Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
COASTAL BERRY COMPANY, LLC, Respondent, and SERGIO LEAL, ERNESTO ROBLES, YOLANDO LOBATO, PAULINO VEGA, HILARION SILVA, JOSE GUADALUPE FERNANDEZ, ALVARO GUZMAN, MARIANO ANDRADE, JORGE PEREZ, HILDA ZUNIGA, JUAN PEREZ, AND ERNESTO ROBLES, Charging Parties, and COASTAL BERRY OF CALIFORNIA FARM WORKERS COMMITTEE, Intervenor.	Case Nos. 99-CE-1-SAL 99-CE-2-SAL 99-CE-3-SAL 99-CE-4-SAL 99-CE-5-SAL 99-CE-6-SAL 99-CE-7-SAL 99-CE-9-SAL 99-CE-10-SAL 99-CE-11-SAL 99-CE-12-SAL 26 ALRB No. 3 (May 10, 2000)

DECISION AND ORDER

On December 7, 1999, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in this proceeding. Thereafter, Respondent (Coastal or Company) and General Counsel timely filed exceptions to the ALJ's decision with briefs in support thereof, and each

subsequently filed briefs in response to the other's exceptions.

The Agricultural Labor Relations Board (ALRB or Board) has considered the decision of the ALJ in light of the exceptions and briefs of the parties and the record herein and has decided to affirm the rulings, findings, and conclusions of the ALJ only to the extent consistent herewith.

Background

It is undisputed that upwards of 400 Coastal employees opposed to efforts by the United Farm Workers of America, AFL-CIO (UFW), to win acceptance as the exclusive bargaining representative for all Coastal employees engaged in a demonstration on June 3, 1998 for the purpose of challenging the Company's admitted preference for unionization.[1] Over a period of several hours they withheld their labor and effectively prevented the Company from conducting harvest operations. On behalf of the

[1]Although not in issue, we hasten to point out that an employer is free to communicate to its employees general views about unionism, even specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." (NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, 616.) By the same token, it seems apparent that the employees who voiced complaints about Respondent's position in that regard were engaged in concerted activity protected by the labor statutes inasmuch as they have the right to "form, join, or assist labor organizations" or "to refrain from any or all of such activities." (National Labor Relations Act, section 7, correspondingly Agricultural Labor Relations Act, section 1152.)

demonstrators, three employees presented Company president David Smith with a written list of demands, only some of which he adopted, including a pledge that he not discipline any employee(s) who had participated in the demonstration.

Tensions between pro-UFW and anti-UFW employees continued, prompting the UFW to demand that Respondent adhere to a "neutrality" agreement entered into by its predecessor. On that basis, the UFW urged Respondent to discharge certain employees (primarily supervisors) because they allegedly were conducting themselves in a manner inconsistent with the agreement and to rehire previously discharged UFW supporters. Following an investigation, Respondent detected disparate treatment toward UFW supporters in disciplinary matters and proceeded to reinstate an unspecified number of them.

Hostilities increased, prompting spokespersons for employees opposed to the UFW to formally request to meet with Smith and David Gladstone, Coastal's owner, in order to again complain about what they perceived to be a continuation of a pro-UFW stance on the part of the Company. Such a meeting was held over a two hour period on June 30, 1998. According to Gladstone, their paramount objective was to secure a concession that UFW supporters be removed from the fields. This view was confirmed by anti-

UFW employee Elisa Jiminez who declared the next day to a television news program that "we don't want the union here in the Company...we didn't want them [UFW supporters] to work."

Not satisfied with the outcome of the meeting, the disenchanted employees pressed their disappointment by conducting a demonstration and work stoppage at the Company's Beach Street compound on July 1, 1998. A short time later, hearing that UFW supporters were working in the strawberry harvest at the nearby Silliman Ranch, a group of them proceeded to the Ranch for the declared purpose of preventing the UFW supporters from working. They subsequently were joined by additional protesters who rushed the field and actually succeeded in preventing the harvesters from working by such means as threats, physical violence, or merely depriving them of the tools required to perform their tasks. During the melee, protesters tossed about both empty and filled strawberry crates and, in at least one instance, struck a pro-UFW employee with a crate full of berries.

Alerted to the potential for a confrontation at the Ranch, the Santa Cruz County Sheriff's office responded by initially dispatching two deputies to the scene, Mitchell and Griffin, who traveled together in the same

vehicle. Mitchell observed about 50 demonstrators gathered near an outbuilding who, according to her testimony, were soon joined by many more employees who arrived by car loads, seven or eight per vehicle, "honking horns, yelling and whistling…waving their arms, almost like in a rally type mood." Mitchell then walked around the outbuilding in order to have a clearer view of the field when she realized that 100 or so protesters were in the process of "attacking the people that…had been working earlier that morning…small fights breaking out all over the fields." She specifically witnessed,

> Groups of four to five men attacking an individual woman, or attacking an individual man or two…the UFW workers were clearly outnumbered and getting jumped by groups of people- the strawberries that they had picked that morning…were being thrown about so all their work was being destroyed.

As she and Griffen prepared to enter the field on foot, Mitchell requested "Code Three" backup which signifies a potential for human injury and instructed the additional support to utilize lights and sirens. Deputy Swannuck arrived to see "an angry crowd on a path of destruction." Siren on, she drove onto a farm access road, causing the protestors to retreat to the parking area, "kicking things and throwing packed product…[and]

destroying crates on the way." She described an incident in which a "drunken" protester lurched toward her brandishing a board with nails in it.

In the parking lot were Smith and another Coastal official who had arrived in and remained in Smith's pickup truck. Mitchell described the manner in which about 50 of the anti-UFW employees surrounded the truck, rocked it from side to side, with one man attempting to deflate its tires, and placed objects in its path as Smith attempted to exit the area. The crowd threw rocks, smashing the windshield of one of the sheriff's vehicles and striking a deputy on the leg. Swannuck was concerned the protestors would destroy the pickup and drag the two men out and harm them. She described the overall scene as "one of the worst scenarios that I've seen, just the number of people involved and the behavior…[t] his seemed like an out of control mob…[e] verybody was just angry and out to destroy something…".

Mitchell believed the crowd was becoming more agitated. Accordingly, she declared a new emergency situation and called for assistance from the Watsonville Police Department which dispatched about five officers. Ultimately, fearful for her own safety as well as that of the occupants of the truck, because "a lynch mob [was]

forming," she requested and received even more assistance from other law enforcement agencies in Monterey and Santa Cruz Counties.

The next day, July 2, 1998, the protestors presented Smith with a new set of demands, the most noteworthy, for our purposes being (1) an ultimatum that none of the protestors will be disciplined for engaging in the "demonstration;" (2) a provision that pro-UFW employees, as well as employees who defied the work stoppage, be "removed;" and (3) that UFW organizers who exercise the provisions of the Board's access regulation be required to maintain a distance from the harvest crews of at least 100 meters. Notwithstanding Smith's assent to the agreement, particularly the provision not to retaliate against any of the protestors, Respondent subsequently discharged eleven employees for engaging in misconduct during the course of the demonstration. The discharged employees filed unfair labor practice charges which became the subject of a formal complaint and hearing.

Following a full evidentiary hearing in which all parties participated, the ALJ in this case found that, by agreeing to forgive the participants' involvement in the most recent of the protests, including the conduct at Silliman Ranch, Respondent had effectively condoned the

actions of all of the Charging Parties and therefore, with one exception, had waived its right to discharge any of them. He expressly declined to grant a remedy to Jorge Perez on the basis of actions which he found so egregious that under no circumstances, even if condonation applied, should they be justified.[2] But in the event his finding on condonation failed to persuade the Board, the ALJ provided an analysis of the conduct alleged as a basis for the discharge of each of the remaining discriminatees in the absence of condonation. His analysis is summarized infra.

As will appear from the discussion which follows, the Board rejects outright the application of the condonation doctrine under the circumstances of this case, affirm's the ALJ's denial of reinstatement to Perez, but would also deny reinstatement to two additional employees, (Yolanda Lobato and Hilda Zuniga,) whom we find, like Perez, to have engaged in serious misconduct. With regard to the remaining discriminatees, the Board agrees with the ALJ that all are entitled to reinstatement even in the absence of condonation.

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[2] The ALJ made no finding with regard to Charging Party Ernesto Robles since he had been the subject of a settlement agreement between the parties and had been reinstated prior to the hearing herein. Accordingly, his status should no longer be an issue in this case.

Concerted Activity

It is well settled that certain concerted activities by employees fall outside the protection of the Agricultural Labor Relations Act (ALRA or Act) and may either render a respondent's treatment of them non-discriminatory or justify the Board's refusal to extend its usual remedies to them. We begin our analysis of the nature of the Charging Parties' activities in this case by first considering whether it was concerted and, if so, by next considering whether it was also protected.

It is clear that the demonstrators concertedly engaged in activity designed to challenge the Company's alleged support of the UFW and to prevent certain employees from working. Insofar as they engaged in a peaceful work stoppage and demonstration while at Respondent's Beach Street compound, they engaged in activities which fall within the parameters of employee rights specified in section 1152 of the ALRA and thus were protected.[3] However, when they thereafter proceeded to the Silliman Ranch to prevent employees perceived to be sympathetic to the UFW from working, by their choice of means - threats, intimidation, and even force - their conduct fell outside

[3] All section references herein are to the California Labor Code, section 1140 et seq., unless otherwise specified.

the protection of the Act which treats, without distinction, both the right to engage in activities for mutual aid and protection, as well as the right to refrain from such activities. By seeking to, and actually interfering with, the rights of supposed UFW supporters to "refrain from joining" in their activities, the demonstrators engaged in unprotected activities.

Under such circumstances, particularly in light of the acrimonious factionalism between the two groups of employees that had developed over a period of time, it is of little consequence that there were only limited incidents of actual physical assaults and property damage, or that the protesters did not succeed in preventing all UFW supporters from joining in the work stoppage.

To the extent the conduct was not protected, Respondent would have been privileged to discharge any Charging Parties but for the agreement to forgive such conduct. The pivotal question, therefore, is whether, under the facts of this case, the Board is obligated to honor the condonation agreement.

Doctrine of Condonation

Condonation "reflect[s] a clear public interest in the prompt settlement of labor disputes [and] is more akin to the doctrine of waiver than to the technicalities

of contract law." (*Ohio Stove Company* (1970) 180 NLRB 868.) As the ALJ in this case correctly observed, the doctrine of condonation has previously been approved and applied by this Board. (*J. R. Norton Company* (1982) 8 ALRB No. 76.) In *Sunrise Mushrooms, Inc*. (1996) 22 ALRB No. 2, the ALJ in that case, with our approval, noted that the National Labor Relations Board (NLRB or national board) will enforce private agreements, but only under the strictest conditions. As he explained,

> "[t]he agreement must not violate public policy. (Citation omitted) 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." (Citation omitted)

"Where, as here, misconduct…[participation in an unprotected attempt to prevent employees from working] is clearly shown, condonation…must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred." (*NLRB v. Marshall Car Wheel & Foundry Co., of Marshall, Texas, Inc.* (5th Cir. 1955) 218 F.2d 409, 414.) "Condonation can be found and is invocable…where there is clear and convincing evidence that the employer has completely forgiven the guilty employee[s]

for [their] misconduct and agrees to a resumption of company-employee relationships as though no misconduct had occurred." (*Packers Hide Association, Inc. v. NLRB* (8th Cir. 1966) 360 F.2nd 59, 62.)

While we agree with the ALJ that Respondent's agreement evinces a willingness to continue the employment relationship by, so to speak, "wiping the slate clean," (*Packer's Hide, supra*) and forgiving the participation of its employees in the unprotected attack on working employees, application of the doctrine of condonation in a case such as this, where to honor an employer's forgiveness necessarily breaches the rights of employees who were the target of the demonstrators, raises questions not considered by the ALJ.

The heart of the parties' agreement was not only to countenance discrimination against a group of employees for exercising their rights under the Act, but also to discriminate against them by changing the conditions of their employment (in setting them apart from other employees) and by thwarting the Board's Access Regulation by denying both employees and union organizers their right to communicate with each other.

One very important point in this case is that Respondent did much more than merely forgive the misconduct

of certain employees. Respondent also rewarded the demonstrators by promising to abrogate, at their behest, fundamental statutory rights of employees who had not engaged in misconduct. First, the demonstrators pressured Respondent into agreeing to patently unlawful demands (i.e., isolating UFW sympathizers and thereby changing a condition of their employment) in exchange for resuming work. The promised action is in itself discriminatory. Where employees attempt to induce improper conduct by their employer, "[c]ourt decisions leave the [NLRB] freer to determine the effect to be given employer condonation…". (*The W. T. Rawleigh Co.* (1950) 90 NLRB 1924, 1975.)

And, while there is no showing that the anti-UFW employees comprised a labor organization at times material herein, we can analogize that "[I]t cannot seriously be argued that conduct engaged in by members of a labor organization in attempting to oust employees for activity on behalf of a rival union…falls within the protection of legitimate union activity." (*Eureka Vacuum Cleaner Co.* (1946) 69 NLRB 878.) Secondly, Respondent pledged, again at the insistence of the protesters, to circumvent the Board's Access Regulation by depriving non-employee organizers access to employees suspected of being supportive of the UFW.

In its submissions to the Board, Respondent has indicated that accepting the proposals put forth by the architects of the agreement served to facilitate the continuation of harvest operations of a highly perishable agricultural commodity. There can be no doubt, on this record, that given the large number of employees involved at the height of the harvest season, Respondent may indeed have simply yielded to a show of force. However, Respondent's interest in vindicating conduct which jeopardized its own interests should not serve to outweigh the statutory rights of its employees to associate freely, as those rights are embodied in Labor Code section 1152 and protected by section 1153(a) and the proviso to section 1156.3(c). Or, as the national board explained in *Eureka Vacuum Cleaner Co., supra*, 69 NLRB 878, 905-906:

> It has been too well-established to necessitate extended discussion or citation of authority that mere economic hardship, exigencies of the moment, fear of reprisal by rival unions, and the like, afford no defense or justification for violation of the Act. Similarly, it is no defense to an employer to assert that members of the union will not work with members of a rival union, and that the employer is not a free agent, and is powerless to prevent the ejection of such employees. Moreover, it has been established that the failure of an employer to prevent the ejection of employees by members of a rival union, and to afford them

> protection from physical violence and intimidation, even where no other unfair labor practice has been committed, renders the employer responsible for the ejection, such ejection being tantamount to a discharge.

In a case as factually complex as this one, we do not believe that we are obligated to validate an agreement between an employer and one group of employees which was designed to discriminate against a different group of employees. Accordingly, we find that the condonation agreement, on its face, is contrary to the basic principles of the Act and thus public policy considerations compel us to deem it invalid at its inception. Our rejection of employer condonation in these circumstances is limited to the facts of this case.

