Woodlake, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

AMERICAN PROTECTION INDUSTRIES, INC., a Delaware Corporation, and EUGENE J. SHAMOON and ANNA L. SHAMOON, TRUSTEES OF THE SHAMOON LIVING TRUST, a Partnership doing business as PARAMOUNT CITRUS ASSOCIATION, Respondent, and, LEOCADIO RUBALCABA, an Individual, Charging Party.	Case No. 89-CE-87-VI 17 ALRB No. 21 (December 20, 1991)

DECISION AND ORDER

On October 10, 1991 Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision and Recommended Order in this matter. Thereafter, American Protection Industries, Inc., a Delaware Corporation, and Eugene J. Shamoon and Anna L. Shamoon, Trustees of the Shamoon Living Trust, a partnership doing business as Paramount Citrus Association (Respondent or Employer) timely filed exceptions to the ALJ's Decision along with a supporting brief, and General Counsel filed an answering brief.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and

has decided to affirm the ALJ's rulings, findings and conclusions, and to issue the attached Order.[1/]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board), hereby orders that Respondent American Protection Industries, and Eugene J. Shamoon and Anna L. Shamoon, Trustees of the Shamoon Living Trust, a partnership d/b/a Paramount Citrus Association, and their officers, assigns, successors and agents, jointly and severally, shall:

(1) Cease and desist from:

(a) Unlawfully discharging any agricultural employee because he or she has engaged in activity protected by section 1152 of the Agricultural Labor Relations Act (ALRA or Act);

(b) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of their rights guaranteed by section 1152 of the Act.

(2) Take the following affirmative actions designed to effectuate the policies of the Act:

(a) Offer each of the employees in the crew of foreman Simon Contreras unlawfully discharged on September 15, 1989,

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[1/]Respondent's liability in this case arose from ambiguity over whether the affected employees reasonably considered themselves to have been unlawfully discharged. Among other factors, this ambiguity resulted largely from Respondent's issuance of paychecks to these individuals at the time of separation, and not on a regular payday. Under the analysis of Pennypower Shopping News (1980) 253 NLRB 85 [105 LRRM 1433] enfd. (10th Cir. 1982) 726 F.2d 626, we conclude under the circumstances present that the Respondent had an obligation to make clear to these employees that such action did not constitute a discharge and that continued employment remained available to them.

who has not yet been rehired by Respondent, immediate and full reinstatement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges of employment.

(b) Make whole each of the employees in the crew of foreman Simon Contreras discharged on September 15, 1989, for all wages or other economic losses suffered as a result of Respondent's unlawful discharge. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful discharge. The award also shall include interest to be determined in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay or makewhole amounts due under the terms of the remedial order.

(d) Sign the attached Notice to Employees embodying the remedies ordered. After its translation by a Board agent into all appropriate languages, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order.

(e) Upon request of the Regional Director or his/her designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have begun at the time the Regional Director requests

peak season dates, Respondent will inform the Regional Director of when the peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season.

(f) Post copies of the Notice in all appropriate languages in conspicuous places on Respondent's property including places where notices to employees are usually posted, for a period of sixty (60) days, the periods and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of athe Notice which may be altered, defaced, covered or removed.

(g) Upon request of the Regional Director, mail copies of the Notice in all appropriate languages to all employees employed by Respondent during the period from July 25, 1989, to the date of mailing.

(h) Provide a copy of the signed Notice to each employee hired by Respondent during the twelve (12) month period following the remedial order.

(i) Arrange for a Board agent or a representative of Respondent to distribute and read the Notice in all appropriate languages to Respondent's employees assembled on Respondent's time and property, at times and places to be determined by the Regional Director. Following the reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any question the employees may have concerning the Notice or employee rights under the Act. All employees are to be compensated for time spent at the reading and question-and-answer period. The

Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and question-and-answer period.

(j) Notify the Regional Director, in writing, thirty (30) days after the date of issuance of the remedial order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with the remedial order.

DATED: December 20, 1991

BRUCE J. JANIGIAN, Chairman I

VONNE RAMOS RICHARDSON, Member

JIM NIELSEN, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging the crew of Simon Contreras for engaging in lawful conduct.

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

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

WE WILL offer immediate reinstatement to all unlawfully discharged employees in the crew of Simon Contreras and make all such members of the crew whole for any losses they suffered as a result of our unlawful act.

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite A, Visalia, California 93291.

