and by taking actions such as contacting employers and urging them not to interfere with employee free choice, issuing public statements, attending rallies to support organizing, sponsoring public forums, etc.
- Urge employers to respect their employees' right to form a union, to remain neutral during union organizing campaigns, to recognize a union voluntarily when a majority of their employees choose to form one and to bargain in good faith and negotiate fair contracts expeditiously.
- Endorse the Employee Free Choice Act, which requires employers to honor their workers' decision to join a union after a majority of them sign union authorization cards or petitions; establishes first contract mediation and arbitration; and creates meaningful penalties when workers are interfered with, coerced or fired for attempting to join a union and bargaining a contract.



PLEDGETO

Restore Workers' Freedom to Form Unions

I pledge to the people of my state, district, and/or community and to the American people that I will work to restore workers' freedom to form unions.

I will:

- Fully support the principle that all workers are entitled to freedom of association at work, as recognized by the International Labour Organization, and I support the right of workers to form a union and bargain collectively in an environment free of interference, intimidation, coercion, harassment, reprisals or delay.
- Publicly support workers who are forming unions by reaffirming the importance of unions to our communities and by taking actions such as contacting employers and urging them not to interfere with employee free choice, issuing public statements, attending rallies to support organizing, sponsoring public forums, etc.
- Urge employers to respect their employees' right to form a union, to remain neutral during union organizing campaigns, to recognize a union voluntarily when a majority of their employees choose to form one and to bargain in good faith and negotiate fair contracts expeditiously.

Endorse the Employee Free Choice Act, which requires employers to honor their workers' decision to join a union after a majority of them sign union authorization cards or petitions; establishes first contract mediation and arbitration; and creates meaningful penalties when workers are interfered with, coerced or fired for attempting to join a union and bargaining a contract.

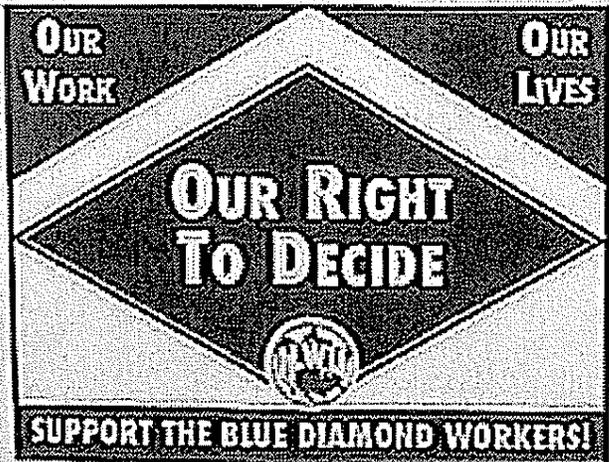
*John...
SAC
Kevin...
Sec. City Council
5/12*

*Benny...
Dist. 10 Council*

*Steve...
Sec. City Council Dist. 11*

*Sarah...
Sec. City Council
District 2
D...
Sec. Council
District 4*

*Don...
Assemblymember
District 10
Arlington*



22c

LEONARD CARDER, LLP

VICTORIA CHIN
LYNN ROSSMAN FARIS
KATE R. HALLWARD
CHRISTINE S. HWANG
JENNIFER A. JAMBOR
ARTHUR A. KRANTZ
DANIELLE LUCIDO
PHILIP C. MONRAD
ELEANOR I. MORTON
ROBERT REMAR
MARGOT A. ROSENBERG
BETH A. ROSS
MATTHEW D. ROSS
PETER W. SALTZMAN
HINA B. SHAH
FRANCISCO UGARTE
RICHARD ZUCKERMAN

ATTORNEYS
1330 BROADWAY, SUITE 1450
OAKLAND, CALIFORNIA 94612

TELEPHONE: (510) 272-0169
FAX (510) 272-0174
www.leonardcarder.com

OF COUNSEL

WILLIAM H. CARDER
NORMAN LEONARD
SANFORD N. NATHAN
KIRSTEN L. ZERGER

SAN FRANCISCO OFFICE
1188 FRANKLIN STREET, SUITE 201
SAN FRANCISCO, CALIFORNIA 94109
TELEPHONE: (415) 771-6400
FAX: (415) 771-7010

PLEASE REFER TO OUR FILE NO.

November 3, 2006

225-171

By facsimile and first class mail

Joseph Norelli, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735
Fax: (415)356-5156

Re: Blue Diamond Growers (20-CA-32930 and 20-CA-32582)

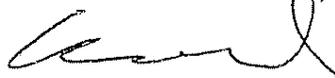
Dear Mr. Norelli:

Attached please find the original plus four copies of an unfair labor practice charge against Blue Diamond Growers alleging that the Employer violated Sections 8(a)(1) and 8(a)(3) of the Act by terminating Ludmila Stoliarova in retaliation for her protected union activity.

Assuming the Region finds merit to this charge, the union respectfully requests that this case be consolidated with Case No 20 CA- 32930 in which the Region recently issued a Complaint. Petitioner makes this request because the two cases involve two strongly related claims and defenses.

Please feel free to contact me with any questions or concerns.

Truly yours,
LEONARD CARDER, LLP



By Kate Hallward

cc: Scott Smith
Peter Olney
Agustin Ramirez
Carey Dall

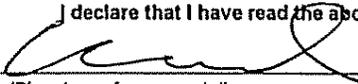


UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS:

File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT		
a. Name of Employer California Almond Growers Exchange, d/b/a Blue Diamond Growers		b. Number of Workers Employed 700 +
c. Address (street, city, State, ZIP, Code) 1802 C Street, Sacramento, CA 95814		d. Employer Representative George Johnson
		e. Telephone No. 916-446-8372
		Fax No.
f. Type of Establishment (factory, mine, wholesaler, etc.) Manufacturing		g. Identify Principal Product or Service Almonds
h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.		
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices.) The Employer violated Sections 8 (a) (1) and (3) of the Act by retaliating against Ludmila Stoliarova because of her Union and concerted protected activities.		
By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.		
3. Full name of party filing charge (if labor organization, give full name, including local name and number) International Longshore & Warehouse Union, Local 17, AFL-CIO		
4a. Address (street and number, city, State, and ZIP Code) 600 4th Street, West Sacramento, CA 95605		4b. Telephone No. (916)371-5638
		Fax No. (510)272-0174
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Longshore & Warehouse Union, Local 17, AFL-CIO		
6. DECLARATION		
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		
By  (Signature of representative or person making charge)	_____ Attorney (Title, if any)	
Address 1330 Broadway, Suite 1450, Oakland, California 94612	Fax No. (510)272-0174 (510)272-0169 (Telephone No.)	November 3, 2006 Date

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

IMPORTANT NOTICE

The date which has been set for hearing in this matter should be checked immediately. If there is proper cause for not proceeding with the hearing date, a motion to change the date of hearing should be made within 14 days from the service of the Complaint. Thereafter, it will be assumed that the scheduled hearing date has been agreed upon and that all parties will be prepared to proceed to the hearing on that date. Later motions to reschedule the hearing generally will not be granted in the absence of a proper showing of unanticipated and uncontrollable intervening circumstances.

All parties are encouraged to fully explore the possibilities of settlement. Early settlement agreements prior to extensive and costly trial preparation may result in substantial savings of time, money and personnel resources for all parties. The Board Agent assigned to this case will be happy to discuss settlement at any mutually convenient time.





Joseph P. Norelli
Regional Director

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

CALIFORNIA ALMOND GROWERS
EXCHANGE d/b/a BLUE DIAMOND
GROWERS

and

Case 20-CA-32930

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 17, AFL-CIO

COMPLAINT AND NOTICE OF HEARING

International Longshore and Warehouse Union, Local 17, AFL-CIO, herein called the Union, has charged that California Almond Growers Exchange d/b/a Blue Diamond Growers, herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S. C. § 151 et seq., herein called the Act. Based thereon the General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The original charge in this proceeding was filed by the Union on March 20, 2006, and a copy was served by first-class mail on Respondent on March 21, 2006.
- (b) The first-amended charge in this proceeding was filed by the Union on October 23, 2006, and a copy was served by first-class mail on Respondent on the same date.
- (c) The first-amended charge, which alleges in relevant part that Respondent violated Section 8(a)(1), (3) and (4) of the Act by disciplining employee Cesario Aguirre due to his union support and activity and in retaliation for giving testimony under the Act, is closely related to the original charge, which alleges in relevant

part that Respondent violated Section 8(a)(1) and (3) of the Act by disciplining employee Cesario Aguirre in retaliation for his participation in union and concerted protected activities.

2. (a) At all material times, Respondent, a California corporation, has been a grower-owned agricultural market cooperative with a facility in Sacramento, California, herein called Respondent's facility, where it is primarily engaged in the business of processing and selling almonds and almond products on a non-retail basis.

(b) During the calendar year ending December 31, 2005, Respondent, in conducting its business operations described above in subparagraph 2(a), sold and shipped from its Sacramento, California facility goods valued in excess of \$50,000 directly to points located outside the State of California.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

David Nichols	-	Distribution Center Section Manager
Jerry Spain	-	Warehouse Manager
Dan Ford	-	Maintenance Department Manager
Martin Basquez	-	Manager

6. (a) About September 21, 2005, Respondent discharged its employee Leo Esparza.

(b) About January 10, 2006, Respondent issued a written warning to its employee Cesario Aguirre.

(c) Respondent engaged in the conduct described above in subparagraphs 6(a) and (b) because the named employees of Respondent formed joined or

assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

(d) Respondent engaged in the conduct described above in subparagraph 6(b) because the named employee of Respondent gave testimony at the unfair labor practice hearing before an administrative law judge of the Board in Case 20-CA-32583.

7. By the conduct described above in subparagraphs 6(a), (b) and (c), Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

8. By the conduct described above in subparagraphs 6(b) and (d), Respondent has been discriminating against employees for filing charges or giving testimony under the Act in violation of Section 8(a)(1) and (4) of the Act.

9. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

NOTICE OF HEARING

PLEASE TAKE NOTICE that commencing at 9:00 a.m. on the 19th day of December, 2006, and on consecutive days thereafter until concluded, a hearing will be conducted at a location to be designated in Sacramento, California, before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

ANSWER REQUIREMENT

Respondent is further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Complaint. The Answer must be **received in this office on or before November 6, 2006 or postmarked on or before November 5, 2006**. Respondent should file an original and four (4) copies of the

Answer with this office and serve a copy of the Answer on each of the other parties. The Answer may not be filed by facsimile transmission. If no Answer is filed, the Board may find, pursuant to a Motion for Default, that the allegations in the Complaint are true.

