STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,	)	Case Nos. 2015-CE-014-VIS
	)	2015-CE-007-VIS
Respondent,	)	2015-CE-008-VIS
	)	2013-CE-064-VIS
and	)	
	)	
JUAN MANUEL JUAREZ HERNANDEZ and UNITED FARM WORKERS OF AMERICA,	)	45 ALRB No. 7
	)	(July 30, 2019)
Charging Parties.	)	

DECISION AND ORDER

Following a three day unfair labor practice (ULP) hearing in the above-captioned case, Administrative Law Judge (ALJ) Mary Miller Cracraft found that Gerawan Farming, Inc. (Gerawan) violated sections 1153, subdivisions (a), (c) and (d) of the Agricultural Labor Relations Act (ALRA or Act)[1] by failing to recall four agricultural employees in retaliation for their support for the United Farm Workers of America (UFW), and with respect to one individual because he testified in a prior ALRB proceeding.

Gerawan filed exceptions to the ALJ's decision with the Agricultural Labor Relations Board (the ALRB or Board) pursuant to Labor Code section 1160.3 and

[1] The ALRA is codified at Labor Code section 1140 et seq.

California Code of Regulations, title 8, section 20282, subdivision (a).[2] Gerawan argues that the ALJ used an incorrect legal standard for evaluating whether the failure to recall the agricultural employees violated the Act, and challenges the ALJ's conclusions as to all violations found.[3]

The General Counsel filed one exception to the ALJ's decision, arguing that the ALJ erred in not finding unlawful retaliation when Gerawan failed to recall one of the employees in 2014 in addition to the violation the ALJ did find with respect to the failure to recall that individual in 2015.

The Board has considered the ALJ's decision, the record, and the parties' exceptions and briefs, and has decided to affirm the ALJ's rulings, findings, and conclusions for the reasons discussed below, and to modify the ALJ's recommended order consistent with the Board's decision.

I. <u>Background</u>

The agricultural employees involved in this case are Eliazar Mulato

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[2] As it has before, Gerawan objects in its exceptions to the participation of Board Member Hall due to alleged bias, conflicts of interest, and lack of impartiality. We reject these claims for reasons previously stated. (*Gerawan Farming, Inc*. (2019) 45 ALRB No. 3, p. 2, fn. 3; *Gerawan Farming, Inc*. (2018) 44 ALRB No. 11, p. 2, fn. 1.)

[3] Gerawan excepts to the order imposed by the ALJ on the basis that the UFW's decertification effective in November 2013 renders moot any unfair labor practice charges brought by the UFW after that time. There is no discussion of this position in Gerawan's brief in support of its exceptions, and Gerawan cites no authority in support this claim. Moreover, we find no legal basis for Gerawan's contention. The underlying charges do not allege bargaining-related violations dependent on the union's certification as the employees' exclusive representative. (See *Gerawan Farming, Inc*., *supra*, 44 ALRB No. 11, p. 13.)

(Mulato), Rafael Marquez Amaro (Marquez), Juan Manuel Juarez Hernandez (Juarez), and Alberto Bermejo Cardosa (Bermejo). They performed seasonal work in Gerawan's peach and nectarine orchards. During the timeframes relevant to this case, Mulato and Marquez worked for crew boss Francisco Maldonado (Maldonado); Juarez worked for crew boss Manuel Ramos (Ramos); and Bermejo worked different seasons for crew bosses Alfredo Zarate (Zarate) and Carlos Rodriguez (Rodriguez). There is no dispute that the alleged discriminatees in this case engaged in protected activity by supporting the UFW, and that Gerawan, through its crew bosses, was aware of this activity.

Work in the nectarine and peach orchards moves through several seasonal cycles: winter pruning and trussing, followed by spring thinning, summer harvesting, and summer pruning. The exact starting and stopping dates for each cycle vary from year to year. Layoffs at the end of each cycle, and recalls at the beginning of the next, happen routinely. Each crew boss assembles his crew when he receives notification from Gerawan of the starting date for the next cycle.

II. Legal Standard for Determining Whether Adverse Employment Actions Violate the ALRA

In discrimination cases under Labor Code section 1153, subdivisions (a) and (c), the General Counsel has the initial burden of establishing a prima facie case. The General Counsel must show by a preponderance of the evidence that the employees engaged in protected concerted activity, the employer knew of or suspected such activity, and there was a causal relationship between the employees' protected activity and the adverse employment action on the part of the employer (i.e., the employee's protected

activity was a "motivating factor" for the adverse action). (*Kawahara Nurseries, Inc*. (2014) 40 ALRB No. 11, p. 11, citing *California Valley Land Co., Inc.* (1991) 17 ALRB No. 8, pp. 6-7; *Woolf Farming Co. of California, Inc*. (2009) 35 ALRB No. 2, pp. 1-2; *Wright Line, A Div. of Wright Line, Inc*. (1980) 251 NLRB 1083, 1087.)

With respect to the third element of causal connection, the Board may infer a discriminatory motive from direct or circumstantial evidence. (*New Breed Leasing Corp. v. NLRB* (9th Cir. 1997) 111 F.3d 1460, 1465.) Where discriminatory motive is not apparent from direct evidence, there are a variety of factors that the Board and courts have considered in order to infer the true motive for the adverse employment action. Such factors may include: (1) the timing or proximity of the adverse action to the activity; (2) disparate treatment; (3) failure to follow established rules or procedures; (4) cursory investigation of alleged misconduct; (5) false or inconsistent reasons given for the adverse action, or the belated addition of reasons for the adverse action; (6) the absence of prior warnings; and (7) the severity of punishment for alleged misconduct. (*Aukeman Farms* (2008) 34 ALRB No. 2, p. 5, citing *Miranda Mushroom Farm, Inc. et al*. (1980) 6 ALRB No. 22; *H & R Gunlund Ranches, Inc*. (2013) 39 ALRB No. 21, pp. 3-4.)

In cases such as this one, where the alleged adverse employment action is the failure to recall an employee, the General Counsel's prima facie case must also include a showing that the employee applied for an available position for which he/she was qualified and was unequivocally rejected. (*McCaffrey Goldner Roses* (2002) 28 ALRB No. 8, p. 8.) If the employer has a practice or policy of contacting former employees to offer them re-employment, then the prima facie showing can be satisfied by

proof of the employer's failure to offer the employee work when work became available. (*H & R Gunlund Ranches, supra*, 39 ALRB No. 21, p. 4; *Giannini Packing Company* (1993) 19 ALRB No. 16, at ALJ Dec. p. 15.)

Once the General Counsel has established a prima facie case of discrimination, the burden shifts to the employer to prove that it would have taken the same action in the absence of the protected conduct. (*Gerawan Farming, Inc*., *supra*, 45 ALRB No. 3, p. 12; *H & R Gunlund Ranches*, *supra*, 39 ALRB No. 21, p. 4; *Wright Line, supra,* 251 NLRB 1083, 1087.)[4] "[I]t is not sufficient for the employer simply to produce a legitimate basis for the action in question. It must 'persuade' by a preponderance of the evidence that it would have taken the same action in the absence of protected conduct." (*Conley* (2007) 349 NLRB 308, 322, enfd. *Conley v. NLRB* (6th Cir. 2008) 520 F.3d 629, 637-638; *David Abreu Vineyard Management, Inc*. (2019) 45 ALRB No. 5, p. 4, fn. 6.)

Where it is shown that the employer's proffered reasons are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. (*Premiere Raspberries, LLC dba Dutra Farms* (2013) 39 ALRB No. 6, p. 8, citing *Limestone Apparel Corp*. (1981) 255 NLRB 722, enfd. (6th Cir. 1981) 705 F.2d 799; *Conley*, *supra*, 349 NLRB 308, 322.)

The ALJ's decision in this case begins with a lengthy discussion of the

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[4] This burden shifting analysis has long been known as the "*Wright Line*" causation test after the National Labor Relations Board's (NLRB's) decision in *Wright Line, supra,* 251 NLRB 1083, enfd. (1st Cir. 1981) 662 F.2d 899, cert. den. (1982) 455 U.S. 989.)

Wright Line test as applied by both the ALRB and NLRB. Relying on our decision in *Sandhu Brothers* (2014) 40 ALRB No. 12, the ALJ concludes that the Board adopted a new legal standard under which a showing of causal connection, or nexus, is no longer a required element of the General Counsel's prima facie case, but rather that a prima facie case is made upon a showing of "activity, knowledge, and animus."[5] (ALJ Dec., p. 6.)

We clarify here that the Board in *Sandhu Brothers* did not adopt a new formulation of the *Wright Line* standard. Indeed, nowhere in that decision does the Board state it is reversing or departing from any prior precedent concerning the *Wright Line* formula or that it is adopting a new or different standard for evaluating charges of discrimination. We additionally note that the Eighth Circuit Court of Appeals recently rejected a standard similar to that adopted by the ALJ in this case in *Tschiggfrie Props. v. NLRB* (8th Cir. 2018) 896 F.3d 880, 886-887. There, the NLRB concluded that its General Counsel need not show any causal connection between an employee's protected activity and the employer's adverse action, and that a showing of "antiunion animus" was sufficient. The court disapproved the standard applied by the NLRB, finding "[s]imple animus toward the union is not enough" to satisfy the General Counsel's burden of establishing a prima facie case. (*Id.* at p. 886.) The court proceeded to find "the General

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[5] All parties to this proceeding have cited ALRB authority enunciating the General Counsel's initial burden as including activity, knowledge, and causal connection. In the briefing before the ALJ, no party challenged the legal standard set forth in our precedent, asserted *Sandhu Brothers* departed from the Board's precedent applying *Wright Line*, or otherwise urged the ALJ to adopt a new formulation of the *Wright Line* standard.

Counsel must prove a connection or nexus between the animus" and the adverse action. (*Ibid*.)

We find the foregoing consistent with precedent under our Act: "In order to establish a prima facie case of unlawful discrimination, [the] General Counsel must show protected concerted or union activity, employer knowledge of such activity, and a causal connection between the activity and the adverse action of the employer." (*Tsukiji Farms* (1988) 24 ALRB No. 3, at ALJ Dec. pp. 63-64; see also *David Abreu Vineyard Management, Inc*., *supra*, 45 ALRB No. 5, at ALJ Dec. p. 5; *Springfield Mushrooms, Inc*. (1988) 14 ALRB No. 10, at ALJ Dec. pp. 31-32; *Babbitt Engineering & Machinery, Inc. v. ALRB* (1984) 152 Cal.App.3d 310, 343, quoting *Jackson & Perkins Rose Co*. (1979) 5 ALRB No. 20, p. 5.) To be clear, this is not to say evidence of general antiunion animus has no relevance at all. "Proof of general company antiunion animus aids [the] general counsel's burden of proof but is not in itself sufficient to prove the charge." (*Kawano, Inc. v. ALRB* (1980) 106 Cal.App.3d 937, 943.) Proof that an employee's protected activity was a motivating factor in the employer's adverse action is required as part of the General Counsel's prima facie case. Accordingly, we do not rely on the ALJ's analysis to the extent that she finds that proof of general antiunion animus on the part of Gerawan is sufficient by itself to establish the General Counsel's prima facie case. We thus turn now to reviewing the discriminatory failure to recall allegations for the four employees at issue in this case in light of the standards we have set forth above.

III. Discussion and Analysis

A. The Unlawful Refusal to Rehire Mulato and Marquez

The first amended consolidated complaint alleged that Mulato and Marquez were laid off in October 2013, after the harvest season, and were not recalled during the 2013 winter pruning cycle or the 2014 spring thinning cycle as they had been in prior years. Their crew boss was Maldonado. The complaint alleges that the failure to recall was in retaliation for their support of the UFW.

Mulato worked for Maldonado from 2010 until October 2013. He testified that he worked full years (i.e. he worked all of the seasonal cycles with the routine layoffs in between) at Gerawan in 2011, 2012, and part of 2013. Marquez began working for Maldonado in October 2011. Marquez also harvested grapes after the tree fruit harvest in 2011 and 2012, but apparently not in 2013.

Mulato and Marquez began supporting the UFW in the spring of 2013. They attended negotiation sessions and UFW meetings, handed out UFW flyers to coworkers, and wore UFW buttons and t-shirts. In August 2013, as decertification proponents were seeking petition signatures, they each requested permission from Maldonado to gather signatures in support of the UFW. During the hearing, crew boss Maldonado agreed that each man was an outspoken UFW supporter.

The ALJ credited Mulato's testimony that, as the various cycles of work progressed through the years, Maldonado routinely called Mulato to let him know when to report back from layoff. In fact, Maldonado regularly gave Mulato a ride to work. Marquez rode to work with David Clemente. The ALJ found that Marquez was routinely

laid off and recalled during the seasonal cycles since he began working at Gerawan in 2011, and that he found out about recall through Clemente. The ALJ credited Mulato's testimony that after he began supporting the UFW, Maldonado stopped giving him rides to work and he began riding with Clemente. After the mid-October 2013 layoff, Mulato did not receive a call from Maldonado about recall to winter pruning as he had in the past. The ALJ found that this was not typical of the years Mulato had worked with Maldonado.

When they did not hear from Maldonado or Clemente about the 2013-2014 winter pruning recall, Mulato and Marquez called Maldonado's cell phone number but received no answer. Neither realized that Maldonado had changed his phone number. That same week, Mulato called Gerawan human resources manager Jose Erevia, but Erevia told him the crew was full and that he would be called if more workers were needed. The ALJ also found that Marquez called Gerawan's office to ask about work but was told only the foreman knew about personnel. Mulato and Marquez also went to the fields in early spring 2014 and asked Maldonado for work, but he told them he could not hire any more people.

Maldonado testified that he changed his cell phone number in late 2013 when he switched carriers. He testified that he provided his new number to the Gerawan office and to Clemente who regularly drove a number of employees to work, but not to employees.

Maldonado testified that he did not call Mulato and Marquez for work after the October 2013 layoff because they did not contact him, and because so many others

did call him asking for work. Maldonado agreed that some of the employees in the 2013/2014 winter pruning crew were new hires, and some who were recalled did not have as much experience as Mulato and Marquez. He denied that he considered Mulato and Marquez's union activity when they were not recalled.

The ALJ found Maldonado's rationale for not recalling Mulato and Marquez was not believable. Maldonado admitted that he did not give either man his new cell phone number, so he knew they could not have contacted him. This is in stark contrast to the many other employees who did have Maldonado's telephone number and were able to contact him. The ALJ also found Maldonado had a past practice of calling employees or their rides for recall and his actions in 2013 were inconsistent with this practice.

After Mulato and Marquez were not recalled to Maldonado's crew, and did not work 2013-2014 winter pruning and most of 2014 spring thinning, they eventually were offered employment with crew boss Ramiro Cruz on May 2, 2014. They both returned to work at Gerawan for the end of spring thinning in 2014, and then harvested peaches in the summer.

Gerawan argues that the timing of the alleged failure to rehire Mulato does not show discriminatory motive. While Mulato began supporting the UFW in the spring of 2013, it was not until November 2013 that Mulato was not recalled. Gerawan also argues that the fact that Mulato stopped getting rides to work with crew boss Maldonado is not relevant because there was no adverse employment action against Mulato at the time Maldonado stopped giving him rides. We do not find these arguments persuasive.

Although the fact that Maldonado stopped giving Mulato rides in spring 2013, after Mulato began supporting the UFW, does not by itself establish that the decision not to recall Mulato in November 2013 was unlawfully motivated, it is relevant background evidence. The ALJ credited Mulato's testimony that his once friendly relationship with Maldonado began to deteriorate as spring 2013 turned into summer and fall, and Mulato continued to participate in more visible UFW activities. While Maldonado did not fire Mulato as soon as he knew about his support for the union, that does not rule out drawing an inference that Maldonado continued to harbor animus toward Mulato's union support. The November 2013 recall presented Maldonado with the first opportunity to get Mulato and Marquez off of his crew without overtly discriminating against them. The timing of employer action in a failure to rehire case must take into account the seasonal nature of the employment. This Board has recognized that in seasonal employment, "the season following protected union or other concerted activity is often the first opportunity for an employer to retaliate for such conduct without blatantly seeming to discriminate." (*Tsukiji Farms*, *supra*, 24 ALRB No. 3, at ALJ Dec. p. 65, citing *Sahara Packing Co.* (1978) 4 ALRB No. 40, at ALJ Dec. p. 15.) We also have found in this context that "it would be misleading to place undue emphasis on the time periods involved and forget that, in seasonal employment, re-employment is generally the first opportunity for more subtle discrimination to occur." (*Sahara Packing Co.*, *supra*, 4 ALRB No. 40, at ALJ Dec. p. 15.)

We agree with the ALJ that Maldonado's disingenuous reason for not rehiring Mulato and Maldonado—because they did not call him—is strong circumstantial

evidence that this stated reason for not recalling the men was pretext. Maldonado knew they did not have his new phone number and he asked Clemente not to give it out.

