STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

McCAFFREY GOLDNER ROSES, A General Partnership, MIKE McCAFFREY and BARRY GOLDNER, Individually and as Partners of McCAFFREY GOLDNER ROSES, A General Partnership,	)	Case Nos. 00-CE-92-VI 00-CE-109-VI 01-CE-32-VI 01-CE-42-VI
Respondents,	)	28 ALRB No. 8 (August 19, 2002)
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO, ROSA VELASQUEZ, GILBERT G. JUAREZ, AND ROBERT GALLARDO	)	
Charging Parties.	)	

DECISION AND ORDER

On May 28, 2002, Administrative Law Judge (ALJ) Douglas Gallop issued the attached Recommended Decision in this matter. In his decision, the ALJ found that McCaffrey Goldner Roses, A General Partnership, Mike McCaffrey and Barry Goldner, Individually and as Partners of McCaffrey Goldner Roses, A General Partnership (Respondent, McCaffrey Roses or Employer) had violated section 1153 (a) of the

Agricultural Labor Relations Act (ALRA or Act) by refusing to rehire employee Gertrudis Ocampo (Ocampo) because of her protected concerted activities.

The ALJ dismissed all other allegations in the Second Amended Consolidated Complaint filed December 18, 2001 involving employees Rosa Velasquez, Gilbert G. Juarez, and Robert Gallardo. Thereafter, both Respondent and General Counsel timely filed exceptions to the Decision along with supporting briefs, and both parties filed answering briefs.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties, and has decided to affirm the ALJ's rulings, findings and conclusions, unless otherwise noted in this Decision, and to adopt his proposed Order as modified.[1]

The ALJ dismissed allegations that Gallardo's layoff and Respondent's failure to recall him in the fall of 2000 violated the Act. The basis for the alleged violations was that Gallardo had been discriminated against for refusing an order from Respondent's labor contractor, Art Arrambide, to fire Ocampo, an employee under

[1] The Respondent has excepted to many of the ALJ's credibility determinations. Respondent specifically argues that because Ocampo admitted using a false name to apply for work at another employer while on regular seasonal layoff from Respondent's operation in order to collect unemployment benefits under her own name, her testimony should not be credited. We find no merit in this argument. It is well established that the Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) The ALJ indicated that he had taken into account Ocampo's admitted receipt of unemployment benefits under false pretenses, but nevertheless found Ocampo's demeanor to be generally forthright and candid. Further, in instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence of absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. Our review of the record in the instant case indicates that the ALJ's credibility determinations are well supported by the record as a whole.

Gallardo's supervision who had engaged in protected concerted activity. [2] The ALJ found that both allegations concerning Gallardo were time-barred under section 1160.2 of the Act, which states that no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing and service of the charge.

While we agree with the ALJ's conclusion that the allegation concerning Gallardo's May 3, 2000 layoff should be dismissed as untimely, we disagree that the allegation that Respondent's refusal to rehire Gallardo violated the Act should also be dismissed as untimely. However, we nonetheless find that allegations concerning the refusal to rehire Gallardo should be dismissed, as the Respondent has carried its burden of showing it would have refused to rehire Gallardo even in the absence of his protected concerted activity.

The six-month statute of limitations period commences when the filing party has clear, unequivocal notice of a final adverse decision. (*NLRB v. Public Service Electric & Gas Co.* (3d Cir. 1998) 157 F. 3d 222*; Local 6 Amalgamated Industrial and Service Workers Union* (1997) 324 NLRB 647.) Notice for purposes of the limitations period can be constructive knowledge of the adverse action. That is, adequate notice can be found, even in the absence of actual knowledge, if a charging party would have discovered the adverse action if he or she had exercised due diligence. (*R.G. Burns Electric* (1998) 326 NLRB 440, citing *Oregon Steel Mills* (1988) 291 NLRB 185.) Because the limitations period functions as an affirmative defense to an unfair labor practice charge, the party relying on that defense has the burden of proof to establish that

[2] Although the Act's protections generally extend only to non-supervisory employees, there are narrow circumstances where an adverse action against a supervisor may be found to violate the Act. Once such exception to the general rule is when a supervisor refuses to discriminate against an employee based on her protected concerted activities, and is then disciplined for that reason. *Sequoia Orange Co., et al* (1985) 11 ALRB No. 21.

the charge was untimely. (*NLRB v. Public Service Electric & Gas Co., supra* 157 F. 3d 222.)

The allegation concerning the May 3, 2000 layoff in the December 18, 2001 Second Consolidated Complaint, was not included in the April 25, 2001 charge, which only alleged that "on or about November 1, 2000, McCaffrey Roses, through its agent, Arthur I. Arrambide, has discriminatorily failed to recall Robert Gallardo because he defied a direct order to commit an unfair labor practice." Although it is well-established that a complaint, although filed after the six month period has run, may allege violations not alleged in the charge if they are closely related to the violations named in the charge, it is also required that the newly alleged violations occurred within the six month period immediately preceding the filing of the original charge. (*NLRB v. Dinion Coil Co*. (2nd Cir. 1952) 201 F. 2d 484.) The May 3, 2000 layoff took place far longer than six months before the original April 25, 2001 charge was filed, therefore this allegation is untimely on its face.

In excepting to the dismissal of the layoff allegation as untimely, the General Counsel contends that because Gallardo was told On May 3 that he was being laid off for budgetary reasons, rather told he was being discharged for his poor work performance, the statute of limitations should be tolled until he actually knew his employment with Respondent was permanently over. We are not persuaded by this argument. Although Gallardo may not have been fully clear as to whether he had been temporarily laid off or permanently discharged at the time he was let go, the surrounding circumstances were sufficient to put him on notice that some kind of adverse action had taken place on May 3. He was the only person laid off at the time, and he was laid off

almost two months before the regular summer seasonal lay off period. We therefore agree with the ALJ that the time period for filing a charge alleging that the May 3 layoff was unlawful commenced at the time when he was notified of his layoff.

On the other hand, we are not persuaded that the charge relating to the failure to rehire filed on April 25, 2001 was untimely. As the time bar issue is an affirmative defense, the Respondent, as the party raising the issue, had the burden to show that Gallardo had clear, unequivocal notice that he was not going to be rehired sometime prior to October 24, 2000.[3] We find merit in the General Counsel's contention that Gallardo reasonably believed his recall could have taken place anytime after that date. Credited evidence shows that workers were recalled in several waves beginning in October 2000 through November 2000. Even under the constructive knowledge/due diligence standard discussed in *R.G. Burns Electric*, *supra* 326 NLRB 440, it was not unreasonable for Gallardo to have failed to realize until considerably after October 24, 2002 that he was not going to be recalled, and the Respondent has failed to show otherwise. Because the Respondent did not adequately establish that the charge alleging the unfair refusal to rehire was untimely, we do not sustain the ALJ's conclusion with respect to this issue.

We therefore turn to the merits of the case and examine whether the Respondent's failure to rehire Gallardo violated the Act. The General Counsel bears the burden of setting forth a prima facie case of retaliation for engaging in protected concerted activity. This is established by showing that: 1) the employee engaged in protected activity; 2) the employer had knowledge of the activity; and 3) the adverse

[3] Under section 20170 of the Board's regulations addressing computation of time periods, the day of the event that starts the time running is not counted. (Tit. 8 Cal. Code Regs. sec. 20170.)

action taken by the employer was motivated at least in part by the protected activity. (*Lawrence Scarrone* (1981) 7 ALRB No.13.) In cases where the alleged retaliation is a refusal to recall or rehire, the General Counsel must also show that the employee applied for an available position for which he was qualified and was unequivocally rejected. (*Kawano, Inc. v. ALRB* (1980) 106 Cal. App. 3d 937; *Vessey & Co. v. ALRB* (1989) 210 Cal. App. 3d 629*; Giannini Packing Company* (1993) 19 ALRB No. 16.) In situations where the employer had a practice or policy of contacting former employees to offer them re-employment, this requirement can be satisfied by proof of the employer's failure to do so at a time when work was available. (*Giannini Packing Company*, *supra* 19 ALRB No. 16.)

