

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SOUTH LAKES DAIRY FARM,	)	Case Nos.	2009-CE-028-VIS
	)		2010-CE-024-VIS
Respondent,	)		2010-CE-025-VIS
	)		2010-CE-026-VIS
and	)		2010-CE-027-VIS
	)		2011-CE-008-VIS
UNITED FOOD AND)		
COMMERCIAL WORKERS	)	39 ALRB No. 1	
UNION, LOCAL 5, GABRIEL)		
SAUCEDO, RODOLFO	)	(January 25, 2013)	
MACIAS, JOSE M. BARAJAS,)		
ADAN SERNA HERRERA,)		
JUAN CARLOS MAYO, JOSE)		
ROBLES, BERNABE RUIZ,)		
LUIS HERRERA, and)		
ARMANDO ROSALES)		
GONZALEZ,)		
)		
Charging Parties.)		

DECISION AND ORDER

On August 30, 2012, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in the above-referenced case. The General Counsel alleged in the complaint that South Lakes Dairy Farm (Employer) violated section 1153(a) and (c) of the Agricultural Labor Relations Act (Act) by discharging employees in retaliation for their Union and protected, concerted activities. The ALJ concluded that the General Counsel failed to prove its prima facie case because it failed to show by a preponderance of the evidence employer knowledge of the Union activities or that the protected, concerted activities alleged were known to the Employer to be protected, concerted activities. The ALJ dismissed the allegations of unlawful termination with respect to

Gabriel Saucedo, Rodolfo Macias, Jose Barajas, Adan Serna Herrera, Juan Carlos Mayo, Jose Robles, Bernabe Ruiz, and Luis Herrera. The General Counsel withdrew the allegations as to Armando Rosales.

The General Counsel filed timely exceptions to dismissal of the allegations of unlawful termination, to which Employer filed a reply.

The Agricultural Labor Relations Board (Board) has considered the entire record and the ALJ's findings of fact and conclusions of law in light of the exceptions and briefs filed by the parties and adopts the ALJ's findings of fact and conclusions of law regarding the terminations of Saucedo, Macias, Barajas, Serna, Mayo, Robles, Ruiz and Herrera. The Board agrees with the ALJ that the record evidence is insufficient to prove a prima facie case due to the failure to prove employer knowledge. (*Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083, 1090-1091, *enf'd.* (1st Cir. 1981) 662 F.2d 889, *cert. denied* (1982) 455 U.S. 989.) We write only to emphasize the weight given an ALJ's credibility determinations in his or her role as the trier of fact and the limitations of the Board in overturning those credibility determinations.

I. Standard of Review

Many of ALJ Gallop's factual findings were based on credibility determinations in which the testimony of several witnesses was disregarded as unreliable and was therefore not credited. The General Counsel states in its brief that, although the Board does give "some deference" to the ALJ's credibility determinations, other findings are reviewed *de novo*. (General Counsel's Exceptions Brief at p. 3.) To be clear, the Board does more than merely give "some deference" to an ALJ's credibility

determinations. The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates they are in error. (*United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3; *P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544, *enf'd.* (3d Cir. 1951) 188 F.2d 362.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*United Farm Workers of America (Ocegueda)*, *supra*; *S & S Ranch* (1996) 22 ALRB No. 7.)

We found no well-supported inferences from the record considered as a whole to support overruling ALJ Gallop's credibility determinations.

II. Termination and Discipline of Gabriel Saucedo

ALJ Gallop held that a prima facie case had not been proven with respect to Gabriel Saucedo's termination and discipline because the General Counsel failed to establish, by either direct or circumstantial evidence, employer knowledge of Saucedo's union activity. (ALJD at pp. 45 – 51.) The General Counsel argued that Fernando Gonzalez, who allegedly had knowledge of Saucedo's union activity, was a supervisor such that his knowledge would be imputed to Employer, and that his supervisory status resulted from once hiring Jose Robles. (General Counsel's Exceptions Brief at pp. 15 – 25. See generally *Kawahara Nurseries* (2011) 37 ALRB No. 4; *Oakwood Healthcare*,

Inc. (2006) 348 NLRB 686; *Croft Metals, Inc.* (2006) 348 NLRB 727; *Golden Crest Healthcare Center* (2006) 348 NLRB 727.)

ALJ Gallop did not find that Gonzalez “hired” Robles, but that he effectively recommended Robles’ hire. (ALJD at p. 44.) This is understandable given the conflicting testimony from Robles, Gonzalez, and owner Manuel Rodriguez as to Gonzalez’ authority to hire employees. National Labor Relations Board (NLRB) precedent is clear that an isolated incidence of effectively recommending a hire does not, in and of itself, confer supervisory status on an employee. (*Frenchtown Acquisition Company v. NLRB* (6th Cir. 2012) 683 F.3d 298, 310; *NLRB v. Dole Fresh Vegetables* (6th Cir. 2003) 334 F.3d 478, 487.) There was a great deal of contradictory testimony as to Gonzalez’ other duties and authorities with respect to the milkers, even among the charging parties. (Testimony of Charging Party Jose Barajas, Record Transcript (RT) 686; Testimony of Charging Party Luis Herrera, RT 481-482; Testimony of Employer Manuel Rodriguez, RT 841-844.) There were no well-supported inferences from the record as a whole that conflicted with ALJ Gallop’s credibility determinations.

Gonzalez’ supervisory status notwithstanding, the case for inferring employer knowledge of Saucedo’s union activity based on circumstantial evidence, although stronger than the case for Gonzalez’ supervisory status, is not sufficient. Employer knowledge need not be established directly, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn, such as (1) the timing of the allegedly discriminatory action; (2) the respondent’s general knowledge of union activities; (3) animus; and (4) disparate treatment. (*Montgomery Ward & Co.*

(1995) 316 NLRB 1248, 1253.) Even assuming that the timing of Saucedo's second warning and dismissal were suspicious, there is not enough in the record as to Employer's general knowledge of union activities, animus, and disparate treatment from which a reasonable inference of employer knowledge may be drawn.

III. The 2010 Discharges of Union Supporters

The General Counsel's case regarding the 2010 discharges of Barajas, Herrera, Macias, Mayo, Robles and Ruiz similarly fails for lack of employer knowledge. Again, Employer's deviation from progressive discipline, the lack of a reason for Herrera's discharge, and the failure to determine whether the replacement employees were indeed more efficient than those whom they replaced are indeed suspicious. However, applying the factors in *Montgomery Ward*, with respect to timing and Employer's general knowledge of union activities, the credited evidence shows that discussions by employees of beginning union activity anew occurred on July 4 of 2010 (Testimony of Jose Barajas, RT 719 – 722), after Employer's documented efforts to increase efficiency by laying off employees and streamlining the milking and feeding process as shown in the June 10, 2010 email from Douglas Degroff of Diversified Dairy Solutions to owners Ryan Schakel and Manuel Rodriguez (Employer's Exhibit 1) and the decision by June 30 as to firing people (Testimony of Manuel Rodriguez, RT 979-980). The testimony establishing direct knowledge, that of Armando Rosales saying that supervisor Javier Vera told him that the group had been fired because they caused

problems and because they supported the union (RT 592- 593)¹, as well as Bernabe Ruiz’ testimony that he had spoken to several employees in May and June of 2010 about the union, some of whom were allegedly anti-union informants², was not credited. With little by the way of animus other than the engagement of labor consultant Tina Leal prior to the 2010 terminations to address issues of these so-called “layoffs” (Testimony of Manuel Rodriguez, RT 965-967), these claims fail. We again found no well-supported inferences from the record as a whole that conflicted with ALJ Gallop’s credibility determinations. The allegations that Macias and Ruiz were also discharged because they individually asked for a raise and asked that a shift change not be implemented similarly fail for lack of employer knowledge that these requests were protected concerted activity, i.e., that the requests were made on behalf of any other employee.

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¹ ALJ Gallop noted, “The alleged incident with Vera and the alleged information was not mentioned during the prehearing conference, in the amended complaint, or in General Counsel’s opening statement. The undersigned considers Rosales to be a biased, highly unreliable witness, and his testimony regarding the employee-informant and Vera to be a recent fabrication.” (ALJD at p. 14.)

² ALJ Gallop repeatedly noted Ruiz’ lack of credibility on pages 27-31 of his decision.

ORDER

The allegations in the First Complaint are dismissed in their entirety.

DATED: January 25, 2013

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

CASE SUMMARY

SOUTH LAKES DAIRY FARM
(United Food and Commercial Workers
Union, Local No. 5)

Case No. 2009-CE-028-VIS
39 ALRB No. 1

Background

On August 30, 2012, Administrative Law Judge (ALJ) Douglas Gallop issued a decision in which he dismissed all the allegations in the complaint, concluding that the evidence did not show that South Lakes Dairy Farm (Employer) committed unfair labor practices by discharging employees Gabriel Saucedo, Rodolfo Macias, Jose M. Barajas, Adan Serna Herrera, Juan Carlos Mayo, Jose Robles, Bernabe Ruiz, and Luis Herrera. Saucedo was discharged after three warnings for violating company rules. Macias was discharged for leaving work early without proper notice because Employer felt it was unjustifiable to maintain him and discharge other employees for being inefficient. Barajas, Serna, Mayo, Robles, Ruiz and Herrera were discharged because Employer was seeking more efficient employees. The ALJ concluded that the General Counsel failed to prove its prima facie case because it failed to show by a preponderance of the evidence employer knowledge of the employees' union activities or employer knowledge that the protected, concerted activities of Macias and Ruiz were protected and concerted. The General Counsel timely filed exceptions to the ALJ's decision.

Board Decision

The Board affirmed the ALJ's decision, noting that the ALJ's decision was heavily dependent on credibility determinations resulting in the testimony of many of the General Counsel's witnesses being disregarded as unreliable and therefore not credited. The Board's review of the record revealed no basis for disturbing the ALJ's credibility determinations. Therefore, the complaint was dismissed in its entirety.

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

In the Matter of:	)	Case Nos. 2009-CE-028-VIS
	)	2010-CE-024-VIS
SOUTH LAKES DAIRY FARMS,	)	2010-CE-025-VIS
	)	2010-CE-026-VIS
Respondent,	)	2010-CE-027-VIS
	)	2011-CE-008-VIS
and)	
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS UNION, LOCAL 5, GABRIEL)	
SAUCEDO, RODOLFO MACIAS, JOSE M.)	
BARAJAS, ADAN SERNA HERRERA,)	
JUAN CARLOS MAYO, JOSE ROBLES,)	
BERNABE RUIZ, LUIS HERRERA, and)	
ARMANDO ROSALES GONZALEZ,)	
)	
<u>Charging Parties.</u>)	

Appearances:

Howard A. Sagasar
Atkinson, Andelson, Loya, Ruud & Romo
Fresno, California
For Respondent

Silas Shawver and Alegria De La Cruz
Visalia ALRB Regional Office
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case on June 5-8 and 11-13, 2012, at Visalia, California. It is based on charges filed by United Food and Commercial Workers Union, Local 5 (hereinafter Union), Gabriel Julian Saucedo Ramos (Saucedo), Rodolfo Macias, Jose Manuel Barajas Rodriguez (Barajas), Adan Serna Herrera (Serna), Juan Carlos Mayo, Jose Robles Becerra (Robles), Bernabe Ruiz Herrera (Ruiz) and Luis Francisco Herrera, alleging that South Lakes Dairy Farms (hereinafter Respondent) violated section 1153(a) and (c) of the Agricultural Labor Relations Act (Act), by disciplining and discharging employees in retaliation for their Union and protected concerted activities. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a Consolidated Complaint and First Amended Consolidated Complaint (hereinafter complaint), alleging these violations and, additionally, that Respondent retaliated against employee, Armando Rosales Gonzalez (Rosales), for his Union activities. General Counsel withdrew the allegations concerning Rosales at the hearing. Respondent filed answers denying the commission of unfair labor practices, and asserting affirmative defenses. After the hearing, General Counsel and Respondent filed briefs, which have been carefully considered.