Form NLRB-4338, Notice, and Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, are attached.

DATED AT San Francisco, California, this 23rd day of October 2006.



Joseph P. Norelli, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

H:\complaints\ca32930

**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD
BEFORE THE NATIONAL LABOR RELATIONS BOARD
IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO
SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT**

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

(OVER)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Case: 20-CA-32930

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds thereafter must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; *and*
- (5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

California Almond Growers Exchange d/b/a
Blue Diamond Growers
George Johnson
1802 C Street
Sacramento, CA 95814
Phone: 916-446-8372

Molly A. Lee, Esq.
Hanson Bridgett Marcus Vlahos & Rudy LLP
425 Market Street, 26th floor
San Francisco, CA 94105
Phone: 415-777-3200
Fax: 415-541-9366

ILWU Local 17
600 4th Street
West Sacramento, CA 95605
Phone: 916-371-5638
Fax: 510-272-0174

Kate Hallward, Esq.
Leonard Carder LLP
1330 Broadway, Suite 1450
Oakland, CA 94612
Phone: 510-272-0169
Fax: 510-272-0174

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CALIFORNIA ALMOND GROWERS
EXCHANGE d/b/a BLUE DIAMOND
GROWERS

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 17, AFL-CIO

Case 20-CA-32583

**ORDER TRANSFERRING PROCEEDING TO THE
NATIONAL LABOR RELATIONS BOARD**

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS HEREBY ORDERED, pursuant to Section 102.45 of National Labor Relations Board's Rules and Regulations, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D.C. March 17, 2006.

Lester A. Heltzer

By direction of the Board:

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the pages attached hereto. Note particularly the limitations on length of briefs and on size of paper, and that requests for extension of time must be served on the parties in the same or faster manner as used in filing the request with the Board.

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of The Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570, on or before

APRIL 14, 2006.

HAS YOUR CONTACT INFORMATION CHANGED?

Please help us update our records by completing and submitting Form NLRB-4701 to the Correspondence Unit in the Executive Secretary's Office, 1099 14th Street, NW, Washington, DC Ph. 202-273-1940 Fax: 202-273-4270.

and

CASE 20-CA-32583

REGIONAL DIRECTOR

EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

REPRESENTATIVE IS AN ATTORNEY

IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 118423 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME: _____

MAILING ADDRESS: _____

E-MAIL ADDRESS: _____

OFFICE TELEPHONE NUMBER: _____

CELL PHONE NUMBER: _____ FAX: _____

SIGNATURE: _____
(Please sign in ink.)

DATE: _____

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

CALIFORNIA ALMOND GROWERS
EXCHANGE d/b/a BLUE DIAMOND
GROWERS

and

Case 20-CA-32583

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 17, AFL-CIO

David B. Reeves, Esq. and
John A. Ontiveros, Esq., of San Francisco, California,
for the General Counsel.

Jerrold C. Schaefer, Esq., and
Molly A. Lee, Esq., (*Hanson, Bridgett, Marcus
Vlahos & Rudy*) of San Francisco, California,
for Respondent.

Jennifer A. Jambor, Esq., (*Leonard Carder*)
of Oakland, California, for the Union.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Sacramento, California on December 5 through December 8, 2005. On June 29, 2005, International Longshore and Warehouse Union, Local 17, AFL-CIO, (the Union) filed the charge in Case 20-CA-32583 alleging that California Almond Growers Exchange d/b/a Blue Diamond Growers (Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). The Union filed the amended charge on August 19, 2005. On October 27, 2005, 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.

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 post-hearing briefs of the parties, I make the following:

Findings of Fact and Conclusions

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 non-retail basis. During the twelve 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. Background and Issues

The complaint alleges that Respondent through its supervisors, on numerous occasions, threatened its employees with loss of benefits and plant closure if they selected the Union as their bargaining representative. The complaint also alleges that Respondent's supervisors, on numerous occasions, interrogated employees about their Union sympathies and made certain promises of benefits to discourage Union activities. The complaint further alleges that Respondent unlawfully discharged employees Ivo Camilo, Mike Flores, and Amado Sabala, and unlawfully disciplined employee Alma Orozco in order to discourage union membership and activities.

B. Facts

1. The Alleged Section 8(a)(1) Statements

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 non-retail basis. There are approximately 600 production and maintenance employees at the Sacramento facility.

¹ The credibility resolutions herein 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 Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, 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.

5 In August 2004, the Union held a series of meetings with some of Respondent's employees interested in Union representation. Thereafter, Augustin Ramirez, an international organizer for the Union held five meetings with employees, from September to December 2004, during which Ramirez gathered information prior to commencing an organizing drive. However, Ramirez did not begin an official organizing drive because he did not believe he had sufficient interest from the Employer's workforce.

10 On October 21, 2004, Respondent sent a letter to employees' homes asserting that selecting the Union as their bargaining representative would erode employer-employee relations and undermine Respondent's market competitiveness. Respondent further sought to discourage employees from signing union authorization cards. The General Counsel does not contend that the October 21, 2004, letter contains any unlawful statements.

15 On or about January 29, 2005, Ramirez held a meeting with employees where he sought volunteers for an organizing committee. Approximately 75 employees attended this meeting and over 35 employees agreed to be part of the organizing committee. Based on this showing of interest, Ramirez began what he termed an official organizing drive. Ramirez held four more employee meetings between February and early March with employees to discuss possible Respondent reaction to the organizing drive.

20 In January Respondent began to react to the organizing drive. From January to early May, Respondent sent numerous letters, bulletins, and fliers and held numerous group and one-on-one meetings with employees expressing its opposition to the Union and the Union's organizing drive.

25 On March 26 Ramirez organized a Cesar Chavez march in Southside Park in Sacramento. More than 50 employees participated, wearing yellow t-shirts with the Union's logo. Employees also held up signs stating, "Blue Diamond Workers Unite, Respect for Hard Work Is All We Ask". The event was covered by local media, coverage that was viewed by Respondent's management staff.

30 On April 15 Ramirez organized another rally in front of Respondent's facility. Approximately 80 employees participated. During the rally employees marched to the front gate and presented a letter from the Union stating that the Union was seeking to organize the employees at the Sacramento facility and naming 58 employees as belonging to the organizing committee. Ivo Camilo, Mike Flores, Alma Orozco and Amado Sabala, the alleged discriminates in this case, were all listed as members of the organizing committee.

35 Thereafter, on April 28, Respondent filed a representation petition in Case 20-RM- 2857 and a charge in 20-CP-1078 seeking an expedited election. However, the Union disclaimed interest in representing the employees and the petition and charge were dismissed on May 9, 2005.

As mentioned above, Respondent began campaigning against the Union in January 2005. Employee Michael Vaughn testified that department manager Dwight Davis held a meeting with employees in the receiving department in January in which he discussed the Union. Davis told employees that if the Union came in, the employees would probably not receive the raise scheduled for September 2005 because the raise would be under negotiation.² Davis said that as a result of negotiations, employees' wages could go up or down. At a meeting in February, Davis cautioned employees against signing anything for the Union as they might be voting for the Union without their knowledge. An employee asked Davis whether Respondent would close its doors if the Union came in. Davis answered, "Anything is possible." Employee Curtis Merjil testified that he attended a meeting held by Davis in January at which the proposed September raises were mentioned. Davis stated that if the Union came in, the employees might not get their raises. Davis testified that he told employees that Respondent would freeze wages and benefits if they selected the Union as their bargaining representative. Davis read a flier which stated that Respondent had "determined that a wage rate change is appropriate" and that employees would receive the increase some time that summer. According to Davis, he stated, "It's my understanding if the Union comes in, it would go to collective bargaining, we would have to freeze everything because it would be considered a bribe, and once it gets to collective bargaining, you need to understand it can go up or down." During this meeting, an employee asked whether the plant would close down if the employees selected the Union. Davis responded "anything's possible." Davis made this comment on more than one occasion.

Employee Violet Renslow testified that in February during a meeting, area manager Don King said that employees would lose their benefits if the Union came in. King said, "You would lose everything. It's all re-negotiable." Patricia Senteney testified that King said that if the Union came in, employees would lose their wages and pension. According to Senteney, King also stated that if the Union got in, the plant would close its doors.

Employee Ivo Camilo testified that senior production manager Ron Lees told him, "Well, I heard that the union tried to get in ". Camilo answered that the employees had not had a raise for some time and that Camilo felt that his \$10 per hour was the equivalent of minimum wage. According to Camilo, Lees answered, "Well. If the Union gets in you can worry about it, the Union succeeds worry about the job, mine included."

Amado Sabala testified that in mid-January, he was approached by department supervisor Francisco Corral in the computer room. Corral said that he had been told to talk to Sabala about the Union. Sabala said he thought having the Union represent the employees was a good idea. Corral answered that Respondent wouldn't allow the Union to do so. Sabala said the employees should have a right to hear from the Union and Corral answered that he did not have a problem with that.

² Respondent contends that no wage increases were scheduled. However, the flier dated January 27, 2005, from Kim Kennedy, Respondent's general manager, stated, "Based on our preliminary assessment, we have determined that a wage rate change is appropriate. The final rate for each position will be dependent on the job descriptions, our internal leveling, and our wage market data. The wage project should be completed sometime this summer." The flier also contained the statement that "We have determined that it is appropriate that Blue Diamond adopt a program of annual wage increases. This change in philosophy allows Blue Diamond (as part of the annual budget process) to determine what amount of increase is appropriate annually." Finally, the last sentence states that the effective date for implementing these changes would be in conjunction with Respondent's new fiscal year, September 2005.

Sabala testified that in mid-February Corral approached him and employee Marcus Johnson. Corral asked if anyone approached the employees about signing anything for the Union. Johnson said he had heard bits and pieces about the Union and then left. Sabala mentioned that he had been a Union member in the past. Corral asked whether the Union had sent Sabala. Sabala answered no.

Employee Alma Orozco testified that supervisor Matt Orlousky asked what she thought about the Union. Orozco answered that her daughter received better benefits than she even though she, Orozco, had worked for the Employer for several years.

Supervisor Kathy Manzer testified that she told employees during a meeting in February that "employees who were members of a collective bargaining agreement would not be able to participate in the pension plan." She also told the employees that the "benefits that they had at the time of union representation would be frozen at that time, and then would be negotiated, that the pension plan as they knew it would no longer exist, based on the information I had from the company." Manzer handed out a flier which included the following question and answer:

Q: Will I be eligible to continue participation in Blue Diamond's pension plan if I am represented by a union?

