Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUNRISE MUSHROOMS, INC., Respondent, and INDEPENDENT UNION OF AGRICULTURAL WORKERS, JOEL TAPIA CHAVEZ AND) MANUEL HERNAN PEREZ, Individuals, Charging Parties.	)	Case Nos. 93-CE-43-SAL 93-CE-64-SAL 94-CE-1-SAL 94-CE-4-SAL 22 ALRB No. 2 (April 26, 1996)

DECISION AND ORDER

On September 25, 1995, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in which he found that Sunrise Mushrooms, Inc. (Sunrise or Employer) violated section 1153, subdivisions (c) and (a) of the Agricultural Labor Relations Act (ALRA or Act)[1] by discharging employees engaged in lawful strike activities and by failing or refusing to reinstate economic strikers upon their unconditional offers to return to work. The ALJ dismissed the portion of the complaint alleging an unlawful unilateral increase in hourly wage rates and held that certain employees were lawfully discharged for engaging in strike misconduct .

Sunrise timely filed exceptions to the ALJ's decision, asserting that the complaint should have been dismissed in its entirety. The Independent Union of Agricultural Workers (IUAW or Union) , one of the charging parties, filed exceptions to the

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

ALJ's findings that six employees were lawfully discharged for strike misconduct. The General Counsel filed exceptions regarding the admission of documents not timely provided and to the ALJ's finding that Jose Antonio Perreyra forfeited his right to reinstatement by leading the Employer to believe that he was not interested in returning and by making himself unavailable for an extended time by spending six months in Mexico.

The Agricultural Labor Relations Board (Board) has considered the attached decision of the ALJ in light of the record and the exceptions and briefs submitted by the parties and affirms the ALJ's findings of fact and conclusions of law,[2] except as discussed below, and adopts his recommended remedy.

DISCUSSION

The Union's Exceptions

The Union filed exceptions to the ALJ's conclusion that six employees were lawfully discharged for strike misconduct. The Union argues that the employees' denials that they engaged in rock throwing should have been credited over the contrary testimony of the Employer's witnesses. The ALJ's credibility determinations are central to his findings and conclusions as to the six individuals. The Board will not disturb credibility determinations, particularly where, as here, they are based on demeanor, unless the clear preponderance of the evidence establishes that they are incorrect. (David Freedman & Co., Inc.

[2]Since there were no exceptions to the finding that the Employer did not unlawfully make a unilateral change in wage rates, said finding is adopted pro forma.

(1989) 15 ALRB No. 9; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531], enfd. (3d Cir. 1951) 188 F.2d 362.) Based on this standard of review, the record has revealed no basis for disturbing the ALJ's credibility determinations.

The General Counsel's Exceptions[3]

General Counsel argues that Jose Antonio Ferreyra should have been credited when he testified that personnel manager Carlos Hernandez placed him on a recall list, and therefore found to have made an unconditional offer to return to work. The General Counsel also argues that Ferreyra's planning to go to Mexico should result not in the forfeiture of reinstatement, but merely the tolling of backpay during the period of his absence. In any event, General Counsel argues, Ferreyra should be treated the same as Tomas Torres and Antonio Vargas, who signed separation agreements[4] and were not on the recall list, but were excused from making an offer to return to work.

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[3]We decline to sustain the General Counsel's exception to the ALJ's failure to impose sanctions on the Employer for its tardy compliance with the Board's rules on discovery, since no prejudice to the General Counsel has been shown. However, parties should be aware that there is a serious risk of having documents excluded from the record if obligations created by discovery regulations and pre-hearing conference orders are not satisfied in a timely manner.

[4]As discussed further below, many of the alleged discriminatees signed separation agreements which stated that they were resigning their employment. For various reasons, the ALJ found the agreements to be unenforceable and, therefore, no defense to the Employer's refusal to reinstate strikers who offered to return to work.

The ALJ reasonably refused to credit Ferreyra's claim that he was put on a recall list because the ALJ found it implausible that Hernandez would have misled Ferreyra to believe that he could be recalled even though Ferreyra had just signed the separation agreement. The ALJ noted that there is evidence that Hernandez informed other signers that sought to be recalled that the separation agreement prevented it. Consequently, we affirm the ALJ' s conclusion that it was not shown that Ferreyra offered to return to work. For the reasons discussed below (page 12) with regard to Torres and Vargas, we find that the failure to offer to return to work precluded the finding of a violation as to Ferreyra.

The Employer's Exceptions

The Employer excepts to the ALJ's findings that Jorge Leyva, Ricardo Aguilera, and Manuel Bautista were unlawfully discharged, that the strikers were not permanently replaced, that the separation agreements were not enforceable, that Fernando Fernandez should be included in the Board's Order, and that Torres and Vargas were unlawfully denied reinstatement. The Employer also has filed exceptions relating to various procedural and evidentiary issues, including allegations of bias.[5]

[5]In its reply to the Employer's exceptions, the General Counsel moves to strike many of the exceptions for failure to state the grounds for the exceptions or to cite portions of the record in support thereof. The General Counsel also claims that the Employer waived the right to raise again various motions made prior to and at the hearing by failing to renew them in its post-hearing brief. While in some cases, the grounds for the Employer's exceptions are not fully articulated, the bases for

(continued...)

a. Termination of Jorge Leyva

The Employer urges the rejection of the ALJ's findings that Nori Palomino, who accused Leyva of throwing a rock at the vehicle she was using to transport replacement workers, was not a believable witness and that Leyva's denial was credible. The ALJ's credibility determinations on this issue are heavily based on demeanor. For the most part, the Employer argues that the ALJ exaggerated the inconsistencies in Palomino's testimony and gave too much weight to the fact that she claimed the rear window was not tinted. However, these arguments do not undermine the demeanor-based aspects of the findings, nor do they counter Palomino's inability to accurately describe Leyva and clearly recall on which side of the vehicle Leyva was when he allegedly threw the rock. Therefore, none of these arguments are sufficient to warrant disturbing the ALJ's findings, as the findings are not contrary to the clear preponderance of the evidence.

b. Terminations of Ricardo Aouilera and Manuel Bautista

The Employer asserts that the ALJ erred in relying on Anastacio Andrade's failure, in describing an incident involving Enrique Fuentes and Ramon Esquival, to also implicate Aguilera and Bautista. The ALJ concluded that the Employer failed to show

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[5](...continued)
the Employer's claims on various issues are sufficiently discernible to allow consideration by the Board. Therefore, the Board declines to strike the exceptions. As to the renewal of earlier motions, the Employer's post-hearing brief does make mention of the denials of the various motions.

a good faith basis for believing that Aguilera and Bautista had engaged in misconduct warranting discharge. The Employer claims that the two men were involved in a separate incident from Fuentes and Esquival, not witnessed by Andrade, and that its good faith belief was based on other evidence. This, Sunrise argues, coupled with the failure of the two men to testify, means that the burden had shifted to the General Counsel, who failed to meet its burden of proving that the misconduct did not take place.

The ALJ did appear to assume that Aguilera and Bautista were accused of being involved in the same incident as Fuentes and Esquival. This may well have been mistaken, for while an October 5[6] letter from the Employer to Union president Pete Maturino describes the four men's alleged misconduct in almost identical terms, an October 11 letter is more detailed and indicates that the incident allegedly involving Aguilera and Bautista occurred at the same location but at a different time of day. The October 11 letter simply states that, on an unknown date, at a specified location, the two men threw rocks at a van driven by an unnamed nonstriking foreman. There is no testimony nor documentary evidence in the record to indicate on what this description or identification is based. Thus, while the ALJ may have been mistaken in relying on Andrade's failure to mention the two men in his testimony, the lack of any corroboration or even the identification of a witness to the separate alleged incident compels the same conclusion, i.e., that the Employer failed to

[6]A11 dates refer to 1993 unless otherwise specified.

demonstrate that it had a good faith belief that they were engaged in serious misconduct.

c. Status of Replacement Workers

The Employer challenges the ALJ's finding that it failed to prove that a mutual understanding existed between it and the replacement workers that the jobs were to be permanent. However, rather than arguing that the evidence was sufficient to sustain its burden of proof, the Employer argues that it was never given notice prior to the hearing that the status of replacement workers was in dispute. The Employer asks that the finding be reversed as outside the scope of the complaint or, in the alternative, it be allowed to introduce further evidence of a mutual understanding of permanent employment. While claiming that the history of the case prior to hearing establishes that all parties acknowledged that the replacements were permanent, no evidence of such an understanding is cited. Rather, the claim appears to be based on the fact that the complaints themselves do not allege that the replacements were temporary and that the issue was not raised by the General Counsel at the pre-hearing conference.

In fact, there is no indication that the General Counsel made it known that it would contest any assertion that the strikers were permanently replaced. The second amended complaint and the pre-hearing conference order indicate that the General Counsel's central claim was that the separation agreements were not a valid impediment to reinstatement.

However, the salient point is that permanent replacement of strikers is an affirmative defense which an employer has the burden to raise and establish. By asserting that the separation agreements were invalid, the General Counsel was claiming that the strikers otherwise were entitled to reinstatement. It was the Employer's burden to raise and prepare to present any relevant affirmative defenses. It was not the General Counsel's burden to identify all possible issues in the case by anticipating and denying any affirmative defenses that the Employer might raise. Therefore, the Employer has no legally cognizable complaint that it was not notified of the need to demonstrate that the replacements were permanent,

d. Validity of the Separation Agreements

The Employer makes numerous arguments in favor of the validity of the separation agreements.[7] Most of these arguments were thoroughly addressed and rejected by the ALJ, and we find no error in his analysis. One argument warrants additional comment. The Employer asserts that the present situation is distinct from those present in Kitiyama Brothers (1983) 9 ALRB No. 23 and various National Labor Relations Board (NLRB) cases cited by the ALJ. In short, while those cases involved private settlement

[7]The separation agreements were agreed to by the Employer and the Union, and the Union took responsibility for distributing and explaining the agreement to the employees. By its terms, the agreements provided for the resignation of the employees, to be converted to layoffs to facilitate unemployment insurance claims, and for the mutual release of all claims. The ALJ found that the employees credibly testified that they were told that they had to sign the agreements in order to receive unemployment benefits and vacation pay.

agreements between an employer and discriminatees in a pending case, the Employer points out that the present situation involves a mutual release of claims prior to any action before the Board.

It is true that most of the cases.cited by the ALJ involve private settlements entered into after ULP charges were filed. However, the Employer fails to convincingly explain why the well-established policy that a waiver of statutory rights be clear and unmistakable should not apply where the purported waiver occurs prior to a charge being filed. In any event, the ALJ also relied on NLRB cases involving pre-charge "resignations," where employees agreed to sever their employment in order to receive benefits, such as vacation pay or pensions. These cases, which are exactly on point, hold that an employee who is told that he or she must resign in order to receive needed benefits has not clearly or unmistakably expressed a desire to relinquish statutory reinstatement rights. Some of these cases, such as Roslyn, Inc. (1969) 178 NLRB [72 LRRM 1043] and P.B.R. Co. (1975) 216 NLRB 602 [89 LRRM 1259], involved voter eligibility, but other similar NLRB cases, such as Agusta Bakery Corp. (1990) 298 NLRB 58 [134 LRRM 1028], involved pre-charge "resignations." The key in these cases is whether the employee expressed the desire to quit and then asked for benefits, in which case the resignation would be upheld, or instead expressed a need for benefits and resigned when told that was a necessary precondition, in which case the right to reinstatement and

backpay is not waived. The facts of the present case fall squarely in the latter category.

e. Fernando Fernandez

The ALJ properly found that the Employer violated the Act by failing to reinstate Fernandez because he signed a separation agreement. This is true even though Fernandez was being investigated for serious strike misconduct. It is well settled that an employer cannot escape a finding of an unlawful discharge by relying on conduct of the employee that was not considered in the discharge. (See, e.g., The Blair Process Co. (1972) 199 NLRB 194; Western-Pacific Construction (1984) 272 NLRB 1393.)

However, as observed by the ALJ, evidence of serious misconduct by the employee can nevertheless be the basis for denying the standard remedy of reinstatement and backpay. The ALJ reached such a conclusion as to Sect Castelan because there was sufficient record evidence to establish the truth of the allegations against him. Since there was only hearsay evidence in the record to support the allegations against Fernandez,[8] the ALJ concluded that his recommended order should include Fernandez.

The Employer argues that it had a good faith belief that Fernandez engaged in misconduct and the ALJ improperly

[8]The only evidence in the record as to the allegations of against Fernandez is a police report and a security guard's report. Fernandez allegedly committed one of most serious acts during the strike, smashing a vehicle window and causing injury from flying glass.

placed the burden on it, rather than the General Counsel, to show that the misconduct actually took place. However, since Fernandez was not discharged for the alleged misconduct, the good faith belief standard is inapplicable. Since unfitness for reinstatement is in the nature of a defense to the standard remedy of reinstatement, the burden is properly placed on the party asserting such defense to demonstrate such unfitness.