Our concurring/dissenting colleague cites *Mackay Radio & Telegraph Co., Inc.* (1951) 96 NLRB 740 for the proposition that there is no exception to the condonation doctrine which could apply to this case. In *Mackay*, the union demanded that the employer agree to "certain unlawful union-security proposals" and then called for a strike for the express purpose of forcing the employer to accede to those demands. According to the NLRB, "we do not believe that the principle of condonation should be applied in this case to the strikers who, as we have held, participated in

a strike which was unlawful from its inception, and not merely unprotected." (*Mackay* at p. 42.) On that basis, the national board rejected the employer's condonation of the striker's conduct, explaining that "[w]e are unable to perceive how it will effectuate the Act's policies to give relief to employees who have engaged in conduct violative of [public policy]." (*Mackay* at p. 743.) The dissent agrees that the NLRB will not honor an agreement that forgives conduct unlawful under the Act, but argues that such an exception to the doctrine of condonation applies only when the conduct to be forgiven is itself unlawful. We think the policy behind withholding assent to an agreement whose object is to excuse unlawful conduct applies with equal force to an agreement which itself has an unlawful end. Or, in other words, if we do not believe we are obligated to approve an agreement that indirectly sanctions unlawful conduct, neither should we be bound to approve an agreement that directly sanctions unlawful conduct.

The Discharges

All of the Charging Parties engaged in protected concerted activity insofar as they took part in the work stoppage on July 1, 1998. However, in light of our conclusion rejecting condonation, the operative question

now is whether the conduct of any of the individual Charging Parties was such that they should be denied the protection of the Act and be disqualified for reemployment on a basis other than condonation. One test, albeit in the context of somewhat analogous and thus useful cases of picket line misconduct, particularly since the ALJ relied on such cases,

> "is whether the misconduct `is so violent or of such serious character as to render the employees unfit for further service,' or whether it merely constitutes `a trival [sic] rough incident' occurring in `a moment of animal exuberance.' This distinction has been drawn on the theory that some types of `impulsive behavior,' being `normal outgrowths of the intense feelings developed in picket lines, must have been within the contemplation of Congress when it provided' for the right to strike." (Ohio Power Co. (1974) 215 NLRB 165, 168.)

As the national board observed in *United Parcel Service, Inc*. (1993) 311 NLRB No. 97, it is well settled Board precedent that "the manner in which an employee exercises a statutory right can be so extreme as to lose the Act's protection." (Citations omitted.) Similarly, in *NLRB v. W. C. McQuaide, Inc*. (3d Cir. 1977) 552 F.2d 519, 527, the court proposed that serious acts of misconduct should disqualify a striker from the protection of the national act as a matter of public policy and the NLRB

holds that verbal abuse or threats alone may not be a sufficient basis for disqualifying an employee for continued employment unless "accompanied by any physical acts or gestures that would provide added emphasis or meaning to their words." (*W. C. McQuaide, Inc*. (1975) 220 NLRB 593, 594.) And, of particular interest here, Coronet Casuals (1973) 207 NLRB 304, 305 held that strikers who engaged in violence against nonstrikers generally could not claim the protection of the national act.

In this case, employing an alternative analysis, the ALJ concluded that even in the absence of condonation, the record evidence demonstrated that seven of the eleven Charging Parties (excluding Ernesto Robles whose case the parties settled) did not engage in serious strike misconduct against employees who declined to honor their work stoppage (i.e., nonstriking employees) and therefore all of them are entitled to reinstatement with backpay. They are: Sergio Leal, Paulino Vega, Hilarion Silva, Juan Perez, Alvaro Guzman, Jose Guadalupe Fernandez, and Yolanda Lobato. While the ALJ made several findings concerning the discharges of Mariano Andrade and Hilda Zuniga, he drew no conclusion as to whether they were entitled to reinstatement absent condonation. With regard to Jorge Perez, however, there is no doubt that the ALJ viewed

Perez's conduct as so serious and egregious that he would not grant him a remedy even were it ultimately concluded that Respondent had forgiven his conduct. Both Respondent and General Counsel excepted to certain of the ALJ' s findings. We examine the Charging Parties as follows.[4]

Paulino Vega and Hilarion Silva. Identical discharge letters went to Vega and Silva explaining to them that they were being terminated because each had parked his vehicle so as to prevent Smith from closing the gate at the Beach Street facility at the start of the demonstration on July 1, 1998. Both denied that they did so intentionally and the ALJ credited their testimony on that point. Vega said he had often parked in the same spot while Silva had parked directly behind him on this occasion. Both complied

[4] In so doing, we have taken into account that although Smith was primarily responsible for the actual decisions to discharge employees, Coastal president Gladstone was more specific when outlining the underlying basis upon which such decisions ultimately were reached. The standard generally followed existing Company rules governing employee conduct. According to Gladstone, no employee was to be discharged for merely participating in the demonstration or for going into the field where UFW supporters were attempting to work. Nor were employees to be discharged for throwing strawberry crates or cartons, empty or full, either in the air or on the ground. Employees could be subject to discharge if any of the above described activities involved fighting or pushing, blocking ingress or egress to the work place, destruction of property, or the dispersal of crates in a manner so that they, for example, "hit someone on the head." Since the throwing of crates, onto the ground or in the air so that they ultimately land on the ground, likely would result in some degree of harm to them, it follows that Gladstone would not include damaged berry cartons within his characterization of actionable destruction of Company property.

with Smith's order to move the vehicles, but waited several minutes, long enough to permit dozens of employees to pass through the gate and gain access to the compound. After a short time, security personnel asked employees to vacate the compound so that the gate might be closed and they complied without incident. The conduct for which Vega and Silva were cited took place against the background of a peaceful work stoppage (i.e., protected concerted activity before rushing the field at Silliman Ranch). We agree with the ALJ that their failure to immediately remove their vehicles does not rise to the level of serious strike misconduct that would warrant discharge.

Juan Perez. Several Perez brothers worked for Respondent at times material herein. Juan was discharged because he allegedly attacked UFW supporter Efren Vargas. The ALJ relied on video evidence to find that while Jorge Perez, Juan's brother, may have meant to strike Vargas, he only placed a hand on his shoulder and pushed him and that Vargas actually tripped and fell as he and Jorge were being separated by other employees. We agree with the ALJ's findings that while Respondent may have acted on a reasonable good faith belief that Juan Perez engaged in serious misconduct, there is an absence of proof that he did so.

Mariano Andrade. With regard to Andrade, Respondent alleged that he participated in the attack on Vargas and, in addition, destroyed packed crates of berries in the field and threw empty cartons at Smith's pickup while it was in the Silliman Ranch parking lot. Again relying on video evidence, the ALJ witnessed numerous employees destroying berry crates in the field but found that Respondent could not reliably identify Andrade as among them. Moreover, the ALJ credited Andrade's denial that he engaged in such conduct while in a work area. Assuming that Respondent correctly found Andrade to have thrown empty cartons at Smith's pickup, we find no basis for Respondent's singular focus on Andrade since many other employees, subject to easy identification, were not penalized for virtually identical conduct. We conclude, therefore, that either Respondent merely erred in its assessment of Andrade's conduct or that, for whatever reason, he received disparate treatment.

Alvaro Guzman. Guzman was discharged on grounds similar to those attributed to Andrade, assaulting UFW workers and destroying crates of berries, but the ALJ found no record evidence of such conduct. Respondent apparently relied on the claim of Charging Party Ernesto Robles who viewed a video and believed he could see Guzman while in

the act of destroying crates of berries. However, the ALJ observed that while Robles did indeed purport to identify Guzman, neither Robles nor the ALJ was able to describe just what Guzman was doing or more importantly, that he was actually engaging in any form of misconduct. Thus, while Respondent may indeed have believed in good faith that Robles was able to identify Guzman, there is a failure of proof that he did in fact engage in the conduct which served as the basis of his discharge. Moreover, even if Guzman did destroy a crate of berries, he would not have been discharged solely for that reason. Accordingly, we will direct that he be reinstated with backpay.

Sergio Leal. Perhaps in part because he is fluent in English and often acts as a spokesperson for the anti-UFW employee contingent, Leal emerged as one of their apparent leaders. Respondent explained his discharge in this manner: "You have repeatedly threatened to destroy Coastal Berry Company and, on July 1, 1998, you participated in efforts to forcibly prevent coworkers from working." The ALJ discounted the latter allegation because the underlying investigative report on Leal is silent as to that particular matter although Leal testified that he did indeed throw a crate of berries in the air. In addition, Leal readily admitted that when the Company rejected his

demands during the June 30, 1998 meeting with Gladstone and Smith, he told the Company officials that he would destroy the Company if necessary in order to keep the UFW out while Smith heard him say he would shut down Respondent. In the video copy of a televised news report admitted into evidence, Leal, explaining why employees were demonstrating, can be heard to declare that, "we'd rather break this Company than have it go union."

We agree with the ALJ that Leal's throwing crates of berries in the air should not disqualify him from future employment under Respondent's stated standard that merely throwing empty or filled crates of berries was not sufficiently serious to strip the perpetrators of the protection of the Act and justify their being discharged for that reason. Moreover, Leal's conduct in that regard was no different from numerous other employees who could readily have been identified on the various videos but who were not disciplined. With regard to the field conduct, therefore, we are compelled to find that Leal was accorded disparate treatment inasmuch as he engaged in conduct no different and no more serious than that of similarly situated employees who were not discharged.

There should be no question that he stated that he intended to "break" the Company, or shut it down if

necessary to prevent unionization. We note first that employees' anti-union statements generally are protected and, further, threats alone may not be a sufficient basis for disqualifying an employee for continued employment unless "accompanied by any physical acts or gestures that would provide added emphasis or meaning to their words." (*W. C. McQuaide, Inc., supra*, 22-0 NLRB 593, 594.) Moreover, the statements were made in the height of tensions between the parties and should be viewed for what we think they are, hyperbole and bravado. What may appear to a disinterested observer as excesses are actually the types of verbal exchanges contemplated by the labor laws during the heat of a protracted labor dispute. Even where employee conduct is insubordinate, ill-tempered or threatening, a discharge for that reason may still be a violation of the Act if the misconduct is not the real cause of the discharge but is merely relied upon as a pretext. (See, e.g. *Lord & Taylor, a Division of Associated Dry Goods Corp*. (1981) 258 NLRB 597.) For the reasons discussed above, as well as the reasons discussed by the ALJ, we agree with the ALJ that Leal did not engage in the type of strike misconduct which would justify denial of reinstatement.

Hilda Zuniga. Sandra Rocha is the puncher for one of the UFW crews which was targeted by the protesters. It is her task to credit her crew members for completed work by punching their individual performance cards (akin to time cards). Their compensation depends entirely on Rocha's ability to accurately record the number of crates they harvest. Charging Party Hilda Zuniga appeared determined to incapacitate Rocha's ability to record the crew members' output by wrestling away her punch tool and apparently succeeded insofar as Rocha eventually was forced to retreat to the edge of the field where she was inaccessible to her fellow crew members. We find that Zuniga effectively deprived an entire crew of its ability to work and engaged in the type of conduct which this Board cannot tolerate under any circumstances. On that basis, we deny her reinstatement.

Yolanda Lobato. Although Lobato did not testify, we have the benefit of video evidence clearly depicting her striking Sandra Rocha with a full crate of berries. Such conduct comports with Respondent's standard for discharging anyone who does more than merely toss a crate in the air or on the ground but who, as in this instance, hurls a crate at a fellow employee. We uphold Respondent's discharge of Lobato.

Jose Guadalupe Fernandez. Sheriff Deputy Mitchell watched as Fernandez attempted to place a large irrigation pipe in the path of Smith's pickup as he was preparing to exit the Silliman Ranch parking lot. When Fernandez picked up a wooden pallet, she tried to talk to him. Her efforts were rebuffed when she placed her hand on his arm and Fernandez bolted. A struggle ensued as other deputies moved in to restrain him. A video depicts Fernandez as he struggled to no avail to prevent officers from handcuffing him and leading him away in a patrol car. The ALJ noted that it was Fernandez's arrest which caused the crowd to react by throwing rocks at the police, "cracking one or two windows."

It was alleged, but not proved, that he had resisted arrest. Fernandez did not testify, but the whole of the incident discussed above appears on one of the evidentiary videos. Apparently the only other incident on the record involving Fernandez occurred in the field where he allegedly suggested that fellow protester Jose Flores "take care" of UFW supporter Isabel Rendon who' had attempted to stockpile empty strawberry cartons in order to continue working. Rendon sat on her cache to secure them until Flores yanked them out from under her. Since neither Fernandez nor Flores testified, the ALJ credited Rendon's

account of the incident. The ALJ included Fernandez in his reinstatement order because he found an insufficient basis for excluding him under the rubric of serious or egregious strike misconduct and we agree.

In sum, therefore, we agree with the ALJ that the following employees are subject to reinstatement and backpay: Sergio Leal, Ernesto Robles (on the basis of his settlement), Paulino Vega, Hilarion Silva, Jose Guadalupe Fernandez, Alvaro Guzman, Mariano Andrade and Juan Perez. We also agree with the ALJ, for the reasons stated by him, that Jorge Perez and absent condonation, Yolanda Lobato are not entitled to reinstatement and backpay. As discussed above, we also deny reinstatement and backpay to Hilda Zuniga for engaging in serious strike misconduct.

Scope of Remedial Provisions

Sections 1160 and 1160.3 grant the Board broad authority to formulate remedial provisions designed to further the purposes and policies of the Act. The Board's exclusive authority in this regard is fundamental. (See, e.g., *Butte View Farms v. ALRB* (1979) 95 Cal.App.2d 961.) The Board's standard provisions for the posting, mailing and reading of notices which are designed to apprise employees of the outcome of the case are proper under the

Board's wide remedial discretion. (Pandol & Sons v. ALRB (1979) 98 Cal.App.3d 580.)

As noted previously, the parties settled the case of one of the charging parties, that of Ernesto Robles.[5] In that settlement agreement, the parties agreed that since there was no showing that there was an interchange of employees between Respondent's Oxnard division and its operations in Monterey-Santa Cruz Counties, it would be sufficient for certain of the notice remedies (i.e., the mailing, posting and reading of the standard Notice to Employees) to be distributed only to employees in the two northern counties since that was where Robles was employed as well as the locale of the conduct at issue herein. On that basis, the ALJ similarly limited his proposed remedial provisions with regard to the remaining discriminatees and is a matter to which General Counsel excepts. We find merit in the exception.

While a limited notice provision may be appropriate in a different case, we believe maximum distribution is warranted here. Hostilities between the two groups of employees had been on-going for a protracted period of time, with attendant coverage in local media.

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[5] With regard to Robles, as noted previously, the parties reached a stipulated agreement at hearing, granting him reinstatement with full back pay. Accordingly, we will include him in our remedial order.

Moreover, immediately following the events which underscore this case, first one and then additional representation elections were held with the outcome still in doubt. It is reasonable for the Board to assume that the circumstances were such that news of events at any of Coastal's various ranches would be widely disseminated among all Coastal employees regardless of where employed. Moreover, we cannot assume that employees in the southern division did not have contact with friends or relatives who may have worked in either Santa Cruz or Monterey Counties. For that reason, and because notices are also designed to apprise employees of their rights under the Act, as well as the outcome of a case, we believe the broadest possible dissemination of the Notice to Employees is warranted under the circumstances here.[6]

Conclusion

In sum therefore, and for the reasons discussed above, we conclude that the doctrine of condonation is not applicable in this instance because the agreement between

[6] Respondent seeks sanctions for General Counsel's use of a document to impeach a management official who was called as a hostile witness without having first disclosed the existence and intended use of the document. Because we find that such use did not materially affect the outcome of this case, we decline to evaluate whether General Counsel's litigation strategy was improper under the circumstances.

Respondent and the protesters compromised the statutory rights of other employees and thus cannot be said to further the purposes and policies of the Act.