A: No. Blue Diamond's pension plan has a provision about who is eligible to participate in the plan. It says, ". . . . the following classes of employees shall not participate in the plan an employee who is a member of a collective bargaining unit. . . ."

Matt Orlousky also held a meeting with employees about the pension plan. Tr. 158-159. Orlousky using the same flier as Manzer told employees, "It is my understanding our pension plan, as written, members of the collective bargaining agreement (are) not eligible to participate in our pension plan. In April, Ted Stockton also discussed the pension plan with employees. According to Stockton he said, "If the Union came in, the Blue Diamond pension would be frozen, it would not be lost but it would still be there. Stockton further said that "some employees would have to be vested again," if the Union were voted in. Stockton used the same flier as Manzer, and Orlousky.

Employee Jim Bizallion testified that Ginger Tanaka, a human resources representative, told employees at a meeting that the day a collective-bargaining agreement was signed, the employees' pension through Respondent would stop. Tanaka also said that employees would have to work five years to vest in the Union's pension plan. Employee Randy Reyes testified that Tanaka stated that if the Union came in, Respondent's pension plan would stop and that there would be a negotiation. She said that employees would have to wait five years to vest in the Union's pension plan. Tanaka did not testify.

Camilo testified that in March, supervisor Martin Basquez told him that if the Union got in, the Employer would change its name or move. Employee Larry Newsome testified that in April, Basquez asked why he was wearing a Union t-shirt and then said, "you know if the Union comes in they have the right to fold up or shut the plant and relocate." Basquez then walked away. Alejo (Alex) Cabalona testified that while he and Newsome were in the cafeteria Basquez said, "I don't know why you guys want the Union, the company has a right to shut it down." Basquez denied talking to these employees but admitted telling family members that the Employer would shut down if the Union came in. I credit the testimony of Newsome and Cabalona.

Employee Geri Daveiga testified that in April leadman Scott Moore asked Daveiga, Dora Wagner and Monique Marquel, why the employees wanted the Union. Moore wrote down their responses and said he would present it to the manager of quality control. Moore said that if the Union came in, the plant could shut down. Dora Wagner also testified that Moore asked why the employees wanted the Union and what the Employer could do to make things better; Moore wrote down the employees' comments. Moore said he would present these to the department head. Wagner also testified that Moore said that if the Union came in, Respondent would shut down the plant. Moore did not deny these comments.

Employee Ann Hurlbut testified that in April test room supervisor Janice Peterson called her into a meeting with three other employees. Peterson said that the Union had raised its ugly head again and was trying to organize Respondent. Peterson said that if the Union came in, Respondent would take away wages and benefits and that bargaining would start from nothing, everything would be negotiated. Peterson added that employees could wind up with less in wages and benefits than they currently received. Peterson asked what the employees thought about the Union and Hurlbut answered, "If the election was held tomorrow, I would vote yes for the Union." Peterson did not testify.

Employee Cesario Aguirre testified that leadman Eugene Spyksma called him into a meeting with Basquez, Dan Ford, and Chris Silva on May 5.³ Tr. 190. Basquez handed Aguirre a flier about the Union. Aguirre said you know where I stand and Basquez asked if there was anything that could change Aguirre's mind. Aguirre answered that he did not think so. Basquez and Aguirre then discussed Aguirre's unhappiness with his loss of benefits. Basquez stated that Aguirre should have resolved these issues prior to returning to work. Aguirre answered that Respondent had not been fair. Aguirre mentioned that he favored the Union even before his accident and Ford asked what Aguirre thought the Union could do for him. Aguirre answered better treatment and better wages. Ford answered that if the Union came in, negotiations start and everything starts from zero. Ford then asked whether Aguirre was willing to take that chance. Ford said if the Union comes in, it will drive away the growers. Aguirre said he was willing to take that risk. Silva asked whether Aguirre was willing to risk his pension. Ford said, if the Union comes in, the employees' pension will freeze immediately. Aguirre did not respond. Aguirre spoke about employee unhappiness with certain company policies. The supervisors said the company was working on that and Ford stated that there would be a substantial wage increase in September. Silva asked Aguirre how the employee would vote, if the election were held the next day. Aguirre said he would vote against it because "we are not ready for an election." Shortly after this meeting, Aguirre wrote down certain notes of the highlights of the meeting. Based on Aguirre's demeanor and the corroboration of his notes, I credit Aguirre's version of his conversation with these supervisors.

2. The Terminations of Camilo, Flores and Sabala and the Discipline of Orozco.

Respondent has written procedures for disciplining and terminating employees in its employee handbook. Under Respondent's "Rules of Conduct" there are two types of violations; those which result in immediate suspension and possible termination and those which result in a written warning. However, employees may be terminated if they receive three written warnings in 12 months or six written warnings in 36 months. In the three discharges at issue herein, I find that

³ According to Basquez, the meeting was to discuss Aguirre's unhappiness with the loss of certain benefits due to injury. Aguirre had already discussed the matter with human resources and there was nothing Basquez could do to help Aguirre. I find the purpose of the meeting was to discuss the Union.

the employees engaged in violations of the rules of conduct. The issue in each case is whether, absent union considerations, the employees would have been issued warnings or discharged.

5 In addition to the written warnings mentioned above, Respondent also issues "coachings" both written and oral to employees, whereby a manager counsels an employee regarding a performance problem. Respondent contends that the written coaching given to Orozco did not rise to the level of discipline. However, in other instances, coachings were relied on to determine the level of subsequent discipline. In such instances coachings appear very much like warnings.

10 Ivo Camilo was a 35-year employee with an excellent work history. Camilo attended Union meetings and was listed as a member of the Union's organizing committee. Camilo's support of the Union was well known by his supervisor Ron Lees.

15 On April 18 Camilo was concerned that the almonds on the machine he was operating were stacking too high. Camilo asked for assistance. Employee Janet Brady-Fox and leadperson Joy Mattos came to assist Camilo. Mattos showed Brady-Fox how to move the almonds into the scales to prevent the almonds from stacking too high. After Mattos left Camilo went to assist Brady-Fox. While Camilo was moving the almonds and showing Brady-Fox how to move the almonds around the machine, Brady-Fox noticed blood on the machine and on Camilo's hand.
20 Brady-Fox called the blood to Camilo's attention. Camilo placed pressure on the scratch on his hand and wiped his hand. However, Camilo did not stop the machine, clean the machine and take the proper precautions to assure that no blood contaminated the product. Neither Camilo nor Brady-Fox reported this incident to Respondent's supervision as required by Respondent's "Good Manufacturing Practices."

25 That evening the maintenance crew found traces of blood on the machine. The traces of blood were reported to Lees the following morning. Lees approached Camilo and asked whether anybody cut a finger on the machine. Camilo thinking that Lees meant a severed finger said no, not thinking of the scratch on his finger. Lees then questioned Brady-Fox who told Lees that
30 Camilo had bled on the machine and his hand.

Lees went back to Camilo and questioned Camilo why he had not mentioned the scratch and blood on his hand. Camilo said that Lees had only asked about a cut or severed finger. Lees and Camilo then argued about what Lees had asked. Lees then asked Brady-Fox to write out a statement of what had occurred. Brady-Fox wrote out a statement for Lees in which she
35 mentioned blood on the machine and on Camilo's hand but did not mention blood on the product. Lees did not request a statement from Camilo.

40 Brady-Fox was later interviewed by Andrea Salzman, employee services representative. Salzman, no longer employed by Respondent did not testify. Salzman's notes indicate an intent to build a case against Camilo⁴ Salzman interviewed Brady-Fox but did not speak with Camilo. In her account of her meeting with Brady-Fox, Salzman contends that Brady-Fox observed and pointed out blood on the product to Camilo. I need not and do not credit such evidence. First, Brady-Fox did not mention blood on the product in her uncoerced statement given to Lees.
45 Second, if there was blood on the product, that was so important, Brady-Fox clearly would have mentioned it; and third if there was blood on the product and Brady-Fox had not reported it to

⁴ I admitted Salzman's notes under Federal Rules of Evidence Rule 803 (6). However, I need not, and do not, credit Salzman's self-serving notes. Salzman's notes appear to be written in an attempt to defend the discharge in the event Camilo sought to file a grievance under the Respondent's internal grievance procedure.

supervision, as required by Respondent's good manufacturing practices, Brady-Fox would have received a warning. As will be discussed more fully below, Respondent's willingness to excuse Brady-Fox leads to a conclusion that the purpose of Salzman's "investigation" was to build a case against Camilo

5

On April 21, Respondent discharged Camilo for "intentional product contamination." Lees did not recommend that Camilo be discharged and, in fact, Lees was not consulted about the discharge. While Respondent concedes that Camilo did not intend to contaminate its product, it contends that by intentionally placing his hands in the almonds after learning of the blood on his hands, Camilo committed an intentional act, violative of the rule. General Counsel contends that Camilo's conduct was negligent and not intentional. General Counsel contends that Camilo's misconduct should have been treated as a failure to comply with the good manufacturing practices, which would have only resulted in a warning. Although Brady-Fox violated the good manufacturing practices, she was not given a warning or even a coaching.

10

15

Respondent, after discovering blood on its machine took the proper steps to insure that no almond product was contaminated. The machine was stopped and sterilized. All product that could have been contaminated was isolated and then destroyed.

20

Alma Orozco has worked for Respondent for over 30 years. Orozco had never been disciplined prior to the coaching at issue herein. Orozco was active in the Union organizing drive, wore a Union t-shirt and was listed as a member of the Union organizing team. On May 2, while doing morning stretching exercises before her shift, Orozco sang the words "mighty, mighty, Union." Later that day she was called to a meeting with Salzman, Plant Manager Janet Hills, and Orlousky, her supervisor.⁵ The managers, who were not present for this incident, accused Orozco of having said that "everyone should do exercises for the Union", "this is bullshit," and "money, money, money." Orozco denied the allegations but admitted to singing not "money, money, money" but rather "might, mighty, Union." Hills claimed that Orozco had intimidated other employees. Orozco answered that employees had been permitted to talk about anything at work and that there was no rule against talking about the Union. Orozco testified that she has sung and danced before during the morning stretching exercises. Orlousky admitted that employees often speak in a loud voice because the plant is noisy. The written coaching stated, inter alia, "You did say that during exercises you loudly said mighty, mighty, union. This is considered to be intimidating to others and will not be tolerated in the workplace."