Upon the entire record in this case, including the testimony, documentary evidence, briefs and oral arguments made by Counsel, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction

The charges were filed and served in a timely manner. Respondent dairy produces milk at its facility in Pixley, California, and is an agricultural employer within the meaning of section 1140.4(c) of the Act. While employed by Respondent, the alleged discriminatees were agricultural employees within the meaning of section 1140.4(b). It is undisputed that at all times material to this case, Respondent's partners, Ryan Neil Schakel and Manuel Rodriguez; and supervisor Hector Javier Vera Mendez (Javier Vera), were supervisors of Respondent within the meaning of section 1140.4(j). The complaint also alleges that Fernando Gonzalez was a statutory supervisor. Respondent contends he was not a supervisor as of the time of the alleged unfair labor practices. It is undisputed that the Union is a statutory labor organization as defined by section 1140.4(f).

Background

Ryan Schakel and Manuel Rodriguez commenced Respondent's operations in March 2005. Although most of the workforce is Spanish-speaking, they are only minimally fluent in the language. Schakel and Rodriguez also operate a farm and trucking company on the property. They both live on the property, but at a considerable distance from the dairy operations. Similarly, Respondent's main office is not proximate to those operations.

The dairy consists of a milking barn, corrals, hospital pen (inside the milking barn), insemination, calf and feeding areas, and a mechanic's shed. As of when the

events discussed herein transpired, Respondent employed about 55 agricultural employees, including milkers, pushers, and “outside workers,” who performed such tasks as insemination, inoculation, health, feeding, mechanical repair, maintenance, and sanitation. Respondent operates day and night milking shifts, while the outside workers primarily perform their duties during the day.

Schakel and Rodriguez typically spend about 30 minutes at the beginning of the day in the dairy barn office meeting with Javier Vera. After this, they divide their time between the dairy, the farming and trucking operations, the main office and their domestic responsibilities. Vera, whose native language is Spanish, manages the entire dairy operation, supervising all of the milkers, feeders and outside workers. Vera effectively recommends workers for hire, discipline and discharge.

The Union filed a Notice of Intent to Take Access on April 10, 2008. Prior to this, none of Respondent’s employees had contacted the Union to request it conduct an organizing campaign. The Union’s chief organizer was Juan Cervantes. Cervantes testified that he and another organizer took access three or four times in 2008, over the course of about one week. They distributed flyers setting forth the rights of employees to organize under the Act, and business cards containing the Union’s telephone number. According to Cervantes, they distributed these materials to 70%-75% of Respondent’s agricultural employees.

The Supervisory Status of Fernando Gonzalez

Fernando Gonzalez has been employed by Respondent since its inception. He worked with Manuel Rodriguez and Ryan Schakel for many years at a different location,

before Respondent commenced operations. Gonzalez testified that he and Vera are currently the supervisors in the milking barn, during the day. Gonzalez does not recall when he was made a supervisor, but testified it was after a Board-conducted July 19, 2010 Union election. Manuel Rodriguez testified that Gonzalez became a supervisor in about June 2011. As of June 2010, Gonzalez was listed as a “supervisor” in Respondent’s payroll records. Rodriguez testified this is because his wife suggested that as a salaried employee, it “calculates better, when they transfer over to the accounting software.”

Gonzalez, and other witnesses, testified that there is no supervisor at night. Gonzalez lives on Respondent’s property, rent free, and if there is a problem on the night shift, employees will contact him, or Rodriguez. If the employees contact him, and he can fix a mechanical problem, Gonzalez will do this. Otherwise, he calls Rodriguez.

Gonzalez testified that most of his job duties include feeding, insemination, treating cow hooves and other veterinary work. In performing these duties, he spends most of his workday outside the milking barn. As a supervisor, he checks to see if all the day shift milkers have shown up for work, and to see if anything is wrong in the milking barn, perhaps two or three times per day. Gonzalez testified that he does “not yet” have the authority to hire workers, and denied he could discharge employees. Gonzalez also denied that he could change a worker’s job.

Gonzalez was somewhat equivocal as to whether he has the authority to discipline employees, but testified that he has not, to date, disciplined any worker, verbally or in

writing. Gonzalez did not receive a wage increase when he was made a supervisor.

Gonzalez is paid a flat rate, while most of the other workers are paid hourly.

Gonzalez testified that prior to being a supervisor, he performed essentially the same duties as now, other than checking on the milkers. He testified that when Vera was on vacation, Manuel Rodriguez would assume his supervisory duties. Vera, however, testified that he relied on other workers, such as Gonzalez, to perform some of his job duties, when he went on vacation. Vera did not say what job duties Gonzalez assumed. Vera also testified that Gonzalez helped manage some of his responsibilities while he was at the dairy, such as reporting problems to Vera. Vera was not asked to specify a time frame as to when Gonzalez assisted him in these ways.

Gonzalez testified that before he was made a supervisor, he had no authority over the milkers. If he saw something amiss in the milking barn, he would report this to Vera. Manuel Rodriguez testified that other outside workers do this as well.

Jose Robles testified that he was employed by Respondent as an outside worker, for about a year. Therefore, he would have been hired in about late June or early July 2009. One of Respondent's workers told Robles there was an opening and, since he was out of work, he should apply.

When Robles arrived at the dairy, the worker told him to speak with Gonzalez, who was in charge of the milkers. He spoke with Gonzalez, who told him to report for work the following day. Robles did this, and began his employment. Gonzalez, in his testimony, denied that he hired Robles, but none of Respondent's witnesses testified who

did this.¹ Robles was a credible witness, as to this portion of his testimony, and in the absence of any evidence showing that someone else hired him, or recommended he be hired, it will be assumed that Gonzalez, at least, effectively recommended Robles' hire.

Bernabe Ruiz testified that Gonzalez was "in charge of like counting the corrals," and was "in charge of giving treatment to the hooves." When first asked who his supervisor was, Ruiz identified Charging Party, Rodolfo Macias, who "was in charge of watching over and checking" the feeders' work.² When asked if anyone else was "in charge or who supervised" him, Ruiz testified, "Well, in the beginning, Fernando Gonzalez. Me and other workers, we would see him as something like would be a foreman." According to Ruiz, Schakel and Rodriguez told him to direct any questions he had to Gonzalez. Ruiz also testified that Gonzalez has a cell phone provided to him by Respondent. Ruiz acknowledged that other bilingual employees, such as Charging Party, Rodolfo Macias, were also provided with cell phones.

Gabriel Saucedo testified that Vera was his supervisor in the morning, and when Vera left work in the afternoon, Gonzalez supervised the milking barn. According to Saucedo, the milkers had to do what Gonzalez told them. On occasion, Gonzalez would tell Saucedo to stop working in the milking barn, and to replace a feeder who had not shown up for work.

¹ Vera denied he hired Robles, and did not know if Gonzalez hired him.

² Neither General Counsel nor Respondent contends that Macias was a statutory supervisor. Ruiz also testified that Vera, at some point, lost his supervisory status, because Manuel Rodriguez, in June 2006, told him that Rodriguez was the only "general foreman." Neither General Counsel nor Respondent contends that Vera lost his supervisory status.

When asked what Gonzalez's job duties were, Luis Herrera testified he was an outside worker who moved, vaccinated and inseminated cows. When asked who his supervisor was, Herrera identified Vera. At some date Herrera could not recall, Gonzalez "commented" to him that he was now in charge of the milkers.

Jose Barajas testified that Vera and Gonzalez were his supervisors, in the milking barn. Barajas did not state whether he considered Gonzalez to be his supervisor during his entire employment with Respondent. According to Barajas, Gonzalez's job duties, with respect to the milkers were, "to go inside the milk barn to see and make sure everything was okay." Barajas testified that Gonzalez never told him what to do because, "We already knew what to do." Gonzalez, on occasion, would tell them something, "was not good," but did not tell them to change the way they performed their job duties. Barajas testified that he "could" ask Gonzalez to change his schedule, but did not claim he ever did this.

Armando Rosales testified that Gonzalez was an inseminator, but "he's in charge of everyone that's at the dairy." Presumably, this would include Vera, Rodriguez and Schakel. Rosales claimed that Gonzalez "checks what time everyone arrives," and "gives the report to the boss." According to Rosales, Gonzalez, "patrols on all of us."

A Board agent testified that she was in charge of conducting the Union representation election. Shortly prior to the election, the agent arrived at Respondent's milking barn, to conduct a pre-election meeting with the workers. The agent had previously notified Respondent that she would be coming to the dairy for this purpose. When she arrived, she observed Gonzalez standing in the middle of the milking lines. In

her opinion, “it appeared like he was in charge of what was going on at the dairy.” She felt this way, because Gonzalez was not wearing the same work clothing as the milkers, and appeared to be telling them what to do. The Board agent could not recall what Gonzalez was saying to them.

At the Board agent’s request, Gonzalez gathered the workers, so that she could conduct a pre-election meeting. The agent requested that anyone who was a supervisor should leave the area, and Gonzalez and Vera, who was also in the area, walked away. Manuel Rodriguez testified that he told Gonzalez to gather the workers for this meeting.

He further testified that as of December 2008 and January 2009, Gonzalez worked as an inseminator and trimmed the hooves of cows. Rodriguez denied that Gonzalez has ever had the authority to hire, discipline or discharge employees. Other than reporting something out of the ordinary to Vera that he might witness while passing through the milk barn, Rodriguez denied that Gonzalez was involved with the work of the milkers, as of January 2009. As noted above, Rodriguez testified that Gonzalez became a supervisor in about June 2011.

The Discipline and Discharge of Gabriel Saucedo

Saucedo was employed by Respondent as a cow pusher, to move cows into the milking barn, and as a relief milker. Saucedo testified that as a pusher, he would arrive 10-15 minutes before the day-shift milkers, who arrived at 5:00 a.m., so that there would be cows ready to be milked at that time. Saucedo worked mostly as a pusher, until about one month before his discharge, which took place on January 9, 2009. Due to the illness of a milker, he had been regularly working in that capacity at the end of his employment.

Saucedo observed Cervantes and the other Union representatives when they took access to Respondent's facilities in March 2008. He accepted the flyer and Cervantes' business card, but did not, at the time, take any further action. This took place in the parking lot, which, along with the lunchroom and milking barn, has surveillance cameras. Manuel Rodriguez credibly testified that the cameras were installed to protect the vehicles and to make sure that employees are punching in, and not punching in or out for each other in the lunch room. He further testified that the cameras do not record sound, and produce grainy, black and white images, which do not resolve fine features.

A week or two after the Union representatives took access, Respondent hired Tina Leal, a labor relations consultant, who spoke with the workers in small groups or, in some cases, individually. Manuel Rodriguez also attended these meetings. Leal urged employees not to support the Union. The complaint does not allege that Leal committed any unfair labor practices. Saucedo testified that he was alone with Leal and Rodriguez for at least part of one meeting. When asked what he said in response to Leal's request that he not support the Union, Saucedo testified, "No, no, that we didn't need it, that I was not, at all, involved with them, at that time."

Saucedo testified that on about four unspecified dates in 2008, Gonzalez asked him if he had called in the Union. This allegedly took place over a period of several weeks. Since Saucedo did not engage in any Union activity until at least mid-December 2008, it appears that he was referring to earlier in the year, when the Union took access. Saucedo testified he thought Gonzalez was "hostilely pressuring him," but at the same

time, was “kind of playing around.” The parties stipulated that these allegations do not appear in Saucedo’s Board declaration.³

Fernando Gonzalez, in his testimony, was not asked to directly respond to this. He did, however, deny being aware of any Union activity by Saucedo, up to the time of Saucedo’s discharge. It follows that if he had been asked, Gonzalez would have denied questioning Saucedo.⁴ There would have been no reason for Gonzalez to suspect that Saucedo, who had told Rodriguez and Leal he was not a supporter, had called the Union. In any event, the undersigned did not find Saucedo to be a very credible witness. There were several occasions where Saucedo appeared to be slanting his testimony to bolster his case and, not infrequently, his testimony was shifting or inconsistent. Under the circumstances presented, it is found that Gonzalez did not interrogate Saucedo, as alleged.⁵

Saucedo testified that he began asking co-workers if they wanted to bring in the Union, in December 2008. He did this, because he was dissatisfied with his working conditions, and felt the Union might be able to help. Saucedo named six employees he spoke with, several of whom are Charging Parties herein, including Luis Herrera.