In the absence of the application of the doctrine of condonation, we have examined the individual cases of each of the Charging Parties in order to determine whether, on this record, any of them engaged in misconduct sufficiently serious to uphold Respondent's discharge of them. On that basis, we conclude that three of them Jorge Perez, Yolanda Lobato, and Hilda Zuniga - are not entitled to reinstatement. With the exception of Ernesto Robles who was the subject of a settlement agreement between the parties and has since been reinstated, we agree with the ALJ herein who found that the seven remaining discriminatees did not engage in misconduct sufficiently egregious to deny them reinstatement with back pay. They are: Sergio Leal, Paulino Vega, Hilarion Silva, Jose Guadalupe Fernandez, Alvaro Guzman, Mariano Andrade and Juan Perez.

ORDER

Pursuant to Labor Code §1160.3, Respondent, Coastal Berry Company, LLC, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or refusing to rehire employees for engaging in protected concerted activities.

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

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

(a) Offer the following employees reinstatement to their former positions of employment, immediately with respect to year-round employees, and at the start of the next applicable season, with respect to seasonal employees, or if no such positions exist, to substantially equivalent positions:

1. Paulino Vega Escutia
2. Jose Guadalupe Fernandez
3. Alvaro Guzman
4. Hilarion Silva Jiminez
5. Sergio Leal
6. Juan Perez Maldonado
7. Mariano Andrade Ortiz
8. Ernesto Robles

(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 this Order becomes final, to all employees employed by Respondent between January 18, 1999 and January 17, 2000.

(f) Post copies of the attached Notice, in all appropriate languages, for sixty days in conspicuous places at all its work locations, 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 places 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 non-hourly 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 this Order becomes final of the steps which have been taken to comply with its terms.[7]

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[7] Please take notice that this is a change from the heretofore standard language requiring a respondent to notify the Regional Director within thirty days of the issuance of the order in order to allow for additional time whenever the appellate process is invoked in any given case.

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: May 10, 2000

GENEVIEVE A. SHIROMA, Chair

IVONNE RAMOS RICHARDSON, Member

GLORIA A. BARRIOS, Member

MEMBER MASON, Concurring and Dissenting:

I concur with the majority's decision to order the reinstatement of Sergio Leal, Paulino Vega, Hilarion Silva, Juan Perez, Alvaro Guzman, Jose Guadalupe Fernandez, Mariano Andrade, and Ernesto Robles.[1] Though I would find that the Employer condoned their strike misconduct, I agree

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[1] At hearing, the parties reached a settlement as to Ernesto Robles, calling for reinstatement and backpay. The settlement was described on the record and the ALJ issued a written recommendation that the settlement be approved by the Board. The settlement previously has not been presented to the Board because the Executive Secretary was awaiting a memorialization of the settlement promised by the parties. Though there were representations on the record that Robles had been reinstated at the time of the hearing, apparently there was a subsequent dispute over the amount of backpay owed and no written agreement has been provided. General Counsel excepts to the ALJ's failure to make findings on the allegations concerning Robles. I agree with my colleagues that the parties be held to the terms of the settlement as stated in the record and that Robles be included in the Board's order so that the amount of backpay may be resolved in conjunction with normal compliance procedures.

with the conclusions of the ALJ and the majority that even in the absence of condonation it was not proven that they engaged in the conduct for which they were discharged, or their misconduct was not sufficiently serious to warrant discharge in light of the same conduct being tolerated of others who were not discharged.[2] I also concur with the decision to deny reinstatement and backpay to Jorge Perez and Yolanda Lobato. However, as explained below, I would find their discharges technically unlawful but deny them reinstatement based on the Board's discretion to fashion an appropriate remedy. Because I dissent from the majority's failure to find the condonation doctrine applicable to this case, I would find that Coastal condoned the conduct of Hilda Zuniga, therefore making her subsequent discharge unlawful.

Condonation

An employer is free to discharge employees who engage in serious strike misconduct because such misconduct removes the protection from retaliation that strike activity would normally enjoy. However, even where strike

[2] Because I believe that due to extensive media coverage it is highly likely that knowledge of the incidents at issue was disseminated throughout the workforce, I concur with the majority's decision to provide for notice remedies for all of Coastal's employees.

misconduct otherwise warrants discharge, if the employer condones the conduct, the employer violates the Act by later imposing discipline. This condonation doctrine applies where there is "clear and convincing evidence that the employer has agreed to forgive the misconduct, to 'wipe the slate clean,' and to resume or continue the employment relationship as though no misconduct occurred." (*General Electric Co.* (1989) 292 NLRB 843, 844.) The doctrine "prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven." (*Ibid.*) Condonation is not to be lightly inferred. (*White Oak Coal Co., Inc.* (1989) 295 NLRB 567, 570.)

By its nature, the doctrine assumes that the employees in question engaged in unprotected activities. Obviously, where the conduct in question is protected, any retaliatory action would be unlawful without reference to Condonation. Indeed, condonation has been found even where the misconduct included throwing rocks, damaging vehicles, throwing "jackrocks" under vehicles, threatening nonstriking employees with physical harm, and assaults on nonstriking employees. (See *General Electric Co., supra, Circuit-Wise, Inc.* (1992) 308 NLRB 1091; *Virginia Manufacturing Co.* (1993) 310 NLRB 1261.)

For condonation to be found, the employer's offer to return the strikers to work must be unequivocal. (*Jones & McKnight, Inc. v. NLRB* (1971) 445 F.2d 97.) Moreover, many cases note that the management agent making the offer to allow strikers to return was aware of the misconduct which had occurred. (See, e.g., *Circuit-Wise, Inc., supra; White Oak Coal Co., Inc., supra*.) Absent a statement providing for blanket amnesty for any and all misconduct, it does not seem logical to conclude that one has condoned conduct of which one is unaware. However, the case law does not indicate that the doctrine attaches only where each act of misconduct is known in detail. Rather, knowledge of the general nature of the misconduct seems to suffice. For example, if a certain type of misconduct is known, such as rock throwing or property damage, it is not necessary that the employer be aware of each incident or have identified individual perpetrators.

Here, the protestors on July I engaged in a variety of misconduct, including physical assaults, destruction of packed berries, the throwing of rocks and empty crates, and storming fields in order to force employees to observe a work stoppage. In my view, all of these activities constitute serious strike misconduct that normally would warrant discharge. However, I am not

persuaded, as is the majority, that this case can be distinguished from cases where the condonation doctrine, as established by the National Labor Relations Board (NLRB), has been applied.[3]

As noted above, the condonation doctrine by definition applies to unprotected conduct that would otherwise warrant discharge. Moreover, the doctrine usually arises in the context of strike misconduct that may be coercive to those employees who have chosen not to take part in the strike. Certainly it is coercive of the protected rights of nonstrikers to assault them or damage their vehicles. Yet, the doctrine has been applied consistently to such conduct. (*General Electric Co., supra, Circuit-Wise, Inc., supra; Virginia Manufacturing Co., supra; Clearfield Cheese Company, Inc.* (1953) 106 NLRB 417.) Thus, while the effect upon the protected rights of nonstrikers may be a legitimate basis for criticizing the condonation doctrine, it is not a basis for distinguishing it from the case at bar.

While it is true, as the majority points out, that the agreement reached on July 2 included provisions which appeared on their face to require Coastal to take

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[3] Section 1148 of the Agricultural Labor Relations Act requires this Board to follow applicable precedents of the National Labor Relations Act (NLRA).

actions which would violate the Act, this also is an insufficient basis for rejecting the application of the condonation doctrine.[4] The Board is not being asked to enforce or validate the agreement reached on July 2. Rather, the issue in a condonation case such as this one is whether the employer agreed to "wipe the slate clean" and forgive the previous misconduct. The provision of the agreement reached on July 2 stating that there would be no retaliation for the activities of the previous day evidences such intent. This is the only relevance of the July 2 agreement. Whether Coastal violated the rights of UFW supporters by agreeing to the other provisions is a separate matter that is not the subject of any allegations in the complaint in this case.

In *Mackay Radio and Telegraph Co., Inc*. (1951) 96 NLRB 740, the NLRB recognized an exception to the condonation doctrine. However, while the decision contains some language which in the abstract may be viewed as supporting the majority's approach in the present case, an examination of the actual holding in the case reveals a narrowness that makes it inapplicable to the facts before

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[4]While it is not determinative of the issue, I note that the record contains no evidence that either the Employer's interpretation or implementation of these provisions resulted in any actual interference with the rights of other employees.

us. In *Mackay*, the NLRB held that the condonation doctrine was not applicable to a situation where the strike is unlawful from its inception, and not merely unprotected. In *Mackay* it was found that the union went on strike with the primary aim of forcing the employer to agree to a union security provision that would have violated the prohibition on closed shops that was instituted a few years before as part of the Taft-Hartley amendments. In reaching this decision, the NLRB distinguished the situation from cases, such as the instant one, involving either (a) violence or other similar conduct during the course of otherwise lawful, albeit not always protected, concerted activity; or (b) participation in concerted activity which the national board for policy reasons held to be unprotected.

Moreover, the NLRB restricted its holding to situations where the employer is alleged to have offered reinstatement at some point during the strike but where no reinstatement took place. Specifically, the NLRB stated:

> We decide no more than is required by the facts in this case: namely, that the employees who participated in the unlawful strike of the kind herein found may not invoke the protection of the Act because they were denied permanent reinstatement at the end of the strike, even though Respondents may have failed to assert the illegality of the strike as the basis for denying reinstatement to such strikers. As the question is not now before us, we do not

> decide whether an employer, after permanently reinstating employees who participated in an unlawful strike, may subsequently discharge or otherwise discipline them for having engaged in such activity.

(*Id*, at p. 743.) In addition, in subsequent cases, the NLRB has viewed *Mackay* as limited to its facts, finding that it does not apply to situations where the strike may constitute a violation of section 8(b)(1)(A) of the NLRA (restraint or coercion of employees in the exercise of their section 7 rights) or section 8(b)(4)(D) of the NLRA (forcing an employer to assign nonbargaining unit work to unit members. (See, respectively, Union Twist Drill Co. (1959) 124 NLRB 1143; *Marquette Cement Manufacturing Co.* (1975) 219 NLRB 549.)

In the present case, the strike began as a protest of Coastal's perceived favoritism toward the UFW. As such, it was lawful at its inception, though it later degenerated into a parade of unprotected conduct. Coastal reinstated the Charging Parties, then later discharged them. Assuming arguendo that the protestors had an unlawful (as opposed to unprotected) purpose, the illegality involved the restraint or coercion of other employees. For these reasons, it is clear that the NLRB

would not find the *Mackay* exception to the condonation doctrine applicable to the present case.

Because the majority has rejected the application of the condonation doctrine due to the existence of facially unlawful provisions in the July 2 agreement, the remainder of Coastal's exceptions to the ALJ' s application of the doctrine have not been addressed. I will do so here.

Coastal attacks the ALJ's condonation analysis on several grounds. First, Coastal asserts that Elizabeth Mine should have been credited in her testimony that Coastal President David Smith indicated to the employees that the agreement would have to be approved, and that such approval never took place. In so claiming, Coastal also asserts that the ALJ improperly shifted the burden of proof by relying on Smith's failure to mention making such a statement.

It was reasonable for the ALJ, given the centrality of the enforceability of the agreement to the merits of this case, to be suspicious that Smith did not say anything in his testimony with regard to the agreement being conditioned upon Owner David Gladstone's approval. This is not a shifting of the burden, but simply a form of judging the plausibility of testimony based on the record

as a whole. Even if Smith's failure to confirm Mine's testimony is disregarded, other circumstances, particularly Gladstone's admission that Smith had full authority to resolve the matter, are sufficient to cast doubt on this portion of Mine's testimony.

For example, Smith negotiated with the anti-UFW employees on June 3 and signed an agreement settling that work stoppage and there is no indication that the agreement required further approval. Nor was there any additional testimony regarding the negotiations between Smith and the employees on July 2, i.e., the actors' words or reactions, which even arguably indicate that the agreement was in any way conditional. In sum, the ALJ reasonably concluded, based on the record as a whole, that Mine's testimony was highly implausible and, therefore, not worthy of belief.[5]

Coastal also asserts that the agreement does not reflect any condonation of physical assaults or property destruction, but only of peaceful protest. This assertion

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[5] To the extent that the ALJ considered it inappropriate to consider extrinsic evidence of the parties' intent concerning the need for further approval of the agreement, he may have been incorrect. For example, if testimony had established that the parties shared the understanding that the agreement was conditioned on Gladstone's approval, such evidence would have been appropriate to consider. Parol evidence is admissible to establish that a writing was not intended as a final act because it is not to become effective until some condition happens. (Witkin, California Evidence, 3rd Ed., sec. 1005; Cal. Code Civ. Proc., sec. 1856, subdiv. B.) In any event, the ALJ's rejection of Mine's testimony was not dependent upon his caution in considering parol evidence.

is based on the use of the word "protesta" (meaning "protest" in English) in the agreement and on Coastal's claim that Smith was not fully aware of the extent and nature of the misconduct.

Coastal relies on the dictionary definition of "protest" in claiming that the agreement only covered expressive activity, i.e., activity which states an objection. Of course, in common usage, the term is usually modified by either a positive or negative adjective, i.e., "peaceful" or "violent." The most that can be said by looking at the term "protesta" in isolation is that it is ambiguous. In any event, the testimony of all witnesses was consistent in reflecting the view that the employees' objective was to be absolved of their conduct on the previous day, which they admitted was wrong. There is nothing in the record which indicates that the no retaliation clause in the agreement was intended to reach only peaceful expressive activity.

Indeed, in light of Coastal's track record of tolerating both work stoppages and vociferous protest activities by both UFW opponents and supporters, the employees would have had no reason to fear retaliation for peaceful protest activity. Moreover, if the employees had engaged only in protected activity, there would have been

no need for the protection of such an agreement, an agreement which they insisted be in writing and be notarized. In sum, a view of the record as a whole makes it difficult, if not impossible, to conclude that the intent of the agreement was to reach only peaceful expressive activity.

The related claim that Smith was not fully aware of the nature and extent of the misconduct also is difficult to square with the record. There is no dispute that Smith witnessed the conduct at the main compound involving the blocking of gates and the blocking of his truck later that morning at Silliman Ranch.

It is also undisputed that on the afternoon of July 1, Smith met with several of the workers who were the victims of the misconduct, including Sandra Rocha and Efren Vargas. The testimony of these workers makes it clear that their purpose was to complain to Smith about what had transpired earlier in the day. Moreover, Ruben Gallegos testified that on July 1, shortly after he and his brother Ramon were attacked, they went up to Smith (who was in his truck) and told him to look at them and see what they (those who attacked them) had done. While Ruben had-only a little blood on him, his brother's jacket was noticeably bloody. As to whether Smith saw the news clips that aired

on the evening of July I and the morning of July 2, the ALJ is correct in characterizing Smith's testimony as evasive. At best, Smith's denial was equivocal.