DATED:

AMERICAN PROTECTION INDUSTRIES, INC., a Delaware Corporation, and EUGENE J. SHAMOON and ANNA L. SHAMOON, TRUSTEES OF THE SHAMOON LIVING TRUST, a Partnership doing business as PARAMOUNT CITRUS ASSOCIATION

By: _____
Representative Title

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

American Protection Industries, Inc./ et al., dba Paramount Citrus Association (Leocadio Rubalcaba)

17 ALRB No. 21
Case No. 89-CE-87-VI

Background

A pruning crew employed by Respondent requested a piece rate that would result in higher pay than the hourly rate set by Respondent. The crew did not begin to work as scheduled while an employee spokeman presented the crew's request for a piece rate. Respondent's supervisor, after discussing the crew's request for a piece rate for 10 or 15 minutes, advised the crew members that their paychecks would be ready in two hours, even though it was not a regular payday. The employees then left, and went to Respondent's office where they waited for their checks. Respondent did not advise the employees that they were not discharged.

ALJ Decision

The ALJ found Respondent had violated section 1153(a) by announcing the issuance of paychecks on a day other than the regular payday. The announcement implied to the employees that they were discharged, or created ambiguity in the employees' minds as to whether they continued to be employed. Where such ambiguity is created by the employer, the employer bears the burden inherent in the ambiguity it created. The ALJ partially discredited witnesses for both General Counsel and Respondent, except for one employee witness called by Respondent whom the ALJ found to be the most non-partisan. The ALJ found that the employees were engaged in a strike during the 10 to 15 minutes they delayed beginning work while their spokesman talked to Respondent's supervisor.

Board Decision

The Board affirmed the ALJ's decision. It noted that Respondent had created a reasonable perception among the employees that their continuing status as employees was ambiguous by issuing paychecks on a day other than payday. Respondent could have avoided liability by making it clear to the employees that such action did not constitute a discharge and that continued employment remained available to them.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: AMERICAN PROTECTION INDUSTRIES, INC., a Delaware Corporation, and EUGENE J. SHAMOON and ANNA L.SHAMOON, TRUSTEES OF THE SHAMOON LIVING TRUST, a Partnership doing business as PARAMOUNT CITRUS ASSOCIATION, Respondents, and LEOCADIO RUBALCABA, an Individual, Charging Party.	Case No. 89-CE-87-VI

Appearances:

Stephanie Bullock
Visalia Regional Office
711 North Court Street, Suite A
Visalia, California
for General Counsel

L. Jeanne Robbins
Marrs and Robbins
25060 West Avenue Stanford,
Suite 222
Valencia, California
for Respondent

Before: Thomas M. Sobel
Administrative Law Judge

DECISION OF ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge:

This case was heard by me in Visalia, California in July 1991. Briefs were filed August 12, 1991. General Counsel alleges that Respondent, an admitted agricultural employer, discharged the crew of Simon Contreras on September 15, 1989 in retaliation for their continued resort to concerted action and for their filing charges about Respondent's treatment of them.

Respondent admits taking certain action against the crew on September 15, 1989, but contends that it did not discharge them. Rather, it contends that the crew struck on that day and, respecting the employee's right to do so, Respondent advised them that if they continued to refuse to work, they would be replaced. The crew continued to refuse to work.

As framed by the parties, then, the decisive issues are:

(1) Did the crew's protest of wages stop short of a strike or did the employees strike? and (2) Did Respondent discharge the crew or merely advise them that, if they would not work, they would be permanently replaced?[1]

I will take a few moments to say what this case is not about. General Counsel argues that the roots of the action taken by Respondent against the crew may be traced backwards to an

[1]The parties have stipulated that Respondent notified the employees on September 25, 1989 that they had been permanently replaced. While the terms of the stipulation by themselves do not establish that, as a matter of fact, the crew was permanently replaced, General Counsel appears to concede that after September 25, 1989 Respondent had no vacancies that were not filled by replacements who had been offered permanent employment.

earlier protest in August 1988 and from there forward through a series of charges against Respondent, followed by more protests, and even a brief work stoppage, all of which served to mark most members of the Contreras crew as "activists." She relies on this history for two distinct, though related purposes: first, the filing of charges itself is used to establish the element of Respondent's "knowledge" within the conventions of a Wright Line analysis;[2] and second, she argues that the history of "activism" by members of the Contreras crew caused Respondent to target those activist employees for the eventual reprisal about which she complains.