³ Saucedo testified that there were both English- and Spanish-language versions of his declaration. General Counsel failed to produce a Spanish-language declaration for Saucedo, or any other witness.

⁴ The failure of a witness to deny allegations may lead to an adverse inference, but if, under the circumstances, such inference is not appropriate, it need not be taken. *Ellison Media Company* (2005) 344 NLRB 1112, at page 1119 [177 LRRM 1285].

⁵ The uncontradicted testimony of a witness may be discredited, even if not disputed by the supervisor or agent alleged to have made a statement contrary to his employer’s interest. *Desert Pines Golf Club* (2001) 334 NLRB 265, at pages 267-268 [172 LRRM 1151].

Saucedo testified that he contacted Juan Cervantes in mid-December. He visited Cervantes at the Union office in Delano, California, and obtained about 30 blank authorization cards. He gave most of the cards to Herrera, and gave all but one of the others, which he kept for himself, to other workers. Saucedo distributed all of the cards but one off Respondent's premises. He gave an employee a card in one of the corrals, and did not see any supervisors in the vicinity. Saucedo continued urging his co-workers to support the Union, in various locations at the dairy, including the lunchroom, and away from the dairy. He did not, however, sign a card until after he was discharged. Saucedo signed the card at his home, where a Union representative was present.

General Counsel did not offer into evidence one signed card dated prior to Saucedo's January 9, 2009 discharge. There was considerable, mostly vague testimony insinuating that there were cards signed prior to that time, none of which was credible. Armando Rosales was employed by Respondent for about three years, and last worked there as an outside worker. He was involved in the Union campaign in early 2009. According to Rosales, Saucedo showed he and Adan Serna "a lot" of signed Union authorization cards in the dairy lunchroom, prior to Saucedo's discharge. On cross examination, Rosales testified that Saucedo showed him about three cards in the lunchroom. Rosales then added that Saucedo showed him about 20 signed cards, in the parking lot, also before Saucedo was fired. Rosales claimed that Saucedo gave him a blank authorization card, before Saucedo was discharged. Rosales' signed card is dated January 12, 2009, after Saucedo's discharge. Contradicting what he said earlier, Rosales now testified that this is when Saucedo showed him the other signed cards.

Contradicting Rosales, Saucedo testified he “could not remember if” he received one or two signed cards before his discharge, and even that claim was uncorroborated by cards dated prior thereto, and thus, was too vague to be credible. Luis Herrera, whose testimony also places in doubt whether Saucedo even distributed any blank authorization cards before his discharge, also contradicted Rosales’ testimony. Rosales’ claim that cards were signed before Saucedo’s discharge is not credited.⁶

Rosales also testified that he observed a worker, who he only knows by his nickname, tell Javier Vera that “they had the votes, and they were distributing cards.” The worker purportedly identified Saucedo and Luis Herrera as the ones passing out the cards. Vera allegedly told the worker he would speak with the bosses. Rosales testified that this took place before Saucedo was discharged. At the same time, he testified that this took place while the Union took access in 2009, which, as discussed below, was after Saucedo’s discharge. Herrera testified that he did not distribute cards until after Saucedo’s discharge.

Vera denied being aware of the Union sentiments of any worker, asking any worker about his Union sympathies or about the meetings with Tina Leal,⁷ telling anyone who he thought supported the Union, asking anyone who supported the Union, discussing the Union, or being told of employees who supported the Union, by one of the alleged

⁶ Rosales also claimed that Bernabe Ruiz gave him a card to sign about a week before Ruiz was discharged, in 2010, and showed him “many” cards signed by other workers. Ruiz did not contend he passed out any authorization cards in 2010, and General Counsel did not offer into evidence any cards dated in 2010, prior to the July 6 discharges, discussed below. This testimony is also discredited.

⁷ Vera did not attend the meetings conducted by Leal.

employee snitches. Vera also denied having heard any worker talking about the Union, passing out or signing Union authorization cards.

Rosales' testimony, about Saucedo showing him signed cards in the lunchroom and parking area, prior to his discharge, has been discredited, as well as similar testimony concerning Ruiz. Rosales testified that he had not been advised General Counsel had withdrawn the complaint allegations in his case, and hoped the Agency would help him.⁸ The undersigned conducted a prehearing conference in this matter on April 24, 2012. During the conference, General Counsel's representative stated that the complaint would be amended to allege Rosales' discharge as unlawful, and that issue was discussed.⁹ The other allegations in the complaint were also discussed, and it became apparent that a major issue would be employer knowledge. The alleged incident with Vera and the alleged informant was not mentioned during the prehearing conference, in the amended complaint, or in General Counsel's opening statement. The undersigned considers Rosales to be a biased, highly unreliable witness, and his testimony regarding the employee-informant and Vera to be a recent fabrication.

⁸ When asked by Respondent's counsel, Rosales denied speaking with anyone from the ALRB concerning this case, other than the investigator, prior to testifying. He specifically denied having spoken with anyone in the hearing room, which included two ALRB attorneys. On further questioning, he admitted speaking with one of these attorneys, when he arrived to testify, but not about his testimony. Rosales additionally denied being interviewed in jail. After considerable coaxing by General Counsel on redirect, Rosales admitted being interviewed by Board attorneys, in prison, where he is serving a sentence for felony drug sales.

⁹ No sworn declaration was taken from Rosales, but Agency representatives must have spoken with him prior to deciding to add him as an alleged discriminatee.

On direct examination, Charging Party, Jose Barajas testified that Saucedo gave him a Union authorization card, which he signed and returned to Saucedo, prior to Saucedo's discharge. On cross examination, Barajas was shown his card, dated January 12, 2009, and testified that Saucedo gave him the card on that date. As noted above, Saucedo was discharged on January 9.

Saucedo testified that, shortly prior to his discharge, he was taking a water break, outside his vehicle in the parking area, adjacent to the milking barn. Saucedo testified he was holding "some" blank authorization cards, because he planned to pass them out. To whom he planned to give these cards to, during a water break, remains a mystery. When reminded he had testified that he gave all the cards away except one, Saucedo claimed he had obtained more from Cervantes, prior to his discharge. Cervantes contradicted this claim, in his testimony. In any event, Saucedo now claimed he was only holding one card, and the others were hidden, inside his vehicle.

Saucedo testified that Fernando Gonzalez came out of the milking barn, and stared at him. Saucedo purportedly tossed the card into his vehicle, so that Gonzalez would not see it. Saucedo testified that he was too late in trying to hide the card, because Gonzalez approached him, and looked into the vehicle, where he could see the card. Saucedo later added, that Gonzalez asked him what he was doing. Saucedo did not reply, and Gonzalez allegedly returned to the milking barn, without saying anything. Prior to the hearing, General Counsel identified this as the major incident establishing Respondent's knowledge of Saucedo's Union activities.

The undersigned has considerable doubt that this incident took place at all. There was no reason for Saucedo to have been contemplating a blank authorization card at that time. His testimony concerning the additional cards appears to be false. Even if the incident did take place, there is no reason to believe that Gonzalez would have even known what a Union authorization card was, at that point. Furthermore, there is no proof that Gonzalez reported this incident, if it took place, to Vera, Rodriguez or Schakel.

Respondent maintains a progressive disciplinary system for less serious rule violations. After the third infraction, the employee is discharged. Saucedo had previously received a written warning for missing work without permission. There is no allegation that this warning was motivated by unlawful considerations. Nevertheless, General Counsel protests the warning, as being unfair. If so, this provides an example of disciplinary action by Respondent, under circumstances others might think unjust, but not constituting an unfair labor practice.

Saucedo testified that after the authorization card incident with Gonzalez, he was given a written warning, "right away," for not counting the cows. In evidence is a Spanish-language written warning, dated January 6, 2009, contending that Saucedo failed to make "a report." It is unclear who prepared the warning, because the space for the supervisor's signature is blank, and none of the witnesses testified as to who prepared it.

The report is commonly referred to as a cow count, where the milker in the number 5 position is supposed to count the cows in each corral at the end of the shift, and write this down. The report is either placed on a clipboard, or slipped under the door to the dairy office. The information in the report is inputted into Respondent's

computerized feeding system, which then calculates how much feed should be prepared for each corral.

Saucedo admitted that a cow count was not prepared that day. Saucedo alternately contended he was intellectually unable to perform this function, to the knowledge of Gonzalez and Vera;¹⁰ that he and another milker, whose name he could not recall, had swapped milking positions, so it was the other worker's responsibility to prepare the report; and that there was no pen available with which to write it. Saucedo testified he did not ask if any of the other workers had a pen that day, "because I did not want to." He did not observe the worker he had traded places with ask anyone else for a pen, either.

Vera and Gonzalez were present in the dairy office, when Saucedo was given the warning notice. Saucedo testified that the only protest he made to Vera was that another worker, who he only knew by his nickname, had failed to prepare a cow count, because he did not have a pen, and that employee had not received a warning letter. On redirect examination, Saucedo now contended that "several" other workers had failed to complete cow counts. Saucedo was unable to name any of these, but offered up two nicknames. In one case, which allegedly took place shortly before the incident leading to his warning letter, Saucedo admitted that the worker had asked Gonzalez for a pen, and Gonzalez did not comply. Saucedo then alleged that this worker had failed to make a cow count

¹⁰ Saucedo later admitted he had previously completed cow counts, with the assistance of other milkers. Saucedo also testified that the other workers did not help him complete the count that day, because everyone was "angry" at him, speculating this was because he did not bring them coffee and doughnuts, as he usually did. At the same time, Saucedo testified it was not his responsibility to perform the cow count, since he had changed positions with the other milker.

“several times,” giving no details. He also gave no details as to the failure(s) of the other worker to complete one or more cow counts.

Jose Barajas testified that, on occasion, the cow count was not completed. He could not give an estimate of how often this occurred, beyond more than once. Barajas testified that he did not complete a cow count on two occasions, because there was no pen available, but admitted he had done so, “later.” Gonzalez had discussed this with him, but did not give him a warning. Barajas did not state when these incidents took place, but as discussed below, it appears this was after Respondent discharged Saucedo.

On cross examination, Barajas contended that he was *never* required to complete a cow count in 2008, and that this did not become part of his job duties until “maybe the end of 2009.” This contradicts all other witnesses on that subject, including Saucedo’s testimony. Barajas testified that he had switched positions with other milkers on occasion, to avoid having to complete the cow count. Barajas acknowledged that when he did this, he made sure the other worker completed the cow count, because he would be blamed, if it were not done.

Saucedo was discharged on January 9, 2009. Saucedo, on direct examination, testified he was assigned to be a milker, on that date. On cross examination, he initially testified he was not sure if he was supposed to be a milker or a pusher. On further examination, Saucedo testified he was supposed to work as a pusher. In any event, Saucedo admittedly was not at any milking position at the start of his shift.

On direct examination, at which time Saucedo agreed he was supposed to be performing milking duties, he contended that the pusher did not arrive early, so he

performed that function. Saucedo testified that the pusher arrived between 5:10 and 5:15 a.m. Saucedo was unable to give the pusher's name, making it difficult to evaluate the credibility of these assertions. In evidence are timesheets, which Respondent contends cover all of the milkers and pushers working the day shift on January 9. All clocked in prior to 5:00 a.m., except one, who clocked in at 5:01. As noted above, the punch clock is located in the lunchroom, within the milking barn.

Saucedo testified that Vera and Gonzalez informed him of his discipline and discharge, at the end of his shift. Saucedo was asked if he explained what had happened to Vera and Gonzalez. Saucedo responded that he did not understand how the cows could be milked without a pusher, but did not contend he said this to them. When asked again what he said, Saucedo testified, "What can I say? They were angry. I don't understand."

As noted above, Fernando Gonzalez and Javier Vera denied any knowledge of Saucedo's Union activity prior to his discharge. Ryan Schakel and Manuel Rodriguez similarly testified they had no such knowledge. Schakel testified that he and Rodriguez made the decision to discharge Saucedo, based on Vera's recommendation, and the two warnings in his personnel file.