Once the General Counsel has established its prima facie case, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of the employee's protected concerted activity. (*Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083.)

Gallardo engaged in protected concerted activity in April 2000 when he refused labor contractor Art Arrambide's request to fire Gertrudis Ocampo because she "was a troublemaker." Although this event occurred months before the failure to recall Gallardo, credited evidence supports the conclusion that there was still animus against Ocampo in the fall of 2000 when Arrambide told Gilberto Juarez not to recall her. Indeed, this evidence was the basis for the violation the ALJ found as to Ocampo, and which we have affirmed. This, in turn, supports the inference that Gallardo's previous support of Ocampo was a motivating factor in the decision not to rehire him in the fall of 2000. However, in light of the discussion below, we need not decide definitively the

issue of whether the failure to rehire Gallardo was motivated at least in part by the protected activity.

Whether the General Counsel sufficiently established that Gallardo sought work for which he was qualified at a time when it was available presents an even closer question. Gallardo testified that he contacted Arrambide for work on unspecified dates in October, November and December 2000 and was told there was no work for him. [4] Given Gallardo's level of experience, it is not reasonable that he would have been seeking anything other than a supervisory position in Respondent's operation. The record indicates that such a position was not available until November 13, 2000 when Juarez was discharged. McCaffrey testified that the position was not filled right away, but that eventually Josephina Mendoza was brought on to take over supervisory responsibilities (Mendoza's start date was not indicated). The testimony that no one was hired to fill the supervisor position right away supports an inference that Gallardo's November and/or December contacts with Arrambide very likely happened at times when Gallardo's old position, performed by Juarez from May 3 to November 13, 2000, was vacant. The record, however, is not entirely clear on the question of whether Gallardo specifically applied for the vacant position and was unequivocally rejected.

Assuming arguendo that the evidence sufficiently establishes that Gallardo sought work for which he was qualified at a time when it was available, and that the failure to rehire him was motivated in part by his refusal to fire Ocampo, we find that the

[4] The record does not establish that Respondent had an established policy of contacting former employees to offer them re-employment.

Respondent adequately met its burden of showing that it would not have rehired Gallardo even in the absence of his refusal to fire Ocampo.

Respondent presented no written documentation of complaints against Gallardo or of any warnings given to Gallardo about his unsatisfactory work performance. Gallardo was told that he was being laid off for budgetary reasons, however, it is apparent that Gallardo's work performance was closely tied to the economic situation that led the Respondent to lay him off. The record indicates that the Respondent began to have misgivings about the way Gallardo was performing his job in the early spring of 2000, and that Gallardo's failure to fully carry out his duties had begun to have a negative economic impact on Respondent.

Mike McCaffrey testified that Gallardo was in charge of overseeing the crucial process of harvesting and preparing budwood for cold storage, and for monitoring the budwood until it was taken out of cold storage in the spring. His unrebutted testimony was that although Gallardo had many years of experience in the rose industry, he had increasingly limited mobility which prevented him from going out into the fields and personally supervising the workers harvesting budwood. Juarez had been hired to help Gallardo with his duties due to his physical limitations. When the quality of the spring 2000 budwood did not meet his expectations, McCaffrey concluded that the process of harvesting and storing the budwood had not been monitored closely enough by Gallardo. Gallardo admitted that the quality of the budwood was not very good that season, and did not offer an explanation that contradicted McCaffrey's assertion that Gallardo's unsatisfactory job performance was directly related to the problems with the budwood.

McCaffrey testified that when he reviewed his books in April 2000, he found his company was facing increasingly serious economic problems due to the downturn in the California rose industry, and due to the fact that he was going to have to obtain new budwood to replace the budwood that was unusable due to its poor quality. He then decided that he did not need two people doing a job that one person should be able to do on his own. It is apparent that the economic situation had not changed dramatically by the time Gallardo allegedly asked for rehire in the fall of 2000. McCaffrey testified that orders in the coming year from his company had fallen off by 750,000 plants.

In addition to the misgivings about Gallardo's job performance, McCaffrey testified that Arrambide had informed him of complaints from several women who had approached Gallardo for work when he was supervisor, alleging that Gallardo had sexually harassed them. Although there is no written documentation of these complaints or of any warnings given to Gallardo, the testimony about the complaints was corroborated by witnesses Domitila Samano and Denella Villarreal, and there was evidence that the complaints were brought to his attention.

We find no reason to discredit McCaffrey's testimony, and find it sufficient to show that even if Gallardo had not supported Ocampo, Respondent would not have rehired him due to legitimate business reasons. We therefore dismiss the allegation concerning Gallardo.

ORDER

By authority of California Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondents, McCaffrey Goldner Roses, A General Partnership, Mike McCaffrey and Barry Goldner, Individually and as Partners of McCaffrey Goldner Roses, A General Partnership, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to recall or otherwise retaliating against, any agricultural employee because the employee, in concert with other employees, has complained about working conditions, or has engaged in other concerted activities protected under section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related matter interfering with, restraining, or coercing any agricultural employee(s) in the exercise of rights guaranteed them by Labor Code section 1152.

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

(a) Offer to Gertrudis Ocampo immediate reinstatement to her former or a substantially equivalent position without prejudice to her seniority or other rights and privileges of employment.

(b) Make whole Gertrudis Ocampo for all wage losses and other economic losses she has suffered as a result of Respondent's discrimination against her, such losses to be computed in accordance with Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondents since the unlawful

refusal to recall Ocampo. Such amounts shall include interest thereon, computed in accordance with our Decision and Order in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

(c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning October 13, 2000, preserve and, upon request, make available to the Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the amounts of backpay and interest due under the terms of the Order. Upon request of the Regional Director, the payroll records shall be provided in electronic form if they are customarily maintained in that form.

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

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional Director, to all employees employed by Respondent during the period October 13, 2000 to October 12, 2001.

(f) Post copies of the attached Notice for 60 days at conspicuous locations on its premises, the places of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of copies of the attached Notice.

(g) Provide a copy of the attached Notice in all appropriate languages to each agricultural employee hired by Respondent during the 12-month period following the date this order becomes final.

(h) Upon request of the Regional Director, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time Regional Director requests peak season dates, Respondent will inform the Regional Director of when the present peak season began and when it is anticipated to end in addition to informing the Regional Director of the anticipated dates of the next peak season.

(i) Arrange for a representative of Respondent or Board agents to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time, at times and places to be determined by the Regional Director. Following any reading, Board agents shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees have concerning the Notice 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.

(j) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing as to what further steps it has taken in compliance with the order.

3. It is further ordered that all other allegations in the Second Amended Consolidated Complaint are hereby dismissed.

Dated: August 19, 2002

GENEVIEVE A. SHIROMA, Chair

GLORIA A. BARRIOS, Member

HERBERT O. MASON, Member

CASE SUMMARY

McCAFFREY GOLDNER ROSES, ET AL
(United Farm Workers of America, AFL-CIO, et al.)

Case Nos. 00-CE-92-VI
00-CE-109-VI
01-CE-32-VI
01-CE-42-VI

28 ALRB No. 8

Background

The complaint alleged that Respondent violated section 1153(a) of the Act by failing to recall Gertrudis Ocampo and supervisor Robert Gallardo, and by discharging Gallardo, Rosa Velasquez and supervisor Gilberto Juarez.

In December 1999 and in the spring of 2000, Ocampo, as primary spokesperson Velasquez and other crew members approached supervisor Gallardo and assistant supervisor/foreman Juarez to complain that a forewoman was being abusive, and was reducing their earnings by distributing work inefficiently. Gallardo told Arrambide of the group's complaints and that Ocampo was the main person complaining.

In mid-April 2000, Arrambide asked Gallardo to point out Ocampo, and requested that Gallardo fire her because she was a "troublemaker." Gallardo refused, saying that Ocampo was a good worker. Gallardo was laid off on May 3, 2000 and was told it was due to Respondent's financial situation. The Respondent testified that Gallardo's unsatisfactory work performance was hurting the business. Ocampo and Velasquez continued to work until regular summer seasonal lay off.

Juarez was in charge of recalling workers for the fall season. Ocampo complied with Respondent's recall procedure by providing her address and telephone number. Juarez obeyed Arrambide's order not to recall Ocampo because she had made trouble during the previous spring. Juarez and Velasquez were later discharged for falsifying Velasquez's time sheet. Gallardo sought work on unspecified dates in October, November and December 2000, but was told there was no work available for him.

The ALJ Decision

The ALJ found the refusal to recall Ocampo violated the Act and dismissed allegations concerning Gallardo, Velasquez, and Juarez. The ALJ found a prima facie case of retaliation against Ocampo for the protected concerted activity and that Ocampo followed the proper recall procedure and sought work when it was available. The ALJ found insufficient evidence to establish that Respondent

would not have recalled Ocampo even in the absence of her protected concerted activity.

The ALJ found that the allegations concerning Gallardo were untimely filed. The ALJ reasoned that had Gallardo exercised due diligence, he would have known by early October 2000 that he was not going to be recalled by Respondent. The ALJ found that Velaquez's protected activity was not a motivating factor in her discharge. Finally, the ALJ dismissed allegations concerning Juarez because he found that under the circumstances of the case, none of Juarez's conduct as a supervisor was protected by the Act.

Board Decision

The Board adopted the rulings, findings and conclusions of the ALJ, except with respect to Gallardo.

The Board sustained the ALJ's conclusion that the charge was untimely filed as to Gallardo's May 3, 2000 layoff. While Gallardo may not have fully understood that he was being permanently than temporarily laid off, the circumstances put him on notice that the May 3 layoff was unlawful and the time for filing a charge alleging that the May 3 layoff was unlawful commenced on that date.

The Board reversed ALJ's conclusion that the allegation concerning the failure to recall Gallardo was untimely because Respondent had not met its burden of showing that October 24, 2000 was an unreasonably late date for Gallardo to have had clear, unequivocal notice that he was not going to be rehired. Gallardo engaged in protected concerted activity when he refused to fire Ocampo. The Board found that Respondent had established that it would not have rehired Gallardo due to his unsatisfactory job performance even in the absence of his protected activities.

***

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging 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 refusing to recall Gertrudis Ocampo from layoff because she concertedly protested her conditions of employment.

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

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

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
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 you have these rights, we promise that:

WE WILL NOT refuse to recall to work, or otherwise retaliate against agricultural employees, because they protest about their wages, hours or other terms or conditions of employment.

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 Gertrudis Ocampo immediate reinstatement to her former position of employment or, if her position no longer exists, to substantially equivalent employment, and make her whole for any loss in wages and other economic benefits suffered by her as the result of the unlawful refusal to recall her to work.

DATED: _____ **McCAFFREY GOLDNER ROSES**

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 711 North Court Street, Visalia, California 93291. The telephone number is (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
McCAFFREY GOLDNER ROSES, A General Partnership, MIKE McCAFFREY and BARRY GOLDNER, Individually and as Partners of McCAFFREY GOLDNER ROSES, A General Partnership,	)	**Case Nos.** 00-CE-92-VI 00-CE-109-VI 01-CE-32-VI 01-CE-42-VI
Respondents,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO, ROSA VELASQUEZ, GILBERT G. JUAREZ, AND ROBERT GALLARDO,	)	
	)	
Charging Parties.	)	

Appearances:

Howard A. Sagaser
SAGASER, FRANSON & JONES
Fresno, California
For Respondent

Francisco T. Aceron, Jr.
VISALIA ALRB REGIONAL OFFICE
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: On December 18, 2001, the Visalia Regional Director of the Agricultural Labor Relations Board (hereinafter ALRB or Board) issued a Second Amended Consolidated Complaint (complaint) alleging McCaffrey Goldner Roses, A General Partnership, Mike McCaffrey and Barry Goldner, Individually and as Partners of McCaffrey Goldner Roses, A General Partnership (hereinafter Respondents) violated section 1153(a) of the Agricultural Labor Relations Act (Act). The complaint is based on charges filed by Robert Gallardo, Rosa Velasquez Martinez (Velasquez), Gilbert Gallardo Juarez and the United Farm Workers of America, AFL-CIO (hereinafter Union). The Charging Parties have not intervened in this proceeding. Respondents filed an answer to the complaint, denying the commission of unfair labor practices and setting forth affirmative defenses.

A hearing was conduced before the undersigned at Bakersfield, California on February 25, 26, 27 and 28, 2002, at which the Board's General Counsel and Respondents litigated the allegations in the complaint. After the hearing, the parties filed briefs, which have been duly considered. Based on the testimony of the witnesses, the documentary evidence received at the hearing and the parties' briefs and oral arguments, the undersigned issues the following findings of fact and conclusions of law.

The Layoff and Refusal to Rehire Robert Gallardo

Facts Regarding the Statute of Limitations Defense

Robert Gallardo was employed as a supervisor by Arrambide Labor Service, which was engaged as a labor contractor by Respondents in late 1999, to provide rose plant workers. Gallardo was assigned to supervise the rose workers at Respondents'

facilities. Gallardo, corroborated by Juarez, testified he was informed, by Arthur Isidro Arrambide, that he was being laid off for economic reasons, on May 3, 2000. Arrambide testified that after Respondents informed him of budgetary problems, he discharged Gallardo, and informed him of work deficiencies leading to the decision. Arrambide further denied Juarez was present when he discharged Gallardo. On April 25, 2001, Gallardo filed a charge, which Gallardo, in a proof of service, contended was served on that date, alleging Respondents violated the Act by refusing to recall him after his layoff. The complaint, however, alleges both Gallardo's layoff and the refusal to rehire him as violations of section 1153(a).[1]

With respect to the failure to rehire Gallardo, he testified that Michael James McCaffrey, Respondent's managing partner, told him, at the time of his layoff, that he might be rehired to supervise Respondents' rose operation in Mexico. Irrespective of whether the Board has jurisdiction over such work under the facts presented, Respondents presented unrebutted evidence that this operation was discontinued, and Gallardo admitted he was later told this. Gallardo also admitted that he told Respondents he was going to retire, when advised that the Mexican rose operation had been discontinued.

Gallardo, corroborated by Juarez, testified that Arrambide told him he would be recalled/rehired in the fall of 2001, which Arrambide, in his testimony, denied. Gallardo, however, did not claim he attempted to return to work at Respondents' facility, after

[1] Respondents admit that they are agricultural employers, and are considered the statutory employers of their labor contractors' employees, under section 1140.2(c) of the Act.

being told the Mexican rose operation had been discontinued. To the contrary, his testimony indicates that once the opportunity in Mexico failed to materialize, he knew that further employment with Respondents was not going to happen. In any event, Gallardo, as a highly experienced rose industry specialist, would have known that if he wanted to resume working as a contractor employee for Respondents, he would have needed to seek rehire by early October 2000, prior to the limitations period, but did not, in his testimony, claim to have done so.

Instead, Gallardo generally testified that he sought unspecified work from Arrambide in October, November and December 2001, a contention denied by Arrambide. It is noted that Arrambide provides contract employees to other employers, and it is clear to the undersigned that this is the employment Gallardo was seeking at that point, assuming his claim is true. According to Gallardo, Arrambide offered him employment for work at a different employer in December, which Gallardo apparently did not accept.

The evidence establishes that Respondents' last rose workers were laid off in July 2001. Respondent began recalling those workers on October 6, under the supervision of Juarez, who had replaced Gallardo after May 3.[2]

Analysis and Conclusions of Law

Respondents contend that the allegations concerning Gallardo are time-barred. Section 1160.2 of the Act requires that no complaint shall issue based upon any unfair

[2]It is unclear whether Juarez was laid off with the non-supervisory rose workers.

labor practice occurring more than six months prior to the filing and service of the charge. Even assuming that the complaint could allege Gallardo's layoff/discharge as a violation, in the absence of said allegation in Gallardo's charge, it was filed and served far longer than six months after Gallardo was informed of his termination. Also, further assuming that Gallardo was misled as to the nature of, and reasons for his termination, once he was informed of his layoff, the time period for filing and serving the charge still commenced, at that point. The alternative would, in effect, permit charges to be filed at virtually any time, unless the employee was informed of unlawful motivation at the time of an adverse action. Accordingly, the layoff allegation will be dismissed, because the charge was not filed in a timely manner.

The evidence shows that Gallardo, given his age and physical condition, would have only been recalled to a supervisory position and, in any event, Gallardo expressed no interest in other work.[3] The record establishes that Gallardo's position had been assigned to Juarez in May 2000. Even if Gallardo would have been willing to accept employment as a foreman under Juarez, Josie Mendoza, who filled that position, was hired on October 6.

Furthermore, Gallardo, if not actually aware that he was not going to be rehired as Respondents' contractor employee, in any capacity, prior to the commencement of the limitations period, would have known this if he had exercised due diligence. Thus, given Gallardo's experience, he would have known that Respondents' operations resumed prior

[3] It is highly unlikely, and Gallardo did not contend, that he would have accepted employment at the substantially lower wages paid to nonsupervisory workers. Rehire by Arrambide as a non-contract employee, or as a contractor to another employer would require that the complaint name an employer other than Respondents.

to October 25, 2000, and if he was diligently seeking rehire for the fall season, would have known this was not going to happen, prior to that date. Inasmuch as Gallardo did not file his charge until April 25, 2001, he knew, or should have known, that he was not going to be rehired as Respondents' contractor employee more than six months before he filed the charge. Accordingly, this allegation is also time-barred, and must be dismissed.[4]

The Discharge of Gilbert Gallardo Juarez

Facts Regarding Supervisory Protection Under the Act

Juarez, a statutory supervisor, last worked for Respondents on November 13, 2000. He was discharged, Respondents contend, for falsifying the timesheet of alleged discriminatee, Rosa Velasquez. The complaint alleges that the real reason for Juarez's discharge was that he "supported" the employees' right to engage in protected-concerted activities, and his discharge was "a means of discriminating" against agricultural employees.

Juarez testified that he was aware Respondents wished to discharge alleged discriminatee, Gertrudis Ocampo, in the spring of 2000, due to her protected activities. At that time, Juarez was Ocampo's foreman, but Gallardo would have been the one to discharge her. Juarez played no role in determining whether to discharge Ocampo, and avoided becoming involved.

[4] In the event that this conclusion is not sustained on review, it is also concluded that Gallardo's statement, that he was going to retire, relieved any obligation which may have existed for Respondents to inform him, at the end of the summer layoff, of any job openings. Gallardo's general testimony, that he sought work from Arrambide in October, November and December 2000, would therefore fail to satisfy General Counsel's burden to preponderantly show that he timely sought recall/rehire with Respondents at a time when work was available for him. See *Vessey & Company, Inc.* v. *ALRB* (1989) 210 Cal.App.3d 629; *Prohoroff Poultry Farms* (1979) 5 ALRB No. 9.

As noted above, Juarez assumed Gallardo's job duties after May 3, 2000.[5] Juarez testified that it was his responsibility to recall rose workers for dethorning work, commencing in early October, 2000. He further testified that he repeatedly asked Arrambide if he could recall Ocampo, but was told not to do so, because of her protected activities. Juarez purportedly brought this to the attention of McCaffrey, who appeared to agree with Arrambide.[6] Irrespective of his sympathies for Ocampo, Juarez admittedly did not recall her and, in fact, put her off when she sought work. After Ocampo was ultimately denied recall, purportedly for not seeking work in a timely manner, Juarez testified that he asked Arrambide if he could reinstate her, but Arrambide would not give such permission.

Analysis and Conclusions of Law

The Act, by its terms, limits the protections therein to non-supervisory agricultural employees. Certain narrow exceptions have been created, where discrimination against supervisors directly affects the employment of statutory employees. One is where the supervisor refuses an order to discriminate against employees, based on their protected activities, and is then disciplined for that reason. The second is where discipline against the supervisor is the employer's means to unlawfully discriminate against employees. *Sequoia Orange Co., et al.* (1985) 11 ALRB No. 21.

[5] Juarez testified that after he assumed Gallardo's job duties, Arrambide also asked him to discharge Ocampo, prior to the summer layoff of the rose workers, which he did not do. As discussed below, said testimony has not been credited. It is also noted that the complaint does not contend Juarez was discharged for this reason, and General Counsel did not make such a contention at the prehearing conference in this case, or in the post-hearing brief.

[6] The credibility of these assertions is discussed below.

As noted above, although Juarez testified that he wanted to recall Ocampo, he, in fact, did not. Thus, if Respondents' refusal to reinstate Ocampo was unlawful, Juarez participated in that conduct. While Juarez gave some testimony indicating he agreed with some of the employee complaints, which took place during the period December 1999 to May 2000, there is no evidence that he joined in their protests, and scant, if any evidence, that he voiced such support to his superiors. In any event, such assistance, in itself, would not confer the Act's protection on a supervisor, and Juarez's discharge, coming several months after the protests, could not reasonably be construed as having a "chilling effect" on the employees' exercise of their statutory rights.[7]

Finally, there is no evidence that Juarez's discharge had an adverse impact on any other employee's job based on prohibited reasons, or that any other employee's work was dependent on his continued tenure. In this regard, although Juarez may have wanted to recall Ocampo, his own testimony shows he continued to defer to the perceived wishes of Arrambide until he was discharged. Under the facts presented, Juarez, as a supervisor, was not protected under the Act. Accordingly, this allegation will be dismissed.

The Refusal to Rehire Gertrudis Ocampo[8]

Statement of Facts

Ocampo began working for Arrambide at Respondents' rose farm on November 8,

[7] One reason for the statutory exclusion of these employees is management's right to expect loyalty from its supervisors. Thus, short of committing unfair labor practices, management is entitled to demand that its supervisors support its positions on unionization and nonunion disputes concerning wages, hours and working conditions.

[8] The complaint alleges that Respondents unlawfully laid off Ocampo on or about June 28, 2000. At the prehearing conference, General Counsel stated that this layoff would not be litigated as unlawful. Accordingly, said allegation will be dismissed.

1999. Previously, Ocampo had worked for McCaffrey for many years at another rose enterprise.[9] When Ocampo began working for Arrambide, she was assigned to a de-eyeing crew of about 18 workers at Respondents' facilities, with Gallardo as her supervisor, and Anita Montoya as her forelady.

Ocampo, corroborated by several witnesses, including Gallardo and Juarez, credibly testified that five crew members, including herself and alleged discriminatee, Rosa Velasquez, complained to Gallardo about abusive treatment by Montoya, in December 1999. Ocampo testified she acted as spokesperson for the employees during this, and future complaints to management.[10] Gallardo recalled that Ocampo approached him, with the others present, and complained that Montoya was harassing the crew members. Gallardo told Ocampo she was the only one complaining. Ocampo responded that she was speaking for all of the crew members present. Gallardo asked the others if this was correct, and they responded it was. At that point, the employees all began speaking at once, so Gallardo told them to let Ocampo speak for them, and the discussion continued.