Nevertheless, we find that, under the circumstances here, the Employer may raise the issue in the compliance phase of the Board's proceedings and offer competent, nonhearsay evidence to establish Fernandez' involvement in serious strike misconduct. Where, as here, the reason for the unlawful failure to reinstate a striker who unconditionally offers to return to work is unrelated to the alleged strike misconduct,[9] and thereby the alleged misconduct is not placed squarely at issue, we do not find it incumbent upon the employer to prove in the liability phase that the employee is nonetheless unfit for reinstatement. Where, as occurred here with reference to Sect Castelan, the issue is raised and fully litigated in the liability proceeding, then a final determination is appropriate at that time,

f. Torres, Vargas (and Ferreyra)

Sunrise excepts to the ordered reinstatement of Tomas Torres and Antonio Vargas. Since the same considerations hold true for Ferreyra, his status will be discussed as well. None of

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[9]Fernandez was refused reinstatement because he signed the separation agreement.

the three were on the October 5, 1993 list of those wishing to return provided by Maturino, nor was it found that they made an unconditional offer to return to work at any other time.[10] In fact, the counsel for the General Counsel admitted at hearing that he was not claiming that there was an unconditional offer to return to work prior to the submission of the October 5 list. Nor does our independent review of the record reveal any clear indication of an unconditional to return made by the Union prior to October 5. Therefore, we agree that the record evidence fails to prove that Vargas, Torres, or Ferreyra were included in any legally effective unconditional offer to return to work.

The ALJ held that Torres and Vargas should be excused from failing to offer to return to work because it would have been futile to do so in light of the Employer's reliance on the separation agreements to deny reinstatement. As noted by the ALJ in his analysis regarding Aguilera, it is well established that discharged strikers need not make an offer to return because, in light of the employer's action severing the employment relationship, such an offer would be futile. (See, e.g., Abilities & Goodwill (1979) 241 NLRB 27.)

However, we are unaware of any NLRB cases not involving discharge where the futility excuse has been recognized. This is not surprising, since the policy underlying the discharge cases appears to be that the employment relationship has been severed

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[10]The record indicates that several strikers made individual unconditional offers to return to work prior to October 5.

by the Employer and to ask to return would be senseless from the employees' perspective. Therefore, where the employment relationship has not been severed by actions of the employer, employees would not reasonably believe that an offer to return to work would be futile.

In this case, both Vargas and Ferreyra testified that they did not understand that they had resigned their employment by signing the separation agreements.[11] This being the case, we do not see how they reasonably could have believed that an offer to return would have been futile. Indeed, both Vargas and Torres testified that they did ask to return. Though the ALJ found that testimony unconvincing, it nonetheless demonstrates their state of mind vis a vis the futility of offering to return. Therefore, we find that the facts surrounding the separation agreements do not warrant excusing employees who signed the agreements from making an unconditional offer to return to work. Consequently, Torres and Vargas will not be included in the Order and we rely on this rationale in affirming the ALJ's exclusion of Ferreyra from the Order.

g. Renewal of Motions, Procedural Issues, and Claims of Bias The Employer argues that it is fundamentally unfair and indicative of bias for the present charges, which are based in large part on the invalidity of the separation agreements, to have been brought against the Employer and not also against the

[11]Torres did not testify, but the lack of understanding to which all employee witnesses testified may be imputed to him as well.

Union. A charge was filed against the Union (94-CL-2-SAL) by many of the employees who signed separation agreements, alleging that Pete Maturino deceived them and caused them to unknowingly agree to a voluntary quit and general release against Sunrise and the Union. The charge was dismissed without going to complaint.

There is no question that the record reflects that the Union, through Maturino, was as equally involved as the Employer in creating the settlement agreements and procuring the signatures of strikers. However, it was within the General Counsel's prosecutorial discretion to determine whether to issue a complaint against the Union for breach of its duty of fair representation. The Board is without authority to add the Union to the complaint in the present case, even if it desired to do so.

The Employer also asserts that it was denied an opportunity to prepare an adequate defense because it was never fully apprised of the General Counsel's theory of the case. However, a review of the complaints[12] and the pre-hearing

[12]The First Amended Consolidated Complaint, reflecting the consolidation of the various charges, was issued on November 30, 1994. The Second Amended Consolidated Complaint, which involved the addition of Guadalupe Leyva and Tomas Torres (and which was unopposed by the Employer at the pre-hearing conference, though only Leyva was mentioned), issued 18 days prior to the hearing. The Third Amended Consolidated Complaint issued after the hearing, but the change (the addition of another seven discriminatees) was raised by motion to the ALJ at hearing. The seven individuals, none of whom were accused of strike misconduct, fell within existing categories of alleged discriminatees and, thus, did not expand the theory of liability. Initially, the Employer did not oppose the amendment, but changed its mind the next day. The ALJ refused to alter his prior granting of the amendment.

conference order indicate that the theory of the case was made reasonably clear, i.e., the separation agreements were void and the strikers were otherwise entitled to reinstatement. The Employer's claim that it was unaware that there was an issue as to whether the strikers were permanently replaced has been addressed above.

In a related claim, the Employer asserts that the Executive Secretary improperly denied it the right to take Maturino's deposition prior to hearing. Regulation 20246 (Cal. Code Regs., tit. 8, § 20246) provides for depositions only where the Executive Secretary determines, in his discretion, that the witness will be unavailable for the hearing within the meaning of Evidence Code section 240, or where special circumstances make it desirable in the interest of justice. Since Sunrise failed to make the showing of necessity required by the regulation, it cannot be said that the Executive Secretary abused his discretion. To the extent that Sunrise is claiming that the Board's discovery procedures should be broadened, that is a matter that must be addressed through the regulatory or legislative process.

Toward the end of the hearing, the ALJ denied the Employer's motion for a continuance so it could locate the Union's attorney who was involved in the separation agreements, Bill Kransdorf. Sunrise now claims that it could not locate Kransdorf prior to that time and that it was denied the opportunity to conduct any discovery. The ALJ properly concluded

that Sunrise had failed to show why, with due diligence, it could not have located Kransdorf earlier or known that his testimony might be relevant.

The Employer also asserts that the ALJ exhibited bias and prejudice throughout the hearing. As examples, the Employer cites the fact that the ALJ early in the hearing put the parties on notice that he viewed the separation agreement on its face to be of suspect validity, asserts that the ALJ made snide remarks, refused to allow counsel for Sunrise to fully examine witnesses, and insisted on ending the hearing of June 9, 1995 despite the need for additional time to rebut the evidence provided by the General Counsel.

Upon reviewing the record, we find no evidence of bias on the part of the ALJ. In fact, it is difficult to come to any other conclusion than that the ALJ showed great patience with counsel who sometimes became combative and disrespectful. None of the ALJ's rulings denied the Employer the opportunity to respond to evidence presented in support of the complaint. A party cannot ascribe fault but to itself for failure to be aware of, and prepared to present, relevant defenses. The ALJ did cut off lines of questioning when it was clear to him that it was cumulative or was leading to no relevant information. This is fully consistent with an ALJ's authority to control the hearing and create a complete record without wasting scarce agency resources.

Lastly, the ALJ exhibited no prejudice in communicating his reservations about the separation agreements' provision for false layoff notices. If anything, this aided the Employer by putting it on notice of hurdles that would have to be overcome with evidence in support of the validity of the agreements.

ORDER

Pursuant to Labor Code section 1160.3, Respondent Sunrise Mushrooms, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging employees who engage in lawful economic strike activities.

(b) Failing or refusing to reinstate employees who have engaged in an economic strike, upon their unconditional offers to return to work.

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

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

(a) To the extent Respondent has not already done so, immediately offer the following employees reinstatement to their former positions of employment, or if no such positions exist, to substantially equivalent positions:

1. Ricardo Aguilera
2. Dionicio Arias
3. Arsenio Arguello Barrera
4. Jesus Manual Barrera
5. Guillermo Barron
6. Manuel Bautista
7. Adrian Dominguez
8. Antonia Duran
9. Maria Duran
10. Fernando Fernandez*
11. Jesus Herrera
12. Baltazar Mora
13. Guadalupe Leyva
14. Israel Ortiz
15. Manuel Hernan Perez
16. Jorge Leyva Quezada
17. Jesus Landin Ramirez
18. Reynaldo Ramirez
19. Pedro Ruiz
20. Jose Salcedo
21. Natividad Tapia
22. Salvador Toriche
23. Abel Trejo
24. Jose Luis Valenzuela
25. Paz Vega

*Unless it is shown that Fernandez engaged in serious misconduct so as to make him unfit for reinstatement and backpay.

(b) Make whole the above employees for all losses in wages and other economic losses they suffered as the result of Respondent's unlawful conduct, plus 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, 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 amounts of backpay and/or other economic losses due under the terms of this Order.

(d) Sign the attached Notice to Agricultural Employees, 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 thirty days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from September 25, 1993 to September 24, 1994.

(f) Post copies of the attached Notice, in all appropriate languages, for sixty 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 any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(g) Arrange for a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time and property 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 employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(h) Provide a copy of the Notice to each agricultural employee hired to work for Respondent for one year following the issuance of this Order.

(i) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps which have been taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with the terms of this Order.

DATED: April 26, 1996

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CASE SUMMARY

SUNRISE MUSHROOMS, INC.
(IUAW, Joel Tapia Chavez,
Manuel Hernan Perez)

22 ALRB No. 2
Case Nos. 93-CE-43-SAL
93-CE-64-SAL
94-CE-l-SAL
94-CE-4-SAL

ALJ Decision

The ALJ found that the Employer, Sunrise Mushrooms, Inc. violated section 1153, subdivisions (c) and (a) of the ALRA by discharging three employees engaged in lawful strike activities and by failing to reinstate economic strikers upon their unconditional offers to return to work. The ALJ found that the former strikers were entitled to immediate reinstatement because they were not permanently replaced and because a separation agreement many of the strikers signed was unenforceable. The ALJ dismissed the portion of the complaint alleging an unlawful unilateral increase in hourly wage rates and held that certain employees were lawfully discharged for engaging in strike misconduct. All parties filed exceptions.

Board Decision

The Board rejected the IUAW's argument that the denials of the six employees found to have engaged in strike misconduct should have been credited over the contrary testimony of other witnesses. The Board found no basis in the record for disturbing the ALJ's credibility resolutions, which were not only are based in part on demeanor, but also supported by other evidence.

The Board declined to impose sanctions on the Employer for its tardy compliance with the Board's rules on discovery, since no prejudice to the General Counsel had been shown. The Board found that the ALJ reasonably refused to credit former striker Jose Antonio Ferreyra's claim that he was placed on a recall list, and affirmed the ALJ's finding that Ferreyra was not entitled to reinstatement on the basis that Ferreyra's failure to offer to return to work precluded the finding of a violation.

Finding no basis for disturbing the ALJ's credibility determinations, the Board found no merit in the Employer's exception that it had successfully shown that Jorge Leyva threw rocks at a vehicle occupied by replacement workers. The Board, while acknowledging that the ALJ may have been mistaken as to which incident Ricardo Aguilera and Manuel Bautista were alleged to have been involved in, concluded that the lack of any corroboration or even the identification of a witness to the actual alleged incident involving Aguilera and Bautista compels the same conclusion, i.e., that the Employer failed to demonstrate that it had a good faith belief that they were engaged in serious strike misconduct.

The Board rejected the Employer's claim that it was not put on notice prior to the hearing that the status of the replacement workers was at issue. The Board noted that the Employer was on notice that General Counsel's central claim was that the separation agreements were not a valid impediment to reinstatement, and that permanent replacement of strikers is an affirmative defense to reinstatement which an employer has the burden to raise and establish.

While summarily affirming the various bases on which the ALJ found the separation agreements to be unenforceable, the Board discussed and rejected the Employer's argument that the well-established policy that a waiver of statutory rights be clear and unmistakable should not apply where the purported waiver occurs prior to a charge being filed. The Board noted that, under NLRB case law, where, as here, employees express a need for benefits and resign when told that was a necessary precondition, the right to reinstatement and backpay is not waived.

While rejecting the Employer's assertion that the ALJ improperly shifted the burden to the Employer when he found that Fernando Fernandez should be included in the Order because the record contained only hearsay evidence that Fernandez had engaged in strike misconduct, the Board held that the Employer may raise the issue in compliance because the Employer, in these circumstances, did not have the burden to prove unsuitability for reinstatement in the liability phase. The Board reversed the ALJ's finding that Tomas Torres and Antonio Vargas should be excused from making an unconditional offer to return to work because, having signed separation agreements, such an offer would be futile. The Board found that such excuse is available only in cases, unlike the present one, where the employment relationship has been severed by actions of the employer.

While acknowledging that the record reflects that the IUAW was as equally involved as the Employer in creating the settlement agreements and procuring the signatures of strikers, the Board noted that it was within the General Counsel's exclusive prosecutorial discretion to determine whether to issue a complaint against the Union. The Board found no merit in the Employer's additional claims that it was denied the right to take a deposition of a witness not shown to be unavailable, and that the ALJ improperly denied a continuance at the end of the hearing to allow the Employer to call a witness it claimed it had just located. The Board also found that the record revealed nothing to support the Employer's claim that the ALJ exhibited bias.

* * *

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), by the Independent Union of Agricultural Workers, Joel Tapia Chavez and Manuel Hernan Perez, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we had violated the Agricultural Labor Relations Act (Act) by discharging employees engaged in lawful strike activities, and by failing or refusing to reinstate economic strikers, upon their unconditional offers to return to work.

The Board has told us to post and publish this Notice.

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

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative (union);
3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation;
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 NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge employees who engage in lawful economic strike activities.