In sum, the evidence establishes that prior to signing the agreement on July 2, Smith either witnessed or learned of, at least in general terms, all of the conduct for which the Charging Parties were discharged.[6] As discussed above, while arguably the case law reflects that knowledge of the misconduct is a necessary element of condonation, it is also clear that it is not necessary that the employer know of each incident in detail. Indeed, the evidence shows that Smith had at least as much knowledge of the nature of the misconduct as did the employer in cases where condonation has been found. (See *Circuit-Wise, Inc., supra; White Oak Coal Co., Inc., supra.*)

Lastly, Coastal asserts that appellate courts have overturned NLRB decisions finding condonation based on much stronger evidence than exists here. However, Coastal cites only *NLRB v. Community Motor Bus Company* (4th Cir. 1971) 439 F.2d 965, a case that clearly is inapposite. In

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[6] Smith was not aware of the nature of the attack on the Gallegos brothers, but he could see from looking at them that they had been involved in a violent incident. Since at the time of the discharges Coastal was unaware that Jorge Perez had attacked the Gallegos brothers, whether Smith condoned this conduct is not a question going to the lawfulness of Jorge Perez' discharge but, as discussed infra, is a question of the appropriate remedy.

that case, the NLRB's finding of condonation was overturned because the employer's offer for the strikers to return to work was viewed by the court as equivocal and, in any event, was rejected by the strikers (who continued on strike for another week), and never renewed.

Denial of Remedy to Jorge Perez and Yolanda Lobato

Where an employer learns of misconduct subsequent to a discharge, that conduct cannot be used to justify the discharge. (*Axelson, Inc*. (1987) 285 NLRB 862.) However, as the ALJ noted, where the conduct is "so flagrant as to render the employee unfit for further service," reinstatement and backpay may be denied. (*Ibid*.) Since the ALJ was unaware of any cases in which this principle had been invoked that also involved a finding of condonation, he was unsure whether it should be applied to the present case. Nevertheless, based on the egregious nature of the assaults carried out by Jorge Perez on the Gallegos brothers, the ALJ recommended that, based on the Board's broad discretion in fashioning appropriate remedies, Perez be denied reinstatement and backpay.

While Smith could see from looking at the Gallegos brothers on July 1 that they had been involved in a violent incident of some sort, he had no idea of the nature of the incident or the identity of the

perpetrator(s) until after the discharge of Perez. Therefore, it is questionable whether it reasonably can be concluded that Smith condoned the attack. If the attack was not condoned, there is no question that the principle of *Axelson, Inc*. would warrant the denial of a remedy for Perez. Even if condoned, I believe the ALJ appropriately denied a remedy to Jorge Perez.

There is no question that the Board has very broad discretion in fashioning appropriate remedies. Indeed, the courts may step in only where the remedies are patently unreasonable under the statute. (*Nish Norian Farms v. ALRB* (1984) 35 Cal.3d 726.) I believe that even where the Board has found that the condonation doctrine applies, it should be free in exceptional cases to deny a remedy to those employees who have engaged in misconduct which by its nature would make reinstatement and backpay incompatible with the purposes of the Act.

There is certainly nothing more coercive to employees engaged in protected activity than to be physically attacked for doing so. Here, the Gallegos brothers were attacked for refusing to join in the work stoppage. To reinstate the perpetrator would send a chilling message not only to them, but to others who may desire to engage in protected activity that is contrary to

wishes of Jorge Perez. For the same reasons, I also would deny any remedy to Yolanda Lobato, who threw a crate of strawberries in the face of Sandra Rocha. While this attack clearly was not as violent as that perpetrated by Jorge Perez, it too would have had a profoundly coercive effect upon Rocha and others who witnessed it.

Conclusion

I believe that the protestors on July 1 engaged in serious misconduct which was unprotected and, thus, subjected them to lawful discipline. Nevertheless, for the reasons explained above, I also believe that I am constrained by precedent to find that Coastal condoned this activity.[7] Moreover, in light of the stated grounds for the various discharges and Coastal's decision not to discipline employees for much of the misconduct that took place on July 1, even absent condonation, I would conclude that the evidence is insufficient to uphold the bulk of the discharges. As noted above, though I find that the discharges of Yolanda Lobato and Jorge Perez technically

[7] I concur with the majority's rejection of Coastal's exceptions regarding the General Counsel alleged failure to fulfill discovery obligations because Coastal has failed to demonstrate prejudice. Specifically with regard to the use of a statement, not included on the General Counsel's exhibit list, for impeachment purposes, I note that the issue of Coastal's purported bias toward the UFW is irrelevant to the condonation issue and of only peripheral relevance to the analysis applied to employees discharged for alleged strike misconduct.

were unlawful, I would deny them any remedy due to their egregious misconduct.

Dated: May 10, 2000

HERBERT O. MASON, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB 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 ALRB found that we had violated the Agricultural Labor Relations Act (Act) by discharging and refusing to rehire employees engaged in a lawful work stoppage and demonstration.

The ALRB has told us to post and publish this Notice, and to mail it to those who have worked for us between January 18, 1999 and January 17, 2000. We will do what the ALRB has ordered us to do.

We also want to inform you that the 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;
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 ALRB;
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 or refuse to rehire employees who engage in lawful activities.

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

WE WILL offer reinstatement to those employees specified in the Board's order 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 out unlawful conduct. Accordingly, we will offer reinstatement with backpay to: Sergio Leal, Paulino Vega Escutia, Hilarion Silva Jiminez, Jose Guadalupe Fernandez, Alvaro Guzman, Mariano Andrade Ortiz, Juan Perez Maldonado, and Ernesto Robles..

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 1880 North Main Street, Suite 200, Salinas, California. The telephone number is (831) 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

CASE SUMMARY

COASTAL BERRY COMPANY, LLC. 26 ALRB No. 3
Case No. 99-CE-l-SAL, et al.

Background

On June 3, 1998, several hundred Coastal Berry Company employees opposed to the organizing efforts of the United Farm Workers, of America, AFL-CIO (UFW), staged a work stoppage and demonstration in order to challenge the Company's admitted stance in favor of unionization. They submitted a list of demands, some of which the Company accepted. Nearly one month later, on July 1 and 2, 1998, in response to what the anti-UFW employees perceived as a continuation of a pro-UFW stance by the Company, the work stoppage and demonstration was repeated over a two day period. On the first day, a number of the protestors rushed a field where UFW supporters were harvesting strawberries and attempted with some success to prevent an unspecified number of them from working by such means as intimidation, threats and physical violence. The next day, the protestors presented the Company with a new ultimatum, including demands that there be no retaliation against any of the demonstrators, that the UFW supporters be isolated, and that UFW organizers not be permitted within 100 meters of harvest crews. The Company agreed and the protestors resumed work. Approximately six months later, the Company discharged eleven employees for misconduct during the work stoppage.

Decision of the Administrative Law Judge

Following a full evidentiary hearing in which all parties participated, the Administrative Law Judge (ALJ) found that Respondent had condoned the very misconduct which served as the basis of the discharges. Notwithstanding Respondent's act of forgiveness, however, the ALJ declined to extend the principle of condonation to one of the discriminatees because, in physically assaulting and injuring an employee who declined to support the work stoppage, he was deemed to have engaged in serious and egregious misconduct that rendered him unfit for future employment. The ALJ believed

such conduct does not further the purposes and policies of the Act and therefore should not be tolerated under any circumstances. As one of the discriminatees had been the subject of a settlement between the parties, and reinstated prior to hearing, he made no findings as to him, but did recommend that the remaining discriminatees be reinstated with backpay. He found the latter discriminatees to be subject to condonation as well as, in the alternative, to an independent analysis in which he found that they had not engaged in misconduct which would warrant their discharge.

Board Decision

As a threshold matter, the Board acknowledged its established commitment to the principles of condonation, but declined to honor this particular agreement which was designed to discriminate against a group of employees and thus was contrary to the Act and public policy. The Board found the agreement invalid on its face due to Respondent's promise to isolate pro-UFW employees and to deny them access by nonemployee Union organizers. By these pledges, Respondent promised to discriminatorily change a condition of employment of the UFW supporters and to deny both the employees and the organizers their right to communicate with each other as provided by the Board's access regulation. Having rejected condonation under these circumstances, the Board then examined the individual discharge cases in the absence of condonation, and agreed with the ALJ that one of the dischargees had engaged conduct which did not warrant a remedy. The Board also found that two additional employees should not be entitled to reinstatement.

Concurrence and Dissent

Member Mason concurred with the majority's decision to order the reinstatement of Sergio Leal, Paulino Vega, Hilarion Silva, Juan Perez, Alvaro Guzman, Jose Guadalupe Fernandez, Mariano Andrade, and Ernesto Robles. Though Member Mason believes that the Board is constrained by precedent to find that Coastal condoned these employees' unprotected activity, he agrees with the conclusions of the ALJ and the majority that even in the absence of

condonation it was not proven that these employees engaged in the conduct for which they were discharged, or their misconduct was not sufficiently serious to warrant discharge in light of the same conduct being tolerated of others who were not discharged. He also concurred with the decision to deny reinstatement to Jorge Perez and Yolanda Lobato, but based this conclusion on the Board's discretion to deny remedies to those who have engaged in misconduct which by its nature would make reinstatement and back pay incompatible with the purposes of the Act. Because Member Mason dissented from the majority's failure to find the condonation doctrine applicable to this case, he would find that Coastal condoned the conduct of Hilda Zuniga, therefore making her subsequent discharge unlawful. Lastly, Member Mason concurred with the majority's rejection of Coastal's exceptions regarding the General Counsel's alleged failure to fulfill discovery obligations because Coastal has failed to demonstrate prejudice.

* * *

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter Of:	)	
COASTAL BERRY COMPANY, LLC,	)	Case Nos . 99-CE-l-SAL
	)	99-CE-2-SAL
Respondent,	)	99-CE-3-SAL
	)	99-CE-4-SAL
and	)	99-CE-5-SAL
	)	99-CE-6-SAL
SERGIO LEAL, ERNESTO ROBLES,	)	99-CE-7-SAL
YOLANDA LOBATO, PAULINO VEGA,	)	99-CE-9-SAL
HILARION SILVA, JOSE GUADALUPE	)	99-CE-10-SAL
FERNANDEZ, ALVARO GUZMAN,	)	99-CE-11-SAL
MARIANO ANDRADE, JORGE PEREZ,	)	99-CE-12-SAL
HILDA ZUNIGA AND JUAN PEREZ,	)	
	)	
Charging Parties,	)	
	)	
and	)	
	)	
COASTAL BERRY OF CALIFORNIA	)	
FARM WORKERS COMMITTEE,	)	
	)	
Intervenor _____	)	

Appearances:

James W. Sullivan
LOMBARDO & GILLES
Salinas, CA
for Respondent

Eugene E. Cardenas
SALINAS ALRB REGIONAL OFFICE
Salinas, CA
for General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: This case was heard by me on September 8, 9, 10, 13, 14, 27 and 28, 1999. It is based on charges filed by 11 former employees (hereinafter-collectively referred to as the Charging Parties) of Coastal Berry Company, LLC (hereinafter Respondent) alleging that Respondent violated section 1153(a) of the Agricultural Labor Relations Act (Act) by discharging and/or refusing to rehire them because they engaged in a protected work stoppage. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a consolidated complaint alleging these violations, which was later amended. Respondent filed an answer to the complaint denying the commission of unfair labor practices. At the hearing, General Counsel and Respondent entered into a settlement agreement resolving the allegations in Case No. 99-CE-2-SAL, regarding the discharge of Ernesto Robles Garcia (referred to as Ernesto Robles in the complaint). The undersigned recommended approval of the settlement, which is pending before the Board.

Subsequent to the hearing, the Charging Parties' representative was permitted to intervene. 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, and the oral and written arguments made by the parties, the following findings of fact and conclusions of law are made.

JURISDICTION

Respondent, a California limited liability company with an

office and principal place of business in Watsonville, California, is an agricultural employer within the meaning of section 1140 (a) and (c) of the Act. In its answer, Respondent admitted that the Charging Parties are agricultural employees.[1] At all material times, David R. Smith, David John Gladstone, Stuart Ben Yamamoto, Elizabeth Ann Mine, Earl Pirtle, Henry (Enrique) Leal, James w. Sullivan and Larry Bruce Galper were statutory supervisors and/or agents of Respondent under section 1140.4 (j).[2]

STATEMENT OF FACTS

Background

Respondent is one of the largest strawberry producers in the United States. It conducts California agricultural operations in Monterey, Santa Cruz and Ventura counties. For several years, the United Farmworkers of America (UFW) has been attempting to organize the employees of Respondent and its predecessors, Monsanto/Gargiulo. Gladstone and Landon Butler purchased Respondent from Monsanto in about June 1997, aware that the UFW was trying to organize the workers. Butler sold his interest in Respondent to Gladstone in December 1997. Gladstone hired Smith,

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[1]Paragraph 14 of the complaint erroneously refers to section 1140(d) as defining the term, "agricultural employee," instead of section 1140(b).

[2]A11 but Gladstone and Galper were named as supervisors in the complaint, and admitted to hold such status in Respondent's answer. Respondent stipulated that Gladstone is a 'supervisor at the hearing, and the evidence clearly shows that Galper was a supervisor while in Respondent's employ.

first as a consultant, and then as President, replacing Galper.

At the hearing, Respondent stipulated that it was in favor of UFW representation of its employees, until July 1998. There was substantial testimony concerning the pro-UFW sentiments and conduct of Gladstone and Butler. Suffice it to state that while some of the allegations were too exaggerated, biased and/or insufficient to be sustained, it is clear that Gladstone was pro-UFW (apparently until he tired of the union's almost continual harassment). While Gladstone's union sentiments are his business, and not subject to any sanctions, the undersigned must consider his lack of candor on the issue (more specifically, his repeated insistence that he did not care whether the UFW campaign succeeded, but was only interested in having an election to put the matter at rest) in evaluating his credibility. Furthermore, while Respondent did assure its employees of their right to choose or reject union representation, and instructed its supervisors to proceed accordingly, it let them know its preference.[3]

Respondent's stance provoked considerable hostility from

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[3]Testimony concerning Gladstone's pro-UFW stance included statements, by Gladstone, that he felt UFW representation would present Respondent with a marketing advantage for those sympathetic with the union movement. In fact, in a memo to the employees dated April 27, 1998 (G.C. Exh. 8), Gladstone stated as much by contending that with a union, there would be a greater demand for Respondent's strawberries. That letter, and two others distributed during April 1998 (G.C. Exhs. 6 and 7) effectively stated that Respondent and the employees would prosper with a union and specifically, "I believe workers should be represented by their union, but of course that is a choice for workers to make for themselves." (G.C. Exh. 7)

other growers and, as time went by, many of its employees who, Respondent suspected, were being encouraged by the rival companies. This resulted in a work stoppage and demonstration at Respondent's main shop on Beach Street in Watsonville, on June 3, 1998,[4] by about 300 to 400 anti-UFW employees, which lasted several hours. According to Smith, the demonstrators blocked trucks from entering the coolers, effectively shutting down operations. Otherwise, the demonstration was peaceful. Charging parties Sergio Leal and Jose Guadalupe Fernandez, and one or two others, became spokespersons for the group apparently, at least in part, because they were among the few bilingual employees.

During the demonstration, Leal, Fernandez and other employees, including charging party Hilda Zuniga Ramirez (Zuniga), presented Smith with a list of demands (G.C. Exh. 10). These included requests that Smith cease intervening in union matters, and respect the wishes of employees opposed to the UFW, to maintain the raise implemented by recently discharged President Larry Galper, to sign a notarized statement guaranteeing that workers would not be discharged for opposing the UFW, and to negotiate with the employees. Smith testified that the workers also demanded that Galper be rehired, which he rejected.