The ALJ also properly found that Maldonado's testimony that he chose employees for recall in the fall of 2013 based on their experience with a particular type of work was not believable. Maldonado admitted that two of the men he recalled after the October 2013 layoff had only worked for him for about a month. Mulato and Marquez on the other hand had three and two years of experience working for Maldonado, respectively. Even after sixteen additional openings became available as the pruning season progressed, Maldonado did not offer recall to Mulato and Marquez.[6]

Failing to adhere to past recall practices, resorting to pretextual reasons, and giving shifting, inconsistent explanations for an adverse action all constitute strong circumstantial evidence of the existence of a hidden, unlawful motive for such action. (*Giannini Packing Company, supra*, 19 ALRB No. 16, at ALJ Dec. p. 17.)

We affirm the ALJ's finding that the General Counsel met her burden of showing that Maldonado had a practice of either calling workers to notify them of a recall or calling drivers and asking them to contact their riders to tell them about the recall. Gerawan argues there must be evidence of a "formal" policy or practice of contacting former employees for recall in order to satisfy this aspect of the General Counsel's prima

[6] Gerawan's claim that Maldondado delegated the decision of who to recall to the driver, Clemente, is directly undercut by Maldonado's own testimony that when Gerawan management gave work to Maldonado to start November 2, 2013, and told him to bring eight crew members, Maldonado decided who to invite and made some of the phone calls.

facie case. In contrast, employee recalls at Gerawan are informal, decentralized and done on an ad hoc basis. We do not find this argument persuasive, and Gerawan cites no authority in support of its contention. Evidence of established, although informal, practices used by forepersons to fill their crews at the beginning of a season is sufficient. (*Rivera Vineyards, et al*. (2003) 29 ALRB No. 5, at ALJ Dec. p. 32; *Giannini Packing Company*, *supra*, 19 ALRB No. 16, at ALJ Dec. p. 18; *Stamoules Produce Co*. (1990) 16 ALRB No. 13, at ALJ Dec. p. 7.) Courts have upheld Board findings in seasonal rehiring circumstances based on an employer's informal hiring practices, including where hiring decisions are made by foremen in "an informal in-the-field system" similar to that used by Gerawan. (*Kawano*, *supra*, 106 Cal.App.3d at pp. 944-945, 954; *Vessey & Co. v. ALRB* (1989) 210 Cal.App.3d 629, 662.)

The record does not indicate that in the past Mulato and Marquez had to affirmatively contact their crew boss in order to secure a position in the crew for the next cycle of work. The ALJ discredited Maldonado's testimony that staying in touch during a layoff was a criterion in determining which workers to recall. In any event, credited testimony shows that Maldonado was aware that Mulato and Marquez were interested in returning to work early in the 2013/2014 cycle. Mulato called Erevia in November 2013 and was told he would be called when there was a need for more workers. The ALJ found that both men went in person to speak to Maldonado in March 2014 early in the spring thinning cycle when there were only a few people on the crew.

We therefore uphold the ALJ's conclusion that the General Counsel established a prima facie case that the failure to recall Mulato and Marquez was

motivated by unlawful considerations.

We also uphold the ALJ's determination that Gerawan failed to show that Marquez and Mulato would not have been recalled even absent their union activity. As discussed above, Maldonado's stated reason for not rehiring Mulato and Marquez— because they did not call him— was pretextual. His testimony that he chose employees for recall in fall 2013 based on their experience with a particular type of work was not credited. Gerawan has failed to rebut the General Counsel's case. (*David Abreu Vineyard Management, Inc*., *supra*, 45 ALRB No. 5, p. 4; *L.S.F. Transportation, Inc*. (2000) 330 NLRB 1054, 1074-1075 ["Where the reason advanced by an employer for a discharge either did not exist or was in fact not relied on, the inference of unlawful motivation established by the General Counsel remains intact, and is indeed logically reinforced by the pretextual reason proffered by the employer"].)

Finally, we reject Gerawan's contention that no violation may be found with respect to Mulato and Marquez because they both were hired by another crew boss in early May 2014. The fact they were subsequently hired does not cure Maldonado's earlier unlawful failure to hire them earlier in the season. (*Ruline Nursery* (1982) 8 ALRB No. 105, p. 15 [employer unlawfully discriminated against two employees by failing to rehire them for "several days" after employees with less seniority were hired].) While the subsequent hiring of Mulato and Marquez may be relevant to mitigation of any backpay to which they are entitled, it does not immunize Gerawan from the unfair labor practice violation itself. (*Sequoia Orange, Co*. (1985) 11 ALRB No. 21, at ALJ Dec. p. 99, fn. 116 [evidence of employees' subsequent recall "would only affect the extent of

mitigation of employer liability, rather than refute the existence of liability itself"].)[7]

B. The Unlawful Failure to Rehire Juarez

Juarez began working at Gerawan in either 2008 or 2009.[8] He worked from the beginning for crew boss Ramos. Ramos' crew performed spring thinning and summer harvesting, but did not work the winter pruning cycle. Each time Juarez was recalled either Ramos, Ramos' son-in-law, or Miguel Miranda (who Juarez rode to work with) called Juarez one or two days before the start date.

In spring of 2014, during spring thinning, Juarez spoke to union organizers when they visited at lunchtime, and he wore a UFW t-shirt to the fruit giveaways on Friday afternoons. This was corroborated by co-worker Miguel Miranda Alvarez (Miranda) who testified that he observed Juarez wearing a UFW T-shirt. Miranda and

[7] Gerawan excepts to the ALJ's alleged denial of its request to order the General Counsel to produce prior witness statements of Marquez. (Cal. Code Regs., tit. 8, § 20274, subd. (a).) We find no merit in this exception. At the close of Marquez's direct examination, Gerawan requested the General Counsel produce all witness statements by Marquez. The General Counsel represented that she conducted a diligent search of her records and produced all statements in her possession. The General Counsel did not withhold any statements under claim of privilege. The statements produced by the General Counsel include a Spanish declaration signed by Marquez on August 27, 2013; a declaration in English signed by Marquez on November 10, 2013; a Spanish declaration signed by Marquez on May 11, 2015, as well as an English translation of that declaration signed on June 1, 2015; and copy of Marquez's testimony in the hearing in case no. 2013-RD-003-VIS. Gerawan speculates and asserts, without any supporting facts, that the General Counsel has refused to produce all of Marquez's prior statements. We reject Gerawan's unsupported accusations and have no reason to question the integrity of the General Counsel's statements on the record before the ALJ. Moreover, the statements Gerawan speculates to exist purportedly relate to the 2015 timeframe—far after the 2014 recall events that are the subject of the allegations of this case concerning Marquez.

[8] At the time of the hearing in this matter, Juarez was working for Gerawan crew boss Ramiro Cruz. Juarez testified that he had been working for Cruz for two years.

Juarez also attended union negotiations together. According to Juarez, after Ramos observed Juarez speaking to UFW organizers, Ramos told him he should "ask the union for a job."

Juarez testified at the 2014-2015 consolidated unfair labor practice and election objection ALRB hearing in case no. 2013-RD-003-VIS. Juarez gave his testimony in October 2014. His testimony was generally about Ramos' activity in assisting decertification efforts. Ramos also testified during the hearing, on March 3 and 4, 2015.

The 2015 spring thinning cycle began approximately two weeks after Ramos testified. Juarez did not hear from Ramos or his son-in-law about a recall as he expected. Juarez testified that on a Sunday in late March 2015, he heard from Miranda that thinning had begun the day before. When Juarez called Ramos on the following Tuesday, Ramos told him the crew was full. Juarez went to the field in early April to ask for work, and Ramos again told him the crew was full. Juarez filed a ULP charge on April 8, 2015, alleging unlawful retaliation in the failure to recall him.[9] On April 12, 2015, Ramos called Juarez and told him there was a position available, and Juarez returned to work the next day.

The ALJ credited the testimony of Juarez over that of crew boss Ramos

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[9] The ULP charge filed by Ramos on April 8, 2015, alleged retaliation for testifying in an ALRB hearing. (Charge no. 2015-CE-07-VIS.) A second charge alleging retaliation for Ramos' union activity was filed on April 9, 2015, by the UFW. (Charge no. 2015-CE-008-VIS.)

where there was a conflict. The ALJ found that after Juarez began his open support of the union, Ramos's attitude toward him became unfriendly.[10] She also found that Ramos showed animus toward Juarez based on Ramos' understanding of what Juarez had testified about at the hearing.

The ALJ found that Ramos had a practice of contacting former employees for rehire. After Gerawan management contacted him to let him know the next cycle of work would begin in a few days, Ramos usually called the same people from season to season. He also called regular drivers like Miranda who called their riders to tell them of the recall. Ramos sometimes had his son-in-law make calls to crewmembers. Ramos denied at the hearing that he had a preference for recalling experienced workers, and claimed that anyone could be trained in 3-4 days. The ALJ found this testimony to be disingenuous and did not credit it. Based on the foregoing, the ALJ found that the General Counsel established a prima facie case of retaliatory failure to recall.

The ALJ found that Gerawan failed to show that Juarez would not have been rehired absent his union activity and his testimony at the ALRB hearing. She reasoned that Ramos did not credibly explain why he did not recall Juarez or why he hired employees with no experience. The ALJ found that the record supported the conclusion that previously Ramos was satisfied with Juarez's work. For example, when Juarez asked Ramos for permission to be absent for a few weeks in 2014, Ramos granted

[10] The ALJ also states that Ramos stopped giving Juarez a ride to work and stopped letting him drive his truck at work to move umbrellas (ALJ Dec., p. 28), but she seems to have this confused with Mulato's testimony about crew boss Maldonado (see above).

the request and put Juarez immediately back to work when he returned.

Gerawan argues in its exceptions that there was no adverse employment action toward Juarez, and that the 19-day delay in recalling him at the beginning of 2015 spring thinning was the result of, at most, "miscommunications or misunderstandings." Gerawan points to the ALJ's finding that hiring for spring thinning occurs over several weeks beginning with a crew of 17-29 people and increasing to 40 people (ALJ Dec., p. 11), and argues that this explains why Juarez was hired in April rather than March. Gerawan also points out that the ALJ found that it was unclear whether crew boss Ramos knew about the ULP charge that Juarez filed on April 8, 2015, alleging failure to recall when Ramos called Juarez on April 12, 2015, to tell him he could come and work. (ALJ Dec., p. 26.) Therefore, Gerawan's position is that the record does not support a finding that the filing of the ULP charge motivated Ramos to finally call Juarez and offer him recall. Further, the fact that Juarez was hired on April 12, 2015, is proof that there was no discrimination.

We find that there is sufficient circumstantial evidence from which to infer that the delay in recalling Juarez was motivated at least in part by Juarez's protected activity. Juarez's union support began in the spring of 2014, and Ramos' disparaging comment that Juarez "should ask the union for a job" occurred during that time frame. However, that does not rule out drawing an inference that Ramos continued to harbor animus toward Juarez's union support. Since Ramos' crew performed spring thinning and summer harvesting, but did not work the winter pruning cycle, the March 2015 recall presented Ramos with the first opportunity to get Juarez off of his crew without any overt

appearance of discrimination. (*Tsukiji Farms*, *supra*, 24 ALRB No. 3, at ALJ Dec. p. 65; *Sahara Packing Co*., *supra*, 4 ALRB No. 40, at ALJ Dec. p. 15.)

Significantly, Ramos changed his established recall process with respect to Juarez. Juarez had worked for Ramos for six or seven years prior to the spring of 2015. At the beginning of a new work cycle, Juarez testified that there were years Ramos would call, and years Ramos' son-in-law would call, but that he always received a direct call to start work the next day. Miguel Miranda, Juarez's driver, who also worked on Ramos' crew testified that "we were always waiting to get a call from him [Ramos] or his son-in-law." Juarez did not receive a call about returning to work for the 2015 spring thinning season, and Ramos told Juarez his crew was full after Juarez came asking for work about a week after thinning began. Juarez knew that most other former crew members had been recalled and that there also was also a number of new people on the crew.[11] When Juarez went to the field to ask for work in early April 2015 and was again told by Ramos that the crew was full, Juarez questioned Ramos "how is it possible that you are giving them [new people] the chance when I've been working for you for so many years." Ramos did not respond.

Miranda, who had attended union negotiations with Juarez, was asked to return to work. However, it was not Ramos who called him. Rather, Jaime Mendoza, Gerawan's liaison with previously injured workers, called Miranda to tell him work was

[11] Miranda testified that there were about three workers who were new when the 2015 thinning season started.

starting.[12] Miranda testified that he was surprised when Ramos did not call him in 2015. Miranda also testified that when he went back on the first day, he gave rides to two other workers. Miranda understood that these two individuals were already hired, because they had worked at Gerawan the year before. Miranda called Juarez on a Sunday to tell him that work had started the day before, and asked him why he had not gone. Juarez told him that Ramos had not called him.[13]

Finally, Ramos' denial at the hearing that he had a preference for recalling experienced workers, and his denial that he knew Juarez was involved with the UFW, neither of which were credited by the ALJ, suggest the existence of a concealed, impermissible motive for the delay in recalling Juarez. Based on the foregoing reasons, we find that the General Counsel met her burden to show that the delay in recalling Juarez was motivated, at least in part, by his protected activity.

The record also supports the conclusion that Ramos (and/or his son-in-law) had an informal, but well-established practice of calling crew members or their drivers a day or two prior to the start of the next work cycle. Ramos testified that when he wanted Juarez to come to work, he would call Miranda, his driver. Juarez had been recalled this

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[12] Miranda injured his shoulder in 2014.

[13] The fact that Miranda, who also supported the UFW, was quickly accepted back into Ramos' crew does not disprove that Ramos had an unlawful motive for not recalling Juarez. (*Kawahara Nurseries, Inc., supra*, 40 ALRB No. 11, p. 22 ["it is well-established that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents"]; *NLRB v. Instrument Corp. of America* (4th Cir. 1983) 714 F.2d 324, 330 [a finding of discriminatory motive as to some employees is not defeated by evidence the employer did not discriminate against all union supporters]; *Nachman Corp. v. NLRB* (7th Cir. 1964) 337 F.2d 421, 424.)

way for at least five years. Miranda corroborated this, testifying “we were always waiting to get a call from him [Ramos] or his son-in-law.”

Turning to the question of whether Gerawan met its burden of showing that Juarez would not have been recalled at the beginning of the spring thinning cycle absent his union activity and his testimony at the ALRB hearing, we find that it has not done so. The ALJ found that Ramos did not credibly explain why he did not recall Juarez or why he hired employees with no experience. As indicated above, the ALJ found Ramos’ claim that he had no preference for recalling experience workers was not credible. The record supports the conclusion that previously Ramos was satisfied with Juarez’s work.

Gerawan argues that that hiring for spring thinning occurs over several weeks beginning with a crew of 17-29 people and increasing as the thinning cycle ramps up, and that this explains why Juarez was hired in April rather than March. Ultimately, the burden was on Gerawan to affirmatively show that the delay would have occurred even in the absence of Juarez’s protected activities. Gerawan’s claim that the delay was based on misunderstandings or miscommunications, falls short of carrying this burden. It is not enough for the employer to simply present a legitimate reason for its action. It must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected concerted activity. (*H & R Gunlund Ranches*, *supra*, 39 ALRB No. 21, p. 4; *David Abreu Vineyard Management, Inc*., *supra*, 45 ALRB No. 5, pp. 3-4 [employer bears the burdens of production and persuasion after the General Counsel establishes a prima facie case of discrimination].) Finally, as set forth previously with respect to Mulato and Marquez, the fact that Ramos subsequently was offered a

position does not prevent finding a violation for the earlier failure to recall him. (*Sequoia Orange, Co.*, *supra*, 11 ALRB No. 21, at ALJ Dec. p. 99, fn. 116; *Ruline Nursery*, *supra*, 8 ALRB No. 105, p. 15.)

For the reasons discussed above, we uphold the ALJ's finding that the delay in recalling Juarez was a violation of the Act.

C. The Refusal to Rehire Bermejo in 2014 and 2015

Bermejo began working for crew boss Zarate in August 2011. He was recalled to Zarate's crew for the 2012 season and again for the 2013 season. Additionally, at the end of Gerawan's harvest seasons in 2011 and 2012, Bermejo, along with other crew members, followed Zarate to work for a labor contractor pruning grape vines for another grower. Zarate characterized Bermejo as a good worker.

Bermejo was an active supporter of the UFW and engaged in pro-UFW activities at Gerawan in 2013. Zarate saw Bermejo wearing UFW clothing and handing out flyers in 2013, and viewed him as one of the most active union supporters in his crew. He also observed a UFW sticker on Bermejo's car in 2013.

At the end of the 2013 season, Zarate gathered his crew to hand out final paychecks. The ALJ found that Zarate expressed concern to Bermejo during this meeting that he was losing grape pruning work because Bermejo was causing "trouble" at Gerawan by handing out union flyers. During the meeting, Zarate also noted the union sticker on Bermejo's car and told Bermejo to remove it, which Bermejo refused to do.[14]

[14] Zarate denied making this statement. However, the ALJ discredited his testimony on demeanor grounds.