WE WILL NOT fail or refuse to reinstate employees who have engaged in an economic strike, upon their unconditional offers to return to work.

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

WE WILL, to the extent we have not already done so, offer those employees who were unlawfully discharged or not reinstated immediate reinstatement to their former positions of employment, or

if no such positions exist, to substantially equivalent positions, and make them whole for any losses suffered as a result of our unlawful conduct.

DATED: SUNRISE MUSHROOMS, INC.,

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907-1899. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	Case Nos	93-CE-43-SAL 93-CE-64-SAL 94-CE-l-SAL 94-CE-4-SAL
SUNRISE MUSHROOMS, INC., Respondent, and INDEPENDENT UNION OF AGRICULTURAL WORKERS, JOEL TAPIA, AND MANUEL HERNAN PEREZ, Individuals, Charging Parties.		

Appearances;

Robin Lynne Kubicek
Attorney at Law
Salinas, California for
Respondent

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DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: This case was heard by me on May 30, and 31, and June 1, 2 and 5-9, 1995, in Salinas, California. It is based on charges filed by the Independent Union of Agricultural Workers (hereinafter Union), which has intervened in these proceedings, Joel Tapia Chavez (Tapia) and Manuel Hernan Perez, individuals. The charges allege that Sunrise Mushrooms, Inc. (Respondent) violated section 1353(a) and (c) of the Agricultural Labor Relations Act (Act) by discharging and refusing to reinstate striking employees, and section 1353(a) and (e), by unilaterally implementing an increase in hourly wage rates. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint, which has been amended three times (complaint). Respondent filed an answer, denying the commission of unfair labor practices, and alleging affirmative defenses. General Counsel and Respondent filed post-hearing briefs, which have been duly considered. Based on the testimony of the witnesses, the documentary evidence received at the hearing,[1] and

[1]At the hearing, and in his brief, the Assistant General Counsel asserts that many of the documents offered by Respondent should have been rejected, because it failed to comply with a subpoena duces tecum and a subsequent discovery order by the Chief Administrative Law Judge. General Counsel also objected to the introduction of exhibits not timely identified and/or produced to it. Although Respondent at least generally identified many of the documents it intended to introduce, it failed to identify others, and General Counsel did not receive copies of any of the documents until shortly before, or at the hearing. Respondent gave various reasons for these failures, not all of which were particularly persuasive, and Respondent certainly could have exercised greater diligence in searching for those records, and the other documents it intended to introduce. Nevertheless, Respondent contended its records were made available to General Counsel, albeit in a totally disorganized manner, and the undersigned did not understand the Assistant General Counsel to deny this. Respondent's contention,

the oral and written arguments made by the parties, the following findings of fact and conclusions of law are made.

I. JURISDICTION

Respondent, a California corporation with an office and principal place of business located in Watsonville, California, is engaged in the business of agriculture, and is an agricultural employer within the meaning of section 1140.4 (a) and (c) of the Act. The Union is, and has at all material times been a labor organization within the meaning of section 1140.4(e). The employees named as alleged discriminatees are agricultural employees as defined by section 1140.4(b).[2] At all material times, Cecil Douglas Tanner, Respondent's President; Marvin Donius, formerly Respondent's General Manager; and Carlos Martinez Hernandez, Respondent's former Personnel Manager were supervisors as defined by section 1140.4(j).

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that other documents were not located until shortly before they were produced, while showing a lack of due diligence, has not been established to be false. It is also noted that Respondent had already submitted some of the documents to the Salinas Regional Office during the investigation of prior charges. Finally, General Counsel has not contended it was prejudiced by the late production, and did not request additional time to review the documents. Therefore, the rulings to admit the documents will not be changed.

[2]The Second Amended Consolidated Complaint lists 29 alleged discriminatees. At the outset of the hearing, General Counsel's motion to amend the complaint, to add seven additional employees, was granted, with no opposition from Respondent. On the second day of the hearing, Respondent, without showing good cause, reversed its position, and moved to dismiss the amendment. Respondent's motion was denied, since it failed to show good cause for its change in position, and because the amendment did not expand General Counsel's theory of liability, but only added employees arguably covered by the unfair labor practices already alleged.

II. OVERVIEW OF THE STRIKE

Respondent produces mushrooms for sale to the public. Its employees, for the most part, work year-round. Among its employees are pickers, packers, general laborers, forklift drivers, tractor drivers, irrigators and mechanics. The majority of these employees are pickers, who are paid on a piecerate basis. Others, such as the packers and general laborers, are paid on an hourly basis. As of July 19, 1993,[3] Respondent's minimum hourly wage was $5.00, and pickers were paid $1.50 per box.

The Union was certified as the collective bargaining representative for the employees of Respondent's predecessor in January 1993. After the Union was certified, several negotiating sessions were conducted. The primary representatives were Pete Maturino, the Union's President, and Tanner, Donius and attorney, Robin Lynne Kubicek, for Respondent.[4]

Respondent, for the stated reason that it was losing money, proposed reducing the minimum hourly rate of general laborers and packers to $4.75, while the Union proposed maintaining a rate of $5.00 per hour. Respondent proposed a reduced piecerate of $1.20 per box for pickers, while the Union sought to retain $1.50 per box. Other items remained in dispute.

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[3] All dates hereinafter refer to 1993 unless otherwise indicated.

[4] A few employees, including Miguel Barrera attended some of the sessions with Maturino, while some management representatives, such as Phillip Daniel Cleaver, Vice President of Sunrise Laboratories, an affiliated company, and a 19% owner of Respondent, attended with Tanner and Kubicek.

Respondent declared impasse, which the Union did not dispute. On July 19, Respondent informed the Union and its employees that, effective July 25, it would implement portions of its proposal, including the reductions in piecerate for pickers and the hourly pay for packers and general laborers. Largely as the result of the wage issues, the Union called a strike, which commenced in the early morning hours of August 12.

This was a bitter strike, which divided families and friends, several of whom had worked together for over a decade. The credible testimony of several witnesses, and supporting documentation, also shows this was a violent strike from the outset, with many incidents of blocking vehicles, the throwing of rocks and other objects, verbal abuse and threats, and the striking of vehicles with rocks, picket signs, fists and other objects. At least five replacement or non-striking employees were injured by rocks or flying shattered glass, the windows of many vehicles were broken (along with other body and mechanical damage), tires were slashed and acts of gross vulgarity took place. Several arrests were made, and citations issued, including two arrests of Maturino, for allegedly breaking a windshield with a rock, and trespassing. Maturino was also identified as having slashed tires. One non-striking employee was arrested, for driving under the influence and possession of a concealed weapon, after picketers complained he had tried to run them down, and brandished a firearm.

Respondent filed a charge against the Union, in

Case No. 93-CL-5-SAL, regarding the strike violence and intimidation, which the Union settled. Respondent also obtained two temporary restraining orders. Deputies from the Monterey County Sheriff's Department were regularly present during, the strike, and several reports were filed with them by employees, supervisors and security guards hired by Respondent. Respondent also sent letters to the Union, protesting the violence and threatening to sue the Union and Maturino, as an individual, for damages.

Estimates on the number of employees who initially joined the strike varied from 110 to about 135, as did the evidence of those who did not join the strike, between 10 and 35.[5] Respondent replaced the strikers within a few days, but permitted those few who wanted to return during the strike to do so.[6]

III. THE HIRING OF REPLACEMENT EMPLOYEES AND THEIR STATUS

According to Tanner, at the outset of the strike, Respondent sent the striking employees letters stating they should return to work within three days, or they would be permanently replaced. Donius did not mention the permanent replacement threat

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[5]Most of the disparity appears based on Maturino's inclusion of eight to ten employees who he believes joined the strike on the first day, but returned on the second.

[6]Tanner sent the Employment Development Department (EDO) a Report of Trade Dispute, dated August 18, in which he stated all of the strikers had been replaced, and no jobs were available. Evidently, Respondent changed its position regarding the availability of work, because the strikers were twice denied unemployment benefits during the strike. A total of about 150 replacement employees were hired between August 18 and 'September 2.

in his testimony, and stated the replacements would have been laid off if large numbers of strikers had wanted to return to work during the strike.[7]

Respondent initially contacted labor contractors for replacement employees, and was told the hourly rate would be $7.50 to $8.00 per hour, which was unacceptable. Respondent then placed an English-language help wanted advertisement in a Watsonville, California newspaper. The advertisement stated, inter-alia, that Respondent had openings for permanent, fulltime positions. Respondent translated the ad into Spanish, and passed out copies in the Watsonville and Santa Cruz, California areas. To Donius' knowledge, no employees were hired as the result of distributing the Spanish-language version. Although Respondent obtained a few replacements who were friends or relatives of non-striking employees and managers, and at least one as the result of the newspaper advertisement, the vast majority were brought in by a labor contractor offering a lower wage rate.

Tanner testified that Donius was in charge of hiring the replacement employees. Donius is not fluent in Spanish, and Hernandez, at the time, was the primary management representative who communicated with employees concerning personnel matters. Tanner stated he was present while replacement employees completed employment applications, but did not testify concerning any discussions with them concerning their tenure.

Donius testified that Hernandez was directly involved in

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[7]The letter to employees was not produced at the hearing.

the hiring of replacements. He did not relate any statements made to or by replacement employees concerning their tenure. Although Respondent called Hernandez as a witness, he was not asked to testify concerning any conversations he had with replacement employees. Hernandez stated that the replacement employees completed standard employment applications and other personnel documents.

Lance Balvin was the only replacement employee who testified. Balvin, who is English-speaking, saw Respondent's help wanted advertisement, and sought employment. When hired, nothing was said to Balvin regarding his tenure.

Analysis and Conclusions

Economic strikers who make unconditional offers to return to work must be offered immediate reinstatement unless the employer shows a substantial business justification for not doing so. One such justification is the hiring of permanent replacement employees, in which case, the strikers must be offered the opportunity to fill vacancies as the permanent replacements leave positions for which the strikers are qualified. A refusal to reinstate economic strikers as obligated is inherently destructive of their statutory rights, and therefore unlawful, even absent a showing of discriminatory motive. Thus, even if an employer has reinstated some economic strikers, its failure to reinstate others as required is still unlawful. Laidlaw Corp. (1968) 171 NLRB 1366 [68 LRRM 1252], enfd. (CA 7, 1969) 414 F2d 99; Vessey & Company, Inc. (1985) 11 ALRB No. 3; Vitronic Division of Penn Corp. (1978)

239 NLRB 45 [99 LRRM 1661], enfd. (CA 8, 1979) 630 F2d 561 [102 LRRM 2753] ; MCC Pacific Valves (1979) 244 NLRB 931 [102 LRRM 1183] .

A claim that permanent replacements have been hired is an affirmative defense, which must be proved by the party making the assertion. It is not sufficient to show that the employer considered the replacements to be permanent. Rather, it must be established that there existed a mutual understanding between the employer and replacements that their employment was to be permanent. The key element in establishing the employees' understanding is that their permanent status was communicated to them. Vessey & Company, Inc. v. ALRB (1989) 210 Cal.App.3d 629, affirming Vessey & Company. Inc.. et al. (1987) 13 ALRB No. 17; Sam Andrews' Sons (1986) 12 ALRB No. 30; Frank Ivaldi. et al. (1993) 310 NLRB 357, at pages 374-380 [122 LRRM 1462].

The only evidence presented that employees knew they were being hired on a permanent basis is the statement in the advertisement, that these were permanent, fulltime positions. It has been established that Balvin read the advertisement, but it cannot be inferred that the other replacements were aware of it, because the vast majority were hired through a labor contractor. Although Hernandez and Donius testified, they gave no evidence showing the employees knew of the permanency of their tenure, and even though Respondent continues to employ many of the replacements, it called none of them to show their understanding as of the time they were hired. Furthermore, Donius' testimony,

that Respondent would have displaced the replacements if the strikers had returned to work, casts doubt as to whether Respondent informed the replacements their jobs were permanent. Under these circumstances, it may only be concluded that Respondent has failed to meet its burden of proof. Accordingly, since the evidence fails to establish that the replacements were permanent (with the possible exception of Balvin), the strikers were entitled to immediate reinstatement upon their unconditional offers to return to work, absent some other justification.

IV. THE UNILATERAL WAGE INCREASE AND ITS EFFECT ON THE NATURE OF THE STRIKE

The complaint alleges that Respondent unlawfully increased the wage rate for strike replacements, thereby converting the work stoppage to an unfair labor practice strike. General Counsel contends this is an additional reason why the strikers were entitled to immediate reinstatement. The undisputed facts show that Respondent, on or about August 15, without notice to the Union (even though Maturino was taking strike access at the time) paid both replacement and non-striking employees in the packing and general labor classifications $5.00 per hour, after having lowered the wage rate for employees in these classifications before the strike $4.75 per hour.[8] As noted

[8]The charge in Case No. 93-CE-43-SAL alleges that only the replacement employees received the wage increase. General Counsel, as of the start of the hearing, was also contending that only the wage increase to replacement employees violated the Act, although Respondent, in its answer and at the prehearing conference stated it had raised the wages for all employees in the affected job classifications. None of the charges specifically refer to the strike having been converted to an unfair labor practice strike by

above, Respondent initially contacted labor contractors for replacement employees, and was told the hourly rate would be $7.50 to $8.00 per hour. Respondent then advertised for permanent replacements at wages ranging from $4.50 to $10.00 per hour, with little success.