It is unnecessary to consider the evidence for the first purpose, and I do not find it very useful for the second. Since this is a discrimination case, and since such cases typically require the fact finder to use the shifting burden of proof principles established by Wright Line, I recognize that my avoiding application of these principles is paradoxical. Nevertheless, in the peculiar circumstances of this case, it is justified. Since Respondent has admitted that in doing whatever it did on September 15, 1989, it was directly responding to the

[2]It will be recalled that the standard elements of a prima facie case under Wright Line are said to be (1) proof of employee protected activities: (2) proof of employer knowledge of those activities and (3) proof of connection between the employee's protected activity and the employer's adverse treatment of him. See Stamoules Produce Co (1990) 16 ALRB No 3, ALJD p32.

assertion of rights protected by the Act[3], no sifting of causes for the operative one is necessary, and whether or not Respondent has committed an unfair labor practice in this case will depend upon how Respondent reacted. In turn, this will come down to a clash of credibility between witnesses.

General Counsel's second purpose picks up here, for she argues that the history of the crew's "activism" helps me to determine the credibility of the parties' respective accounts. According to her, the conduct of most of the members of the Contreras crew was so bothersome to Respondent that in a kind of "then there were none" strategy, Respondent progressively rid itself of its assertive employees.[4] Respondent uses the same history, emphasizing the periods of re-employment of the allegedly "targeted" employees to argue essentially that it had so many opportunities to rehearse its response to the employees' protected activity, that it must have gotten it right on September 15, 1989. Since neither interpretation of this background strikes me as more plausible than the other, I see no

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[3]I should emphasize that Respondent has not questioned the protected nature of the crew's activity on September 15, even though it contends that the crew also "walked off" the job the day before the events in question.

[4]For example, General Counsel argues that the fact that Respondent directly hired the "discriminatees with a history" points to its desire to get rid of them. Even if I assume that, in directly hiring the members of the Contreras crew, Respondent was motivated by consciousness of the employees' activism, I could as easily infer that Respondent did this in order not to be responsible for the mistakes of its labor contractors.

need to consider it at all.[5]

FACTS

There is a "past" without which the events of September 15, 1989 cannot be understood, namely, what happened on the immediately preceding day, September 14, 1989. I will start there.

It is undisputed that the Contreras crew was assigned to re-do a group of trees in Block 27 on September 14.[6] It appears that, besides the trees in Block 27 which had to be "re-done", there were also some "new" trees. It is also agreed that there was some kind of dispute over the rate of pay, although the record is very confusing about the exact nature of that dispute. I conclude that the employees wanted to be paid separately for the new trees, while Respondent wanted to pay by the hour for all work in the block.

The basis of my conclusion is as follows: Elpidio Martinez testified that the crew was going to be paid by the hour for both "redoing the trees" and for the "new pruning work," I:59, 11:12-

[5]While I am on the question of the evidence offered as background I will address a related point. General Counsel also relies on one particular incident, when many of the alleged discriminatees learned that they could be permanently replaced if they went out on strike, to argue that the crew was not likely to have pushed what turned out to be their final protest to the point at which Respondent could resort to replacing them. If I take it as a given that employees who knew what to avoid would not have pushed their protest to the point beyond which Respondent could invoke countermeasures, why can I not also assume that Respondent would not have reacted except appropriately?

[6]The crew last pruned in Block 27 on September 12th. (See RX1.)

13, 16-17; Enrique Hernandez testified that there were "some new trees they wanted us to do", 1:88, 11. 20-21, for which the crew wanted to be paid "the same prices as before," but the company wanted to pay by the hour for those trees; and Santiago Solis testified that the crew wanted to work on "those trees for the same price we had done it before", 1:80, but the company wanted to pay by the hour. Finally, foreman Faustino Lopez testified that the crew wanted to be paid "piece work" after they had completed "re-doing" the trees, 1:114, 115,[7]

In view of the consistency of most the accounts about the crew's wanting piece-rate for the new trees, I find that to be the focus of the dispute. I further find that, in inconsistently describing the dispute as being about the amount of piece-rate, Lopez has confused the events of September 14 with those of September 15. Obviously, I also disagree with General Counsel's contention that the crew did not want to do the re-pruning at an hourly rate. See Post Hearing Brief p.6.