25

30

35

George Johnson, director of employee services, testified that Respondent decided discipline was not necessary. Johnson testified that a coaching was necessary because another employee had objected to Orozco's conduct. Johnson did not explain why the reference to mighty, mighty, union was necessary to the coaching. Orlousky had never before given a written coaching. He further testified that this was the first time Hills was present for an investigatory interview. Hills had never before been involved in disciplinary warnings given out by Orlousky. Orlousky did not make any attempt to question the person leading the stretching exercises or any attempt to determine whether the complaint against Orozco was a result of a personal conflict.

40

45

Mike Flores had worked for Respondent since 1985. He was active in the Union drive and was listed as a member of the Union organizing committee. On June 4, Flores directed a crew of four employees, including him, in the packaging, labeling, and palletizing of almond paste. On this

⁵ Hills no longer employed by Respondent did not testify. It was never explained why Salzman and Hills were present for a coaching about such a minor incident. I draw the inference that they were present because of the Union implications of this incident.

date production was off schedule due to an injury to a crew member. However, by 9:35 a.m., the crew was caught up with production.

5 During the morning of June 4, Ron Lees walked through the paste room area and did not observe Flores.⁶ Lees questioned two employees but they did not know where Flores was. Lees found Flores in an area behind two cabinet doors. The cabinet doors were open in a manner which concealed the space between the cabinets. Lees moved the doors and found Flores sitting there. This occurred shortly before 9:35 a.m.

10 Flores' eyes were not shut and Lees admitted that he did not believe Flores was asleep. Lees took Flores to the plant lobby where they could speak privately. Lees asked what Flores was doing and Flores answered that he was resting his eyes. Flores said he was "caught up on his work and was just resting his eyes for three minutes until the next batch of almond paste was ready." Lees told Flores that he could not be hiding during work time and told Flores to go back to
15 work. Lees then called Stockton at his home.

20 On June 6, Lees and Salzman met with Flores. Flores said that he had a headache on June 4 and that was why he was resting his eyes. Hills had earlier instructed Lees that Flores was to be suspended for "taking a rest during work during work time" Flores was suspended pending investigation. Salzman allegedly undertook an investigation. On June 10, Salzman and Lees terminated Flores. Johnson testified that Doug Gendal, Respondent president, Kim Kennedy, general manager, and Janet Hills made the decision to terminate Flores based on Salzman's report.⁷

25 The termination letter drafted by Salzman with Lees' signature states that Lees "opened the locker doors and found you sitting down, your back against the wall and your eyes shut. The discharge form also states, "You had [been] previously counseled regarding inappropriate work behavior (sleeping on the job) incident.

30 The earlier counseling referred to in the termination letter, refers to an incident in April, where supervisor Dwight Davis found Flores sitting with his feet up in the work area. Although Respondent treated this as sleeping on the job to justify the June discharge, in April it did not treat the incident as sleeping on the job but rather as a situation where, Flores although not sleeping, gave the wrong impression. Respondent claimed that Stockton had counseled Flores about
35 sleeping on the job. Stockton concluded that Flores was not sleeping. While Stockton had spoken to Flores in April, he gave Flores no written warning or written coaching, Stockton counseled Flores about sleeping on the job and to stay in his work area. Although Respondent relied on the April coaching, Respondent terminated Flores without contacting Stockton.

40 Respondent contends that Flores was discharged because he was not doing work and hiding from his supervisor and, because he had been previously counseled by Stockton about not working during work time. Based on Flores' prior incident, Respondent contends that Flores engaged in "a willful disregard of instruction."

45 Stockton testified that he was told by Lees that Respondent was using the April incident to discharge Flores. Stockton was not contacted by Respondent prior to Flores' termination. Neither Stockton nor Lees recommended that Flores be discharged.

⁶ Lees was acting as Flores supervisor that day as Ted Stockton manager was on vacation.

⁷ Gendal, Hills and Kennedy did not testify.

Amado Sabala worked for Respondent for over 2 years. Sabala was a Union supporter and listed as a member of the Union organizing drive. On June 8, Sabala was working on an almond drying machine and shortly before the lunch break Sabala shut down his machine for cleaning. According to Sabala he told employee Walter Avila that he was going to rest inside the machine during the lunch break.⁸ Sabala testified that he previously received permission to rest in the machine during lunch from Corral his supervisor. Corral denies giving such permission. I credit Corral.

According to Sabala, he went into the machine to rest his back at 3:30 a.m. and that five minutes later supervisors Kenny McGuire and Debenett Stitt approached the machine. The credible evidence shows that these supervisors found Sabala in the machine prior to 3:30 a.m. McGuire asked Sabala to get out of the dryer. After Sabala exited the machine, McGuire accused Sabala of sleeping in the machine. Sabala contended that he had permission to do so. Sabala was placed on suspension and later discharged for sleeping on the job.

The credible evidence shows that Paul Renslow, a leadman, saw Sabala sleeping in the dryer at 3:15 a.m. Renslow notified McGuire. McGuire and Stitt went to the dryer and saw Sabala sleeping. When McGuire questioned Sabala about this incident, Sabala stated that he had permission to take his lunch period at anytime. That testimony is not credited. Corral denied that he gave Sabala permission to rest his back or sleep in the machine. The safety risk would be too great for Corral to permit such conduct. Sabala could sleep during his lunch break but it would have to be in the cafeteria or his car and not in a work area. Sabala was suspended pending an investigation. McGuire recommended that Sabala be discharged for sleeping on the job. In the past, McGuire had ceased using an employee from a sub-contractor because that employee was sleeping on the job. On June 14, Sabala was discharged for sleeping on the job.

C. Conclusions

1. The independent Section 8(a)(1) allegations

a. Threats of loss of wages and benefits

As mentioned above, Davis told employees that if the Union came in, the employees would probably not receive the raise scheduled for September 2005 because the raise would be under negotiation. Davis said that as a result of negotiations employees' wages could go up or down. On another occasion, Davis stated that if the Union came in, the employees might not get their raises. Davis testified that he told employees that Respondent would freeze wages and benefits if they selected the Union as their bargaining representative. Davis read a flier which stated that Respondent had "determined that a wage rate change is appropriate" and that employees would receive the increase some time that summer. According to Davis, he stated, "It's my understanding if the Union comes in, it would go to collective bargaining, we would have to freeze everything because it would be considered a bribe, and once it gets to collective bargaining, you need to understand it can go up or down."

While no amount has been announced, the employees had been notified of a scheduled pay increase in September. Davis told the employees that if the Union was selected that existing benefit would be lost. The Board has held that an employer's threat to withhold employees' scheduled wage increases if they select the union as their bargaining representative

⁸ Avila did not testify. Respondent contends that it checked with Avila who denied knowledge that Sabala intended to rest during his lunch break.

is in violation of Section 8(a)(1) of the Act. *More Truck Lines*, 336 NLRB 772 (2002); *Smithfield Packing Co.*, 344 NLRB No. 1 (2004). Further, Respondent's threat to "freeze" employees' wage levels and deny them their scheduled wage increases if the Union were voted in violated Section 8(a)(1) of the Act. *More Truck Lines, supra*; *Superior Emerald Park Landfill*, 340 NLRB No. 54 (2003). Davis could lawfully tell employees that wages could go up or down but he could not threaten or imply that employees would be deprived of existing benefits if they voted for the Union.

I find that area manager Don King threatened that employees would lose their benefits if the Union came in. King said, "You would lose everything. It's all re-negotiable." King said that if the Union came in, employees would lose their wages and pension. Finally, King stated that if the Union got in, the plant would close its doors. Accordingly, I find that Respondent threatened a loss of benefits and plant closure if the employees selected the Union as their representative.

During a conversation with supervisor Ron Lees, Ivo Camillo stated that the employees had not had a raise for some time and that Camillo felt that his \$10 per hour was the equivalent of minimum wage. Lees answered, "Well, if the Union gets in you can worry about it, if the Union succeeds worry about the job, mine included." I find that Lees unlawfully threatened loss of employment if the employees selected the Union as their representative.

Employee Ann Hurlbut testified that in April test room supervisor Janice Peterson called her into a meeting with three other employees. Peterson said that the Union had raised its ugly head again and was trying to organize Respondent. Peterson said that if the Union came in, Respondent would take away wages and benefits and that bargaining would start from nothing. Everything would be negotiated. Peterson added that employees could wind up with less in wages and benefits than they currently received. Accordingly, I find that Respondent threatened a loss of wages and benefits if the employees selected the Union as their representative.

b. Allegations of Interrogation

In mid-February Corral asked Sabala and Marcus Johnson if anyone approached the employees about signing anything for the Union. Johnson said he had heard bits and pieces about the Union and then left. Sabala mentioned that he had been a Union member in the past. Corral asked whether the Union had sent Sabala and Sabala answered no.

The Board's test for determining whether interrogation of employees concerning their union activities or the union activities of other employees is set out in *Rossmore House*, 269 NLRB 1176, 1177 (1984):

Whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.

The Board has said that a totality of the circumstances test must be applied, even when the interrogation is directed to unit members whose union sympathies are unknown to the employer. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Some of the considerations taken into account by the Board in determining whether, under the totality of the circumstances, the interrogation was coercive include: Whether the employee interrogated was an open and active union supporter; whether there is a history of employer hostility towards or discrimination against union supporters, whether the questions were general and non-threatening, and whether the management official doing the questioning had a casual and friendly relationship with employee being questioned. *Sunnyvale Medical Clinic*, supra at 1218.

I find that this interrogation of Sabala and Johnson by Corral, violated Section 8(a)(1) of the Act. There was no evidence that Johnson was an active union adherent. The conversation took place prior to the time that Sabala became identified as an active union supporter. Moreover, the questions went beyond the employees' union activities, if any, and sought information about the union activities of other employees that Sabala and Johnson might be aware of. Combined with the Respondent's numerous unfair labor practices, I find this questioning tended to restrain and coerce employees in violation of Section 8(a)(1).

Employee Alma Orozco testified that supervisor Matt Orlousky asked what she thought about the Union. Orozco answered that her young daughter received better benefits than she even though she, Orozco, had worked for the Employer for several years. This conversation took place prior to the time Orozco became identified as an active Union supporter. In the context of Respondent's other unfair labor practices, I find that this questioning tended to restrain and coerce employees in violation of Section 8(a)(1) of the Act.

At a meeting with four employees, Peterson asked what the employees thought about the Union and Hurlbut answered, "If the election was held tomorrow, I would vote yes for the Union." I find by this conduct, in the context of unlawful threats by Peterson, Respondent violated Section 8(a)(1) of the Act.

c. Statements Regarding Pension Benefits

Supervisor Kathy Manzer told employees during a meeting in February that "employees who were members of a collective-bargaining agreement would not be able to participate in the pension plan." She also told the employees that the "benefits that they had at the time of union representation would be frozen at that time, and then would be negotiated, that the pension plan as they knew it would no longer exist, based on the information I had from the company." Manzer handed out a flier which included the following question and answer:

Q: Will I be eligible to continue participation in Blue Diamond's pension plan if I am represented by a union?