The uncontroverted testimony establishes that the contractor who eventually supplied most of the replacements insisted that employees would not cross a picket line for less than $5.00 per hour. Since this was the lowest minimum rate Respondent could obtain, it agreed. When the replacement employees in the minimum classifications were initially paid at a lower rate, due to an error by Respondent, they demanded $5.00 per hour to continue crossing the picket line.

Respondent increased the minimum hourly rate of non-striking employees, because its attorney believed that paying different rates, based on replacement status, would constitute unlawful discrimination. Striking employees learned of the wage increase, and at least some of them were upset by this.

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the unilateral change, and General Counsel did not contend this as of the prehearing conference. It was not until the Second Amended Consolidated Complaint was issued, after the prehearing conference, that an unfair labor practice strike allegation appeared. Again, only the unilateral changes to replacement employees was alleged as unlawful. At the hearing, General Counsel raised the issue of the increases to non-striking employees, but did not move to amend the complaint. Given this history, and the greatly expanded theory of liability which would result from now considering whether the increases to non-striking employees changed the nature of the strike, no such finding will be made.

Analysis and Conclusions

Until fairly recently, the National Labor Relations Board (NLRB) held that while an employer could unilaterally determine the manner in which it obtained replacement employees, it could unilaterally change wage rates and benefits only if it had reached impasse with the union, and the change was the same as, or reasonably comparable to its last offer. Brady - Stannard Motor Company. Inc. (1985) 273 NLRB 1434 [118 LRRM 1170], enfd. Local 259. United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB (CA 2, 1985) 776 F2d 23 [120 LRRM 3102] ; Evacuation-Construction. Inc. (1980) 248 NLRB 649 [104 LRRM 1088], enf. denied (CA 4, 1981) 660 F2d 1015 [108 LRRM 2561].[9] The ALRB followed this rule, in West Foods. Inc. (1985) 11 ALRB No. 17, at pages 24-26, ALJD at pages 122-126.

Currently, the NLRB treats the setting of terms and conditions of employment during a strike, including wages, for replacement employees as a management prerogative, incidental to the employer's right to hire replacement workers, which does not require bargaining. Goldsmith Motors Corp. (1993) 310 NLRB 1279 [145 LRRM 1021]; GHR Energy Corp. (1989) 294 NLRB 1011, at page 1012 [133 LRRM 1069]; Marbro Company. Inc. (1987) 284 NLRB 1303 [126 LRRM 1282]; Capitol -Husting Company. Inc. (1980) 252 NLRB 43, at page 45 [105 LRRM 1492], enfd. (CA 7, 1982) 671 F2d 237 [109

[9]In effect, this placed the same burden on employers as they faced in any other situation where they desired to make changes, including those for non-striking employees. See Robbins Co. (1977) 233 NLRB 549 [96 LRRM 1569].

LRRM 3234] .[10]

Given the often urgent need to obtain replacement workers to harvest and pack agricultural commodities, there is no reason to believe that agricultural employers have any less interest in obtaining replacement employees, without constraints. Therefore, since the ALRB is bound to follow NLRB precedent where practical, it is concluded that Respondent had no obligation to give the Union notice of the minimum hourly wage rate it set for replacement employees, or the opportunity to negotiate that subject, and did not violate Section 1353(a) or (e) of the Act in failing to do so.

It is undisputed that this strike was initiated for economic reasons. In order to convert an economic strike to an unfair labor practice strike, the employer must commit unfair labor practices which prolong the dispute. The ALRB has adopted the NLRB's rule that unfair labor practice strikers generally must be immediately reinstated to their former positions of employment, or to substantially equivalent positions, upon their unconditional offer to return to work, even if this requires discharging replacement workers. Admiral Packing Co.. et. al. (1981) 7 ALRB No. 43; Orbit Corporation/Sea Jet Trucking (1989) 294 NLRB 695 [132 LRRM 1047].

The only alleged unfair labor practice claimed to have prolonged the strike which has properly been raised is the setting

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[10]The NLRB continues to require notice and the opportunity to bargain with respect to changes in the terms and conditions of employment for non-striking employees, unless impasse has been reached, and the change must be consistent with the employer's last offer. Marbro Company. Inc., supra.

of higher wage rates for some replacement employees. Since no merit has been found in that allegation, it is concluded that the strike continued to be economic in nature.[11]

V. EMPLOYEES DISCHARGED FOR ALLEGED STRIKE MISCOUNDCT[12]

1. Joel Tapia Chavez (Tapia): Tapia was accused of three acts of misconduct: a verbal threat to Martin Garcia, a verbal threat to Anna Ayala and throwing rocks at a vehicle driven by Aubrey Norman Seagraves. Respondent's "Summary of Allegations of Striker Misconduct" alleges that on August 12, Tapia told Garcia he would "knock the shit" out of Garcia and his family. Apparently, Respondent received this information from its Head Grower, Anastacio Andrade, who testified he observed this, and that Tapia uttered an oath to Garcia. In his testimony, Andrade placed the incident on about the fourth day of the strike (August 15). As will be detailed below, Andrade also accused Miguel Barrera and Francisco Guerrero of threatening to "kick the shit" out of those going to work during the strike.

Garcia, Respondent's Assistant Grower, and Tapia's cousin, did not testify that any such statement was made. Rather,

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[11]In light of this conclusion, it is unnecessary to reconsider Respondent's motion to dismiss the unfair labor practice strike allegation as untimely, or to consider its other defenses to the unilateral change allegation.

[12]Respondent discharged ten employees for alleged strike misconduct, nine of whom are alleged in the complaint. Respondent advised the Union of some of the allegations against the employees, and requested a response by October 15. When the Union failed to respond by that date, Respondent sent letters of discharge to the employees, dated October 20. After the Union learned of the discharges, it responded by denying any of the alleged misconduct took place.

on August 12, Tapia approached him and yelled "Cousin, get out or you will regret what will happen to you and your family. Do it soon, or you'll regret it, son-of-a-bitch." When Garcia asked Tapia not to speak to him in that manner, Tapia repeated the statements. Respondent's summary of strike misconduct and letters to the Union do not mention this incident as a reason for Tapia's discharge.

Tapia denied ever threatening Garcia or his family. Tapia admitted he yelled at Garcia, but contends he told Garcia he was wrong to work as a "scab" and to bring his wife to work in that capacity. Tapia told Garcia that he and his wife were never to come to his home again.

Ayala is a safety consultant employed by Respondent's workers' compensation carrier. During the strike, in addition to her normal duties, she performed general labor work and at times, transported non-striking employees through the picket line. Ayala testified that early in the strike (her declaration places the date as August 14), she was about to move her vehicle, which was parked on Respondent's premises, when Tapia and another employee walked onto the property, and Tapia, who she knew at the time, yelled at her, in Spanish, "Anna, tonight it's your turn!" Ayala took this as a threat, due to the violence she had previously observed. Tapia, in his testimony, denied making this statement. Rather, he loudly asked Ayala, from the picket line, if she had bad feelings about transporting people to work during the strike, and asked her to consider the strikers' cause.

Seagraves was employed by Respondent as its night watchman, and worked during the strike. He testified that on six or seven occasions, rocks were thrown at his vehicle. Seagraves observed a pattern, where the rock-throwers would hide behind vehicles and then, after receiving verbal signals, would pop up and throw the rocks. Seagraves became highly upset by this, and decided to start looking for who was throwing the rocks.

On the date of the incident in question (set forth as August 28 in the Sheriff's Department report), Seagraves was driving off Respondent's premises when he observed what he believed to be a signal to two persons crouched behind a parked vehicle. Seagraves then saw the two straighten up and throw rocks at his van, striking it and causing minor damage. Seagraves recognized these individuals from work, but did not know their names. At the hearing, he was unable to give their physical descriptions.

Seagraves testified that he got out of his vehicle and accused the two of throwing the rocks. As the picketers surrounded his vehicle, he began banging on the top and shouting. Sheriff's deputies arrived, and Seagraves pointed out Tapia and striker Sect Lujano Castelan. Seagraves declined to press charges against them but a report was taken, later obtained by Respondent. Seagraves also reported the incident to Respondent's management and attorney.

Tapia and Castelan denied that they threw rocks at Seagraves' vehicle, although they admitted Seagraves accused them

of this. Tapia, who was regularly on the picket line, initially denied ever seeing any rocks thrown during the strike, or any other improper conduct by the strikers. When recalled later in the hearing, Tapia testified he did observe a rock hit Seagraves' vehicle. Tapia also testified he received a citation for this incident, where the Sheriff's Department report, in addition to a letter from the Union's attorney (Respondent's Exhibit 10) and Seagraves' testimony, shows he did not. Tapia further testified that Seagraves drove off to contact the Sheriff's deputies, but the report corroborates Seagraves' version of the incident. In addition, Tapia executed a sworn declaration stating he signed an employment separation agreement, when in fact, he did not.

Castelan testified that at the time of the rock-throwing incident, he and Tapia were carrying flags, a contention not corroborated by Tapia. Castelan also testified he was cited for the incident, when he was not. He further contended that the Sheriff's deputy was with Tanner at Respondent's office, while Tanner, corroborated by the report, testified the patrol vehicle was parked on the street. Castelan also gave confused, contradictory testimony concerning when he signed a recall list circulated by Maturino.

It is found that Respondent, at the time it discharged Tapia, had a good-faith belief that he had thrown a rock at Seagraves' vehicle and the credible evidence establishes that Tapia, in fact, threw the rock. Seagraves and Ayala were among the few witnesses at this hearing who could be considered totally

candid in their testimony. Seagraves, by refusing to press charges, demonstrated he had no personal ax to grind, but was truly upset at what took place. Similarly, Ayala's vivid account of her encounter with Tapia, and her recitation of the somewhat unusual Spanish-language phrase chosen by Tapia rings true.

Some of the inconsistencies and inaccuracies in the testimony of Tapia and Castelan are set forth above. Both gave the impression of actively concealing, to the extent possible, anything that might be construed as improper behavior by themselves or anyone else supporting the strike. Irrespective of whether the statement to Ayala constituted coercive strike misconduct, the denial by Tapia of having made it adversely affects his credibility. Accordingly, the evidence establishes the rock-throwing incident.[13]

2. Miguel Barrera: Respondent's summary cites five incidents of misconduct by Barrera including:

a) Threats of bodily harm to Carlos Martinez Hernandez on August 13;

b) Removal of company property on August 12;

c) Threats to "kick the shit" out of persons who crossed the picket line on August 12;

[13]As noted above, Andrade, but not Garcia, claimed that Tapia told Garcia he would "kick the shit" out of striking employees. Andrade's similar allegations against Miguel Barrera were also not corroborated by other witnesses. This does not mean that Respondent acted in bad faith by believing Andrade. Since the outcome herein is not affected by whether the purported threats to Garcia and Ayala constituted "coercive strike misconduct" warranting discharge, no conclusions will be reached on those issues.

d) A report that he was threatening employees on September 2; and

e) A rock-throwing incident involving a vehicle driven by Phillip Daniel Cleaver. For the purposes of this Decision, only incidents a) and e) will be discussed.[14]

Hernandez, a stipulated supervisor, is Respondent's former personnel manager, but has not been employed by Respondent since April 8, 1994. He testified that near the beginning of the strike (the Sheriff's Department report sets the incident on August 13), he was in the process of reporting an incident to a deputy when Barrera approached him and, in Spanish, stated, "Don't be a 'finger' because later you'll be crying, they'll kill you." Barrera, in his testimony, denied having said anything to Hernandez.

Cleaver testified that in early September (the Sheriff's Department report sets the incident on September 5), he saw Barrera with three other unidentified individuals, who were carrying flags or picket signs, as he pulled up to a stop sign, on

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[14]No testimony was presented concerning incident d), and Respondent admitted that Barrera would not have been discharged solely on the basis of incident b). With respect to incident c), the summary and Respondent's letters to the Union only refer to the one statement being made, with the summary listing Andrade as the only witness. Andrade, who contended that both Barrera and striker Francisco Guerrero said they would "kick the shit" out of employees who went to work, was not corroborated by Garcia, or former employee Jose Antonio Ferreyra Chavez (Ferreyra), who were both present. Andrade, Garcia and Ferreyra gave conflicting, non-corroborating accounts of other alleged statements by Barrera on August 12, which do not appear in the summary or Respondent's letters to the Union. It is also noted that Francisco Guerrero was not discharged based on what he said on that date, although Andrade accused him of making the same threat as Barrera.

his way from the picketing area. Cleaver recognized Barrera, because he had met him during contract negotiations, so he rolled down the window and said hello. Barrera acknowledged his greeting by nodding. As Cleaver drove off, he saw Barrera pick up. a rock, so he accelerated. He then saw Barrera throw the rock at his vehicle, but it missed. Cleaver found his vehicle in the wrong lane of traffic on the highway, and was badly shaken by this. He returned to Barrera and told him he was going to have him arrested. Cleaver reported the incident, and Barrera was cited.

When initially asked about the incident, Barrera testified, "Well, [Phillip] was accusing me of having thrown a rock to a van, but I didn't hit anybody. It was like from here to there." When asked again, Barrera testified that if he had thrown the rock, he would have hit Cleaver's vehicle. Given a third opportunity to respond, Barrera simply denied throwing the rock.