In contrast to the previous two years, Zarate did not include Bermejo in his grape pruning crew after the end of Gerawan's 2013 season. Additionally, again in contrast to the prior two seasons, Bermejo did not receive a call from Zarate concerning Gerawan's 2014 thinning season. Bermejo testified that he was concerned that Zarate would no longer be giving him any work and, accordingly, at the beginning of Gerawan's 2014 season, he called Zarate and asked for a position on his Gerawan crew. Zarate told him to consult Gerawan's phone message system to find out when work would start. However, when Bermejo learned from the message system that work would be starting, and appeared at the orchard to request a position, Zarate told him that his crew was full. As Bermejo was leaving, he encountered crew boss Rodriguez who offered him work on his crew.

Bermejo worked for crew boss Rodriguez for the entire 2014 season. Rodriguez testified that he was satisfied with Bermejo's work and found him to be reliable, assigning him to drive a tractor. Bermejo continued his pro-UFW activity in 2014. Rodriguez, however, denied noticing whether Bermejo wore a UFW hat or t-shirt, and further denied knowing about the union-related issues and protests at Gerawan generally. The ALJ discredited these denials, finding them to be unreliable and highly improbable given that crew bosses, by all accounts, previously had received training from ALRB staff and the union activity in the fields was done openly for all to observe. Thus, she found that Rodriguez was aware of efforts to support the UFW and that he had seen Bermejo wearing a union t-shirt and hat. Bermejo was laid off at the end of the 2014 harvest season with the rest of Rodriguez's crew.

On February 9 and 10, 2015, Bermejo appeared as a witness in the consolidated unfair labor practice and election objection ALRB hearing in case no. 2013-RD-003-VIS. (See *Gerawan Farming, Inc*. (2016) 42 ALRB No. 1, affd. in part and revd. in part by *Gerawan Farming, Inc. v. ALRB* (2018) 23 Cal.App.5th 1129; *Gerawan Farming, Inc*. (2018) 44 ALRB No. 10.) One of the allegations against Gerawan was that Gerawan permitted pro-decertification employees to circulate petitions while denying pro-union employees similar opportunities. Bermejo provided testimony adverse to Gerawan concerning this and other issues. Zarate also testified at the hearing on February 9 and 10, 2015. During his testimony, Zarate was asked about Bermejo and his testimony. Subjects of questioning included Bermejo's union activity, allegations that Zarate had made anti-union statements to Bermejo, and whether Zarate denied Bermejo permission to circulate a pro-union petition during working time. Bermejo's and Zarate's appearances at the hearing occurred approximately one month before the start of Gerawan's next season, the 2015 spring thinning.

Gerawan's 2015 thinning season began in late March. Neither Zarate nor Rodriguez called Bermejo to offer him work. The ALJ found that, in late March, Bermejo telephoned both Zarate and Rodriguez to ask for work on their crews.[15] Both crew bosses told him their crews were full. Bermejo testified that he went in person to the orchards in

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[15] Bermejo could not identify the precise date on which he called. However, he remembered that he called before his mother was hospitalized, which occurred around when thinning started. The record reflects that crews under Zarate and Rodriguez began working in late March.

or around May 2015, and spoke to six or seven different crew bosses, including Zarate and Rodriguez, looking for work. Each crew boss, including Zarate and Rodriguez, told him that their crews were full. Bermejo ultimately found no work at Gerawan in 2015, and has not worked at Gerawan since.[16]

1. The Alleged Failure to Recall Bermejo in 2014 Is Time-Barred

The General Counsel argues that the ALJ erred in not finding a violation in 2014 when crew boss Zarate did not hire Bermejo. The General Counsel's first amended consolidated complaint, which issued on April 12, 2018, includes charge no. 2015-CE-014-VIS, which alleges unlawful retaliation in refusing to rehire Bermejo in 2015, but not in 2014. The General Counsel argues that even if a 2014 violation as to Bermejo was not specifically alleged, the ALJ should nevertheless have found a violation in 2014 because the facts relating to 2014 were alleged in the complaint and litigated at the hearing, and were closely related to charge no. 2015-CE-014-VIS. The General Counsel also points to charge no. 2013-CE-64-VIS, which was filed on December 23, 2013, and states that:

> On or about November 15, 2013 and continuing to date, the above-named employer, through its officers, agents and representatives, failed to recall workers, Rafael Marquez, Teresa Adja, Elias Hernandez, Fidel Lopez, Fidel Lopez, Eliazar Lopez, among others, in retaliation for their union support, and protected concerted activities in violation of the Act.

The General Counsel argues that because charge no. 2013-CE-64-VIS alleges widespread and continuing retaliation against employees beyond just those

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[16] Bermejo testified he obtained employment elsewhere later in May 2015 that lasted through September 2015.

named, the Board has the discretion to find that a ULP occurred in 2014 as well as 2015.

We do not find merit in the General Counsel's exception. First, under the circumstances of this case we find the 2013 charge, which specifically names six individuals but does not include reference to Bermejo, is insufficient to permit finding a violation as to Bermejo, especially as to an alleged violation occurring after the charge was filed. (See *NLRB v. Newton* (5th Cir. 1954) 214 F.2d 472, 474-475 [allegations of discriminatory discharge as to certain employee not mentioned in an unfair labor practice charge or amended charge was time-barred where the alleged violation occurred after the original charge and more than six-months before the amended charge was filed].) Second, the 2015 charge cannot be interpreted to encompass the alleged 2014 violation under the ALRA's six-month statute of limitations. (Lab. Code, § 1160.2 ["No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge …"].) The General Counsel's original complaint on the 2015 charge, issued in June 2017, alleged only a single cause of action concerning the failure to rehire Bermejo in 2015. Although the General Counsel's first amended complaint issued on April 12, 2018, does include allegations concerning Zarate's failure to rehire Bermejo in 2014, those allegations remain time-barred under section 1160.2. While the General Counsel is permitted to include in an unfair labor practice complaint allegations broader than those specifically alleged in an underlying charge, we are barred under section 1160.2 "from enlarging or adding to the language of the charge so as to include unfair labor practices committed more than six months prior to the filing and serving of the charge." (*Indiana Metal Products Corp. v. NLRB* (7th Cir. 1953) 202 F.2d 613, 619;

McCaffrey Goldner Roses, supra, 28 ALRB No. 8, p. 4 [General Counsel may include in a complaint "violations not alleged in the charge if they are closely related to the violations named in the charge" so long as "the newly alleged violations occurred within the six month period immediately preceding the filing of the original charge"], citing *NLRB v. Dinion Coil Co*. (2d Cir. 1952) 201 F.2d 484; see *Gerawan Farming, Inc*., *supra*, 45 ALRB No. 3, p. 9, fn. 7.) Accordingly, we dismiss the General Counsel's exception. Nevertheless, while we find that the events that occurred in 2014 cannot form the basis of an unfair labor practice finding, the Board may consider those events as background in order to shed light on the character of events that occurred within the limitations period, i.e., in 2015. (*ALRB v. Ruline Nursery Co*. (1981) 115 Cal.App.3d 1005, 1014 ["while occurrences within a six-month period preceding the filing of a charge, in and of themselves may constitute unfair labor practices, earlier events may be utilized to shed light on the character of those events"]; *International Association of Machinists v. NLRB* (1960) 362 U.S. 411, 416.)

2. The General Counsel Established a Prima Facie Case That the Failure to Rehire Bermejo in 2015 Was Motivated in Part by His Union Activity

There is no dispute that Bermejo was an active UFW supporter and both Zarate and Rodriguez were aware of Bermejo's union activity. We find that the General Counsel established a causal connection between Bermejo's protected activity and the decision not to rehire him in 2015.

With respect to Zarate, there is clear evidence that he harbored anti-union sentiment and, beginning in 2013, acted on that motivation to deny Bermejo work

opportunities. As described above, at the end of the 2013 season, Zarate explicitly called out Bermejo's union activity, telling him that he was causing "trouble" by his union leafleting, which was affecting the assignment of work. He also instructed him to remove the union sticker from his car. Telling Bermejo to remove his union sticker on the last day of the season, particularly in conjunction with the comments about not getting the winter grape work, carried the implication that further union activity would threaten Bermejo's future opportunities at Gerawan.[17]

After delivering this warning, Zarate's treatment of Bermejo abruptly changed. For two consecutive seasons, Zarate had included Bermejo in his grape pruning crews. This ceased after October 2013, and Zarate was no longer included on those crews. In March 2014, Zarate failed to call Bermejo at the beginning of the thinning season as he had done in the past, and when Bermejo called to ask for work he was first told to use the automated line and later told there was no work for him.

When Bermejo again attempted to get work on Zarate's crew in March 2015, one month after giving his contentious testimony at the ALRB hearing, Zarate told him once again that his crew was full and there was no work for him. Yet, this occurred at the very beginning of the season when the crews should have been forming and expanding. Indeed, the record reveals that Zarate's crew was expanding throughout late March. However, when Bermejo called for work at the beginning of the season he was

[17] To be clear, we make no unfair labor practice finding as to Zarate's failure to bring Bermejo to work with him in the grapes for another employer.

flatly told that the crew was full and there was no work for him.[18] We conclude that Zarate's justification for refusing to hire Bermejo in 2015 was pretextual. Accordingly, we find that the General Counsel established the third element of the prima facie case that there was a causal connection between Bermejo's known union activity and Zarate's decision not to hire him in 2015.

With respect to Rodriguez, we also find that the causal connection element was established. Bermejo continued to support the union in 2014 when he was working on Rodriguez's crew. He asked for and received permission from Rodriguez to attend negotiation sessions during this time. Rodriguez's denial that he knew anything about union activity at Gerawan in general and his claim that he did not know whether Bermejo was involved with the UFW, neither of which were credited by the ALJ, suggest the existence of a concealed, impermissible motive for Rodriguez's failure to recall Bermejo in 2015. Rodriguez also expressed frustration with Bermejo's leaving work to attend the negotiation sessions because "he would leave, and then the tractor would be just sitting full of fruit. And so I had to put somebody else on it so that they could take it when he

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[18] Although we do not find an additional independent violation based upon Bermejo's in-person request for work in or around May 2015, we do note that, when Bermejo made this request, Zarate again gave him the same answer he had given each time Bermejo asked for work after October 2013 – the crew was full and there was no work for Bermejo. Member Broad would find separate violations in May for both Zarate and Rodriguez. Member Broad finds the evidence shows Bermejo visited the orchards in May asking for work, including from both Zarate and Rodriguez, and both told him—as they had before—that their crews were full. The record shows both crew bosses continued to hire workers throughout the month of May, despite their statements their crews were full and despite Zarate's unequivocal testimony that his crew was full and he did not hire any more workers after May 10, which is contradicted by the record.

would leave."

Rodriguez testified that he had a preference for hiring workers with prior experience over those without. He also testified that, in putting together his crew for the 2015 season, if workers called him, he would tell them when work would be starting. He stated that he did not expect every worker who called for work to actually show up on the first day, and he expected to still be hiring on the first day of work.[19] The record reflects that Rodriguez's crew was still expanding when spring thinning began. However, when Bermejo—who had the type of experience Rodriguez sought—called in March, Rodriguez told him there was no room on his crew. As with Zarate, we find this excuse to be pretextual. The fact that Rodriguez sought to conceal his knowledge of Bermejo's union activity and provided a false reason for his decision not to hire Bermejo in 2015 is powerful evidence of a hidden unlawful motivation. (*York Products, Inc*. (1988) 289 NLRB 1414, 1420 ["The assertion of false of shifting reasons [for employer's failure to recall employees] is strong evidence that its actions were unlawfully motivated"].) Rodriguez's failure to adhere to his own stated hiring process and criteria provides further proof of unlawful motivation. Finally, while there was some temporal separation between Bermejo's union activity and the rehire decision, the spring 2015 hiring season was Rodriguez's first opportunity to exclude Bermejo from his crew after learning of that activity. We find that the General Counsel met her burden of establishing a causal

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[19] This is consistent with how Rodriguez picked up Bermejo at the beginning of the 2014 season after Bermejo was turned away by Zarate when he came to the orchards asking for work.

connection between Bermejo's known union activity and Rodriguez' refusal to hire him in 2015.

3. Gerawan Did Not Meet Its Burden to Prove Bermejo Would Not Have Been Rehired Even in the Absence of Protected Activity

Because the General Counsel established a prima facie case, the burden of persuasion shifted to Gerawan to prove that it would have declined to hire Bermejo in 2015 even absent his protected activity. As discussed above, we find that the reason stated by Zarate and Rodriguez for failing to hire Bermejo, that there was no room on their crews for him, was pretextual. Gerawan also argues that Bermejo was not available to work when the 2015 spring thinning season began because he was taking care of his mother who got sick "exactly when thinning started." However, although Bermejo could not recall exactly when he called Zarate and Rodriguez, he did testify that he called before his mother got sick.[20] As the ALJ found, to the extent Bermejo then became unavailable for work for part of the 2015 season, this may affect any backpay remedy which he may be due. However, it does not prove that Gerawan would not have hired Bermejo in the absence of his protected activity.[21]

[20] He further testified that he visited the orchards in May after his mother got better, and, since he previously was denied work when he called before his mother got sick, that once she was better he had to put in the effort to start looking for work again.

[21] Gerawan also argues that a backpay remedy for Bermejo that runs from April 2015 until the date he is offered reinstatement is not appropriate because the record establishes that Bermejo never worked the winter pruning season at Gerawan. We do not need to address this issue at this point in the process as this is a matter for the compliance phase of the case.

ORDER

Pursuant to Labor Code section 1160.3, it is hereby ORDERED that respondent Gerawan Farming, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
    a. Failing to recall or otherwise retaliating against any agricultural employee because the employee has engaged in protected concerted and/or union activity protected under section 1152 of the Agricultural Labor Relations Act.
    b. In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.
2. Take the following affirmative actions that are deemed necessary to effectuate the policies of the Act:
    a. Offer seasonal employment to Alberto Bermejo Cardosa;
    b. Make whole Eliazar Mulato, Rafael Marquez Amaro, Juan Manuel Juarez Hernandez, and Alberto Bermejo Cardosa for all wages and other economic losses that they suffered as a result of Gerawan's unlawful failure to recall them. Loss of pay or other economic losses are to be determined in accordance with established Board precedent. Such amounts shall include interest to be determined in the manner set forth in *Kentucky River*

Medical Center (2010) 356 NLRB No. 8 and excess tax liability is to be computed in accordance with *Tortillas Don Chavas* (2014) 361 NLRB No. 10, minus tax withholdings required by federal and state laws. Compensation shall be issued to Eliazar Mulato, Rafael Marquez Amaro, Juan Manuel Juarez Hernandez, and Alberto Bermejo Cardosa and sent to the ALRB's Visalia Regional Office, which will thereafter disburse payment to Eliazar Mulato, Rafael Marquez Amaro, Juan Manuel Juarez Hernandez, and Alberto Bermejo Cardosa;

c. Preserve and, upon request, make available to the ALRB or its agents for examination and copying, all records relevant a necessary to a determination by the Regional Director of the bay pay amounts due under the terms of this Order. Upon request of the Regional Director, the records shall be provided in electronic form if they are customarily maintained in that form;

d. Upon request of the Regional Director, sign the attached Notice to Agricultural Employees (Notice) and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth below;

e. Post copies of the Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the periods and places of posting to be determined by the Regional Director, and

exercise due care to replace any Notice which has been altered, defaced, covered, or removed;

f. Arrange for a representative of respondent or a Board agent to distribute and read the Notice, in all appropriate languages, to all bargaining unit employees then employed, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, Board agents shall be given opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice of their rights under the Act. The Regional Director shall be determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost during the reading of the Notice and the question-and-answer period;

g. Mail copies of the Notice, in all appropriate languages, within 30 days after the date this Order becomes final to all agricultural employees employed by respondent, including those employed by farm labor contractors at any time during the period from November 2, 2013, through March 29, 2016, at their last known addresses;

h. Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the date of this Order becomes final;

i. Notify the Regional Director in writing, within thirty days after the date this Order becomes final, of the steps respondent has taken to comply with its terms. Upon request of the Regional Director, respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

DATED: July 30, 2019

Cathryn Rivera-Hernandez, Member

Isadore Hall III, Member

Barry D. Broad, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After a hearing at which all parties had an opportunity to present evidence, the Agricultural Labor Relations Board (the "ALRB" or "Board") found that we violated the Agricultural Labor Relations Act (the "ALRA" or "Act") by failing to recall from layoff workers in retaliation for their support of the United Farm Workers of America ("UFW").

The ALRB has told us to post, publish and abide by the terms of this Notice. The ALRA is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
2. To form, join, or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another;
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT refuse to recall you from layoff because of your support for a union,

WE WILL NOT in any like or related matter interfere with, restrain or coerce employees from exercising their rights under the Act,

WE WILL offer Alberto Bermejo Cardosa immediate employment to his former position, or if that position is no longer available, to a substantially equivalent position,

WE WILL make whole Eliazar Mulato, Rafael Marquez Amaro, Juan Manuel Juarez Hernandez, and Alberto Bermejo Cardosa, who were no recalled for unlawful reasons, for all wages or other economic losses that they suffered as a result of our unlawful failure to recall them.