The demonstration ended when Smith signed a written agreement (G.C. Exh. 11). The agreement stated that Galper would

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[4]All dates hereinafter refer to 1998, unless otherwise indicated.

not be rehired, but the wage increase would not be rescinded. He also agreed that Respondent would not negotiate with the UFW unless it won a Board election. Finally, Smith agreed that no discipline would be imposed against any employee for participating in the demonstration. The employees returned to work the following day, but Leal, at least, was not satisfied with the outcome.

Respondent continued to receive reports of employee dissatisfaction, and conflicts between pro- and anti-UFW workers. At the same time, it was subjected to repeated accusations of anti-UFW conduct by UFW representatives, in particular, its President, Arturo Rodriguez. The UFW demanded that supervisors and employees perceived as opposed to it be discharged for violating a neutrality agreement adopted by Respondent from its predecessor, and/or for coercing pro-UFW employees, and that pro-UFW employees discharged when Galper was President be rehired. According to Smith, when he investigated the latter demand, he felt there had been some disparate treatment toward UFW supporters in disciplinary matters, and therefore did rehire some of the employees.

After the June 3 demonstration, Respondent implemented some security measures, including the installation of video cameras at its administrative compound, hiring security guards and locking some of the gates at the compound. The "back" gate, located in an area used, inter-alia for parking, remained open during business hours, due to the volume of traffic. Respondent also

hired two former ALRB agents to speak with employees in the Watsonville fields and another individual for the Oxnard area. Respondent's stated reason for this action was to attempt to assuage some of the anti-UFW employees' concerns, and to investigate reports of pro- and anti-UFW conduct by supervisors and employees.

The situation did not improve. The anti-UFW workers eventually called for a meeting with Smith and Gladstone on June 30 and, dissatisfied with the result, conducted demonstrations and work stoppages on July 1 and 2. Twelve employees were discharged and refused reinstatement for their conduct during these incidents, although the actual discharges were not made until January and February 1999.[5] Eleven of these employees are the Charging Parties.

Sergio Leal

Leal was discharged on January 18, 1999. His termination notice states, "You have repeatedly threatened to destroy Coastal Berry Company, and on July 1, 1998, you participated in efforts to forcibly prevent coworkers from working."[6] Attorney

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[5]Respondent gave various reasons for the delay, including a demand from the General Counsel that it cease investigating the incidents while the Board investigated charges filed against Respondent.

[6]This statement is followed by a list of Respondent's rules that Leal, by his conduct, allegedly violated. All of the discharge letters followed this format. At one point in the hearing, when it appeared that Respondent was alleging additional conduct from that specified at the outset of the letters as grounds for discipline, Respondent's counsel at least implied that by stating the rules violated, such conduct was, in fact,

Sullivan's investigative report and recommendation regarding Leal (R. Exh. 20), however, says nothing about Leal's participation in efforts to forcibly prevent coworkers from working.

When anti-UFW employees learned that Gladstone was in Watsonville on June 30, they demanded to meet with him and Smith. Leal was one of the employees who attended the meeting. Leal testified he was one of eight employees present, and the meeting lasted about 3 hours. The employees again protested what they viewed as pro-union pressure by Respondent, and also protested the presence of the former Board agents in the fields. Gladstone told the employees they should sign union authorization cards so there could be an election, (apparently in response to demands that the access of UFW representatives be terminated). The employees stated they would not sign cards, prompting Gladstone, according to Leal, to tell them they were not loyal to him. Gladstone and Smith, in their testimony, did not deny that Gladstone made this statement.

Smith testified that the employees accused them of being UFW representatives, and asked to purchase the company, which was rejected. They wanted the UFW representatives, who were taking access, to stop bothering them, and for Respondent to call for an election. Smith and/or Gladstone responded that by law, the UFW had access rights and Respondent could not call for an election. The employees also accused Respondent of sending spies into the

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considered in the discharge decisions. The plain reading of the letters, and Sullivan's investigative reports and recommendations show that such interpretation should be rejected.

fields, and demanded the two former Board agents be removed. In effect, Respondent refused all of the employees demands.[7]

In response to a leading question from Respondent, Leal testified that, apparently in response to the rejection of their demands, he stated he would destroy the company, if that was what it took to keep the union out. Smith, however, testified that Leal actually said he would shut Respondent down. Gladstone did not attribute any statements of this nature to Leal. Leal, uncontradicted by Gladstone and Smith, credibly testified that he also told them the employees would refuse to work if the UFW came in.

The only other evidence of Leal making a similar statement is a videotaped interview after the July l demonstration. In the interview, Leal stated that the employees were demonstrating because they had been subjected to three years of union organizing and were tired of it. He accused Gladstone of being pro-union, against the employees' wishes. Leal stated they wanted an election. When asked about the violence which took place that day, Leal replied that the employees were restless, and violence was going to happen in this sort of situation. At the end of the interview, Leal stated, "We'd rather break this company than have it go union."

Although Sullivan has made a number of representations

[7]Gladstone, in his testimony, displayed a vague recollection of the meeting, stating that the main demand was to get the UFW representatives out of the fields. Gladstone could not recall any allegations that Respondent was pro-UFW at this meeting which, in light of Smith's and Leal's testimony, is not credited.

concerning the reasons for Leal's and the other employees' discharges, he did not testify under oath concerning his investigation. This causes substantial problems in evaluating Respondent's case, particularly where there was no eyewitness testimony at the hearing. A case in point is the allegation that Leal "participated in efforts to forcibly prevent co-workers from working" which, as noted above, was not contained in Sullivan's report.

Sullivan represented, but did not testify, that Leal, who on July 1 admittedly entered the fields where largely pro-UFW, non-striking employees were working and threw a crate of strawberries in the air, was responsible for the other employees' violent conduct by doing so. With respect to entering the fields, Respondent admittedly did not discharge the numerous employees who did this in a non-violent manner. Gladstone admitted that employees were not discharged for throwing crates of strawberries in the air.[8] Furthermore, videotapes of the incidents show many

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[8]In its brief, Respondent urges that the testimony of its sole owner, on certain key points, be discredited, including the testimony concerning employees destroying berries. The record shows that Gladstone kept track of the misconduct investigation, and played a far more important role in the discharges than Respondent would have us believe. Respondent, in this and several other instances, failed to directly show if and how it became aware of the alleged misconduct as of the discharge dates. In this instance, the UFW s objections to conduct of election in Case No. 98-RC-l-SAL accused Leal of misconduct, and presumably would have been read by Sullivan prior to Leal's discharge. Respondent points to Leal's claim for unemployment insurance benefits, which states he was discharged for provoking others to fight, as an admission of misconduct. Leal credibly testified that this was placed on his claim by an EDD representative, based on Respondent's representations.

employees who did this and could easily have been identified and discharged. In addition, there is no evidence Leal took a leadership role in that conduct, and he credibly denied being the first or second employee to throw boxes of berries.

Paulino Vega Escutia (Vega) and Hilarion' Silva Jiminez (Silva)

Vega and Silva were discharged on January 18, 1999. Their discharge letters give the same reason for termination:

> Before 7:00 a.m. on July 1, 1998, you parked your vehicle in the yard at 480 West Beach Street to block the closing of the gate in order to allow protestors to trespass into the main compound and block company operation.

Vega testified he was aware there was going to be a demonstration at Respondent's Beach Street facility on July 1. Smith was also aware of this, having been so informed the previous evening. The "back" gate in the parking area has been referred to above. Actually, it consists of two gates on rollers which close inward. When open, the gates leave a wide space, capable of containing several vehicles. Smith testified that when he arrived, two vehicles, including Vega's, prevented him from closing the gates. At the time, Smith did not know who had parked the vehicles, and Respondent has not shown how or when it discovered Vega's identity. It is also undisputed that Respondent, at no time, ever asked any of the discharged employees their version of the events. The video shows that Vega's vehicle was parked several yards from the open gate.

[9]Silva's first name was incorrectly spelled in the complaint, which has been corrected.

Vega credibly testified that he did not intentionally park his vehicle so as to prevent the closing of the gate, and had often parked there before. Respondent presented no evidence that employees had previously been told not to park there, and it is highly unlikely that Vega would have known, when he parked, that Smith wanted the gate closed. Vega went into the shop, inasmuch as little was happening outside. When he came back outside, he saw Smith in a vehicle, apparently trying to move Vega's vehicle, and another which had parked behind it.

Silva testified that when he reported to work on July 1, he was unaware that a protest was planned. Silva denied that he parked his vehicle so as to prevent Smith from moving Vega's, and contends he was unaware there was anything wrong with where he chose to park. Smith contended otherwise, based on his claim that Silva parked his van in front of Vega's just as he was about to push Vega's vehicle with the one he was driving.[10] Although none of these three witnesses was totally candid in his testimony, Silva is credited. In fact, Silva parked behind Vega's vehicle, as Silva and Vega testified, a video of the incident confirms, and which was Respondent's position prior to the hearing. Smith also gave the impression of generally exaggerating the situation and its effect of Respondent's security.

[10]Prior to this, Smith had approached Leal, who was at the scene, and demanded he move one of the vehicles. When Leal told Smith he could not move the vehicle because it was not his, Smith threatened to discharge Leal. While not particularly noteworthy in itself, the undersigned believes that Smith saw Leal as being a ringleader of the anti-UFW forces, and intended to hold him responsible for whatever happened.

It is, however, undisputed that Silva ignored Smith's request to move his vehicle. According to Silva, he did this for about four minutes, and then moved. Although Silva never did explain why he did this, Vega, who witnessed part of the incident after he left the shop, gave a pretty good indication of the reason. According to Vega, although he realized Smith wanted his vehicle moved once he left the shop, he did not do so, because some of the protestors were chanting (presumably to Silva), "Don't move. Don't move." (Vega had previously given other reasons for not moving his vehicle.) Once Silva moved his vehicle, Vega's vehicle was pushed out of the gate's path:

According to Smith, there were "numerous" protestors at the facility when he arrived at 5:30 a.m., which conflicts with all other accounts, that most of the protestors showed up after 6:30. Smith did not specify when he asked Silva (whose identity was unknown to him at the time) to move, or whether Silva eventually complied. Smith claimed that the conduct of Silva and Vega resulted in at least 100 protestors entering the compound. While the video of the incident (obtained from other sources, since Respondent's new system failed) may not show it in its entirety, it appears far fewer employees came in. More importantly, Respondent does not contend that any damage took place based on this event, and the video appears to show the protestors readily complying when police/security personnel asked them to leave. At that point, the gates were closed.

Yolanda Lobato Hilda Zuniga Ramirez (Ziiniga) Alvaro Guzman Mariano Andrade Ortiz (Andrade) , Jorge Perez and Juan Perez Maldonado.

Once the gates were shut at the Beach Street facility, word spread amongst the protestors that a crew of pro-UFW workers was working at the Silliman Ranch. Many of the protestors decided to go to the ranch to get them to join the work stoppage, some expressing the view that if necessary, this end would be obtained through violence. A relatively small group arrived first, and traded insults with the pro-UFW workers, who generally refused to stop working.[11] Subsequently, a larger group of workers arrived and, when the employees did not heed their demands to stop working, many entered the fields, engaging in more coercive tactics, leading to the discharge of the above-named employees.

Lobato's discharge notice, dated January 18, 1999, states that she "entered the fields to interfere with employees who wished to work and . . . assaulted Sandra Rocha."[12] Sullivan's investigative report essentially repeats this allegation, and recommends discharge. Zuniga's notice, dated February 23, 1999, states that she encouraged the attack on Rocha, urged coworkers to take her punching tool and destroyed crates of packed berries. Sullivzn's report states that Zuniga is "seen" throwing packed

[11]Workers from each side accused the other of calling each other bad names at the Silliman Ranch. The undersigned believes that both sides engaged in this conduct. Respondent does not contend that anyone was discharged for purely verbal conduct at the ranch.

[12]Rocha's full name is Sandra Nori Rocha Maldonado.

cartons of berries in the air, and Rocha "testifies" that when Lobato threw the carton on berries on her, Zuniga was urging her on, and telling her to get Rocha's punch tool. Sullivan's recommendation was that this could go either way, but he would terminate Zuniga.

Rocha testified that she was the crew's puncher. Zuniga and Elisa Jitninez entered the field and began shouting obscenities at her. They demanded she give them her punch tool, which she refused to do, at which point they purportedly said they were going to hit her. Rocha "believes" they pushed her, because she fell to the ground. A male worker, Euginio Contreras, stated that if Zuniga and Jiminez could not get the puncher from her, he would. At that point, Rocha left the field, and stood at the perimeter.

Efren Vargas Rosas (Vargas), on the other hand, partially contradicted Rocha by contending that it was Lobato and Zuniga who tried to take the punch tool away, apparently leading to the contentions in Sullivan's report. Vargas corroborated Rocha's claim that Zuniga was one of the employees who tried to take away her punch tool, but did not corroborate. Rocha's "belief" that the anti-UFW protestors pushed her to the ground.

According to Zuniga, she did speak with Rocha at the Silliman Ranch, asked her to stop punching the workers' cards and to give Zuniga her puncher. A lot of other workers were present when she made these requests. Rocha purportedly replied, "Take the punch away if you can." Zuniga did not respond to this, and

moved away. Zuniga denied fighting with Rocha, or encouraging others to fight with her. Zuniga admitted throwing boxes of strawberries in the air.

The credible evidence shows that Zuniga did, in fact, participate in efforts to take Rocha's punch tool from her, although Zuniga is credited in her claim that Rocha, who had earlier unnecessarily interjected herself into a conversation between anti-UFW workers and then Branch Manager Stuart Ben Yamamoto, dared her to attempt this. Rocha's "belief" that Zuniga and Jiminez pushed her is unconvincing, in light of the absence of such allegations in Sullivan's recommendations, after hearing her "testimony," not to speak of the conflict in testimony regarding who was present with Zuniga. Accordingly, while Rocha may have been verbally abused in the field, the evidence fails to establish any significant physical contact by Zuniga. Furthermore, in light of Sullivan's report, it does not appear Respondent knew, at the time of the discharge, Rocha was contending that Zuniga had pushed her.[13]

Rocha testified that after she retreated to the edge of the field, Lobato approached her and began throwing boxes of packed berries into the air. Lobato then threw a box full of strawberries on her face, (resulting in no visible physical injury). This is shown in a video. Lobato did not testify. The video shows that when Lobato threw the box, only two other

[13]Sullivan contended, but did not testify, that it became difficult to interview some of the employees because they were represented by counsel in a civil suit against Respondent.

workers were in the immediate vicinity. One of these was clearly a male, and the other, whose face was covered, has not been identified as being Zuniga.

Alvaro Guzman was discharged by letter dated January 18, 1999 for allegedly assaulting employees at the Silliman Ranch and destroying crates of packed berries. Sullivan's report generally repeats these allegations, but does not identify any other source than the videos for his belief that Guzman engaged in this conduct. Sullivan, in Respondent's opening statement, identified Guzman as one of the employees throwing cartons at Smith's' vehicle. Sullivan, however, was not testifying at the time, and there is no sworn testimony that the individual shown was Guzman. Guzman did not testify. Respondent contends that charging party, Ernesto Robles, identified Guzman in the act of destroying packed berries. While Robles did identify Guzman in a video, the record does not reflect what Guzman was doing at the time, and the undersigned has no recollection that Guzman was shown engaging in such conduct. Again, even assuming Guzman did destroy fruit, there is no sworn evidence showing how Respondent learned of this prior to his discharge.