The Discharges of Luis Herrera, Bernabe Ruiz, Jose Barajas, Adan Serna, Juan Carlos Mayo, Jose Robles and Rodolfo Macias

After Saucedo was discharged, he was employed by the Union, and continued soliciting employees to join. Saucedo testified that he obtained signed authorization

cards from Jose Barajas, Adan Serna and Juan Carlos Mayo.¹¹ The cards are dated January 12, 2009. It is unclear where this took place.

Luis Francisco Herrera was employed by Respondent for about five years. Herrera was an outside worker, performing such tasks as moving cows and treating their hooves. Herrera had never received a written warning. Herrera is related to Charging Parties, Bernabe Ruiz and Adan Serna. Herrera rode to work, inter alia, with Charging Party, Jose Rosales, and employee-Union activist, Denis¹² Vargas.

Herrera became involved in the Union campaign, because he felt Vera was pressuring and abusing the workers. Herrera believes he began supporting the Union in 2009, about one week prior to Saucedo's discharge, which is when Saucedo first spoke to him on the subject. Herrera asked 15 or more workers to support the Union, primarily in the corral areas and at his home. Herrera chose those employees he trusted to solicit for the Union. Herrera testified that Saucedo gave him the blank Union authorization cards in January 2009, *after* Saucedo's discharge. Juan Cervantes also gave Herrera cards.

Herrera distributed the cards to co-workers, urging them to sign. He again testified he did so after Saucedo's discharge. This makes sense, because none of them was signed until then. Herrera distributed about five cards in the corral areas, and others at his home. He testified that Fernando Gonzalez was in the chute area, about 100 to 150 feet away, when he gave an employee a card. Gonzalez was working with the cows at the time, and Herrera admitted he did not believe Gonzalez could have recognized the

¹¹ He also obtained a signed card from Armando Rosales.

¹² This spelling is from Respondent's payroll records.

card from that distance. Gonzalez said nothing to him about what he had done. Gonzalez, in his testimony, denied seeing Herrera, or anyone else, distributing authorization cards at the dairy.

Herrera testified that employees began returning signed cards to him about one and one half weeks later. Herrera signed a card on January 10, 2009, and collected about 15 more from other workers, also in January. Herrera, as an organizing tactic, showed some workers signed cards, so they would also complete them. Employees began calling Herrera about the Union, some of whom he had not given his telephone number.

Similarly, Saucedo testified that he and a Union representative visited Martin Rodriguez Salcedo (Rodriguez), a mechanic, at his home, apparently at some point during Saucedo's employment with the Union, which lasted two or three weeks. They showed Rodriguez 24 or 25 signed Union authorization cards, and he could read the signatures, which included most of the Charging Parties. They gave Rodriguez a blank card. Martin Rodriguez did not testify at the hearing.

The Union filed a second Notice of Intent to Take Access on January 19, 2009. Ryan Schakel testified that Tina Leal returned to Respondent's facilities in response to Respondent being served with the Notice. Manuel Rodriguez was less certain of this, at one point testifying that this might have taken place because he heard that employees were signing Union authorization cards. Rodriguez, upon further questioning, testified Leal was probably contacted in response to the Notice. Rodriguez denied that employees had reported to him that cards were being signed. Schakel, however, testified that after

one of the times the Union took access, Rodriguez told him an employee had given Rodriguez a blank authorization card.

In January, after the 19th, Tina Leal conducted meetings with groups of, or individual employees. Rodriguez or Schakel represented management during these meetings, with Leal acting as an interpreter. Herrera testified that at the meeting he and the other outside workers attended, Manuel Rodriguez asked if the workers knew why they had been called in. When no one responded, Rodriguez pulled out a blank Union authorization card, and told them that was the reason for the meeting. Rodriguez essentially admitted doing this at the meetings, claiming he received the card from Leal.

Herrera testified that Leal told his group she knew a lot of employees had signed cards, and that Saucedo had been visiting workers at their homes.¹³ Leal did not testify, and Rodriguez did not deny that Leal said this. Herrera was, in general, a credible witness, and his testimony is accepted as true. Based on this testimony, the undersigned believes it is probable that Leal “knew” that a lot of cards had been signed, because one or more employees had reported this to Respondent, be it Manuel Rodriguez, or someone else. Herrera testified that after the meetings conducted by Leal, some of the workers who had signed authorization cards asked him to return them, because they feared retaliation.

General Counsel argues that the above evidence proves that not only did Martin Rodriguez and/or other workers report that many Union authorization cards had been

¹³ Saucedo testified that he continued to visit workers at their homes, after he was discharged.

signed, but that Respondent was apprised that most of the Charging Parties were card signers. If this were the case, Respondent would have also been provided with the identities of the many other employees who had signed cards. In any event, Respondent did not discharge or discipline any of the card-signers in 2009.

Herrera testified that, during the time period he was distributing the authorization cards, Vera told him, "Luis, I believe Ryan is thinking bad things about you," and that he should speak with Schakel. Vera, in his testimony, denied making such a statement to Herrera. Herrera testified that, in response to Vera's comment, he went to see Schakel, and told him, with Leal interpreting, "I was aware that he thought I was with the Union, and that I just simply wanted to work, and that was all." Schakel did not respond, according to Herrera. Schakel testified that he "did not recall that meeting." As noted above, Leal did not testify.

Herrera also testified that in January 2009, Fernando Gonzalez told him that Schakel had asked "regarding me and about the Union," and Gonzalez had told Schakel he knew nothing about Herrera "being in" the Union. Gonzalez denied this took place. Herrera's testimony concerning these incidents is credited.

Subsequent to Saucedo's discharge, he and Cervantes arranged for an organizing meeting at a restaurant in Tulare, California. After Saucedo, Cervantes and another Union organizer entered the restaurant, Javier Vera arrived, with his wife and brother, according to General Counsel's witnesses. Ruiz testified that he observed Vera enter the restaurant, but that Vera did not see him, because Ruiz and Adan Serna were across the

street in a parking lot. None of the other employees who planned to attend the meeting had arrived.

The employees who were going to attend the meeting, and Saucedo, communicated by cell phone, and cancelled it. Inside the restaurant, Cervantes approached Vera and introduced himself, in order to make a record of the encounter. Vera testified that he went to the restaurant to eat, with his wife and daughter, at his wife's suggestion. The complaint does not allege this incident as an unfair labor practice, and the testimony fails to show that Vera saw any current or former employee, other than Saucedo.

The Union failed to obtain enough signed authorization cards to file for an election. At that point, the Union abandoned its organizing campaign. Cervantes further testified that, to his knowledge, the Union made no further organizing efforts at Respondent's facility until after the remaining alleged discriminatees' employment was terminated.

Herrera testified that he next became involved in the Union campaign when Bernabe Ruiz and Rodolfo Macias contacted him, at the end of June 2010. Herrera told them he did not want to get involved, because he was dealing with personal issues. After Jose Barajas discussed the matter with him at Herrera's home, Herrera agreed to become involved again, and spoke with some of his co-workers. Barajas, in his testimony, clearly recalled that he and Herrera first discussed bringing back the Union on July 4, 2010.

An employee told Herrera that Martin Rodriguez now wanted to join the Union. Herrera testified he told Rodriguez that he knew Rodriguez supported "the bosses," but

Herrera supported the Union, and he did not care if Rodriguez told them this. As noted above, General Counsel contends that Rodriguez was an informant. Herrera testified he was discharged four or five days later, on July 6, 2009. Given Barajas' testimony, it is quite possible that Herrera's discharge actually took place within a day or two after he told Rodriguez he supported the Union.

Jose Barajas was employed by Respondent as a milker, for about five years. He had never received a disciplinary warning. When asked whether he was a good worker, Barajas replied, "Well, not good, but I would do my work." Barajas rode to work in a green Honda with Charging Parties, Serna, Mayo, Rosales and one other worker. Barajas became involved in the Union campaign in 2009, at the behest of Saucedo. Barajas signed a card, given to him by Saucedo, along with Serna and Mayo, at Serna's home in Tulare, California. As noted above, Barajas contended Saucedo was still employed by Respondent at the time, but said testimony is not credited.

Barajas testified that he distributed about three authorization cards, at work and at worker's homes, during about a one-week period, in January 2009, while Tina Leal was conducting employee meetings. Barajas obtained the cards from Saucedo. At work, he distributed the cards in the parking area, but out of the range of the surveillance camera. He would call workers over to his car, and ask them to sign cards, as they left the day shift. Serna and Mayo would be in the vehicle with him when he solicited workers to sign cards. Barajas testified that "someone," whose name he could not recall, told him "they" knew that the ones in his vehicle were passing out cards. Said hearsay testimony is insufficient to establish that Respondent was aware of this activity.

Barajas testified he had two conversations about the Union with co-workers in the employee lunchroom, one worker on each occasion. Barajas named Ruiz and Serna as employees he spoke with on that subject. Barajas testified that Carlos Mayo also spoke in support of the Union with workers, at their homes, on unspecified dates.

Barajas became inactive in the organizing campaign after the 2009 Tina Leal meetings, because there was insufficient worker support. As noted above, Barajas testified that he agreed to resume his Union activities when he discussed this with Herrera, on July 4, 2010, at Herrera's home. Barajas discussed the renewed Union campaign the following day, with Mayo and Serna, on their way to work. This was the only testimony concerning their Union activities in 2010. Barajas, Mayo and Serna were discharged the following day, along with Herrera, Jose Robles, Ruiz and Macias. Mayo and Serna did not testify at the hearing.

Barajas, like Herrera, accused Martin Rodriguez of informing the owners of their Union activity, resulting in the discharges. His proof of this consisted of a hearsay statement by a co-worker to that effect. How Rodriguez would have become aware of the scant 2010 Union activities of Barajas, Mayo and Serna, and the virtually non-existent activities by Jose Robles (discussed below), before the discharges, also remains a mystery.

Bernabe Ruiz began working for Respondent in 2006, and he was last employed as a feeder. Manuel Rodriguez hired him. Ruiz testified that he received a telephone call from Gabriel Saucedo, "around December" 2008. Saucedo asked him if he would join the Union. Ruiz said he would, if enough of the other workers also joined. Ruiz attached

this condition, based on his general belief that employers retaliate against union supporters. Ruiz testified that he did not know how Saucedo obtained his telephone number. Contradicting Ruiz, Saucedo testified Ruiz had given his telephone number to him, shortly after they met, years earlier.

That day, Ruiz discussed the Union issue with Luis Herrera, at Herrera's house. Herrera is Ruiz's cousin. Herrera allegedly told him that he had already spoken with Saucedo and Juan Cervantes, and thought it was a good idea. Herrera asked Ruiz if he would talk to other workers about supporting the Union, and Ruiz agreed to do so. Herrera told Ruiz he had the authorization cards to sign. Ruiz was not given blank authorization cards to distribute to other employees.

Ruiz signed an authorization card, dated January 12, 2009. He obtained the card from Saucedo, who visited him at his home, along with Cervantes and another Union representative, after Saucedo's discharge. Ruiz testified that, prior to this, he had spoken with five other employees about joining the Union, at the dairy. At least three, and probably four of these are or were Charging Parties herein, and the last was actively soliciting employees to sign Union authorization cards.¹⁴ Ruiz talked about the Union while driving his truck "by the corral," where the cows were being treated and "on the chute on the other side." Ruiz did not contend that anyone in management observed

¹⁴ These include Luis Herrera, Adan Serna and Jose Barajas. Ruiz also referred to speaking with "Armando." Armando Rosales was a Charging Party herein, until General Counsel withdrew the allegations concerning him. Finally, Ruiz spoke with Denis Vargas who he later identified as an employee who actively solicited employees to sign authorization cards.

these discussions. Ruiz also discussed the Union with co-workers, mostly Herrera, away from the dairy.