DATED: _______________ GERAWAN FARMING, INC.

By: _________________________________
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board (ALRB). One ALRB

office is located at 1642 W. Walnut Avenue, Visalia, CA 93477, telephone number (559) 627-0995.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE

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CASE SUMMARY

GERAWAN FARMING, INC.
(Juan Manuel Juarez Hernandez
and United Farmworkers of
America)

45 ALRB No. 7
Case Nos. 2015-CE-014-VIS, et al.

ALJ Decision

On August 27, 2018, the Administrative Law Judge (ALJ) issued a decision finding that Gerawan Farming, Inc. (Gerawan) violated sections 1153(a), (c) and (d) of the Agricultural Labor Relations Act (ALRA or Act) by failing to recall four agricultural employees from seasonal layoffs in retaliation for their support for the United Farm Workers of America (UFW), and with respect to one individual because he testified in a prior ALRB proceeding.

Board Decision

The Board affirmed the ALJ's factual findings and legal conclusions consistent with its own decision. The Board reiterated that under the legal standard for determining whether adverse employment actions violate the Act, the General Counsel bears the initial evidentiary burden to show that the alleged discriminatees engaged in protected concerted or union activity, the employer knew of or suspected such activity, and that there was a causal relationship between the employees' protected activity and the adverse employment action. The Board clarified that to the extent that the ALJ indicated in her decision that proof of general antiunion animus on the part of the employer was sufficient by itself to establish the General Counsel's prima facie case, the Board did not rely on her analysis. The Board further found that evidence of established, although informal practices used by forepersons to fill their crews following a regular seasonal layoff was sufficient to satisfy the General Counsel's prima facie showing that the employer had a practice or policy of contacting former employees to offer them re-employment. The Board affirmed the ALJ's conclusion that Gerawan violated the Act when one of its foremen did not recall two experienced workers who were active union supporters where the foreman's proffered reason for not recalling the workers was a pretext. The Board affirmed the ALJ's conclusion that Gerawan violated the Act when another of its foremen delayed rehiring a union supporter where Gerawan failed to show the delay would have occurred even absent the worker's union activity. Finally, the Board found a violation as to the failure to rehire a fourth worker when he called two foremen at the beginning of the 2015 thinning season and was told crews were full, an excuse the Board found to be a pretext. The Board rejected the General Counsel's argument that a violation should have also been found for a 2014 failure to recall the same worker, because that allegation was time-barred. Member Broad stated that he would find an additional violation when the worker went to the fields later in the season to look for work and again was told the crews were full.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC., Respondent, and, UNITED FARM WORKERS OF AMERICA, and, JUAN MANUEL JUÁREZ HERNANDEZ, Charging Parties.	Case Nos.: 2015-CE-007-VIS 2015-CE-008-VIS 2015-CE-014-VIS 2013-CE-064-VIS **DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE**

Appearances

For ALRB General Counsel
Julia Montgomery, General Counsel
Silas M. Shawver, Deputy General Counsel
Chris A. Schneider, Regional Director
Stephanie Padilla, Graduate Legal Assistant

For Charging Party United Farm Workers of America
Mario Martinez, Esq.
Edgar Iván Aguilasocho, Esq.
Brenda Rizo, Paralegal,
Charlotte Mikat-Stevens, Legal Fellow
Martinez Aguilasocho & Lynch

For Respondent Gerawan Farming, Inc.
Ronald H. Barsamian, Esq., Seth Mehrten, Esq.
Patrick S. Moody, Esq.
Crystal Pizano, Esq., Barsamian & Moody
David A. Schwarz, Esq., Irell & Manella, LLP
Michael Mallery, General Counsel, Gerawan Farming, Inc.
Jose Erevia, Human Resources Manager, Gerawan Farming, Inc.

DECISION

The broad issues in these consolidated cases are:

- Whether the General Counsel carried the burden of persuasion to show by a preponderance of the evidence that a motivating factor in Gerawan Farming, Inc.'s (Gerawan or Respondent) failure to recall four agricultural employees was their union or other protected conduct.

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- If a preponderance of the evidence supports an inference that union or protected conduct was a motivating factor in failure to recall, whether Gerawan demonstrated that the same action would have taken place in the absence of the union or protected conduct.

Hearing was held in Fresno from May 22-24, 2018. All parties were provided an opportunity to call and fully examine the witnesses.[1] On the record as a whole,[2] including the briefs of all parties, and after assessing the relative credibility of various witnesses,[3] the following findings of fact and conclusions of law are made.

I. Legal Standard

A. *Wright Line* Shifting Burden Analysis

In order to determine whether an adverse employment action is unlawful, the *Wright Line*[4] causation test is utilized. This test has a shifting burden of analysis. Unfortunately, throughout the years, the elements of this test have been mischaracterized or stated in different ways. This lack of consistency is cause for confusion on the part of litigants and judges. Thus, before analyzing the facts of this case, a few words are warranted regarding evolution of *Wright Line*.

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[1] Gerawan argues that it did not have the opportunity to fully cross-examine one of the alleged discriminatees because the General Counsel did not provide all of the statements made or adopted by the witness as requested by Gerawan and required by Rule 20274 (a). After full argument regarding this matter, Gerawan was ordered to proceed with cross-examination. Gerawan stated it would file a request for special permission to appeal this ruling pursuant to Rule 20242(c) and thereafter cross-examined the witness. Relying on *Premiere Raspberries* (2012) 38 ALRB No. 11, pp. 8-9, by Order of June 28, 2018, pp. 2-3, the Board denied the request for special permission to appeal because an appeal of an evidentiary ruling that can be addressed effectively through exceptions is not a collateral order subject to interlocutory review.

[2] All parties agree that Gerawan is an agricultural employer within the meaning of § 1140.4(c) of the Agricultural Labor Relations Act (ALRA). All parties agree that the Charging Party United Farm Workers of America (UFW) is a labor organization within the meaning of § 1140.4(f) of the Act.

[3] Specific credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to the factual findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[4] *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083 enfd. (1st Cir. 1981) 662 F.2d 899, cert. denied, (1982) 455 U.S. 989.

1 The source of the shifting burden of analysis is a 1977 Supreme Court case, *Mt. Healthy City*
2 *School District Board of Education v. Doyle.*[5] In that case, the School District did not renew
3 Doyle's contract because he communicated with a local radio station and because he made an
4 obscene gesture to two girls in connection with their failure to obey commands he made in his
5 capacity as cafeteria supervisor. The Court found that Doyle's communication to the radio
6 station was constitutionally protected First Amendment speech.[6]
7 The lower court found that Doyle's protected speech, a non-permissible reason for
8 failure to renew, played a "substantial part" in the decision not to renew Doyle's contract. The
9 lower court held that if a non-permissible reason, such as exercise of First Amendment rights,
10 played a substantial part in the adverse employment decision, the decision is unlawful even in the
11 face of other permissible grounds.[7] Thus, the lower court employed no shifting burden and
12 provided no opportunity for the school district to prove that Doyle would not have been retained
13 even absent his exercise of free speech. The lower court held, based on the finding that free
14 speech played a substantial part in failure to retain him, that Doyle was entitled to reinstatement
15 with backpay.
16 On review, the Court stated:[8]
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18 A rule of causation which focuses solely on whether protected conduct play a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally
19 protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would
20 requirement reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire,
21 and does indeed play a part in that decision – even if the same decision would have been reached had the incident not occurred. The constitutional principle at
22 stake is sufficiently vindicated if such an employee is placed in no worse a position that if he had not engaged in the conduct. A borderline or marginal
23 candidate should not have the employment question resolved against him because of constitutionally protected conduct. But the same candidate ought not to be
24 able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that
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[5] 429 U.S. 274.
[6] Id. at 284.
[7] Id.
[8] Id. at 285-286.

> record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

The Court thus formulated a causation test for instances in which constitutionally protected actions formed a basis for the discipline:[9]

> Initially, in this case, the burden was properly placed upon [Doyle] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" – or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. [Doyle] having carried that burden, however, the District Court should have gone on to determine whether the [School] Board had shown by a preponderance of the evidence that it would have reached the same decision as to [Doyle's] re-employment even in the absence of the protected conduct.

In adopting *Mt. Healthy,* the NLRB held that whether an employer's adverse employment action was motivated by employee protected activity should be assessed by applying a shifting burden analysis as follows:[10]

> Initially, the employee must establish that the protected conduct was a "substantial" or "motivating" factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct.

In other words, an inference of motivation is found if the General Counsel satisfies the initial burden of persuasion.[11] Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place in any event.[12]

In *Director, Office of Workers' Compensation Programs, DOL v. Greenwich Collieries*, the Court noted that over the years, articulation of the term "burden," was blurred by careless usage of the terms "burden of proof," "burden of persuasion," and "burden of production."[13] The Court held that "burden of proof," as utilized in the Administrative

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[9] Id. at 287 (footnote omitted).

[10] *Wright Line,* supra, 251 NLRB at 1087.

[11] "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line,* supra, 251 NLRB at 1089.

[12] Id.

[13] (1994) 512 U.S. 267, 272.

Procedure Act (APA),[14] referred to the "burden of persuasion,"[15] that is, "the notion that if evidence is evenly balanced, the party that bears the burden of persuasion must lose."[16] This is distinguished from the "burden of production," "a party's obligation to come forward with evidence to support its claim."[17] Finally, the Court acknowledged that it had earlier reached a contrary conclusion in *NLRB v. Transportation Management Corp*[18] holding that the APA burden of proof provision determines only the burden of going forward, not the burden of persuasion. The Court rejected this prior *Transportation Management Corp.* holding.[19]

In 1996, the NLRB recognized the modification required in *Greenwich Collieries* as a change in phraseology.[20] Utilizing the modification, the NLRB noted that the General Counsel's burden is to "persuade that antiunion sentiment was a substantial or motivating factor." If the General Counsel satisfies this burden, "The burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity."[21]

Throughout the process of adoption of *Mt. Healthy* and *Greenwich Collieries,* it cannot be too strongly emphasized that the shifting burden analysis is a test of causation. Thus, when further development of the elements of the initial burden of persuasion were enunciated, it was unnecessary to add an element of causation. The entire test is one of causation.

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[14] 5 U.S.C. §554. The APA is the procedural underpinning of the NLRA and other federal statutes.

[15] *Greenwich Collieries,* supra, 512 U.S. at 276.

[16] Id. at 272.

[17] Id.

[18] (1983) 462 U.S. 393, 404 fn. 7.

[19] *Greenwich Collieries,* supra, 512 U.S. at 277-278.

[20] *Manno Electric, Inc.* (1996) 321 NLRB 278, 283 fn. 12 (*Greenwich Collieries* merely suggests a "change in phraseology" and "does not represent a substantive change in the *Wright Line* test."), enfd. (5th Cir. 1997) 127 F.3d 34.

[21] Id.

B. NLRB Elements of the Initial Burden of Persuasion

To satisfy the initial burden of persuasion as to causation, the General Counsel must show three elements by a preponderance of the evidence: activity, knowledge, and animus.[22] The NLRB has expressed these three elements as follows:[23]

> [T]he elements required to support the General Counsel's initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer.

There is no "nexus" element in the initial burden of persuasion because such an element would be superfluous.[24] Causation or motivation is assessed by application of *Wright Line*. The lack of a "nexus" element in the NLRB articulation is a matter of pure logic. Thus, in a somewhat oversimplified mathematical sense, the General Counsel's *Wright Line* burden of persuasion might be summarized as: Inference of Motivation equals Activity plus Knowledge plus Animus (IM = A + K + A).

In legal lexicon, if the General Counsel satisfies the initial burden of persuasion by a preponderance of the evidence (showing that there was activity, knowledge, and animus), *Wright Line* assesses this showing as supporting an inference that protected activity was a substantial or motivating factor in the adverse employment action.

Although various NLRB Members have advocated for addition of a fourth element of nexus, that is, a showing of causal connection between the animus and the adverse

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[22] *Kitsap Tenant Support Servs.* (2018) 366 NLRB No. 98, slip op. at 11, citing *Libertyville Toyota* (2014) 360 NLRB 1298, 1301 and fn. 10, enfd. sub nom. *AutoNation, Inc. v. NLRB* (7th Cir. 2015) 801 F.3d 767; *Austal USA, LLC* (2010) 356 NLRB 363 at 363; see also, *Mesker Door, Inc.* (2011) 357 NLRB 591, 592 n. 5 ("The judge incorrectly described the General Counsel's initial burden as including a fourth 'nexus' element.")

[23] *Kitsap*, supra, 366 NLRB No. 98, p. 11.

[24] See *Kitsap*, supra, 366 NLRB No. 98, pp. 11-12 fn. 25: "Thus, [Chairman Ring] agrees that there is no separate and distinct 'nexus' element that the General Counsel must satisfy under *Wright Line*. He emphasizes, however, that *Wright Line* is inherently a causation test. Thus, identification of a causal nexus as a separate element the General Counsel must establish to sustain his burden of proof is superfluous because '[t]he ultimate inquiry' is whether there is a nexus between the employee's protected activity and the challenged adverse employment action. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327-1328 (D.C. Cir. 2012)." See also, *Advanced Masonry Systems* (2018) 366 NLRB No. 57, pp. 3-4 fn. 8.

employment action,[25] the NLRB has never adopted such a requirement.[26] It is superfluous and logically inconsistent with *Wright Line,* which is a causation test adopted by the NLRB and approved by the United States Supreme Court. Nexus is already built into the formula.

To be clear, however, the NLRB from time to time expressed the General Counsel's burden as requiring four elements: activity, knowledge, animus, and causal connection.[27] More recently, as seen from the discussion above, the NLRB appears to require rigorous articulation of the initial burden as requiring only the three elements of activity, knowledge, and animus. In its recent cases, the NLRB has specifically rejected nexus as part of the initial *Wright Line* showing.[28]

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[25] For instance, former NLRB Members Schaumber and Johnson, and former NLRB Chairman Miscimarra emphasized that *Wright Line* is ultimately a causation test. In their views, a fourth element, causal connection or nexus, should be required between the animus and the action. See former Member Schaumber: *Shearer's Foods, Inc.* (2003) 340 NLRB 1093, 1094 fn. 4; former Member Johnson: *St Bernard Hospital & Health Care Center* (2013) 360 NLRB 53 fn.2; former Chairman Miscimarra concurring: *Starbucks Coffee Co.* (2014) 360 NLRB 1168, 1172 fn. 1. Chairman Ring and former Chairman Kaplan do not advocate adding a fourth element to the test. They find it logically superfluous. See *Advanced Masonry Systems,* supra, 366 NLRB No. 57, slip op. at 3-4 fn. 8 (former Chairman Kaplan); *Kitsap Tenant Support Services,* supra, 366 NLRB No. 98, slip op at 11-12 fn. 25 (Chairman Ring).

[26] See, e.g., *Neises Constr. Corp.* (2017) 365 NLRB No. 129, slip op. at 1-2, fn. 6.

[27] Although not an exhaustive list by any means, in various cases the NLRB articulated the *Wright Line* initial burden as a four-part test with nexus as the fourth factor or has adopted without comment the decisions administrative law judges with the same misstatement. See, e.g., *American Gardens Management Co.* (2002) 338 NLRB 644, 645 (Four elements in initial showing: activity, knowledge, adverse action, nexus); *Tracker Marine, LLC* (2002) 337 NLRB 644, 646 (Board adopted without comment the ALJ's recitation of a four-part initial burden: activity, knowledge, adverse action, nexus); *American Federation of Teachers of New Mexico* (2014) 360 NLRB 438, 448 (same). More recent NLRB precedent, cited above, appears to consistently utilize a three-prong initial burden with no causal connection or nexus requirement. See also, *Libertyville Toyota,* (2014) 360 NLRB 1298, 1301 fn. 10: "Even though there are a handful of instances in which Board panels, without purporting to modify or add to the longstanding Wright Line test, have in passing referred to a "nexus" element, those decisions are not to the contrary, given the overwhelming number of cases in which the Board has stated the Wright Line test precisely as we do here. We note that such cases do not reflect a different approach as, in none of the cases cited by our colleague, was such a "nexus," or the lack thereof, the basis for the Board's holding."

[28] *TM Group, Inc.* (2011) 357 NLRB 1186, 1186 fn. 2: "Contrary to the judge's statement of the Wright Line standard, however, "nexus" is not an element of the General Counsel's initial burden. See, e.g., *Mesker Door*, 357 NLRB [591, 592] fn. 5 (2011). . . ."