When recalled as a witness, Barrera, contradicting both his earlier testimony and a sworn declaration taken by the Union, denied knowing who Cleaver is or that Cleaver accused him of throwing a rock. Barrera later returned to his earlier position, that Cleaver had accused him. In his testimony, Barrera denied seeing any picket line misconduct or having any knowledge thereof, despite having been a picket-line captain who was present almost every day of the strike,[15] and having been identified as being present when massive strike misconduct took place.

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[15] Barrera initially testified he was present every day during the strike, but later changed his testimony, stating he missed about four days in September.

Barrera further testified that he was, to Respondent's knowledge, the most active employee supporting the Union, and was the one who had brought it in to organize the employees. He claimed that on several occasions before the strike, Tanner had told him he wished Barrera would leave because he had brought the Union in. In addition, Barrera testified that Respondent brought someone in "from the State"[16] who told Respondent's employees Barrera was lying to them. Barrera contended he was also accused in a second rock-throwing incident, at a time he was not even present, and these allegations are just a pretext to get rid of him.[17]

It is found that as of the date of Barrera's discharge, Respondent had a good-faith belief that Barrera threw the rock at Cleaver's vehicle, and the evidence establishes that, in fact, he did this. Although Cleaver did not identify the individuals present with Barrera when he threw the rock, the vast majority of those carrying flags and picket signs during the strike were striking employees. Therefore, it is found that at least one striking employee, other than Barrera, witnessed the incident. Cleaver, like Seagraves and Ayala, was very impressive as a witness from the standpoint of his demeanor. His detail in recounting the rock-throwing incident was also impressive and, despite Barrera's contentions, was not a fabrication designed to

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[16]Barrera was apparently referring to a labor relations consultant.

[17]Respondent's letter to the Union, dated October 11(Respondent's Exhibit 9), also refers to the second incident.

get rid of him.

In addition to the inconsistencies and apparent admission to the rock-throwing noted above, Barrera generally was a hostile, evasive and non-responsive witness, who did not convey the impression of truthfulness. Barrera also denied making the statement attributed to him by Hernandez. While other portions of Hernandez's testimony displayed some weaknesses in recall and accuracy, he was convincing in recounting the colorful use of words by Barrera. Thus, Barrera was contradicted on a second incident by a more credible witness.

3. Rogelio Guerrero Trejo (Guerrero):

Respondent's summary cites three allegations of misconduct involving Guerrero:

a) Verbal threats to Andrade on August 12;

b) Hitting the vehicle driven by a non-striking employee with a picket sign, on August 17; and

c) Throwing a rock at the vehicle driven by strike replacement Lance Balvin. For the purposes of this decision, only incident c) will be discussed in detail.[18]

Lance Balvin worked as a replacement employee for three months, at which point he quit because he felt it was "dangerous

[18]A1though Respondent produced a police report concerning incident b), it is clear this was not relied upon in the discharge decision, since the driver of the vehicle was not identified, and Respondent knew it would be unable to procure him as a witness. With respect to incident a), the evidence shows that Respondent did not rely on verbal threats alone to discharge employees. In any event, Andrade has already been found to be a rather unreliable witness. Furthermore, Guerrero's version of the incident, denying any explicit threats, sounded quite plausible and is credited.

and scary." Balvin testified that in August, he saw Guerrero throw a rock which struck his vehicle, as he was entering Respondent's premises. This caused minor damage. Balvin continued onto the property, and reported the incident to Tanner. Tanner advised Balvin to contact the Sheriff's deputies, which he did. Balvin pointed out Guerrero to them, and made a citizen's arrest. Although Guerrero was booked on the charge, he was never tried, apparently because Balvin was paid restitution for the damage.

At the hearing, Balvin described Guerrero as being 5'10" to 6' tall and weighing 160 pounds. Balvin also described Guerrero as being heavy. He did not believe Guerrero had a mustache. Balvin recalls that Guerrero was wearing a serape. Tanner testified that Guerrero regularly wore a serape during the strike, and was the only striker wearing one that day. Tanner also testified that he has seen Guerrero with and without a mustache.

Guerrero, who is actually 5'5" tall and has a mustache, denied throwing the rock. He testified he had a mustache during the strike and that "everybody" did. Guerrero stated he wore a serape on the day of the incident, but others wore,similar serapes.

Guerrero initially testified that he was standing by one of the entrances to Respondent's facilities when Balvin's vehicle passed, but later contended he had just exited a portable bathroom. Guerrero at one point testified that he had a clear

view of Balvin's vehicle, and no one threw any rocks at it or caused any damage. He then testified that the bathroom was blocking his view, and he assumed no rocks hit Balvin's vehicle, because the guards were close by and would have arrested whoever did this. On another matter, Guerrero initially testified that on the first morning of the strike, no one threatened any of those crossing the picket line, but only requested they respect their cause. With some prodding, Guerrero admitted some of the picketers became angry and used "strong" language.

Although Balvin gave a highly inaccurate estimate of Guerrero's height, and probably was wrong in his belief that Guerrero did not have a mustache, he was still a more credible witness. In addition to the significant inconsistencies in Guerrero's testimony, Guerrero was also non-responsive on several occasions. His efforts to show that others looked and dressed like him, and that no damage or misconduct took place were unimpressive, given the credible evidence to the contrary.

Balvin did not give the impression of being revenge-oriented, and there is no evidence of any reason why he would have intentionally mis-identified the rock-thrower. While a mistake in identity is always a possibility, Balvin appeared certain that he correctly identified Guerrero as the rock-thrower to the Sheriff's deputies. In this regard, the credible evidence shows that Guerrero stood out, because he was the only one in the vicinity wearing a serape. Therefore, the evidence preponderantly establishes that Respondent reasonably believed Guerrero threw the

rock damaging Balvin's vehicle, and that he, in fact, did this.

4. Jorge Leyva Ouezada (Leyva):

Leyva was accused of throwing a rock, striking the van driven by Nori Palomino, an employee of one of Respondent's affiliated companies. Palomino, who regularly transported non-striking employees through the picket line, testified that commencing the second day of the strike, the van was pelted with rocks on a daily basis. On one occasion, employees inside were injured by the rocks and broken glass. She was also the target of various shouted threats and obscenities, and picketers frequently blocked her vehicle.

Palomino testified that on the morning of September 5, she was driving the van with employee-passengers when she saw Leyva at her side of the van holding a flag. Leyva then picked up a rock, and threw it, striking the vehicle. Palomino, however, later testified she observed Leyva through the van's inside rear-view mirror (indicating he was behind the van). Palomino, and later Tanner, denied the van's rear window was tinted, but the Sheriff's Department report specifically notes it was darkly tinted.[19] Furthermore, the report notes that Palomino initially claimed the van was struck in the rear, but inspection revealed damage to the driver's side panel. Palomino, who had never seen Leyva before the incident, testified he is about 5'2" to 5'3"

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[19]Tanner, on being confronted with the report, then claimed Palomino spotted Leyva through the driver's-side window. Leyva, probably exaggerating the point, testified that all of the windows were tinted.

tall, when in fact, his height is 5'9".

Palomino made a citizen's arrest of Leyva, and he was cited, but never tried for the offense. According to Palomino, she asked Leyva, at the scene, why he had thrown the rock, and he replied, "Because of your boss, that's why."

Leyva denied throwing the rock, or telling Palomino the reason. Although Leyva was generally not a very impressive witness, and was easily confused when questioned, his denials are credited. As with Balvin's identification, Palomino gave a highly inaccurate estimate of Leyva's height. Unlike Balvin, Palomino gave the impression of being an angry individual, bent on making someone pay for the indignities she suffered during the strike. Also unlike Balvin, Palomino, who was quite familiar with the van, clearly gave false testimony when she denied the rear window was tinted. It is also notable that both in her testimony, and in her report to the deputies, Palomino showed confusion as to whether the rock had come from the side or the rear. Finally, and without condoning the rock throwing that did take place, it is difficult to imagine how Palomino or the van would have survived the strike if it had been pelted by rocks every day after the first, as she contended.[20] Accordingly, while Respondent may have reasonably believed Leyva was the culprit, the credible evidence preponderantly establishes that he did not throw the rock as alleged.

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[20]Cleaver, who was a far more credible witness, stated the van was damaged two or three times during the strike.

5. Ricardo Aguilera, Manuel Bautista. Ramon Esquival and Octavio Enricrue Fuentes:

None of these employees appears in Respondent's summary of strike misconduct. Respondent's attorney, in letters to Maturino dated October 5 and 11, stated that these four strikers were being considered for discharge because they allegedly threw rocks that struck a van driven by a supervisor. Respondent's only witness concerning this incident was Andrade. None of the accused employees testified, and Respondent produced no law enforcement report on the incident.

Andrade believes the rock throwing took place on August 16, at about 6:00 p.m. Andrade was driving an automobile (not a van) with employee passengers, when he observed Fuentes and Esquival, who he knew from work, come out from behind some bushes and throw rocks, striking the vehicle. Andrade was quite certain only those two were in the area, and at no time mentioned Aguilera or Bautista. Andrade reported the incident to Respondent's management and attorney.

Although Andrade was generally not a convincing witness, his testimony on this incident was believable, and is credited. Accordingly, it is found that Respondent reasonably believed that Fuentes and Esquival threw the rocks, and that, in fact, they did so. On the other hand, it remains a mystery why Respondent believed Aguilera and Bautista were involved, and the only evidence, Andrade's testimony, establishes they were not.

6. Arturo Placencia:

Placencia was discharged for throwing objects at an

automobile driven by a non-striking employee, on September 6. Placencia did not testify at the hearing.

Marvin Donius testified that he observed Placencia, who he knew from work, throw an object at the automobile driven by an employee. Other striking employees, and Seagraves were in the vicinity at the time. Donius belatedly identified Humberto Garcia as also throwing objects at the vehicle. Donius reported this incident to the authorities, and a report issued. Seagraves corroborated this testimony, stating he observed the two throw "little objects" which struck the vehicle, and Donius identified them to him. The driver of the vehicle did not testify, and apparently no charges were filed.

Based on the foregoing, it is concluded that Respondent had reason to believe that Placencia threw one or more objects at the vehicle, and he, in fact, did throw one or more small objects .[21]

Analysis and Conclusions

An employer may discharge a striking employee who engages in strike misconduct sufficiently egregious to render the employee unfit for further employment. It has the initial burden of establishing a good faith belief that the employee engaged in such misconduct, and that the discharge was for that reason. Then, the burden shifts to General Counsel to establish that the

[21]Garcia was also discharged for the incident, but is not named in the complaint. Although Garcia is also not named in the Sheriff's Department report, or Respondent's letter of October 5, Seagraves corroborated Donius' testimony regarding Garcia, Respondent's summary of strike misconduct sets forth Garcia's involvement, and he is identified in Respondent's letter of October 11.

employee, in fact, did not engage in the misconduct. Bertuccio Farms (1984) 10 ALRB No. 52.

The National Labor Relations Board (NLRB) has expanded its definition of strike misconduct warranting discharge.. Its current test disqualifies employees who engage in conduct which tends to discourage other employees from exercising their statutory rights (most commonly their right not to participate in a strike). Clear Pine Mouldings. Inc. (1984) 268 NLRB 1044 [115 LRRM 1113].

The throwing of objects at vehicles, in the presence of striking or non-striking employees, constitutes coercive strike misconduct. It is immaterial whether the objects cause only slight damage, or no damage at all, since the conduct itself is highly coercive. GSM. Inc. (1987) 284 NLRB 174 [125 LRRM 1133]; New Galax Mirror Corp. (1984) 273 NLRB 1232, at page 1233 [118 LRRM 1519]; Central Mack Sales. Inc., et al. (1984) 273 NLRB 1268 [118 LRRM 1615]; Hotel Holiday Inn de Isla Verde (1982) 265 NLRB 1513 [112 LRRM 1191]; Cloucrhertv Packing Co. (1989) 292 NLRB 1139 [131 LRRM 1699]. Even if the object is unlikely to cause damage or injury, such as a tomato thrown at a bus, the throwing of such an object constitutes coercive strike misconduct. Massachusetts Coastal Seafoods. Inc. (1989) 293 NLRB 496, at pages 530-531 [132 LRRM 1035]. The fact that criminal charges are later dropped is not dispositive of whether the employer had a reasonable belief that misconduct took place. New Galax Mirror Corp., supra.

Based on the foregoing, it is concluded that Respondent

discharged Tapia, Barrera,[22] Guerrero, Esquival, Fuentes and Placencia,[23] based on its reasonable belief that they engaged in strike misconduct warranting discharge, which has not been credibly rebutted by General Counsel.[24] Accordingly, the allegations concerning these employees will be dismissed.

Irrespective of whether the evidence establishes that Respondent had a reasonable belief that Leyva, Aguilera or Bautista engaged in coercive strike misconduct, which is highly questionable in the cases of Aguilera and Bautista, the credited evidence shows that they did not, in fact, engage in the alleged misconduct. Accordingly, their discharges violated §1153(a) and

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[22]Barrera is the only employee accused of strike misconduct who General Counsel seriously contends was singled out for his leadership in Union affairs. It has been found that the rock-throwing incident involving Cleaver did, in fact, take place and was not fabricated so that Respondent could rid itself of a Union activist. It is concluded that even if Respondent harbored substantial animus toward Barrera for his Union activities, it still would have discharged him for throwing the rock, as it did other strikers. In light of these conclusions, it is unnecessary to determine the effect of Barrera's threat to Hernandez, particularly since there is no evidence that any statutory employee heard the statement, other than Barrera.