Ruiz further testified that, *prior* to Saucedo's discharge,¹⁵ Vera called him into a meeting with Schakel and Rodriguez. Several other employees were present, including Rodolfo Macias, who acted as interpreter, Luis Herrera and Jose Barajas. Rodriguez showed them three blank "cards" and asked if they knew anything about them. No one responded. Rodriguez purportedly stated he had more cards, which had been given to him by employees. Rodriguez allegedly told the workers that this was all he wanted to know, and released them to return to work.

Ruiz specifically testified that this took place at a separate meeting from those conducted by Tina Leal, discussed above.¹⁶ Herrera and Barajas testified at the hearing, and did not corroborate Ruiz. Herrera and Rodriguez testified that Rodriguez showed employees one card, at the Leal meetings, and they did not contend that he asked employees about the card, or said he had others. The incident reported by Ruiz was not mentioned in the complaint, at the prehearing conference or in General Counsel's opening statement. Ruiz's testimony was at odds with General Counsel's other witnesses on several other points. Therefore, his testimony is not credited.

Ruiz also testified that during one week, in January 2009, Fernando Gonzalez and five other employees he perceived as being allied with management asked him about the

¹⁵ When asked about this on cross examination, Ruiz stated he did not remember the date too well.

¹⁶ Ruiz further testified that the meetings he attended with Leal took place prior to Saucedo's discharge, also at odds with all other witnesses who testified on the subject.

Union, and/or if he had joined it or had signed an authorization card.¹⁷ In all cases, Ruiz denied knowing anything about the Union campaign, because he thought they would inform management, and he would be discharged. In his conversation with Gonzalez, Gonzalez allegedly asked Ruiz if he knew anything about a union, because he had seen Denis Vargas passing out authorization cards. Gonzalez, in his testimony, denied ever asking Ruiz if he knew anything about the Union. Ruiz's lack of credibility has been discussed above, and Gonzalez, although not credited in all of his testimony, was the more believable witness. Ruiz's testimony concerning Gonzalez is not credited. Vargas was still employed by Respondent as of the hearing.

Ruiz testified that he believes he began discussing the Union again with co-workers, on an unspecified date in June 2010. He became involved because management allegedly had made a lot of promises, but had not kept them. Ruiz felt pressured to perform too much work, and to avoid working overtime. He initially discussed bringing back the Union with Rodolfo Macias (who he now trusted) and one other worker.

General Counsel contends that Ruiz and Macias spoke with at least 30 employees about the Union, shortly before their discharges. The record does not support this. Ruiz testified that there were about 30 employees that were going to join the Union, not that he and Macias had spoken with at least that many employees. Ruiz had earlier been asked to name the employees he had spoken with on the subject, and he named 11, five of

¹⁷ One of these employees was Charging Party, Rodolfo Macias. Ruiz did not trust Macias, because he was, "like a leader."

whom are charging parties.¹⁸ There was no evidence presented that Macias spoke with anyone about the Union, other than Ruiz, in June or July 2010. Furthermore, given the undisputed evidence that no cards had been signed in 2010, as of the date of Ruiz's discharge, and that, as discussed below, the serious organizing took place thereafter, Ruiz's claim that, prior to his discharge, he knew that about 30 workers were in support is not credited.

According to Ruiz, one of the employees he purportedly spoke with was Oscar Rodriguez. Ruiz, in his Board declaration, testified this took place in "about" *May* 2010. Ruiz testified that Martin Rodriguez subsequently approached him and asked for an authorization card. Rodriguez allegedly told Ruiz he knew Ruiz was organizing for the Union, because Oscar Rodriguez had told him this. Martin Rodriguez purportedly told Ruiz he wanted to join the Union. Ruiz did not believe this, because he had been informed that Rodriguez had previously given authorization cards to management.¹⁹ Ruiz did not acknowledge his Union activity, and did not give Rodriguez a card.

Another employee Ruiz perceived as being anti-Union allegedly approached him and asked who was organizing and what they were doing. Ruiz told him he knew nothing about this. During this conversation, Manuel Rodriguez "passed by," and "took a

¹⁸ The undersigned does not accept, at face value, Ruiz's contention that he spoke with that many workers. As noted above, Ruiz wrongly contended that Manuel Rodriguez showed workers three, rather than one cards, and said he had more. In his Board declaration, Ruiz stated Rodriguez showed the workers about five cards.

¹⁹ Said testimony was ruled as inadmissible hearsay, regarding whether Martin Rodriguez had actually given cards to Respondent's managers. It was allowed in to explain Ruiz's state of mind when he responded to the request.

quick glance at them.” Said testimony does not establish that Rodriguez overheard the conversation, if it actually took place.

Ruiz was simply not trustworthy enough as a witness to credit his testimony concerning Oscar and Martin Rodriguez in 2010, absent corroboration. In any event, Ruiz admitted he consistently denied being a Union organizer, when approached by employees he did not trust, including Martin Rodriguez. It is incredible that Ruiz would have solicited Oscar Rodriguez, a relative of Martin Rodriguez, to join the Union.

As noted above, Jose Robles was employed by Respondent as an outside worker for about one year. He was the least senior outside worker. He had not received any written warnings. Robles was involved in one Union-related discussion at the dairy, with a group of other workers. Robles estimated this was about six months after he began his employment, which would be about January 2010, a time all of the other witnesses agree there was no employee Union activity. In any event, Robles does not know if anyone in management observed this alleged discussion. Robles testified that he asked Herrera if he still had authorization cards, while riding to work with Herrera. This purportedly took place in about April 2010. Robles admittedly did not sign a Union authorization card, or engage in any other Union activity, until after his discharge. After being discharged, Robles signed a representation petition.

General Counsel contends that Respondent knew or suspected Robles was a Union supporter, primarily because he rode to work with Herrera and, since everyone purportedly knew Herrera was an employee-Union organizer, Robles would be assumed to share these sentiments. In support of this theory, Robles testified that he could be

seen, entering and exiting Herrera's vehicle, as they arrived at, and left work. Robles did not contend that Manuel Rodriguez or Ryan Schakel ever actually saw this.²⁰

Herrera, Ruiz, Barajas, Serna, Mayo and Robles were terminated from their positions on July 6, 2010, along with Rodolfo Macias, whose case will be discussed, below. Manuel Rodriguez, with Javier Vera acting as the interpreter, individually informed the workers of this. Rodriguez told them they were being "laid off," because Respondent was in a poor financial condition, and he did not cite any deficiencies in their work performance. Rodriguez offered them letters of reference, and gave them their final paychecks. Robles testified that Rodriguez also told him that, as the least senior (outside) worker, he had been selected for layoff.

Respondent lost over \$2,000,000 on its dairy operation in 2008, and over \$9,000,000 in 2009. During that time, milk prices were decreasing, and the price of feed was rising. Rodriguez and Schakel testified they began looking for ways to make Respondent profitable in about May 2010. They determined that they needed to increase milk production and reduce feeding costs. In evidence is an e-mail memo from Respondent's licensed nutritionist, dated June 10, 2010, noting that Respondent discussed reducing its workforce, in order to reduce expenses. According to Rodriguez and

²⁰ In further support of the "guilt by association" theory, General Counsel presented the testimony of Armando Rosales, who claimed that Fernando Gonzalez, "since 2009 and in 2010," "five or 10 times," told him not to ride to work with Barajas, Mayo or Serna, because he would be associated with them as being pro-Union. Gonzalez denied ever saying this to Rosales, and Barajas did not testify that Rosales ever told him about it. As noted above, Rosales was not a credible witness, and this testimony is rejected.

Schakel, Respondent had a number of employees who were performing acceptably, but not well enough to make the business profitable.

Rodriguez and Schakel testified that after examining the dairy's work requirements, they concluded it was not feasible to significantly reduce the workforce. Instead, they decided to replace some employees with superior performers. In late June, Rodriguez, Schakel and Vera surreptitiously observed the workers, and drew up lists as to who they felt should be replaced. They compared the lists, and, by June 30, decided to terminate the employment of these six employees. Rodriguez and Schakel testified that the employees were not notified of their discharges until July 6, because Schakel was taking a trip for the Fourth of July weekend. General Counsel's witnesses did not dispute Schakel's absence from the dairy until July 6. Therefore, it is found that Respondent had decided to discharge the employees, by no later than June 30.

Rodriguez testified that he observed Jose Barajas and Adan Serna making excessive noise in the milking barn. Loud noise upsets the cows, and causes them to produce less milk, along with other problems. Schakel also testified that he observed excessive loud noise from them. Vera had also reported complaints from milkers, that Barajas and Serna were too loud.

Schakel testified that Macias and Ruiz, who worked together, were not performing their feeder duties correctly, and that discussing this with Macias had not resulted in an improvement in their work performance. Schakel did not observe these problems with the other feeders. According to Rodriguez, Ruiz was a slow worker, who spent too much

time talking with other employees. Rodriguez also claimed that Ruiz did not spread the feed properly in the corrals.

Rodriguez testified that other workers had agreed to perform Jose Robles' job duties, and he and Schakel testified Respondent did not replace him, at least, not right away. According to Rodriguez, although Juan Carlos Mayo was a long-term employee, he seemed, "not to be focused." "His head was off somewhere else," and "he just wasn't paying attention to detail." Rodriguez and Schakel claimed that Mayo, as a cow pusher, was a slow worker. Rodriguez testified that Mayo was "a bit" faster when driving a tractor, while Schakel thought he drove "like a wild man," putting too much stress on the equipment. Rodriguez was not asked why Luis Herrera was selected for layoff, and Respondent's counsel also failed to ask Vera or Schakel about this.²¹

Vera testified that Rodriguez and Schakel had discussed firing workers with him about 10 to 15 days before these employees were discharged. They told him, "possibly a week or more" beforehand, that these employees were going to be "suspended" or "fired." The decision was made, based on the financial condition of the dairy, and their "low" work performance, as determined by the three of them, who had compiled lists of employees who they felt were not performing well.

Vera recommended that Juan Carlos Mayo be discharged, because he was not performing his duties as a feeder properly. Vera cited two examples of things Mayo

²¹ A possible reason for this is that Respondent's Exhibit 3(c), a summary of discharges, does not list Herrera as one of those terminated from employment on July 6.

allegedly did improperly. Vera testified that he had previously spoken with Mayo about these problems, but Mayo's work performance had not improved.

Vera testified he believes Jose Barajas was discharged for making too much noise in the milking barn, and excessively talking on the telephone and with co-workers. Vera testified that he had previously asked Barajas to keep his voice down, but workers reported to him that Barajas' alleged misconduct continued.

According to Vera, Adan Serna was discharged because he was not mixing the feed correctly. This purportedly caused Respondent, "a lot of problems." Vera believes he had spoken to Serna about this, but was not sure. After being shown Respondent's payroll records, Vera admitted Serna had been working as a milker for several months, up to his discharge. Vera testified that Jose Robles was discharged, because there was not enough work to justify his continued employment, given Respondent's financial condition.

Vera testified that the discharged workers were replaced shortly afterward. One of the replacements is a relative. Rodriguez testified that all but Robles were replaced, and that they planned to hire Vera's relative as a replacement, prior to the discharges. Rodriguez otherwise had a very poor recall of who the replacements were, and it appears they were primarily hired based on Vera's recommendations.

Rodolfo Macias did not testify at the hearing. The limited testimony concerning his Union activity is set forth above. As noted above, Ruiz testified he and Macias discussed bringing back the Union in June 2010. Respondent's witnesses denied any knowledge of Macias' Union activity.

Manuel Rodriguez testified he made the decision to discharge Macias, because he left work, on July 5, without notifying anyone. Rodriguez was aware that Macias previously had a cardiac problem, apparently in early March 2010, for which he had been hospitalized, and he had granted Macias' request for some time off to recuperate. When Macias returned to work, Rodriguez also granted Macias' request to begin work two hours later, which Macias did, until June 18. At that point, he returned to his previous starting time.

Rodriguez testified that as of July 5, Macias had a company-issued cell phone, which he could have used to inform someone that he had to leave work. On the morning of July 5, Rodriguez became aware that Macias was not at his work area. Rodriguez called Ruiz, who told him, he did not know where Macias was. Rodriguez drove around the facility looking for Macias. He called for Macias on his company-issued and personal cell phones, but Macias did not answer.