Gallardo told the employees he would speak with Arrambide about their complaints, and testified that he did so. Gallardo initially testified that he told Arrambide the main employees complaining were Ocampo, Velasquez and his daughter, Gloria Gallardo, but on cross-examination, deleted his daughter from the list. Arrambide told Gallardo he would "get back" to him on this, but never did. Arrambide denied having

[9] The record is unclear as to whether Ocampo was directly employed by McCaffrey, or through a labor contractor.

any complaints about Montoya brought to his attention. Arrambide, in his testimony, also denied that Gallardo ever informed him Ocampo acted as spokesperson for the crew members, or being aware of this. In his prehearing declaration, taken by Respondents' attorneys, however, Arrambide stated:

> In December of 1999, Gallardo informed me that Ocampo had complained regarding her wages. . . .[11] In April of 2000, Gallardo informed me that Ocampo had complained regarding her wages.

It is also noted that Respondents, at the prehearing conference in this case, admitted knowing that Ocampo spoke out concerning the wages, but denied knowing Velasquez also did this. Therefore, it is found that Gallardo did inform Arrambide that the employees, led by Ocampo, had complained about Montoya.[12]

Gallardo, who did not choose Montoya as the crew foreperson, observed some of her abusive conduct, and had additional complaints of his own concerning her work performance. Therefore, after a winter layoff, he removed Montoya as the foreperson, and assigned that function to Juarez, who had been supervising another crew. Montoya then became Juarez's helper, apparently with no reduction in pay.

The crew was recalled for dethorning work in March. The employee witnesses credibly testified that although Montoya was no longer the foreperson, they felt she continued to treat them abusively. The workers were paid a piece rate over a guaranteed

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[10] Respondent points to other testimony and witness declarations, in claiming that Ocampo was not an outspoken leader. The undersigned found such evidence unconvincing, when compared with the more specific evidence presented as to what actually took place during these meetings, and certain admissions, discussed herein.

[11] In light of the conflicting testimony by all of the other witness who testified on the issue, Arrambide was incorrect concerning the subject of the December complaint.

[12] While Gallardo was credible on some issues, the undersigned found his inconsistent and sometimes belated efforts to tie in Rosa Velasquez as a leader in these disputes to be singularly unimpressive, and a rather obvious ploy to lend unwarranted assistance to her case.

hourly minimum. They blamed Montoya for being slow in bringing them the rose plants and mixing varieties as reasons why they could not earn more than the minimum. In addition, the quality of the plants was not good, also slowing down their work.

The same five crew members met with Gallardo in April, led by Ocampo, to again protest Montoya's abusive conduct, and to complain that she was bringing them the plants too slowly. Gallardo told them he would speak with Arrambide, and credibly testified that he did so.[13] Although Arrambide denied that Gallardo specified Ocampo as having complained, his prehearing declaration, noted above, contradicts this.

Ocampo testified that she spoke directly with Arrambide about the wage issue. According to Ocampo, she told Arrambide the piece rate was unfair, and that some of her co-workers were only earning $30.00 to $32.00 per day. Arrambide told Ocampo that the workers would receive Respondents' $6.15/hour minimum hourly rate, if their piece rate earnings were lower, but no more than that amount. Ocampo replied that this was unfair, because they were working very hard.

Gallardo, unprompted, volunteered that he recalled Ocampo speaking directly to Arrambide as well, around April 7.[14] Juarez testified that in April, he observed Arrambide and Ocampo engaged in a conversation for five to ten minutes, which he could not hear. After the conversation, Arrambide entered the office, and did not appear to be happy. Although Ocampo testified that the entire crew was present during this

[13]Gallardo initially testified that he identified Ocampo as the one complaining, but later added Velasquez.
[14] See Transcript, Volume II, page 325. To the undersigned, the fact that this testimony first came out on cross-examination, and was spontaneous, makes it all the more reliable, even considering Gallardo's other weaknesses as a witness.

conversation, she was not corroborated on this point by the other employee witnesses. On the other hand, Ocampo testified that she was the only one who spoke to Arrambide during this conversation. Arrambide denied ever speaking directly with Ocampo.

Ocampo was a more credible witness than Arrambide,[15] as was Juarez, from the standpoint of their demeanor, conviction, corroboration by other witnesses and support from the documentary evidence. Furthermore, Gallardo also credibly corroborated Ocampo's claim. In addition to the conflict between Arrambide's declaration and his testimony concerning his knowledge of Ocampo's role in the disputes, Arrambide was contradicted on too many points by the other witnesses, including Respondents'. He also tried to play both sides of the fence concerning his knowledge of the employees generally, claiming not to know their names when it suited his purposes, and then admitting such knowledge when it was to his advantage. Therefore, Ocampo is credited in her testimony that she complained directly to Arrambide concerning the piece rate, although she was either mistaken when she claimed the other crew members were present, or was only referring to their presence in the area, rather than their having been directly with her during the discussion. Based on Gallardo's and Juarez's testimony, it is also concluded that this conversation took place in April 2000.[16]

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[15] The undersigned has taken into account Ocampo's admitted receipt of unemployment insurance benefits under false pretences when working at different employers' facilities, while on layoff from Respondents, in evaluating her credibility. Ocampo was, nevertheless, generally impressive as a candid and forthright witness.

[16] Although Ocampo indicated that this conversation took place in May, she also testified that she spoke with Arrambide in May about his demand that she be discharged, discussed below. Gallardo and Juarez were more reliable as to the date of this conversation, particularly since Gallardo's employment was terminated on May 3, 2000 and thus, had the conversation between Ocampo and Arrambide taken place in May, it is highly unlikely that Gallardo would have been aware of it. Although Juarez did not hear the conversation, he was quite sure it took place before Arrambide told Gallardo to discharge Ocampo. Ocampo, for her part, was probably confusing the date of this conversation with the one she had with Arrambide in May.

About one week after this conversation, Arrambide asked Gallardo to point out Ocampo. Juarez was present. According to Arrambide, he asked this, because he had known Ocampo under another name at a previous employer, and said this to Gallardo. Juarez, however, credibly testified that Arrambide asked, "Who is Tula?," which is Ocampo's nickname, suggesting he was not concerned about the name she used elsewhere.

Gallardo initially testified that after pointing out Ocampo, Arrambide told him to fire the troublemakers. On cross-examination, Gallardo first testified that Arrambide told him to fire Ocampo and Velasquez, but then retreated to "the troublemakers." Gallardo also showed some confusion by contending that the discharge request by Arrambide was made on an occasion subsequent to when he pointed out Ocampo, and then retracting said contention. Juarez testified that Arrambide told Gallardo to fire Ocampo, because she was a troublemaker, when Gallardo identified her. Gallardo testified he told Arrambide he would not fire the workers, because they were good employees. Juarez testified Gallardo said he would not fire Ocampo, because she was a good worker. Arrambide testified he told Gallardo that Ocampo had to work under her real name, and if she would not do so, to fire her.

Of the three, Juarez was the most credible.[17] Juarez, who is on good terms with Velasquez, would certainly not have hesitated to name her as an employee Arrambide

[17] Juarez did testify that he observed, and Gallardo reported to him other occasions where Arrambide asked Gallardo to discharge Ocampo, and that Arrambide made the same request to him, prior to the summer layoff. These allegations were not in Juarez's prehearing declaration, and Gallardo did not corroborate Juarez regarding the alleged additional requests to him by Arrambide. While this portion of Juarez's testimony is not credited, the undersigned still considers him to have generally been truthful.

wanted discharged, if this had happened.[18] Arrambide, as noted above was not a very credible witness.

Therefore, it is found that Arrambide approached Gallardo, in the presence of Juarez, and asked him to point out Ocampo. When Gallardo did this, Arrambide told him to fire Ocampo, because she was a troublemaker. Gallardo refused, citing Ocampo's good work record.