[23]Placencia's discharge raises a close issue, in light of Seagraves' and Donius' vague descriptions of the objects thrown. Nevertheless, if they were big enough for them to notice, the throwing thereof tended to coerce employees, particularly in the context of many other incidents where objects were thrown.

[24]By coercive strike misconduct, only the throwing of rocks or other objects is considered herein. As noted above, it does not appear the Respondent discharged employees based on verbal threats alone and conversely, the throwing of objects alone is enough to warrant discharge. The Ayala and Hernandez incidents were discussed in detail, because they adversely impacted on the credibility of Tapia and Barrera.

(c) of the Act.[25]

VI. RESPONDENT'S RECALL PRACTICES

As noted above, a few employees requested reinstatement after the first day of the strike and were returned to work. Prior to the conclusion of the strike, some employees had already made such offers in person, (and possibly by telephone) to Hernandez, at Respondent's office. Initially, Hernandez simply took down the employees' names and telephone numbers, but he was instructed to begin another list, requiring employees to make their requests in person and sign a recall list. Once Maturino submitted his list, it was merged with Hernandez's second list, and a new recall list created.

Respondent informed the Union that, consistent with its practice of recalling laid off employees by telephone, this would be the only means used to recall former strikers. In addition, employees would be recalled in order of the date of their requests to return to work, within their job classifications, rather than by seniority. The Union at least tacitly agreed to these procedures.

According to Hernandez and Tanner, after the strike ended, only five vacancies arose in positions strikers were qualified for until the fall of 1994. All five positions were

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[25]The records show that Leyva and Bautista unconditionally offered to return to work, but Aguilera did not. Since these employees were discharged, however, they were under no obligation to offer to return to work, to preserve their reinstatement rights. Aguilera's failure to make such an offer, without more, does not establish a waiver of reinstatement and indeed, his receipt of the discharge letter reasonably would have convinced him that such an offer would be futile.

filled by former strikers. This is not to say that only five replacement employees left Respondent's employment during that period. Tanner testified that during the strike, Respondent hired substantially more replacements than strikers, because the replacements were not as productive. Once that crop of mushrooms was harvested, there was an increasingly reduced labor demand, because the replacements became more proficient, and the subsequent crop was substantially smaller. As the result, many vacancies were not filled. Tanner's testimony was not contradicted, and is supported by Respondent's payroll and production records.

Tanner testified that no time limit was set when Respondent and the Union negotiated the recall procedures. According to him, Respondent followed the list for about one year and then stopped, based on the advice from Kubicek that this was a reasonable period to follow it. Nevertheless, it appears that nine additional former strikers were reinstated between November 1993 and February 1994. Tanner admitted, however, that since the date Respondent decided to cease following the recall list, it has transferred employees into vacant picker positions, and has hired large numbers of employees in that and other classifications previously occupied by the former strikers, due to increased production demands.

Analysis and Conclusions

An employer may hire more replacement employees than strikers, if the hirings are based on legitimate business considerations, and then allow the workforce, through attrition,

to return to normal prior to reinstating economic strikers. On the other hand, if these actions are taken to thwart the Laidlaw rights of the employees, they will not act as a bar to the reinstatement rights. Kurz-Kasch. Inc. (1987) 286 NLRB 1343 [130 LRRM 1044], remanded (CA 6, 1989) 865 F2d 757, decision on remand (1991) 301 NLRB 946 [137 LRRM 1310] ; c_f. Outboard Marine Corp. (1992) 307 NLRB 1333, at pages 1341-1344 [140 LRRM 1265].

There are no time limits on the reinstatement rights of economic strikers, inasmuch as these are statutory in nature, and place a relatively minor burden on the employer. Thus, where an employer terminates such rights without notice, or even if it has bargained to impasse on the subject, it disregards its recall obligations at its own peril. Brooks Research & Manufacturing, Inc. (1973) 202 NLRB 634 [82 LRRM 1599]; Medallion Kitchens. Inc. (1986) 277 NLRB 1606, at page 1613 [121 LRRM 1199]; Gaso Pumps. Inc. (1985) 274 NLRB 532 [119 LRRM 1052].[27] An employer violates the reinstatement rights of former strikers when it transfers employees into positions vacated by replacement workers, as well as when it hires new employees. Crossroads Chevrolet. Inc. (1977) 233 NLRB 728 [96 LRRM 1612] ; MCC Pacific Valves, supra.

It has been concluded that Respondent was obligated to immediately reinstate striking employees upon their unconditional offers to return to work, displacing replacement employees, if necessary. Should this conclusion not be upheld, Respondent has

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[27]In one case, where a union agreed to a time limit for employees to apply for reinstatement, as part of a comprehensive settlement providing substantial remedies for the strikers, the NLRB, on remand, upheld the limit. Hotel Holiday Inn de Isla Verde (1986) 278 NLRB 1027 [121 LRRM 1273].

established a substantial business justification for hiring additional employees during the strike, and not filling vacancies during the period its workforce returned to its pre-strike complement. Respondent, however, was not entitled to unilaterally cease using the recall list, particularly since its only obligation was to attempt to contact the employees by telephone as vacancies arose. Thus, to the extent that any striking employee otherwise entitled to reinstatement may be considered to have been permanently replaced, any transfers or new hires into positions for which the former strikers were qualified, after they offered to return to work, still violated their Laidlaw rights.

VII. EMPLOYEES NOT REINSTATED BECAUSE THEY SIGNED EMPLOYMENT SEPARATION AGREFMENTS

As visible support for the strike dwindled, and the replacement and non-striking employees were able to keep Respondent operational, Maturino wanted to end the strike. The parties met on September 13, in an attempt to reach agreement on a contract. At the meeting, Kubicek told Maturino there were no vacancies for the strikers, which he later repeated to some of the employees on the picket line. When Maturino asked if Respondent would discharge replacements to make vacancies, he was told it would not. Kubicek confirmed this in a letter dated September 14.

On the morning of September 22, Maturino took a vote among those present on the picket line to end the strike, which passed. He then met with Tanner, telling him that the employees wanted to end the strike, so they could collect unemployment insurance benefits. Maturino offered to prepare a list of employees who wanted to return to work. He also told Tanner that

some of the employees did not wish to return to work for Respondent, but instead wanted to find jobs elsewhere. Tanner said he would arrange a meeting with their attorneys present to discuss the issues further.[28]

That afternoon, Maturino and Tanner, accompanied by their attorneys, William Z. Kransdorf and Kubicek, respectively, met. The parties "discussed" unemployment insurance benefits, the pending criminal charges against Maturino and striking employees, reimbursement for damages and the possible discharge of employees engaged in strike misconduct. Maturino or Kransdorf asked Respondent to release the Union from damages arising from the strike, which Respondent refused to do. Maturino asked if there were any vacancies for striking employees, and Kubicek responded there were none that day, but there might be in the future. Maturino asked Respondent to discharge the strike replacements, so the striking employees could immediately return to work, which Respondent refused to do. According to Tanner, Maturino proposed a separation agreement whereby employees who signed, including those accused of strike misconduct, would receive unemployment benefits and accrued vacation pay. Maturino testified it was not the Union's idea to have employees resign, but Respondent's. The parties agreed that Respondent would draft a separation agreement in English, which the Union would translate into Spanish. Maturino would meet with the employees, accompanied by Kransdorf, to make sure he adequately explained the agreement. Those who

[28]The facts concerning the two meetings on September 22 are based on an amalgam of the testimony of Maturino and Tanner, with Tanner providing most of the testimony on the afternoon meeting.

signed would be given written notices of layoff, to present to the EDD. Maturino would place the names of those who wanted to return to work on a recall list, to be submitted to Respondent. Respondent would discharge those it believed had engaged in strike misconduct, who did not sign the agreement.

About 37 strikers signed English-language versions of the separation agreement, of whom, General Counsel alleges 16 as alleged discriminatees.[29] The agreements provide as follows:

1. The employee will resign, effective September 22, and will not apply for employment or rehire.

2. The employee will not institute or join in any lawsuit or other action against Respondent or the Union, based on Respondent's failure to employ or rehire the employee.

3. Respondent and the Union disclaim any admission of liability.

4. Respondent will "convert" the employee's resignation to a "lay off for lack of work," providing a written notice thereof to the employee, so the employee may apply for unemployment insurance benefits. Respondent will not contest the employee's claim for benefits.

5. Respondent will pay the employee all accrued vacation benefits within 72 hours.

6. Respondent and the Union will release the employee from any claims they have against the employee.

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[29]No explanation was given concerning why the others who signed were not included in the complaint. Respondent's list of employees executing the agreement (General Counsel's Exhibit 9), is inaccurate in that it erroneously includes Rogelio Guerrero, but fails to include Jesus Landin Ramirez, Pedro Ruiz and Guadalupe Leyva.

The agreement concludes by reciting that the employee has read the agreement, that it has been fully explained and the employee fully understands it.

The circumstances under which the agreement was signed was a subject of testimony by many witnesses, including former employees, Maturino, Donius and Tanner.[30] All of the employees denied that Maturino explained to them that by signing the agreement, they would be resigning their employment. Rather, he told them if they wanted to collect unemployment insurance benefits (some also mentioned vacation pay), they would have to sign the document (which they could not read, because it was in English). One or more of the employees testified that Maturino also told them the agreement would protect them and Respondent, and if they did not want to sign the agreements, not to do so.

Furthermore, several employees testified they were not present during any meeting that afternoon, but arrived later, and were simply handed the agreements with instructions to sign if they wanted to receive benefits. According to the employees, they did not realize they were resigning from their employment until representatives from a human rights group informed them, most notably at a meeting conducted by the group on the following day.[31]

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[30]Respondent moved to continue the hearing, inter alia, in order to obtain Kransdorfs appearance. Respondent's motion was denied, because it had ample notice that it might require his presence. In any event, what was said when the employees signed the agreement only affects one of the several bases for the conclusions herein.

[31]The evidence shows that while many signed the separation agreements on August 22, others, including Jose Ferreyra, Maria and Antonia Duran, Jesus Ramirez, Pedro Ruiz and Guadalupe Leyva signed

Respondent vigorously argues that none of these employees should be credited. Indeed, their testimony must be regarded as suspect, because the unrebutted evidence establishes they participated in substantial group discussions on the events which transpired, with both the human rights group representatives and a Board investigator, who then prepared nearly identical declarations for them to sign. In addition, their testimony did have a certain programmed air, which became even more pronounced when one employee[32] attributed the same statements allegedly made by Maturino to Hernandez.

Nevertheless, Maturino admitted he did not provide the employees with a Spanish-language version of the agreement, because he felt he could explain it himself. Respondent was aware of this. He also did not read the entire document to them, because he felt it was too long.[33] In addition, Maturino

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on subsequent dates.

[32]This was Ferreyra.

[33]The entire agreement consists of two typewritten pages. Said conduct is consistent with Maturino's overall handling of this affair, which at best would be termed careless, but more accurately, deplorable. As noted above, Maturino did not respond to Respondent's allegations of employee strike misconduct until after the employees were discharged. In his testimony, Maturino first admitted he had only spoken to two or three of the accused employees, but later contended he spoke with them all. He was not corroborated on this latter testimony by some of the discharged employees who testified. Maturino testified he failed to respond by Respondent's deadline because he does not take such threats seriously, until the discharge takes place. Maturino also felt it was appropriate to conduct the strike termination vote, and to present the separation agreement only to those who happened to be present on September 22. (Any testimony by Maturino that he made more than a token effort to contact others is not credited.)

He also failed to make more than a token effort (if any) to contact employees who were not present on the picket line, to find out if they wanted to be reinstated, once he got around to even

admittedly did not circulate or compile a list of employees desiring reinstatement on that date, and his testimony significantly lacks any claim that he informed employees of this option on September 22.

Maturino admitted that during the course of explaining the agreement, some employees protested being required to resign, and began arguing and shouting, hardly conducive to a rational understanding of the agreement.[34] Maturino also admitted that employees stated they did not understand what they had signed, at the human rights group meeting. More significantly, Donius testified that after signing agreements, he observed five to ten employees request reinstatement to Hernandez. Although Donius is not fluent in English, he understood (probably as related by Hernandez) that the employees were confused, because they thought they could sign the agreement, and still be eligible for recall when vacancies arose.

Maturino contends he explained the agreement to a group of about 35-40 employees. Not only did most of the employees who testified dispute this, but Donius testified that in observing the meeting, he saw groups of employees come and go. Maturino claims that he fully explained the essential terms of the agreement to

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beginning that process. Finally, even though Kubicek had just informed him that although vacancies were not available immediately, there might be in the near future, Maturino assumed the strikers would not be reinstated for about six months, and conducted himself accordingly.

[34]Maturino claims that when an employee asked why no Spanish-language copy was provided, he shouted they could take copies with them, apparently leaving it up to the employees to find someone to translate the entire document for them.

the employees, and most of the subsequent discourse concerned whether they should resign. At the same time, he testified that Kransdorf opened the meeting by telling the employees that the agreement "was nothing that would hurt them as far as any-liabilities."