A: No. Blue Diamond's pension plan has a provision about who is eligible to participate in the plan. It says, "... the following classes of employees shall not participate in the plan. . . . an employee who is a member of a collective bargaining unit. . . ."

Supervisors Orlousky, Stockton and Tanaka made similar statements that employees in a collective-bargaining unit were not eligible for Respondent's pension plan. They never mentioned that the Union could negotiate that the employees retain that existing pension benefit. Rather, the supervisors threatened that the existing benefit would be lost. They threatened that the existing benefit would be replaced by a union plan which would not vest for five years. Respondent violated Section 8(a)(1) of the Act by "the suggestion inherent in the exclusionary language that unrepresented employees will forfeit the plans' benefits if they choose union representation." *Ryder Truck Rental*, 341 NLRB No. 109 (2004) citing *Handleman Co.*, 283 NLRB 451, 452 (1987). See also *Lynn- Edwards Corp.*, 290 NLRB 202, 205 (1988) ("It is well settled that an employer violates Section 8(a)(1) through a provision in, or a statement about, a plan that suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining.").

d. Statements Regarding Plant Closure

5 In March, supervisor Martin Basquez told Camilo that if the Union got in, the Employer would change its name or move. In April, Basquez asked Larry Newsome and Alex Cabalona why they were wearing Union t-shirts and then said, "you know if the Union comes in they have the right to fold up or shut the plant and relocate." Basquez then walked away. Basquez made similar statements to family members who were employed by Respondent. I find that by these statements Respondent unlawfully threatened employees with plant closure and loss of employment in violation of Section 8(a)(1) of the Act.

10 During meetings with employees, when an employee asked whether the plant would close down if the employees selected the Union, Davis responded "anything's possible." According to Davis, he made this comment on more than one occasion. I find by this conduct Respondent impliedly threatened employees with plant closure if the employees selected the Union as their representative. *Brunswick Food & Drug*, 284 NLRB 663, 680-681 (1987).

e. Alleged Violations by Scott Moore

20 Employees Geri Daveiga and Dora Wagner testified that in April, leadman Scott Moore threatened that if the union came in, the Employer would shut down. Moore admitted that he told these employees that Respondent might move out of Sacramento, if the Union came in. Moore also admitted asking employees, in this conversation, what their problems were at work and writing down a list of their concerns. Moore told the employees he would take the list to his department manager.

25 Moore is a leadman and General Counsel contends that he is a supervisor within the meaning of the Act. Respondent contends that Moore is not a supervisor and that it cannot be held liable for his statements.

30 In April, Moore was leadman over 30 employees. Moore assigns work tasks to and trains employees. The assignments were made on a rotational basis. Moore can edit time cards but he does not approve them. Moore had the authority to approve vacation requests and to permit employees to leave work early. Moore did not issue discipline but helped compose disciplinary notices and sat in on disciplinary meetings. He would interview job applicants along with the supervisors. The hiring decisions would be made by the supervisors.

35 Supervisory status under the Act depends on whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term "supervisor" as:

40 The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of
45 independent judgment.

In discussing the above statutory definition, the Sixth Circuit declared that Section 2(11) is to be interpreted in the disjunctive and that "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). See also *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002) *Mfg. Co.*, 169 F.2d 571 (6th Cir.

1948), cert. denied 335 U.S. 908 (1948); *Harborside Healthcare Inc.*, 330 NLRB 1334 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998); *Allen Services Co.*, 314 NLRB 1060 (1994); and *Queen Mary*, 317 NLRB 1303 (1995).

5 As the party alleging supervisory status, the General Counsel bears the burden of demonstrating that status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998), and *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998).

10 The record reveals that Moore does not have authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them or to adjust their grievances or to effectively recommend such action. While Moore assigns work, the assignments are made on a rotational basis and do not require independent judgment. His duties regarding timecards do not require independent judgment. While Moore can approve vacation requests and time off, any decisions regarding disapproval are made by the supervisors. While Moore participates in hiring and disciplinary meetings, authority is exercised by the supervisors not Moore. The evidence shows that Moore's responsibilities in those areas are routine and do not require the exercise of independent judgment. See *Los Angeles Water & Power Employees' Association*, 340 NLRB no. 146 (2003); *PECO Energy*, 322 NLRB 1074 (1997); *Chrome Deposit Corp.*, 323 NLRB 961 (1997). Accordingly, I find that
 15
 20 General Counsel has not established that Moore was a supervisor within the meaning of Section 2(11) of The Act or that Respondent was liable for his statements regarding the Union.

f. May 5 Meeting with Cesario Aguirre held by Basquez, Ford and Silva

25 On May 5 leadman Eugene Spysma called Aguirre into a meeting with Basquez, Dan Ford, and Chris Silva. Basquez handed Aguirre a flier about the Union. Basquez asked if there was anything that could change Aguirre's mind. Aguirre answered that he did not think so. Basquez and Aguirre then discussed Aguirre's unhappiness with his loss of benefits. Basquez stated that Aguirre should have resolved these issues prior to returning to work. Aguirre answered that Respondent had not been fair. Aguirre mentioned that he favored the Union even before his accident and Ford asked what Aguirre thought the Union could do for him. Aguirre answered better treatment and better wages. Ford answered that if the Union came in, negotiations start and everything starts from zero. Ford then asked whether Aguirre was willing to take that chance. Ford said if the Union comes in, it will drive away the growers. Aguirre said he was willing to take that risk. Silva asked whether Aguirre was willing to risk his pension. Ford said, if the Union comes in, the employees' pension will freeze immediately. Aguirre did not respond. Aguirre spoke about employee unhappiness with certain company policies. The supervisors said the company was working on that and Ford stated that there would be a substantial wage increase in September. Silva asked Aguirre how the employee would vote, if the election were held the next day. Aguirre said he would vote against it because "we are not ready for an election." I find that in this conversation Basquez unlawfully interrogated Aguirre about his union sympathies. Further, Basquez and Ford unlawfully threatened a loss of benefits if the employees choose the Union as their bargaining representative. Neither Basquez nor Ford disavowed Silva's threat.
 30
 35
 40
 45

2. The discharge of Ivo Camilo

In cases involving dual motivation, the Board employs the test set forth in *Wright Line, A Division of Wright Line, Inc.*, 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 anti-union 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*, 5 251 NLRB 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 No. 123, slip op. at 2 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services, supra*:

10 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 No. 94, slip op. at 3 (2003).

When 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 20 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). 25 Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line, supra*, 251 NLRB at 1088, n. 11.

Ivo Camilo was a 35-year employee with an excellent work history. First, Camilo was engaged in Union activity and Respondent was aware of that activity. Camilo was listed as a 30 member of the Union's organizing committee and Camilo's support of the Union was well known by his supervisor Ron Lees. On April 15, Camilo participated in the rally at Respondent's facility and his name was listed as a member of the Union's organizing committee.

On April 18, Camilo committed a violation of Respondent's "Good Manufacturing 35 Practices." When shown blood on his finger or hand, Camilo took steps to stop the bleeding and wipe the blood, but he failed to report the incident to a supervisor, stop the machine, attend to his cut or scratch, have the machine sterilized and have the product isolated. Janet Brady-Fox also failed to take the proper steps dictated by the good manufacturing practices. Respondent choose to treat Camilo's offense as an intentional offense, intentional product contamination rather than 40 as a violation of its good manufacturing practices (which would have resulted in a warning). However, Respondent chose not to give Brady-Fox, not known as a union adherent, any discipline, not even a coaching. When Brady-Fox originally gave a report to Respondent regarding this incident she did not report blood on the almond product. It was not until an interview, which I find highly suspicious, by Andrea Salzman from employee services, that Brady- 45 Fox mentioned blood on the almond product. As mentioned above, I do not credit Salzman's report or Brady-Fox's testimony that blood was seen on the almond product. While Salzman interviewed Brady-Fox, she never interviewed Camilo. I also note that Lees, Camilo's supervisor was not consulted about this discharge. Under these circumstances, I find that General Counsel has established a prima facie case that Camilo was discharged, rather than being given a disciplinary warning, because of his union activities.

Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employee's union activities. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

As stated above, Camilo violated Respondent's good manufacturing practices and under its rules of conduct would have received a written warning. Respondent contends that Camilo's conduct in placing his hands in the almonds after learning of blood on his finger or hand makes this an intentional act regardless of Camilo's motive. Respondent's hostility towards Union activity evidenced by its numerous unfair labor practices casts great doubt on its motivation. Further, the glaring disparate treatment between Brady-Fox and Camilo leads me to conclude that Respondent's motive was to build a case against Camilo and to rid itself of a union adherent.

Respondent contends that Brady-Fox was not disciplined because she did not normally work in that department, she feared retaliation from Camilo, and she reported the injury to Camilo. I find these reasons especially unpersuasive. While Brady-Fox did not normally work in that area, the employees are all trained that if there is such an injury, the injury is to be taken care of and reported to supervision. The machine is to be stopped and sterilized. The product is to be isolated so that any possible contaminated product can be destroyed. Brady-Fox, like Camilo and all other employees received such training. I simply do not credit the testimony that Brady-Fox feared retaliation from Camilo. There is no suggestion that she recommended to Camilo that they take the proper good manufacturing practices. The contention that Brady-Fox was relieved of her duties because she reported the incident to Camilo is nonsensical. Respondent's rules require reporting such an incident to a supervisor. Further, reporting a violation to the person who committed the violation and who took inadequate measures clearly does not insure compliance with the good manufacturing practices. Thus, after Camilo failed to take adequate measures, Brady-Fox was required to report the incident. I can only infer that she was given a pass because Respondent was more interested in building a case against Camilo than it was in enforcing its good manufacturing practices.

Thus, I find that Respondent has failed to establish that Ivo Camilo would have been discharged in the absence of his union activities. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) by discharging Ivo Camilo in order to discourage union activities.