C. ALRB Elements of Initial Burden of Persuasion

In *Martori Bros. Distributors v. ALRB*,[29] the court adopted the *Mt. Healthy-Wright Line* "but for" test as the appropriate test to be utilized by the ALRB in dual motivation cases:

> Labor Code section 1148 provides that "[t]he board shall follow applicable precedents of the National Labor Relations Act, as amended." In light of the recent Wright Line decision, the ALRB henceforth should apply this "but for" standard in assessing the dual motive for discharge of agricultural workers under the Agricultural Labor Relations Act. When it is shown that the employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities.

Although the ALRB has embraced *Wright Line's* shifting burden analysis, it has not until recently utilized the three elements (activity, knowledge, animus) of the NLRB's requirements for the General Counsel's initial burden of persuasion.[30] Rather, the ALRB has generally required that the General Counsel show activity, knowledge, and nexus to satisfy the initial burden of persuasion. For instance, in a post-*Martori Bros.* 1981 case,[31] the following was stated:

> To establish a prima facie case of discriminatory discharge or discriminatory refusal or failure to rehire, the General Counsel must show by a preponderance of the evidence that the employee was engaged in protected activity, that Respondent had knowledge of such activity, and that there was some connection or causal relationship between the protected activity and the discharge or failure to rehire.

In subsequent cases, the ALRB followed the burden-shifting test of *Wright Line* but did not utilize the three elements articulated by the NLRB – activity, knowledge, and animus – which satisfy the General Counsel's initial burden and create an inference of unlawful

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[29] (1981) 29 Cal.3d 721.

[30] *Sandhu Brothers Poultry and Farming* (2014) 40 ALRB No. 12.

[31] *Verde Produce Co.* (1981) 7 ALRB No. 27, at pp. 2-3, issued three months after *Martiori Bros.*, supra, citing *Jackson and Perkins Rose Co.* (1979) 5 ALRB No. 20, p. 5; see also *Nash de Camp Co.* (1982) 8 ALRB No. 5, slip op. at 2, finding no causal connection or nexus.

motivation. For example, in *Bruce Church, Inc.*,[32] the ALRB held that the General Counsel must establish activity, knowledge and nexus by a preponderance of the evidence.

In 1987, the ALRB specifically adopted *Wright Line* in all cases involving dual motivation.[33] Despite adopting *Wright Line,* the ALRB did not state the three elements – activity, knowledge, and animus – that were necessary under NLRB precedent to satisfy the General Counsel's initial burden of persuasion. Subsequent ALRB decisions up to and including *Kawahara Nurseries*[34] continued to utilize the nexus element rather than animus.[35]

All parties to this proceeding have cited to ALRB authority enunciating the three-pronged General Counsel initial burden as including activity, knowledge, and causal connection.[36] However, a month after *Kawahara Farms* was issued, the ALRB issued *Sandhu Brothers.*[37] Relying on NLRB authority in *Donaldson Bros. Ready Mix, Inc.*[38] the ALRB stated in *Sandhu Brothers:*[39]

> The General Counsel satisfies this [initial] burden by showing that (1) the employee was engaged in protected activity, (2) the employer had knowledge of the protected activity, and (3) the employer bore animus toward the employee's protected activity.

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[32] *Bruce Church Co., Inc.* (1983) 9 ALRB No. 75, ALJD at p. 10; see also *Ranch No. 1* (1986) 12 ALRB No. 21, slip op. at 5-6, fn. 5; *D'Arrigo Brothers* (1987) 13 ALRB No. 1, adopting judge's articulation at ALJD p. 19.

[33] *Sam Andrews' Sons* (1987) 13 ALRB No. 15 at pp. 6-7. See also, *California Valley Land Co., Inc.* (1991) 17 ALRB No. 8 pp. 6-7 (also setting out two-part *Wright Line* analysis but not mentioning the elements of the initial General Counsel showing as activity, knowledge, and nexus).

[34] (2014) 40 ALRB No. 11, p.11.

[35] See, e.g., *Bruce Church, Inc.*, (1990) 16 ALRB No. 3, slip op. at 14; *T.T. Miyasaka, Inc.* (1990) 16 ALRB No. 16 at pp. 20-21; *California Valley Land Co., Inc.* supra, 17 ALRB No. 8, slip op. at 6-7. Other cases have expressed the same concept as nexus or causal connection by utilizing the term "motivation" as the third prong of the General Counsel's initial burden of persuasion. See, e.g., *H & R Gunlund Ranches* (2013) 39 ALRB No. 21, p. 3; *McCaffrey Goldner Roses* (2002) 28 ALRB No. 8, pp. 5-6.

[36] General Counsel Brief at 20 citing *Lawrence Scarrone* (1981) 7 ALRB No. 13, p. 5; Charging Party Brief at p. 2, citing *California Valley Land Co. and Woolf Farming Co. of California, Inc.* (1991) 17 ALRB No. 8 at pp. 6-7; Respondent Brief at p. 13, citing *Lawrence Scarrone,* supra.

[37] (November 13, 2014) 40 ALRB No. 12.

[38] (2004) 341 NLRB 958, 961.

[39] *Sandhu Brothers,* supra, 40 ALRB No. 12 at p. 14.

The ALRB did not specifically state in *Sandhu Brothers* that it was changing its prior three-element standard. However, because the ALRB is bound by NLRB precedent,[40] it is submitted that the better approach is set forth in *Sandhu Brothers.* That standard will be utilized here.[41]

II. Facts and Analysis

A. Nature of Seasonal Work in Gerawan's Peach and Nectarine Orchards

The employment actions at issue took place in Gerawan's peach and nectarine orchards. Specifically, the work performed for crew bosses Francisco Maldonado (Maldonado), Manuel Ramos (Ramos), Alfredo Zarate (Zarate), and Carlos Rodriguez (Rodriguez) is involved.[42] The peach and nectarine season moves through various cycles including winter pruning, followed by spring thinning, and concluding with harvesting including summer pruning.

In the winter months, after the trees have lost their leaves, the workers prune them. This usually happens in November and December and into early spring. During this winter pruning cycle, the crews also truss the trees with two circles of string or other supporting material. The trussing provides circumference support for the branches when the fruit becomes

[40] Cal. Labor Code, § 1148: "The [ALRB] shall follow applicable precedents of the National Labor Relations Act, as amended."

[41] California State law does not appear to be contrary to *Sandhu Brothers.* Although many California courts have followed and adopted *Wright Line*, the only California State holding regarding the General Counsel's initial burden of persuasion is contained in *Babbit's Eng'g & Mach. v. ALRB* (4th Dist. 1984) 152 Cal.App.3d 310. There the court stated that the General Counsel's evidence allowed the ALRB to drawn an inference of causal connection between the discharges and antiunion animus. (Id. at 330). This statement is consistent with *Mt. Healthy*. However, the court also stated that the General Counsel "is obliged to prove by a preponderance of the evidence that the employee was engaged in union activity. . . . and that there was some connection or causal relationship between the union activity and the discharge." Id. at 343 [ellipsis in original court recitation], relying on *Jackson & Perkins Rose Co.* (1979) 5 ALRB No. 20, p. 5 (complaint dismissed for lack of knowledge and animus)." This statement is somewhat ambiguous as to whether causal connection is an inference to be drawn from the evidence produced by the General Counsel's evidence or an actual holding that causal connection is one of the elements of the General Counsel's burden of persuasion. Under these circumstances, it would appear that there is no clear California State law contrary to the ALRB enunciation in *Sandhu Brothers*.

[42] The parties agree that crew bosses Maldonado, Ramos, Zarate, and Rodriguez are supervisors within the meaning of § 1140.4(j) of the Agricultural Labor Relations Act (ALRA), California Labor Code §§ 1140-1166.3. These crew bosses lay off and recall employees utilizing their independent judgment.

heavy in the summer. The winter pruning crew is usually 18-20 employees to start and can increase to 26-37[43] during the winter pruning cycle.

After about a one or two-week break following winter pruning, the spring thinning cycle usually begins in April and continues into mid-May. The spring thinning crew begins around 17-29[44] strong and can sometimes increase to around 40[45] employees.

After another short break, the harvesting cycle begins around May 20 and ends in September or October. At its peak, there may be as many as 30-45[46] employees in a harvesting crew. Summer pruning occurs during harvesting as each block is finished. This summer pruning is performed in order to allow light to reach as much of each tree as possible in the coming spring thus enhancing blooming potential. At the end of the harvest season, the crew may be reduced to only eight employees to complete the summer pruning.

B. Alleged Refusal to Recall Eliazar Mulato (Mulato) and Rafael Marquez Amaro (Marquez)

The first amended consolidated complaint (the complaint)[47] alleges that agricultural employees[48] Mulato and Marquez were laid off in October 2013 and were not recalled during 2013 winter pruning or 2014 spring thinning, as was the prior practice. The

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[43] For example, payroll records for Maldonado's January 2012, 2013, and 2014 crews show that the largest employee complements were 26, 37, and 29 respectively.

[44] Payroll records for Maldonado's March and April 2012, 2013, and 2014 indicate employee complements of 25, 29, and 17, respectively, following a one or two week break. Zarate's April 1, 2015 employee complement was 32 workers while Rodriguez' was 33.

[45] Although the payroll records show a clear break between winter pruning and spring thinning, there are no clear breaks between spring thinning and harvesting. Using the dates that Maldonado supplied, i.e., spring thinning typically occurs from April to mid-May, the payroll records indicate maximum spring thinning crews of 35, 41, and 31 in 2012, 2013, and 2014 respectively.

[46] Payroll records indicate Maldonado's crew reached a high of 45 employees in 2012, 41 employees in 2013, and 31 employees in 2014.

[47] The backpay specification which was consolidated with the complaint was severed prior to hearing. Thus, this hearing involved only the liability phase of the proceeding.

[48] There is no dispute that Mulato and Marquez were at all relevant times agricultural employees within the meaning of § 1140.4 (b) of the Act.

complaint alleges that failure to recall Mulato and Marquez until May 2014 violated § 1153 (a) and (c) of the ALRA.[49] Both Mulato and Marquez worked for crew boss Maldonado.

1. Facts

Mulato began working for Gerawan in June 2010 on Maldonado's[50] crew. In agreement with Maldonado, Mulato explained that employees were laid off during breaks between the cycles of work. For instance, there might be a one to two week break between the winter pruning and the spring thinning cycles or between the spring thinning cycle and harvesting and another break between harvesting and winter pruning. As each year progressed through the various cycles of work, Maldonado called Mulato to let him know when he should report back from layoff for the next cycle of work. In fact, Maldonado also routinely provided Mulato with a ride to work.

Marquez began working in Maldonado's crew in October 2011. Marquez rode to work with David Clemente. Marquez was routinely laid off and recalled from layoff during the seasonal cycles. Marquez found out about recall through his ride, David Clemente. Marquez usually had one to two days' notice of recall.

Around the spring of 2013, Mulato began supporting the United Farm Workers of America (UFW). Mulato spoke with his co-workers about the UFW and distributed UFW flyers to his co-workers. Mulato told Maldonado that he supported UFW because UFW supported the workers and protected them from abuses on the job. In May or June 2013, Mulato requested permission from Maldonado to attend negotiations between Gerawan and the UFW. He also recalled attending mediation sessions between Gerawan and the UFW in Modesto around July 2013. In mid-November 2013, Mulato joined other workers, including co-worker Marquez, at

[49] The relevant underlying unfair labor practice charge, 2013-CE-064-VIS, was filed on December 23, 2013, alleging failure to recall due to union activity. The complaint alleges violation of §1153(a). However, the parties fully litigated the case as if §1153(a) and (c) were at issue. Thus, both subsections of the Act will be considered. See, e.g., *Signal Produce Co.* (1980) 6 ALRB No. 47, p. 4 fn. 1.

[50] Maldonado began as a general laborer at Gerawan in 2008. He became a crew boss eventually and served in that capacity in the 2013-2014 season. In 2018, Maldonado quit working at Gerawan. Currently, he is remodeling houses.

Gerawan offices in Kerman where employees asked Gerawan to sign a contract with UFW. In late August 2013, Mulato asked Maldonado if he could collect signatures for the UFW. Maldonado reported this request to human resources manager Jose Erevia (Erevia) and to Gerawan counsel.

Like Mulato, in 2013 Marquez began supporting the UFW. He attended negotiating sessions and UFW meetings. At negotiations, Marquez expressed work problems such as pressure from the crew bosses, calling human resources with problems and not receiving a return call, and the go around employees were given. At this time, he also attended a mediation session in Modesto. On these occasions, Marquez asked Maldonado's permission to attend and Maldonado gave permission. At work, Marquez handed out UFW flyers to his co-workers. Marquez wore a red UFW t-shirt to the fields. He also wore it on Fridays when he went to the packinghouse where the owners gave out free fruit. In late August, Marquez joined Mulato in requesting permission to gather UFW support. In November 2013, Marquez joined other pro-UFW employees at the Gerawan offices in Kerman to support UFW's request that Gerawan sign a contract.

Mulato and Marquez were credible witnesses. Although much of their testimony was about facts that occurred five years in the past, they specifically recalled their activities. Further, Maldonado agreed that Mulato and Marquez engaged in open Union activities and he was aware of their activities.

Thus, in 2013, Maldonado became aware of Union activity at Gerawan. Maldonado attended training sessions conducted by Gerawan regarding union procedures. He also attended supervisory training conducted by the ALRB on August 24, 2013. Maldonado agreed that during the harvest season, Mulato and Marquez asked if they could collect signatures for the union. Maldonado agreed that he was interviewed by the ALRB probably four times in 2013. Maldonado agreed that he was aware that Mulato and Marquez were UFW supporters and that they asked for permission to attend negotiation sessions on several occasions in the first half of 2013. Maldonado was also aware that Mulato and Marquez distributed UFW literature at work during breaks. Maldonado agreed that they were both outspoken union supporters.

Prior to the time he engaged in Union activity, Mulato rode to work with Maldonado and moved Maldonado's truck around the fields. Mulato felt that Maldonado was a good friend. After Mulato began supporting the UFW, Maldonado no longer let Mulato drive his truck and no longer provided Mulato with a ride to work each day. Mulato began riding with David Clemente after Maldonado quit giving him a ride.

Maldonado agreed that Mulato had in the past ridden with him to work and moved Maldonado's truck around in the fields from one row to another to move the umbrellas. Maldonado agreed that he and Mulato got along well.

In mid-October 2013, the harvest crew, including Mulato and Marquez, were laid off. At that time, the harvest crew were tying the trees around their circumferences to reinforce the branches during the next growing season. As was typical, Maldonado told Mulato he was laid off until further notice.

Mulato did not receive further notice. This was not typical of the years Mulato worked with Maldonado. Each time employees were recalled, Maldonado would call Mulato and give him notice of when to return from layoff.[51]

However, Maldonado did not call Mulato or Marquez to return to work when the 2013-2014 winter pruning cycle began. When he heard nothing about the winter pruning recall, Mulato called Maldonado's cell phone on an unspecified date in November 2013 but there was no answer.[52] Marquez also called Maldonado but Maldonado did not answer. That same week in November 2013, Mulato called human resources manager Jose Erevia (Erevia). Erevia told Mulato that the crew was full but if more workers were needed, Mulato would be called. In 2014

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[51] Marquez recalled that when this layoff occurred it might have been the time Maldonado told him to call into a central number to find out when to report back to work.

[52] Mulato remembered the date of this call was during the week Maldonado started back to work. Extrapolating from the payroll records, this would have been the first week of November. Maldonado agreed that in late 2013 he changed his phone number. This came about when he changed carriers in order to have more cell coverage. He did not attempt to keep his old number when he made this provider change. "It didn't seem important." He gave his new number to the office and also to David Clemente. Maldonado explained that he gave the number to the drivers but not to many of the workers.

during the thinning season, Mulato went to the fields with Marquez seeking work. They spoke to Maldonado who told him the crew was full but he would call if he needed more workers.

While laid off, Marquez called the office and asked about jobs. He was told that only the foreman knew about personnel. Mulato and Marquez also went to the fields in April 2014 and asked Maldonado for work. Maldonado told them the crew was full and he had a whole line of people waiting. Marquez asked for Maldonado's cell number. Maldonado declined to give it to him and said he would call. Maldonado told Marquez to leave his phone number and Marquez complied. However, Maldonado did not call. Mulato observed the crew performing winter pruning work. Some of them were new to the crew.

According to Maldonado, shortly after the October 2013 layoff, he visited supervisor Antonio Franco (Franco) to see if there was any work. Franco told him to report with a crew of eight workers. Payroll records indicate that on November 2, 2013, Maldonado and a crew of eight workers reported for work and continued through November 15, 2013. Some of the crew of eight had only a month or two of prior experience with Gerawan. Maldonado agreed that he called driver David Clemente (Clemente) when he obtained the recall for eight employees. He told Clemente to report and bring along three specific employees. Maldonado knew that Clemente gave rides to Mulato and Marquez. However, he did not specify either of them.