According to all the General Counsel's witnesses, Elpidio Martinez, acting as spokesman for the crew, spoke to Lopez as the crew was about to start work on Block 27. Thus, Martinez himself testified that he asked Lopez for a raise before the crew began

[7]After stating this, however, Lopez then stated that the crew wanted a higher piece-rate for the new trees. 1:116 On this highly confusing issue in this strongly contested case, I will take the parties points of agreement as dispositive.

to work, (I:59)[8]; Santiago Soils related that Martinez told Lopez at about 9:30 that the crew wanted more money (i.e., piece-rate) for the new trees, 1:80; Hernandez put the same conversation at around 9:00 a.m. (1:89). The employees agree that nothing came of their request, that they went to work at the hourly rate, and that they left when their foreman Simon Contreras told them to go home.

Lopez acknowledges that the crew asked him for a raise, but he puts the conversation at 11:30 after the crew had actually finished the "re-do", and when he was on his way home to eat lunch. According to him, Martinez told him that the crew had finished the "re-do" and "would not charge anything for the job." Lopez replied, "If you've finished...keep pruning." Martinez then asked to talk to Pete Alvitre, Respondent's farm manager. Because Alvitre was not available, Lopez said he would call Kirn Thorkelson, which he did.[9] Thorkelson picks up the story: He

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[8]Martinez appeared to have forgotten that the crew had also worked at Block 40 that day and was shifted to Block 27 sometime around 8:30 a.m. See RXl. However, his testimony is clear that the discussion with Lopez took place before the crew started on Block 27. In view of the clarity of the testimony that Martinez spoke to Lopez before work began on Block 27, I don't regard Soils' and Hernandez's testimony about the time (9:00 or 9:30) when Martinez spoke to Lopez as important.

[9]No sooner does he say this than in response to the next question, "What did you do after you called Kirn", he testifies "I [was] going to call Kirn when he gets home for lunch", implying either that he only promised to call Kim or that he did call him, but could not reach him. 1:100 1. 15-18 A few moments later, Lopez implies again that he spoke to Kim while he was with the employees: "[Pete] isn't at the ranch he was [in Macfarland] and then I called Kim and I told him...all the workers, they finished re-doing [the] job and all the people were outside the block [b]ecause they wanted to keep working

was told sometime between 11:30 a.m. and 12:00 p.m. that the crew wanted to talk to him. By the time he drove out to Block 21, the crew was gone. When he saw no one there, he concluded, and testified, that the crew walked off the job without finishing the block. II:160

At the risk of interrupting the chronology, I should explain why Thorkelson and Lopez were dealing with Simon Contreras' crew on that day. According to Thorkelson, he was asked to watch Contreras[1] crew from 9:00 a.m. to 12:00 p.m.[10] because Contreras had a doctor's appointment. A fair reading of Thorkelson's testimony on this point is that Thorkelson's responsibility for the Contreras crew "started" at 9:00 a.m. Lopez, however, testified that he and the general foreman (whom I take to be Thorkelson) gave the crew its orders for the "re-do" on Block 27 before the start of work at 7:00 a.m. Thorkelson, too, testified that he spoke to the crew at 6:30 a.m. to tell them they were going to move to Block 27.[11] II:132 According

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by [piece rate]" I:115 Thorkelson plainly testifies Lopez called him on the radio. II:162 11.11 I find that he called Thorkelson.

[10]After twice stating that his "watch" ran from 9:00 a.m.-12:00 p.m., Thorkelson unaccountably testifies that Contreras was not supposed to return until 1:30 p.m. II:180 11 1-2, 11-12; compare 11. 13-14. Since it is unlikely that Contreras would have asked Thorkelson to "watch" the crew for a period shorter than the time he was due to return, I discount the 1:30 p.m. "return" time.

[11]He also testified that he accompanied them on the move to 27 and told them "the price to re-do the work there that we wanted re-done, some rows for $4.50 an hour." This testimony strongly implies, and therefore corroborates, my finding that there were two sorts of work available in Block 27 on September 14. However, the testimony may also be taken to imply that there

to him, no one protested the rate at the beginning of the job.

Without attempting to resolve any of the parties' differences for the moment, I will summarize them: according to General Counsel's witnesses, the employees sought to obtain a higher wage (piece-rate on the new trees) as they were about to start on Block 27, were told that the wage was fixed, whereupon they went to work and completed the job, leaving when the foreman said they could. According to Respondent's witnesses, the crew accepted the rate before they started the job, finished part of the job, sought to negotiate a higher wage for the rest of it, and walked off the job without waiting for an answer.

I note first that Thorkelson's testimony about giving the crew their instructions at 6:30 a.m. is at least impliedly contradicted by his testimony about when he was supposed to "watch" them. The same thing may be said of his testimony about moving with the crew to Block 27; RX1, a representative time card for September 15, shows that the crew started work on Block 27 at 8:30 a.m., which, once again, is earlier than the starting time Thorkelson gave for watching the crew. While it is not inherently incredible that Thorkelson, a general foreman, would give assignments to the crew of a sub-foreman, Respondent did not explain Thorkelson's involvement with the crew on September 14 in that way. If Thorkelson's reason for dealing with the crew was,

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was another rate for the new trees, which would contradict my finding that both sorts of work were to be done at the hourly rate. Since the testimony is so ambiguous, I decline to alter my finding on the basis of it.

as he testified, because he was watching it for the absent-Contreras, and if, as he also testified, he was only watching it from 9:00 a.m.-12:00 p.m., it follows that he did not give the crew its assignment and did not tell them the price at 8:30 a.m. Did the crew stop work on September 14?

General Counsel argues that Respondent's version should not be credited because, as Thorkelson admitted, walking off the job without permission would ordinarily have resulted in some sort of disciplinary action[12] against the crew and neither Thorkelson nor Contreras took any action against the crew. I don't find this argument very persuasive. After all, Thorkelson testified he waited until the 16th to fill out the appropriate forms in connection with the events of September 15.

Considering the problem from the standpoint of timing alone, it is possible to reconcile the General Counsel's version with that of Thorkelson in the following way: (1) Since Lopez testified he did not call Thorkelson until 11:30 a.m.; and since (2) Thorkelson could not have come out to Block 27 until sometime after that at the earliest and since, (3) he may have arrived as late as 12:00 p.m. and since (4) he was only to watch the crew for Contreras until 12:00, (5) it is possible that Contreras returned sometime between the time Lopez left and the

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[12] Q: (By General Counsel): In the ordinary course of business, Mr. Thorkelson, if a worker left without permission would that be noted in his personal file?

A: For Paramount it would be.

II:162

time Thorkelson arrived, so that, (6) as the employees testified, Contreras dismissed them.[13] Since nothing in Thorkelson's or Lopez's testimony establishes that the employees walked out and, as I have shown, Thorkelson's testimony does not contradict the crew member's version that they did not walk out, Respondent has failed to prove that they did.

The next morning, September 15th, the crew reported to work at Block 27 at 6:30 a.m. According to General Counsel's witnesses, Leocadio Rubalcaba approached Lopez and told him that the trees were too big for the $1.20/tree rate. Lopez said he could do nothing about the rate and promised to call Thorkelson. Lopez denied he had this initial conversation with Rubalcaba, and it really makes little difference if he didn't. According to both him and Thorkelson, Lopez accompanied Thorkelson that morning as his translator.[14] Both men agree that Thorkelson (through Lopez) offered the crew pruning at $1.20/tree.[15] Thus, Thorkelson testified that he asked the crew if they were ready "to go back at $1.20 an hour [per tree?] to finish the rest of the field." II:137. "[W]e had brought them back at $4.50 an hour to do some rework... we asked then to prune it for $4.50.

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[13]We will never know from Contreras' mouth because he died before the hearing. It is also possible that, even if Contreras did dismiss the crew, he did so only when he found them not working. However, no testimony supports the possibility.

[14]Thorkelson: "I did the talking, he did the translating." II:137; See also, Lopez, I:102

[15]Lopez: "I_ just said- The foreman says, "If you guys want to keep working, you know, keep pruning...." :102

The agreement was $1.20 [per tree] to go back.... They refused to go back to work for $1.20. They said the $4.50 an hour they agreed on, that they would not charge us for that and wanted more money." II:137.

General Counsel's witnesses agree that Rubalcaba, speaking in Spanish on behalf of the crew, told Thorkelson that the rates were too low for the size of the trees. (See e.g. I:35, 6) According to Rubalcaba, Thorkelson replied that the company could not pay anymore and, added "that they had gotten word from the company that they had the authority to fire them." Martinez essentially related the same conversation. I:62 Solis omitted Thorkelson's saying anything about having orders or permission to fire the crew. I:83

Martinez's declaration, taken by the Board agent in support of the charge, does not contain Thorkelson's purported statement that he had orders to fire them. In apparent explanation for this omission, Martinez testified that he told the agent about Thorkelson's threat. I discount this. It seems unlikely to me that a Board agent would fail to include a direct threat of retaliation. Thus, we have one employee witness (Solis) failing to mention at the hearing that Thorkelson spoke of having orders to fire the crew and another employee witness (Martinez) who, I find, failed to mention to a Board agent that Thorkelson made such a statement, and who testified untruthfully about that failure, which gives me the impression that, in asserting that Thorkelson signalled the company's intention to

fire the crew, the employees are not telling the truth.

General Counsel's witnesses testified that Rubalcaba next told Thorkelson that since the company had been threatening to fire them for so long, Thorkelson might as well go ahead and do it. I take it that the supposed "threat" is represented by Rubalcaba's testimony that Simon Contreras told him sometime in August "to be alert because they were trying to fire [them]." The parties stipulated that Rubalcaba's declarations do not contain any references to this purported statement. Rubalcaba testified that he informed the agent of the statement. Once again, I discount Rubalcaba's testimony: I simply cannot believe a Board agent would have failed to include such a statement had it been made to him or her.[16]

It is at this point that the most critical dispute between the parties arises. General Counsel's witnesses testified that Thorkelson then told the workers they were fired and that they could pick up their pay checks. Thorkelson and Lopez say that Thorkelson told the crew they could work at the rate the company was offering or that he would replace them. According to Lopez, someone (probably Rubalcaba,) responded: "The people refuse to keep pruning". Thorkelson himself testified he tried to persuade some workers that they should go back to work at $1.20/tree

[16]Though I discount the testimony that Contreras warned Rubalcaba, I do not doubt that Rubalcaba accused "Thorkelson" of "threatening" them for so long that Thorkelson might as well go ahead and fire them. Based upon the history of charges, I believe the employees believed Respondent was "after" them, especially since that is also General Counsel's theory of the case.

because they had agreed to work at that rate.[17] According to him, some workers, speaking in English, told him they wouldn't prune for $1.20/tree, and that they weren't going to do the work. With the positions stalemated, Thorkelson told the employees they could pick up their checks in a couple of hours. Lopez and Thorkelson also emphasized that Thorkelson also said that anyone who wanted to work could see him.

I have a great deal of difficulty believing that Thorkelson had the exchange in English about which he testified, in view of Lopez's testimony that "these guys don't speak English" and that he was there as Thorkelson's translator. I find that, just as the employees gilded the lily in their testimony, Thorkelson is doing the same thing here. Nevertheless, on the main point of contention between the parties -- whether or not the employees had ceased work (struck) to obtain higher wages, -- I find in favor of Respondent. Ridgeway Trucking Company (1979) 243 NLRB 1048 enf'd (5th Cir 1980) 622 F2d 1222 (work stoppage treated as strike) In doing so, I rely largely on the testimony of another of Respondent's witnesses, Adolfo Chavez,[18] who indicated that employees did not want to work

[17]This can only refer to his testimony about the previous day's events which, I have found, Respondent has failed to prove took place.

[18]General Counsel attacks Chavez's credibility on the grounds that he earlier told a Board agent that he hadn't heard anything. II:241 Chavez was clearly a reluctant witness. He also testified that when he spoke to the Board agent, she was with Rubalcaba and that he told her that what he knew "somebody else that went with her" (Rubalcaba) also knew. To my mind, Chavez's reluctance to testify was that of a "man in the middle,"

because they didn't like the wage.[19] But if Chavez supports Respondent's version of events to that extent, he also provides no support for the main feature of Respondent's defense. According to him, Thorkelson told the employees, "If you don't want to work you can go back home, the checks will be ready in two hours," II:228, and, more important, Chavez could not recall Thorkelson's saying anything about the workers' being replaced. II:232

Before considering how this testimony bears on the ultimate question whether or not Thorkelson discharged the crew, I will first relate what happened next because I believe that it also bears upon that question. It is undisputed that the crew went to the packing house where they waited in the parking lot outside the office for several hours while their checks were being prepared. (It was not a regular payday for the crew.) It is also undisputed that a number of workers asked Lopez if they could return to work. Lopez testified he spoke to Juan Hernandez about returning to work in the parking lot. Lopez also saw Jesus Munoz and Francisco Verduzco "around the ranch"; they also wanted to keep pruning. Finally, Lopez ran into Adolfo Chavez who asked him if he and his brother could keep working. Lopez told each of

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rather than that of a hostile witness, and I credit him.

[19]Even if, as General Counsel's witness testified, they never said they refused to work, after 10 or 15 minutes of protesting the wage they were offered, their actions would speak louder than their silence on this point.

the men that he would have to ask Thorkelson or Alvitre. I:107[20] Each of the men subsequently came back to work.

The next day, Alvitre helped Thorkelson prepare a Personnel Action Notice (P.A.N.) for each employee in the crew. The P.A.N.'s are in evidence as RX2 and RX3 (RX2 being the PAN's for the discriminatees who walked out and who did not ask to come back to work; RX3 being the PAN's for those whom Lopez identified as "willing to work".) Each of the P.A.N's has the CHANGE OF STATUS box marked Termination and each "termination" is explained in the following way:

> "They wanted to change the price again. I told them no way, they had agreed to $1.20 per tree on Block 27. I told them they would be replaced. So they walked off.

Each form also includes the following language which Alvitre helped draft:

> They had the chance to come and find me and ask for their job back but they did not unconditional rehired for job until permanently replaced assigned seniority call back list after permanent replacement.

One final point remains to be discussed. In January 1990, the alleged discriminatees who had not asked Lopez for their jobs asked Nora Beriavides of the American Friends Service Committee for help in finding employment. Benavides spoke to Alvitre on their behalf. According to her, Alvitre essentially told her that he would never take the employees back. Alvitre admits

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[20]Later, on the week-end, Lopez went out to see each of the people who had asked about a job. He told them they had "to justify that if you want to come back to work", I:110. No "paper" was ever introduced.

speaking to Benavides, but he testified that he merely referred her to the company's attorney. Respondent argues that Benavides is not to be credited because Alvitre's purported statement is inconsistent with both Respondent's stated legal position and with its subsequent actions. But this is to make a virtue of necessity: if the employees were strikers as Respondent has all along contended, Respondent could not have taken any other position or acted in any other way without admitting to an unfair practice. Since it is not inherently incredible that Alvitre made such a statement to Benavides, and since, as far as I can tell, Benavides has no interest in this proceeding, I credit her. However, her testimony about what Alvitre said in January is of limited relevance to what Thorkelson said in September.

CONCLUSION

Obviously, the parties do not agree about much. I think all the witnesses are confused, having trouble distinguishing one day from the other and recalling the precise details of their disputes. To confound matters further, I have found General Counsel's witnesses in such a rush to make their case that they have put words in Thorkelson's and Contreras' mouths; but I have also found Thorkelson so bent on proving the employees went on strike that he has made up conversations, too. Since it is clear that both sides have tried to fit the events of September 15 into molds that suit their interests, my overall sense is that what actually happened was far more ambiguous than either side is willing to admit. In such cases, the law has evolved a standard.

An employee who goes out on strike remains an employee and is entitled to return to work upon making an unconditional offer to return to do so unless the employer can show a legitimate and substantial business justification for refusing to take him back. It follows that, if by what Thorkelson said or did, he gave the employees cause to believe they could not come back to work because they had been discharged, he committed an unfair labor practice: "whether [an employer's] statements constitute an unlawful discharge depends upon whether [his statement] would reasonably lead the employees to believe that they had been discharged." Ridgeway Trucking Company, supra. "It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated." NLRB v Trumball Asphalt Company of Delaware (8th Cir 1964) 327 Fd 841, 843. Did Thorkelson give the employees reasonable cause to believe they were discharged?

I start with Chavez's testimony because his testimony alone avoided the extremes of partisanship. Chavez could not recall Thorkelson's using the word "replace"; according to him, Thorkelson simply told the employees to go home if they didn't want to work. Thorkelson himself admits he told the crew they could pick up their checks. To my mind, if Thorkelson's message was that the crew could pick up their checks and go home it would signal a discharge. See, Ridgeway Trucking Co. supra. Additional evidence that Thorkelson was not clear about what he intended comes from P.A.N.'s. Whatever else he put on the

P.A.N.'s, Thorkelson also indicated that the employees had been terminated, which tells me that, despite his testimony, he did not appreciate the legal distinction between discharge and replacement and did not observe it.[21] Finally, though the testimony does not relate to the question of employee perception upon which this case turns, there is Nora Benavides' testimony that Alvitre told her that Respondent would not take the employees back. Alvitre's statement bespeaks enough animus to question the bona fides of the defense which Alvitre helped to prepare.[22]

Against these considerations, I must weigh the fact that some employees asked to come back and were taken back. Doesn't the fact that they asked for work corroborate Thorkelson's testimony that he also said anyone who wanted to work could see him? Even if Thorkelson did invite anyone who wanted to work to see him, the fact that his other remarks would have led employees to believe they had been discharged, at the most created an ambiguous situation and since it was Respondent who created the

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[21]lndeed, the language of the P.A.N.'s which purports to describe the employees' status is hopelessly confused: strikers are not deemed "unconditional[ly] rehired until permanently replaced."

[22]Since it would not have been unlawful for Thorkelson to have told the crew on September 15 that they could be permanently replaced, if the crew were given cause to believe they had been discharged on that day it may be asked: Did Respondent's letter of September 25, (advising the crew that they had been permanently replaced) put the matter on the right track? I do not think so; by that time the employees had no option to reconsider their position as strikers and to reclaim their jobs as of right.

ambiguity, the burden of its results falls on it. Pennypower Shopping News, Inc., (1980) 253 NLRB 85, enf'd (USCA 10th Cir) 726 F2d 626. I find that Respondent violated the Act.

ORDER

By authority of Labor Code Section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board), hereby orders that Respondent American Protection Industries, and Eugene J. Shamoon and Ana L. Shamoon, Trustees of the Shamoon Living Trust, a partnership d/b/a Paramount Citrus Association, and their officers, agents, successors and agents, jointly and severally, shall:

(1) Cease and desist from:

(a.) Unlawfully discharging any agricultural employee because he or she has engaged in activity protected by Section 1152 of the Act;

(b.) In any like or related manners interfering with, restraining or coercing agricultural employees in the exercise of their rights guaranteed by Section 1152 of the Act.

(2) Take the following affirmative action designed to effectuate the policies of the Act:

(a.) Offer each of the employees employed in the crew of foreman Simon Contreras and unlawfully discharged on September 15, 1989, who has not yet been rehired by Respondent immediate and full reinstatement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his

seniority and other rights and privileges of employment.

(b.) Make whole each of the employees employed in the crew of foreman Simon Contreras and discharged on September 15, 1989, for all wages or other economic losses he suffered as a result of Respondent's unlawful discharge. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful discharge. The award also shall include interest to be determined in the manner set forth in E. W. Merritt Farms (1988) 14 ALRB No. 5.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay or makewhole amounts due under the terms of the remedial order.

(d.) Sign a Notice to Employees embodying the remedies ordered. After its translation by a Board agent into all appropriate languages, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order.

(e.) Upon request of the Regional Director or his/her designated Board agent, provide the Regional Director with the dates of Respondent's next peak season. Should Respondent's peak season have begun at the time the Regional Director requests peak season dates, Respondent will inform the Regional Director of when the peak season began and when it is anticipated to end in addition to informing the Regional Director

of the anticipated dates of the next peak season.

(f.) Post copies of the Notice in all appropriate languages in conspicuous places on Respondent's property including places where notices to employees are usually posted, for a period of sixty (60) days, the periods and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered or removed.

(g.) Upon request of the Regional Director, mail copies of the Notice in all appropriate languages to all employees employed by Respondent during the period from July 25, 1989, to the date of mailing.

(h.) Provide a copy of the signed Notice to each employee hired by Respondent during the twelve (12) month period following a remedial order.

(i.) Arrange for a Board agent or a representative of Respondent to distribute and read the notice in all appropriate languages to Respondent's employees assembled on Respondent's time and property, at times and places to be determined by the Regional Director. Following the reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employee rights under the Act. All employees are to be compensated for time spent at the reading and question-and-answer period. The Regional Director shall determine a reasonable rate of compensation to be

paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and guestion-and-answer period.

(j.) Notify the Regional Director, in writing, thirty (30) days after the date of issuance of a remedial order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him/her periodically thereafter in writing what further steps have been taken in compliance with the remedial order.

DATED: October 10, 1991

THOMAS SOBEL
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging the crew of Simon Contreras for engaging in lawful conduct. The Agricultural labor Relations Act is law that gives you and all other farm workers in California these rights:

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

WE WILL offer reinstatement to all employees in the crew of Simon Contreras and make all members of the crew whole for any losses they suffered as a result of our unlawful act.

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite A., Visalia, California 93291.

DATED:

AMERICAN PROTECTION INDUSTRIES, INC., a Delaware Corporation,
and EUGENE J. SHAMOON and ANNA L. SHAMOON, TRUSTEES OF THE SHAMOON LIVING TRUST, a Partnership doing business as PARAMOUNT CITRUS ASSOCIATION

By: _____

Representative Title

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

DO NOT REMOVE OR MUTILATE.