3. The Written Coaching Given to Alma Orozco

Alma Orozco has worked for Respondent for over 30 years. Orozco had never been disciplined prior to the coaching at issue herein. Orozco was active in the Union organizing drive, wore a Union t-shirt and was listed as a member of the Union organizing team. On May 2, while doing morning stretching exercises before her shift, Orozco sang the words "mighty, mighty, Union." Later that day she was called to a meeting with Salzman, Plant Manager Janet Hills, and Orlousky, her supervisor. The managers, who were not present for this incident, accused Orozco of having said that "everyone should do exercises for the Union", "this is bullshit," and "money, money, money." Orozco denied the allegations but admitted to singing not "money, money, money" but rather "might, mighty, Union." Hills made a vague claim that Orozco had intimidated other employees. Orozco answered that employees had been permitted to talk about anything at work and that there was no rule against talking about the Union. Orozco testified that she has sung and danced before during the morning stretching exercises. Orlousky admitted that

employees often speak in a loud voice because the plant is noisy. The written coaching stated, inter alia, "You did say that during exercises you loudly said mighty, mighty, union. This is considered to be intimidating to others and will not be tolerated in the workplace." Orozco was active in the Union and Respondent was well aware of it. In fact Orozco was disciplined for singing the words "mighty, mighty, Union" although there was no rule against such conduct. I find that General Counsel has established a prima facie case under *Wright Line*.

I find that Respondent has failed to establish that Orozco would have been disciplined in the absence of her union activities. None of Respondent's supervisors were present for the alleged offense and they never spoke to the person in charge. Respondent contended that there was some vague complaint against Orozco but could not adequately explain Respondent's actions. Respondent has not shown that Orozco's conduct lost the protection of the Act. Nor could Respondent explain, other than the Union implications, why the plant manager was present for this coaching. Respondent contends that this coaching is not discipline. That defense is rejected. The record reveals instances, such as the case of Mike Flores, where Respondent relied on coachings to determine the extent of subsequent discipline. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) by issuing a written coaching to Orozco in order to discourage union activities.

4. The Discharge of Mike Flores

Mike Flores had worked for Respondent since 1985. He was active in the Union drive and was listed as a member of the Union organizing committee. Flores was discharged during Respondent's campaign of unfair labor practices. Flores was discharged for conduct which on its face would normally mandate a written warning. During the morning of June 4, Ron Lees walked through the paste room area and did not observe Flores. Lees questioned two employees but they did not know where Flores was. Lees found Flores in an area behind two cabinet doors. The cabinet doors were open in a manner which concealed the space between the cabinets. Lees moved the doors and found Flores sitting there.

Flores eyes were not shut and Lees admitted that he did not believe Flores was asleep. Lees took Flores to the plant lobby where they could speak privately. Lees asked what Flores was doing and Flores answered that he was resting his eyes. Flores said he was caught up on his work and was just resting his eyes for three minutes until the next batch of almond paste was ready. Lees told Flores that he could not be hiding during work time and told Flores to go back to work. Lees did not suspend Flores but was instructed by Hills to do so. Hills intervention in this discipline is suspicious.

On June 6, Lees and Salzman met with Flores and suspended Flores. Neither Lees nor Stockton, Flores' supervisor, recommended suspension or discharge. Salzman allegedly undertook an investigation. Salzman did not speak with Flores or Stockton. On June 10 Salzman and Lees terminated Flores. Doug Gendal, Respondent president, Kim Kennedy, general manager, and Janet Hills made the decision to terminate Flores based on Salzman's report. None of these managers testified to explain their reasoning.

Flores' offense of loafing or not being at his work station was termed sleeping on the job even though Lees admitted that Flores was not sleeping on the job. Further, Respondent relied on an oral coaching to justify escalating this offense from a warning to a discharge. First, in the Orozco incident, Respondent argued that a coaching is not discipline. Second, Respondent did not speak with Stockton to determine the nature of the oral coaching. Thus, I find that General Counsel has established a prima facie case that absent his union activities, Flores would have received a written warning but not been discharged for his conduct in June 4, 2005.

Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employee's union activities. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

Respondent contends that Flores was discharged because he was not doing work and hiding from his supervisor and because he had been previously counseled by Stockton about not working during work time. Based on Flores' prior incident, Respondent contends that Flores engaged in "a willful disregard of instruction." Respondent's argument of willful disregard of instruction seems contrary to its warning system which allows employees three written warnings in 12 months or six written warnings in 36 months. By using the terminology "willful disregard of instruction", Respondent was escalating its established warning system to justify Flores' discharge. Further, Respondent never contacted Stockton to determine the nature of the oral coaching given to Flores. Moreover, to further exaggerate Flores' misconduct, Respondent referred to "sleeping on the job" when neither the June incident nor the prior incident in April involved sleeping on the job. Accordingly, I find that Flores would have received a written warning absent his union activities and that Respondent has failed to establish that Flores would have been discharged absent his union activities.

5. The Discharge of Amado Sabala

Amado Sabala worked for Respondent for over 2 years. Sabala was a Union supporter and listed as a member of the Union organizing drive. He told Corral, his supervisor, that he used to be a member of the Union. Sabala was discharged during Respondent's campaign of unfair labor practices.

On June 8, Sabala was working on an almond drying machine. Shortly before the lunch break, Sabala shut down his machine for cleaning. The credible evidence shows that Renslow, McGuire and Stitt found Sabala in the drying machine prior to the 3:30 am lunch break. McGuire asked Sabala to get out of the dryer. After Sabala exited the machine, McGuire accused Sabala of sleeping in the machine. Sabala contended that he had permission to do so. Respondent investigated and found that neither supervisor Corral nor employee Avila corroborated Sabala's story. Sabala was placed on suspension and later discharged for sleeping on the job. Under Respondent's rules of conduct sleeping on the job is cause for immediate suspension and probable termination. Even assuming that General Counsel established a prima facie case under *Wright Line*, I find that Respondent has established by credible evidence that Sabala would have been discharged for sleeping on the job absent his union activities. Accordingly, I recommend that this allegation of the complaint be dismissed.

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. By threatening employees with loss of scheduled wage increases, loss of benefits, and loss of pension benefits, Respondent violated Section 8(a)(1) of the act.

5 4. By threatening plant closure and loss of employment, Respondent violated Section 8(a)(1) of the Act.

5. By coercively interrogating employees about their union activities and union sympathies, Respondent violated Section 8(a)(a) of the act.

10 6. By discharging employees Ivo Camilo and Mike Flores and warning employee Alma Orozco, in order to discourage union activities and union membership, Respondent violated Section 8(a)(3) and (1) of the act.

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

8. Respondent did not otherwise violate the Act as alleged in the complaint.

The Remedy

20 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.

25 Respondent having discriminatorily discharged Ivo Camilo and Mike Flores, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

30 Respondent must also be required to expunge any and all references to its unlawful discharges of Camilo and Flores, and its unlawful warning to Alma Orzco, from its files and notify Camilo, Flores and Orozco in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

35 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 recommended⁹

40 ORDER

Respondent, California Almond Growers Exchange d/b/a Blue Diamond Growers, its officers, agents, successors, and assigns, shall:

45 1. Cease and desist from:

⁹ 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.

- 5
- 10
- 15
- a. Threatening employees with loss of scheduled wage increases, loss of benefits, and loss of pension benefits, in order to discourage union membership or activities.
 - b. Threatening employees with plant closure and loss of employment, in order to discourage union membership or activities.
 - c. Coercively interrogating employees about their union activities and union sympathies.
 - d. Discharging employees and disciplining employees, in order to discourage union activities and union membership.
 - e. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

- 20
- 25
- 30
- 35
- 40
- 45
- a. Within 14 days from the date of this Order, offer Ivo Camilo and Mike Flores full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed but for their unlawful discharges.
 - b. Make Ivo Camilo and Mike Flores whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of the decision.
 - c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Camilo and Flores, and the unlawful warning given to Alma Orzco, and within 3 days thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.
 - d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
 - e. Within 14 days after service by the Region, post at its facility in Sacramento, California copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

¹⁰ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2005.

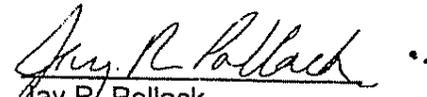
5

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

10

Dated, Washington, D.C. March 17, 2006

15


Jay R. Pollack
Administrative Law Judge

20

25

30

35

40

45

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and has ordered us to post and abide by this notice

The National Labor Relations Act gives all employees the following rights:

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten you with loss of scheduled wage increases, loss of benefits, and loss of pension benefits, in order to discourage union membership or activities.

We WILL NOT threaten you with plant closure and loss of employment, in order to discourage union membership or activities.

WE WILL NOT interrogate you about your union activities and union sympathies or the activities or sympathies of your fellow employees.

WE WILL NOT discharge employees or discipline employees, in order to discourage union activities and union membership.

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

WE WILL offer Ivo Camilo and Mike Flores full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed but for their unlawful discharges.

WE WILL Make Ivo Camilo and Mike Flores whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Camilo and Flores, and the unlawful warning given to Alma Orzco, and WE WILL NOT make reference to the permanently removed materials in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against these employees.

California Almond Growers Exchange d/b/a
Blue Diamond Growers

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400

San Francisco, California 94103-1735

Hours: 8:30 a.m. to 5 p.m.

415-356-5130

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND
MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS
CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

CALIFORNIA ALMOND GROWERS
EXCHANGE d/b/a BLUE DIAMOND
GROWERS

and

Case 20-CA-32583

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 17, AFL-CIO

COMPLAINT AND NOTICE OF HEARING

International Longshore and Warehouse Union, Local 17, AFL-CIO, herein called the Union, has charged in that California Almond Growers Exchange d/b/a Blue Diamond Growers, herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. § 151 et seq., herein called the Act. Based thereon the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The charge was filed by the Union on June 29, 2005, and a copy was served by first-class mail on Respondent on June 30, 2005.

(b) The first-amended charge was filed by the Union on August 19, 2005, and a copy was served by first-class mail on Respondent on August 23, 2005.

2. (a) At all material times, Respondent, a California corporation, has been a grower-owned agricultural market cooperative with a facility in Sacramento,

Complaint and Notice of Hearing
Case No. 20-CA-32583

California, herein called Respondent's facility, where it is primarily engaged in the business of processing and selling almonds and almond products on a non-retail basis

(b) During the calendar year ending December 31, 2004, Respondent, in conducting its business operations described above in subparagraph 2(a), sold and shipped goods valued in excess of \$50,000, from its facility to customers located outside the State of California, including General Mills, Ralston Purina, and Hershey Foods.