In addition to the undisputed flaws in Maturino's claim that the agreement was fully or clearly explained, Maturino was not a credible witness. Maturino was facing criminal charges arising from the strike, not to speak of Respondent's threat to sue him and the Union for damages. Respondent has long taken the position that if the settlement agreement fails, the Union should be required to reimburse it for any backpay awarded. Thus, Maturino has every reason to see that the agreement is upheld.

Maturino also exhibited a willingness to give misleading testimony, when he initially implied that employees really did not wish to return to work for Respondent, and only wanted to collect unemployment insurance benefits, which was contradicted by his demand for their reinstatement at the afternoon meeting on September 22 and his subsequent admission that he knew of about 40 employees who did wish to return to work as of that date (coinciding with the high end of his estimate of those present). On a collateral issue, Maturino denied punching Respondent's labor contractor during the course of an argument, after Tanner credibly testified he had witnessed this.[35]

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[35]It is noted that Seagraves credibly, and without contradiction by Maturino, testified that Maturino challenged him to a fight when they became involved in an argument. Tanner credibly testified that he had to physically wrestle stolen property from Maturino's grasp when Maturino refused to return it to him.

As Maturino secured executed separation agreements from employees, he turned them in to Tanner. After Maturino and Tanner executed the agreements, Tanner wrote the employees' names on form letters stating they had been laid off for lack of work. -When asked if he was troubled by the English-language agreements, Tanner testified that he asked Maturino about this, and Maturino said he had explained the terms to the employees. Tanner also testified that irrespective of the agreements, Respondent considered the employees to be "voluntary quits," thus ineligible for reinstatement. The employees were given the layoff forms, and as early as the next day, began applying for unemployment insurance benefits.

Tanner testified that Respondent's policy is that employees receive accrued vacation pay on their anniversary date. Pursuant to the separation agreements, employees were paid for accrued vacation time after they signed, although there is some dispute as to whether the payment was timely in all instances.

The strike continued after September 22, primarily because some employees wanted to return to work, and Respondent refused to discharge replacement employees to create vacancies. In a letter dated September 23, Kubicek asked why the picketing was continuing, and no list of employees wishing to return to work had been submitted. When a few employees purportedly told Maturino they had changed their minds about resigning, he reported this to the Union's attorneys. They initially took the position that the separation agreements were invalid, but subsequently reversed this position.

On October 4, Maturino compiled a list of employees who wanted to return to work, including several who had signed agreements. On October 5, he informed Respondent that the strike was over, and produced the list, which Respondent has acknowledged as containing unconditional offers to return to work. Commencing on or about September 25, employees who were still on strike requested reinstatement directly to Respondent. Some of these employees had also executed separation agreements. Respondent has refused to reinstate any employee who signed an agreement.[36]

Analysis and Conclusions

Both the Board and the NLRB have refused to be bound by private party agreements which waive the statutory rights of employees. Emerson Electric Co. (1979) 246 NLRB 1143, at page 1149 [103 LRRM 1073] ; Michael M. Schaefer, an individual proprietor v. NLRB (CA 3, 1983) 697 F2d 558; Service Merchandise Company, Inc. (1986) 278 NLRB 185 [121 LRRM 1179]; Frontier Foundries, Inc., et al . (1993) 312 NLRB 73 [144 LRRM 1073] ; Knoxville Distribution Co. (1990) 298 NLRB 688, at page 696 [134 LRRM 1142]; Auto Bus. Inc. (1989) 293 NLRB 855 [131 LRRM 1195]; Panoramic Industries. Inc. (1983) 267 NLRB 32 [113 LRRM 1152]. Citing familiar language used by the NLRB, the ALRB stated, in Kitavama Brothers (1983) 9 ALRB No. 23:

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[35]The Union was decertified in a Board election, and replaced by the United Farm Workers, in May 1995.

> Reinstatement and backpay are remedies which the Board provides in the public interest to enforce a public right. No private right to such relief attaches to a discriminatee which he can bargain away or compromise.

This does not mean that the NLRB will never enforce a private agreement, but it does so only under the strictest conditions, particularly when, as here, the charging party has not requested withdrawal of the unfair labor practice charge and General Counsel at no time has been a party to, or approved the settlement.[37] The agreement must not violate public policy. Panoramic Industries. Inc., supra. It must adequately remedy the alleged unfair labor practices so that the purposes of the Act are effectuated by approving the agreement. The more serious the violations, the less likely that the NLRB will abstain from official action. Service Merchandise Company. Inc., supra; Frontier Foundries. Inc., et al., supra; cf. Texaco. Inc., supra.

The NLRB is hesitant to uphold limitations on reinstatement, even where employees are accused of strike misconduct. Thus, in Hotel Holiday Inn de Isla Verde (1986) 278 NLRB 1027 [121 LRRM 1273], the NLRB had rejected a strike settlement agreement which converted the proposed discharge of strikers accused of misconduct to nominal suspensions, and set time limits on their offers to return to work. On remand from the Court of Appeals, the NLRB held that these relatively minor conditions on reinstatement were acceptable. Similarly, the NLRB upheld a strike settlement agreement which provided for

[37]See eg. Texaco. Inc. (1985) 273 NLRB 1335 [118.LRRM 1160], enfd. as modified (CA 3, 1981) 650 F2d 463; Ventura Coastal Corp. (1982) 264 NLRB 291 [112 LRRM 1023] ; Independent Stave Company. Inc. (1987) 287 NLRB 740 [127 LRRM 1204].

reinstatement of economic strikers, but changed their seniority rights. Gem City Ready Mix Co., et al. (1984) 270 NLRB 1260 [116 LRRM 1266].

To the extent the ALRB would ever enforce a settlement agreement providing for resignation from employment, given its position in Kitayama Brothers, supra. the NLRB always requires that a waiver of reinstatement be clear and unmistakable, which at minimum requires the employees understand the agreement and truly wish to resign their positions. Any purported waiver of reinstatement, absent an offer to recall the employee, is suspect. Kitayama Brothers, supra; Sam Andrews' Sons (1990) 16 ALRB No. 6. Where some employees objected to a settlement agreement waiving reinstatement, the NLRB refused to enforce it. Service Merchandise Company. Inc., supra. The NLRB had held that even assuming a valid agreement to curtail reinstatement rights, this does not establish a substantial business justification for refusing to recall strikers who apply for reinstatement shortly after a negotiated time deadline has expired. Vitronic Division of Penn Corp. (1978) 239 NLRB 45 [99 LRRM 1661], enfd. (CA 8, 1979) 630 F2d 561 [102 LRRM 2753]. Furthermore, it is well established that employees who "resign" in order to receive benefits, such as vacation pay or pensions, or to obtain interim employment have not clearly or unmistakably expressed a desire to relinquish their reinstatement rights. Roslyn, Inc. (1969) 178 NLRB 197 [72 LRRM 1043] ; P.B.R. Co. (1975) 216 NLRB 602 [89 LRRM 1259] ; Acrusta Bakery Corp. (1990) 298 NLRB 58 [134 LRRM 1028].

The separation agreement relied upon herein by Respondent is particularly unworthy of being enforced. It

constitutes a fraud and thus violates public policy, because it provided layoff notices to employees for the purpose of obtaining unemployment insurance benefits, when Respondent knew full well the employees had not been laid off for lack of work. Indeed, Respondent considered the employees to be voluntary quits, and accorded them even fewer rights than employees who voluntarily resign in the normal course of events, since it refused to even consider them for rehire.[38] Employees used these false documents to apply for benefits, and even if the EDD ultimately learned of the separation agreements, as contended by Respondent, or employees were eligible for benefits in any event, the providing of such documents constituted a clear attempt at deception.

Secondly, at least with respect to the vast majority of employees, who were not accused of strike misconduct, the consideration was wholly inadequate, if not completely illusory. Under the agreement, employees forfeited their statutory reinstatement rights and received no cash settlement. In exchange, some received accrued vacation pay, which Respondent contends was not due until their anniversary dates, in itself a

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[38]A few of the former strikers who signed agreements were later hired by one of Respondent's affiliated companies. Respondent does not contend it refused to recall any employee because the employee had obtained permanent employment elsewhere, and did not raise this as an affirmative defense. An employee loses reinstatement rights under such circumstances, but only where the party asserting the defense shows the employee obtained permanent employment with comparable terms and conditions. Lone Star Industries. Inc. (1986) 279 NLRB 550, at pages 553-554 [122 LRRM 1462], affd. in pert, part, Lone Star Industries v. NLRB (CA DC, 1987) 813 F2d 472. See Lone Star Industries. Inc. (1992) 309 NLRB 430, at footnote 1 [142 LRRM 1084] . The evidence fails to disclose the terms and conditions of any subsequent employment obtained by former striking employees of Respondent, and thus, there is no proof that said employment is comparable. All interim earnings, of course, will be deducted from the employees' net backpay.

minor concession. Labor Code Section 227.3 provides that whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having used accrued vacation time, the employee shall be paid wages for that time. The California Supreme Court has held that even where vacation benefits do not vest until the employee's anniversary date, under an employer's policy, §227.3 requires a pro rata payment on the employee's termination. Saustez v. Plastic Dress-Up Co. (1982) 183 Cal.Rptr. 846 [31 Cal3d 774]. The accrued vacation pay is to be paid to the employee on termination of employment for any reason. Evans v. CUIAB (1985) 216 Cal.Rptr. 782, at page 790 [39 Cal3d 398]. Thus, there was no consideration in the vacation pay, because it was already due to the employees when they "resigned".

Section 1262 of the Unemployment Insurance Code disqualifies striking employees from receiving benefits while the strike is actively in progress. As noted above, on September 22, Maturino informed Respondent the employees wished to return to work, and Respondent refused the request on the ground there were no vacancies. It has been found that since the evidence fails to establish the replacements were permanent, the employees were entitled to reinstatement at that time. It is clear that had Respondent agreed to reinstate the employees at that time, the strike would have ended, pursuant to the strike termination vote.

Even assuming the employees were permanently replaced, they were at least arguably eligible for unemployment insurance benefits, irrespective of the separation agreements. In Ruberoid Co. v. CUIAB (1963) 27 Cal. Rptr. 878 [59 Cal2d 73] the California

Supreme Court held that once an employer permanently replaces strikers, its refusal to permit them to return to work constitutes a discharge, and they are eligible for benefits. Even if Maturino's request for the employees' reinstatement were considered conditional, because he requested that the replacements be discharged, the provision of fraudulent layoff notices should not serve as valid consideration. In any event, since any conditions on the employees' offers to return to work were removed shortly thereafter, their receipt of statutory benefits for this brief period, to the extent it could be considered any valid consideration, was minimal. It is also noted that employees receiving backpay under Board orders are obligated to report this to the EDO, and on demand reimburse the benefits received, so this does not necessarily result in any windfall to them.

It is also clear that employees signed the agreements in order to receive unemployment insurance benefits and/or vacation pay. It is highly unlikely that more than a few of these employees, most of whom had been employed by Respondent for a substantial period, would have otherwise waived reinstatement (assuming they even realized they were resigning), and the credible evidence shows that in fact, virtually all of them wished to return to work.[39] To the extent Maturino's testimony, that employees objected to waiving reinstatement, should be credited, this also shows the lack of a waiver.

Finally, the purported waiver was not "clear and unmistakable." The employees were not given Spanish-language

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[39]In the absence of an offer of reinstatement, the testimony that a few employees did not wish to return does not establish waivers of reinstatement for anyone.

copies to read and the agreement was not read to them, in full, both material conditions of the agreement and essential to their complete understanding. Nowhere did Maturino specifically claim that he even verbally informed employees they were waiving their right to file Board charges. In light of these failures,- and Maturino's failure to give employees the option, on September 22, to offer to return to work, it should be no surprise that employees were confused as to the effect of the agreement on their reinstatement rights. Based on the foregoing, and in light of the lack of credible evidence to the contrary, Respondent has failed to establish that employees fully understood the terms of the agreement. For all of the above reasons, it will not be enforced.

VIII. APPLICATION TO SPECIFIC EMPLOYEES

1. Manuel Hernan Perez. Abel Trejo. Guillermo Barron, Israel Ortiz, Paz Vega, Pedro Ruiz, Antonia Duran, Maria Duran, Adrian Dominguez, Dionicio Arias, Guadalupe Leyva and Salvador Toriche: There is no dispute that these employees, personally and/or through the Union had unconditionally offered to return to work by October 5,[40] and that their signing of the separation agreement is the only reason they were not considered for recall. Since the separation agreements have been invalidated, Respondent violated §1353(a) and (c) by failing to recall these employees.

2 . Sect Lujano Castelan and Fernando Fernandez: Castelan and Fernandez were both being considered for discharge for strike misconduct at the time they signed the settlement

[40]There was a conflict regarding when Maria Duran personally offered to return to work. Based on the recall list, it is concluded that unless an earlier date appears next to the employee's name, Respondent was first given notice of the offer to return to work on October 5. Employees not on the list are discussed below.

agreements, but Tanner acknowledged no final decision had been made to discharge them. Both offered to return to work. Inasmuch as Respondent chose to rely on the invalidated settlement agreements, rather than discharge these individuals, it violated §1153(a) and (c) by refusing to consider them for recall.