Although the quality of the rose plants improved somewhat, some of the crew members were still dissatisfied with their wages, and the same five who had earlier complained to Gallardo (including Ocampo) made an appointment to speak with McCaffrey, in May. They conducted the meeting through an interpreter, office worker, Domitila Samano. Ocampo spoke first for the employees, stating their wages were inadequate. She said the plants were running very slowly, and this was the cause of the problem. McCaffrey stated he was unaware of the problem, and would discuss it with Arrambide.

The other employees also discussed their complaints about Montoya, and one of her relatives, who was also employed by Arrambide. McCaffrey again stated he had been unaware of the problems, and would speak with Arrambide. The meeting was interrupted by a telephone call for McCaffrey, and ended at that point.[19] McCaffrey and Arrambide

[18] With respect to the wage complaints, Velasquez was paid on an hourly basis, and had little interest in the dispute. Ocampo was the only employee in the group who had performed this task on a piece rate basis in the past, and she instigated the group's complaint, based on her prior earnings experience.

[19] McCaffrey testified that all of the employees spoke out, and little was said about Montoya or her relative. McCaffrey's recall of the meeting appeared weak, and Ocampo's version of the meeting, set forth above, is credited. It is also noted that Respondents called Samano as a witness, and she did not deny General Counsel's witnesses' account of the meeting.

testified that after the meeting, they discussed the wage issue. Since it was early in the season, they decided to wait before changing the piece rate. Inasmuch as the complaints to them ceased, no change was made.

Ocampo found out about Arrambide's demand to have her discharged from Gallardo, after Gallardo was laid off,[20] and from Juarez, after Velasquez told her Juarez had told her this. According to Ocampo, she asked Arrambide if he intended to discharge her, in May. Arrambide told her this was just a rumor, and to ignore it. Arrambide, in his testimony, denied this conversation took place. Ocampo, as the more believable of the two, is credited.

On June 28, Ocampo took an early layoff, a few days before the rest of the crew was given a seasonal layoff. She took an interim job with another employer. The employees understood, from Juarez, that they were to sign a list if they wished to be recalled for the next available work. When employed for many years at McCaffrey's prior rose operation, McCaffrey's secretary had contacted Ocampo for recall, once she stated she was available. In her only prior layoff with Arrambide, Gallardo had personally recalled Ocampo to work.

Juarez credibly testified that once he became Arrambide's foreman, he was in charge of recalling employees. He asked the employees under his supervision to sign a

[20] It is noted that this conversation does not appear in Ocampo's prehearing declarations. While Ocampo testified that Gallardo first referred to her, and then to Velasquez as targets for discharge, Velasquez testified that Gallardo generally referred to the group of five employees as being targets. (Velasquez, who demonstrated a very poor recall for dates, appeared to initially place this discussion in December 1999.) Gallardo did not recall whether he told Ocampo or Velasquez that Arrambide had made the discharge request, although he did remember meeting with the crew members after his layoff. Even in the absence of this allegation in Ocampo's declarations, her testimony is credited, since she was generally a candid witness. Assuming Gallardo also mentioned Velasquez as a target for discharge, this does not mean that Arrambide had actually said this.

recall list. Once they signed the list, he would hire them, as needed, if they showed up at the facility, or would call them at the telephone numbers they provided. Juarez also recalled one employee on Arrambide's request.[21]

Ocampo, corroborated by other witnesses, testified that she periodically visited Respondents' premises to see when she would be recalled, in July, August, September and October 2000. In September, she signed the employee list for recall, which was being maintained by Samano, and also signed up Velasquez and another crew member, Gloria Anguiano. Ocampo went to Respondents' facility on October 5, and asked Juarez when work would become available. Juarez told her work would commence on October 16, but in fact, work resumed the next day, and most of the crew was back to work by October 13. No one contacted Ocampo to inform her of this.

Juarez testified that during this time period, Arrambide repeatedly told him not to recall Ocampo, because she was a troublemaker, a contention denied by Arrambide. Juarez was the more believable witness, gave detailed testimony on this issue, and was corroborated by documentary evidence, in particular, his recall list.[22] Juarez first put available employees who had not been laid off to work on the next rose project. Of the

[21] Arrambide was evasive in his testimony concerning the recall procedure, and Juarez's role therein.

[22] Juarez also testified that he told Arrambide he wanted to recall Ocampo, in the presence of McCaffrey and his independent contractor, Lawrence Joseph Mungia, stating he would recall her unless McCaffrey agreed with Arrambide. McCaffrey purportedly nodded, which Juarez took as meaning he should not recall Ocampo. Arrambide, McCaffrey and Mungia denied this incident took place. Since Juarez, McCaffrey and Mungia appeared to be relatively equal in credibility, no resolution will be made for this conflict in testimony. Even assuming, however, that Juarez made up this incident, he would still be credited in his testimony, that Arrambide, on other occasions, told him not to recall Ocampo. In addition to his overall greater credibility than Arrambide, it has been conclusively established that Ocampo timely sought work, and no other reason for the failure to recall her appears from the record. In this regard, evidence was presented that Ocampo had left her interim employment in a timely manner, to be available for recall. Although Ocampo filed for unemployment insurance benefits on October 8, she credibly explained that she did this to satisfy the required annual one week waiting period.

former crew members, he first hired Velasquez, because she would drive him to work, on October 6. On that date, he also hired Maria Luisa Saragoza, who had been the forelady of a different crew, because she told Juarez she needed work. He next hired employees who reported for work, and then began calling employees at their homes.

Arrambide's records show that most of Ocampo's crew was recalled on October 13, 2000. Juarez credibly testified that he did not contact Ocampo to inform her that work was available, due to Arrambide's directive. Ocampo credibly testified that she went to Respondents' facility on October 13.[23] She saw that the rest of the crew was working and, after speaking with Velasquez, met with Juarez. Ocampo, corroborated by Juarez, credibly testified that Juarez told her she had not been recalled, because Arrambide did not want her working for him. Velasquez credibly testified that Juarez later told her that Ocampo was not going to be recalled, because Arrambide considered her a troublemaker. Juarez told Ocampo he would speak with Arrambide, and call her. When Juarez did not call, Ocampo called him. Juarez was asleep, but his common law wife told Ocampo she would not be recalled.

Arrambide's records for Juarez's crew in June 2000 show that, while there were as many as 18 employees working on one day, Ocampo was one of five crew members employed throughout the month and, other than requesting a layoff a few days early, was among the last group laid off. The timesheets show that Ocampo performed several

[23] Respondent disputes that October 13 has been established as the date of her visit. Contrary to this contention, the undersigned is satisfied, based on Ocampo's testimony, the documentary evidence and all of the surrounding facts, that this date is correct. Respondent points to the testimony of employee, Gloria Anguiano, as contradicting Ocampo. In fact, Anguiano testified she did see Ocampo at the facility after she was recalled, and obviously was confused as to whether this took place on the first day she returned, or thereafter.

duties, including, "de-leafing/de-thorning," "service," "maintenance," "processing" and "shed."

As noted above, the first timesheet for Juarez's crew in October 2000 (October 6) included Velasquez (under the name, "Velarde,") and Maria Luisa Saragoza. The October 13 timesheet listed 13 employees, including Josefina Mendoza, who became the foreperson. Eugenia Guevara and Gloria Angiano joined Velasquez as returning "core" crew members from June, on October 13. Velasquez and Angiano credibly testified that Respondents contacted them by telephone to return to work, after Ocampo put their names on Juarez's recall list. The other employees on the October 13 timesheet did not appear on the June timesheets, and only one was on Juarez's recall list.

Arrambide's October timesheets show that more crew members were added on October 15, 17, 23 and 24. Aurora Ore, another former "core" crew member, first appeared on the November 6 timesheet, and Carmen Medina, who had appeared in the June timesheets on June 5 and 6, first reappeared on November 11. In the absence of any explanation to the contrary, it is found that these dates represent the first hire/recall dates for these employees, and that at least some of them were new hires.[24] Respondents have still not recalled Ocampo. No reason was given at the hearing for this continued failure to recall her. Arrambide testified that after the charge was filed (the charge was served on October 26, 2000), he asked Juarez why Ocampo had not been recalled. Juarez purportedly told him Ocampo had applied when no work was available. Said testimony

[24] In this regard, Velasquez also credibly testified that Respondents hired new employees to work on the crew, beginning in October 2000. Respondent has its own interpretation of what these records show, which does not alter the undersigned's view of the recall process, as it took place.

is contrary to substantial evidence to the contrary and, further taking into account Arrambide's lack of credibility in general, is not credited.

Analysis and Conclusions of Law

Section 1152 of the Act grants agricultural employees the right, inter alia, "to engage in . . . concerted activities for the purpose of mutual aid and protection." Under section 1153(a), it is an unfair labor practice for an employer to "interfere with, restrain or coerce" agricultural employees in the exercise of that right. In order to be protected, the employee's action must be concerted, in cases not involving union activity. This means the employee must act in concert with, or on behalf of others. *Meyers Industries, Inc.* (1984) 268 NLRB 493 [115 LRRM 1025], rev'd (1985) 755 F.2d 941, decision on remand, (1986) 281 NLRB 882 [123 LRRM 1137], aff'd (1987) 835 F.2d 1481, cert. denied, (1988) 487 U.S. 1205; *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41.

Protected concerted activity includes conduct arising from any issue involving employment, wages, hours and working conditions. Protests, negotiations and refusals to work arising from employment-related disputes are protected activities. Retaliation by an agricultural employer against employees, because they engage in protected concerted activities, is considered interference, restraint and coercion under §1153(a). *J. & L. Farms* (1982) 8 ALRB No. 46; *Lawrence Scarrone* (1981) 7 ALRB No. 13; *Miranda Mushroom Farm, Inc., et al.* (1980) 6 ALRB No. 22; *Giumarra Vineyards, Inc.* (1981) 7 ALRB No. 7; *NLRB* v. *Washington Aluminum Co.* (1960) 370 U.S. 9 [50 LRRM 2235]; *Phillips Industries, Inc.* (1968) 172 NLRB 2119, at page 2128 [69 LRRM 1194].

In order to establish a prima facie case of retaliatory interference for engaging in protected concerted activity, the General Counsel must preponderantly establish: (1) that the employee engaged in such activity; (2) that the employer had knowledge of the activity; and (3) that a motive for the adverse action taken by the employer was the protected activity. *Lawrence Scarrone*, supra; *United Credit Bureau of America, Inc.* (1979) 242 NLRB 921 [101 LRRM 1277], enf'd (CA 4, 1981) 643 F.2d 1017 [106 LRRM 2751]; *Mid-America Machinery Co.* (1978) 238 NLRB 537 [99 LRRM 1290]. Where the alleged retaliation is a refusal to recall or rehire, General Counsel normally must show that the employee applied for work at a time when work was available, or that the employer had a policy of recalling employees. *Rogers Foods, Inc.* (1982) 8 ALRB No. 19, at ALJD pages 30-34; *Grand View Heights Citrus Association* (1986) 12 ALRB No. 28.

Motive may be established by direct or circumstantial evidence. Direct evidence would include statements admitting or implying that the protected concerted activity was a reason for the action. The timing, or proximity of the adverse action to the activity is an important circumstantial consideration. Timing alone, however, will not establish a violation. Other circumstantial evidence includes disparate treatment; interrogations, threats and promises of benefits directed toward the protected activity; the failure to follow established rules or procedures; the cursory investigation of alleged misconduct; the commission of other unfair labor practices; and false or inconsistent reasons given for the adverse action. *Miranda Mushroom Farm, Inc., et al.*, supra.

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

The credible evidence shows that Ocampo acted in concert with, and as spokesperson for other agricultural employees in protesting the conduct of Montoya, as a forelady and co-employee, and the piece rate. Both subjects constitute terms and conditions of employment. Since the protests involved wages and working conditions, and were a group effort, Ocampo's activities were protected and concerted.

Juarez and Gallardo, as supervisors of Respondents' labor contractor, admittedly knew of Ocampo's protected conduct, and her leadership role. Contrary to his denials, it has been found that Arrambide was aware of Ocampo's leadership role in these disputes. It has been established that Arrambide harbored considerable animus toward Ocampo for her role in the dispute, attempted to have Gallardo discharge her, and required Juarez to not recall her. The reference to Ocampo as a "troublemaker" by Arrambide, in the context presented, can have no other meaning than as a reference to her protected concerted activities. Finally, Juarez credibly admitted he did not recall Ocampo because Arrambide told him not to do so, in retaliation for her protected conduct.

The evidence further shows that Ocampo fully complied with Respondents' recall requirements, in that she signed the recall list, and made reasonable efforts to be present at a time when work was available. Based on the credible evidence presented, Ocampo

was not required to be present at Respondents' premises on a daily basis to keep her application timely. Even if, as Respondents contend, Ocampo did not appear at work on an exact date work was available, this would have been, in large part, to Juarez's evasive conduct.[25] Furthermore, the evidence shows that once she signed the recall list, Juarez, in the normal course of events, would have contacted her for work, even if she had not thereafter gone to Respondents' premises. Therefore, General Counsel has established a prima facie case that the refusal to recall Ocampo was unlawful.

Respondents' primary defense is that Ocampo did not timely apply for work. Said defense has been found factually incorrect. More to the point, however, the defense has been found false, in that the real reason Ocampo was not permitted to return was Respondents' retaliation for her protected concerted activities. Respondents also contend that Juarez, in refusing to recall Ocampo, acted outside the scope of his authority, and even if his conduct was unlawful, Respondents are not responsible. The credited evidence, however, shows that Juarez was specifically directed to not recall Ocampo, for prohibited reasons. Even in the absence of such directive by Arrambide, Respondents would still be responsible for Juarez's conduct, as its supervisor. *Karahadian Ranches, Inc.* v. *ALRB* (1985) 38 Cal.3d 1; *Babbitt Engineering & Machinery* v. *ALRB* (1984) 152 Cal.App.3d 310, at pages 332-333. Therefore, it is concluded that Respondents violated section 1153(a) of the Act by refusing to recall Ocampo.

[25] Even if the evidence showed that Ocampo had to keep showing up at Respondents' premises to seek work, which it does not, Respondents continued adding crew members after October 20, and it is reasonable to assume that Juarez, absent prohibited reasons, would have told Ocampo that additional openings could occur.

The Discharge of Rosa Velasquez

The Prima Facie Case

Rosa Velasquez was employed by Arrambide, and worked at Respondents' rose operation as a checker and counter, commencing in early October 1999. Velasquez was paid an hourly rate, and not subject to piece rate bonuses. Velasquez participated in the meetings with Gallardo and McCaffrey, and cited a few complaints she voiced concerning Anita Montoya, along with the other four crew members. Since Velasquez was an hourly employee, the piece rate dispute did not affect her, and she did not claim that she complained to Gallardo, Arrambide or McCaffrey about her wages.

Velasquez, undisputed by Arrambide in his testimony, credibly testified that she spoke with him, prior to the meeting with McCaffrey. She told Arrambide that the employees were complaining to her, but she was only the checker, and asked why he would not speak with them. Arrambide responded that he would meet with the workers.

As noted above, Gallardo testified that after Arrambide told him to identify Ocampo, Arrambide told Gallardo to discharge the "troublemakers." Said testimony has not been credited; rather, Juarez's testimony, that Arrambide told Gallardo to fire Ocampo, has been credited. Also noted above, Ocampo testified that when Gallardo told her Arrambide wanted Ocampo to be discharged, he also "mentioned" Velasquez as being on "the list" of those targeted for termination. It was found, however, that assuming Gallardo said this, it does not mean Arrambide made such a statement to Gallardo. It is also noted that Juarez did not contend that Arrambide told him not to recall Velasquez in October.