3 At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

4 At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and are now, and have been at all material times herein, supervisors of Respondent within the meaning of section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

George Johnson	Director, Employee Services
Janice Peterson	Section Manager
Ted Stockton	Manager, Manufacturing Division
Ginger Tanaka	Manager, Employee Benefits
Martin Basquez	Maintenance Manager
Francisco Corral	Department Supervisor
Dwight Davis	Supervisor, In-Shell and Receiving Department
Dan Ford	Supervisor

Complaint and Notice of Hearing
Case No 20-CA-32583

Don King	Area Manager
Ron Lees	Senior Production Manager
Kathy Manzer	Department Manager, Manufacturing
Ken McGuire	Sanitation Supervisor
Matt Orlousky	Main Production Line Manager
W. Scott Moore	Lead Inspector, Quality Control
Chris Silva	Lead Electrician

6. Respondent, by Dwight Davis, at its facility:

- (a) About January 2005, threatened its employees with the loss of scheduled wage increases if they selected the Union as their bargaining representative;
- (b) About January 27, 2005, threatened employees that it would freeze their wages and benefits if they selected the Union as their bargaining representative;
- (c) About February 2005, threatened its employees with plant closure if they selected the Union as their bargaining representative.

7 Respondent, by Francisco Corral, at its facility:

- (a) About January or February 2005, interrogated employees about their union sympathies;
- (b) About February 2005, interrogated its employees about their union sympathies.

8. About February 2005, Respondent, by Don King, at its facility, threatened employees that they would lose everything if they selected the Union as their bargaining representative

Complaint and Notice of Hearing
Case No. 20-CA-32583

9. About February 2005, Respondent, by Ron Lees, at its facility, threatened its employees with loss of jobs if they selected the Union as their bargaining representative.

10. About February 2005, Respondent, by Kathy Manzer, at its facility:

(a) Threatened employees with the loss of pension benefits if they selected the Union as their bargaining representative;

(b) By distributing to its employees a document entitled "What happens to your pension?" threatened them with the loss of pension benefits if they selected the Union as their bargaining representative.

11. About February 2005, Respondent, by Matt Orlousky, at its facility, threatened employees with the loss of pension benefits if they selected the Union as their bargaining representative.

12. About April 2005, Respondent, by Martin Basquez, at its facility, threatened its employees with plant closure if they selected the Union as their bargaining representative.

13. About April 2005, Respondent, by Scott Moore, at its facility:

(a) Threatened its employees with plant closure if they selected the Union as their bargaining representative;

(b) By soliciting employee complaints and grievances, promised its employees improved benefits and other terms and conditions of employment if they refrained from supporting the Union.

14. About April 2005, Respondent, by Janice Peterson, at its facility:

Complaint and Notice of Hearing
Case No. 20-CA-32583

(a) Threatened its employees with a loss of pension benefits and wages if they selected the Union as their bargaining representative;

(b) Interrogated employees about their union sympathies

15. About April 2005, Respondent, by Ted Stockton, at its facility, threatened its employees with loss of pension benefits if they selected the Union as their bargaining representative.

16. About May 5, 2005, Respondent:

(a) By Martin Basquez, at its facility, threatened its employees with a loss of pension benefits if they selected the Union as their bargaining representative.

(b) By Dan Ford, at its facility:

(i) Interrogated its employees about their union sympathies;

(ii) Threatened its employees with a loss of wages and benefits if they selected the Union as their bargaining representative;

(iii) Threatened its employees with plant closure if they selected the Union as their bargaining representative;

(iv) Threatened its employees with unspecified reprisals if they selected the Union as their bargaining representative.

(c) By Chris Silva, at its facility, in the presence of Martin Basquez and Dan Ford:

(i) Interrogated its employees about their union sympathies;

Complaint and Notice of Hearing
Case No 20-CA-32583

(ii) Threatened its employees with loss of benefits if they selected the Union as their bargaining representative.

17. About May 2005, Respondent, by Ginger Tanaka, at its facility, threatened its employees with loss of pension benefits if they selected the Union as their bargaining representative.

18 (a) About May 2, 2005, Respondent disciplined its employee Alma Orozco.

(b) About the dates set forth opposite their names, Respondent discharged the employees named below:

Ivo Camilo	April 21, 2005
Mike Flores	June 10, 2005
Amado Sabala	June 14, 2005

(c) Respondent engaged in the conduct described above in subparagraphs 18(a) and (b) because the named employees of Respondent formed joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

19 By the conduct described above in paragraphs 6 through 17, Respondent has been interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

20 By the conduct described above in paragraph 18, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its

Complaint and Notice of Hearing
Case No 20-CA-32583

employees, thereby discouraging membership in a labor organization in violation of Sections 8(a)(1) and (3) of the Act.

21. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

NOTICE OF HEARING

PLEASE TAKE NOTICE that commencing at 11:00 a.m. on 5th day of December, 2005, and on consecutive days thereafter until concluded, a hearing will be conducted in the John H. Moss Federal Building, Sonoma East and West Conference Room, 650 Capitol Mall, Sacramento, California, before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

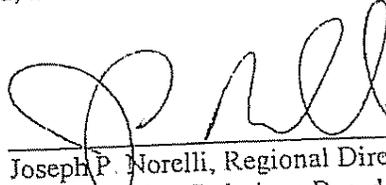
ANSWER REQUIREMENT

Respondent is further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, IT MUST FILE AN answer to the Complaint. The Answer must be received in this office on or before November 10, 2005. Respondent should file an original and four (4) copies of the Answer with this office and serve a copy of the Answer on each of the other parties. The Answer may not be filed by facsimile transmission. If no Answer is filed, the Board may find, pursuant to a Motion for Default, that the allegations in the Complaint are true.

Complaint and Notice of Hearing
Case No 20-CA-32583

Form NLRB-4338, Notice, and Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, are attached.

DATED AT San Francisco, California, this 27th day of October 2005.



Joseph P. Norelli, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

**INTERNATIONAL
LONGSHORE &
WAREHOUSE UNION**
AFL-CIO



1188 FRANKLIN STREET
SAN FRANCISCO
CALIFORNIA 94109
(415) 775-0533
(415) 775-1302 FAX
www.ILWU.org

ROBERT McELLRATH
President

JOSEPH R. RADISICH
Vice President

WESLEY FURTADO
Vice President

WILLIAM E. ADAMS
Secretary-Treasurer

For immediate release
Nov. 8, 2006

Contact: Marcy Rein, ILWU Organizing Dept., 510-847-4443 (cell)
Para información en español, favor de llamar a Agustin Ramirez, 916-606-4681

MEDIA ADVISORY

Sacto City Council puts Blue Diamond workers on the agenda

At its regular Nov. 9 meeting, the Sacramento City Council will consider a resolution backing the Blue Diamond workers' union organizing effort. The workers and their supporters will rally on the steps of City Hall, 915 I St., at 6:15 p.m. The Council session will start at 7 p.m.

Council members Steve Cohn and Kevin McCarty are co-sponsoring the resolution, which condemns Blue Diamond's anti-union campaign and calls on the company to sign a card-check neutrality agreement with the International Longshore and Warehouse Union (ILWU). Seven of the nine City Council members signed the "Pledge to Restore Workers' Freedom to Form Unions" in May 2005. A vote for this resolution would be consistent with that pledge.

When the workers at Blue Diamond's Sacramento plant began organizing two years ago to join the ILWU, the company launched an aggressive anti-union campaign. The National Labor Relations Board found the company guilty of more than 20 labor law violations in March 2006, including illegal firings, threats and interrogation. The company admitted no wrongdoing and now faces hearings on new complaints issued by the NLRB Oct. 23.

In 1995 Blue Diamond secured a \$21 million package of funding from the city of Sacramento in exchange for its promise not to relocate.

WHAT: Sacramento City Council votes on resolution supporting Blue Diamond workers' union effort

WHO: workers from Blue Diamond Growers with community and union supporters; drill team from International Longshore and Warehouse Union Local 10; ILWU International Vice President Joseph Radisich; California Assembly member Dave Jones

WHEN: Thursday, Nov. 9. 6:15 p.m.: Rally on City Hall steps with **ILWU Drill Team***; 7 p.m.: City Council session (resolution should come up early in session)

WHERE: Sacramento City Hall, 915 I St.

* *special visual interest*

mer.opciu29afl-cio 11-3-06

22e

**INTERNATIONAL
LONGSHORE &
WAREHOUSE UNION**
AFL-CIO



1188 FRANKLIN STREET
SAN FRANCISCO
CALIFORNIA 94109
(415) 775-0533
(415) 775-1302 FAX
www.ILWU.org

ROBERT McELLRATH
President

JOSEPH R. RADISICH
Vice President

WESLEY FURTADO
Vice President

WILLIAM E. ADAMS
Secretary-Treasurer

For immediate release
Oct. 25, 2006

PRESS RELEASE

Blue Diamond faces hearing on new labor law violations

The National Labor Relations Board has again found strong evidence that Blue Diamond Growers (BDG) broke U.S. labor law in order to chill organizing efforts at its Sacramento processing plant. The Board issued a complaint against Blue Diamond Oct. 23 for illegally firing one union supporter and disciplining another. The complaint comes just eight months after the Board found Blue Diamond guilty of more than 20 labor law violations and ordered BDG to re-hire two fired workers and post a notice in the plant promising not to repeat its illegal acts.

“The company has never acknowledged they were found guilty,” said Cesario Aguirre, one of the workers named in the new complaint. “The judge’s order is posted but they never accepted the guilt.”

Blue Diamond seized on flimsy pretexts to go after Aguirre and Leo Esparza, both veteran workers and active members of the organizing committee in the plant. Aguirre, a mechanic with 28 years at the plant, got written up for momentarily removing his company-provided tinted safety glasses to inspect a hole he had drilled. The write-up came from two supervisors he had testified against at an NLRB hearing less than a month before. In the new complaint, the Board cited BDG not only for discriminating against an open union supporter but for retaliating against someone who gave testimony in an unfair labor practice hearing.

Esparza had kept a clean disciplinary record for his 24 years in the plant. Blue Diamond abruptly fired him in September 2005 with the excuse that he took home a broken weed-whacker he found in the trash.

“Lots of us had been dumpster diving at Blue Diamond for years,” Esparza said. “Before I got involved with the union, this was never an issue. One day I even drove out of the plant with a discarded desk tied to the top of my car, and no one said anything.”

Blue Diamond’s Sacramento plant is the largest tree-nut processing facility in the world. Workers there have been organizing since September 2004 to join International Longshore and Warehouse Union Local 17.

CONTACT: Marcy Rein, ILWU Organizing Dept., 510-847-4443 (cell)

Para información en español, favor de llamar á Agustín Ramirez, 916-606-4681 (celular)

mer:opeiu29afl-cio 10-24-06



This article was printed from the News&features section of the *Sacramento News and Review* originally published November 9, 2006.