When he was later informed that Macias had left, because he was not feeling well, Rodriguez decided he should be discharged, because Macias had not notified anyone that he was leaving. Rodriguez had Vera call Macias, the following day.²² He instructed Vera to tell Macias to report in. When Macias arrived, Rodriguez had Vera inform Macias that he had abandoned his job, and gave him his final paycheck. Macias turned in his cell phone to Rodriguez on July 20. Rodriguez testified that at no time did Macias provide Respondent with a physician's note, stating he was unable to work on July 5.

²² The record is not clear on this, but it appears that Macias was not scheduled to work on July 6.

Bernabe Ruiz testified that at about 9:30 a.m., on July 5, he observed Macias tapping on his chest. Without saying anything, Macias got into his vehicle and drove away. After some unspecified period of time, Ruiz called Macias, who told him he was “feeling bad,” and asked Ruiz to notify “the foreman or the boss.” Ruiz asked Macias why he did not do this himself, to which Macias replied, “they didn’t not [sic] pay attention to him anymore.” Ruiz did not deny that Manuel Rodriguez had called him, asking for the whereabouts of Macias.

Ruiz testified that about 15 minutes later, he notified Javier Vera that Macias had left work, because he was not feeling well. Vera said, “Fucking lazy ass, that’s fine. I’m going to send Hugo over.” Vera had the other employee take over Macias’ work duties.

Vera testified that Macias “disappeared” from work on July 5, 2010, e.g. without notice. Vera (and Rodriguez) was not aware of any other worker who had done this before. Vera also testified that he has never seen any document showing that Macias went to the hospital that day.

Vera testified he found out that Macias had left work when a worker, possibly Ruiz, called and told him Macias had left, about two hours earlier. Vera was aware that Macias had previously stated he had problems with his heart. Vera testified he did not recall if the person who reported that Macias left work said anything about health problems, or if he referred to Macias as a “lazy ass.” What Vera did recall was that the worker told him Macias was not in his work area, that he had seen him leave in his truck and the worker was not sure “what was happening there.”

**The Discharges of Bernabe Ruiz and Rodolfo Macias,
Allegedly for Engaging in Protected Concerted Activity**

The complaint alleges that Ruiz and Macias were also discharged in violation of section 1153(a), because they concertedly requested a wage increase, and asked Ryan Schakel not to implement a change in their shifts. General Counsel argues the facts, but not the law, in her brief. As noted above, Macias did not testify at the hearing. Ruiz testified that sometime in June 2010, he went to the dairy office to get his paycheck. He asked to speak with Schakel. According to Ruiz, “I asked him if he would give me a raise, like 50 cents,” because he had proved he performed his work well. Schakel allegedly responded that he could not grant the raise, due to Respondent’s poor economic condition, but they could discuss it in the future. Ruiz testified that he and Macias had previously discussed asking Schakel for a raise, and they decided to do so separately, so as to not “pressure” Schakel. Ruiz did not contend he told Schakel that he and Macias had previously discussed asking for a raise.

Schakel testified that employees commonly ask for raises. He testified that Macias, but not Ruiz asked for a raise. Macias asked, “Can I have some more money?” and he denied the request, citing Respondent’s poor economic condition. Macias did not tell Schakel that he had previously discussed asking for a raise with Ruiz.

Rodriguez also denied that Ruiz ever asked him for a wage increase. Rodriguez testified that on June 20, 2010, when he handed Macias his paycheck, Macias also asked him, “Hey, is there any chance I can get some more money?” Rodriguez told Macias he

would speak with the other owners about this. Rodriguez denied that Macias' requests for a wage increase played any role in his decision to discharge Macias.

As noted above, Ruiz was not, in general, a credible witness. Ruiz's Board declaration says nothing about him asking Schakel for a raise, or about having previously discussed doing this with Macias. It is found that, in fact, Ruiz did not request a wage increase from Schakel or Rodriguez.²³

Ruiz testified that shortly thereafter, Vera told them they would be changed to a split shift. Ruiz initially testified that the shift change was not implemented, because he was discharged first. Ruiz then testified that he and Macias asked Schakel to prevent the shift change from being implemented. Schakel granted the request. Schakel and Vera did not testify concerning these incidents, so it will be presumed that they did take place. Ruiz also testified that his starting time had been changed, on various occasions, in 2010, unrelated to his re-involvement with the Union campaign.

Subsequent Events

After being discharged, the six workers who were "laid off" met, apparently joined by a few others, and Herrera called Cervantes. He asked whether they could still organize for the Union, and Cervantes responded affirmatively. Cervantes dictated a Union authorization petition to Ruiz, who wrote it down.²⁴ The "laid off" employees, and three others signed the petition on that date. Additional employees, including Macias,

²³ As will be discussed below, even if Ruiz's testimony were credited, the outcome of these allegations would be the same.

²⁴ At the time, Cervantes was in Salinas, and could not give the workers authorization cards. Cervantes testified he dictated the petition to Herrera, but Herrera and Ruiz agree that it was Ruiz who wrote it down.

signed thereafter, and Cervantes subsequently met with workers in a park, obtaining signed Union authorization cards.

Armando Rosales testified that two days after these discharges, he was present when Javier Vera allegedly told two of the purported anti-Union employee snitches, that the employees had been fired because they caused problems with the Union. Vera allegedly added, that “they” were going to continue firing all the employees who supported the Union.

Counsel failed to ask Vera to respond directly to this allegation. Nevertheless, Rosales’ lack of credibility has been discussed above. Vera’s conduct was not alleged at the prehearing conference, in the complaint or in General Counsel’s opening statement. It is discredited as a recent fabrication.

After the discharges, Respondent brought back Tina Leal, to discuss them with the remaining employees. The Union filed a Petition to conduct an election, and Notices of Intent to Take Access and Intent to Organize, on July 12, 2010. As noted above, the election was conducted on July 19. There were determinative challenged ballots. The ballot of Fernando Gonzalez was one of those challenged. The Union subsequently withdrew its challenges to several voters, including Gonzalez. After those challenged ballots were opened and counted, it was determined that the Union had lost the election.

ANALYSIS AND CONCLUSIONS OF LAW

The Supervisory Status of Fernando Gonzalez

Supervisors are not considered part of an agricultural employee collective bargaining unit and, therefore, are not eligible to vote in Board elections. Section 1140.4(j) of the Act provides:

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

Section 1140.4(j) parallels language contained in the National Labor Relations Act, and decisions of the National Labor Relations Board (NLRB) are applicable to issues involving supervisory status under the ALRA. The factors establishing supervisory status, enumerated in section 1140.4(j), are considered in the disjunctive, meaning that if an individual exercises any one supervisory function, he or she is a statutory supervisor. On the other hand, the establishment of “secondary” supervisory indicia, such as job title, higher wages and benefits, special equipment and being assigned to an office, will not confer supervisory status, absent one of the enumerated functions.

The Board, in a recent decision, made a detailed analysis of current NLRB case law on the subject of supervisory status, and adopted its approach. While the undersigned will not reiterate this lengthy analysis, it is clear the Board intends to closely scrutinize the job duties of alleged supervisors, where the statutory indicators relied upon are the assignment and/or responsible direction of the work of other employees.

Kawahara Nurseries, Inc. (2011) 37 ALRB No. 4, applying *Oakwood Healthcare, Inc.* (2006) 348 NLRB 686 [180 LRRM 1257] and *Croft Metals, Inc.* (2006) 348 NLRB 717 [180 LRRM 1293]. Thus, where an alleged supervisor is not involved in such hallmark supervisory functions as hiring, firing, laying off, recalling, disciplining or promoting employees, a strong showing will have to be made that work assignments and directions are not of a routine nature, and require the exercise of independent judgment.

Briefly stated, a statutory work assignment is defined as an assignment to a department, shift or overall task, but not to discrete functions within a department, shift or other sub-unit. If the individual does make statutory work assignments, it must further be shown that he or she exercises independent judgment in doing so, as opposed to implementing routine or clerical policies established by the employer. Therefore, the alleged supervisor must evaluate the skills and abilities of other workers, rather than filling spots to ensure that the work gets done. If it is contended that the employee responsibly directs the work of others, it must further be shown, by specific evidence, (as opposed to implication) that the individual is accountable for the work performance of the assignees, e.g. that he or she will be disciplined or rewarded based on the job performance of the employees purportedly being supervised.

Conclusory evidence will not establish the elements of statutory work assignments or direction of work. Rather, specific instances showing the nature of the assignments and direction must be shown. *Kawahara Nurseries, Inc.*, *supra*; *Golden Crest Healthcare Center* (2006) 348 NLRB 727, at page 731 [180 LRRM 1288]. In short, it is now very

difficult to establish supervisory status based on work assignments or the responsible direction of work.

Supervisory authority is not established by sporadic instances thereof. *Bowne of Houston, Inc.* (1986) 280 NLRB 1222 [122 LRRM 1347]; *Montgomery Ward & Co., Incorporated* (1972) 198 NLRB 52, at pages 55-58 [80 LRRM 1814]. Correcting the work of other employees does not constitute discipline, within the meaning of section 1140.4(j). *Kawahara Nurseries, Inc.*, supra. The mere authority to issue verbal reprimands is too minor a disciplinary function to constitute statutory authority, in the absence of evidence that such warnings lead to any other discipline. *The Ohio Masonic Home, Inc.* (1989) 295 NLRB 390, at pages 393-394 [131 LRRM 1503]; *Passavant Health Center* (1987) 284 NLRB 887 [125 LRRM 1274].

“Secondary” indicia of supervisory authority, such as higher pay rates, special equipment, assignment to an office, and job title are, in essence, irrelevant to a determination of statutory supervisory status, since the establishment of any enumerated supervisory function will confer that status, while a plethora of only secondary indicia will not. The fact that employees believe that an individual is a supervisor, without a showing of statutory authority, will not, in itself, establish that status, even if that belief is caused by the employer designating the individual by that title. *Kawahara Nurseries, Inc.*, supra, at page 26; *PHI, Inc. d/b/a Polynesian Hospitality Tours* (1989) 297 NLRB 228, at fn. 3 [133 LRRM 1218], enfd. (C.A.D.C., 1990) 920 F.2d 71 [135 LRRM 3238].

It is concluded that the credited evidence establishes that Fernando Gonzalez has not been a statutory supervisor at any time during his employment with Respondent. As

of the time of Gabriel Saucedo's discharge, Gonzalez worked as a feeder and inseminator, treated cow hooves and worked with sick cows. There is no credible evidence that he possessed or exercised any supervisory authority over other workers.

Based primarily on Herrera's testimony, it appears that Gonzalez was told, prior to the other discharges, that he was now a supervisor, and was listed as such in Respondent's payroll records. These, however, are secondary indicia of supervisory authority, along with the issuance of a cell phone to him, his status as a salaried employee and being provided with free housing.

The only credited evidence that Gonzalez exercised a "hallmark" supervisory function, was that he at least effectively recommended the hire of Jose Robles. The evidence shows that Gonzalez was not involved in the decision to discharge any employee, or that he hired anyone else, including the replacements. Under these circumstances, the hire of Robles constituted an isolated, sporadic exercise of statutory authority, insufficient to establish supervisory status.

The evidence regarding Gonzalez' alleged assignment of work and responsible direction was generalized, vague and therefore, insufficient to establish section 1140.4(j) status.²⁵ Checking to see if employees are at work, looking for problems, being present at disciplinary meetings, calling employees into meetings, and occasionally moving an employee from one position to another to briefly fill a temporarily vacated spot, do not establish responsible direction or the assignment of work, as defined by the case law.

²⁵ This includes Vera's testimony, that workers, including Gonzalez, perform "some" unspecified duties he normally performs, when he is on vacation.

Similarly, the fact that employees sometimes contact another worker when there are problems, and the worker attempts to perform mechanical repairs, fails to show that the worker exercises any of the enumerated supervisory functions. In light of the additional fact that the milkers require little supervision, Gonzalez did not responsibly direct, or assign work to them.