Maldonado explained that the three employees he named for recall were selected based upon the work that was being performed. That work was tying the circumference of the trees for reinforcement. "They [the three specifically-recalled employees] did the job best from . . . amongst the crew." Maldonado testified that his brother had told him that these employees were good workers.[53] When the size of the crew grew the following week, Maldonado did not call Mulato and Marquez for the stated reason that they had not contacted

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[53] The record does not reflect that Maldonado and his brother discussed these workers in terms of tying the circumference of trees. Maldonado's testimony was about his brother's description of their general working qualities. Maldonado testified that the crew of eight was assembled based on their skills for the particular task rather than on their general skills. This testimony is internally inconsistent and discredited.

him about work. Of course, both had tried but could not do so because they did not have his new phone number.

On November 18, 2013, the crew increased to 18 and up to 24 by the end of 2013. At this point, the crew was engaged in the normal winter pruning cycle. Neither Marquez nor Mulato were recalled for this work. Maldonado agreed that some of the employees were new hires and some who were recalled did not have as much experience with Gerawan as Marquez and Mulato. Maldonado had Marquez' and Mulato's phone numbers. He testified he did not recall them because there were so many people calling him for work and neither Marquez nor Mulato called him. Although Maldonado could not recall the specific individuals he hired for the winter pruning season and did not recognize their names when they were read from the payroll records, he insisted that all of them had a lot of experience working elsewhere. Maldonado testified that he did not take Marquez' and Mulato's Union activity into consideration when they were not recalled.

Maldonado's testimony regarding the rationale for not recalling Mulato and Marquez is unbelievable. Mulato and Marquez had three and two years of experience, respectively, performing work on Maldonado's crew. Maldonado testified that he was satisfied with their work and had no problems with them. Further, Maldonado testified that he preferred to hire experienced individuals for his crew – those who would do a good job, were reliable, and would show up for work. He gave no specific reason for failure to recall Mulato and Marquez in November except that the employees he recalled were recommended by his brother and he selected them based on the tying work that was being performed. Records indicate that these employees had little experience with Gerawan. Thus, Maldonado's testimony that he chose other employees for recall based on experience with the particular work is discredited. Maldonado's testimony that he did not recall Mulato and Marquez is rejected as inconsistent with his agreement that he had a new cell phone number that he did not give to Mulato and Marquez and because it is inconsistent with his prior practice of recalling employees by phoning them or their rides.

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During the spring thinning cycle,[54] Maldonado remembered that Marquez and Mulato came to the fields in March 2014 and asked for work. He told them he could not hire them – he could not take any more people. Maldonado asked for their phone numbers and said he would call them back when he had authority to hire more people. However, he did not do so.

On May 2, 2014, Mulato and Marquez were offered employment with crew boss Ramiro Cruz. They both returned to work at Gerawan performing spring thinning and then harvesting peaches in the summer.

2. Analysis

As stated above, in analyzing dual motivation discrimination cases, the ALRB utilizes the test set forth in *Wright Line*[55] in order to assess whether employer action is motivated by unlawful reasons. Under this test, the General Counsel shoulders an initial burden of persuasion to show by a preponderance of the evidence that union or other protected conduct was a motivating factor, in whole or in part, for the employer's adverse employment action.

Proof of such unlawful motivation may be based on direct evidence or can be inferred from circumstantial evidence.[56] The unexplained timing of an adverse employment action may be indicative of animus (NLRB)[57] or motivation (ALRB).[58] Other factors such as

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[54] Respondent asserts on brief that Marquez and Mulato visited the field asking for a job after the 2014 spring thinning season. The record, however, indicates that the employees visited Maldonado in March 2014 at the very beginning of the 2014 spring thinning season when Maldonado had just a few people. (Vol. II, p. 50:19-25-51:1-7).

[55] *Wright Line*, supra, 251 NLRB at 1087; see also *Am. Gardens Mgmt. Co.*, supra, 338 NLRB at 645 fn. 7 (endorsing application of *Wright Line* to allegations of discrimination for filing an unfair labor practice charge or giving testimony before the Board).

[56] *H & R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21, p. 3; *Brink's, Inc.*, supra, 360 NLRB 1206 fn. 3; *Camaco Lorain Mfg. Plant* (2011) 356 NLRB 1182, 1184-1185.

[57] *N.C. Prisoner Legal Services* (2007) 351 NLRB 464, 468, citing *Davey Roofing, Inc.* (2004) 341 NLRB 222, 223; *Electronic Data Sys. Corp.* (1991) 305 NLRB 219, 220, enfd. in relevant part (1993 5th Cir.) 985 F.2d 801.

[58] *H & R Gunland Ranches*, supra, 39 ALRB No. 21, p. 3.

disparate treatment and failure to follow established rules or procedures are sometimes found indicative of animus[59] or true motive.[60]

Finally, the ALRB requires that the General Counsel's initial showing in a failure to recall situation is that the employee applied for an available position for which the employee was qualified and was then unequivocally rejected.[61] However, where the employer has a practice or policy of contacting former employees to offer them re-employment, the requirement may be satisfied by proof of the employer's failure to offer the employee work when the work became available.[62]

To rebut the General Counsel's evidence, the employer must show that it would have taken the same action in the absence of the employee's protected conduct.[63] The employer's defense that it would have taken the same action in any event fails by definition if the General Counsel shows that the employer's rationale for its adverse action is pretextual – either false or not actually relied upon.[64]

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[59] See, e.g., *CNN America, Inc.* (2014) 361 NLRB 439, 457-458; *Brink's, Inc.* (2014) 360 NLRB 1206, n. 3.

[60] *H & R Gunlund Ranches*, supra, 39 ALRB No. 21, pp 3-4: The inference of the true motive of an adverse action may be proven by circumstantial evidence of 1) timing, 2) disparate treatment, 3) failure to follow established rules or procedures, 4) cursory investigation of alleged misconduct, 5) false or inconsistent reasons given for the adverse action, or belated addition of reasons for the adverse action, 6) the absence of prior warnings, and 7) the severity of punishment for the alleged misconduct.

[61] See *McCaffrey Goldner Roses*, supra, 28 ALRB No. 8, p. 6 (General Counsel must show employee applied for available position for which he was qualified and was unequivocally rejected); *Vessey & Co. v. ALRB* (1989) 210 Cal.App.3d 629, 661 (same).

[62] See, e.g., *H & R Gunlund Ranches*, supra, 39 ALRB No. 21 at p. 4 (In situations where the employer has a practice or policy of contacting former employees to offer them re-employment, proof of the employer's failure to rehire at a time when work was available satisfies the requirement of application and rejection for available position which employee was qualified for); *Giannini Packing Company* (1993) 19 ALRB No. 16, ALJD at 17-18 (additional requirement that a position have been available is satisfied by evidence that the employer "had a policy of contacting former employees to offer them reemployment.")

[63] *Wright Line*, supra, 251 NLRB at 1089.

[64] *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, 759 fn. 7 (where ALRB concludes that employer's purported business justification is pretextual, *Wright Line* dual motive analysis is irrelevant since there is only one remaining cause: union animus); *David Saxe Prods. LLC* (2016) 364 NLRB No. 100, slip op. at 4; *Rood Trucking* (2004) 342 NLRB 895, 898 (quoting *Golden State Foods Corp.* (2003) 340 NLRB 382, 385).

Preliminarily, it is noted that the crew bosses were solely responsible for assembling the crew at the beginning of each cycle of each season. The record indicates that once a crew boss is notified of the recall date, the crew boss calls employees or employees' drivers to let them know when to return to work.

a. General Counsel's Initial Showing

- Activity and Knowledge

Respondent does not dispute activity or knowledge of alleged discriminatees Mulato and Marquez. They began supporting the UFW in the spring of 2013. Their crew boss Maldonado as well as Gerawan negotiators were aware of their activity. Maldonado was aware that Mulato and Marquez were outspoken UFW supporters and that they distributed UFW literature at work on break time. Maldonado's knowledge is imputed to Respondent.[65] In 2013, Mulato and Marquez routinely attended negotiation sessions between the UFW and Gerawan in Modesto. Mulato joined other employees at Gerawan headquarters requesting the Gerawan sign a contract. Marquez wore his Union t-shirt to the packinghouse where the owners handed out free fruit on Fridays. Thus, it is found that the General Counsel has shown by a preponderance of the evidence that Mulato and Marquez were engaged in Union activity and that Respondent had knowledge of their activity.

- Animus

Maldonado agreed that he and Mulato got along well. Prior to learning of Mulato's Union sympathies, Maldonado drove Mulato to and from work each day and allowed Mulato to drive his truck from row to row to move umbrellas. Once Maldonado learned of Mulato's Union sympathies, he quit giving Mulato rides and no longer allowed Mulato to drive his truck. Nothing other than Mulato's status as a Union supporter can support this change in Mulato's duties. The timing of this action is indicative of animus.

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[65] *Vincent B. Zaninovich & Sons, Inc.* (1999) 25 ALRB No. 4, p. 1-2, affirming ALJ pp. 23-25 (knowledge of protected activity held by supervisors is imputed to employer); cf. *Warmerdam Packing Co.* (1998) 24 ALRB No. 2, p. 2 fn. 3 (supervisory knowledge not imputed where evidence shows information was not passed on to higher official who made decision regarding the adverse employment action).

Further, Maldonado's disingenuous explanation for failure to recall Mulato and Marquez is indicative of animus. Prior to the 2013-2014 winter pruning season, Maldonado obtained a new phone number. He did not reveal his new number to Mulato or Marquez. However, his stated reason for failing to recall them was that they did not call him. Maldonado knew this was impossible for them to do. This testimony has been previously discredited in the fact section.

Finally, in early November 2013, Maldonado was given authority to hire a crew of eight. Whether this was unusual, as Respondent portrays it, or the normal course of business, Maldonado's explanation for failure to select admittedly good workers Mulato and Marquez and instead selecting others he had never worked with before is incredible and unworthy of belief. This action is also indicative of pretext.[66]

- Practice or Policy of Contacting Former Employees for Rehire

The record reflects a definite practice on the part of crew boss Maldonado, to contact the former crewmembers at the beginning of each cycle of work, i.e., at the beginning of spring thinning, harvest, and winter pruning. It is further undisputed that the crew bosses do not always personally call each and every former crewmember. Rather, as to employees who ride with a coworker, the crew bosses routinely contact the driver and request that the driver contact his/her riders about the recall. This method of communicating recall was utilized by the four crew bosses uniformly.

Thus, Maldonado was responsible for assembling his crew for each cycle of work. Maldonado built his crews by calling drivers and employees. He preferred to hire experienced, reliable employees. Mulato and Marquez were recalled season after season and year after year and met the experience and reliability criteria for recall.

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[66] See, e.g., *Stamoules Produce Co.* (1990) 16 ALRB No. 13, ALJD at 33, cited by the Charging Party (sudden and unexplained deviation from prior practices were false and pretextual, giving rise to an inference of unlawful motive)

Respondent relies on the prior testimony of Erevia to the general effect that the crew bosses recall former crew members who stay in touch with them during layoff. Erevia stated that employees who always show interest in coming back are recalled if the crew boss wants to recall that person. Except for Erevia's non-specific testimony, this record does not contain any testimony to that effect. None of the crew bosses except Maldonado testified that staying in touch during layoff was a criteria regarding which employees to recall. Maldonado's testimony in this regard has been discredited.

Respondent also claims that the General Counsel's evidence depends on an erroneous assumption that the recall procedures were consistent and systematic. Respondent avers that its recalls are fast-paced and informal and no universal criteria are utilized in the recall process.

Respondent's arguments are rejected. Respondent cites no authority or testimony that would require a formally consistent and systematic recall process. The practice utilized by the crew bosses may, indeed, be fast-paced and informal but this does not mean there is no practice at all. In fact, there is a well-established informal practice of recalling former crewmembers at the beginning of each cycle of a season. It is concluded that the General Counsel has shown by a preponderance of the evidence that these Gerawan crew bosses had an informal practice of contacting former crewmembers to offer them reinstatement at the beginning of each seasonal cycle.

Having found activity, knowledge, and animus, as well as a practice of contacting former crewmembers to offer re-employment, it is concluded that the General Counsel has satisfied the initial burden of going forward. The General Counsel's evidence provides an inference that Union activity was a motivating factor in Gerawan's failure to recall the employees. The burden now shifts to Respondent to show that it would not have recalled these employees in the absence of their activity on behalf of UFW.

b. Respondent's Burden to Show Mulato and Marquez Would Not Have Been Rehired Absent Their Protected or Union Activity

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1 The evidence regarding Mulato and Marquez indicates that when employees were
2 laid off in mid-October 2013, Maldonado told them they would be recalled by further notice. It
3 was typical that Maldonado would call Clemente, who provided transportation for Mulato and
4 Marquez. There is no evidence that prior to November 2013 Maldonado had ever named the
5 specific employees Clemente should bring with him.
6 Maldonado explained that when he phoned Clemente for the November 2013
7 winter pruning recall, he gave Clemente the specific names of Clemente's former riders that he
8 wanted Clemente to bring. Although Maldonado knew that Mulato and Marquez rode with
9 Clemente, Maldonado specifically named three other employees that Clemente should bring with
10 him.[67] Neither Mulato nor Marquez were named by Maldonado. The three employees
11 Maldonado named for recall were, according to him, selected on the basis of the winter pruning
12 work to be performed: tying the circumferences of the trees for reinforcement. The record does
13 not support a finding that this is specialized work. It is performed by all workers each season.
14 Indeed, Mulato and Marquez were preforming this work when they were laid off in mid-October
15 2013.
16 Nevertheless, Maldonado testified that the three other specifically recalled
17 employees who rode with Clemente did the best job from among the prior crew. This statement
18 is inconsistent with Maldonado's testimony that Mulato and Marquez worked as well as any
19 other workers and he had no problems with their work. Further, the explanation that he asked
20 only for these three specific employees due to their tying skills is belied by the fact that he could
21 not remember their prior employment. Thus, Maldonado's testimony that he asked for three
22 specific employees due to their specialized skill has been discredited. These reasons are simply
23 pretext.
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[67] Two of the eight recalled employees had terrible attendance records. Others had very little experience. On hearing their names, Maldonado testified he could not recall them.

The fact that Maldonado deviated from past recall protocol by naming three specific Clemente riders for general labor is found to be false and pretextual. Further, Maldonado made himself unreachable by Mulato and Marquez by virtue of his new phone number.[68] Finally, when Mulato and Marquez went to the orchards during the 2014 thinning cycle, Maldonado again told them the crew was full but he would call if more workers were needed. Maldonado did not call but continued to hire employees without Gerawan experience.

These excuses for failure to recall Mulato and Marquez are unworthy of belief. They deviate from prior practice and constitute pretext, leaving only Union animus as the reason for discharge. Thus, Gerawan has not shown that Mulato and Marquez would not have been recalled absent their Union activity. It is accordingly found that Mulato and Marquez were not recalled during winter pruning 2013 or spring thinning 2014 in violation of §1153 (a) and (c) of the Act.

c. Juan Manuel Juárez Hernandez (Juárez)

The complaint alleges that Respondent refused to recall agricultural employee[69] Juárez in retaliation for his protected concerted and union activities and in retaliation for testifying in an ALRB hearing and participating in an ALRB investigation.[70] The complaint alleges that failure to recall Juárez from March 24, 2015 until April 12, 2015 violated sections1153 (a), (c), and (d) of the ALRA.

1. Facts

Juárez began working for Respondent in either 2008 or 2009. His supervisor from the beginning was crew boss Manuel Ramos (Ramos). Each time Juárez was recalled, he testified that he received a call from Ramos, or Ramos' son-in-law, or Miguel Miranda Alvarerz

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[68] Maldonado testified that he hired new workers because they called him on his phone. Although Maldonado declined to give Mulato and Marquez his new phone number, the new employees apparently were given it. Maldonado's testimony that he did not hire Mulato and Marquez because they did not call him is unworthy of belief.

[69] There is no dispute that Juárez was at all relevant times and agricultural employee within the meaning of §1140.4(b) of the Act.

[70] The relevant unfair labor practice charges were filed on April 8 (by Juárez) and April 9, 2015 (by UFW), in Cases 2015-CE-007-VIS and 2015-CE-008-VIS, respectively.

(Miranda). In any event, one of them told Juárez the date to report. Ramos testified he called Miranda, who provided Juárez a ride to work, to let Juárez know of the recall.

When in conflict, the testimony of Juárez is credited over that of Ramos. Ramos did not have good recollection of many details regarding his crews from past years. On the other hand, an employee who counted on calls to let him know when to report for work following layoff would logically remember these events clearly. Thus, it is found that Ramos or Ramos' son-in-law as well as Miranda usually called Juárez to let him know when to return.

Typically, the call to return to work came one or two days prior to the report date. Ramos' team performed spring thinning and harvesting but did not work the winter pruning cycle.

In 2014, spring thinning work began in March or April. Ramos granted Juárez permission to be absent from work for two weeks telling him there would be work when Juárez returned. When Juárez returned, Ramos put him back to work for the remainder of the season.