Isabel Rendon Mendoza (Rendon) testified that while working on July 1, she observed several employees enter the fields at Silliman Ranch, "They" (Rendon later named five employees, including Guzman) were yelling things like, "Vultures, leave the fields, or suffer the consequences." Rendon later testified she could not recall who yelled, "adhere" to the consequences.

Guzman allegedly approached her and asked her if she was the bravest one there. He then asked what she was waiting for, to leave. Rendon told Guzman to please let them work. Guzman replied, "I'm not fucking with you, I'll pay for your day," but left. Rendon then resumed working. Rendon's declaration to the UFW, however, attributes the offer to pay her wages to Lobato, and does not even contend that Guzman spoke to her.[14] In addition, Rendon gave a highly inaccurate, inconsistent version of the Vargas incident, discussed below, and contradicted herself concerning alleged verbal abuse by Juan Perez. Therefore, although Guzman was not called as a witness, Rendon's testimony will be considered untrustworthy, and discounted, unless corroborated by reliable testimony.

The discharge letters to Andrade, Jorge Perez and Juan Perez all refer to an attack on Vargas. Andrade's letter also states chat he destroyed crates of packed berries and threw empty cartons at a vehicle driven by Smith. Sullivan's reports do not mention Andrade as having destroyed crates of berries.

Vargas testified that when the second group of anti-UFW workers arrived, Jorge, Juan and Antonio Perez, along with "two others,"[15] approached him. Vargas initially testified that one of these workers told Vargas that if he did not leave, he would fuck Vargas' mother. When asked who said this, he stated both

[14]Respondent made no effort to have Rendon explain this major inconsistency.

[15]Vargas only identified them as "Santana" and his brother.

Jorge and Juan Perez made the statement. They took away his strawberry box and told him to give them his cart. Vargas claims he responded that if they did not want him to work, he would stop.

Vargas testified that all of the employees were "offending and assaulting" him, and that Juan and Jorge Perez again made the obscene reference to Vargas' mother. Vargas initially testified that "they" then started assaulting and hitting him, causing him to trip on a furrow and fall to the ground. When he got up, he was again assaulted, but an employee known as "Santana" led him out of the field. On cross-examination, Vargas specified that it was Jorge Perez who hit him on the forehead, and on the back of his head.

The videos in evidence do not show anyone hitting Vargas. Rather, they show Jorge Perez pushing Vargas on the shoulder, and the two being separated by other employees. As they are being separated, Vargas trips and falls down. Upon being shown the video, Vargas stated he believed there was another video, showing Jorge Perez striking him. No such video was produced.

Andrade, Jorge Perez and Juan Perez gave 'similar accounts of the incident. After demonstrating at the Beach Street facility, the went to the Silliman Ranch to stop the employees there from working, although they did not travel together. Jorge Perez took Vargas's berries, and told Vargas to give him his cart. Vargas refused, telling Perez to fuck his mother. At that point Perez attempted to hit Vargas, but succeeded only in pushing him a

couple of times on the shoulder, because the other anti-UFW workers in the vicinity, including Andrade and Juan Perez stepped in between them.[16]

Juan Perez testified that he had asked Vargas to stop working before his brother became involved and, when Vargas swore at him, he moved away, returning to help separate his brother and Vargas. Andrade denied that he fought with Vargas, but instead, shouted at Jorge Perez not to fight. Inasmuch as the video tends to corroborate the anti-UFW employees' version of this incident, they are credited.[17] It is noteworthy that Juan and Antonio Perez are twins, and Rendon identified Jorge and Antonio Perez as the ones who attacked Vargas. It is also noteworthy that Gladstone, in his testimony, likened the incident to a "sophomoric shoving match" between two rival groups.

Andrade denied having destroyed crates of packed berries. There was no evidence to the contrary, and Respondent has not identified Andrade doing this in the videos. Andrade's denial, therefore, is credited.

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[16]Jorge Perez initially contended that Vargas came at him, and he was just defending himself. After viewing the video of the incident, Perez admitted it was his fault.

[17]Vargas, in his testimony, did not accuse Andrade of any misconduct. Andrade's declaration, received into evidence, also states that Vargas shouted foul language to them. The declarations of Andrade and Juan Perez state that no one fought with Vargas, which is technically true. In any event, even if the declarations are misleading on this point, the record as a whole sustains their version of the incident.

Jose Guadalupe Fernarxdez and, additional Conduct by Andrade

Fernandez was discharged by letter, dated January 18, 1999, for having been convicted of resisting arrest and obstructing the exit of Respondent's managers from the Silliman Ranch.

Smith was informed of the disturbance at Silliman while at another ranch, and drove to the shop adjacent to the Silliman Ranch fields with another manager of Respondent. Smith intended to speak with the employees, but when he saw the unruly nature of the crowd, decided to leave. He was prevented from doing this when the vehicle was surrounded by demonstrators, some of whom shouted at him, banged on the vehicle, and placed at least one board with nails under the tire(s).

Police personnel, who had been summoned on Yamamoto's instructions, began clearing a path. As Smith slowly began exiting, employees placed empty cardboard boxes in the path of the vehicle, and others, admittedly including Andrade, threw boxes at the vehicle, striking it several times, but apparently not damaging it. Santa Cruz County Sheriff Robin Renee Mitchell testified that Fernandez was one of the employees throwing crates at Smith's vehicle, although this is not stated as a reason for his discharge. Fernandez, along with another unidentified employee, dragged a large irrigation pipe, and placed it in the path of Smith exiting vehicle.

When Mitchell saw Fernandez picking up a heavy wooden pallet (whether to place it in the path of Smith's vehicle or to throw it being unclear), she approached him and tried to talk to him.

Mitchell felt his conduct was particularly significant, because he appeared to be a leader of the group. Fernandez started walking away, so she grabbed his arm. Fernandez pulled away, at which point a large, male officer tackled Fernandez and, as an incident, Mitchell. When Fernandez resisted being handcuffed, by preventing the officers from moving his arms, the male officer choked Fernandez until he complied. As Fernandez was led to the patrol car, he repeatedly screamed, "Fuck you!" Fernandez's arrest incensed the crowd, who began throwing rocks at the police and their vehicle, cracking one or two windows. The incident is captured on video. Inasmuch as Fernandez did not testify, and the video largely corroborates Mitchell's account, her testimony is credited. Fernandez reportedly pled nolo contendere to a charge of resisting arrest, although this was alleged, rather than proved.

Additional Allegations Regarding the Conduct of Jorge Perez, Juan Perez and Jose Guadalupe Fernandez

Leal and Rocha testified that when the first group of anti-UFW employees arrived at Silliman, a group went over to Yamamoto and asked him to tell the employees who were working to leave the fields. When Yamamoto refused to do this, Fernandez told him there would be serious consequences if he did not comply. Respondent interprets this as a threat, while General Counsel and the Charging Parties contend that Fernandez was warning Yamamoto, because they knew a larger group of demonstrators were on the

way.[18]

Rocha testified that Juan Perez, Guzman (she believes) and others approached Ramon Gallegos and tried" to throw away his strawberry box, using foul language in the process. On cross-examination, Rocha testified that Juan Perez called the workers a "bunch of drunken kiss-asses." The workers left when someone told them to stop Ramon Gallegos did not testify, but his brother, Ruben Gallegos Fernandez (Ruben Gallegos) did, claiming to have witnessed the conduct directed against his brother. Ruben Gallegos did not corroborate Rocha. Juan Perez did hot directly respond to this allegation in his testimony, but denied involvement in any violence. The uncorroborated testimony of Rocha concerning Juan Perez's conduct is too non-specific to permit the making of any specific findings, other than he, perhaps, called the workers, "Drunken kiss-asses."

Rocha and Rendon both testified that when the first group of anti-UFW demonstrators arrived at the Silliman Ranch, they began taking empty strawberry boxes, presumably in order to prevent the employees from working. Rendon took several empty boxes to her work area, and sat on them. Fernandez told demonstrator, Jose Flores to "take care of that." Flores then approached Rendon, and yanked the boxes out from under her, causing Rendon to fall to the ground. Inasmuch as Fernandez and Flores did not testify,

[18]Rocha unnecessarily interjected herself into this incident by approaching the group, and telling the anti-UFW employees to let them work. Fernandez told Rocha, who was then considered a supervisor, that she was in favor of the UFW, when she was supposed to be neutral.

the above testimony is credited.

Ruben Gallegos testified that he reported to the Beach Street facility on July 1. When he heard the demonstrators planned to go to the Silliman Ranch to stop the employees there from working, some vowing to use violent means if necessary, he immediately left, to warn his brother, Ramon. When he arrived at Silliman, he urged his brother to leave, but Ramon Gallegos refused. Ruben Gallegos then returned to his van. Gallegos testified that he observed the Vargas incident. Then, a group including the Perez brothers, approached his brother, one of them assuming a leadership role. He saw Jorge Perez hit Ramon Gallegos on the face. Ruben Gallegos generally alleged that the others also beat his brother, later specifying Juan Perez as one of them. At the same time, Gallegos admitted he has trouble distinguishing between Jorge and Juan Perez (which is strange, because Juan and Antonio Perez are the twins, and Jorge and Juan Perez do not strongly resemble each other).

Ruben Gallegos left his van, to go to the rescue of his brother. When he arrived, Jorge Perez hit him on the face, knocking him down. While on the ground, he was being kicked, but could not see who was doing this. The assault stopped after he heard someone tell the attackers to let up. The incident left Ramon Gallegos, and to a lesser extent Ruben Gallegos, bloody.

Juan Perez denied hitting, kicking or threatening either of the Gallegos brothers, and testified that Ruben Gallegos was his friend. Perez denied seeing any attack on Ramon Gallegos on

July 1, although he did see a large crowd of employees approach him, including his brothers, Jorge and Antonio. Juan Perez then saw a brawl, involving Ruben Gallegos. Someone, he believes Jorge Perez, hit Ruben Gallegos, who was knocked to the ground. Since Ruben was his friend, Juan Perez went to his assistance, covering him with his body. In the course of doing this, he was kicked as well. Jorge Perez did not testify concerning this incident.

Based on the foregoing, it is found that Jorge Perez hit both Ramon and Ruben Gallegos, and workers, not including Juan Perez, kicked Ruben Gallegos. Juan Perez was not involved in the initial part of the incident, explaining why he did not see the attack on Ramon Gallegos, who apparently had left the immediate area before Ruben was assaulted. Juan Perez's claim that he did not strike, but instead tried to end the assault against Ruben Gallegos is consistent with his earlier conduct in the Vargas incident. Furthermore, Juan Perez generally gave the impression of being an honest witness, and Ruben Gallegos' identifications, other than his testimony concerning Jorge Perez, were suspect.

Resondent' knowledge of the Above Incidents as of Jul 2

As noted above, both Smith and Gladstone were present when Leal made a statement about shutting down or destroying Respondent, on June 30. Smith observed the incidents at the Silliman Ranch shop on July 1, including his vehicle being surrounded by angry demonstrators, nails placed under at least one tire, cartons being thrown on the vehicle and the irrigation

pipe dragged in the path of his vehicle. Smith testified that he was able to identify only a few of the individuals present at that time. Smith admitted observing Fernandez's arrest, but mischaracterized Fernandez as having wrestled with the police authorities.

After the incident in the Silliman Ranch fields, many of the pro-UFW employees went to the UFW office, some giving statements to UFW representatives and interviews to the press. On the afternoon of July 1, the UFW conducted a protest at the Beach Street facility. During the demonstration, Silliman Ranch workers, including Rocha, Vargas, Rendon and one or both of the Gallegos brothers met with Smith, and told him what the demonstrators had done to them, although the record is not clear as to which of the protestors were identified at that time. For example, Ruben Gallegos testified that he and his bother simply told Smith, and before him another supervisor, to look at what had happened to them. Ramon Gallegos, at least, was bloody at the time.

Videos (none show the Gallegos brothers incident) and interviews from the demonstration were widely broadcast on the local news that evening and the following morning. The news videos are similar in content.[19] The news videos show the protestors going into the fields, the Lobato-Rocha and Vargas incidents, boxes of strawberries being thrown into the air, most

[19]Police videos show some of the events at the Beach Street facility, and more 'detail of events at the Silliman Ranch fields.

of the incidents surrounding Smith at the Silliman Ranch shop (including Vargas' arrest), protestors throwing objects at the police, and Leal's interview after the incident. Smith also admitted he had heard, by July 2, that first aid had been given to some of the employees.

Smith was anything but candid concerning his viewing of these videos by mid-morning on July 2. Instead of simply admitting he had seen them, Smith tried to give the impression he had not, testifying he did not see the news on the evening of July 1, but that, "By morning it was on the news." Later, Smith testified that he had not seen the videos "in detail," on July 2. This latter testimony implies that Smith had seen the videos. In light of Smith's evasive testimony, and in the absence of a specific denial, it is found that he had, in fact, seen at least some of the videos by mid-morning on July 2.

The Events of July 2

Instead of reporting to work on July 2, the anti-UFW employees gathered at Silliman Ranch, and demanded to speak with Smith, who was summoned by Respondent's managers. When Smith arrived, he was surrounded by 40 to 50 employees, who shouted demands at him. Smith told the employees to select a spokesperson, and employee Elisa Jiminez acted as the interpreter. Smith was very concerned that if the work stoppage continued, the fruit would spoil and Respondent would lose its crop. Smith told the employees that if necessary, Respondent would disk the fields. This angered the employees, who did not

return to work, so Smith negotiated their demands.

The protestors wanted to be paid for the previous day, which Smith rejected. They wanted Respondent to sell the company to the employees, call for an election and get the UFW but of the fields, all of which were rejected. Smith did, however, agree to make it easier for employees who did not wish to listen to UFW representatives during access periods to leave the area. The demonstrators wanted the pro-UFW workers removed from fields they worked in. Smith considered the two groups' continued proximity to each other a security risk, so he agreed to transfer those employees to another division. The protestors wanted the former ALRE agents, who they considered spies, out of the fields, which Smith agreed to.[20] According to Leal, some of the employees were upset that the agents were asking them why they opposed the UFW. Finally, the employees wanted a notarized agreement that none of the protestors would be disciplined for their conduct on July 1. Smith agreed. The translation of the notarized agreement reads as follows:

> That no retaliation should exist against any co-worker, including foremen, punchers, sprayers, truck drivers, irrigators, pickers, and the rest of those involved in this protest. (That no one should be fired)
>
> That the UFW organizers stay 100 meters away from the crews.
>
> That those who are in favor of and supporting the UFW and those who worked on 7/1/98 be removed.

[20]In his testimony, Gladstone stated that these individuals were hired to be Respondent's eyes and ears in the field.

According to Smith's former assistant, Elizabeth Ann Mine, after Smith signed the agreement, he told the employees he would do his best to have them approved. Leal testified that Smith simply stated that he had signed the agreement, so now the employees should return to work. Smith, although testifying in detail on these negotiations, did not corroborate Mine's testimony. Surely, had Smith made such a potentially exculpatory statement, Respondent would have had him so testify. Furthermore, since Smith, at least at the time, had sole authority to resolve the dispute, it would have made no sense for him to have made such a statement. Therefore, although Mine was generally a credible witness, this aspect of her testimony will not be credited. In any event, the failure to incorporate any need for approval into the agreement would render such a verbal condition, made after the negotiations and signature, of highly questionable relevance, had Smith made such a statement.

Upon execution of the agreement by Smith, the employees, including the Charging Parties, returned to work. The Charging Parties continued working until the end of the harvest, several months later or, if year-round employees, until their discharge.

Post-July 2 Events

The UFW and their supporters inundated Respondent with verbal and written criticism for the incidents at the Silliman Ranch, and a civil lawsuit was filed by the UFW, Rocha, Vargas, Rendon and the Gallegos brothers. At one point, Respondent considered sending a letter in response to those received from

various individuals and organizations. The draft of the letter, which was never sent, portrayed Respondent as highly pro-union, but being victimized by the UFW. The draft again referred to the events at the Silliman Ranch as a "sophomoric shoving match." Gladstone, in his testimony, stated that the draft contained false statements.[21]

The UFW presented Respondent with a list of some 20 employees and supervisors it wanted discharged. Mine credibly testified that it was in response to this demand (and probably the public outcry) that the Charging Parties were discharged. Smith and Gladstone, in their testimony, essentially ignored the July 2 agreement, contending that the investigation was ongoing from July 1. According to Smith, he was not fully aware of the violence which had occurred, and did not believe the agreement would protect employees who had attacked others. The evidence, however, shows that while he was not aware of the identities of all the perpetrators, Smith had witnessed or been informed of virtually all that had happened, when he signed the agreement.

With respect to that agreement, any doubt concerning Smith's knowledge of what he had agreed to is resolved by Mine's credible testimony that, when Respondent discharged the employees, Smith told her he was upset, because he had promised them no one would

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[21] In its brief, Respondent renewed its objections to receipt of the draft, which are again overruled. In any event, the ultimate conclusions herein would be the same, with or without that exhibit. Smith again demonstrated his lack of candor by contending he considered the criticism directed toward Respondent as a mere "distraction."

be fired. Smith, in his testimony, generally alleged that Respondent considered the agreement and decided it definitely did not apply to the Charging Parties. At the same time, he pointedly did not deny making the statements attributed to him by Mine, and sounded anything but convinced Respondent had chosen the correct course of action. In fact, although Smith did not testify concerning the reasons for his departure from Respondent's employ, the undersigned considers it no coincidence that Smith resigned effective February 28, 1999, shortly after the last discharge letters went out. Gladstone, for his part, was non-responsive when asked why Respondent discharged the employees after Smith signed the agreement, simply contending that the investigation was ongoing.

Gladstone insisted that he played no role in the discharge decisions. Said testimony was misleading, at best. Smith, near the end of his testimony, admitted that Gladstone ordered that the investigation continue, and that the "guilty" be punished. Smith further admitted that he disagreed with Gladstone's decision. Mine also testified that Smith told her he had been ordered to discharge the employees. Accordingly, it is found that Gladstone, pressured by the UFW and its supporters, overruled Smith's agreement not to discharge employees for their conduct on July 1, leaving it to Smith and Sullivan to decide the specific employees to be disciplined.

As noted above, Sullivan, who witnessed none of these events, did not testify concerning the bases for his reports and

recommendations, leaving us all to guess where several of them came from. Presumably, he spoke with Smith and other managers who were present, reviewed the videos, interviewed some witnesses, attended depositions in the civil action, looked at the police reports and performed some legal research. In evidence are other accusatory documents, such as the complaint in the civil action,[22] correspondence from the UFW and the UFW's objections to conduct of the ALRB's second election. Gladstone also referred to statements taken by Respondent, prior to the demand by General Counsel that the investigation cease. What Sullivan specifically relied upon, however, is strikingly lacking in the record, with the exception of some references in the reports to the videos. As noted above, the Charging Parties were not given the opportunity to present their versions of the facts. Smith followed Sullivan's recommendations for all of the employees investigated, with the exception of Fernandez, who Sullivan recommended be retained in light of his later position with the anti-UFW union, the Comite, described below.

Soon after the events of July 1 and 2, the anti-UFW employees formed their own union, the Comite, and petitioned the ALRB for an election, held on July 24. Fernandez and Leal became President and Vice President, respectively, of the Comite. The Comite won the election, but it was set aside, because Respondent failed to include its Oxnard employees on the eligibility list.

[22]The civil complaint, inter-alia, refers to the beating administered to the Gallegos brothers, without naming the perpetrators.

In a subsequent election, the Comite garnered more votes than the UFW, but the UFW's objections are still pending.

During the week preceding the July 24 election, the UFW staged several rotating walkouts and demonstrations protesting the election. According to Smith, the walkouts involved the blocking of ingress and egress of vehicles and some additional misconduct, mostly by UFW representatives. Respondent was unable to identify those responsible for the few acts of violence, such as stone throwing, during the demonstrations. On the other hand, Respondent informed the UFW that it considered the walkouts to be intermittent in nature, and threatened to replace employees who did not report to work. With the exception of a few workers, who Respondent contends failed to return, or quit rather than accept its terms, the walkouts ended. Respondent agreed that no employees who returned to work would be disciplined for their conduct during the UFW work stoppages.[23]

ANALYSIS AND CONCLUSIONS OF LAW

Protected Concerted Activity

Section 1152 of the Act grants agricultural employees the rights, inter alia, to refrain from supporting unions and to engage in activities for the purpose of mutual aid or protection. An employer violates section 1153(a) for interfering with, restraining or coercing employees in these activities. Anti-union activities are clearly protected. London Chop House. Inc.

[22]No conclusion is reached as to the protected status of the UFW walkouts.

(1982) 264 NLRB 638 [111 LRRM 1302]. Given the many employees who engaged in the July 1 and 2 protests, there is no question that the activity was concerted.

Respondent does not contend that the objects of the protests and refusals to work were unprotected. In Eastex. Inc. v. NLRB (1978) 437 US 556 [98 LRRM 2717], the United States Supreme Court adopted a broad view of the mutual aid and protection clause of the National Labor Relations Act, but added that the relationship between the object of employees' activities and the employment relationship may become so attenuated as to fall outside the intended scope of that legislation. The NLRB and the courts have repeatedly been called upon to interpret that directive.

In this case, the anti-UFW protestors made a number of demands, some of which would appear to have been protected, while others were more questionable. The demands for no retribution cuu wages for July 1 would generally fall within the ambit .of traditional protected activity. See Rockwell International Corp. (1986) 278 NLRB 55 [122 LRRM 1285]; Bridgeport Ambulance Service, Inc. (1991) 302 NLRB 358 [138 LRRM 1023]. Although not directly restated on July 1 or 2, it is apparent that a continuing reason for the protest activity was the employees' perception that Respondent was engaging in pro-UFW conduct. Even if an employer lawfully expresses and acts on its views concerning unionization, employees have the right to engage in concerted activities protesting the employer's position. Springfield Hospital (1986) 281 NLRB 643, at pages 678-684 [124 LRRM 1339].

In order to be protected, the employees' demands do not have to be meritorious. On the other hand, there is no protection for demands taken in bad faith. Giannini Packing Corp. (1993) 19 ALRB No. 16, at ALJD Page 15; Boyd Branson Flowers. Inc. (1995) 21 ALRB No. 4. The anti-UFW employees demanded that the UFW representatives be removed from the fields, and that Respondent call for an election. While both demands pertain to working conditions, the employees had previously been told that Respondent had no legal basis to grant such demands. Although this raises an issue of bad faith, the employees were not obligated, per se, to accept Respondent's representations and thus, the demands were probably still protected.

The record fails to disclose whether the former ALRB agents hired to be Respondent's "eyes and ears" in the fields were statutory supervisors, or otherwise managerial employees. Assuming they held such status, the protestors were demanding their discharge or reassignment. For many years, such demands represented a battleground issue for the NLRB and the courts, as a possible intrusion on management prerogatives. Now, however, it is established that employees are engaged in protected activity when they demand the removal of a supervisor, so long as the supervisor occupies a position which affects the employees' terms and conditions of employment. Atlantic Pacific Construction Co. v. NLRB (CA 9, 1995) 52 F.3d 260 [149 LRRM 2087]; The Hoytuck Corp. (1987) 285 NLRB 904 [126 LRRM 1319]. Inasmuch as the former ALRB agents worked with the field

employees, their perceived promotion of unionism and surveillance were lawful subjects for protest, even to the point of demanding discharge.

More questionable was the demand that pro-UFW employees be removed, which Respondent agreed to do. The record does not establish whether the transfer of the pro-UFW employees caused any economic hardship or other adverse consequences. Assuming it did, it is unlikely that the demand that employees be punished for their pro-union views could be considered a protected object. It is also questionable whether the demand that Gladstone sell the company to the employees was protected. Attempting to alter the managerial structure or ownership of a company may not be protected activity. Harrah's Lake Tahoe Resort Casino (1992) 307 NLRB 182 [140 LRRM 1036]; Nephi Rubber Products Corp. (1991) 303 NLRB 151 [137 NLRB 1267], enforced (CA 10, 1992) 976 F.2d 1361 [141 LRRM 2498].

It is unclear what test applies where some of the objects of employee action are protected, and others are not. Inasmuch as Respondent has not challenged the protected nature of the protest's object, and dominant themes thereof were protected, it is concluded that, absent serious misconduct, the protest was protected under the Act. In any event, the discussion of condonation, below, probably renders this a moot point.

Condonation

An employer may discharge striking employees who engage in strike misconduct sufficiently serious to render them unfit for

further employment. The ALRB and the National Labor Relations Board currently disqualify employees from reinstatement and backpay where the employees' conduct reasonably tends to coerce other employees from exercising their statutory rights (most commonly their right not to participate in the strike). Sunrise Mushrooms, Inc. (1996) 22 ALRB No. 2; Clear Pine Mouldings. Inc. (1984) 268 NLRB 1044 [115 LRRM 1113]. Similar conduct directed against managers or third parties also constitutes grounds for discipline. Aztec Bus Lines. Inc. (1988) 289 NLRB 1021, at page 1027 [131 LRRM 1214]; Virginia Manufactyring Company. Inc. (1993) 310 NLRB 1261, at page 1272 [145 LRRM 1106]. Once it is established that the employees engaged in a protected work stoppage, the employer has the initial burden of establishing a good faith belief that the employees engaged in such misconduct, and that they were discharged for that reason. The burden then shrifts to General Counsel to show, in fact, that the employees did not engage in the misconduct.

The NLRB consistently has held that even where it is established that employees engaged in misconduct otherwise justifying discharge, if the employer condones the actions, it violates the National Labor Relations Act by later imposing discipline. Condonation is not to be lightly inferred, and applies only where there is clear and convincing evidence that the employer has agreed to forgive the misconduct, to "wipe the slate clean" with regard to said conduct, and to resume or continue the employment relationship as though no misconduct took

place. Condonation has been applied where serious strike misconduct took place, including throwing rocks at, and damaging vehicles. White Oak Coal Co., Inc. (1989) 295 NLRB 567 [131 LRRM 1802]; General Electric Co. (1989) 292 NLRB 843 [130 LRRM 1209]. Our Board has followed this doctrine. J.R. Norton Company (1982) 8 ALRB No. 76, at pages 22-26.

Reinstatement or offers thereof to the striking employees is evidence of an intent to condone misconduct, but in itself, may not be sufficient, at least in the view of the California Supreme Court and some of the Courts of Appeal. Martori Brothers Distributors v. ALRB (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626]; Packers Hide Association v. NLRB (CA 8, 1966) 360 F.2d 59 [62 LRRM 2115]; NLRB v. Community Motor Bus Company (CA 4, 1971) 439 F.2d 965 [76 LRRM 2844]; cf. Virginia Manufacturing Company, Inc., supra. This is particularly true where an offer of reinstatement is rejected, and the unprotected conduct continues. On the other hand, the above cases also indicate that even where the strike was unprotected, if the employer condones the conduct, subsequent discipline constitutes a violation.

In contrast, where the agreement to permit the employees to return to work is part of a settlement agreement, either resolving a strike, or strike-related litigation, the NLRB and the courts consider this strong evidence of condonation. Although strict contractual principles may not have been stated in the decisions, it is apparent that the courts objected to the employers benefiting from the employees' end of the bargain,

while not complying with their obligations. Jones & McKnight, Inc. (CA 2, 1971) 445 F.2d 97 [77 LRRM 2705]; Confectionery and Tobacco Drivers and Warehousemen's Union Local 805. IBTCWHA v. NLRB (1962) 312 F.2d 108 [52 LRRM 2163]. See also J.R. Norton Company, supra.

Respondent contends that because the agreement signed by Smith did not specifically refer to violence, it did not condone that conduct. Aside from the fact that several of the Charging Parties were not even accused of "violent" conduct, the cases cited above did not require such specificity in holding the employers to their agreements. Respondent further contends that since Smith was not fully aware of the conduct which occurred on July l, he could not have condoned such acts. The undersigned maintains serious doubts as to whether such lack of knowledge, absent proof of fraud or misrepresentation by the Charging Parties, would constitute a valid basis to excuse Respondent from performing its obligations under the agreement. Nevertheless, even if Respondent is conceptually correct in its argument, the evidence shows that Smith had personally observed, or was informed of most of the protestors' conduct when he signed the agreement. It is not required that the person agreeing to reinstate individuals who arguably engaged in strike misconduct have been aware of all the objectionable acts, or the identity of those committing them. White Oak Coal Co., Inc., supra.

Respondent also cites Smith's testimony, that in signing the agreement, he did not really intend to condone egregious

misconduct. Again, given the wording of the agreement, it is questionable whether Smith's subjective intentions would take precedence over the wording of the document itself. In any event, Smith has been discredited in this contention, as demonstrated by his subsequent statements and conduct. Finally, there is Mine's testimony, that Smith said he would seek approval of the agreement. As noted above, said testimony has not been credited, and even had Smith made such a statement, it probably would have had no effect, since at the time he had final authority in the matter. Accordingly, it is concluded that Respondent condoned all of the protestors' conduct by virtue of the July 2 agreement, and by subsequently discharging and/or refusing to rehire the Charging Parties, violated section 1353(a) of the Act .[24]

Further Analysis and Conclusions

Assuming Respondent condoned the Charging Parties' conduct, no further analysis is necessary, with respect to the §1353(a) violations. If, however, it is subsequently held that the facts do not sustain said conclusion, some additional discussion is warranted. As noted above, the manner in which Respondent chose to present its case, in several instances did not clearly specify the conduct being punished, or the facts used to substantiate Respondent's belief thereof. While technical failures of proof

[24]General Counsel has chosen not to allege any of Respondent's conduct as violative of section 1353(c).

may be overcome through inferences ,[25] and the person making the disciplinary decisions may rely on reports from others,[26] the report itself must have some basis in fact. Clougherty Packing Co. (1989) 292 NLRB 1139, at page 1142 [131 LRRM 1700]; General Telephone Company of Michigan (1980) 251 NLRB 737, at page 739 [105 LRRM 1288]. The employer may not rely on conduct not known at the time of the adverse action, or subsequently acquired evidence of the conduct cited for discipline. Ornamental Iron Work Co. (1989) 295 NLRB 473, at page 478 [133 LRRM 1077]. Given the conflicting evidence given by Respondent's witnesses as to the conduct the Charging Parties engaged in, and their identities, and Respondent's failure to specify what it relied upon, it is difficult to tell whether Respondent had a reasonable belief of misconduct when it made the decisions, with respect to some of the employees. Furthermore, at least one ALRB case would find the investigation itself to be suspect, because none of the Charging Parties was asked his or her version of the facts. Conagra Turkey Company (1992) 18 ALRB No. 14, at ALJD pages 17 and 18. See also Sunnyside Nurseries, Inc. (1980) 6 ALRB No. 52.

It can be inferred that Smith and/or Gladstone informed Sullivan that Leal made a statement to them on June 30, although the conflict in Leal's and Smith's testimony makes it unclear as to what Sullivan was told. It may also be presumed that Sullivan

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[25]See Axelson, Inc. (1987) 285 NLRB 862 [129 LRRM 1344].

[26]See General Chemical Corp. (1988) 290 NLRB 76 [131 LRRM 1238].

viewed Leal's interview on July 1, where he stated the employees would rather break Respondent than go union. Leal's statements did not necessarily refer to violence against Respondent and, in fact, more likely referred to strike activity. Smith's testimony indicates this is what he understood was meant by Leal, even if Leal's testimony was more accurate. In any event, that sort of rhetoric, in the course of presenting grievances, is generally not considered sufficiently egregious to warrant discharge. D'Arrigo Brothers Co. of California (1987) 13 ALRB No. 1; Bruce Church, Inc. (1990) 16 ALRB No. 3, at pages 10-11; Fairfax Hospital (1993) 310 NLRB 299 [143 LRRM 1357], enforced (CA 4, 1993) 14 F.3d 594 [145 LRRM 2027]; cf. AAR Technical Service Center (1980) 249 NLRB 1201 [104 LRRM 1291]. The allegation that Leal "participated" in efforts to forcibly prevent coworkers from working is vague. Sullivan's representation that this refers to Leal throwing a box of berries is contradicted by other discharge notices, which specify that conduct. In any event, Gladstone testified that employees were not discharged solely on that basis. Therefore, inasmuch as Leal's verbal conduct was protected, and he would not otherwise have been discharged, his discharge violated section 1353 (a), even absent condonation.[27]

[27]This is not to say that an employer must per se establish a reasonable belief in all of the cited misconduct to meet its burden. In this case, however, it has been convincingly established that Respondent's primary concern was Leal's verbal conduct, and that he would not have otherwise been discharged. Although no section 1353 (c) violation is alleged, the evidence suggests that Leal's relatively minor acts would not have caused such concern had Respondent not viewed him as a leader in the anti-UFW movement.

Similarly, even assuming it has been established that Guzman destroyed at least one crate of packed berries, it is clear he would not have been discharged for that conduct. Further assuming Respondent has established that Guzman threw boxes at Smith's vehicle, it is not listed as a reason for his discharge, showing either that Respondent was not aware of that conduct, or condoned it. With respect to Guzman's purported assault (s) on other employees, the only testimony resembling this came from Rendon, who did not contend that he made any physical contact with her. In any event, Rendon's testimony has not been credited. Therefore, even assuming Respondent was relying on Rendon in discharging Guzman (the report refers only to the videos), in fact, Guzman did not engage in assaultive conduct sufficiently serious to warrant discharge. Accordingly, Respondent violated section 1353(a) by discharging him.

With respect to Vega and Silva, the credible evidence fails to show that either of them intentionally parked their vehicles so as to prevent the closing of the back gates at the Beach Street facility. Their failure/refusal to move the vehicles is somewhat mitigated by the fact that an unorganized crowd was demanding the vehicles not be moved. It is also noted that the inability to close the gates resulted in no damage or injury.

Similar, but more serious conduct has been viewed as a minor harassment tactic, not sufficiently serious to lose protected status. Noblit Brothers, Inc. (1992) 305 NLRB 329, at page 389 [139 LRRM 1336]. In that case, an employee briefly stole the

keys of a security van during a strike, thus preventing its use. Said conduct, while improper, did not result in a finding of serious misconduct. Therefore, even viewed in its most favorable light to Respondent's case, the conduct of Vega and Silva did not warrant discharge, and Respondent again violated section 1353(a).

with respect to the Vargas incident, it is established that Vargas told Smith about it, and inferentially, Smith related this to Sullivan. Exactly what Sullivan was told, however, is lacking in the record. The video itself is inconclusive as to what was said during the incident. It does, however, show that while Jorge Perez went after Vargas and pushed him on his shoulder, no blows were landed. One interpretation of the video might be that the other employees, rather than trying to break up the altercation, were participating in it, but this is by no means clear. Thus, Respondent would have been well-advised to have sougnt the other employees' versions of what transpired.

The mere proximity of an employees to strike-related misconduct, and even some verbal participation will not cause the employee to lose protected status. Minor scuffles, disorderly arguments and obscene language (as opposed to threats) during a work stoppage, unless repeated and egregious, are not valid causes for discipline. On the other hand, active participation in strike misconduct, even if not the direct infliction of injury or property damage, may result in lost protection. D'Arrigo Brothers Co. of California, supra; Mini Togs. Inc., et al (1991) 304 NLRB 644 [138 LRRM 1425] ; General Telephone Company of

Michigan, supra, General Chemical Corp., supra; Wayne Stead Cadillac. Inc. (1991) 303 NLRB 432, at pages 436-437 [138 LRRM 1326]; Ornamental Iron Work Co. supra, at page 480; Beaird Industries (1993) 311 NLRB 768 [145 LRRM 1054]; cf. David Freedman & Co., Inc. (1989) 15 ALRB No. 9; Cal Spas, supra, at page 62; Alaska Pulp Corp. (1989) 296 NLRB 1260, at pages 1275-1276 [133' LRRM 1201]; GSM Inc. (1987) 284 NLRB 174 [125 LRRM 1133].

Assuming Respondent may have established a reasonable belief that Juan Perez and Mariano Andrade participated in an attack on Vargas, General Counsel has clearly met his burden to show that they did not, in fact, act beyond separating Vargas and Perez. While Juan Perez may have used obscene language, so did Vargas, and the evidence fails to establish a threat. Inasmuch as this was the only conduct cited against Juan Perez in his discharge letter, Respondent violated section 1353(a), even absent condonation.

Andrade was also accused of throwing boxes of berries and throwing empty cartons at Smith's vehicle. The evidence failed to establish the former allegation, while Andrade admitted the latter. The throwing of objects at vehicles, even if no damage is caused, constitutes serious strike misconduct. Sunrise Mushrooms, Inc., supra, at ALJD page 29. It is noted that other employees are shown in the videos throwing boxes at the vehicle; yet Andrade was the only one cited for this, casting doubt on whether he would have been discharged solely for this conduct.

Unlike Gladstone's admission that employees were not discharged just for throwing boxes of berries in the air, however, it is not clearly established that throwing boxes at Smith's vehicle was not, in itself, grounds for discharge. Therefore, no final conclusions will be reached regarding Andrade, beyond condonation.

Similarly, while Jorge Perez did not actually land any blows in the Vargas incident, he objectively may have coerced Vargas by his conduct. Thus, he may have been disqualified from reinstatement under the Clear Pine Mouldings test. Inasmuch as Jorge Perez is otherwise dealt with herein, no conclusion will be reached as to whether his role in the Vargas incident, in itself, would constitute serious strike misconduct, absent condonation.

General Counsel concedes that Lobato's conduct, in throwing the box of strawberries on Rocha's face, would warrant discharge, absent condonation. The credited facts regarding Zuniga present a closer case. There is no evidence that Zuniga encouraged Lobato to throw the box on Rocha, as stated in her discharge letter. The punching tool incident might well be categorized as a minor scuffle, rather than serious strike misconduct. Although Zuniga did destroy at least one crate of packed strawberries, it does, not appear that Respondent would have discharged her for that conduct alone. Nevertheless, inasmuch as the facts present a debatable issue with respect to Zuniga, no final conclusion will be reached, beyond condonation.

Most of the conduct relied upon by Respondent to discharge

Fernandez appears in the videos. The mere fact of his arrest and the alleged nolo contendere plea do not establish a reasonable belief of serious strike misconduct Clougherty Packing Co., supra, at page 1145. The video, and Mitchell's testimony establish very minor resistance by Fernandez, who was tackled and choked during the arrest. Neither his conduct during the arrest, nor his use of vulgar language thereafter qualifies as serious strike misconduct. Newport News Shipbuilding & Dry Dock Company (1982) 2&5 NLRB 716, at pages 731-732, 738-740 [112 LRRM 1372]. The dragging of the irrigation pipe, although improper, did little to impede Smith's exit, and certainly less than the employees who blocked the vehicle. One suspects that Smith went against Sullivan's recommendation, because Fernandez was seen as a leader in the anti-UFW movement. It is concluded that in addition to condonation, the evidence does not establish that the conduct cited against Fernandez in his discharge letter amounted to serious strike misconduct.[28]

[28]In his brief, General Counsel concedes that the dragging of the irrigation pipe probably constituted serious strike misconduct. The undersigned does not agree that a one-time, brief blocking of egress has been so interpreted. General Counsel also claims that Respondent treated the anti-UFW protestors disparately from the pro-UFW demonstrators, later in July. The evidence fails to establish that Respondent knew the identity of any employee who engaged in the few acts of object throwing which took place during the UFW demonstrations, or otherwise tolerated conduct equally or more serious than cited in the discharge letters, with the possible exceptions of Leal, Silva and Vega. It is unnecessary to decide whether General Counsel would succeed in his theory with respect to these employees.

Other Ground for Denying Reinstatement

As noted above, an employer cannot rely on facts not known at the time of a discharge to subsequently justify it. Nevertheless, if it is shown that the employee engaged in misconduct "so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant," reinstatement and backpay will be denied. This standard places a heavier burden on the employer than it had in justifying the original discharge. M Restaurants. Inc., d/b/a The Mandarin (1977) 228.NLRB 930 [96 LRRM 1380]. In cases involving strikes, the NLRB will decline to order reinstatement, and backpay from the date the employer acquired knowledge of serious strike misconduct, even where the original grounds for the discharge did not withstand scrutiny. Axelson. Inc., supra, Cornell Iron Works, Inc. (1989) 296 NLRB 614 [132 LRRM 1181].

The facts presented herein do not fit squarely within the parameters established by the NLRB. Neither case dealt with condonation and, in fact, the conduct either took place after the discharges, or the employers were unaware of the conduct until thereafter. In the case of Jorge Perez, it has been found that Respondant was aware of the conduct, but not his participation in the Callegos brothers incidents. In all probability, once Respondent decided to renege on its agreement, these incidents would have been cited in Perez's discharge letter, had Respondent been aware of his identity, but whether this satisfies the NLRB test is questionable.

The Board has broad remedial powers in determining how to best remedy unfair labor practices. Since the undersigned is obligated to state an opinion on the matter, it will be that Jorge Perez should be denied reinstatement and all backpay, despite Respondent's condonation. Perez assaulted three employees, bloodying two of them. It was only through the intervention of others that he did not inflict harm on the third. His misconduct, highly personal and violent in nature, was far more serious than that cited in the above-referenced cases. There is no evidence of provocation with respect to the Gallegos brothers. While Vargas used profane language toward the anti-UFW protestors, many of them, including Perez, initiated the entire incident by harassing Vargas and the other employees for declining to join in the protest. In short, Perez's misconduct was flagrant and egregious. Under these circumstances, it will better effectuate the purposes of the Act to send a message that this sort of conduct will not be tolerated, than to give legal sanction to it and add additional backpay to the already substantial amount Respondent will be required to pay.

With respect to the additional conduct attributed to some of the other Charging Parties, assuming said conduct took place, some of it may have constituted serious strike misconduct, but none appears to meet the standard set forth in The Mandarin, supra.[29] Therefore, reinstatement and backpay will be ordered

[29]Lobato's action, in throwing the box of strawberries onto Rocha, constituted a momentary act of misconduct, causing no apparent physical injury. Furthermore, Respondent fully condoned

for the rest of the Charging Parties.

Summary of Conclusions

Respondent, having condoned all of the conduct alleged as grounds for discharge/refusal to rehire, violated section 1353 (a) by terminating the employment of all of the Charging Parties, except Ernesto Robles, whose case was settled, and therefore, no conclusion is reached. Assuming Respondent established a reasonable belief that Sergio Leal, Paulino Vega, Hilarion Silva, Juan Perez, Alvaro Guzman and Jose Guadalupe Fernandez engaged in the conduct attributed to them in their discharge letters, said conduct did not amount to serious strike misconduct, and/or General Counsel has proved they did not, in fact, engage in such conduct. Although Respondent violated section 1353 (a) by discharging Jorge Perez, based on condonation, his flagrant and egregious acts of misconduct make reinstatement and backpay inappropriate as remedies.

THE REMEDY

Having found that Respondent violated section 1153 (a) of the Act by discharging and refusing to rehire employees for engaging in protected concerted activities, I shall recommend that it cause and desist therefrom and take affirmative action designed

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all of Lobato's conduct, knowing her identity. Fernandez, assuming he actually told employees to take work equipment away from others, told Yamamoto there would be serious consequences if he did not release the employees from work and threw empty cartons at Smith's vehicle, may have thereby engaged in serious strike misconduct but, considering that no injury or damage resulted, is not unfit for reinstatement, even in conjunction with the conduct alleged in his discharge letter.

to effectuate the policies of the Act.

In fashioning the affirmative relief delineated in the following order, I have "taken into account the entire record of these proceedings, the character of the violations found, the nature of Respondent's operations, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Management. Inc. (1977) 3 ALRB No. 14.[30]

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

ORDER

Pursuant to Labor Code §1160.3, Respondent, Coastal Berry Company, LLC, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or refusing to rehire employees for engaging in protected concerted activities.

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

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[30]The settlement agreement in Case No. 99-CE-2-SAL provides that the notice to employees be published only at Respondent's Inland Division. The undersigned, in his written recommendation to the Board for approval of the agreement, requested that General Counsel and Respondent state, in their briefs, their positions regarding any notice required pursuant to this Decision. Neither did so. Therefore, it will be presumed that, as in Case No. 99-CE-2-SAL, General Counsel and Respondent agree that it is appropriate to limit publication of the notice to the Inland Division.

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

(a) Offer the following employees reinstatement to their former positions of employment, immediately with respect to year-round employees, and at the start of the next applicable season, with respect to seasonal employees, or if no such positions exist, to substantially equivalent positions:

1. Paulino Vega Escutia
2. Jose Guadalupe Fernandez
3. Alvaro Guzman
4. Hilarion Silv'a Jiminez
5. Sergio Leal
6. Yolanda Lobato
7. Juan Perez Maldonadq
8. Mariano Andrade Ortiz
9. Hilda Zuniga Ramirez

(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, cf 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 inland Division employees employed by Respondent for the period January 18, 1999 to the date of the mailing.

(f) Post copies of the attached Notice, in all appropriate languages, for sixty days in conspicuous places at its Inland Division work locations, 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 Inland Division employees of Respondent on company time and property at time(s) and places 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.

Dated: December 7, 1999

DOUGLAS GALLOPB
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 former employees, the General Counsel of the ALRB 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 ALRB found that we had violated the Agricultural Labor Relations Act (Act) by discharging and refusing to rehire employees engaged in lawful strike activities.

The ALRB has told us to post and publish this Notice, and to mail it to those who have worked for us since January 18, 1998. We will do what the ALRB has ordered us to do.

We also want to inform you that the 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;
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 ALRB;
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 or refuse to rehire employees who engage in lawful strike or protest activities.

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

WE WILL offer those employees specified by the ALRB 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.

DATED:_____ COASTAL BERRY COMPANY, LLC

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 ALRB. One office is located at 1880 North Main Street, Suite 200, Salinas, California. The telephone number is (831) 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