This article may be read online at:

<http://www.newsreview.com/sacramento/Content?oid=236577>

Copyright ©2006 Chico Community Publishing, Inc.

Printed on 2006-11-09 14:11:45.

Blue Diamond battle on two fronts

By Graham Womack

Blue Diamond Growers is facing another hearing by the National Labor Relations Board, and possible pressure from the Sacramento City Council, for its treatment of union-supporting employees.

The NLRB issued a complaint October 23 saying the Sacramento-based almond distributor illegally fired one veteran employee, Leo Esparza, and disciplined another, Cesarlo Aguirre, for supporting organizing efforts by the International Longshore and Warehouse Union. A hearing is scheduled for December 19.

The allegations had been dismissed by the NLRB in March--but at that time the NLRB ordered the company to reinstate two other employees.

NLRB regional director Joseph Norelli said the ILWU appealed Esparza's and Aguirre's cases in June with new evidence, prompting an investigation.

It's all part of the struggle to unionize Blue Diamond employees, which the ILWU has been attempting to do for two years. Blue Diamond public affairs officer Susan Brauner said the company wants an immediate election by employees to decide whether there will be a union. But ILWU organizer Agustin Ramirez said the "toxic environment" within the company prevents a fair election at this point.

On another front, Sacramento City Council members Steve Cohn and Kevin McCarty are sponsoring a resolution, scheduled to be introduced Tuesday, November 9, that would ask Blue Diamond management to remain neutral in the face of unionization efforts.

Brauner declined to discuss previous disciplinary action by her company, though she said, "We are very careful in how we work with the people in our company."

According to ILWU, Esparza, a 24-year Blue Diamond veteran, allegedly was fired in September of 2005 for taking home a broken weed whacker from a company dumpster. Agustin Ramirez, an ILWU organizer, said Esparza had scavenged for years without incident.

Two supervisors cited 28-year veteran Aguirre in January for not wearing safety goggles--a month after he testified against them in the previous trial, Ramirez said. The union wants Esparza reinstated and Aguirre's record cleared. "If Cesarlo hadn't been an open union supporter, the company wouldn't be doing what they're doing right now," Ramirez said.

NEUTRALITY MAKES A FAIR VOTE POSSIBLE

Picture this: You're running for City Council. Your opponent can have as much TV time as she wants. You can only buy time on Monday and Thursday nights—after 10. Your opponent has had the voter list since she started campaigning. The Registrar won't give it to you until a month before the vote. Your opponent has connections in the city Sanitation Dept. Word goes out that people showing your lawn signs and bumper stickers won't get their trash picked up.

You complain to the state agency that enforces fair election rules. Three years later it decides that yes, your opponent played dirty. She won't be fined or face jail time. She just has to run a notice in the local paper saying she broke the law and won't do it again.

Fair? Not! But that's what most workers face when they want to vote on unionizingunless their employer has signed a neutrality agreement.

Employers have huge power over their workers, and they use it to keep unions out...by any means necessary.

25 % illegally fire at least one union supporter during an organizing drive

51% illegally threaten to close the plant if the union comes in

92% force workers to sit through anti-union meetings on work time—which is legal In ILWU organizing drives, we almost always hear about supervisors illegally interrogating workers on their support for the union and illegally spying on union activities. Many spread rumors and try to turn workers against each other.

Labor law offers little help.

If an employer breaks the law, the union can file charges with the National Labor Relations Board—and wait. The enforcement process can take years. Meantime the employer enjoys the fruit of its crime—a scared and pliable workforce. If it is found guilty, it will pay no more than back wages plus interest to fired workers.

Without neutrality, terror shadows the union vote.

The workers at Blue Diamond Growers (BDG) in Sacramento, CA have been trying to join the ILWU for two years. In March 2006 the Labor Board found BDG guilty of illegally threatening to move or close, threatening that workers would lose their pensions and firing and disciplining union supporters. Even after the Board ordered BDG to re-hire two of the fired union supporters, the fear lingers. The two came back in April, but some people at the plant still don't feel comfortable talking about the union.

With a neutrality agreement in place:

The employer keeps quiet. It promises not to campaign against the union.

The union has access. Union supporters and reps can talk freely about organizing at the plant during non-work time, so workers can make an informed choice.

Disputes go to arbitration. If one side thinks the other is breaking the agreement, they resolve the issue promptly through arbitration.



A neutrality agreement evens out the balance of power.

International Longshore and Warehouse Union, 1188 Franklin St., 4th floor, San Francisco, CA 94109 * 415-775-0533

**INTERNATIONAL
LONGSHORE &
WAREHOUSE UNION**
AFL-CIO



1188 FRANKLIN STREET
SAN FRANCISCO
CALIFORNIA 94109
(415) 775-0533
(415) 775-1302 FAX

JAMES SPINOSA
President

ROBERT McELLRATH
Vice President

WESLEY FURTADO
Vice President

WILLIAM E. ADAMS
Secretary-Treasurer

**BACKGROUND ON THE NATIONAL LABOR RELATIONS BOARD'S DECISION
AND PETITION FOR INJUNCTION AGAINST BLUE DIAMOND GROWERS
MARCH 2006**

For more information: Marcy Rein, ILWU Organizing Dept., 510-847-4443 (cell)
Para información en español, favor de llamar á Agustin Ramirez, 916-606-4681

What is the National Labor Relations Board?

The National Labor Relations Board (NLRB) enforces the National Labor Relations Act, which sets the rules employers and unions must follow in organizing drives, contract negotiations and other situations. Section 7 of the Act protects the right to organize. It affirms workers' right to organize, bargain collectively and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a) of the Act spells out employer violations of those protected rights. These include making threats and promises, as well as interrogating, spying on and discriminating against union supporters.

What is an unfair labor practice complaint?

Unfair labor practice complaints issued by the National Labor Relations Board (NLRB) can be compared to indictments in criminal cases. If either union members or employers believe the labor laws have been broken, they can file charges with the Board. The Board then investigates. If it decides the charges have merit, it will issue complaints, which are heard by an administrative law judge.

The NLRB issued a complaint against Blue Diamond Growers Oct. 27, 2005. NLRB Administrative Law Judge Jay R. Pollack held a four-day hearing on those complaints Dec. 5-8. Both sides had a chance to give evidence. Though his ruling is dated March 17, 2006, the union did not receive it until March 21.

How did Blue Diamond break the law?

Judge Pollack found Blue Diamond guilty of numerous violations of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. Blue Diamond broke the law by:

- *"Threatening employees with loss of scheduled wage increases, loss of benefits and loss of pension benefits"*

Several supervisors flatly told workers they would no longer be able to participate in the company's pension plan if they joined the union. "They never mentioned that the Union could negotiate that the employees retain that existing pension benefit," Pollack wrote in his decision. "Rather, the supervisors threatened that the existing benefit would be lost. They threatened that the existing benefit would be replaced by a union plan which would not vest for five years."

- *"Threatening plant closure and loss of employment"*

"Area manager Don King threatened that employees would lose their benefits if the Union came in. King said, "You would lose everything. It's all re-negotiable. King said that if the Union came in, employees would lose their wages and pension. Finally, King stated that if the union got in, the plant would close its doors," Pollack wrote. Several other supervisors and managers made similar threats.

- *"Coercively interrogating employees about their union activities"*

Judge Pollack cites several incidents of supervisors aggressively questioning workers about their support for the union and union activities.

- *"Discharging employees Ivo Camilo and Mike Flores and warning employee Alma Orozco"*

In these cases, Judge Pollack found the actions taken against the workers much harsher than usual for the circumstances.

"Ivo Camilo was a 35-year employee with an excellent work history," Pollack wrote. The company accused him of willfully contaminating almonds with blood from a one-eighth inch cut on his hand and fired him April 18, 2005—three days after he took part in a union rally and put his name on a list of union supporters. Another worker who knew of the incident but did not report it, Janet Brady-Fox, did not receive even a warning. "The glaring disparate treatment between Brady-Fox and Camilo leads me to conclude that Respondent's motive was to build a case against Camilo and rid itself of a union adherent," the judge wrote.

Mike Flores, another union supporter, got fired after an incident in which higher management claimed he was sleeping on the job—though his immediate supervisor admitted in the hearing that he did not believe Flores was asleep. "Flores would have received a written warning absent his union activities," Pollack found.

Alma Orozco had worked for Blue Diamond for 30 years and had never been disciplined before an incident on May 2, 2005. "None of Respondent's supervisors were present for the alleged offense and they never spoke to the person in charge," Pollack noted.

Altogether, Pollack cited violations committed by 13 managers and supervisors throughout the plant. The quantity and distribution of the unfair labor practices and the involvement of high management point to a systematic campaign to interfere with workers' right to organize. Plant Manager Janet Hills, for example, got involved in both Flores' discharge and Orozco's discipline. "Hills' intervention in this discipline is suspicious," Pollack wrote of Flores' case.

What is a 10(j) injunction?

The San Francisco office of the NLRB (Region 20) filed a petition in U.S. District Court Feb. 21 seeking a 10(j) injunction against Blue Diamond. This injunction would enforce Judge Pollack's decision. For example, it would order Blue Diamond to reinstate Camilo and Flores right away, while it is appealing Judge Pollack's ruling.

The Board reserves 10(j) injunctions for the worst of labor law violators. They are rare and hard to get. The regional offices of the Board must get permission from the General Counsel (the agency's top lawyer) and a majority of the five-member national Board in Washington, D.C. The Board has only approved 70 10(j) injunctions since June 2001. **The current Republican-dominated Board in D.C. agreed Region 20 should seek an injunction against Blue Diamond. The hearing was set for May 5.** When Blue Diamond decided not to appeal Judge Pollack's order, the injunction became unnecessary.

What happens next?

Judge Pollack ordered Blue Diamond to immediately:

- offer Camilo and Flores their jobs back, with back pay plus interest;
- take all references to the illegal discharges and discipline out of their files and Orozco's; and
- post a notice in the plant informing the workers of their rights under the National Labor Relations Act and the actions taken to remedy the discrimination against Camilo, Flores and Orozco, and promising not to violate the Act again.

The NLRA does not provide for any monetary or other penalties for employers who violate its provisions.

Blue Diamond had until April 14 to appeal. After initially telling the workers it would do so, the company backed off and let the deadline pass.

The Blue Diamond workers continue to insist on their right to decide whether or not they want to join a union in an atmosphere free of pressure and threats. They and the International Longshore and Warehouse Union believe this will only happen if the company agrees to follow the law and sign an agreement to remain neutral during a the decision-making process.