The Discipline and Discharge of Gabriel Saucedo

In order to establish a prima facie case of unlawful retaliation against employees for engaging in union activity, General Counsel must show that the employees engaged in such activity, the employer had knowledge thereof (or suspected this), and the union activity was a motivating factor in an adverse employment decision. Once the prima facie case has been established, the burden shifts to the employer to show that the adverse action would have been taken, even absent the union activity. *Wright Line, A Division of Wright Line, Inc.* (1980) 251 NLRB 1083 [105 LRRM 1169], enfd. (CA 1, 1981) *NLRB v. Wright Line, Inc.* 662 F.2d 899 [108 LRRM 2513], cert. denied (1982) 455 U.S. 989 [109 LRRM 2079].

General Counsel has established that the alleged discriminatees engaged in union activities in 2009. It is problematic whether General Counsel has established that Respondent knew that Robles rode to work with Herrera, or that this would necessarily cause Respondent to suspect that he shared Herrera's Union sentiments. General Counsel must next establish that Respondent knew or suspected the workers engaged in such activities or associations. Absent such proof, the allegations must be dismissed. General

Counsel's evidence concerning Respondent's direct knowledge is either insufficient, or has been discredited.

Absent direct evidence of employer knowledge, this may be established by circumstantial evidence. In determining whether knowledge has been established, it is appropriate to examine the record as a whole. The primary factors considered are the timing of the adverse action with respect to the union activity, the employer's general knowledge that employees are engaging in organizational activity, the employer's animus toward such activity, and whether the reasons advanced for the adverse action are pretexts. *Regional Home Care, Inc.* (1999) 329 NLRB 85 [166 LRRM 1117]; *Glassforms, Inc.* (2003) 339 NLRB 1108 [173 LRRM 1156].

If an employee is disciplined or discharged shortly after he or she engages in union activities, this constitutes important circumstantial evidence that the employer was aware of such activities prior to deciding to take the adverse action. Some cases have even gone so far as to conclude that it is "stunningly obvious" that where a worker is discharged shortly after engaging in union activities, the employer is aware of such activities. *Regional Home Care, Inc.* supra; *Isaac Rubin and Marion Kane dba Novelry Products Company* (CA 2, 1970) 424 F.2d 748, at page 750 [74 LRRM 2040]; *Frye Electric, Inc.* (2008) 352 NLRB 345, at page 351 [184 LRRM 1272]. The undersigned has found no case, however, including those just cited, where timing alone has been found to establish employer knowledge. To the contrary, several cases have found that employer knowledge was not established, even though the adverse action followed closely on the heels of the protected activity. *Del Mar Mushrooms* (1981) 7 ALRB No. 41; *BLT*

Enterprises of Sacramento, Inc d/b/a Sacramento Recycling and Transfer Station (2005) 345 NLRB 564 [178 LRRM 1353]; *Rust Craft Broadcasting Company, a wholly owned subsidiary of Rust Craft Greeting Cards, Inc.* (1974) 214 NLRB 29, at pages 32-33 [88 LRRM 1174]; *Gold Coast Restaurant Corp., d/b/a Bryant & Cooper Steakhouse* (1991) 304 NLRB 750 [139 LRRM 1256]; *Lab Glass Corp.* (1989) 296 NLRB 348, at page 356 [133 LRRM 1175].

As noted above, the second primary circumstantial consideration to establish employer knowledge is its general knowledge that some of its employees are organizing for a union. Even if the employer has such general knowledge, there still must be sufficient other evidence to show that it knew the alleged discriminatee was involved in those activities. *Harvey Engineering and Manufacturing Co.* (1979) 209 NLRB 766, at page 772 [85 LRRM 1498]. Thus, general knowledge of union activities, in itself, does not establish knowledge that a particular employee has engaged in such activities.

With respect to the employer's animus against the union, lawful expressions of opposition to unionization may assist General Counsel's case, but do not, in themselves, establish employer knowledge. *Kawano, Inc. v. ALRB* (1980) 106 Cal.App.3d 937, at page 943 [165 Cal. Rptr. 492]. More telling are unlawful expressions of animus toward employees who support unionization, such as discipline, threats and interrogations. *Glassforms, Inc.*, supra.

Under the *Wright Line* analysis for cases of employment discrimination, once a prima facie case of discrimination is established, the employer's defense is first evaluated on the basis of whether the non-protected conduct proffered is totally without merit, or

was a motivating factor in the adverse employment decision. The first category of this defense is commonly known as a pretext, while the later is often referred to as a mixed motive. In establishing the prima facie case, a finding that the reason given for the discipline or discharge was pretextual is relevant in determining employer knowledge, in addition to determining the post-prima facie defense asserted.

The term, “pretext,” has been defined as being so baseless, unreasonable or contrived as to raise a presumption of unlawful motive. *U.S. Corrections Corporation* (1993) 310 NLRB 431, at page 437 [144 LRRM 1015], and cases cited therein. When other employees engage in the same conduct without discipline, the adverse action against the alleged discriminatee may be considered a pretext. This is commonly referred to as disparate treatment. *George Lucas & Sons* (1985) 11 ALRB No. 11, modified after unpublished remand, (1987) 13 ALRB No. 4; *The Garin Company* (1985) 11 ALRB No. 18.

On the other hand, the fact that an employer’s defense is not convincing, or might even be considered suspicious and implausible does not establish employer knowledge of the alleged discriminatee’s union activity if, under all of the circumstances, such knowledge has not preponderantly been established. This is true even if the worker was a good employee with no prior disciplinary history. *Del Mar Mushrooms*, supra; *BLT Enterprises of Sacramento, Inc. d/b/a Sacramento Recycling and Transfer Station*, supra. Furthermore, although not in itself dispositive, the fact that known union adherents were not disciplined is a relevant factor to consider. *ABC Bodyworks, Inc.* (1973) 201 NLRB 833 [82 LRRM 1362].

General Counsel also contends that the small plant doctrine establishes Respondent's knowledge of its employees' Union activities. The small plant doctrine has been applied to a bargaining unit of comparable size to that herein. *American Directional Boring, Inc. d/b/a ADP Utilities Contractors, Inc.* (2008) 353 NLRB 166, at page 181 [185 LRRM 1001], enf. denied on other grounds, *NLRB v. American Directional Boring, Inc.* (CA 8, 2010) 383 Fed.Appx. 594 [188 LRRM 3024], reaffirmed (2010) 355 NLRB 1020 [190 LRRM 1044]. The small plant doctrine is usually only applied where there is active union organizing in progress. The smallness of the plant, in itself, is insufficient to establish employer knowledge. Rather, additional circumstantial evidence is required. The standard for applying the small plant doctrine is that the employee's protected union activity was "carried out in such a manner, or at times that in the normal course of events, the employer *must* have known about them." (Emphasis added.) *Mario Saikhon, Inc.* (1978) 4 ALRB No. 107; *M. Curti & Sons* (1993) 19 ALRB No. 41; *Faurecia Exhaust Systems* (2009) 353 NLRB 382, at pages 291 to 292 [185 LRRM 1113].

Saucedo's testimony, that Fernando Gonzalez repeatedly asked him if he had called in the Union, in 2008, has not been credited. Even if this had taken place, Saucedo testified he repeatedly told Gonzalez he knew nothing about the Union, and told Leal and Rodriguez he was not involved. Nevertheless, even assuming Gonzalez interrogated Saucedo as to whether he brought in the Union, and disbelieved Saucedo's denials, General Counsel has failed to prove that he reported this to Respondent's agents. Inasmuch as Gonzalez was not a statutory supervisor, said proof is required. The mere

suspicion that Gonzalez was an informant is insufficient to establish that he, in fact did this. *Mario Saikhon, Inc.* (1978) 4 ALRB No. 107, at page 3, footnote 3.

The evidence does establish that Saucedo called the Union and obtained Union authorization cards, and that he discussed bringing in the Union with some employees, shortly prior to his discharge. In light of Herrera's testimony, it is problematic whether Saucedo passed out blank authorization cards, while still employed by Respondent. Therefore, it must be determined whether Respondent, prior to Saucedo's discharge, found out that he had spoken with Juan Cervantes, obtained and/or possibly distributed blank authorization cards, or had spoken in favor of Union representation with other employees.

In weighing the circumstantial factors to infer knowledge, Saucedo's discipline and discharge did closely follow the actual commencement of his Union activity. On the other hand, it had been over seven months since the Union had taken access to Respondent's facilities, and there is no evidence to suggest that it was generally aware that its employees were involved in an organizing campaign, when it discharged Saucedo. Saucedo spoke primarily with like-minded co-workers, and there is insufficient evidence showing Respondent's managers observed any of this. While Respondent expressed its opposition to unionization, General Counsel does not contend that it did so in an unlawful manner.

As noted above, the undersigned has substantial doubt as to whether the parking lot incident involving Gonzalez took place at all. If it did, Saucedo's inconsistent testimony is insufficient to establish that Gonzalez saw the authorization card. There is

also insufficient evidence that, given the early point in the Union campaign, Gonzalez would have known what Saucedo was holding. Again, General Counsel has also failed to prove that, even if Gonzalez saw and recognized the card, he reported this to Vera, Schakel or Rodriguez.

The undersigned cannot conclude that the reasons given for Saucedo's warning letters and discharge were pretexts. General Counsel does not contend that the first warning letter, issued prior to Saucedo's Union support, was unlawful. Saucedo admits that he engaged in the conduct that led to the next warning letter, and his discharge. His testimony concerning those two incidents was inconsistent and vague. Furthermore, it does not appear that he explained any of the alleged extenuating circumstances to Respondent's managers, beyond contending that another employee had failed to complete a cow count, without discipline. Similarly, General Counsel's evidence concerning alleged disparate treatment was insufficiently specific or extensive enough to conclude that Saucedo was obviously the victim of unlawful discrimination, in either of the final two incidents.

It is also inappropriate to invoke the small plant doctrine in this case. There was no active organizing by the Union at the time of Saucedo's discharge, and his protected activities, were not so open and widespread as to conclude that Respondent "must" have been aware of them. In addition, General Counsel failed to establish surrounding circumstances that are required to apply that doctrine. Inasmuch as General Counsel has failed to establish that Respondent was aware of Saucedo's Union activities as of the time of his discipline and discharge, those allegations will be dismissed.

The Remaining Alleged Section 1153(a) and (c) Discharges

Respondent became abundantly aware of a Union organizing campaign in January 2009, after Saucedo's discharge. The evidence accepted as true shows Respondent was also aware that many employees had signed Union authorization cards, and it suspected Luis Herrera was one of those circulating the cards. The credited evidence also shows that Herrera informed Respondent that all he wanted to do was work, and that Respondent's trusted employee, Francisco Gonzalez, told Respondent's manager that Herrera was not involved in the organizing drive. Herrera then became inactive in the Union campaign for an extended period of time.

General Counsel's evidence, that Respondent's agents personally observed or heard employees discussing the Union is unconvincing. The evidence shows that most of the employees discharged on July 6, 2010 had signed Union authorization cards in January 2009, and that purportedly anti-Union employees were shown signed Union authorization cards, at that time. General Counsel contends this also proves that these informants reported that most of the alleged discriminatees had signed cards, a contention that requires a tenuously-supported inference. Even if this took place, where does this leave General Counsel? It would follow that the informants also reported the identities of the many other card-signers, and Respondent did not discipline or discharge any card-signer in 2009.

An employer's beliefs concerning the pro-union sentiments of employees may change. Thus, the evidence may show that an employer once knew or suspected that an employee supported the Union, but subsequent events changed its mind. *Anja*

Engineering Corporation v. National Labor Relations Board (C.A. 9 1982) 685 F.2d 292 [111 LRRM 2089]. About 17 months had passed since the January 2009 Union campaign, before there was any organizational activity by Respondent's employees, in late June 2010. There was only Union talk taking place at that time, and the Union itself had not made an appearance. Absent proof that Respondent became aware of that talk, and was given reason to believe that the alleged discriminatees were engaging in said activity, Respondent would have no reason to suspect that they still supported the Union, at the time of the discharges.

The evidence concerning the discussions that took place in late June and early July 2010 is that pro-Union employees discussed bringing back the Union, under circumstances not establishing that Respondent's managers observed this taking place. Given the extremely limited Union activities of Barajas, Mayo, Serna and Robles in 2010, it would have been, in essence, impossible for Respondent to have learned of this, prior to their discharges. Given the fact that Respondent had decided to discharge them by June 30, the probability is reduced to zero. Therefore, even if the tenuous inference were taken, that someone had reported that they (other than Robles) had signed Union cards in 2009, Respondent would have had no reason to suspect that such support existed, as of June 30, 2010, when it decided to discharge these workers.

Ruiz's testimony, concerning his alleged encounters with Oscar and Martin Rodriguez, has not been credited. Even if it were credited, the undersigned would not be able to tell whether the incidents took place before Respondent decided to discharge Ruiz, given Ruiz's gross unreliability regarding dates, even based on a comparison with

other events. The remainder of his testimony, including the scant information concerning the Union activities of Rodolfo Macias in 2010, fails to establish that Respondent's agents became aware of his or Macias' support for the Union in that year. As noted above, Ruiz was very careful to avoid discussing unionization with employees he considered pro-management.

The evidence does establish that Respondent suspected Herrera of being an employee Union organizer in early 2009. The evidence also establishes that Herrera told Respondent's managers that all he wanted to do was work, strongly implying he was not involved, at least anymore, and Gonzalez told them Herrera was not involved at all. There would have been no reason for Respondent, as of June 2010, to suspect that Herrera was supporting or organizing for the Union, based on his 2009 activities.

Herrera's testimony, that he disclosed his Union sympathies to Martin Rodriguez in 2010, has been credited. As noted above, however, crediting Herrera, this would have taken place no earlier than July 1, after Respondent had decided to discharge the employees. If Barajas' testimony, as to the date of their renewed activity is correct, the incident involving Herrera and Martin Rodriguez probably took place after July 1. Thus, even if Rodriguez took up Herrera's invitation to report his Union sympathies, a conclusion not proved by General Counsel, such report would have occurred after Respondent had already decided to discharge Herrera.

The evidence pertaining to these allegations is significantly weaker than the facts established in *BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling and Transfer Station*, supra. In that case, the employer was well aware that its approximately

40 employees had previously been discussing unionization, and employees had told its agents that they wanted a union to represent them. The organizing began again, with many on-site union-related discussions. Immediately prior to the discharge of five union activists, employees met with union representatives and distributed authorization cards, at the employer's facility. When discharged, the union adherents, who had good work records, were simply told they "did not fit in." The employer subsequently committed several unfair labor practices. In addition, a manager told employees there would be no more discharges, unless someone "pissed him off."

The administrative law judge and NLRB majority concluded the evidence failed to establish that the employer was aware of its employees' union activities, at the time of the discharges. They also upheld the judge's conclusion that the small plant doctrine could not be applied. The evidence failed to directly establish that the employer was aware of the renewed union activity. In the absence of this, the NLRB was unwilling to infer knowledge from the surrounding circumstances, which were clearly far more compelling than those presented herein.

In this case, General Counsel has failed to present any credible evidence of direct knowledge by Respondent of the renewed Union campaign. The 2010 campaign, in itself, was limited to Union-related discussions when the workers were discharged, and had only been in progress for a short period of time, making it less likely that Respondent's managers, or the alleged snitches, would have become aware of this. In this regard, General Counsel's reliance on *Vibra-Screw, Incorporated* (1991) 301 NLRB 371 [137 LRRM 1119] is misplaced. In that case, unlike here, the union had served a

petition for election on the employer, shortly prior to the commencement of retaliatory actions, the first discrimination was against employees who had openly reported what had transpired at a union meeting throughout the plant, and the employer subsequently committed numerous additional unfair labor practices. In addition, the judge found that the employer's stated reasons for the adverse actions were "baseless."

The circumstantial evidence supporting Respondent's knowledge of Union activity, prior to the 2010 discharges, is even less compelling than in Saucedo's case, where the timing is suspicious. General Counsel contends that Respondent was aware of the Union activities and associations of these workers as of January 2009. If so, the timing of their discharges, some 17 months later, is not suspicious. Furthermore, as noted above, if Respondent knew the identities of most, or all the card signers, it did not discipline or discharge any of them at the time. The renewed discussions took place after the long-term absence of the Union, and there is no reason to believe that Respondent had reason to suspect that its employees were generally involved in a Union campaign. As noted above, Respondent had expressed its opposition to unionization, but did not commit any unfair labor practices, in expressing such opposition.

The undersigned is unable to conclude that the reasons given for these discharges were pretextual. It is clear that Rodolfo Macias left work without telling anyone. There is no evidence that he was unable to do so. To the contrary, he was able to drive his vehicle, and later told Ruiz that he did not notify Respondent of his departure, based on his belief that no one listened to him.

General Counsel recites a laundry list of alleged failures in proof by Respondent, regarding the remaining discharges, not the least of which is its failure to give any specific reason why Herrera was discharged. Nevertheless, the standard for establishing a pretext is substantially higher than is the standard for showing that an employer has not met its burden of proof in a *Wright Line* defense.

It is undisputed that Respondent suffered multi-million dollar losses in 2008 and 2009. General Counsel's argument that, to Respondent's knowledge, its financial status had improved to the point where it did not need to take any remedial action is unconvincing. General Counsel's converse argument, that Respondent waited too long to take action, only doing so when it learned of the renewed organizing effort, is also not preponderantly established. More convincing is the evidence that Ryan Schakel told Rodolfo Macias he could not give him a wage increase, shortly before Macias' discharge, due to Respondent's financial condition, and testimony, by General Counsel's witness, that Respondent was trying to get its employees to work harder, while at the same time avoiding overtime, in 2010.

Respondent has further established that it planned to take personnel action in response to its financial condition, prior to any renewed Union presence, and had selected who it was going to discharge, prior to any Union activity in 2010 by at least four of the seven workers who were discharged, one of whom, essentially, never engaged in any such conduct. The record further shows that it is *impossible* that Respondent could have learned of the scant, or non-existent 2010 Union activities of Barajas, Serna, Mayo and Robles, prior to their discharges. General Counsel is free to criticize the quality of

Respondent's proof, but the Board has stated that it is not its purpose to determine whether an employer has "proper cause" to discharge employees, at least in the absence of a prima facie showing of unlawful conduct. *D'Arrigo Brothers Co. of California* (1987) 13 ALRB No. 1.

Under all the circumstances presented, it is concluded that General Counsel has failed to preponderantly establish that Respondent knew of the Union activities of these employees, at the time of their discharges. It is further concluded that General Counsel has failed to establish circumstances warranting the application of the small plant doctrine. Inasmuch as General Counsel has failed to establish a prima facie case, these allegations will be dismissed.

**The Discharges of Bernabe Ruiz and Rodolfo Macias
Allegedly for Engaging in Protected Concerted Activity**

Section 1152 of the Act grants agricultural employees the right, inter alia, "to engage in . . . concerted activities for the purpose of mutual aid and protection." Discrimination against employees for engaging in protected concerted activities is considered interference, restraint or coercion in the exercise of that right, in violation of section 1153(a). *J. & L. Farms* (1982) 8 ALRB No. 46; *Lawrence Scarrone* (1981) 7 ALRB No. 13; *Miranda Mushroom Farm, Inc., et al.* (1980) 6 ALRB No. 22; *NLRB v. Washington Aluminum Co.* (1960) 370 U.S. 9; *Phillips Industries, Inc.* (1968) 172 NLRB 2119, at page 2128 [69 LRRM 1194].

Protected activity includes conduct arising from any issue involving employment, wages, hours and working conditions. Protests, negotiations and refusals to work, arising

from employment-related disputes are protected activities. *Meyers Industries, Inc.* (1984) 268 NLRB 493 [115 LRRM 1025], rev'd (1985) 755 F.2d 1481, decision on remand, (1986) 281 NLRB 882 [123 LRRM 1137], aff'd (1987) 835 F.2d 1481, cert. denied, (1988) 487 U.S. 1205; *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41. The merits of the work-related complaint are not determinative, so long as the activity is not pursued in bad faith. This is often true even if the employees stop working in pursuing the protest. *Giannini Packing* (1993) 19 ALRB No. 16; *M. Caratan, Inc.* (1978) 4 ALRB No. 83.²⁶

In order to be protected, the work-related activity must also be concerted. This means that the activity must be engaged in by more than one employee, or by one employee, acting on the authority of at least another worker. Personal requests and complaints are not protected under section 1153(a). *Meyers Industries, Inc.* (1984) 268 NLRB 493 [115 LRRM 1025], rev'd (1985) 755 F.2d 1481, decision on remand, (1986) 281 NLRB 882 [123 LRRM 1137], aff'd (1987) 835 F.2d 1481, cert. denied, (1988) 487 U.S. 1205; *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41.

In order to establish a prima facie case of retaliation for engaging in protected concerted activity, the General Counsel must preponderantly establish: 1) that the employee engaged in such activity, or that the employer suspected this; 2) that the employer had knowledge (or a suspicion) of the concerted nature of the activity; and 3) that a motive for the adverse action taken by the employer was the protected concerted

²⁶ The Fifth Circuit of the California Court of Appeal affirmed the unfair labor practices, but remanded the case to the Board on portions of the remedy ordered, in an unpublished decision issued on January 17, 1980. See (1980) 6 ALRB No. 14, for the decision on remand.

activity. *Meyers Industries, Inc., supra; Gourmet Farms, Inc., supra; Reef Industries, Inc.* (1990) 300 NLRB 956 [136 LRRM 1352]. Unlawful motive may be established by direct or circumstantial evidence. Direct evidence would include statements admitting or implying that the protected concerted activity was a reason for the action. The timing, or proximity of the adverse action to the activity is an important circumstantial consideration. Timing alone, however, will not establish a violation. Other circumstantial evidence includes disparate treatment; interrogations, threats and promises of benefits directed toward the protected activity; the failure to follow established rules or procedures; the cursory investigation of alleged misconduct; the commission of other unfair labor practices; false or inconsistent reasons given for the adverse action; the absence of prior warnings and the severity of the punishment for alleged misconduct. *Miranda Mushroom Farm, Inc., et al., supra; Namba Farms, Inc.* (1990) 16 ALRB No. 4.

Once the General Counsel has established the protected concerted activity as a motivating factor for the adverse action, the burden shifts to the employer to rebut the prima facie case. To succeed, the employer must show that the action would have been taken, even in the absence of the protected concerted activity. *J & L Farms, supra; Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083 [105 LRRM 1169].

It is undisputed that Rodolfo Macias requested a wage increase from Ryan Schakel and Manuel Rodriguez, shortly prior to his discharge. Such request is clearly a protected subject under section 1153(a). As noted above, however, General Counsel must also establish that Respondent was aware that Macias' request was concerted. *Myers Industries, Inc., supra; Ellison Media Company, supra*, at pages 122-124. Although

Bernabe Ruiz has been found to be an unreliable witness, it will be assumed that he and Macias did discuss asking Schakel for a raise, before Macias did this. Macias, however, in making his request, gave no indication that Ruiz also wanted a raise, or that he was speaking on behalf of any other employee.²⁷ Under these circumstances, it is concluded that General Counsel has failed to show that Respondent was aware of the concerted nature of the request. Inasmuch as the evidence fails to establish a prima facie violation of section 1153(a), this allegation will be dismissed.²⁸

Assuming Ruiz should be credited, by jointly requesting that the shift change not be implemented, Ruiz and Macias did engage in protected concerted activity, to the knowledge of Respondent. Nevertheless, the shift change was never implemented, and there is insufficient evidence that the request was a motivating factor in their discharges. Accordingly, this allegation will also be dismissed.

ORDER

The allegations in the First Amended Consolidated Complaint are hereby dismissed.

Dated: August 30, 2012

Douglas Gallop
Administrative Law Judge, ALRB

²⁷ Even if Ruiz's testimony, that he also asked Schakel for a raise, were credited, Ruiz did not indicate that his request was for anyone other than himself. The circumstances fail to establish that Schakel would have reasonably known that there was any relationship between the two requests, had they taken place.

²⁸ The evidence also fails to establish any animus by Respondent directed toward the request.