After he returned to work in 2014, Juárez spoke with Union organizers who visited during lunch. He wore a Union t-shirt to the packing facility when he went to pick up free fruit on Fridays. Juárez testified in an ALRB hearing in October 2014. His testimony was generally about Ramos' activity in assisting decertification efforts.[71] After Ramos observed Juárez talking with Union representatives at a negotiation session, according to Juárez, Ramos told him he should ask the Union for a job. Ramos' warm greetings to Juárez ceased around this time as well. Coworker Miguel Miranda Alvarez (Miranda) attended the union negotiations with Juárez. Miranda observed Juárez wearing a UFW t-shirt at the packing plant when they went to pick up free fruit from the company.

The parties stipulated that crew boss Manuel Ramos testified at the ALRB hearing on March 3, 2015, from approximately 11 a.m. until 5 p.m. During this period, his testimony was

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[71] See *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1, ALJD pp. 114-115, remanded *Gerawan Farming Inc. v ALRB* (May 30, 2018) Fifth Appellate District Court of Appeal F073720.

interrupted by a discussion between counsel and the administrative law judge about exhibits. Ramos also testified on March 4, 2015 from 9 a.m. until approximately 10:30 a.m.

Thus in March 2015, Ramos testified in the same ALRB hearing that Juárez had in October 2014. At that hearing, Ramos was asked about Juárez' purported earlier testimony that Ramos offered to pay $10 per hour to workers who joined a particular anti-union protest. The question did not accurately reflect Juárez' prior testimony. Ultimately, Ramos was not allowed to answer the question because it mischaracterized Juárez' testimony.

The 2015 spring thinning season began two weeks after Ramos gave his testimony. Juárez did not receive word of recall from Ramos or his son-in-law. Nevertheless, Juárez found out on a Sunday in late March through a friend, Miranda, that work had started on the prior day, a Saturday. Miranda told him that Ramos had called everyone else plus there were new employees. Juárez called Ramos on the next Tuesday and asked for work. Ramos told him the crew was full. There were already 20 workers. Juárez asked how there could already be new crewmembers who had never worked there before. Juárez asserted that he had more right than those new members to be on the crew.

Miranda worked on Ramos' crew from 2010 to 2015. Each year he worked for Ramos, he received a call from Ramos or Ramos' son-in-law, one or two days before he needed to report for work. Miranda drove other crewmembers, including Juárez, to work. Due to a November 2014 injury, Miranda did not work for the rest of the year. In March 2015, Miranda received a call from Jaime Mendoza, who is in charge of injured employees, to report to work to begin spring thinning work. Miranda did not see Juárez at work. He did see three new employees who had not been with the crew in 2014. Miranda called Juárez to see if he needed a ride. Juárez told Miranda he had not received a call to come to work.

Juárez went to the field on a Wednesday in early April 2015 to ask for work. Ramos told him the crew was full. Juárez questioned Ramos, "[H]ow is it possible that you're giving them (the new people) the chance when I've been working with you for so many years?" According to Juárez, Ramos said he was sorry and told Juárez to look for work with other crews.

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On April 8, 2015, Juárez filed an unfair labor practice charge with the ALRB alleging retaliation in failure to recall him.[72] On April 12, 2015, Ramos called Juárez and told him he had a position available for him. Juárez returned to work the following day.

It is unclear whether Ramos knew about the unfair labor practice charge when he recalled Juárez to work. Juárez testified, "He called me and said my job was there when I wanted it. And he said I could go back the following week and to get back to work. But then after he found out about the complaint, everything changed rather quickly."

Both Juárez and Miranda testified that Ramos told them at an unspecified time that if he had ten workers like them, he would only need a ten-member crew to do what 30 members of his crew did. Ramos did not recall making such a statement.

Ramos has worked for Gerawan about 40 years. For the last 18-20 years he has been a crew boss. A few days before work is to begin, Ramos typically receives a call from Gerawan giving him the start date. Ramos lets various workers who live in Reedley know about the start date. Ramos also typically advises the workers who drive others to the fields when the start date will be.

Ramos recalled that Juárez worked on his crew for 3 or 4 years. Ramos testified that Juárez worked just as well as the rest of the crew – not better and not worse – "I've always had a good crew." He had no more problems with Juárez than he had with anyone else. When Ramos wanted Juárez to work, he communicated with Miguel Miranda, the person who gave Juárez a ride. Miranda gave rides to 5-8 employees. Ramos did not typically speak to Juárez by phone. Ramos does not remember March-April 2015 employees on a payroll list of employees read to him.

Ramos remembered that in 2013 there were some protests at Gerawan related to Union issues. Ramos remembered that in 2014 there were also activities related to the Union at Gerawan. Ramos testified that he did not know whether Juárez was involved in these or not.

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[72] That is charge 2015-CE-007-VIS, one of the underlying charges in this proceeding.

Ramos said that when the Union came to discuss matters with his employees, he moved to another area and did not look in the direction of the Union organizers.

Although Ramos recalled testifying in a proceeding involving an election, he stated that he did not remember the substance of his testimony and did not remember if there was testimony about Juárez. Ramos refused to state a preference for hiring experienced employees. Ramos claimed any individual could be trained in three or four days.

To the extent Ramos testified that he could not remember whether Juárez wore a Union shirt, spoke to Union representatives, or testified in an NLRB proceeding, his testimony is discredited. Rather than attempting a thoughtful search of his memory in these areas, Ramos appeared to seek automatic refuge in a faulty memory. Moreover, his testimony that he removed himself from the area and could not see through the leaves when the Union representatives came to the orchards appears improbable and, in any event, would not rule out seeing things before removing himself.[73] Thus, Juárez testimony is credited when in conflict with the testimony of Ramos. Thus, it is found that Ramos observed Juárez' Union activity including his Union shirt. Ramos saw Juárez at negotiations speaking to Union representatives, and Ramos knew Juárez testified at the ALRB hearing. Further, Ramos' testimony that he did not necessarily prefer hiring employees with experience is disingenuous and is not credited.

2. Analysis[74]

a. General Counsel's Initial Showing

- Activity and Knowledge

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[73] Respondent notes that there is no evidence that crew bosses saw the UFW organizers when they took access "as they [the crew bosses] adhered to instructions from both upper management as well as the ALRB to leave the area when the UFW took access." (R Brief, p. 2:17-20) The record is devoid of any such instructions to leave the area. Similarly citing prior cases involving these parties, the General Counsel notes that in 2013 Gerawan held many union-related meetings with its supervisors. The cited prior cases do not discuss union-related supervisory meetings and no finding regarding such meetings may be made here.

[74] The *Wright Line* analysis applies to cases of alleged discrimination based on Union activity as well as alleged discrimination based on testifying before the ALRB. *Nakasawa Farms* (1984) 10 ALRB No. 48, p. 7.

The record as a whole indicates activity and knowledge regarding Juárez. He began engaging in Union activity in 2014 by speaking to Union organizers who came to the work place and wearing a Union t-shirt to the packinghouse on Fridays to receive fresh fruit from the owners. In late 2014, he testified at an ALRB proceeding regarding decertification activity and his testimony was highlighted to Ramos when Ramos testified in the same proceeding just two weeks before Ramos formed his 2015 spring thinning crew. It is therefore found that the General Counsel has shown by a preponderance of the evidence that Juárez was engaged in Union activity and Respondent had knowledge of that activity.

- Animus

After Juárez began his open Union activity, Ramos' attitude toward him changed from friendly to unfriendly. Ramos no longer provided Juárez a ride to work and no longer let him drive Ramos' truck to move umbrellas at work. Further, Ramos indicated a degree of animus toward Juárez based on what Ramos thought Juárez had testified before the ALRB.

Juárez, an openly pro-Union employee, testified at an ALRB hearing in October 2014 about crew boss Ramos' activity in assisting decertification efforts. Ramos testified at the same ALRB hearing on March 3, 2015. Ramos was examined about the prior testimony of Juárez, albeit mischaracterized as claiming that Ramos told employees they would be paid $10 per hour to attend an anti-union rally. Several weeks after Ramos testified, he assembled his spring thinning crew without including Juárez. After five or six years of recall pursuant to the ordinary practice, he was not recalled following his testimony. The timing of this action is indicative of animus.[75]

Additionally, when Ramos was asked about testifying in the earlier ALRB hearing, he indicated animus against Juárez by strongly protesting:

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[75] Respondent's argument that Juárez applied for work when no opening was available is rejected. The practice or policy of contacting former employees for rehire satisfies the requirement that the employee applied for an available position for which the employee was qualified. See discussion supra regarding *H & R Gunlund Ranches*, supra, 39 ALRB No. 21 at p. 4.

Q. When you came to the hearing several years ago you learned that Juan Juarez had testified that you sent people to the anti-Union protest?

A. Well, if he did it, I don't know why he did it because -- because I never -- I've never sent anybody to protest and I have no interest in that.

- Practice or Policy of Contacting Former Employees for Rehire

Ramos usually received a call from Gerawan a few days before each cycle of work. After that, he was responsible for bringing a crew to the orchard on the start date. He usually called the same people from season to season to be part of his crew. Ramos also called drivers, such as Jaime Cortez or Miguel Miranda, who routinely brought in other crew. The drivers then called each of their riders to report the recall. Ramos also asked his son-in-law to make calls to other former crewmembers.

Ramos testified that he did not call individual employees. He just called their rides. Juárez testified he was contacted directly by Ramos' son-in-law as well as by Miranda. These facts indicate that in the case of Ramos' crew, there was a practice or policy of contacting former crewmembers for rehire.

Accordingly, it is found that the General Counsel has carried the initial burden to show activity, knowledge, animus, and a practice of contacting former employees for recall. Thus, a preponderance of the evidence indicates that a motivating factor in failure to recall Juárez was his Union activity and his testifying in an ALRB hearing. The burden of persuasion now shifts to Respondent to demonstrate that it would have taken the same action in the absence of Juárez' Union activity and his testimony before the ALRB.

b. Respondent's Burden to Show that Juárez Would Not Have Been Rehired Absent His Protected or Union Activity and His Testifying Before the ALRB

Regarding Juárez, crew boss Ramos testified to no reason for failure to recall him. Moreover, he did not credibly explain why so many new employees with no experience at Gerawan were hired instead of Juárez.[76] Ramos confirmed that Juárez worked with him for a

[76] No doubt crew boss Ramos as well as the other crew bosses are excellent teachers and can train new employees as necessary. Other crew bosses, however, agreed that they preferred hiring experienced

number of years and was as good as any other employee. This may appear to be faint praise but all of the crew bosses who testified described their crews in the same manner. Perhaps more telling is the fact that Ramos allowed Juárez to leave for several weeks in 2014 and immediately put him back to work on his return. At a minimum, this indicates a degree of comfortable satisfaction with Juárez' work and his dependability.

Respondent speculates that Ramos did not call driver Miranda in 2015 because he thought Miranda was on sick leave. Ramos did not testify that this is why he did not call Miranda. There is no evidence regarding why Ramos' son-in-law did not contact Juárez. Moreover, the record is silent regarding how Juárez was transported to work in 2014 after Miranda was injured and whether this driver might have been recalled or not. Accordingly, Respondent's speculative argument that due to Miranda's injury, Ramos simply could not contact a ride for Juárez fails.

Based on this record, it is found that Juárez would have been recalled if he had not engaged in Union activity and had not testified before the ALRB. The normal procedure for recall was telephone contact to the employee or the employee's driver shortly before work was to start. Juárez had been recalled in this fashion for five or six years. No reason has been presented for failure to call Juárez or his ride.

Thus, in the absence of demonstrating that it would have taken the same action even in the absence of Juárez' Union activity and his testimony before the ALRB, it is found that Gerawan refused to recall Juárez in retaliation for his Union activities and in retaliation for his testifying in an ALRB hearing. This action violated §1153(a), (c), and (d) of the Act.

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workers. Ramos testified that he could train a new employee in three days and had no preference for hiring experience. This testimony is so contrary to common sense and principles of expedience and efficiency as to be unlikely and unworthy of belief. It cannot be credited. The trustworthiness of this testimony is further belied by the payroll records which indicate that numerous employees were recalled year after year, season after season.

c. Alberto Bermejo Cardosa (Bermejo)

The complaint alleges that agricultural employee[77] Bermejo was not recalled in April 2015 because of his union or protected concerted activity in violation of §1153 (a) and (c) of the ALRA.[78]

1. Facts

Bermejo began working for Gerawan crew boss Alfredo Zarate (Zarate) in August 2011 and worked on Zarate's crew until October 2013. In 2014, Bermejo worked for Gerawan crew boss Rodriguez. Bermejo worked the entire 2014 season with Rodriguez but was not recalled in 2015 by either Zarate or Rodriguez. It is this failure to recall that is at issue.

At the end of Gerawan's harvest seasons in 2011 and 2012, Bermejo and other crew members followed Zarate to work for an independent contractor pruning grape vines for a different farming operation, i.e., not for Gerawan. However, in 2013, Zarate did not take Bermejo with him to work with the grapes. When Bermejo sought work at Gerawan with crew boss Zarate for the spring thinning of 2014, Zarate told Bermejo that his crew was full. Bermejo then began working with Gerawan crew boss Rodriguez. There is no allegation of unfair labor practice regarding failure to recall Bermejo to Zarate's crew for the spring thinning of 2014.

Bermejo was involved in activities on behalf of UFW in 2013 and 2014. During breaks and lunch, he distributed pro-Union flyers and invited coworkers to support the UFW. Bermejo attended negotiation sessions. He asked permission from crew boss Rodriguez to leave work early to attend these meetings and permission was granted. Bermejo also attended an ALRB hearing with a coworker in August 2014 to support the UFW. Zarate agreed that among

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[77] There is no dispute that Bermejo was at all relevant times an agricultural employee within the meaning of §1140.4(b) of the Act.

[78] The unfair labor practice charge in Case No. 2015-CE-014-VIS was filed by UFW on May 18, 2015, alleging that Respondent's refusal to recall Bermejo was discriminatory and in retaliation for his Union activity.

1 workers on his crew, Bermejo was one of the most active Union supporters. Zarate agreed that
2 Bermejo had a UFW sticker on the back of his car.

3 Bermejo worked the entire 2013 season on Zarate's crew. He received his final
4 paycheck in October 2013 at a store where employees gathered to receive their checks. Bermejo
5 recalled speaking to Zarate at this gathering. There was a lot of small talk but at one point, Zarate
6 noted that Bermejo had a UFW sticker on his car. Zarate told Bermejo to remove the sticker.
7 Zarate also told Bermejo that he was not getting the work with the grapes because Bermejo was
8 causing "trouble" at Gerawan by handing out union flyers.

9 Alfredo Zarate, crew boss, has worked for Gerawan since 2008. His work has
10 been with peaches and nectarines in Reedley and Kerman. As crew boss, Zarate forms the crew,
11 directs the work by explaining what is to be done, watches that everyone is working, and
12 monitors the quality of work. He hires the number of laborers initially set by Gerawan at the
13 beginning of each cycle of work.[79] As work progresses, additional workers are added. Gerawan
14 gives him one or two days' notice of the date to begin working. Zarate prefers to hire workers
15 with prior experience.

16 Zarate also works for an outside contractor when there is no work at Gerawan. He
17 is a crew boss for the outside contractor too and he uses the same crew at both the outside
18 contractor and Gerawan. Thus, he simply lets his outside crew know that they will be moving to
19 Gerawan on a certain date. If employees working with him for the outside contractor have not
20 worked for Gerawan previously, he sends them to register at Gerawan before work at Gerawan
21 starts.

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[79] Zarate testified that he started letting some workers know about recall in 2015 if the worker had been asking about a start date. If workers had not asked about a start date, he did not contact them. Zarate could not remember whether Bermejo was one of the workers who asked him for a start date. Citing this testimony, Respondent contends that Zarate denied ever calling workers to recruit them to work in his crew. Respondent's characterization is unhelpful and, in fact, an overstatement of the testimony.

As crew boss at Gerawan, Zarate reports employee problems to Gerawan. As a result, written warnings, suspensions, as well as other discipline may issue. Zarate does not receive copies of these documents and does not keep track of written warnings, suspensions, or other discipline. Zarate can hire employees who have been disciplined in the past. However, if an employee has been fired, the employee is not eligible for rehire.

Although Zarate did not remember the years that Bermejo worked on Zarate's crew, the parties agree it was in 2012 and 2013. In 2012, Bermejo began working in Zarate's crew for the outside contractor and then followed with Zarate to Gerawan. Zarate testified, "Yes. He's a good worker. Yes, he's – he's a worker. He – he got it – he did his job, but sometimes there's problems and sometimes he came in late." Zarate agreed that Bermejo was one of six tractor drivers on the crew and that this position entailed additional responsibility and training.[80]

Zarate was asked, "Do you recall any protests at Gerawan in 2013?" and responded, "Well, the guys were out there with the crews . . . . They . . . came around lunchtime to – to share and pass out their things, their flyers." From employees, Zarate learned the material were "something about the Union and protesting."

Zarate agreed that Bermejo supported the Union, had flyers, wore a UFW t-shirt, and had a UFW sticker on his car. Zarate denied telling Bermejo that he should take the sticker off if he wanted to find work. Zarate denied any discussion with Bermejo about the sticker. "No. One is free. One is free. So, no, no, no, no. No." This denial is not credited. Based on Zarate's demeanor, it must be concluded that his testimony was given as if by rote repetition of guidance or advice provided after the fact rather than what was actually said at the time of the conversation with Bermejo. Accordingly, it is found that Zarate told Bermejo he should remove the Union sticker from his car if he wanted work.

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[80] Only four tractors are utilized each day, according to Zarate. However, there are six tractor drivers per crew just in case there are absences.

Zarate testified that he remembered Bermejo asking for work at the start of a season but he could not recall what year it was. Zarate had a full crew but thought that Bermejo had gone to work for a different crew boss after he told Bermejo that his crew was full. Based on other record evidence, it must be inferred that the year was 2014.[81]

Normally Bermejo waited to hear from crew boss Zarate. However, in 2014, he did not hear from Zarate so Bermejo contacted Zarate when the thinning season was beginning in late March 2014. Zarate advised Bermejo to listen to the phone message system in order to know when work with start. This was not the past method for recall. In any event, Bermejo listened to the message system for a few days and eventually heard a message about where work was going to start. He reported for work on that date.

When Bermejo reached the orchard, Zarate told him the crew was full and he could not work. On this particular date, Bermejo recognized most of the workers from the year before. As Bermejo was leaving, crew boss Rodriguez saw him and put him to work on his crew.

The parties stipulated that Zarate testified in an ALRB hearing[82] on February 9, 2015, from 8:41 a.m. until 5 p.m. He also testified on February 10, 2015 from 8:41 a.m. until approximately 10:30 a.m.

Zarate agreed that in 2015, when work was "well along," thus after Zarate's testimony at the ALRB, Bermejo asked for work but there "wasn't any room. . . . We were already full." Zarate was unaware whether Bermejo found work with another Gerawan crew boss at that time. Once again, payroll records reflect that new names appeared on Zarate's crew list.[83]

Bermejo was disciplined twice in 2014 while he worked on Rodriguez' crew. On August 30, 2014, he received a one-day suspension for failing to pick in his assigned area. He

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[81] Zarate's 2014 spring thinning crew included individuals who had not worked for Gerawan in 2013 including Margarito Diaz, Evaristo Diaz, Santiago Diaz, and Fortino Avolos.

[82] This was the ALRB hearing in *Gerawan Farming, Inc.* (2017) 42 ALRB No. 1, remanded *Gerawan Farming Inc. v ALRB* (May 30, 2018) Fifth Appellate District Court of Appeal F073720.

[83] These included Jesus Gadea, Bernardo Gadea, Jose Manuel Pineda, and David Wilman Perez Sanchez.

received a two-day suspension for picking green fruit on September 4, 2014. The record clearly indicates that crew bosses can rehire employees who have received discipline short of discharge.

Bermejo continued his activities on behalf of UFW throughout the 2014 season. He distributed UFW flyers, attended, and spoke at contract negotiation sessions. At times, Bermejo sought permission from Rodriguez to attend these meetings. Rodriguez also attended the ALRB hearing on decertification which was ongoing in 2014 and 2015. Rodriguez thought Bermejo was reliable and did a good job during the 2014 season. Bermejo was laid off with the rest of Rodriguez' crew at the end of the 2014 season.

In March 2015,[84] Bermejo called both Zarate and Rodriguez to ask for work. Both said they already had a full crew. In May 2015, Bermejo went to the orchards and spoke with Zarate and Rodriguez who, again, said they were full. Bermejo walked row by row through the orchard and was able to observe employees who were working. There were employees who had not been on the crews in 2014. On a couple of other occasions in May 2015, Bermejo visited Gerawan seeking work. He could not recall the names of the crew bosses he spoke with on those occasions. He thought he spoke to five, six, or seven crew bosses. He also went to the Gerawan offices in Kerman to ask other crew bosses for work. In the end, he was unable to find work at Gerawan in 2015.

Crew boss Rodriguez testified he usually starts with a crew of around 12 to 18 employees at the beginning of the thinning season. The crew gradually expands to as many as 38 employees. A portion of each year's crew includes prior employees. In 2014, Alberto Bermejo worked for him. This was the only season that Bermejo worked on his crew and Rodriguez was

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[84] Bermejo was an intelligent, thoughtful witness. Based on his testimony, it is found that Bermejo called in March 2015 and visited the fields in May 2015.Bermejo could not remember if he called at the beginning of the thinning season in March or later in May. He thought it was at the start. However, in the spring of 2015, Bermejo's mother became ill and he was her transportation: "I think it was probably around May [when I visited the fields] because when I called all the foremen – I think I called before May. But since they didn't give me any work then I needed to put the effort in right away because my mother got sick. . . . then I didn't put the effort into start right away to look for work until my mother got somewhat better, and then I started looking for work again." He explained that he was unable to verify that he called in March because his phone no longer worked. (Tr II, pp. 90-91). Based on this testimony, it is found that Bermejo called in March 2015 and visited the fields in May 2015.

satisfied with his work. Rodriguez observed that Bermejo appeared to be experienced. Once the harvest season began, Rodriguez assigned Bermejo to tractor work. Rodriguez found Bermejo to be reliable. He did a good job while he worked in the crew during 2014.

Rodriguez testified that he knew nothing about protests or workers being in favor of the Union. Similarly, Rodriguez testified, "I don't have any reason to talk about the Union or anything else. I just go to work and that's what I do." When asked whether Bermejo wore a Union t-shirt and baseball cap, Rodriguez replied, "Like I said, I'm not noticing how people are dressed. I'm noticing how they are working." This portion of Rodriguez testimony is particularly unreliable, highly improbable, and is therefore discredited. From all accounts, the crew bosses went to ALRB training. The Union activity in the fields was open for all to observe. Thus, it is found that Rodriguez knew of the Union effort at Gerawan and observed that Bermejo wore a Union t-shirt and baseball cap.

On an unspecified date in 2015, Rodriguez received a call from Gerawan letting him know when work would begin. Rodriguez did not recall whether Bermejo called him in 2015 seeking work. He did not keep any records about who called or asked for work. However, Rodriguez testified that after he heard when work would start, he let all those know who had been asking about work.[85]

Rodriguez expressed dissatisfaction about Bermejo's leaving work in 2014:[86]

> [H]e would leave and then the tractor would be just sitting there full of fruit. And so I had to put somebody else on it so that they could take it when he would leave. . . . He told me that at some -- at a certain hour he was -- he was going to go over there during the workday.

On the record as a whole, it is found that Rodriguez dissatisfaction stemmed from Bermejo's attendance at contract negotiation meetings and ALRB hearings.

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[85] Citing Rodriguez' testimony, Respondent states on brief that Rodriguez denied ever calling workers to recruit them to work in their crews. This statement on brief mischaracterizes Rodriguez' cited testimony. See Vol. I, 108:6-7 (After receiving notice from Gerawan in 2015 that spring thinning would begin in a few days, Rodriguez let workers know the start date: "The ones that were asking about when we were going to start. The other ones that didn't, no.")

[86] Tr. I, p. 117:2-7.

Rodriguez was not aware of any reason why Bermejo did not begin work in 2015 in his crew. However, by the time Bermejo came to the field to ask for work, Rodriguez had no vacancy. Vacancies may have arisen after that date but Rodriguez did not fill those vacancies with Bermejo because he had no contact information for him. Rodriguez stated that he did not deny work to anyone. In filling the mid-season vacancies, he gave opportunities to those who were new to the work but also hired those who already knew how to work.[87]

2. Analysis

a. General Counsel's Initial Showing

- Activity and Knowledge

Bermejo openly distributed pro-Union flyers and spoke with co-workers in support of the Union in 2013. He attended negotiation sessions with the permission of crew bosses Zarate and Rodriguez and he attended an ALRB hearing with a co-worker to support the UFW. Gerawan management and crew bosses were able to observe these activities as well. Thus, both crew boss Zarate and crew boss Rodriguez were aware of Bermejo's Union activity. It is found that the General Counsel has shown by a preponderance of evidence that Bermejo was engaged in Union activity and Respondent had knowledge of his activity.

- Animus

Bermejo was told by Zarate in October 2013 to remove a UFW sticker from his car. During this same conversation, Zarate told Bermejo he was causing "trouble." Zarate also expressed concern that his crew was losing work at a vineyard (not at Gerawan) due to that trouble. In this context, the use of the general term "trouble" may be reasonably understood as indicative of trouble from supporting the Union. These comments are indicative of animus. Zarate did not rehire Bermejo when the 2014 season began. Instead, Bermejo found work with crew boss Rodriguez.

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[87] In May 2015, when Bermejo visited the orchards and asked for work, Rodriguez and Zarate both hired four or five workers who had no experience with Gerawan.

Thereafter, Zarate testified before the ALRB in February 2015. In forming their crews for the 2015 spring thinning, both Zarate and Rodriguez hired numerous workers without prior Gerawan experience while denying Bermejo a place on their crews. Such deviation from past practice is indicative of animus. Further, Rodriguez had no stated reason for failure to rehire Bermejo apart from his taking time off during 2014 for what Rodriguez knew was Union activity.

- Practice or Policy of Contacting Former Employees for Rehire

In the same vein, Zarate and Rodriguez are responsible for hiring. Zarate and Rodriguez agreed that Bermejo was a good worker. Zarate testified that he would have rehired Bermejo in 2014 but Bermejo was already working with another crew that spring.[88] Rodriguez rehired as many people "as the boss allows me to get." Rodriguez found it best to hire former crewmembers rather than to train new employees. However, if there are not sufficient numbers of former crew, he will hire new employees and train them. Rodriguez routinely called the same people from season to season and year to year.

Having presented credible evidence of activity, knowledge, animus, and a practice of contacting former employees for rehire, the General Counsel has satisfied the initial burden. A preponderance of the evidence supports an inference that Bermejo's union activity was a motivating factor in the April 2015 failure to recall him. The burden now shifts to Gerawan to prove that Bermejo would not have been recalled in any event.

b. Respondent's Burden to Show that Bermejo Would Not Have Been Rehired Absent His Union Activity

It is clear that Bermejo was disciplined twice in 2014 while on Rodriguez' crew. However, the record indicates these disciplinary actions were not the cause for failure to recall.

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[88] The General Counsel argues that Zarate's refusal to hire Bermejo in 2014 was due to anti-union animus. There is no allegation of an unfair labor practice in refusal to rehire Bermejo in 2014. To the extent the General Counsel makes the argument that Zarate's failure to rehire Bermejo in 2014 was an unfair labor practice, it is disregarded.

1 In fact, Rodriguez was not aware of any reason why Bermejo did not begin the
2 2015 season with his crew. Failure to recall Bermejo is simply unexplained by Rodriguez.
3 Respondent argues that Bermejo was not recalled because by the time he asked
4 for work, the crew was full. This argument assumes workers are only recalled if they ask for
5 work. However, the record is replete with evidence that former crewmembers are routinely
6 recalled without making a specific request for recall. Thus, this argument is rejected. In the
7 absence of any other evidence, it is found that Respondent has not shown that it would not have
8 recalled Bermejo absent his Union activity. Thus, it is found that Respondent violated §1153(a)
9 and (c) of the Act by failure to recall Bermejo in April 2015.[89]
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III. CONCLUSION
11 In each case, the General Counsel's evidence has created an inference that the
12 failure to recall the employees was due to their Union activity by showing activity, knowledge,
13 animus, and a practice of recall. No cogent reasons have been advanced for failure to recall the
14 alleged discriminatees as a part of this normal recall process.
15 Gerawan has not shown that it would have taken the same action even absent the
16 employees' Union activity. In fact, just the opposite is shown. The normal process for recall is to
17 request members of the laid-off crew to return. No specific credible reason has been offered by
18 Gerawan indicating that the alleged discriminatees would not have been recalled in any event.
19 The employment records do not offer reasons for failure to recall. All alleged discriminatees
20 were good, experienced employees. Replacement worker status indicates new employees were
21 utilized in many instances rather than recalling the experienced alleged discriminatees.
22 Thus, it is concluded that Respondent Gerawan failed in each instance to prove
23 that it would not have recalled the alleged discriminatees absent their union activity.
24 Accordingly, it is found that Respondent violated the Act by failure to recall the four alleged
25 discriminatees.
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[89] Arguments regarding whether Bermejo was available for work once he became his mother's care giver are relevant to the compliance phase of these proceedings.

REMEDY

It is recommended that Gerawan be ordered to cease and desist from failing to recall employees due to their Union activity or due to their testimony before the ALRB. It is further recommended that Gerawan make the alleged discriminatees whole for their losses due to Gerawan's unlawful activity. The backpay periods for Mulato and Marquez run from October 2013 until May 2014 when they were recalled. The backpay period for Juárez is from March 24, 2015 to April 12, 2015. Bermejo's backpay period will run from the date he should have been recalled in April 2015 until the date he is offered reinstatement. Thus, Bermejo is owed an offer of reinstatement plus backpay. Finally, the standard remedies regarding preservation of records, posting and mailing Notices, and Board agent distribution and reading of the Notice are recommended.

Based on these findings of fact and conclusions of law and the record as a whole, it is recommended that the following Order be issued.

ORDER

Pursuant to section 1160.3 of the Act, the Agricultural Labor Relations Board hereby ORDERS that Respondent Gerawan Farming, Inc., a California corporation, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing to recall or otherwise retaliating against any agricultural employee because the employee has engaged in protected, concerted and/or Union activity as defined in section 1152 of the Act; and

(b) Otherwise interfering with or restraining any employee in the exercise of the rights guaranteed under section 1152 of the Act.

2. Take the following affirmative steps which are deemed necessary to effectuate the purposes of the Act:

(a) Offer seasonal employment to Alberto Bermejo Cardosa who was not recalled in April 2015.

(b) Make whole Eliazar Mulato, Rafael Marquez Amaro, Juan Manuel Juárez Hernandez, and Alberto Bermejo Cardosa, who were not recalled for unlawful reasons, for all wages or other economic losses that they suffered as a result of Gerawan's unlawful failures to recall them. The award shall include interest to be determined in accordance with *Kentucky River Medical Center* (2010) 356 NLRB 6 (daily compound interest adopted).

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, time cards, personnel records, and all other records relevant and necessary for a determination by the Regional Director of the losses due under this Order. Upon request of the Regional Director, records shall be provided in electronic form if they are customarily maintained in that form.

(d) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(e) Post copies of the Notice, in all appropriate languages, at conspicuous places on Respondent's property, including places where notices to employees are usually posted, for sixty (60) days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copies of the Notice which may be altered, defaced, covered or removed. Pursuant to the authority granted under section 1151(a) of the Act, give agents of the Board access to its premises to confirm the posting of the Notice.

(f) Mail signed copies of the attached Notice in all appropriate languages within 30 days after the date this Order becomes final or thereafter if directed by the Regional Director to the last known address of all agricultural employees it employed, including those employed by farm labor contractors, during the planting and harvesting periods or other relevant periods of employment from November 2013 to date.

(g) Grant ALRB agents access to work sites where the agricultural employees in the bargaining unit work at mutually arranged times in order to distribute and read the attached Notice to them and to answer questions employees may have about their rights under the Act outside the presence of supervisory personnel.

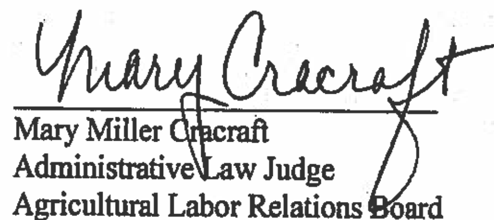
(h) Compensate employees for the time spent during the Notice reading and the following question and answer period at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period.

(i) Provide access during the notice-posting period to ALRB agents to ensure compliance with the notice-posting requirements of this ORDER.

(j) Provide a signed copy of the Notice to each person it hired for work as an agricultural employee during the 12-month period following the issuance of the ALRB's Order in this case.

(k) Notify the Regional Director in writing within thirty (30) days after the date of issuance of this Order of the steps Respondents have taken to comply with the terms and, on request, notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order until notified that full compliance has been achieved.

DATED: August 27, 2018



Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

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NOTICE TO AGRICULTURAL EMPLOYEES

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves.
2. To form, join, or help a labor organization or bargaining representative.
3. To vote in a secret ballot election to decide whether you want a union to represent you.
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board.
5. To act together with other workers to help and protect one another.
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT refuse to recall you from layoff because of your support for the United Farm Workers of America (UFW),

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees from exercising their right under the Act,

WE WILL offer Alberto Bermejo Cardosa immediate employment to his former position or, if that position is no longer available, to a substantial equivalent position,

WE WILL make whole Eliazar Mulato, Rafael Marquez Amaro, Juan Manuel Juárez Hernandez, and Alberto Bermejo Cardosa, who were not recalled for unlawful reasons, for all wages or other economic losses that they suffered as a result of our unlawful failures to recall them.

DATED: ____________________

GERAWAN FARMING, INC.
By:

____
Representative Title

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board.