Nevertheless, even when an employer has been found to have unlawfully discharged or refused to reinstate an employee, reinstatement and backpay will be denied as remedies if the evidence proves that the employee engaged in serious misconduct rendering the employee unfit for reinstatement. Axelson, Inc. (1987) 285 NLRB 862 [129 LRRM 1344].

The issue of the rock-throwing incident involving Castelan and Tapia has been discussed above, with both having been found to have engaged in the misconduct. In addition to warranting discharge, such conduct renders these employees unfit for reinstatement. Accordingly, reinstatement and backpay will not be ordered for Castelan.

With respect to Fernandez, the only evidence of misconduct directly linked to him is contained in a Sheriff's Department report, and other hearsay documents, such as the summary of strike misconduct. It can hardly be said that such hearsay evidence "proves" that Fernandez engaged in misconduct, making him unfit for reinstatement. Therefore, reinstatement and backpay will be ordered for him.

3. Tomas Torres, Jesus Landin Ramirez, Antonio Vargas Venegas (Vargas) and Jose Antonio Ferreyra Chavez (Ferreyra):

None of these employees' names appears on Respondent's final recall list or on the list of employees desiring to return

to work submitted by Maturino. Hernandez did not recall Torres ever making such a request, and Torres did not testify. Therefore the evidence fails to establish an unconditional offer to return to work by Torres.

Ramirez testified that on about September 25, he went to Respondent's office and signed Respondent's recall list, also giving his telephone number. Ramirez later called Hernandez about his employment, and Hernandez told him he had resigned, because Ramirez executed a separation agreement. Hernandez, in his testimony, remembered Ramirez calling about his position, but noted Ramirez had signed a separation agreement and was not recalled. Thus, it is undisputed that Ramirez did call to seek reinstatement. It is also found that he was the initial employee requesting reinstatement to Hernandez after the September 22 strike termination vote, doing this on or about September 25, but Hernandez inadvertently failed to enter his name, or failed to transfer it to the final recall list.

Vargas testified, contrary to all other witnesses who spoke on the subject, that he and many other employees went to Respondent's office and signed a recall list on September 22, the same day he and most of the others signed the separation agreement. His testimony is also contradicted by the documentary-evidence. Vargas claimed that as of the time he signed the list, it contained over 25 names. Vargas also contended he was placed on Maturino's list, even though his name does not appear on the list Maturino submitted to Respondent. Vargas further testified that he and his wife telephoned Hernandez several times thereafter, to see when there would be an opening for him.

Hernandez never told him his name was not on the list, or that he was ineligible for recall because he signed a separation agreement. Hernandez, in his testimony, stated he did not recall if Vargas ever contacted him to return to work.

Vargas' claim that he requested a return to work is not credited. It is highly unlikely that both Maturino and Hernandez would have overlooked his requests, and the evidence fails to show that any striking employee went to Respondent's office on September 22. It is also highly improbable that had Vargas asked to return to work, particularly on September 22, Hernandez would not have brought up the settlement agreement, as he did with Ramirez, and also Maria Duran, when they sought reinstatement. It is also highly improbable that if Vargas or his wife had thereafter called to check the status of his recall, that Hernandez, if he did not bring up the settlement agreement, would not have required Hernandez to sign the recall list, pursuant to Respondent' s instructions.[41]

Ferreyra testified he was planning to go to Mexico, and wanted to collect his vacation pay. Ferreyra went to Respondent's office and spoke to Hernandez, apparently on October 4. Hernandez allegedly told him that if he wanted to receive his vacation pay or collect unemployment insurance benefits, he had to sign a separation agreement, which Ferreyra did. Ferreyra also claims he told Hernandez he wanted to return to work, and signed Respondent's recall list. Hernandez denied this and testified that, in fact, Ferreyra told him he just wanted to get away from

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[41]It is noted, however, that one employee was reinstated upon Maturino's request, without having signed the list.

the threats. Ferreyra was in Mexico for about six months. He was hired by one of Respondent's affiliated companies in November 1994, and still worked there as of the hearing.

It is found that Ferreyra did not request a return to work for Respondent, and did not sign the recall list or request his name be placed on it. It is undisputed that Ferreyra went to Respondent's office to collect his vacation pay to help finance his trip to Mexico. This is hardly consistent with a desire to work. It is also questionable that Hernandez (as opposed to Maturino) would have misled Ferreyra by allowing him to sign a separation agreement and then, without any comment about consequences thereof, placing him on the recall list.

Analysis and Conclusions

It has been found that Ramirez did request a return to work, but Torres, Vargas and Ferreyra did not. Ordinarily an unconditional offer to return to work is a prerequisite to obtaining reinstatement rights after an employee goes on strike, unless the employee has been discharged. In this case, however, the employees who signed the separation agreement would have reasonably been discouraged from seeking reinstatement, based on the terms thereof. It is also clear that since Respondent was relying on the agreement to deny reinstatement, that such offers would have been futile. Although some employees who signed the agreements still requested a return to work, it is concluded that after signing an agreement stating they were resigning, Torres and Vargas were excused from making such requests. Ferreyra, however,

actively led Respondent to believe he did not wish to return,[42] and made himself unavailable to be recalled for an extended period of time. Under these circumstances, he forfeited his reinstatement rights. Based on the foregoing, it is concluded that Respondent violated §1153(a) and (c) by failing to recall Ramirez, Torres and Vargas, but not Ferreyra.

IX. ADDITIONAL ALLEGED DISCRIMINATEES

General Counsel alleges that nine additional employees were unlawfully denied reinstatement, who were not discharged for strike misconduct and did not sign separation agreements. Respondent contends these employees were either reinstated in a timely manner, or not entitled to reinstatement, because there were no positions available. With respect to the latter contention, it has been found herein that Respondent was obligated to displace the replacement employees and, at any rate, its unilateral decision to stop using the recall list did not constitute a valid reason to deny employees their reinstatement rights.

1. Baltazar Mora, Leopoldo Mora and Arsenio Arguello Barrera: The uncontradicted evidence by Hernandez shows that these employees were reinstated, as positions became available, in order of their offers to return to work. Respondent learned that Baltazar Mora and Arsenio Barrera desired reinstatement on October 5, 1993, and both were reinstated on February 24, 1994. Inasmuch as Respondent, having failed to establish they were permanently replaced, was obligated to immediately offer them reinstatement on

[42]This does not constitute a finding that Ferreyra's conduct satisfies the requirements for a waiver of reinstatement.

October 5, it violated the Act by delaying the offer. With respect to Leopoldo Mora (shown as Leopoldo Martinez in Respondent's exhibits), he was reinstated on November 16, 1993, after offering to return to work on October 1. Hernandez credibly testified that he attempted to contact Mora, but was initially unable to reach him. When he did, Mora was offered reinstatement. Under these circumstances, the evidence fails to establish a violation based on the delay in Leopoldo Mora's recall.

2. Natividad Tapia Jose Salcedo, Jesus Manuel Barrera. Jose Luis Valenzuela. Reynaldo Ramirez and Jesus Herrera: It is undisputed that these employees made unconditional offers to return to work, and were not recalled solely on the basis that positions were allegedly not available. It has been found, however, that Respondent was obligated to offer the strikers reinstatement, even if it meant displacing the replacement employees. Furthermore, Tanner's testimony establishes that even if the employees had been permanently replaced, vacancies did exist when Respondent began transferring current employees and hiring new employees in disregard of the recall list. Therefore, Respondent violated §1153(a) and (c) by failing to offer reinstatement to these employees.

X. THE REMEDY

The purpose of the Board's remedial orders are, to the extent possible, to restore employees to the positions they would have been in absent the unlawful conduct. As noted above, economic strikers who have not been permanently replaced are entitled to be immediately recalled, upon their unconditional offers to return to work. It is therefore appropriate that

Respondent be ordered to immediately offer reinstatement to those employees who have not already received such offers, even if it means displacing replacement employees, transferred employees or employees hired since the conclusion of the strike. It is also appropriate that the employees receive backpay, commencing the dates they offered to return to work.[43]

Although no violation has been found based on Respondent's failure to previously make written offers of reinstatement, it is appropriate, given the passage of time, and in order to ensure maximum remedial effect, that Respondent make both written and telephonic offers of reinstatement to the employees. General Counsel and the Union shall assist Respondent in obtaining the current addresses and telephone numbers.

In a typical discharge case, the Board orders immediate reinstatement for the discriminatees, and their backpay commences as of the date of the discharge. In this case, however, Respondent, prior to discharging Bautista, Leyva and Aguilera on October 20, had also refused to reinstate Bautista, who offered to return on October 1, and Leyva, whose name was on Maturino's list submitted on October 5. Accordingly, their backpay shall commence on those dates. It does not appear that Aguilera has requested reinstatement, so his backpay shall commence on October 20, the date of his discharge.[44] Interest shall be payable for all

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[43]Ramirez's rights shall be based on an offer to return to work on September 25. Since Torres and Vargas did not offer to return to work, their backpay shall be based on an offer received on October 5. Baltazar Mora and Arsenio Barrera shall be entitled to backpay for the period October 5, 1993 to February 24, 1994.

[44]It cannot fairly be held that because Aguilera had not requested reinstatement by October 20, he never would have done so, absent his discharge.

amounts due, in accordance with applicable Board precedent.

It is also appropriate that a cease and desist order issue. Respondent shall be ordered to take the other affirmative action set forth in the complaint, except to provide peak season information, which does not apply to Respondent's operations, and General Counsel's request that, in addition to the usual Notice posting and mailing requirements, Respondent be ordered to personally deliver copies of the Notice to employees subsequently hired.

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent Sunrise Mushrooms, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging employees who engage in lawful economic strike activities.

(b) Failing or refusing to reinstate employees who have engaged in an economic strike, upon their unconditional offers to return to work.

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

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

(a) To the extent Respondent has not already done

so, immediately offer the following employees reinstatement to their former positions of employment, or if no such positions exist, to substantially equivalent positions:

1. Ricardo Aguilera
2. Dionicio Arias
3. Arsenio Arguello Barrera
4. Jesus Manuel Barrera
5. Guillermo Barren
6. Manuel Bautista
7. Adrian Dominguez
8. Antonia Duran
9. Maria Duran
10. Fernando Fernandez
11. Jesus Herrera
12. Baltazar Mora
13. Guadalupe Leyva
14. Israel Ortiz
15. Manuel Hernan Perez
16. Jorge Leyva Quezada
17. Jesus Lanolin Ramirez
18. Reynaldo Ramirez
19. Pedro Ruiz
20. Jose Salcedo
21. Natividad Tapia
22. Salvador Toriche
23. Totnas Torres
24. Abel Trejo
25. Jose Luis Valenzuela
26. Paz Vega
27. Antonio Vargas Venegas

(b) Make whole the above employees for all losses in wages and other economic losses they suffered as the result of Respondent's unlawful conduct, plus 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, 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 and makewhole period and the amount of backpay and makewhole due under the terms of this Order.

(d) Sign the attached Notice to Agricultural Employees, 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 thirty days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from September 25, 1993 until the date on which said Notice is mailed.

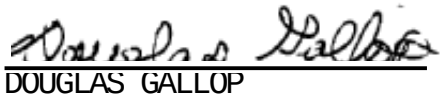
(f) Post copies of the attached Notice, in all appropriate languages, for sixty days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, 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 the assembled employees of Respondent on company time and property 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 employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps which have been taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with the terms of this Order.

IT IS FURTHER ORDERED that the remaining allegations in the Third Amended Consolidated Complaint are hereby DISMISSED.

Dated: September 25, 1995



DOUGLAS GALLOP
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), by the Independent Union of Agricultural Workers, Joel Tapia Chavez and Manuel Hernan Perez, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we had violated the Agricultural Labor Relations Act (Act) by discharging employees engaged in lawful strike activities, and by failing or refusing to reinstate economic strikers, upon their unconditional offers to return to work.

The 'Board has told us to post and publish this Notice, and to mail it to those who have worked for us since September 25, 1993. We will do what the Board has ordered us to do.

We also want to inform you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
2. To form, join or help 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 NOT discharge employees who engage in lawful economic strike activities.

WE WILL NOT fail or refuse to reinstate employees who have engaged in an economic strike, upon their unconditional offers to return to work.

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

WE WILL, to the extent we have not already done so, offer the following employees reinstatement to their former positions of employment, and make them whole for all losses in pay or other economic losses they suffered as the result of our unlawful conduct:

1. Ricardo Aguilera
2. Dionicio Arias
3. Arsenio Arguello Barrera
4. Jesus Manual Barrera
5. Guillermo Barron
6. Manuel Bautista
7. Adrian Dominguez
8. Antonia Duran
9. Maria Duran
10. Fernando Fernandez
11. Jesus Herrera
12. Guadalupe Leyva
13. Baltazar Mora
14. Israel Ortiz
15. Manuel Hernan Perez
16. Jorge Leyva Quezada
17. Jesus Landin Ramirez
18. Reynaldo Ramirez
19. Pedro Ruiz
20. Jose Salcedo
21. Natividad Tapia
22. Salvador Toriche
23. Tomas Torres
24. Abel Trejo
25. Jose Luis Valenzuela
26. Paz Vega
27. Antonio Vargas Venegas

DATED:

SUNRISE MUSHROOMS, INC.,

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907-1899. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE