STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ANTHONY HARVESTING, INC., and ANTHONY FARMS, a partnership, PAUL GARY ANTHONY aka GARY ANTHONY and PAUL SCOTT ANTHONY, Partners, Respondent, and FRANCISCO CAMACHO, JAVIER SUAREZ, and TRINIDAD PANTOJA, Charging Parties.	Case Nos. 90-CE-141-SAL 90-CE-142-SAL 18 ALRB No. 7 (September 21, 1992)

DECISION AND ORDER

On April 24, 1992, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Decision and Recommended Order in this matter. Thereafter, General Counsel and Anthony Harvesting, Inc. and Anthony Farms, a partnership consisting of Paul Gary Anthony and Paul Scott Anthony (Respondent) filed timely exceptions to the ALJ's Recommended Decision along with supporting briefs. General Counsel filed a motion to strike Respondent's exceptions and brief.[1]

[1]We deny General Counsel's motion to strike Respondent's Exceptions and Brief. The Exceptions and Brief sufficiently comply with the requirements of our regulation for specificity. The exceptions are sufficiently specific to enable us to identify the portions of the ALJ's decision as to which Respondent takes exception, and to understand the arguments in support of those exceptions. (S & J Ranch (1992) 18 ALRB No. 2.)

The Board has considered the record and the ALJ's Decision in light of the exceptions[2] and briefs filed by Respondent[3] and General Counsel,[4] and has decided to affirm the

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[2]General Counsel and Respondent have excepted to some of the ALJ's credibility findings. The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. (Standard Dry Wall Product (1950) 91 NLRB 544, enfd. (3d Cir. 1951) 188 F.2d 362.) We have carefully examined the record and find no basis for reversing the findings.

[3]Respondent contends that the employees who walked out on November 21 did not strike but voluntarily relinquished their employment. While it is true that striking employees must vacate the work site, it is equally well established that they cannot be penalized for doing so. (See, e.g., NLRB v. Fansteel Metallurgical Corp. (1939) 306 U.S. 240 [59 S.Ct. 490]; C.G. Conn, Ltd. v. NLRB (7th Cir. 1939) 108 F.2d 1344 [5 LRRM 806]; NLRB v. International Van Lines (1972) 409 U.S. 48 [93 S.Ct. 74].) To permit an employer to convert such conduct into grounds for discharge would undermine employees' statutory right to engage in protected strike activity. We therefore reject Respondent's contention that the employees quit.

[4]General Counsel excepts to the ALJ's failure to find that Respondent violated the Act by discharging Trinidad Pantoja for failing to remain in the driver's seat on the broccoli machine after he and his supervisor were clearly instructed by Gary Anthony to do so. Cal OSHA inspector Robert Smith had inspected the broccoli machine that day and had advised Gary Anthony that the only safety problem he had observed was the driver's failure to remain seated. Gary Anthony discharged both Pantoja and foreman Isidro Denis after returning later the same day and finding Pantoja not in the driver's seat while the broccoli machine was in operation, exposing the cutters in front of the machine to danger because of the driver's inability to shut off the machine without delay.

The evidence failed to establish that Pantoja's discharge was pretextual. The General Counsel did not establish that Gary Anthony condoned the subsequent failure of the other drivers to remain seated in the broccoli harvesting machine. Neither did General Counsel provide an explanation for the simultaneous discharge of Pantoja's foreman, who was not associated with any concerted activity. We believe this discharge emphasized the serious nature of the disobedience causing Pantoja's discharge.

(continued...)

ALJ's rulings, findings and conclusions and to issue the attached order.

The Board notes that this is the first case to employ its recently revised regulations permitting the consolidation of liability and compliance issues. As a result, the liability and amount of backpay due most of the discriminatees was determined in this single proceeding. Prior to the Board's regulatory change, the amount due discriminatees would not have been reached until the completion of all proceedings on the initial or liability phase, including any appellate court proceedings. The attendant delays would forestall routine investigatory matters, such as checking for interim employment in mitigation of amounts that may be found owing. The determination of the majority of the claims in this case, based on a unified proceeding employing fresh evidence, settles the amounts due the eight employees whose backpay was litigated.[5]

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[4](...continued)

The foreman's knowledge that the replacement drivers failed to remain seated does not establish that Respondent discharged Pantoja for pretextual reasons. While a lower level supervisor's knowledge is ordinarily imputed to higher level supervision, where the higher level supervisor's denial of knowledge is credited, the lower level supervisor's knowledge is not attributed to the higher level supervisor. (Dr. Phillip Megdal, D.D.S., Inc. (1982) 267 NLRB 82 [113 LRRM 1138].) Similarly, where there is reason to believe that a lower level supervisor has withheld knowledge of some activity from higher level management, the lower level supervisor's knowledge is not imputed. (Kimball Tire Company, Inc. (1978) 240 NLRB 343 [100 LRRM 1258].)

[5]We reject Respondent's contention that the evidence here shows intentional concealment of interim earnings by the discriminatees. The fact that incomplete records were initially

(continued...)

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Anthony Harvesting, Inc., and Anthony Farms, a partnership, Paul Gary Anthony aka Gary Anthony and Paul Scott Anthony, partners, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to reinstate, or otherwise discriminating against, any agricultural employee for engaging in protected concerted activity.

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

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer to the following individuals immediate and full reinstatement to their former or subsequently equivalent position, without prejudice to their seniority or other employment rights or privileges:

(1) Hector R. Camacho

(2) Fidel Camacho

(3) Francisco Camacho

(4) Fidencio Garcia

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[5](...continued)
produced and subsequently added to, after the Region's request for additional information, is inconclusive.

(5) Javier Garcia

(6) Fidencio Macias

(7) Noel Medrano

(8) Ramon M. Pacheco

(9) Javier Suarez

(10) Manual Suarez

(11) Reyes Valderas

(12) Ruben Valderas

(13) Juvencio Zavala

(b) Make whole the above-named individuals for all losses of pay and other economic losses they have suffered as a result of Respondent's unlawful discharges, the makewhole amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in E. W. Merritt Farms (1988) 14 ALRB No. 5.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and any amounts of backpay due under the terms of this Order remaining to be determined.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into

all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of the Order, to all agricultural employees employed by Respondent at any time during the period from November 23, 1990 to November 23, 1991.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director and exercise due care to replace notices which have been altered, defaced, covered, or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages to all if its agricultural employees on company time at time(s) and place(s) to be determined by the Regional Director. Following the reading, the 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 and their rights under the Act. 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 work time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the

steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request until full compliance is achieved.

BACKPAY ORDER

Respondent, its officers, agents, successors and assigns shall pay the amounts contained in Attachment A hereto to the employees named therein, plus interest to the date of payment calculated in accordance with the Board's decision in E. W. Merritt Farms (1988) 14 ALRB No. 5.

DATED: September 21, 1992

BRUCE J. JANIGIAN, Chairman[6]

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

[6]The signatures of Board Members in all Board decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

ATTACHMENT A

Name	Amount
Fidel Camacho	$10,658.38
Francisco Camacho	5,612.54
Javier Garcia	4,410.02
Fidencio Macias	6,805.35
Noel Medrano	6,044.40
Ramon M. Pacheco	9,147.83
Reyes Valderas	7,159.68
Ruben Valderas	8,886.24
Total	$58,724.44

CASE SUMMARY

Anthony Harvesting, Inc., et al.
(Francisco Camacho, et al.)

18 ALRB No. 7
Case Nos. 90-CE-141-SAL
90-CE-142-SAL

Background

The complaint herein alleged that Respondent violated the Act by discharging broccoli machine driver Trinidad Pantoja, and by discharging 13 members of the broccoli crew 12 days later because they engaged in a protected work stoppage. The complaint also alleged that Respondent, consisting of Anthony Harvesting, Inc. and Anthony Farms, a partnership consisting of Gary Anthony and Scott Anthony, constituted a single employer. Respondent contended that it lawfully discharged Pantoja, and that the 13 employees on the broccoli crew were not discriminated against in that they either quit their employment, or, if they did not quit, engaged in unprotected conduct in the course of the work stoppage or struck for an unprotected object, and failed to make an unconditional offer to return to work, if they were in fact protected strikers.

ALJ Decision

The ALJ dismissed the allegation that broccoli machine driver Pantoja had been unlawfully discharged, finding that General Counsel failed to establish a prima facie case that Pantoja's discharge resulted from his activity as one of the members of the crew who had expressed requests for payment of overtime and other changes in working conditions. The ALJ found that Respondent discharged Pantoja because he failed to follow Gary Anthony's instructions to remain in the driver's seat. Gary Anthony instructed Pantoja to remain in the driver's seat immediately after an inspector from Cal OSHA had inspected the broccoli machine. Pantoja's failure to remain seated was the only serious safety problem identified by the inspector.

Thirteen employees ceased work and demanded payment of overtime. The ALJ credited Respondent's foreman's testimony that he did not tell them they were discharged, and also discredited the employees' testimony that they were told they were fired. The ALJ found that the employees presented themselves ready to work at starting time the next work day, conduct sufficient to establish an unconditional offer to return to work. Respondent avoided talking to them, directing them to leave the area. Respondent offered no evidence that the replacement employees had been given explicit assurances of their permanence and that therefore, since it had failed to establish that the employees quit, that it had no defense to the failure to reinstate the employees.

Case Summary: 18 ALRB No. 7
Anthony Harvesting, Inc. Case Nos. 90-CE-141-SAL
(Francisco Camacho, et al.) 90-CE-142-SAL

The ALJ found Harvesting and Farms to be a single integrated enterprise, based on the identical ownership, identical management, and interrelated operations. He found that Scott Anthony had a role in the control of labor relations and that he consulted with Gary on important matters involving Harvesting. The ALJ found that Harvesting and Farms did not operate at arm's length, in that no written agreements existed between them, terms of agreement between them were subject to adjustment depending on the level of economic success enjoyed by the crops they worked on, and full formal separation was not observed in the administration of the two companies' common office.

Board Decision

The Board affirmed the ALJ's decision. The Board noted that Respondent discharged Pantoja's supervisor as well as Pantoja, supporting Respondent's contention that the reason for the discharge was their joint failure to follow the clear instruction given to both the foreman and Pantoja by Gary Anthony that Pantoja was to remain seated at all times. No evidence showed any other motive for the Respondent to discharge foreman Denis. There was no showing that any level of supervision above the crew foreman became aware that the drivers who replaced Pantoja failed to remain seated.

The Board noted that Respondent contended that the crew had quit, yet failed to present any evidence to support its contention. The evidence showed only that the thirteen employees acted as strikers, in leaving the premises in support of their demands, rather than remaining on the premises and either preventing the employer from using them or engaging in job actions in support of their demands. Respondent failed to come forward with any evidence that the strikers intended to sever their employment. Respondent concluded that the strike constituted a quit. Had Respondent communicated its conclusion to the strikers, it would have constituted a discharge for engaging in a protected strike. Because Respondent concluded that the employees quit, it failed to deal with the employees' attempt to return to work on the next work day, which long established law recognizes as a sufficient unconditional offer to return to work.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: ANTHONY HARVESTING, INC., and ANTHONY FARMS, a Partnership, PAUL GARY ANTHONY aka GARY ANTHONY and SCOTT ANTHONY, Partners, Respondents, and FRANCISCO CAMACHO, JAVIER SUAREZ, and TRINIDAD PANTOJA, Charging Parties.	)	Case Nos. 90-CE-141-SAL 90-CE-142-SAL

Appearances:

Randolph C. Roeder
Littler, Mendelson, Fastiff & Tichy
650 California Street, 20th Floor
San Francisco, CA 94108-2693
for Employer

Clifford Meneken
Salinas ALRB Regional Office
112 Boronda Road
Salinas, CA 93907
for General Counsel

Before: Thomas M. Sobel
Administrative Law Judge

DECISION OF ADMINISTRATIVE LAW JUDGE

I.

INTRODUCTION

a.

This case was heard by me on various days in November and December 1991 and in January 1992. Briefs were filed in March 1992. On August 29, 1991, General Counsel issued a complaint alleging the Respondent Anthony Harvesting Inc., (1) discriminatorily discharged Trinidad Pantoja on November 11, 1990, and (2) either discriminatorily discharged 13 broccoli cutters on November 21, 1990, because of their exercise of rights protected by the Act or refused to reinstate the 13 when they offered to return to work on November 23, 1990.[1] Anthony Harvesting timely filed an answer admitting that it was an agricultural employer and that the alleged discriminatees were agricultural employees, but denying the commission of any unfair labor practices.

b.

Shortly before hearing, General Counsel (1) moved to amend the complaint to include Anthony Farms, a partnership, as part of a single integrated enterprise with the original Respondent, and (2) moved to consolidate hearing on the liability questions in the case with a backpay specification under the

[1]Of course if General Counsel proves that Respondent discriminatorily discharged the 13 on November 21, 1990, whatever happened on the 23rd is irrelevant. General Counsel plead the matter in the alternative because there is a dispute over whether (1) Respondent discharged the cutters, (2) they quit, or (3) they engaged in a work stoppage. If it is found that the crew was engaged in a work stoppage, their reinstatement rights become relevant.

Board's newly issued regulations which permit such consolidation. (Cal. Code Regs., tit. 8, § 20290(b).) I granted leave to amend the complaint to include trial of the employer issue, but deemed consolidation inappropriate at the time because the backpay period had not yet been fixed.[2] Prior to commencement of hearing, however, Respondent reinstated eight of the alleged discriminatees; I therefore permitted consolidation of their backpay claims with the liability issues.

After injection of backpay issues into the proceeding, Respondent for the first time argued that the discriminatees were not agricultural employees.[3] It became clear during a second

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[2]It seemed to me that prior to fixing of the backpay period, trial of backpay claims with liability issues would not be much of an advance over the present bifurcated procedure since a subsequent hearing would always be necessary to consider any backpay owing outside the period considered in the consolidated proceeding. After hearing in this case, I am not sure that my original judgment to limit trial only to these eight was correct. Trial of the backpay claims which I did consider was the most expeditious of any backpay case I have ever heard. This was partly due to especially cooperative counsel, but it also seemed to me that with the backpay period so recent, it was also easier for Respondent to satisfy itself about periods of interim employment than it would have been if the backpay case were tried five years from now. Speedy resolution of claims for at least some part of the eventual backpay period may well be worth achieving in the long run.

An additional reason occurs to me the more I reconsider the matter. The ordinary bifurcated backpay procedure is notoriously slow. It seems to me that if a Board order against a respondent which contains at least some compensatory amount is finally upheld by a Court of Appeal, a respondent will know, in a fraction of the time that the bifurcated procedure takes, part of the immediately enforceable claim against it. This may conduce to speedier resolution of the entire case.

[3]As noted above, I permitted trial of the claims of only those eight discriminatees who were reinstated and General Counsel issued an Amended Backpay Specification with respect to those eight only. Accordingly, Respondent's Amended Answer to

Pre-Hearing Conference Call, the tape recording of which is available in Board files, that Respondent was raising the jurisdictional issue only as a limitation upon the amount of backpay. If I understand the argument correctly, Respondent contended that because the eight employees named in the Amended Backpay Specification ordinarily spent some of their time packing, their gross backpay should be discounted in the proportion their time packing bore to the total number of hours they worked. I ruled that I would not entertain such a defense in this case; that even if the employees had engaged in both agricultural and non-agricultural work, so long as the Board has jurisdiction to provide a remedy in the first place, it could order compensation even for losses flowing from arguably non-covered employment.[4] (See, e.g. Olaa Sugar Company, Ltd. (1955) 118 NLRB 1442 [37 LRRM 1018] where the Board orders an employer engaged in both agricultural and non-agricultural work to make whole a discriminatee for all losses suffered by the discrimination against him.)

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the Backpay Specification raises the jurisdictional issue with respect to only those employees named in the Amended Specification.

[4]It remains to point out that the eight employees named in the backpay specification were indisputably engaged in primary agriculture (cutting broccoli) when the alleged unfair labor practice took place. Accordingly, the test of Camsco Produce Company (1990) 297 NLRB No. 157, which applies only to secondary agriculture, is inapplicable.

II.

EMPLOYER ISSUE

Before reconstructing the salient events, I will first consider the question of the identity of the Employer. As previously noted, General Counsel has alleged that Anthony Harvesting, Inc., and Anthony Farms, a Partnership and its partners Gary and Scott Anthony, constituted a single integrated enterprise. The most commonly applied test for a single integrated enterprise looks to four factors: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations. (Holtville Farms (1984) 10 ALRB No. 49.) Although these categories overlap to a great degree, to the extent possible I will describe the evidence in conformity with them.

COMMON OWNERSHIP

Anthony Harvesting Inc. is a California corporation, the primary business of which is the harvesting of row crops, including cucumber, broccoli, mixed lettuce. It was organized in 1987. It is owned in equal parts by the brothers Gary and Scott Anthony. In the same year they created the corporation, the brothers also created Anthony Farms, a partnership described by Gary Anthony as "a farming business" which "plants", "grows" and "cares" for row crops, mostly vegetables.

COMMON MANAGEMENT

As far as the record shows, Gary and Scott are the only two directors of Harvesting; as equal partners, they also constitute the highest level of management of Farms. Each

brother, however, is primarily in charge of one entity: thus, Gary "runs" Harvesting and Scott "runs" Farms. Scott did admit that he talks over Farms' business with his brother. The two entities share space in an office in King City and use the same post office box; however, Gary testified that the office personnel work for either one entity or the other, but not for both. There is one area, however, in which there is regular common management.

Although Farms is in the business of growing and caring for crops, it "employs" no labor; rather Harvesting employs all the people that work on Anthony Farms.[5] If Harvesting employs all the people that work on Farms, it follows that on the day-today operational level, Harvesting's supervisors regularly supervise Farms' operations. Exactly how much of the farming work (i.e. planting, irrigating, cultivating as opposed to harvesting) is done for Farms by harvesting is not clear from the record. Parts of the reason for that is confusion in Gary's testimony. Thus, he initially testified that Anthony Harvesting does not grow any crops (I:32); then he acknowledged that it did thin and hoe some crops for Farms, but denied that it did any irrigation (I:33). A few sentences later, he admitted that

[5]Gary Anthony testified: "Anthony Farms does not employ any people. Harvesting employs the people. They employ all the people that work on Anthony Farms, but not necessarily all the people that work for Anthony Farms." (I:41.) Although it is clear that Farms uses labor contractors and custom harvesters, it is not clear what distinction Gary is attempting to draw here. Under the ALRA, labor contractor supplied employees are considered the employees of the employer engaging them and the Board has to make its own determination about the employer status of a custom harvester.

Anthony Harvesting employees do planting and irrigation "at times" for Farms. At one point, he implied that Harvesting does "all" the irrigation because "there is only one single employer." (I:33-34.[6])

INTERRELATION OF OPERATIONS

Harvesting neither owns nor leases land, but Farms does. What percent of the crops grown on land leased by Farms is harvested by Anthony Harvesting is not clear. Scott estimated that it might be less than "a majority", but "without the dollar volume" he couldn't say. Rick Harris testified that about 10 percent of Harvesting's harvest operations are on land leased by Farms and 20% and 15% respectively are on lands leased by Scott and Gary in their individual capacities.

Harvesting owns no equipment; some of the equipment it uses (but not a majority) is owned by Farms. At least one of the broccoli machines used by the crew involved in this case is owned by Farms. When Harvesting uses Farms equipment, it doesn't bill the Harvesting company directly, rather some sort of accounting for the rental is made, most likely from the proceeds from the sale of the crop. Similarly, Harvesting doesn't bill Farms directly for its harvesting services. Gary simply described it as "something in lieu of" direct billing or "a rental factor" which might be debited each month. In evidence are a number of security agreements indicating that the assets of Farms and Harvesting are used interchangeably to secure loans to one or the

[6]To the extent there is only "one single employer" there is centralized control of labor relations.

other entity. Gary admitted "All our loans through all the different entities are cross-tied."

Based upon the evidence detailed above, I find that Harvesting and Farms constitute a single-integrated enterprise.

III.

THE ALLEGED UNFAIR PRACTICES

a.

A good deal of the hearing was devoted to the history of concerted activities among the crew to which the alleged discriminatees belong. Ordinarily, proof of such activities is necessary to establish General Counsel's prima facie case; however, in this case Respondent's defense essentially concedes that it knew the alleged discriminatees engaged in protected activities, and especially complaints about overtime. According to Respondent, try as it might, the crew was impossible to satisfy. In view of this, I will omit the typical background discussion of the crews' concerted activity to consider whether or not General Counsel made out a prima facie case.[7]

b.

PANTOJA INCIDENT

On November 11, 1989, CAL-OSHA Inspector Robert K. Smith went to fields being harvested by one of Respondent's broccoli crews. Though there was some difficulty in his

[7]Despite the unimportance of the history of the crews' activities in the conventional "causal" context, such evidence is still relevant on the different question of what happened on November 11th and November 21st. As will become clear from my discussion, I do not consider it highly probative.

communicating with the man who appeared to be in charge of the crew, and who apparently spoke no English, Smith was able to ascertain that it was one of Respondent's machines was at work in the field. He went to Respondent's office in King City; the office called Gary by car phone; and the two men arranged to meet in the field. Smith told him he was there in response to a complaint. (II:176.)

Before describing what happened next, a brief description of how a broccoli machine works is in order. For schematic purposes, a broccoli harvesting machine might be pictured as an airplane without a tail: two long trailers extend wing-like across a field pulled by a tractor which juts out in front of the machine like a nose. The tractors move slowly because the cutters work just ahead of the machine; thus, they are at risk if anything should happen to one of them, or if the machine were to pick up speed. For this reason, it is important for the driver to be able to stop the machine.

Smith became concerned about this when he saw the driver of the machine, Trinidad Pantoja, out of his seat and making boxes with his back to the direction of travel. There is no question that, in making boxes as he was, Pantoja was not violating any existing company policy; rather, he was performing customarily and, as I shall show, the drivers who replaced him would perform in the same fashion.

Exactly what happened after Gary and Smith agreed to meet in the field varies in the telling. According to Isidro Denis, the foreman of the crew at that time, Gary arrived at the

field before Smith did and inspected the machine, discovering that the safety switches on the machine were broken. He asked Denis how long they had been like that; Denis told him they were like that for as long as he had been working there. While he and Gary were going over the machine, Smith returned.

Gary and Smith went around the machine together after which Smith told Gary he could start the machine again. Denis acknowledges that Gary also said something to him in English which he understood to mean that Pantoja should make his turns slower. (III:18.) Denis conveyed this to Pantoja. According to Denis, Gary never spoke to Pantoja directly. Pantoja corroborated this.

Gary tells a different story. In the first place, he implied that he made no preliminary examination by himself; rather, he met Smith at the edge of the field and they went in together. According to Gary, it was while he was with Smith that he discovered the broken safety switches which he decided not to bring to Smith's attention.

On the basis of Smith's concerns, and, furthermore, being secretly aware that the safety switches were inoperative, Gary told both Pantoja and Denis that Pantoja had to remain in the driver's seat. Indeed, according to him, he thought the matter so serious that he told Pantoja in both English and Spanish[8] that he had to remain seated. For emphasis, Gary also

[8]Denis and Pantoja contend they do not speak English; Gary repeated the instructions he gave in Spanish at the hearing; the instructions were in comprehensible Spanish. If Gary spoke in Spanish, he would have been understood.

told Maria Nava, one of the packers (and the wife of the foreman who was to replace Isidro Denis), to make sure that both Isidro and Pantoja observed his instructions. Tomas Rodriguez testified he heard Gary tell Denis and Pantoja that Pantoja was to remain seated.

At one point Gary testified that he gave these instructions to Denis (who was on the ground) and Pantoja (who was on the machine above him) while Smith was talking to Maria Nava. Later, he testified the inspector was leaving when he spoke to Pantoja and Denis. Smith himself testified Gary did not speak to either Denis or Pantoja while he was there. If Gary did speak to Pantoja and Denis, it seems more likely than not that it was while the inspector was leaving. Smith did testify that Gary told him he was going to direct the operator to remain in the seat. There is no question that Smith told Nava that Pantoja was to remain seated.

Gary then left the field. According to him, the machine started up before he left and Pantoja was in the driver's seat.[9] Maria confirmed that Pantoja started out in the driver's seat, but started making boxes again (with his back to the front of the tractor) once Gary was out of sight. It is also undisputed that at some point Gary appeared at the edge of the field where he observed (through binoculars) Pantoja again out of

[9]Although Gary offered, by way of argument, that this indicated to him that Pantoja had received and understood his instructions, I'm not sure it proves very much even if true. I assume that Pantoja would have to be in the seat to start the machine.

the seat. According to Gary, when Pantoja saw that he was being observed, he "jumped into the seat."

Pantoja admits being out of the seat and returning to it. According to him, he did so because Maria finally told him that Gary wanted him to remain seated. According to him, this was the first he heard that this was what Gary wanted. When he told Denis what Nava said, Denis told him (as he testified before me) that he thought Gary wanted him to be more careful on the turns. It is undisputed that not very long after Pantoja claims he saw Gary, the machine finished its pass through the field and Gary fired Denis ostensibly for failing to keep Pantoja in his seat and Pantoja ostensibly for failing to remain in his seat.[10]

I have already noted that Respondent does not deny that Pantoja's crew engaged in extensive concerted activities and that Pantoja, in particular, occasionally spoke for the crew. Under the conventional standard, there remains to be considered the final element of General Counsel's prima facie case, namely, if there is a causal connection between Pantoja's protected activities and Respondent's treatment of him. In this connection, I should emphasize (1) Smith's telling Gary that he was there in response to a complaint; (2) the Company's informing EDD in connection with Pantoja's unemployment claim that he failed "to keep everything in working order on the machine;" and

[10]I could continue the narrative to detail the parties' respective accounts about what was said when Gary fired the two men; suffice it to say that each account supports the main lines of the testimony recited here.

(3) the fact that the drivers who succeeded Pantoja in that position continued to make boxes just as Pantoja did.

I cannot see that Smith's telling Gary he was responding to a complaint points to any connection to Pantoja's discharge; not only is there nothing in the record to lead anyone to conclude or to suspect that it was Pantoja's complaint which brought Smith, but also Smith's recommendation that Pantoja remain in the seat does not seem reasonably likely to trigger thoughts of retaliation. To the extent the letter to EDD can be construed as asserting that Pantoja was fired for not keeping the switches in order, General Counsel argues that it must be taken as contradicting the Company's present position and manifesting "shifting reasons." On the record as a whole, I cannot take it that way; rather, it strikes me as Respondent's attempt to add to the "cause" behind the discharge in order to defeat the unemployment claim.

The most powerful factor in proving "discrimination" is Respondent's permitting Pantoja's successors as drivers to make boxes in exactly the same way as Pantoja had. Suggestive as this is, its probative force is diminished by (1) General Counsel's failure to prove that any of Respondent's supervisors actually saw the new drivers out of the seat, and (2) the testimony of Javier Suarez that the new drivers were told by their foreman to go to their seats when "the owners" came. (III:98.) On this record, I cannot conclude that Pantoja's protected activities played any part in Gary's decision to discharge him.

Even if I were to conclude that General Counsel made out a prima facie case, I still conclude that Gary would have fired Pantoja in the absence of any protected activities. It is undisputed that Smith's only concern was with Pantoja's being out of his seat. Smith himself testified Gary said he would instruct the driver accordingly. Denis conceded that Gary said something to him, but claims that it was in English and that he understood it to mean something other than that Pantoja should remain in his seat. Since I cannot believe Gary deliberately misled Denis or Pantoja about what he wanted, I have tried to conceive of anything Gary could have said in English which would lead a listener not fluent in that language to think he was talking about making slower turns when he was actually saying stay seated.[11] I cannot think of anything.

I dismiss this allegation of the complaint.

c.

THE INCIDENT OF NOVEMBER 21st.

1.

Juan Nava, Maria's husband, replaced Isidro Denis as foreman of the crew the following day. Though General Counsel presented some testimony about threats to replace the crew made by Nava in succeeding days and some testimony about Nava's

[11]I am not overlooking the employees' testimony that they don't understand English, but Denis didn't testify that he didn't understand anything Gary said; he testified that he understood him to want Pantoja to make his turns slower.

denigrating the crew, for reasons noted below but which need not detain me here, I do not rely on either kind of evidence.[12]

November 21st was the day before Thanksgiving. Everyone agrees the morning was so cold that ice coated the broccoli. In such circumstances, harvesting is typically delayed until the ice melts in order to avoid damaging the heads. Everyone agrees the crew was present and ready to work at 6:30 a.m. Javier Suarez initially testified that the crew started to work at 6:30 a.m. folding up one machine and readying another which was to be used that day. After the crew had "setup", Nava told them it was too icy to begin so they waited for 45 minutes to an hour. Juvencio Savala corroborated this sequence of events.[13] Respondent's witnesses contend that no work of

[12]The first time Javier Suarez was asked about Nava's initial comments to the crew, he related: "Guys, from here on out I am the foreman of this crew. And from this time forward things will be different. Let's see how much you can stand from me and let's see how much I can stand from you. And that was it." (III 96-97.) The second time he testified, General Counsel asked him a leading question about whether or not Nava had threatened to replace the crew and Suarez confirmed that he had. (IV:55.) It seems unlikely to me that, if Nava prefigured the crew's eventual replacement, that Suarez not only would have forgotten to mention it the first time he testified, but also that the tone of Nava's remarks which he initially conveyed would have been so friendly. I also do not take Suarez's testimony that Nava referred to the crew as "monkeys" as strongly probative on the question of whether or not he discharged the alleged discriminatees when, as I will explain, I have sufficient reason not to believe the employees' account that he told them they were fired.

[13]Suarez would later testify the crew actually began to cut broccoli at 6:40 a.m. (IV:25.) He might have meant to say this in his original testimony to the effect that "we were starting to -- we were going to start to cut broccoli" [shortly after they finished "setting up"] (III:99), when Nava stopped them because of the ice. When reminded of his declaration which averred that "[they] started work at 7:30", he admitted that the crew did not

any kind was done before 7:30. Indeed, according to them there was no need to close up one machine and set up a new one because the crew was going to use the machine that was left in the field from the day before.

Maria and Juan Nava testified that when he saw the frozen field he told the crew they couldn't start for awhile. When the workers started to ask how long they would have to wait, "[Juan] told them more or less 7:30 because sometimes people can go and make payments or do this or that." According to both Maria and Tomas Rodriguez, many of the crew actually went to San Ardo. (Rodriquez himself went for coffee; he testified that Javier Suarez and his brother went to get gas.) Suarez contends most of the crew stayed at the field.

I find that the crew did not start cutting broccoli until 7:30 a.m. I also find, based upon Rodriguez's testimony that he left to go to San Ardo, and upon Maria's uncontradicted testimony that the crew was free to do anything it wanted until 7:30, that no one was required to remain at the field. Though I am not persuaded that the crew did work of any kind before

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start to cut broccoli until 7:30 a.m. (IV:26.) Later, Suarez would testify the crew started cutting at around 7:00 a.m. (VI:89.) Based upon the record as a whole, including my incredulity over the proposition that Nava would not have known immediately that the field was not ready to be cut (after all frost is easily visible on a lawn and on rooftops on cold mornings), I find the crew started work at 7:30 a.m.

7:30 a.m., for reasons noted below, it makes no difference if they did.[14]

2.

Everyone agrees that when the crew did begin to work, there was some kind of a dispute between Suarez and Nava about Suarez's being assigned as a cutter. I mention this because Respondent implies that it was this dispute which caused Suarez to "organize" the crew, as Tomas Rodriquez would testify that Suarez did (V:39), to stop working at 4:30 p.m. According to Rodriquez, Suarez urged this as the crew changed fields sometime around 2:00 p.m. Further, Rodriquez testified that he would not go at which point Juvencio Savala told him "those that don't leave me are going to kick them out." (V:40.) Savala denied any such conversations. (IV:89.)

Though it is clear that Suarez and Nava had some sort of disagreement that morning, on the record as a whole I cannot conclude that what happened later in the day had anything to do with it. This crew had been fighting with Respondent about overtime for months; later in the day they would claim to be entitled to it; the roots of that claim have nothing to do with what happened to Suarez that morning. I also do not believe

[14]The starting time will be of some moment in considering the employees' later claim that they were entitled to overtime. I should point out in this connection even if the crew did some "set-up" before 7:30 a.m., it was not more than 15 minutes of work. In view of my further finding that the crew otherwise was free to leave the field after they did the work, I am not convinced that they were subject to the control of the employer for the rest of the hour between 6:30 and 7:30 a.m. Accordingly, the waiting-time cannot be counted as "hours-worked." (See INC Order No. 14-80 § 2(b).)

Rodriquez's account that he was threatened by Savala. Nothing in Rodriquez's account of what actually happened later that day to "those who didn't leave" supports the claim that there was hostility toward them. And if there was no overt hostility when the "work stoppage" actually took place, I find it hard to believe that even if there was some discussion about "walking out" as early as 2:00 p.m., that the discussions were accompanied by threats.

3.

Suarez did testify that the crew was aware of the time and began to talk among themselves about asking for overtime pay after 4:30 p.m. It so happened that around that time the machine left the field to make a turn, at which point most of the cutters walked away from it, formed a separate group, and went to ask Nava about overtime. Hector Ramirez testified that around 4:45 p.m. he asked his fellows "if they were coming out with [sic] overtime." Nava agreed that the crew had finished a pass and the machine was already out, or at the edge, of the field when a group of cutters asked him about the overtime.[15] The major difference between the story told by General Counsel's witnesses and that told by Respondent's witnesses is that General Counsel's witnesses insist they only asked about overtime. Juan and Maria Nava insist "the crew" also said to Nava they weren't

[15]Rodriquez added that initially only 10 employees went out and they urged everyone else to leave. Two others left and he was the only cutter to stay with the machine. (V:41.)

going to work after 4:30.[16] According to Maria, someone said the crew was entitled to overtime that day because they had started at 6:00 a.m. Juan reminded them that they had waited until 7:30 a.m.

At some point, Nava said something to the effect that he could see they did not want to work anymore. Ramirez and Suarez testified Juan then said they were "fired." (IV:70.) When asked Nava's exact words, Suarez testified he said, "[T]here was no more work for us." (IV:71.) Savala and Suarez emphasized that Nava walked away from the crew and started the machine across the field. I discount this. Since there was only one cutter left in the field, Nava's testimony that he had to reposition what was left of the crew before the machine could continue, makes more sense.

Nava testified that he went to his car phone to tell his immediate supervisor, Jose Almonza, what was happening. Almonza told him to call Gary. He then went to call Gary. Savala agrees that Nava disappeared for a while before returning at which point he gave them their paychecks, saying he had "just spoken to Gary and that was all for [them]." (IV:89.)[17] Ramirez relates a later conversation with Nava when the crew approached him to ask "if it were true that he had fired

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[16]Juan Nava added that they personalized the dispute, saying the crew told him they weren't going to work with him anymore. I discount this. On the record as a whole, this dispute was about overtime.

[17]It is undisputed that November 21st was a payday and the entire crew was paid.

us." Nava said, "Yes, that he had already talked to the boss." (IV:71.) Suarez must be referring to the same conversation when he testified "the crew" asked him "what it was that he was trying to give us to understand that was all for us." (IV:59.) Although General Counsel witnesses also testified that they asked where work was going to be on the 23rd, Nava denied being asked this. It is undisputed that the 13 showed up for work on the 23rd of November. A replacement crew was already there.

In the record as a whole, I cannot find that Nava ever told the 13 they were "fired." General Counsel's witnesses' own confusion about what actually happened is the most compelling evidence that, despite some testimony about Nava's having said they were fired, he never said any such thing. I also cannot find that the crew quit; rather, it seems clear to me that they stopped work at 4:30 p.m. to talk to Nava about getting overtime. Indeed, this is exactly Nava's interpretation of events in his notebook: "Estas 13 persons pararon a las 4½ p.m. la rason [razon] de que pararon de trabajar was porque sequn ellos creen que no les estan pagando tiempo y medio [media]." (GCX 14.) "These 13 people stopped at 4:30 p.m. The reason they stopped[18] work was because according to them they believed they are not being paid time and a half." (Hearing Officer's Translation.)

Under IWC Order 14-80 agricultural employees are entitled to time and a half (overtime) pay after 10 hours of

[18]Spanish has a number of words for "quit"; "parar" (to stop) is not one of them.

work. (IWC 14-80 §3[A].) Since I have found that the employees did not start work until 7:30 a.m., it follows that at 4:30 p.m. they were not entitled to overtime under the IWC Order, having only worked nine hours.[19] Although the nature of the employees' objective in this case is obscured by Suarez's misleading attempt to establish that the crew began to cut at 6:30 a.m., it is clear from the record as a whole, including Maria Nava's testimony, that the crew wanted the waiting-time to count towards overtime.[20] If there were no IWC Order, employees' concerted refusal to work in order to put pressure on their employer to pay them for "waiting time" would be protected as a one-time work stoppage.[21] Does it make any difference that the crew was not entitled to be paid for the hour between 6:30 and 7:30 a.m.? For employees to lose the protection of the Act because they were not entitled to overtime under the IWC Order would be to say that concerted action is protected only to

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[19]Even if I were to credit the employees that they worked for about 15 minutes "setting-up", the other 45 minutes until 7:30 would still be considered "free time" and the crew would still not have worked 10 hours by 4:30 p.m.

[20]Respondent contends that because the crew knew it was not entitled to overtime, they must have had some other motive for their actions, and he vigorously argues that that motive was to get rid of Nava. On the record as a whole, I do not find that to be the case. Respondent's analysis misses the distinction between the employees' wanting Respondent to pay overtime and asserting that they were entitled to it under the IWC order.

[21]See Armstrong Nurseries, Inc. (1986) 12 ALRB No. 15 in which the Board distinguishes between work stoppages, in which employees walk off their jobs, and partial strikes, in which strikers refuse to work on certain tasks or remain on premises. In this case, the eight employees walked off the job.

the extent employees seek what they already have. I find the walkout is protected.

In view of the conflicting testimony about whether or not the crew asked Nava on the evening of the walkout about coming back to work, I do not find that they did. However, there is no dispute that they showed up for work when it was next available, on the day after Thanksgiving. As strikers, the employees had the right to reinstatement upon making an unconditional offer to return to work unless Respondent had permanently replaced them. Since showing up for work has been held to be a sufficient offer (Sunbeam Lighting Company, Inc. (1962) 136 NLRB at 1267), and since Suarez testified without contradiction that his wife sought to talk to Respondent's supervisor, Rick Harris, about going back to work, the burden shifted to Respondent to demonstrate "a mutual understanding between itself and the replacements that they were permanent." (Hansen Bros. (1986) 279 NLRB 74; Tile, Terrazzo & Marble Contractors Assn. (1987) 287 NLRB 77.) Since Respondent introduced no evidence about the "permanency" of the replacements, but chose to rest on the adequacy of the employees' offer to return, I find the refusal to reinstate the crew on November 23rd was an unfair labor practice.

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Anthony Harvesting Inc., and Anthony Farms, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to reinstate, or otherwise discriminating against, any agricultural employee for engaging in protected concerted activity.

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

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer to the following individuals immediate and full reinstatement to their former or subsequently equivalent position, without prejudice to their seniority or other employment rights or privileges:

(1) Hector R. Camacho

(2) Fidel Camacho

(3) Francisco Camacho

(4) Fiderick Garcia

(5) Javier Garcia

(6) Fiderick Macias

(7) Noel Medrano

(8) Ramon M. Pacheco

(9) Javier Suarez

(10) Manuel Suarez

(11) Reyes Valderas

(12) Ruben Balderas

(13) Juvencio Zavala

(b) Make whole the above-named individuals for all losses of pay and other economic losses they have suffered as a result of respondent's unlawful discharges, the makewhole amount to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in E.W. Merritt Farms (1988) 14 ALRB No. 5.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of the Order, to all agricultural employees employed by Respondent at any time during the period from November 23, 1990 to November 23, 1991.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director and exercise due care to replace notices which has been altered, defaced, covered, or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages to all if its agricultural employees on company time at times(s) and place(s) to be determined by the Regional Director. Following the reading, the 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 and their rights under the Act. 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 worktime lost at this reading and the question-and-answer period.

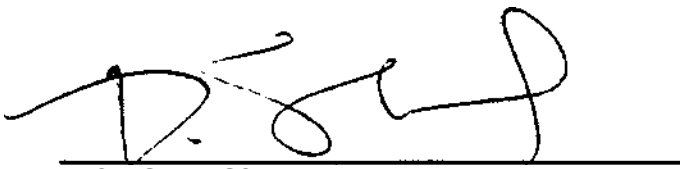
(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request until full compliance is achieved.

BACKPAY ORDER

Respondent has not contested any element of the backpay specification. I hereby recommend that the Board direct Respondent, its officers, agents, successors and assigns to pay the amounts contained in General Counsel's final backpay

specification plus interest to the date of payment calculated in accordance with the Board's decision in E.W. Merritt Farms (1988) 14 ALRB No. 5.

Dated: April 24, 1992



THOMAS M. SOBEL
Administrative Law Judge, ALRB

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 that we Anthony Harvesting, Inc., and Anthony Farms 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 refusing to reinstate Hector R. Camacho, Fidel Camacho, Francisco Camacho, Fiderick Garcia, Javier Garcia, Fiderick Macias, Noel Medrano, Ramon M. Pacheco, Javier Suarez, Manuel Suarez, Reyes Valderas, Ruben Balderas, Juvencio Zavala. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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.

Because it is true that you have these rights, we promise that:

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

DATED: ANTHONY HARVESTING INC.
ANTHONY FARMS

By: _____
Representative Title

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 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE.