

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LASSEN DAIRY, INC.,)	
dba MERITAGE DAIRY,)	
)	Case Nos. 07-CE-37-VI
Respondent,)	07-CE-48-VI
)	
and)	35 ALRB No. 7
)	
JOSE ANTONIO TOSTADO and)	(October 28, 2009)
JUAN ALBERTO TOSTADO,)	
)	
Charging Parties.)	

DECISION AND ORDER

On June 1, 2009, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in which he found that Lassen Dairy, Inc. dba Meritage Dairy (Lassen or Employer) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA) by assigning Jose Antonio Tostado (hereafter Jose Tostado) and Juan Alberto Tostado (hereafter Juan Tostado) more onerous working conditions by transferring them to the hospital barn and later discharging Juan Tostado in retaliation for their protected concerted activities. The ALJ dismissed the allegation that Jose Tostado was unlawfully discharged, finding that the Employer met its burden to demonstrate that he would have been discharged even in the absence of his protected activity.

The Employer timely filed exceptions to the ALJ’s findings, arguing that all allegations should have been dismissed. The United Food and Commercial Workers Union, Local 5 (UFCW) timely filed exceptions on behalf of Jose Tostado, arguing that

his discharge also should have been found to be unlawful. In addition, the Employer filed an objection to the UFCW's exceptions and moved to strike them for failing to conform to the requirements of California Code of Regulations, title, 8, section 20282, subdivision (a)(1), to state the grounds for each exception and to cite portions of the record that support the exceptions.

The Agricultural Labor Relations Board (Board) has considered the record and the ALJ's decision in light of the exceptions and briefs filed by the parties¹ and affirms the ALJ's findings of fact and conclusions of law,² and adopts his recommended decision.

¹ The Board has held that failure to comply with Regulation 20282 is grounds for dismissing exceptions. (See, e.g., *S & J Ranch, Inc.* (1992) 18 ALRB No. 2.) However, the Board has declined to dismiss exceptions where compliance with the regulation is sufficient to allow the Board to identify the exceptions and the grounds therefore and address them on their merits. (*Warmerdam Packing Company* (1998) 24 ALRB No. 2; *Olson Farms/Certified Egg Farms, Inc.* (1993) 19 ALRB No. 20; *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11.) Here, the UFCW has provided a list of exceptions that consists of challenges to various findings regarding Jose Tostado. The only identification of the grounds for the exceptions consists of the attachment of six pages of the General Counsel's post-hearing brief containing discussion of several aspects of hearing testimony relating to the warnings issued to Jose Tostado. We have accepted the UFCW's exceptions only for the limited purpose of addressing whether the arguments contained in the attachment merit overturning the ALJ's conclusion that Jose Tostado's discharge was not unlawful. They do not, as the arguments are either contradicted by the evidence or otherwise fail to undermine the ALJ's findings and conclusions.

² The Employer claims that collateral estoppel principles should operate to preclude a finding that Juan Tostado was discharged for protected activity, based on a prior decision by the Labor Commissioner that included a factual finding that Tostado had quit his employment. The ALJ found that collateral estoppel did not apply, citing precedent involving the National Labor Relations Board (NLRB). He also concluded that not all the elements were established because in his view it was not necessary to decide in the Labor Commission case whether Tostado quit or was discharged. While we affirm the conclusion that collateral estoppel does not apply, we rely on authorities that directly
(Footnote continued....)

ORDER

Pursuant to Labor Code section 1160.3, Respondent, Lassen Dairy, Inc., dba Meritage Dairy, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging, assigning more onerous work to 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.

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

(Footnote continued)
establish that the ALRB has primary jurisdiction over matters arising under the ALRA. Section 1160.9 of the ALRA provides that “[T]he procedures set forth in this chapter shall be the exclusive method of redressing unfair labor practices.” In *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, 558, the California Supreme Court held that this was a codification of the federal law approach recognizing the primary jurisdiction of the NLRB. This was affirmed in *Kaplan’s Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 67-68. In *Vargas v. Municipal Court* (1978) 22 Cal.3d 902, 916, the court addressed a situation analogous to the one here, i.e., the interplay between the primary jurisdiction of the ALRB and related findings in another forum. In that case the court held that, while it was appropriate for the municipal court to proceed with an unlawful detainer trial while a related unfair labor practice charge was pending before the ALRB, the municipal court proceeding was not to be given collateral estoppel effect.

(a) Rescind the discharge of Juan Alberto Tostado and offer him immediate reinstatement to his former position of employment or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges of employment.

(b) Make whole Juan Alberto Tostado for all wages or other economic losses he suffered as a result of his unlawful discharge, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. 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 June 19, 2007, 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. Upon the request of the Regional Director, payroll records shall be provided in electronic form if they are customarily maintained in that form.

(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. 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 the Notice.

(f) Arrange for a representative of Respondent or Board agent(s) to distribute and read the attached Notice, in all appropriate languages, to all agricultural employees of the Employer, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, Board agents 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 Respondent to all non-hourly wage employees 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 date this Order becomes final or when directed by the Regional Director, to all agricultural employees employed by Respondent at any time during the period January 1, 2007 to December 31, 2008,³ at their last known addresses.

³ The commencement date is based on the approximate date of the unlawful reassignment of the Tostado brothers to the hospital barn, the first unfair labor practice herein.

(h) Provide a copy of the Notice in all appropriate languages to each agricultural employee hired to work for Respondent during the twelve-month period following the date this Order becomes final.

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

All other allegations contained in the Complaint are hereby Dismissed.

DATED: October 28, 2009

GUADALUPE G. ALMARAZ, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

CASE SUMMARY

LASSEN DAIRY, INC.
(Jose Antonio Tostado,
Juan Alberto Tostado)

35 ALRB No. 7
Case Nos. 2007-CE-37-VI
2007-CE-48-VI

Background

Administrative Law Judge (ALJ) Douglas Gallop issued a decision in which he found that Lassen Dairy, Inc. (Employer) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA) by assigning Jose Tostado and Juan Tostado more onerous working conditions by transferring them to the hospital barn and later discharging Juan Tostado in retaliation for their protected concerted activities. The ALJ dismissed the allegation that Jose Tostado was unlawfully discharged, finding that the Employer met its burden to demonstrate that he would have been discharged even in the absence of his protected activity. The Employer timely filed exceptions to the ALJ's findings, arguing that all allegations should have been dismissed. The United Food and Commercial Workers Union, Local 5 (UFCW) timely filed exceptions on behalf of Charging Party Jose Tostado, arguing that his discharge also should have been found to be unlawful. In addition, the Employer filed an objection to the UFCW's exceptions and moved to strike them for failing to conform to the requirement to state the grounds for each exception and to cite portions of the record that support the exceptions.

Board Decision

The Board summarily affirmed the ALJ's decision, with two comments. While affirming the ALJ's rejection of the Employer's claim that collateral estoppel principles should operate to preclude a finding that Juan Tostado was discharged for protected activity, based on a prior decision by the Labor Commissioner finding that he quit his employment, the Board relied on authorities that directly establish that the ALRB has primary jurisdiction over matters arising under the ALRA. The Board denied the motion to strike the UFCW's exceptions, but accepted them only to the extent that the grounds for exceptions could be identified. The Board found that the identifiable contentions were either contradicted by the evidence in the record or otherwise failed to undermine the ALJ's findings and conclusions.

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
)
 LASSEN DAIRY, INC.,)
 dba MERITAGE DAIRY)
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Respondent,)
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and)
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 JOSE ANTONIO TOSTADO and)
 JUAN ALBERTO TOSTADO)
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Charging Parties.)

Case Nos. 2007-CE-37-VI
 2007-CE-48-VI

Appearances:

John D. Michael
 Baker, Manock & Jensen, P.C.
 Fresno, California
 For Respondent

Eugene E. Cardenas
 El Centro Regional ALRB Office
 For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case at Visalia, California on March 24 and 25, 2009. The case is based on charges filed by Jose Antonio Tostado de Luna (Jose Tostado) and Juan Alberto Tostado de Luna (Juan Tostado), alleging that Lassen Dairy, Inc. dba Meritage Dairy (hereinafter Respondent) violated section 1153(a) of the Agricultural Labor Relations Act (hereinafter Act) by assigning them to more onerous working conditions, and then discharging them in retaliation for their protected concerted activities. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint alleging said violations. Respondent filed an answer denying the commission of unfair labor practices, and asserting affirmative defenses. The Charging Parties intervened prior to the hearing. After the hearing, General Counsel and Respondent submitted post-hearing briefs, which have been duly considered.

Upon the entire record in this case, including the testimony of the witnesses, the documentary evidence received at the hearing, the parties' briefs and other arguments made by counsel, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction

The jurisdictional facts are not in dispute. The charges were filed and served in a timely manner. Respondent dairy produces milk at its facility in Bakersfield, California, and is an agricultural employer within the meaning of section 1140.4(c) of the Act. At all times material to this case, Cesar Alfredo Rey was a supervisor of Respondent within the

meaning of section 1140.4(j). While employed by Respondent, Jose and Juan Tostado were agricultural employees under section 1140.4(b).

The Alleged Unfair Labor Practices

Virtually all of the operative facts in this case are contested. Indeed, the record is littered with conflicts in testimony, not infrequently between allied witnesses. On the one hand, former supervisor Cesar Rey was not impressive from the standpoint of his demeanor, which was defensive, and Kenneth Hernandez, former Human Resources Manager, and now a consultant, demonstrated the ability to testify on the basis of assumed facts, sometimes shown to be incorrect. The undersigned generally found Juan Tostado to be a credible witness, from the standpoint of his demeanor. On the other hand, some of Jose Tostado's testimony was demonstrably wrong or untrue, and significant discrepancies exist between his testimony, and that of his brother. General Counsel and Respondent each presented one "uninvolved" witness, but both of these appeared biased in favor of the party calling him to the stand. On top of this, the evidence presented significantly contradicts representations made by both General Counsel and Respondent at the prehearing conference in this case.

The Tostado brothers began working for Respondent as milkers in November 2005. They usually worked together as a team, and were sometimes joined by a third employee. The milkers were paid a flat daily rate, based on a 10-hour shift. Since Respondent provided an unpaid one-hour meal break, a normal day would be 11 hours. In addition, Respondent, by law, was required to give the workers two paid 15-minute breaks, which the brothers apparently worked through on a regular basis. Juan Tostado

testified that the foreman prior to Cesar Rey had permitted the milkers to leave early, with full pay, if they completed milking the cows, a fact the undersigned believes explains the conduct of Jose Tostado.

Cesar Rey was hired by Respondent on November 1, 2006.¹ After a two-week training period, he became the milkers' foreman. It is undisputed that when Rey was hired, Respondent was experiencing a high level of mastitis infection, and had too many sick and dying cows. The somatic cell count in its milk was approaching the level where Respondent would not be permitted to sell it to the public. Juan Tostado admitted that some of the cows he and his brother milked came down with mastitis.

Shortly after Rey became the foreman. A meeting took place in Respondent's parking lot. At the prehearing conference, General Counsel contended that the Tostado brothers were the only employees who spoke at this meeting. Even their testimony, however, shows this was not the case. All witnesses agree that another employee, "Leonel," who was later discharged and did not testify, told Rey the employees wanted to meet with him. According to the Tostado brothers, Rey initially stood by the office door, and said he wanted the employees to meet with him one at a time. When the employees refused to do this, he met with them in the parking lot.

According to Juan Tostado, Leonel started the meeting by telling Rey the workers wanted a raise, and asked Respondent to pay them at overtime rates when required. Jose Tostado then stated the workers wanted a small raise, and a better supply of work gloves.

¹ At one point, Rey incorrectly stated his starting date was December 1, 2006.

Juan Tostado then stated that he also felt the workers should get a raise, because the other dairies were paying more, and complained about the insufficient supply of gloves. Other employees indicated their agreement, but did not speak directly to Rey.

Jose Tostado contradicted his brother as to the subjects discussed at the meeting. According to him, the issues were the raise, more work gloves, and a newly-implemented change in paydays. Jose Tostado did not mention overtime pay as a subject discussed. On direct examination, Jose Tostado testified that his brother spoke about the wage increase and work gloves, but on cross-examination, he contended Juan Tostado also complained about the change in pay schedule, a subject not raised in Juan Tostado's account of the meeting.

Cesar Rey testified that when Leonel told him the workers wanted to speak with him, he went directly to the parking lot. Rey testified that the only issue at the meeting was a wage increase, and that the subject of work gloves did not come up. Rey testified that Juan Tostado was one of many employees requesting a pay increase and, to his recollection, Jose Tostado said nothing at the meeting. Rey also recalled a statement made by a different employee. Rey and the Tostado brothers agree that Rey told the employees he could not do anything, because the owner was away on vacation. According to Rey, however, the employees said they were not going to return to work until Respondent met their demands, and engaged in a work stoppage for two or three hours. The Tostados testified that the meeting lasted less than one-half hour.

Respondent called an employee witness, who testified that the Tostados said nothing at the meeting, contradicting Rey's testimony, that Juan Tostado did speak out.

The employee also contradicted Rey when he testified that nothing was said about a work stoppage, and that the meeting ended in less than one-half hour.

The undersigned believes that, as hinted at, but not stated in the record, Jose Tostado may have included the change in pay schedule as a topic discussed at the November meeting by confusing it with another protest, concerning that subject. Since the parties have chosen not to develop this, reliance will be placed on Juan Tostado's version, since he was the most credible of the witnesses presented.²

The Tostados testified that after the meeting, Rey became highly critical of their work, and shouted at them, sometimes using profane language.³ Jose Tostado testified that Rey mostly directed this harsh criticism at them, and not the other milkers in their area. As noted above, Juan Tostado conceded that some of the cows they milked became sick and died, and he further testified that some of the criticism from Rey stemmed from their alleged failure to adequately sterilize the cows' udders. On the other hand, Rey admitted that the cows of other milkers were also becoming sick, and dying. It is undisputed that Respondent, during this time period, conducted training sessions for the milkers to reduce the incidence of mastitis in the herd.

² Although the Tostados' testimony concerning the role of "Leonel" at the meeting conflicts with General Counsel's position at the prehearing conference, said testimony was to their disadvantage. Therefore, the conflict will not be found to impact on their credibility.

³ While it is true that Rey had only recently become the foreman, the parking lot meeting did not take place the first day he assumed these duties.

Rey denied ever criticizing the work of the Tostado brothers. Indeed, he claimed they were among, if not the best milkers, and denied mastitis was a problem with the cows they milked. Said testimony is contradicted by Respondent's position, at the prehearing conference, that Rey did criticize the Tostados' work, but did not shout at them.⁴ It is hardly likely that Juan Tostado would admit that cows he and his brother milked became sick and died if this were not the case. If so, it is highly unlikely that Rey would have never criticized their work. In any event, Juan Tostado was a more credible witness than Rey, and the brothers' version of these events is credited.

Rey reassigned the Tostado brothers to the hospital barn in January 2007.⁵ The facts concerning hospital barn work are essentially undisputed. Hospital barn workers milk sick, newly acquired and recently pregnant (fresh) cows. They work the same number of hours and receive the same pay as other milkers. Respondent had recently reduced the number of hospital barn milkers to two, one for each shift.

While the Tostado brothers had previously worked together, and sometimes with a third milker, they now worked alone, on different shifts. Although hospital barn milkers are assigned fewer cows, they take longer to milk, due to the barn's configuration, and the greater difficulty in controlling new cows. The regular milk barn has a pit where the workers stand under the cows, while the hospital barn does not. Therefore, milking in the

⁴ In this instance, Rey's testimony is to Respondent's advantage, from its position at the prehearing conference.

⁵ Based on the later exchange of shifts by the brothers, three months later, it appears the assignment was made on, or shortly after January 1.

hospital barn is more arduous, because the workers have to stoop down to perform their duties. Since the milkers work at the same level as the cows, the work is more dangerous, since it is easier for the cows to maul them. Indeed, Jose Tostado was injured in the hospital barn, when a cow pushed him into the wall.

Juan Tostado testified he asked Rey why he was being transferred to the hospital barn. Rey responded that it was because Tostado talked too much with his co-workers. Jose Tostado testified that when he first asked Rey why he was being reassigned, Rey refused to answer. When he asked again later, instead of answering the question, Rey told him, “If you people think you are going to get a wage increase, you’re not going to get anything.”

Rey denied that either of the Tostado brothers asked why their job assignment had been changed, or complained about this. According to Rey, he selected them to work in the hospital barn because they were the most conscientious milkers, and best suited to work with sick, new and “fresh” cows. Respondent, at the prehearing conference, contended that the employees previously working in the hospital left their employment, thus necessitating the assignments. At the hearing, Respondent presented no evidence concerning the identities of the previous hospital barn workers, or why they no longer performed that work. In light of this, the improbability that neither brother would even ask why the change had been made, and Juan Tostado’s superior credibility, the brothers’ version of what Rey said about the reassignments is credited.

Jose Tostado was discharged on May 21, 2007.⁶ Rey's testimony on this issue is well documented, and is credited over Jose Tostado's rather feeble explanations. As noted above, Rey's predecessor had permitted the milkers to go home early if they finished milking all of the cows assigned to them. Rey, however, would not permit this. Rey testified, and Jose Tostado did not deny it, that he verbally warned Tostado for leaving prior to completing his 10 hours of work, before April 27, 2007. On that date, Rey issued Tostado a written warning for continuing to work fewer than 10 hours. Tostado initially testified he told Rey that he was working through his breaks and, therefore, was entitled to leave one-half hour early. Tostado, however, did not testify that he was given permission to subtract his break periods and, according to him, Rey told him not to do so when issuing the warning letter. Furthermore, Rey credibly testified that Tostado was frequently working considerably less than 9 ½ hours per shift.

Rey testified that at some point during the disciplinary process, Tostado told him he had finished milking the cows early, and therefore could leave before the end of the shift. Contradicting his earlier testimony, Tostado stated he believed he worked all of his hours, but then testified that he worked until he finished his job, e.g. milking the cows. Rey testified he told Tostado that if he finished milking early, he had to perform other duties, such as cleaning up the barn. Rey is credited concerning what was said during the disciplinary process.

⁶ All dates hereinafter refer to 2007 unless otherwise indicated.

Rey issued Tostado another written warning on April 30 for continuing to leave work early. Tostado testified that Rey told him this was for failing to work 11-hour shifts, and he told Rey he was only obligated to work 10 hours per shift. The warning notice itself stated that Tostado failed to work 10, and not 11-hour shifts, and is documented by Tostado's time sheets for the preceding payroll period, which show that he regularly worked considerably less than 10 hours.

Rey issued a written warning and discharge notice for Tostado on May 21. Tostado testified Rey told him the final discipline was imposed because he failed to clock out at the end of his shift. He allegedly had forgotten to clock out the night before, and told a secretary this the morning he was discharged. He explained to Rey what had taken place when informed of his discharge, but Rey said it did not matter. Rey denied that any such exchange took place.

The final notice itself states that Tostado was discharged for continuing to leave work early, as Rey testified, and not for failing to clock out. The timesheets for this pay period were produced at the hearing and, although not offered into evidence, were reviewed by the undersigned. Rey testified that, in fact, Tostado failed to clock out on several occasions in the period immediately prior to his discharge, including the day before. The timesheets, inspected at the hearing by the undersigned, further show that when he did clock out, Tostado rarely worked the full 10 hours.

When asked why the timesheets showed several instances where he had failed to clock out, Tostado alleged that the time clock was malfunctioning. Tostado did not claim he notified anyone about this, and Rey credibly testified that he knew of no malfunction

in the time clock. It is also noted that the timesheets in evidence for the previous warning letter show no instances where Tostado failed to clock out. It is found that, in fact, Tostado continued to leave work early in May, and Rey reasonably believed that when Tostado failed to clock out, he did so in an effort to conceal his early departure.

The final notice refers to three written warnings. The other warning was for an unrelated incident where the Tostado brothers exchanged shifts, in April. Jose Tostado testified he had received permission from Rey to do this when first assigned to the hospital barn. Rey denied granting such permission, and Juan Tostado testified that when he told Rey his brother claimed permission had been granted, Rey denied this. Even if Jose Tostado believed such permission had been granted, he should have reminded Rey of this when he and his brother changed shifts, three months later. In any event, while General Counsel contends that, pursuant to Respondent's disciplinary procedure, the warning should have been verbal, he does not allege that the warning letters for the incident were unlawful, and the evidence fails to show this.

Some of the facts surrounding the departure of Juan Tostado from his employment with Respondent are undisputed. Tostado had a solo-vehicle accident on Respondent's property, while driving to work on June 17. Tostado apparently walked to the barn and, feeling the effects of the accident, called for a ride home. He asked Jerrina Rodriguez,⁷ the friend of his brother, Luis Enrique, to notify Rey he would not be able to work his shift, and she did so. Tostado was present when Rodriguez made the call. Tostado

⁷ This appellation comes from a Labor Commissioner's Order, discussed below.

testified Rodriguez told him Rey had said he was discharged when she spoke with him, although he did not hear Rey say this over the telephone. Rey found a replacement for Tostado that evening. Rey also had Tostado's vehicle towed, the following morning.

Tostado called Rey during the day on June 18, and asked for some time off due to injuries suffered in the accident. Rey told Tostado he could not grant the time off unless Tostado provided a note from a physician authorizing it. Tostado went to a doctor that day, and obtained a note authorizing time off from work until June 26. On June 19, Tostado went to Respondent's facility to give Rey the note. He was sufficiently apprehensive about Rey's conduct, that he brought his brother, Luis Enrique, Jerrina Rodriguez and his roommate, Jorge Roberto Zavala with him as witnesses.

According to Juan Tostado and Zavala, when they located Rey, he was sitting on a tractor. Tostado asked Rey to come down, and offered him the note. Rey told Tostado he was too late, and he was fired. Tostado said Rey had told him to bring the note, but Rey repeated it was too late, and Tostado was discharged. Rodriguez suggested they leave the note in Respondent's office and obtain a copy, to prove the note had been delivered. They did so, and left. Tostado, having been told he was discharged, made no further effort to contact Respondent.

Rey testified that when Juan Tostado offered him the note, he was working on a loader, and his hands were greasy. He told Tostado he could not take the note, and to leave it in the office. Juan Tostado and the others then went to the office. Rey denied telling Tostado he was discharged. Juan Tostado and Zavala testified that Rey did not tell

Tostado he was unable to take the note, and that his hands were not greasy, since he was wearing gloves. Rey denied ever wearing gloves at work.

Rey wrote a notice of termination for Juan Tostado on June 28. The notice states Tostado was discharged for failing to return from his leave of absence, but it was not mailed to Tostado. Rey admitted making no attempt to contact Tostado prior to issuing the notice, and was unable to give any explanation for failing to do so. Rey and Human Relations consultant, Kenneth Hernandez, testified that when Hernandez later reviewed the notice, he told Rey that under the circumstances, Tostado had quit his employment, and a second notice was prepared alleging this.

Tostado's final paycheck was dated June 19. Respondent produced a check register indicating that, in fact, the check issued on or about June 29. Hernandez claimed the discrepancy was due to a "key error," but did not show how he was aware of this. Rey contended he had a clerical employee attempt to contact Tostado to pick up his final paycheck and when that was unsuccessful, the check was mailed to him. Tostado denied being aware of any attempt by Respondent to contact him, and stated he received the final paycheck at a subsequent legal proceeding.

At Respondent's request, the undersigned has taken judicial notice of an Order, Decision or Award of the Labor Commissioner in Case No. 01-33374-CT, dated October 18, 2007. The case was an action by Juan Tostado to recover unpaid overtime and rest period wages, due to Respondent allegedly making it impossible to take the rest periods. The hearing officer awarded Tostado a small portion of the alleged unpaid overtime, and nothing for the unpaid rest periods. The Order noted that Juan Tostado, his brother,

Enrique, Jerrina Rodriguez and Jorge Zavala testified at the hearing, in addition to Cesar Rey. Juan Tostado appeared pro-per, and General Counsel was not a party to the proceeding. The Order notes that Tostado testified he was discharged June 17, at the time *he* told Respondent he could not work due to his injury. The hearing officer found that, in fact, Tostado quit his employment, by not returning from the leave of absence.

Kenneth Hernandez testified he was Respondent's representative at the hearing. At the hearing, he asked Tostado if Rey told him he was discharged on June 18. After refusing to answer twice, Tostado admitted Rey had not said this.⁸ The hearing officer's report does not specifically refer to this testimony, and Respondent did not produce the hearing transcript. At the hearing, Tostado was asked the same question. Tostado first denied, and then admitted Rey did not say he was discharged. On redirect examination, Tostado again testified that Rey told him he was fired.

At the hearing, Respondent moved that the Labor Commissioner's ruling, that Juan Tostado quit his employment, be given collateral estoppel effect. The party seeking

⁸ The undersigned did not find Hernandez to be a particularly reliable witness. He was willing to unequivocally testify that all employees who need them receive Spanish-language copies of Respondent's employee handbook, contradicting employee testimony, without establishing he personally observed this. He also contradicted Rey's version of Rey's policies on rotating shifts, even contending he personally observed shift rotations that Rey testified did not occur. Rey's version, that he only rotated shifts one time per year, was corroborated by documentary evidence showing that the Tostado brothers were still working their shifts well after three months had passed. Also contradicting both Rey and Juan Tostado, Hernandez claimed that Rey told him he had tried to contact Tostado, prior to writing his separation notice. Hernandez's conduct, in manipulating the separation notice for Juan Tostado, further failed to inspire confidence.

collateral estoppel must establish four elements: 1) Identity of the issue; 2) That the issue was actually litigated on the merits; 3) That the issue was necessarily decided; and 4) That the parties were identical or in privity. The undersigned denied the motion, because the National Labor Relations Board has found the where its General Counsel is not a party to the other proceeding, the parties are not identical or in privity, for the NLRB case. *Field Bridge Association* (1992) 306 NLRB 322 [140 LRRM 1012], enf. (C.A. 2, 1993) 982 F.2d 845 [142 LRRM 2238]. See also *Ronald E. Evans d/b/a Evans Sheet Metal, et al.* (2002) 337 NLRB 1200 [170 LRRM 1502]. In addition, a California Court of Appeal has found that collateral estoppel is inappropriate to a Labor Commissioner finding that a party quit his employment, under these circumstances, because the issue was not necessary to decide. *Noble v. Draper* (C.A. 3, 2008) 160 Cal.App. 4th 1, at pages 32-33 [73 Cal.Rptr. 3d 3].

As noted above, Juan Tostado was generally a credible witness, more so than Rey. On the other hand, one must consider that he and, apparently, Jorge Zavala, Luis Enrique Tostado and Jerrina Rodriguez, were administratively discredited by the hearing officer in the Labor Commissioner case. In addition, Hernandez testified that Tostado admitted Rey did not tell him he was discharged on June 18, an admission repeated at this hearing, perhaps inadvertently. Given this difficult conflict in testimony, the undersigned has decided to look to the conduct of Tostado and Rey, in the context of the employment relationship.

The undisputed facts show that Juan Tostado consistently acted to preserve his employment, at least until June 19. Even though injured in the accident, he still reported

to work, and made sure Rey was notified of his inability to perform his job duties. After being informed that he would lose his job if he could not work,⁹ Tostado still called Rey the following day to request time off. When Rey required doctor's note, Tostado obtained one. Obviously fearing the loss of his job, Tostado brought three witnesses with him to prove he complied with this directive.

Rey, on the other hand, acted in a manner showing a dislike for, and a desire to get rid of Tostado, unrelated to his work performance. His rather brusque treatment of Tostado after the accident is revealing. Rey could not even recall showing any concern for Tostado's condition and, without asking Tostado, almost immediately had his vehicle towed. When Tostado tried to give Rey the note, even Rey contended he said nothing more to Tostado than to leave the note in the office. In light of Rey's contention that Tostado was one of the best milkers, his inexplicable failure to even attempt contacting Tostado, and instead, terminating his employment, displayed undue haste. This conclusion is amplified when one considers Rey's past treatment of Tostado, when he verbally abused the brothers, and reassigned them to work in the hospital barn. Respondent's maneuvering of Tostado's separation papers casts further doubt on the legitimacy of its position.

Based on the foregoing, Juan Tostado and Jorge Zavala are credited, that Rey told Tostado the note was too late, and he had been discharged. It is also found that even if

⁹ Tostado is credited, that Jerrina Rodriguez told him this, without necessarily finding that Rey said this to Rodriguez.

Rey did not actually tell Tostado he had been discharged, his refusal to accept the note, in the context of the surrounding circumstances, caused Tostado to reasonably believe his employment had been terminated.

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.”

Discrimination against employees for engaging in protected concerted activities is considered interference, restraint or coercion in the exercise of that right, in violation of section 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; *NLRB v. Washington Aluminum Co.* (1960) 370 U.S. 9; *Phillips Industries, Inc.* (1968) 172 NLRB 2119, at page 2128 [69 LRRM 1194].

In order to be protected, employee action must be concerted, in cases not involving union activity. This generally means the employee must act in concert with, or on behalf of others. 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.

Meyers Industries, Inc. (1984) 268 NLRB 493 [115 LRRM 1025], rev’d (1985) 755 F.2d 1481, 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. The merits of the work-related complaint are not determinative, so long as the activity is not pursued in bad faith. This is often true even if the employees

stop working in pursuing the protest. *Giannini Packing* (1993) 19 ALRB No. 16; *M. Caratan, Inc.* (1978) 4 ALRB No. 83.¹⁰

In order to establish a prima facie case of retaliation for engaging in protected concerted activity, the General Counsel must preponderantly establish: 1) that the employee engaged in such activity, or that the employer suspected this; 2) that the employer had knowledge (or a suspicion) of the concerted nature of the activity; and 3) that a motive for the adverse action taken by the employer was the protected concerted activity. *Meyers Industries, Inc., supra*; *Gourmet Farms, Inc., supra*; *Reef Industries, Inc.* (1990) 300 NLRB 956 [136 LRRM 1352]. Unlawful 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; false or inconsistent reasons given for the adverse action; the

¹⁰ The Fifth Circuit of the California Court of Appeal affirmed the unfair labor practices, but remanded the case to the Board on portions of the remedy ordered, in an unpublished decision issued on January 17, 1980. See (1980) 6 ALRB No. 14, for the decision on remand.

absence of prior warnings and the severity of the punishment for alleged misconduct.

Miranda Mushroom Farm, Inc., et al., supra; Namba Farms, Inc. (1990) 16 ALRB No. 4.

Once the General Counsel has established the 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].

It is undisputed that the Tostado brothers, at minimum, participated in a wage protest with other employees, and that Respondent was aware of that activity. Therefore, they engaged in protected concerted activities. It has also been found that their participation at the meeting was conspicuous, in that they were two of the three employees who spoke out to Rey at the meeting.

The assignment of more onerous work duties constitutes a negative change in the terms and conditions of employment. If the change is made in response to the protected activities of an employee, it constitutes unlawful discrimination. *Paul Bertuccio* ((1984) 10 ALRB No. 10; *Mike Yurosek & Son, Inc.* (1983) 9 ALRB No. 69. Although the hours and pay for the Tostado brothers remained the same after they were assigned to the hospital barn, the reassignment isolated them from each other, and other workers. In addition, the work was more arduous, because they had to stoop while milking the cows, and more dangerous, because they were exposed to an increased likelihood of being injured. Therefore, the assignment constituted a negative change in their conditions of employment.

Inasmuch as the Tostado brothers' testimony concerning Rey's comments to them, when they asked about the change, has been credited, it shows that he was upset with them for their conspicuous role in the wage dispute. In addition, the credited evidence shows that Rey had previously singled out the brothers for harsh and abusive criticism, while the record fails to show and, indeed, Respondent denied that their work performance was particularly unacceptable. Based on this, it is concluded General Counsel has established a prima facie case, that a motivating factor in the hospital barn assignments was the brothers' protected concerted activity.

Respondent has failed to show it would have made the assignment, absent the protected concerted activity of the Tostado brothers. Rey's generalized testimony concerning the need for capable employees in the hospital fails to explain why the change needed to be made; in particular, why the employees already performing that function could not continue doing so. In addition, Respondent failed to substantiate its contention, at the prehearing conference, that the employees previously working in the hospital barn, had ceased working. Under these circumstances, it is concluded that Respondent violated section 1153(a) of the Act by making the hospital barn assignments.

Jose Tostado was not discharged until several months after his protected concerted activity. Nevertheless, the record demonstrates Respondent's animus toward that activity, and other unfair labor practices have been found arising from the concerted protest. This is sufficient to establish a prima facie case of unlawful discrimination, even though the important element of timing is not persuasive.

The record, however, amply shows that Respondent has satisfied its obligation to show that Jose Tostado would have still been discharged, absent his protected concerted activity. Even assuming Tostado reasonably believed, based on the rules established by Rey's predecessor, that leaving work early was acceptable, once the milking was completed, Rey was entitled to change that policy, unless shown that he promulgated or applied the change in a discriminatory fashion. General Counsel has not alleged, no less proved, that this was the case.

Tostado was first verbally warned, and then repeatedly disciplined for continuing to leave work early. His denials of, and explanations for his misconduct are, at minimum, unconvincing. When Tostado persisted in leaving work early, compounding the problem by failing to clock out on several occasions, Respondent had independent grounds for discharging him. General Counsel has failed to establish that Respondent treated other employees, under similar circumstances differently. Therefore, Respondent has rebutted General Counsel's prima facie case, and this allegation will be dismissed.

The discharge of Juan Tostado took place even further in time from his protected concerted activity. Nevertheless, in light of the unwarranted hostility exhibited toward him by Cesar Rey, the unlawful reassignment to the hospital barn, and the undue haste in removing Juan Tostado from his employment, it is concluded that General Counsel has established a prima facie case of unlawful discrimination. It has been found that Rey told Tostado he was discharged. Even if he did not, his conduct reasonably caused Tostado, who had demonstrated a strong desire to continue his employment, to believe this was the case. Under these circumstances, it was Respondent's obligation to clarify Tostado's

employment status, which it failed to do. *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4.

Respondent has not rebutted General Counsel's prima facie case. Having told Juan Tostado to submit a medical report excusing him from work on June 18, Respondent was not justified in stating it was too late when he submitted the note on June 19. Furthermore, even if Respondent did not discharge Tostado until shortly after the medical leave of absence expired, its failure to even attempt contacting him was, under the circumstances was unjustified, and displayed an unlawful motive. Accordingly, it is concluded that the discharge of Juan Tostado violated section 1153(a) of the Act.

THE REMEDY

Having found that Respondent violated section 1153(a) of the Act, I shall recommend that it 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 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.

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, Respondent, Lassen Dairy, Inc., dba Meritage Dairy, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
 - (a) Discharging, assigning more onerous work to 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.
2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:
 - (a) Rescind the discharge of Juan Antonio Tostado de Luna, and offer him immediate reinstatement to his former position of employment or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges of employment.
 - (b) Make whole Juan Antonio Tostado de Luna for all wages or other economic losses he suffered as a result of his unlawful discharge, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. 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 June 19, 2007, 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 Respondent 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 Respondent to all no hourly 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 January 1, 2007 to December 31, 2008,¹¹ at their last known addresses.
- (h) Provide a copy of the Notice to each agricultural employee hired to work for Respondent 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 Respondent has taken to comply

¹¹ The commencement date is based on the approximate date of the unlawful reassignment of the Tostado brothers to the hospital barn, the first unfair labor practice herein.

with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

3. All other allegations contained in the Complaint are hereby dismissed.

Dated: June 1, 2009

Douglas Gallop
Administrative Law Judge, ALRB

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 discharging Juan Antonio Tostado de Luna, and by assigning more arduous work to employees, because they concertedly protested their 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 discharge, assign more onerous work to 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 Juan Antonio Tostado de Luna immediate reinstatement to his former position of employment or, if his position no longer exists, to substantially equivalent employment, and make him whole for any loss in wages and other economic benefits suffered by him as the result of his unlawful discharge.

DATED: _____

LASSEN DAIRY, INC., dba MERITAGE DAIRY

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 1642 W. Walnut Ave., Visalia, California. 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