Velasquez was laid off in July 2000, along with the other remaining rose workers. As noted above, she the first former crew member recalled, on October 6, 2000. She returned under a different name, in order to collect unemployment insurance benefits under her real name, while working at Respondents' facility. Although she worked under a different name, Arrambide, after equivocating on the issue, acknowledged he recognized her as a former employee, but claimed he did not know she was working under another name. Velasquez was discharged on November 15, 2000.

Respondents' Defense

Velasquez was informed of her discharge by Arrambide. According to Velasquez, Arrambide told her McCaffrey and Mungia wanted her discharged, because she was working under a different name and had been paid for a Sunday in October she did not actually work. As noted above, Juarez was also discharged, allegedly because he falsified Velasquez's timesheet for that weekend. Velasquez acknowledged she had been working under a different name, in order to collect unemployment insurance benefits under her real name, but contended Arrambide already knew this. General Counsel presented several witnesses who testified that this was a common practice under Arrambide, and he was aware of it. Arrambide denied such knowledge, but in any event specified, on cross-examination, that Velasquez was discharged for falsely claiming that she had worked on October 14 and 15. Velasquez claimed she told Arrambide she had worked on October 14, and had been paid for October 15, on Samano's authorization, because she had previously run errands for her, before and after work. Arrambide testified that Velasquez admitted to him she had not worked on either date.

Respondents' other witnesses, Samano and Maria Luisa Saragoza,[26] not only denied payment had been authorized for that Sunday, but also denied Velasquez had been asked to work on Saturday, or did so. Saragoza testified that when she found out Velasquez had been paid for the weekend, after not seeing her there, she asked Juarez about this, and he said he had given Velasquez the weekend off. Saragoza and Arrambide testified that Saragoza then contacted Arrambide, and asked him why Velasquez had been paid. According to Arrambide, it was at this point, when going over the timesheets and conferring with Saragoza, he found out that Velasquez was working under a different name.

Velasquez's timesheets for October 14 and 15, 2000 have been altered. Juarez testified that he did not alter the timesheet, and believes Samano did this. Juarez presented what he claimed were copies of his original timesheets for the weekend, showing he marked Velasquez as being absent. Juarez also testified that Samano admitted to him she was responsible for the problem and would remedy it, but never did. Samano denied this testimony, and Arrambide claimed he never heard these allegations prior to discharging Velasquez and Juarez. McCaffrey and Mungia testified that they separately asked Juarez if he had falsely credited hours for Velasquez in the timesheets and he admitted it, allegations denied by Juarez.

[26] Based on the conclusions reached herein concerning the prima facie case, it is unnecessary to revisit General Counsel's motion to preclude Saragoza's testimony, restated in the brief, based on nondisclosure of her identity as a non-worker witness by Respondents, prior to the hearing. It is noted, however, that Saragoza, without contradiction, testified that when last employed by Arrambide prior to the hearing, she was not a supervisor, and was not a supervisor in October 2000.

The foregoing demonstrates that the witnesses for one side or the other engaged in extensive and carefully calculated fabrications concerning these events. It is particularly troubling that all of these witnesses made the above contentions in a forthright and convincing manner. Fortunately, it is unnecessary, for the purposes of this Decision, to resolve these conflicts in testimony.

Analysis and Conclusions of Law

The evidence shows that Velasquez did not play an outstanding role in the employee meetings with Gallardo, Arrambide and McCaffrey. Significantly, other than being present, she played no role in the piece rate dispute. Even though, contrary to his contentions, Arrambide was aware that the employees, including Velasquez, also complained about Montoya, the credible evidence shows that the piece rate dispute, and Ocampo's leading role therein, was the proximate, although perhaps not the only factor leading to his demand that Ocampo be discharged. In this regard, it was shortly after Ocampo began leading the wage protest that he sought her discharge, although her prior role concerning Montoya may have also been a contributing factor. The only other evidence of potentially protected activity by Velasquez is that she asked Arrambide to speak with the employees. There is no evidence that he was angered by the request.

Although it has been found that Respondents refused to recall Ocampo, based on her role in the protests, there is no credible evidence of animus against Velasquez for her

participation therein. To the contrary, Velasquez was recalled to work with no directive to the contrary by Arrambide.[27]

General Counsel contends that since Respondents' reasons for discharging Velasquez are false and/or pretexts, this shows that her discharge was motivated by unlawful considerations. In the absence of sufficient evidence affirmatively pointing to a violation of the Act, however, no violation could be found based on Respondents' allegedly false or insufficiently established grounds for the discharge. Since Velasquez's discharge came months after her inconspicuous role in the employee protests, and subsequent to her recall, and because there is insufficient evidence showing animus toward her protected activities, it is concluded that General Counsel has failed to establish a prima facie case that Respondents acted unlawfully in terminating her employment. Therefore, this allegation will be dismissed. In light of this conclusion, it is unnecessary to decide whether Respondents have proved their defense.

THE REMEDY

Having found that Respondents violated section 1153(a) of the Act, I shall recommend that they cease and desist there from and take affirmative action designed to effectuate the purposes 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 Respondents' operations, and the

[27] Even if, as Gallardo testified, Arrambide wanted the other crew members, and specifically, Velasquez, discharged in April, the recall of Velasquez and the other crew members, beginning in early October, shows that any earlier hostility toward them for their limited protected activity had dissipated. Although Velasquez was working under another name in October 2000, Arrambide, who knew her by appearance, would have seen that she had been recalled.

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.[28]

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

ORDER

Pursuant to Labor Code section 1160.3, Respondents, McCaffrey Goldner Roses, A General Partnership, Mike McCaffrey and Barry Goldner, Individually and as Partners of McCaffrey Goldner Roses, A General Partnership, their officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Refusing to recall or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in concerted activities protected under section 1152 of the Agricultural Labor Relations Act (Act).

   (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.

[28] Juarez's testimony shows that Velasquez and Saragoza were recalled under special circumstances on October 6, 2000, and it is very unlikely that Ocampo would have been recalled before October 13. Juarez testified that absent unlawful considerations, Ocampo would have been one of the first former crew members recalled. Accordingly, it may be assumed she would have been recalled on October 13. To the extent that there is any uncertainty on this point, ambiguities as to the commencement of the backpay period created by the commission of unfair labor practices should be resolved in favor of the party suffering unlawful retaliation.

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

(a) Offer Gertrudis Ocampo immediate reinstatement to her former position of employment or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges of employment.

(b) Make whole Gertrudis Ocampo for all wages or other economic losses she suffered as a result of the unlawful refusal to recall her for work, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondents since the unlawful refusal to recall Ocampo. The award shall also include interest to be determined in the manner set forth in *E. W. Merritt Farms* (1988) 14 ALRB No. 5.

(c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning October 13, 2000, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

(d) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent

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

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

(f) Arrange for a representative of Respondents or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondents to all nonhourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees

employed by Respondents at any time during the period October 13, 2000 to October 12, 2001, at their last known addresses.

(h) Provide a copy of the Notice to each agricultural employee hired to work for Respondents during the twelve-month period following the issuance of a final order in this matter.

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

3. It is further ordered that all other allegations in the Second Amended Consolidated Complaint are hereby dismissed.

Dated: May 28, 2002

_____
Douglas Gallop
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging 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 refusing to recall Gertrudis Ocampo from layoff because she concertedly protested her conditions of employment.

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

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

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
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 you have these rights, we promise that:

WE WILL NOT refuse to recall to work, or otherwise retaliate against agricultural employees, because they protest about their wages, hours or other terms or conditions of employment.

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 Gertrudis Ocampo immediate reinstatement to her former position of employment or, if her position no longer exists, to substantially equivalent employment, and make her whole for any loss in wages and other economic benefits suffered by her as the result of the unlawful refusal to recall her to work.

DATED: _____ **McCAFFREY GOLDNER ROSES**

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 711 North Court Street, Visalia, California 93291. The telephone number is (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE