

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HERBTHYME FARMS, INC.,)	Case Nos. 2008-CE-074-VIS
)	2009-CE-024-VIS
Respondent,)	
)	36 ALRB No. 2
and)	
)	(May 4, 2010)
LABORERS INTERNATIONAL)	
UNION OF NORTH AMERICA)	
LOCAL 1184,)	
)	
_____ Charging Party.)	

DECISION AND ORDER

On November 17, 2009, Administrative Law Judge Mark R. Soble (ALJ) issued the attached decision in which he dismissed all allegations in the complaint, concluding that HerbThyme Farms, Inc. (Employer) did not commit unfair labor practices by discharging employees Heriberto Castillo and Alfredo Rios. Castillo was discharged on December 1, 2008, for repeatedly refusing a new assignment, i.e., insubordination. Rios was discharged on February 4, 2009, primarily for a physical confrontation with his supervisor. The General Counsel alleged that the grounds for the discharges were pretextual and that instead both discharges were due to these employees' protected concerted activities. The General Counsel timely filed exceptions to the ALJ's decision, and the Employer filed a reply to 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 parties and

affirms the ALJ's findings of fact¹ and conclusions of law, and adopts his recommended decision.

ORDER

The complaint in Case Nos. 2008-CE-074-VIS and 2009-CE-024-VIS is hereby Dismissed in its entirety.

Dated: May 4, 2010

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

WILLIE C. GUERRERO, Member

¹ The witnesses for the General Counsel and the Employer gave widely divergent versions of the critical events underlying the discharges. As a result, the ALJ's decision was by necessity heavily dependent on credibility determinations, including those based on demeanor. 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.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or 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. (*S & S Ranch, Inc.* (1996) 22 ALRB No. 7.) A review of the record in this case has revealed no basis for disturbing the ALJ's credibility determinations.

CASE SUMMARY

HERBTHYME FARMS, INC.
(Laborers Int'l., Local 1184)

36 ALRB No. 2
Case Nos. 2008-CE-074-VIS
2009-CE-024-VIS

Background

On November 17, 2009, Administrative Law Judge Mark R. Soble (ALJ) issued a decision in which he dismissed all allegations in the complaint, concluding that HerbThyme Farms, Inc. (Employer) did not commit unfair labor practices by discharging employees Heriberto Castillo and Alfredo Rios. Castillo was discharged on December 1, 2008, for repeatedly refusing a new assignment, i.e., insubordination. Rios was discharged on February 4, 2009, primarily for a physical confrontation with his supervisor. The General Counsel alleged that the grounds for the discharges were pretextual and that instead both discharges were due to these employees' protected concerted activities. The General Counsel timely filed exceptions to the ALJ's decision.

Board Decision

The Board summarily affirmed the ALJ's decision, noting that the ALJ's decision was by necessity heavily dependent on credibility determinations, including those based on demeanor. The Board's review of the record revealed no basis for disturbing the ALJ's credibility determinations. Therefore, the complaint was dismissed in its entirety.

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:) Case Nos. 2008-CE-074-VIS
) 2009-CE-024-VIS
)
HERBTHYME FARMS, INC.,)
)
 Respondent,)
)
and)
)
LABORERS INTERNATIONAL)
UNION OF NORTH AMERICA)
LOCAL 1184,)
)
 Charging Party.)

Appearances:

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DECISION OF THE ADMINISTRATIVE LAW JUDGE

This matter was heard by Mark R. Soble, Administrative Law Judge (ALJ), Agricultural Labor Relations Board (ALRB), at the Royal Plaza Inn conference room, 82-347 Highway 111, Indio, California, on June 24, 25, 26 and July 1, 2009.

The following evidence was considered by the ALJ: the testimony of Heriberto Castillo, Alfredo Rios Andrade, Mohmoud Sabla, Mohammed Jaghamah, Richard Trujillo, Joseph Falco and Michelle Hoehn; General Counsel's ("GCX") Exhibits 1-3 and 6-15; Employer's ("E") Exhibits a-r and t-u.

Prehearing conferences in this matter were heard on May 12, 27 and 28, 2009. On May 19 and June 3, 2009, respectively, the ALJ issued Orders memorializing the prehearing conferences, which are marked for identification purposes as PH-1 and PH-2. The ALJ also issued a written Order on June 29, 2009.

I. ISSUES

The issues in this matter are:

1.) Whether, by discharging employee Heriberto Castillo, Respondent HerbThyme Farms, Inc. ("HerbThyme" or "company") committed an unfair labor practice in violation of the Agricultural Labor Relations Act (ALRA) § 1153, subdivision (a).

2.) Whether, by discharging employee Alfredo Rios Andrade, HerbThyme committed an unfair labor practice in violation of the ALRA § 1153, subdivision (a).

II. BACKGROUND

HerbThyme has several farms that grow herbs. One of these farms is called "Oasis Farms" and is located near Thermal, California. Herb Thyme's farm manager is Joseph Falco ("Falco"). Mohmoud Sabla ("Sabla") and Mohammed Jaghamah

(“Jaghamah”) are crew supervisors with HerbThyme. Michelle Hoehn (“Hoehn”) is the company’s human resources director. Richard Trujillo (“Trujillo”) is the company’s quality control manager.

The case involves whether or not HerbThyme committed unfair labor practices by discharging its former employees Heriberto Castillo (“Castillo”) and Alfredo Rios (“Rios”). As this decision will explain, the testimony of the supervisors and the two employees dramatically differed, offering little or no overlap in their accounts as to the facts that allegedly transpired.

Castillo, who only worked for HerbThyme for a total of eight weeks, was a union election observer in the November 6, 2008 representation election that occurred for the Oasis Farms agricultural workers. Thus, Castillo engaged in a protected, concerted activity. At this election, the workers selected Laborers International Union of North America Local 1184 (“union”) as their bargaining representative. There is clear evidence that HerbThyme supervisor Sabla knew that Castillo served as an election observer, as Castillo was the observer who challenged Sabla’s right to vote in that election.

On or about December 1, 2008, HerbThyme terminated Castillo, allegedly for insubordination.¹ Company supervisors testified that when new work assignments were given, Castillo was assigned to a weeding crew supervised by Sabla, but that Castillo refused to report to the weeding crew. Company supervisors further testified that Castillo was repeatedly told that he had to report to the weeding crew, first by crew supervisor

¹ Castillo was not given a written termination notice. Exhibit E-d is an internal company document showing Castillo’s termination. This document was signed by Falco and Hoehn on December 1, 2008.

Sabla, then by crew supervisor Jaghamah, then by farm manager Falco and finally by human resources director Hoehn.

Castillo states that Jaghamah had always been his immediate supervisor and that, on the day in question, Jaghamah and Sabla gave conflicting directions to him.²

Castillo testified that Jaghamah told Castillo to assist employee Rios, while Sabla instead told him to join the weeding crew. Castillo states that later that day Sabla told him to go home. Castillo indicates that two days thereafter he was orally told by Jaghamah that he had been terminated. Castillo testified that he never spoke with Falco or Hoehn about his termination.

Rios, who worked for HerbThyme for approximately six months, testified that he told Jaghamah that he was a union representative. Rios also gave Sabla a union subpoena for Rios to testify at an ALRB investigative hearing, which Sabla then passed along to Falco. Serving as a union representative and testifying on behalf of the union are both protected concerted activities.

On or about February 4, 2009, HerbThyme terminated Rios, allegedly for a physical altercation that Rios initiated with supervisor Sabla, as well as for being under

² Sabla and Jaghamah are cousins. (3 RT 536:20-21) At hearing, employees Castillo and Rios referred to Sabla and Jaghamah as "Little Mohammed" and "Big Mohammed", respectively. Sabla testified that it did not offend him when the agricultural workers referred to him as "Little Mohammed" or "Mohammed Junior". (3 RT 536:22-537:22)

the influence of alcohol while on company property.³ While the company alleges that their primary reason for firing Rios was the physical altercation between Rios and Sabla, the company also claims that Rios was untruthful regarding an incident involving the repairs of an all-terrain vehicle (“ATV”) and as to his request for a petty cash reimbursement.⁴ Rios, on the other hand, denies that a physical altercation occurred between him and Sabla, denies drinking on company property, denies wrongdoing as to the ATV, and denies submitting an inappropriate reimbursement claim.

The parties dispute whether Rios gave the union subpoena to HerbThyme prior to when the company decided to terminate Rios.

III. SUMMARY OF THE EVIDENCE

A. Stipulated Facts.

The ALRB General Counsel and Respondent HerbThyme stipulated to the following facts:

³ The company gave Rios a written termination notice, but the notice did not state the reason why Rios was being terminated. (Exhibit GCX-15) The employer is not legally obligated to give the employee a timely written termination notice stating the precise reason(s) for the termination. However, by failing to give the employee a contemporaneous discharge notice including the basis for the termination, the employer makes it more difficult for the fact-finder to ascertain whether the company proffered reasons at hearing were those actually considered at the time of discharge, or if the proffered reasons were instead carefully crafted or bolstered during the litigation process.

In its employee handbook, HerbThyme includes as possible grounds for immediate dismissal: (1) insubordination or using threatening language to a supervisor, (2) being intoxicated or possessing alcohol on company property, and (3) provoking a fight, fighting, or attempting bodily injury to another employee. (Exhibit GCX-10)

⁴ In addition, in December 2008, HerbThyme issued two corrective action memoranda to Rios. The first warning memorandum was issued to Rios for having unexcused absences on two consecutive days. (Exhibit E-i) The second warning memorandum was for telling another employee to ride with him on a trip to another city without having obtained his supervisor’s approval. (Exhibit E-j)

While the lesser violations were not the reason(s) leading HerbThyme to terminate Rios, the ALJ believes that analysis of the testimony on those issues is important for purposes of making accurate determinations regarding witness credibility.

- 1.) The representation election for HerbThyme's agricultural employees at its Oasis facility in or near Thermal, California, took place on November 6, 2008;
- 2.) The union's observers for the November 6, 2008 representation election were Heriberto Castillo and Leodario Villalva Gatica;
- 3.) The investigative hearing before ALJ Douglas Gallop regarding the HerbThyme's objections to the November 6, 2008 representation election occurred on February 9, 2009; and,
- 4.) The union was certified by the ALRB as the bargaining representative for the agricultural employees of HerbThyme's Oasis facility on April 2, 2009.

(Court Reporter's Transcript, volume one, at page eighteen, lines one through twenty, hereafter abbreviated as 1 RT 18:1-20)

B. HerbThyme's Admissions at the Prehearing Conference.

At the first prehearing conference, HerbThyme admitted to the following facts:

- 1.) The charges in this matter were timely filed and served;
- 2.) HerbThyme is an agricultural employer within the meaning of the ALRA;
- 3.) Castillo and Rios were agricultural workers at HerbThyme within the meaning of the ALRA;
- 4.) At all relevant times, Sabla, Jaghamah, Falco and Hoehn were HerbThyme's supervisors or agents; and,

- 5.) At all relevant times, Laborers International Union of North America Local 1184 was a labor organization within the meaning of the ALRA.

(PH-1, at page 2.)

C. Testimony of Heriberto Castillo.

1. Castillo Worked at HerbThyme For Approximately Eight Weeks.

Castillo joined HerbThyme as a full-time employee in mid-September 2008.⁵ (3 RT 551:10-11 and 3 RT 557:3-10) Castillo speaks Spanish. (3 RT 550:1-3) Castillo normally started worked at 6:00 a.m. (3 RT 558: 2-3) Castillo did weeding and other tasks under Jaghamah's supervision. (3 RT 556:22-25 and 3 RT 557:5-7) Castillo was never supervised by Sabla. (3 RT 592:4-11) Following a one-week layoff in October 2008, Castillo was rehired by HerbThyme and was again assigned to weeding. (3 RT 558:7-23)

2. Castillo Engaged in Protected, Concerted Activities by Serving as a Union Election Observer.

On November 6, 2008, Castillo served as the union's election observer. (3 RT 559:2-4) As an election observer, Castillo challenged the right of Sabla to vote, as Sabla was the supervisor of the harvest crew. (3 RT 560:6-25) Two or three days later, Sabla asked Castillo why he didn't let him vote. (3 RT 563:2-6) From Sabla's tone, Castillo felt that Sabla was a little bit irritated with him. (3 RT 563:7-9)

⁵ Exhibit GCX-1 shows that Heriberto Castillo was hired on September 23, 2008.

3. Castillo Testified That, on December 1, 2008, Supervisors Sabla and Jaghamah Gave Him Conflicting Work Assignments.

On December 1, 2008, Castillo arrived at work at 6:00 a.m. (3 RT 563:10-12) Castillo states that, at approximately 6:30 a.m., Jaghamah directed him to report to the "mechanic", Rios, and to assist Rios for the day. (3 RT 563:13-564:6) Rios and Castillo proceeded to pick up irrigation pipes with a forklift and to clean up the surrounding area. (3 RT 565:4-13) Sabla then came by and told Castillo to go weed. (3 RT 565:14-18) Castillo advised Sabla that Jaghamah had assigned him to assist Rios. (3 RT 565:19-21) Castillo also told Sabla that if he wanted Castillo to weed, he needed to send someone else to assist Rios. (3 RT 598:7-15)

Castillo indicates that Jaghamah and Sabla then both came together to where he was working. (3 RT 567:11-13) Sabla told him that he should go do the weeding and Jaghamah then told him to keep working with Rios. (3 RT 567:11-15) Sabla then came back and told Castillo to go home. (3 RT 567:18-21) Castillo advises that Falco was not present during his conversation with Jaghamah and Sabla. (3 RT 568:16-19) Castillo further states that supervisor Gamini Weerasekera ("Weerasekera") was not present translating during that conversation (3 RT 568:20-23) and that, in fact, he did not have any conversations with Falco on December 1, 2008. (3 RT 570:15-18) However, Castillo acknowledged that Falco was present, perhaps two meters away, when Castillo asked Jaghamah why Sabla was firing him. (3 RT 571:5-572:13) Castillo indicates that

Jaghamah told him that there was no problem and for Castillo to just come back the next day. (3 RT 572:2-8)

4. Castillo Testified That He Then Returned to Work on December 2, 2008, When Jaghamah Again Told Castillo To Come Back the Next Day.

Castillo then reported for work the next day, December 2, 2008, at 6:00 a.m. (3 RT 575:22-576:1) Jaghamah told Castillo to come back the next day. (3 RT 576:4-10) Neither Falco nor Sabla were present during that conversation. (3 RT 576:11-16) Jaghamah then drove Castillo home. (3 RT 576:17-18) Castillo lived about five or six miles from HerbThyme. (3 RT 589:20-24) On the ride home, Castillo states that Jaghamah was critical of Falco. (3 RT 577:16-24) Castillo also states that Jaghamah suggested that getting rid of the union might improve things. (3 RT 577:24-578:2)

5. Castillo Testified That on December 3, 2008, Jaghamah Told Castillo That He Had Been Terminated, and That Neither Falco Nor Hoehn Discussed the Matter With Castillo.

Heriberto Castillo testified that he then reported to work on the next day, December 3, 2008, at 6:00 a.m. (3 RT 582:8-12) Castillo went to speak with Jaghamah and Jaghamah told Castillo in Spanish that he was fired. (3 RT 582:13-583:8) Castillo confirms that Falco was present on this occasion, but did not speak to Castillo. (3 RT 584:4-10) Castillo later testified that, during this conversation, Falco was nearby and Jaghamah did speak with Falco in English. (3 RT 606:21-25) Weerasekera was not present and did not talk to Castillo at all that day. (3 RT 584:11-12 and 3 RT 613:7-11)

Jaghamah gave Castillo a paper and a check. (3 RT 584:13-15) Castillo did not initially look at the paper and check. (3 RT 584:16-22)

The paper that Castillo received was written in English, so Castillo went and showed it to Rios. (3 RT 585:23-25) Castillo had Rios translate the paper for him. Neither the paper nor the check had Castillo's name on it, both the first and last name were different.⁶ (3 RT 586:16-23 and 3 RT 587:5-10) Nonetheless, Castillo proceeded to cash the check. (3 RT 587:14-19) Later that day, Castillo had a conversation with Jaghamah and HerbThyme's secretary. (3 RT 587:23-24) Jaghamah told him to leave the paper and not to worry about the check, because his check and the one to the other person were for the same amount. (3 RT 588:7-9)

Castillo testified that he never talked to farm manager Falco about his termination. (3 RT 601:16-17) Castillo further testified that he never had a conversation with human resources director Hoehn regarding his termination. (4 RT 810:9-23) Castillo explained that he tried to telephone Hoehn, but he reached an answering machine and did not leave a message. (4 RT 811:11-812:4) Castillo testified that he did not speak with any female employee at HerbThyme about his suspension or discharge. (4 RT 812:7-11)

D. Testimony of Alfredo Rios.

1. Rios Worked at HerbThyme For Approximately Six Months.

Rios was first hired by HerbThyme in August or September of 2008.⁷ (2 RT 326:21-23) Rios speaks Spanish fluently and also speaks English. (2 RT 328:3-4)

⁶ None of the witnesses testified as to what name was actually on this check. Castillo did testify, however, that the accompanying piece of paper was in fact a notice of termination of a different employee. (4 RT 812:12-18)

⁷ Exhibits GCX-6 and E-f are personnel documents that show that Alfredo Rios was hired on August 1, 2008.

HerbThyme first had Rios doing construction work and the company then moved him to servicing the trucks and tractors. (2 RT 327:15-17 and 2 RT 328:14-16) Rios also drove trucks for HerbThyme. (2 RT 337:23-25)

2. Rios Engaged in Protected Concerted Activities by Serving as a Crew Representative.

Rios testified that in October 2008 he talked to Jaghamah about the layoffs that had occurred. (2 RT 332:12-25) This was shortly after Luis Alonso had become the HerbThyme general manager. (2 RT 334:1-9) Rios states that Jaghamah suggested that the employees talk to the union. (2 RT 333:20-24) Rios attended approximately four union meetings and later mentioned his attendance to Jaghamah. (2 RT 334:17-335:18) Rios also told Jaghamah that he had been selected as a crew representative. (2 RT 337:10-12) Rios states that on November 6, 2008, he spoke with Jaghamah about the union election that day. (2 RT 330:3-5) Rios told Jaghamah that he had voted for the union. (2 RT 330:17-18)

In late November 2008, Rios states that he had a conversation where Jaghamah suggested that they should get rid of Falco, who had since replaced Alonso as the general manager. (2 RT 342:15-22 and 2 RT 344:9-14) During this conversation, Rios states that Jaghamah also asked him to help get rid of the union. (2 RT 342:23-25) Rios states that, prior to December 1, 2008, he had never received any written warnings at work. (2 RT 344:21-25)

3. Rios Testified that, on December 1, 2008, Supervisor Jaghamah Assigned Castillo to Assist Rios in Moving Heavy Pipes.

On December 1, 2008, Rios reported to work at HerbThyme at 6:00 a.m. (2 RT 345:10-11) Rios states that he asked Jaghamah for assistance moving some very heavy pipes. (2 RT 345:22-346:3) Rios indicates that Jaghamah assigned Castillo to assist him. (2 RT 346:4-14) Rios and Castillo began picking up the pipes and other items and then Sabla arrived at their location. (2 RT 346:16-23) Sabla told Castillo to go weed. (2 RT 346:24-347:5) Rios heard Castillo then tell Sabla to speak with Jaghamah about it. (2 RT 347:13-15) Rios states that he also told Sabla that Jaghamah had assigned Castillo to work with him. (2 RT 347:16-19)

Approximately five to ten minutes later, Sabla returned with Jaghamah to the location where Rios and Castillo were working. (2 RT 348:4-15) Rios states that Jaghamah indicated that Castillo should continue to work with him. (2 RT 348:16-19) Rios states that Sabla came back later and told Castillo to go home and to return the next day. (2 RT 349:11-16) Rios states that he spoke about the incident with Jaghamah at the end of the day. (2 RT 350:15-24) In this conversation, Rios indicates that Jaghamah told him not to worry, that Castillo would be back to work, and that Sabla was just a kid who did not know what he was doing. (2 RT 351:10-20 and 2 RT 352:12-14) Rios states that he learned that Castillo had been fired on December 3rd or 4th when Castillo showed him paperwork and spoke with him. (2 RT 355:8-15)

4. Rios States That He Never Drank Alcohol During the Work Day.

Rios states that he never drank beer at work. (2 RT 368:12-18) Rios denies ever having earlier conversations with Falco about a day when he purchased sealed containers of beer during his lunch break. (2 RT 364:9-16) Rios also denies having had conversations with Falco regarding alcohol or about drinking on the job. (2 RT 365:5-8 and 2 RT 366:11-13) Rios also contends that Falco never inquired with him about beer cans found in a company toilet and in a bag of product delivered to Compton. (2 RT 365:9-11 and 2 RT 369:12-15)

5. Rios Denies Having Inappropriately Handled Repairs of a Company ATV.

Rios states that Falco asked him to handle the repairs for a Yamaha four-wheel drive ATV. (2 RT 377:1-12) Rios indicates that Falco told him to either do it himself or to take the vehicle to a shop. (2 RT 377:13-15) Rios claims that he took the vehicle to a shop in his personal truck, but the shop declined to repair the vehicle because the company did not pay for the required part in advance. (2 RT 377:19-21) Rios then took the vehicle from the shop to his home for a day or two. (2 RT 377:22-378:17) Rios denies that Falco ever accused him of failing to return the ATV to the company. (2 RT 377:18-23)

6. Rios Recalls Only a Couple of Past Conversations With Falco.

Rios does recall a conversation where Falco spoke with Rios about his having taken employee Israel Lopez with him to Compton without permission.⁸ (2 RT 397:7-

⁸ The ALJ notes the similarity in those facts to the circumstances where Castillo was found assisting Rios, allegedly without authorization.

11) Rios does recall a conversation with Falco regarding an absence in late December 2008. (2 RT 393:13-394:17) On the other hand, Rios denies having had conversations with Falco about a fuel receipt submitted for reimbursement. (2 RT 364:2-7) In fact, in six months of employment, Rios only recalls talking with Falco on a couple of occasions. (2 RT 388:18-22)

7. Rios Denies Having Had a Physical Altercation With Sabla.

On January 29, 2009, an incident occurred involving both Rios and Sabla. (2 RT 370:4-6) Shortly after Rios' work day ended, Sabla confronted Rios and yelled at Rios because of a problem with how certain bags of product were labeled. (2 RT 370:16-22) This occurred approximately twenty minutes after Rios had finished working for the day. (2 RT 383:7-9) Rios then went to the shop to speak with Jaghamah. (2 RT 370:22-25) Rios states that Jaghamah told him to leave and that Sabla was just a foolish kid who did not know what he was doing. (2 RT 371:13-19) Rios states that Sabla was just three or four meters away, but the two of them neither spoke nor physically came in contact with one another. (2 RT 371:23-373:3) Rios confirms that HerbThyme manager Richard Trujillo was also nearby, washing a truck. (2 RT 386:21-387:4) Rios indicated that he and Trujillo did not speak on that occasion. (2 RT 387:5-8)

8. Rios Was Subpoenaed by the Union to Testify at an ALRB Hearing.

On the morning of February 4, 2009, Rios gave Sabla a subpoena for Rios to testify on behalf of the union. (2 RT 356:25-357:9) Rios states that Sabla told him that if the document was from the union, Rios would be fired because Sabla was one hundred percent with Joe Falco. (2 RT 358:20-22) Three days later, on February 7, 2009, when

Rios was getting ready to punch out, Falco fired Rios. (2 RT 359:11-17) Falco gave Rios his check. (2 RT 359:21-360:4) Rios claimed that Falco did not tell him that he was fired, and that Jaghamah and Sabla were a few meters away, with Falco only saying in English that Rios did not need to punch out. (2 RT 360:19-361:12 and 2 RT 361:23-25) On February 9, 2009, which was two days after his termination, Rios appeared at the ALRB hearing pursuant to the union subpoena that he had received. (2 RT 408:14-409:18)

E. Testimony of Mohmoud Sabla.

1. Sabla served as an HerbThyme Supervisor.

Mohmoud Sabla is HerbThyme's supervisor for the cooler and packing room. (2 RT 417:2-5) Sabla has previously served as the supervisor for harvesters and weeders. (2 RT 418:6-11) He has worked for HerbThyme for three years and four months. (2 RT 448:22-23) Sabla speaks Arabic, English and Spanish. (2 RT 417:1-5 and 2 RT 422:15-16) Sabla is the cousin of supervisor Mohammed Jaghamah. (3 RT 536:19-21)

2. Sabla Knew That Castillo Served as a Union Election Observer.

On November 6, 2008, the date of the union election, Heriberto Castillo objected to Sabla voting in the election. (2 RT 429:13-15 and 2 RT 449:14-25) However, Sabla contends that the voting challenge did not bother him and he did not hold it against Castillo. (2 RT 429:16-19)

3. Sabla Testified That, on December 1, 2008, There Was a Meeting With All Company Employees At Which New Work Assignments Were Made.

On December 1, 2008, the day that Heriberto Castillo was suspended, Sabla recalls a meeting in which new work assignments were made.⁹ (2 RT 419:6-8) All of the employees were present at the meeting. (2 RT 419:4-5) Sabla states that Falco talked about the new assignments and that, at the meeting, Castillo was assigned to the weeding crew, which was then supervised by Sabla. (2 RT 419:9-25) Sabla stated that each supervisor called out the names of the employees who were assigned to that supervisor. (2 RT 456:19-25)

4. Sabla Indicates That He Found Castillo Working With Rios and Directed Castillo to Report to the Weeding Crew, But That Castillo Refused to Go.

Sabla states that he noticed that Castillo was not with the weeding crew. (2 RT 420:3-6) Sabla states that he then went to look for Castillo and found him behind the packing room with someone driving a forklift. (2 RT 420:22-421:3) Sabla states that he inquired with Castillo as to why Castillo was not with the weeding crew, and Castillo responded to him that he did not like weeding. (2 RT 420:16-21) Upon further requests for him to join the weeders, Sabla states that Castillo refused to go. (2 RT 421:4-14)

⁹ Neither Rios nor Castillo remembered an all-staff meeting occurring on December 1, 2008. (2 RT 349:23-350:11 and 3 RT 591:6-12)

5. Sabla Indicates That He and Jaghamah Then Went Together to Tell Castillo to Report to the Weeding Crew, But That Castillo Again Refused to Do So.

Following a conversation with Falco, Sabla returned with Jaghamah to speak with Castillo. (2 RT 421:13-422:3) When Jaghamah asked Castillo in Spanish why he would not go with the weeding crew, Castillo told him that he did not like Sabla and did not want to go with the weeding crew. (2 RT 422:17-25 and 2 RT 466:23-25)

6. Sabla Indicates That He, Jaghamah, Weerasekera and Falco All Went Together To Talk With Castillo and That Castillo Still Refused to Report to the Weeding Crew.

Sabla states that he and Jaghamah updated Falco, and that the trio, along with a fourth supervisor, Gamini Weerasekera, returned to speak with Heriberto Castillo. (2 RT 424:4-20) Sabla states that Falco asked Castillo in English, with Weerasekera translating the question into Spanish, whether Castillo had a safety concern. (2 RT 425:3-15 and 2 RT 469:16-24) Falco then advised Castillo that if he refused the job assignment, it would be bad for him. (2 RT 425:16-22) After multiple inquiries from Falco, Castillo still refused to join the weeding crew, and Falco advised Castillo that he was going to be suspended. (2 RT 426:1-427:3 and 2 RT 472:19-473:7) Sabla states that Castillo then took out his union card and held it up. (2 RT 486:16-25) Sabla stated that this is the first time that he knew that Castillo was with the union. (2 RT 487:1-3) Sabla states that, other than Castillo, he is unaware of an employee ever having refused a work assignment. (3 RT 535:14-17) Sabla denies that he ever recommended to Falco that Falco terminate Castillo's employment with HerbThyme. (3 RT 536:8-18)

7. Sabla Supervised Rios When Rios Worked as an HerbThyme Truck Driver.

With respect to Rios, Sabla testified that he supervised Rios during the time that Rios served as a truck driver for HerbThyme. Rios mostly drove the truck back and forth to different locations on the farm, but Rios also sometimes drove the truck roundtrip from Thermal to Compton. (2 RT 431:1-3 and 3 RT 540:20-541:5)

8. Sabla Saw Rios With Beer During the Work Day.

Sabla states that there was an occasion, sometime during the first ten days of January 2009, when he saw Rios leaving a mini-market during his lunch break with three twenty-four ounce cans of Bud Light beer in his hands. (2 RT 431:14-432:11 and 2 RT 487:13-488:7) Sabla called Falco on his work cellular telephone to inform Falco what he had observed. (2 RT 491:10-18)

In late January 2009, on a work day in the late afternoon, Sabla found three beer cans in a cooler near where Rios and two other employees were working. (2 RT 434:13-21) Finally, in late January 2009, Sabla states that, while he was walking at work, he saw Rios holding a twelve-ounce beer can in his hand while driving the company truck, though he did not actually see Rios drinking from the can. (2 RT 434:22-435:4 and 2 RT 489:19-21) Sabla again called Falco on his work cellular telephone to advise Falco as to Sabla's observation, but they did not take any immediate action. (2 RT 493:11-21 and 3 RT 537:23-539:1)

9. Sabla Testified That He Inquired Many Times With Rios Regarding Repairs of a Company ATV and Later Found that the Vehicle was not at the Repair Shop.

Sabla contends that he inquired with Rios many times about the status of an ATV that Rios took to a shop for repairs. (2 RT 445:11-16) Sabla states that he then went to the shop, and the ATV was not there. (2 RT 447:1-4)

10. Sabla Recalls Having Questioned Rios Regarding Some Mislabeled Boxes.

Sabla recalled a day when he spoke with Rios about the labeling of boxes at approximately 6:00 p.m. or 6:20 p.m. (2 RT 436:21-438:4 and 3 RT 515:23-25) Sabla states that he was in a company truck and Rios was in his personal truck at the time of the conversation. (2 RT 438:11-20) Sabla indicates that he asked Rios why he had the wrong labels on certain boxes. (2 RT 438:21-23) Sabla further states that he told Rios that he should have helped a colleague label the boxes. (2 RT 438:21-439:17) Sabla stated that the conversation only lasted for a minute and that neither he nor Rios yelled at each other. (2 RT 438:24-25 and 3 RT 517:3-10)

11. Shortly After Sabla's Conversation With Rios Regarding the Mislabeled Boxes, Rios Put His Hands on Sabla's Chest and Pushed Him.

Sabla then proceeded to go a quarter-mile to the cooler and packing room area. (2 RT 439:18-440:2) Sabla states that it took him nine to ten minutes to get there. (2 RT 518:15-18) Sabla indicates that shortly thereafter Rios appeared. (2 RT 440:3-12) Sabla states that Rios began yelling at him in Spanish, more or less saying "who do you think you are" and "why are you doing this"? (2 RT 440:18-21 and 3 RT 524:23-25) Sabla

states that Rios was right up close to him, in his face, and put his hands on Sabla's upper chest, near but not on his neck, and pushed Sabla slightly backward. (2 RT 440:22-441:6 and 3 RT 525:17-526:8) Sabla then grabbed Rios' hands. (3 RT 527:11-528:19) Sabla states that he and Rios were in physical contact for approximately one to three minutes, yet at no time did Sabla call out for assistance. (3 RT 545:6-24 and 3 RT 547:13-548:4) Although Sabla states that the altercation occurred about three feet outside of the packing room door, he indicates that Rios asked him if he wanted to "take this outside". (2 RT 441:19-442:10 and 3 RT 525:8-10) Sabla states that he smelled beer on Rios' breath. (3 RT 544:6-9)

12. Trujillo and Jaghamah Separated Rios and Sabla Following the Physical Altercation.

Sabla testified that HerbThyme manager Richard Trujillo then approached Sabla and Rios, followed shortly thereafter by Jaghamah. (2 RT 442:12-25) Trujillo and Jaghamah then separated Sabla and Rios; Trujillo went outside with Rios, and Jaghamah went inside with Sabla. (2 RT 443:1-10)

13. Sabla Did Not Report the Physical Altercation with Rios to Falco For Two to Three Days Thereafter.

Sabla admits that he did not report the incident to Falco for at least two to three days thereafter, stating that the company was busy preparing for inspectors, even though both Sabla and Falco had cellular telephones.¹⁰ (2 RT 443:24-444:14 and 3 RT 531:11-

¹⁰ Sabla acknowledged that he made three to four cellular telephone calls to Falco during the typical work day. (2 RT 493:22-25)

21) During those two or three days, Sabla continued to supervise Rios. (3 RT 533:7-16)

Moreover, the time that Sabla allegedly saw Rios holding a beer while driving the company truck was two days following the altercation between Rios and Sabla. (*See* dates on Exhibit E-k and E-l) Sabla took the time to call Falco about that matter, but he did not bring up the topic of the physical altercation. Sabla denies that he ever recommended to Falco that HerbThyme terminate Rios' employment. (2 RT 499:2-4)

14. Sabla acknowledges that Rios handed him a Union Subpoena.

Sabla states that Rios gave him a subpoena to testify on behalf of the union two or three days before Rios was terminated. (3 RT 509:13-17) Sabla believes that this was a Thursday. (3 RT 509:18-23) An hour later, Sabla left the document on Falco's desk. (3 RT 512:15-21) One hour after that, Sabla then checked to confirm that Falco had received the subpoena. (3 RT 512:22-514:22)

F. Testimony of Mohammed Jaghamah.

1. Supervisor Jaghamah previously served as the Farm Manager.

Mohammed Jaghamah has been employed by HerbThyme Farms for the past two years. (1 RT 24:1-4) He has held a variety of supervisory positions with HerbThyme, including a four month stint as the farm manager. (1 RT 24:5-26:3) Mohammed Jaghamah speaks Arabic, English and Spanish. (1 RT 22:12-24 and 1 RT 26:14-24) Jaghamah is the cousin of supervisor Mohmoud Sabla. (1 RT 27:14-21)

Following Jaghamah serving as farm manager from June 2008 to September 2008, the role was thereafter undertaken by Luis Alonso, then by Tom Guenther and finally by Joseph Falco. (1 RT 28:8-21 and 1 RT 36:19-22) After serving as farm manager,

Jaghamah was reassigned to a different supervisory position with HerbThyme, a position below the farm manager in the company's hierarchical structure. (1 RT 24:1-8) In October 2008, Alonso implemented layoffs of employees and, shortly thereafter, the employees began labor organizing activities. (1 RT 28:22-29:6)

Jaghamah states that he disagreed with the October 2008 layoffs. (1 RT 30:15-17) When a bunch of employees came to him with complaints, Jaghamah told them that the layoffs were not his doing, and that it was okay with him if the employees sought assistance from a union or government entity. (1 RT 30:1-20) Jaghamah indicates that he told some employees that they had the right to call a union. (1 RT 31:5-12)

2. Jaghamah hired Alfredo Rios and Heriberto Castillo.

Jaghamah states that he first hired Alfredo Rios in August 2008. (1 RT 32:24-25) Jaghamah indicates that he had a good work relationship with Rios. (1 RT 31:23-32:1) Rios was initially hired to do construction work. (1 RT 33:1-2) After a month or two, Rios was re-assigned to be a mechanic for the company. (1 RT 33:16-34:6) Jaghamah also hired Heriberto Castillo to do weeding. (1 RT 35:13-22) Jaghamah saw Castillo serving as a union election observer on November 6, 2008. (1 RT 35:23-36:10)

3. Jaghamah Recalls an All-Staff Meeting on December 1, 2008.

Jaghamah testified that he recalled a 6:30 a.m. meeting on December 1, 2008 where Falco addressed all of the HerbThyme employees at the Oasis Farm. (1 RT 37:7-13) Jaghamah states that the meeting lasted for approximately half an hour and that he translated Falco's comments from English to Spanish for the fifty or sixty employees who were present. (1 RT 37:15-20 and 1 RT 39:10-19) Jaghamah states that

Weerasekera did not translate for Falco at that meeting. (1 RT 61:13-16) At this meeting, Falco organized the employees into different groups with a supervisor assigned to each group. (1 RT 37:21-38:21) At the morning meeting, neither Falco nor Jaghamah told Castillo to report to Sabla. (1 RT 45:16-46:3) Instead, Sabla would have called Castillo's name. (1 RT 46:21-22)

4. Falco Told Jaghamah to go with Sabla and Ascertain Why Castillo would not Report to the Weeding Crew.

Falco requested Jaghamah to go with Sabla to talk to Castillo and see why Castillo was refusing to report to Sabla. (1 RT 46:8-13) Castillo told Jaghamah that he did not like Sabla, that he did not want to work for Sabla, and that he wanted to go back to the assignment where he belongs, laying pipes in the greenhouses. (1 RT 48:9-21) Jaghamah told Castillo that he was no longer in charge and that he could not change Castillo's work assignment. (1 RT 68:16-23)

5. Jaghamah Testified That He, Sabla, Weerasekera and Falco All Went Together To Talk With Castillo and That Castillo Still Refused to Report to the Weeding Crew.

Falco then took Weerasekera, along with Jaghamah and Sabla, to go speak with Castillo. (1 RT 69:9-16) Falco told Castillo that he was assigned to Sabla's crew. (1 RT 70:2-4) Castillo told Falco that he did not want to work with Sabla and that he wanted to go back to his prior assignment. (1 RT 70:15-18)

6. Jaghamah Indicated That Falco Then Suspended Castillo.

On December 1, 2008, Falco suspended Castillo. (1 RT 54:20-25) On December 3, 2008, Castillo told Jaghamah that the last pay check received by Castillo had a different person's name on the check. (1 RT 55:9-56:5) Jaghamah states that while Castillo's check was given a check with someone else's name on it, the check was issued in the correct amount. (1 RT 56:1-13)

On the day that Castillo was suspended, December 1, 2008, Jaghamah drove Castillo back to Castillo's home. (1 RT 43:22-25) On the way to Castillo's home, Jaghamah states that Castillo told him that he did not like receiving orders from Sabla. (1 RT 44:15-22)

7. Jaghamah Remembers Many Conversations Between Falco and Rios.

Jaghamah remembers Rios having had many conversations in English with Falco, typically more than once a week. (3 RT 615:8-616:13) Some of these conversations involved Falco's concern that Rios was drinking on the job. (3 RT 615:13-617:25) On four other occasions, Falco and Rios spoke regarding the company's ATV. (3 RT 618:15-622:6) Jaghamah stated that the company was supposed to pay with a check for the ATV repairs, but he was unaware as to whether anyone ever gave a check to Rios. (3 RT 626:11-626:20)

8. Jaghamah Remembers Falco Questioning Rios Regarding Israel Lopez.

Another conversation between Falco and Rios involved the allegation that Rios inappropriately took employee Israel Lopez with him when driving the company truck to Compton. (3 RT 628:6-20) Rios failed to get permission from a supervisor to take the

other employee with him. (3 RT 628:18-20) Jaghamah states that Rios first told Falco that he had received permission from Jaghamah, but later admitted that he had just taken the other employee with him on his own. (2 RT 628:24-629:20)

9. Jaghamah Testified That a Physical Altercation Occurred Between Rios and Sabla.

Jaghamah recalled the incident between Sabla and Rios as having occurred around 6:00 p.m. (3 RT 630:6-7) The incident took place in front of the small door by the packing room. (3 RT 631:20-25) Jaghamah heard some yelling and saw Rios pushing Sabla and talking loudly. (3 RT 630:11-18) Jagamah had heard both Rios and Sabla yelling. (3 RT 645:14-22) Rios was putting his nose close to Sabla's face and Sabla was backing up. (3 RT 631:13-19) Rios was speaking in Spanish. (3 RT 634:12-14) When Jaghamah arrived, HerbThyme employee Richard Trujillo was a step ahead of him. (3 RT 632:22-25) They separated the two men, and Jaghamah took Sabla inside. (3 RT 633:4-12) Shortly thereafter, Jagamah went to speak to Rios and smelled alcohol on his breath. (3 RT 634:23-635:1) Rios told him that Sabla was an "asshole". (3 RT 649:19-25)

10. Jaghamah Testified That He Did Not Report the Physical Altercation Between Rios and Sabla to Farm Manager Falco.

Jagamah did not mention the incident between Rios and Sabla to Falco until after Falco asked him about it. (3 RT 636:14-24) Jagamah said that he did not initially report the incident because they were busy preparing for inspectors arriving the next day and later told Falco that he had thereafter forgot to mention the incident to Falco. (3 RT

636:16-637:5) Falco was upset with him for not having reported the incident to him sooner. (3 RT 651:6-14)

11. Jaghamah Testified That Falco Assisted Him in Preparing His Declaration.

Jaghamah answered questions regarding his signed declaration, dated December 16, 2008.¹¹ (1 RT 76:16-21; Exhibit GCX-11) Jaghamah indicates that Falco orally asked him questions and wrote down his answers in order to prepare the declaration. (1 RT 77:13-24)

G. Testimony of Richard Trujillo.

1. Trujillo is HerbThyme's Quality Control Manager.

Richard Trujillo has worked for HerbThyme for three and a half years and serves as a quality control manager for HerbThyme. (1 RT 207:3-15) Trujillo is fluent in English and Spanish. (2 RT 206:11-16 and 2 RT 213:8-14)

2. Trujillo Observed a Physical Altercation Between Rios and Sabla.

Trujillo observed an incident between Sabla and Rios. (1 RT 208:14-16) Trujillo was in the office working on an email when he heard a loud argument nearby. (1 RT 208:24-209:3) As Trujillo walked out of the office, he observed Rios with his right hand on Sabla's chest and his left hand grabbing Sabla's arm. (1 RT 209:1-25) While the incident began before Trujillo arrived, he could tell from the positioning of the two men that Rios was the aggressor. (1 RT 215:9-216:16) Trujillo states that Sabla was "hanging on" to Rios. (1 RT 210:7-16)

¹¹ Exhibits GCX-11 through GCX-14 are the separate declarations signed by Jaghamah, Falco, Sabla and Hoehn, respectively. They are all signed on either December 15 or 16, 2008.

3. Trujillo Observed Indications Suggesting That Rios Had Been Drinking.

As he approached within two to three feet of the men, Trujillo smelled alcohol from Rios, but not from Sabla. (1 RT 210:17-24 and 1 RT 220:7-17) Trujillo also noticed that Rios' face was red. (1 RT 220:12-17) After the men were separated, Trujillo walked outside with Rios while Jaghamah stayed with Sabla. (2 RT 211:11-15) Trujillo spoke with Rios for a few minutes, but he did not recall the content of the conversation, as he was mostly focused on calming down the two men. (2 RT 212:2-11)

4. A Few Days Thereafter, Trujillo Reported The Altercation to Falco.

Within a few days thereafter, Trujillo told Falco about the incident. (2 RT 212:17-20 and 2 RT 223:23-224:3)

H. Testimony of Joseph Falco.

1. Falco Joined HerbThyme on November 24, 2008.

On November 24, 2008, Joseph Falco became HerbThyme's farm manager. (1 RT 81:7-13) Falco's primary language is English. (1 RT 80:19-21) He has spent over thirty years working in the field of agriculture. (1 RT 144:3-6) Falco indicates that the HerbThyme "Oasis Farm" is comprised of approximately one hundred and twenty gross acres, of which approximately one hundred of those acres are usable for farming. (1 RT 145:10-17) The Oasis Farm presently has approximately one hundred employees.¹² (1 RT 145:19-21) During peak season, they can harvest as much as fifteen thousand pounds of herbs per day. (1 RT 146:11-19) Basil is forty-five percent of the company's sales. (1

¹² Neither party addressed whether the present number of employees is comparable to the number of employees at the time of the alleged unfair labor practices.

RT 147:16-17) HerbThyme also grows chives, cilantro, dill, oregano, sage and thyme.
(1 RT 147:9-20)

2. Falco Described the Company's Disciplinary Process.

Falco indicated that the company handbook calls for a progressive discipline system. (1 RT 87:16-88:5) For certain offenses, the progression would be from counseling to written warnings, followed by suspension and ultimately termination. (1 RT 89:25-90:8) Among the offenses for which the handbook calls for immediate termination is being under the influence of alcohol on company premises. (1 RT 91:18-22) As farm manager, Falco has the authority to make termination recommendations which are then approved by Michelle Hoehn of the company's human resources department. (1 RT 94:19-25)

3. After the Prior Seasonal Task of Laying Pipes was Completed, Falco Changed Castillo's Work Assignment to That of Weeding.

In November 2008, Castillo's work assignment included laying the irrigation pipes or heat tubes in the greenhouses. As of December 1, 2008, HerbThyme had completed laying all of the heat tubes in the greenhouses. (1 RT 156:14-18) Falco noted that laying heat tubes is a seasonal task that is only needed during certain times of the year.¹³ (1 RT 146:20-147:7) Falco made the decision to reassign Castillo to the weeding crew. (2 RT 313:21-315:2)

¹³ The General Counsel did not present any evidence to refute the claim that, as of December 1, 2008, the company did not need to further lay heat tubes. Nor did the General Counsel allege that the mere change of assignment for Castillo was itself an unfair labor practice. Given the testimony that this task was done for the season, the ALJ has no basis to further consider whether the change of Castillo's assignment constituted an unfair labor practice.

4. On December 1, 2008, Falco Addressed The Employees in an All-Staff Meeting and Supervisors Informed Workers of Their New Assignments.

On December 1, 2008, in the early morning, farm manager Falco addressed all of the Oasis Farms employees using a translator. (1 RT 150:5-22) The line supervisors then read out the names of the employees that were to report to them. (1 RT 151:25-153:4)

5. Falco Learned that Castillo was Refusing His New Work Assignment.

Falco first heard that Castillo had refused his work assignment from Sabla. (1 RT 108:1-5) Falco then called Jaghamah and asked him to accompany Sabla to speak with Castillo. (1 RT 110:6-11 and 1 RT 153:10-16) Falco claims that he saw Jaghamah tell Castillo to report to Sabla.¹⁴ (1 RT 117:10-19) Jaghamah then returned to Falco's office and advised him that Castillo refused to work for Sabla. (1 RT 110:16-20 and 1 RT 153:17-20)

6. Falco Then Went to Talk to Castillo.

Falco, Jaghamah and Gamini Weerasekera then joined Sabla and Castillo to discuss the matter. (1 RT 110:21-111:5) Castillo told Falco that he did not want to work for Sabla. (1 RT 111:17-19) Castillo also told him that he wanted to work with his friends. (2 RT 308:16-17) Falco recalls that employee Elizabeth Yietas may also have been present during this conversation.¹⁵ (1 RT 112:11-113:2) Falco told Castillo to listen carefully and to understand that refusing a supervisor's instructions could be considered insubordination and could result in suspension. (1 RT 155:17-156:13) Falco

¹⁴ However, Falco admitted that the conversation that he allegedly saw between Jaghamah and Castillo actually occurred approximately thirty to forty yards from the office where he was located. (1 RT 117:16-118:9)

¹⁵ Neither Weerasekera nor Yietas testified at this hearing.

does not recall telling Castillo that the company had finished laying the heat tubes in the greenhouses, which meant that employees would no longer be needed to complete that task.¹⁶ (1 RT 157:2-18) Near the end of the conversation, Falco advised Castillo that he was going to suspend him.¹⁷ (1 RT 158:5-9) Castillo then reached into his wallet and pulled out a card, shouting, “You can’t do that, I’m with the union.” (1 RT 158:10-13)

7. Falco Terminated Castillo.

Falco believed that Castillo’s insubordination was significant enough to leapfrog past implementation of progressive discipline. (1 RT 167:17-23) Falco believed that Hoehn made a telephone call to Castillo on the same day that Falco recommended Castillo’s termination. (1 RT 95:6-18) However, Falco did not know whether Hoehn had spoke with Castillo before or after Falco recommended his termination. (1 RT 97:17-24) On December 1, 2008, both Falco and Hoehn signed the paperwork terminating Castillo. (Exhibit E-d)

8. Falco Claimed That When He Terminated Castillo, He Did Not Know That Castillo Had Served as an Election Observer.

Falco stated that he did not become aware that Castillo served as a union election observer until May 2009. (1 RT 83:22-85:11) Falco notes that there was a second

¹⁶ By explaining this point to Castillo, Falco might have eliminated any existing confusion. HerbThyme supervisors claim that Castillo wanted to lay the heat tubes or irrigation pipes. The ALJ understood the work involving heat tubes and irrigation pipes to be similar if not synonymous. But that work under either name was no longer available to anyone. To the extent that Castillo wanted to work with certain “friends”, those employees also would not have continued to handle the heat tubes or irrigation pipes at that juncture.

¹⁷ E-c is a note from Joe Falco, dated December 1, 2008, which on its face purports to be a witness statement by Falco which states that Falco suspended Castillo “for the balance of the day” and recommends terminating Castillo. If Falco indeed used the language that Castillo was suspended for the balance of the day, this might explain why Jaghamah possibly told Castillo that he could come back to work the next day.

union election observer, Leo Villalva, who is still employed with HerbThyme. (1 RT 148:20-149:11)

9. Falco Described Rios' Work Duties.

Per Falco, Rios worked in maintenance and assisted the mechanic. (1 RT 176:5-8) Falco stated that Rios was good candidate to become a truck driver because he spoke excellent English. (1 RT 176:14-20) Falco initially testified that, in the first or second week of January 2009, Rios became a truck driver for HerbThyme. (1 RT 176:9-13) Later in the hearing, Falco indicated that Rios had been reassigned from maintenance to driving the company truck by the second half of December 2008. (2 RT 284:1-3)

10. Falco Testified that He and Rios Regularly Communicated.

Falco stated that he had conversations with Rios in English "all the time". (1 RT 176:21-23) Falco indicated that several of his conversations with Rios involved concerns that Falco had regarding Rios. Falco states the topics that he discussed with Rios included his concerns regarding Rios' dishonesty, alcoholism and insubordination. (1 RT 182:5-9)

11. Falco Discussed an Attendance Issue with Rios.

Falco indicates that he also spoke with Rios on the telephone on December 25, 2008. (1 RT 179:16-18) Falco states that Rios called to advise Falco that Rios' personal truck broke down in Sacramento, and that he was going to be a day late returning to work. (1 RT 179:21-25) Falco states that this occurred after Rios had a vacation request

denied and the company then issued a warning to Rios due to his unexcused absence.¹⁸
(1 RT 180:18-24; Exhibit E-i)

12. Falco Talked with Rios about Rios Having Taken Another Employee with Him on a Work-Related Trip to Compton.

Falco had a conversation with Rios after Rios asked another employee, Israel Lopez, to accompany Rios in the company truck on a work-related trip to Compton. (1 RT 183:14-184:10) Rios was supposed to drive to Compton, but Rios had not been authorized to take a second employee with him. (1 RT 183:2-184:25) According to Falco, this issue of taking a second employee to Compton occurred within a few days of the attendance issue.¹⁹ (1 RT 191:20-23)

13. Falco Talked with Rios about the Progress made on ATV Repairs.

Falco also had a conversation with Rios as to the delay regarding repairs to the company's inoperable ATV that was used for a supervisor to travel between adjacent farms. (1 RT 204:6-8) Falco claims that Rios admitted that he had the vehicle at his home after initially stating that he was unaware of the vehicle's location. (1 RT 233:19-235:18)

¹⁸ E-i is a "corrective action memorandum" issued by HerbThyme on December 29, 2008 to Alfredo Rios for unexcused absences on two consecutive days.

¹⁹ E-j is an undated "corrective action memorandum" issued by HerbThyme to Alfredo Rios for "telling an employee to ride with him without supervisor's approval".

14. Falco Spoke With Rios After Rios Was Spotted Leaving a Mini-Mart with Beer.

Falco testified that, in early December 2008, he received a report from Sabla that Rios had been seen during his lunch hour leaving a mini-mart with a six-pack of beer. (1 RT 178:16-22) Falco did not smell alcohol on Rios' breath that day, but advised him that purchasing alcohol during the lunch hour looked bad because it creates the appearance of an opportunity to drink during the work day. (2 RT 277:8-20) Falco states that Rios told him that he did purchase the beer, but assured Falco that he was not drinking during work hours. (1 RT 178:24-179:1)

15. Falco Spoke With Rios After a Beer Can was Found in a Company Toilet.

There was another incident approximately ten days later where a beer can was found in a toilet near where Rios was working. (1 RT 193:15-17 and 2 RT 278:7-15) Falco discussed this with Rios, although Falco had no evidence that Rios was the source of the beer can and did not smell an odor of alcohol when he smelled Rios' breath. (1 RT 193:15-194:7 and 2 RT 238:3-12) Falco admitted that approximately half of the company's one hundred employees had access to that toilet that day. (2 RT 278:13-25)

16. One of HerbThyme's Compton Employees Found a Beer Can in a Bag of Product Delivered by Rios.

There was another incident in early December 2008 where Rios drove bags of product from Thermal to Compton and the Compton employees found a beer can in one

of the bags.²⁰ (1 RT 198:14-199:22) Falco concluded that Rios must have been responsible for the beer can in the bag of product and thereafter discussed the matter with him. (1 RT 199:23-25 and 1 RT 201:7-14) However, Falco admitted that the bags are sealed by the harvest crew at the harvest table. (1 RT 201:2-5) Falco testified that thirty to forty employees were working near that general area. (2 RT 292:13-21)

17. Falco Learned From Trujillo That There Had Been a Physical Altercation Between Rios and Sabla.

Falco stated that he had learned of the January 29, 2009 incident involving Rios and Sabla from Richard Trujillo on February 4, 2009. (1 RT 134:24-135:135 and 2 RT 238:16-22) Trujillo told Falco that he witnessed Rios' hands on Sabla's chest, with Rios acting in an aggressive manner. (2 RT 240:1-9) Falco then inquired with Sabla and Jaghamah. (2 RT 240:13-19) Sabla told Falco that Rios shoved him and was intoxicated. (2 RT 242:14-22) Jaghamah told Falco that he heard yelling and then had to help separate Rios and Sabla, and smelled alcohol on Rios' breath. (2 RT 244:19-245:2)

18. Two Days Following the Physical Altercation Between Rios and Sabla, Sabla Reported to Falco Concerns Regarding Rios and the Use of Alcohol.

Falco states that Sabla urged him to fire Rios based on the concerns regarding Rios and the use of alcohol occurring on January 31, 2009.²¹ (2 RT 268:17-22) Specifically,

²⁰ Ironically, it was only after the first of the alleged alcohol-related incidents that the company moved Rios to the position of truck driver.

²¹ The ALJ notes that this testimony contradicts Sabla's testimony on the same subject. Sabla denies having ever recommended to Falco that Rios be terminated. (2 RT 499:2-4)

on January 31, 2009, Sabla told Falco that he saw Rios drinking on company property. (2 RT 288:15-19) Sabla told Falco that he found a beer can in the cooler, and Rios was one of three nearby employees. (2 RT 288:6-19) Later that same day, Sabla reported to Falco that he saw Rios driving a company truck while holding a beer can. (2 RT 290:4-17) In both of these conversations, Sabla failed to mention to Falco the physical altercation between Rios and Sabla that had occurred just two days earlier on January 29, 2009.²² (2 RT 269:1-4) Five to ten minutes later, Falco then confronted Rios. (2 RT 290:21-23) Falco did not smell alcohol on Rios' breath, but he did find a warm, empty beer can inside the company truck.²³ (2 RT 291:1-292:1)

19. Falco Recommended to Hoehn That Rios be Terminated.

Falco states that he made the recommendation to terminate Alfredo Rios on the afternoon of February 4, 2009. (1 RT 125:18-21 and 1 RT 136:16-18) His recommendation to Michele Hoehn stated that Rios acted in an “aggressive physical way” with Sabla.²⁴ (1 RT 138:7-9; Exhibits E-k and E-l) His recommendation also mentioned that Sabla caught Rios drinking on company property two days after the

²² The ALJ found Falco credible in stating that Sabla did not tell him in the January 31, 2009 conversation(s) about the January 29, 2009 physical altercation between Rios and Sabla. As discussed in the analysis section *infra*, this fact leads the ALJ to significantly doubt the veracity of portions of Sabla's testimony. Sabla stated that he did not call Falco after the allegation because of pressing work matters, namely, an upcoming inspection. But surely if Sabla was not concealing this matter from Falco, Sabla would have told Falco about the physical altercation when mentioning other alcohol-related incidents involving Rios just two days after the altercation, especially since Sabla claims that he smelled alcohol on Rios' breath during the altercation. Instead, Sabla mentioned his physical altercation with Rios only on February 4, 2009, upon inquiry from Falco, who had learned of the incident from Richard Trujillo.

²³ This was the company truck that Rios had driven earlier that day, although other company employees may have had access to the truck.

²⁴ Exhibits E-k and E-l are signed internal company memoranda dated February 4, 2009 by Falco regarding the decision to terminate Rios. E-k refers to the termination as Falco's decision and E-l refers to the termination as Falco's recommendation. E-l also adds information regarding the ATV issue.

incident.²⁵ (Exhibits E-k and E-l) Falco indicates that he would have shared information about that recommendation with Sabla. (1 RT 128:12-17) Notwithstanding the alcohol allegations on January 31, 2009, Falco states that he had Rios driving on company property thereafter for approximately one week. (1 RT 141:1-17) Falco noted that Rios' English language skills and valid driver's license kept Rios "DOT-compliant".²⁶ (2 RT 316:16-21) Falco never offered formal alcohol counseling or assistance to Rios. (2 RT 297:9-15)

20. Falco Testified That He First Learned That Rios Had Been Subpoenaed on February 6, 2009.

Falco stated that he first learned that Rios had been subpoenaed to testify for the union on Friday morning, February 6, 2009. (1 RT 126:5-19 and 2 RT 262:10-11) Falco testified that the other employees who were subpoenaed for the hearing were not disciplined. (2 RT 266:9-25)

21. Falco Advised Rios of his Termination on February 7, 2009.

Falco testified that he met with Rios on Saturday, February 7, 2009, to tell Rios that he was being terminated. (1 RT 132:21-23 and 2 RT 267:1-3) Falco spoke to Rios in English. (1 RT 133:11-12) Falco states that he told Rios that he was being terminated for aggressively putting his hands on Sabla. (1 RT 134:10-14) Falco states that he did

²⁵ The facsimile from Joseph Falco to Michele Hoehn, dated February 4, 2009, also mentions the allegations regarding the ATV and gasoline receipts. Falco states that Rios submitted receipts for reimbursement for purchasing gasoline, but that the company truck instead used diesel. (2 RT 252:19-253:1) Rios denied to Falco that he submitted a false receipt. (2 RT 307:5-7) However, Falco states that he ultimately "terminated Mr. Rios for one reason . . . putting his hands on and shoving the supervisor." (2 RT 318:1-10)

²⁶ Presumably, Falco's reference to Rios being "DOT-compliant" refers to Rios meeting requirements of the U.S. Department of Transportation and/or the California Department of Motor Vehicles.

not mention any other reason to Rios. (1 RT 135:2-4) Falco claims that Rios did not respond to him when Falco told him the reason for the termination. (2 RT 268:10-13)

22. Falco Recalled an Email Exchange with Hoehn Regarding Decertification.

Falco did remember an email exchange with Michelle Hoehn in early February 2009 about the possibility of union decertification. (1 RT 98:4-9 and 1 RT 102:3-104:17; Exhibit E-r) In this email, Falco tells Hoehn that he estimates three-fourths of the workers support the union, so “if we ever get to a point in time when a decertification is possible, our work will be cut out for us.” (Exhibit E-r)

I. Testimony of Michelle Hoehn.

1. Hoehn Served as HerbThyme’s Director of Human Resources.

Michelle Hoehn is HerbThyme’s Director of Human Resources. (3 RT 655:1-3) Hoehn is now based in Pico Rivera. (3 RT 655:4-5) Back on December 1, 2008, Hoehn was located in Compton. The language that Hoehn speaks the best is English, but she is also fluent in Spanish. (3 RT 654:8-10 and 3 RT 656:25-657:4) To issue a warning, the farm manager does not need her approval beforehand. (3 RT 736:17-19) However, Hoehn states that she makes the final decision on the termination of non-supervisory employees. (3 RT 658:17-20 and 3 RT 750:16-24) Hoehn stated that she typically tried to call employees before terminating them for insubordination, aggression or stealing. (3 RT 738:19-25) Hoehn stated that it would typically take one or two days to get a termination pay check out to Oasis Farms. (3 RT 719:19-23)

2. Following Her Receipt of Falco's Recommendation, Hoehn Claims that She Spoke on the Telephone With Castillo.

Hoehn does not recall ever meeting Heriberto Castillo in person. (3 RT 657:17-19) Falco told her that Castillo had been insubordinate and refused his supervisor's instructions. (3 RT 761:10-15) Falco recommended that Castillo be terminated. (3 RT 762:3-4) Hoehn recalls that this conversation was in the morning shortly after she arrived at work. (3 RT 762:1-2) Hoehn states that sometime that day she spoke with Castillo in Spanish over the telephone. (3 RT 763:11-18 and 3 RT 767:14-16) Hoehn did not recall whether she called Castillo or if he had called her. (3 RT 765:6-9) Hoehn states that Castillo kept repeating "that's not my job" and also mentioned that Sabla was confusing. (3 RT 765:10-23) Hoehn states that she told Castillo that if he did not listen to his supervisor, he could lose his job. (3 RT 766:2-4) Hoehn indicates that when she spoke to Castillo she may not have known that he had already been suspended. (3 RT 767:3-13) Michelle Hoehn and Joseph Falco both signed the separation report terminating Heriberto Castillo on the same day as the December 1, 2008 incident. (Exhibit E-d)

3. Hoehn Terminated Rios, But She Did Not Speak With Him.

Hoehn does not recall if she ever spoke to Alfredo Rios. (3 RT 740:15-21) Falco told Hoehn that there was a fight and that Rios pushed Sabla. (3 RT 742:18-22) Hoehn stated that she does not recall having talked with Sabla about the altercation. (3 RT 747:19-22) Nor does Hoehn recall having talked with Jaghamah or Trujillo about the incident. (3 RT 749:1-9) Hoehn indicates that she tried to call Rios prior to approving his termination but was unable to reach him. (3 RT 714:13-17) Hoehn testified that the primary reason that

she terminated Rios was because he pushed his supervisor. (3 RT 758:16-20) Hoehn also took into account the other items listed in Exhibit E-1 (the ATV issue, the alleged drinking on company premises two days after the Sabla altercation, and the request for reimbursement for gasoline), and his two prior discipline notices (for the holiday absence and employee ride-along to Compton, respectively). (3 RT 759:1-22) Hoehn remembered speaking with Falco about continuing to allow Rios to work for a couple more days even after they learned of the altercation between Rios and Sabla. (3 RT 719:1-17)

J. Excluded Evidence.

E-v and E-w are two documents that the ALJ did not admit. Neither were marked during either of the two prehearing conferences. Nor in the prehearing conferences did HerbThyme even bring up the topic that Hoehn ever spoke with Castillo. E-v is purportedly notes typed by Hoehn sometime after she spoke with Castillo. The document does not state who generated it. The notes were provided to the General Counsel at most a scant two weeks before the hearing commenced. The ALJ declined to admit them due to HerbThyme's inability to satisfactorily explain why the notes were not sooner located and provided to the General Counsel. Further, the fact that HerbThyme was unable to locate these notes until just before the hearing suggests that the notes may not have been maintained in the ordinary course of business. However, the ALJ allowed Hoehn to testify as to her alleged conversation with Castillo.

Exhibit E-w is a group of photographs of a Bud Light beer can inside a sealed bag of product that was delivered to Compton. The bags appear to be made of a clear, largely

transparent material. The ALJ found the photographs inadmissible due to their non-relevance and potential for prejudice. Rios was one of only many employees with access to the bags of product in question and there is no plausible reason why Rios, even if he had been drinking beer, would have unsealed a bag of product and then put a beer can in plain view inside the bag of product.

IV. WITNESS CREDIBILITY AND DEMEANOR

As will be discussed below, the ALJ found making the factual determinations in this matter to be a challenging exercise because the hearing left the ALJ with serious doubts about the accuracy of the testimony of almost all of the witnesses.

A. Heriberto Castillo.

Heriberto Castillo was not a persuasive witness. The ALJ notes that, at one juncture in the hearing, HerbThyme's counsel tried to get Castillo to concede that he refused Sabla's direction to join the weeding crew. The gist of Castillo's earlier remarks was that Jaghamah had given him a conflicting work assignment so that is why Castillo failed to comply with Sabla.²⁷ However, when pressed on the topic of whether he refused Sabla's request, Castillo testified that he told Sabla that if he wanted Castillo to weed, Sabla needed to send someone else to assist Rios. The ALJ found this statement implausible, self-serving and inconsistent with the remainder of Castillo's testimony.

²⁷ The ALJ notes that Rios was later accused by HerbThyme of taking an additional employee with him on a trip without authorization to do so from a supervisor. The ALJ does have to wonder if there was any possibility here as to whether it was Rios, with the better English skills, who told Castillo to come along and assist him on December 1, 2008. If so, it is possible that HerbThyme terminated Castillo under circumstances where Castillo was, at least initially, genuinely confused, especially since HerbThyme failed to explain to Castillo that the seasonal work of laying the heat tubes and irrigation pipes was recently completed.

The ALJ also found particularly incredulous Castillo's self-serving claim that Jaghamah told him that getting rid of the union might improve things for him. The evidence seemed to show that, whether it was actually true or not, Jaghamah liked to tell the employees that he was empathetic and on their side. While Jaghamah was surely disappointed that the farm manager position had been taken from him and given to Falco, which is a natural response, someone as shrewd as Jaghamah would not have believed that if Castillo alone offered to help HerbThyme oust the union that Jaghamah might reclaim his earlier position from Falco. Thus, the ALJ concludes that it is unlikely that Jaghamah made a comment to Castillo tying his reinstatement to ousting the union. As a result, based upon a preponderance of the evidence, the ALJ finds that Castillo either made up, or incorrectly remembered, this statement regarding getting rid of the union that he attributed to Jaghamah.

The ALJ also finds it unlikely that Castillo would have simply taken the word of line supervisors Sabla and Jaghamah that he was fired without speaking with either Falco or Hoehn. Castillo claims that he received conflicting work assignments from Sabla and Jaghamah, who he knew to be cousins.²⁸ But Castillo claims that he then accepted their word that he was suspended without speaking to anyone above them, such as Falco or

²⁸ Castillo testified that when Sabla first told him to join the weeding crew, he continued to follow Jaghamah's prior instructions, which allegedly were for Castillo to assist Rios. If true, this would seemingly suggest that Castillo considered Jaghamah's authority over him that day to be superior to that of Sabla. Yet Castillo indicates that later that day he asked Jaghamah "why Sabla was firing him". If Castillo thought that Jaghamah was his supervisor that day, it seems unlikely that Castillo would have left solely because Sabla told him to do so, absent an affirmative statement from Jaghamah. Moreover, rather than simply leaving, Castillo would have presumably pressed with Jaghamah and others Castillo's contention that he was simply following Jaghamah's directions.

Hoehn.²⁹ Admittedly, Castillo is not fluent in English and Falco is not fluent in Spanish, but Castillo could have asked to speak to farm manager Falco and brought someone along to assist in translating. If Castillo thought he had been terminated because Sabla and Jaghamah had given him conflicting work assignments, it is likely that Castillo would have demanded to speak to a higher-up farm supervisor.

B. Alfredo Rios.

Rios is even more deserving of disbelief. Rios' testimony that Jaghamah asked him in back November 2008 to help him get rid of the union is not believable. Rios himself states that Jaghamah knew that he served as a union crew representative and more importantly, Jaghamah had suggested that he go to the union just a few weeks before. Clearly, even if HerbThyme or Jaghamah harbored anti-union animus, Jaghamah himself had no self-interest in telling Rios that he wanted to get rid of the union. Because the ALJ finds unbelievable the testimony by both Castillo and Rios on this subject, there is no need to address the question of whether such statements by Jaghamah meet the hearsay exception standard for an admission against interest.

The ALJ also doubts the veracity of Rios' testimony claiming that he only spoke with Falco a couple of times during the complete duration of his HerbThyme employment. Such testimony flies against the other testimony presented during the hearing, and it is especially implausible since Rios' good English skills made him someone with whom Falco could directly communicate.

²⁹ Castillo testified that he obtained and dialed a telephone number for Hoehn, who was located in a different city, but that he then reached an answering machine and did not leave his name or a message. (4 RT 811:11-812:4)

Rios' testimony regarding his unexcused absences also seemed inaccurate. Clearly, the unexcused holiday absences were not a factor in HerbThyme's termination decision. Yet, Rios denied that the absences occurred on the dates seemingly documented by HerbThyme. This testimony either reflects confusion on Rios' part or, more likely, a pattern on the part of Rios to deny responsibility for any past misconduct, no matter how far removed from the termination decision. The ALJ does not think for a minute that the absences in question were part of the rubric as to why HerbThyme terminated Rios. But if Rios is inaccurate about the "little" details, then it is also more likely that he is inaccurate in parts of his testimony on important details as well.

The ATV incident is harder to assess. Either party could have bolstered its case by submitting testimony or documents from the repair shop addressing whether or not Rios initially brought the vehicle there for repairs, and whether the shop then declined to repair the vehicle in the absence of receiving an advance check from the company. The ALJ also finds it plausible that, at some juncture, either Falco or Jaghamah told Rios that he could try to repair the vehicle himself, just that they did not contemplate the vehicle sitting at Rios' home for a lengthy period of time.

On the other hand, Rios' testimony rang particularly untrue when he indicated that following the incident in which Sabla yelled at him regarding some mislabeled product, he went to the area where Jaghamah and Sabla were working, but spoke and interacted only with Jaghamah. Ironically, it is only if the physical altercation actually occurred, which the ALJ finds by a preponderance of the evidence to be true, that Sabla had a motive to exaggerate or lie about alcohol use by Rios two days following the skirmish.

The ALJ notes that under Rios' version of the facts, Sabla did not have a plausible personal motive to frame Rios.³⁰

The ALJ also disbelieved Rios when he testified as to Sabla's response to him upon receipt of the union subpoena. Rios claimed that Sabla told him that, if the document was from the union, Rios would be fired because Sabla was "one hundred percent with Joe Falco".³¹ The ALJ finds that by this juncture Sabla had personal animus toward Rios due to the earlier physical altercation between them. But the comment that Rios' seeks to attribute to Sabla is highly implausible. The implication is that Falco is anti-union, and Sabla would terminate Rios due to his loyalty to Falco. But Falco was Sabla's supervisor, not the other way around. Falco was the manager who made the termination recommendations to Hoehn, whereas Sabla was at a lower organizational level. So it makes no sense for Sabla to have uttered the specific comment that Rios seeks to attribute to him. Rather, this appears to be an attempt by Rios to falsely tie anti-union animus to Falco.³²

Finally, the ALJ finds it unlikely that, as Rios testified, Falco said nothing to him when he gave Rios his last check. For all the inconsistencies in Falco's testimony, it seems probable that Falco did in fact tell Rios that he was being terminated.

³⁰ As discussed *infra*, assuming that the physical altercation did in fact occur, Sabla undermined his credibility by failing to report the altercation to his supervisor, Falco, until after Falco had already learned of the incident from Trujillo and followed up by inquiring with Sabla.

³¹ The ALJ believes Falco's testimony that he would have contemporaneously told Sabla that he had recommended to Hoehn that she terminate Rios. (1 RT 128:12-17)

³² Indeed, in many unfair labor practice cases, an employee is limited to circumstantial evidence to demonstrate the employer's anti-union animus. This is sometimes because the employer's supervisors are sophisticated enough to refrain from directly telling the employees the company's true position. Clearly, in some instances, circumstantial evidence alone is necessarily sufficient to prove anti-union animus. In the instant case, however, Rios' testimony is almost too scripted and too convenient. Rios would have the fact-finder believe that Sabla, a crew supervisor who harbored ill-will toward him, informed Rios that he would be fired due to the higher-up farm manager's anti-union sentiments.

C. Mahmoud Sabla.

Supervisor Mohmoud Sabla was generally an unpersuasive witness. For example, Sabla testified that the first time he learned that Castillo was with the union was when Castillo took out his union card on the day Castillo was suspended, which was December 1, 2008. Yet Sabla also conceded knowing that Castillo served as the union election observer back on November 6, 2008, which means that he actually knew of Castillo's union affiliation a full twenty-five days prior to December 1, 2008.

More significantly, Sabla testified that he withheld information about his physical altercation with Rios from Falco due to an upcoming inspection. But two days later, Sabla had plenty of time to report two other instances in which he allegedly suspected that Rios had beer on company property.³³ By then, the pushing incident gave Sabla a reason to dislike Rios. Given that Sabla testified that Rios smelled of alcohol at the time he allegedly shoved Sabla on January 29, 2009, it is inconceivable that if the altercation indeed occurred that Sabla did not remember it in the context of alcohol-related incidents being discussed on January 31, 2009. Nor is it plausible that it would save Falco time for Sabla to mention the January 31st observations without bringing up the January 29th physical altercation. Thus, Sabla was either concealing the January 29th altercation from Falco because he thought the altercation reflected poorly upon him, or alternatively Sabla did not mention it to Falco because the incident was insignificant or altogether fabricated. As discussed below, the ALJ seriously considered the latter options, but instead finds,

³³ Indeed, according to Falco's testimony, Sabla recommended to him that Rios be terminated due to the alcohol-related incidents occurring on January 31, 2009. (2 RT 268:17-22) Sabla testified that he never recommended to Falco that Rios be terminated. (2 RT 499:2-4) The ALJ finds Falco's testimony on this subject to be the more persuasive.

based on Richard Trujillo's credible testimony, that the physical altercation between Sabla and Rios not only occurred, but rose to the level to trigger discipline.

The General Counsel's argument that testimony only demonstrated that Rios and Sabla were merely "holding onto each other" is incorrect. If Rios aggressively put his hands on Sabla's chest and began pushing him, this is factually dissimilar from an employee pushing away a supervisor's hand when the supervisor was pointing a finger near or in the employee's face, as was the case in *Pictsweet Mushroom Farms* (2002), 28 ALRB 4.

At times, Sabla's testimony was inconsistent and at other times his answers sounded rehearsed. For example, Sabla first testified that he and Rios were in physical contact for three minutes. The ALJ did not find this testimony to be credible. Later, Sabla testified that the physical contact might have lasted for a single minute, which seems more plausible. Overall, Sabla was an unpersuasive witness.

D. Mohammed Jaghamah.

Jaghamah was also not a particularly persuasive witness. Similar to Sabla, Jaghamah had no reasonable explanation as to why he failed to promptly tell Falco about the altercation between Rios and Sabla. Also, Jaghamah testified that he could not recall whether the company ever gave a check to Rios for purposes of getting the ATV repaired. The ALJ is mindful of the fact that Falco was the new supervisor for Jaghamah and Sabla and they were likely concerned about his impression of them. The ALJ could easily believe Jaghamah giving one answer to the employees and another to Falco. In their interactions with the non-supervisory agricultural workers, it is almost like Jaghamah and

Sabla had the roles of “good cop, bad cop,” with Jaghamah trying to be the likeable supervisor.

The ALJ did find Jaghamah credible when he testified that Rios eventually admitted to taking colleague Israel Lopez along on a truck ride to Compton without first obtaining approval from a supervisor.

E. Richard Trujillo.

Richard Trujillo’s testimony was the briefest of the witnesses at this hearing, but it was also the most persuasive. His responses seemed spontaneous and unscripted. He recalled an incident between Rios and Sabla, and he had to personally intervene. Trujillo recalled that Rios had his hands on Sabla’s chest and arm and that Rios’ face was red and smelled of alcohol. From the positioning of two men, it appeared to Trujillo that Rios was the aggressor.³⁴ A few days later, on February 4, 2009, Trujillo mentioned the incident to Falco.

By finding that Trujillo was a credible witness, the ALJ finds as a corollary that Rios was lying in claiming not to recall the physical altercation between him and Sabla. While it is possible that Sabla did somewhat provoke Rios by yelling at him some twenty minutes beforehand, Trujillo’s testimony painted a picture of Rios as the physical aggressor and of Sabla as a person who was trying to extricate himself from the physical contact.

³⁴ Trujillo’s testimony regarding the physical altercation appears to substantiate Sabla’s testimony on that specific subject. Given Trujillo’s testimony that when he came upon the two men, Rios smelled of alcohol and had his hand aggressively positioned on Sabla’s chest, the ALJ finds that, based upon a preponderance of the evidence, Rios had pushed Sabla backwards moments before Trujillo and Jaghamah came upon the scene.

F. Joseph Falco.

While parts of Falco's testimony were believable, other parts were not. The ALJ did not believe Falco when he testified that he first learned that Castillo had served as a union election observer only in May 2009. On December 1, 2008, after Falco announced that he was suspending Castillo, the employee purportedly whipped out his union card and held it up like a magic shield. Moreover, in mid-December 2008, Falco signed a declaration addressing Castillo's role as a union election observer. When confronted with these facts, Falco merely stated that he knew it was alleged that Castillo had been a union election observer, but since Falco started work at HerbThyme a few weeks thereafter, he did not know it for sure. At best, Falco was playing semantics with this portion of his testimony, as he likely discussed the alleged unfair labor practices with his colleagues and had every reason to know that Castillo had served as a union election observer.

Similarly, Falco testified that he was very concerned that Rios might be drinking on company property, yet thereafter assigned Rios to drive the company truck. Falco states that he repeatedly positioned himself to smell Rios' breath, but never smelled beer or alcohol on Rios' breath. The testimony is inconsistent with his actions. If Falco genuinely believed that Rios had a drinking problem, then he should have advised Rios to get assistance or formal counseling and assigned the truck-driving duties to a sober employee.

Another instance where Falco was unbelievable was when he testified that he saw Jaghamah tell Castillo to report to Sabla. But Falco then conceded that he was located in

his office some thirty to forty yards away when Jaghamah was talking with Castillo, and this does not even take into account that Jaghamah presumably spoke to Castillo in Spanish, a language in which Falco is not fluent.

G. Michelle Hoehn.

Michelle Hoehn was an articulate witness, but the ALJ was troubled with her ability to remember certain details with great precision and then to not recall at all other similar types of details. Hoehn does not recall if she ever met Castillo or Rios, yet she seems to assume that she would recognize their voice on the telephone. Hoehn did not recall if she called Castillo or if it was the other way around. Hoehn does not recall if she knew that Falco had already suspended Castillo prior to when she allegedly spoke with Castillo on the telephone. Hoehn signed the termination report for Castillo on December 1, 2008, the same day that Falco notes that he suspended Castillo for the balance of the day. While Hoehn recalls writing notes of her conversation with Castillo at some juncture, she was unable to find them when the employer initially produced documents to the General Counsel. Nor did Hoehn have any telephone records to substantiate her claim of having spoken with Castillo. Finally, and most significantly, Hoehn did not mention her conversation with Castillo in her declaration signed in mid-December 2008, nor did HerbThyme mention the alleged conversation between Hoehn and Castillo during any of the prehearing conferences in this matter.

On the other hand, Hoehn seemed genuinely certain that she spoke with Castillo that day. The ALJ believes that Hoehn is being truthful with her recollection of having had the telephone conversation and also that Castillo is being truthful in not recalling

such a telephone conversation. By a slim preponderance, the ALJ finds that it is more likely that Castillo is confused and mistaken as to whether or not he spoke with Hoehn than the other way around. This was understandably a stressful and difficult day for Castillo who felt like he was being mistreated, in part due to the failure of the company to carefully explain why they had switched his work-related duties. On the other hand, Hoehn clearly recalled that the issue had come up prior to the time that she arrived at her office that day.

Hoehn also recalled certain phrases that were consistent with Castillo's comments to other HerbThyme supervisors. There is little possibility that Hoehn spoke with a different person impersonating Castillo. Thus, unless Hoehn is completely fabricating her conversation with Castillo, which the ALJ does not believe, then the most likely scenario is that Hoehn and Castillo had an extremely brief conversation, and that, at this juncture, Castillo truthfully does not recall it.

V. FINDINGS OF FACT

All findings of fact are made based upon a preponderance of the evidence.

(ALRB Regulation § 20286, subdivision (b).)

1. The complaint was properly filed and served. (PH-1, page 2)
2. Respondent is an agricultural employer within the meaning of the ALRA § 1140.4, subdivision (c). (PH-1, page 2)
3. At all pertinent times, Heriberto Castillo was an agricultural employee within the meaning of the ALRA § 1140.4, subdivision (b). (PH-1, page 2)

4. At all pertinent times, Alfredo Rios was an agricultural employee within the meaning of the ALRA § 1140.4, subdivision (b). (PH-1, page 2)

5. At all relevant times, Laborers International Union of North America, Local 1184, was a labor organization within the meaning of the ALRA. (PH-1, at page 2)

6. At all relevant times, Mohmoud Sabla, Mohammed Jaghamah, Joseph Falco and Michelle Hoehn were all supervisory employees of Respondent within the meaning of ALRA § 1140.4, subdivision (j). (PH-1, page 2)

7. On November 8, 2008, Heriberto Castillo successfully challenged the right of supervisor Mohmoud Sabla to vote in the union election. Sabla later made a snide comment to Castillo, but the comment merely demonstrated arrogance on Sabla's part rather than any anti-union animus.

8. Effective Monday morning, December 1, 2008, Heriberto Castillo was reassigned to the weeding crew. This reassignment was made because Castillo previously worked laying heat tubes and irrigation pipes and that work was completed.

9. On Monday morning, December 1, 2008, Castillo went with Rios to assist him in picking up irrigation pipes and cleaning up that area. It is possible that Rios had suggested that Castillo assist him. If Sabla called out Castillo's name earlier in the morning, Castillo either did not hear him or did not understand.

10. Thereafter, supervisor Mohmoud Sabla told Castillo to report to the weeding crew. Castillo refused to follow Sabla's directions, and instead continued to assist Rios. At this juncture, Castillo understood Sabla, although he may have thought that Sabla was mistaken.

11. Shortly thereafter, supervisors Mohammed Jagamah and Mahmoud Sabla went to Castillo and told him that he had to report to the weeding crew supervised by Sabla. Castillo refused and told them that he was not assigned to weeding and did not want to work for Sabla. By this point, Castillo clearly understood what was requested, but did not like it.

12. Later in the morning, Jagamah and Sabla returned to Castillo, along with Joe Falco and possibly also Gamini Weerasekera.³⁵ Falco told Castillo to report to Sabla and the weeding crew. Falco did not explain to Castillo that employees were no longer needed to lay the heating tubes and irrigation pipes. Castillo still refused to report to the weeding crew. Falco told Castillo that he would be suspended for the day. Castillo told the supervisors that they could not do this to him, as he was in the union.³⁶

13. Falco and Hoehn discussed Castillo's insubordination that morning and Herb Thyme terminated Castillo later that day. In the interim, Hoehn called and briefly spoke with Castillo, who genuinely does not recall that conversation. There is no evidence that Castillo's past role as a union election observer entered into the company's decision. Castillo was then given a termination check, although the name on the check was completely incorrect. Castillo somehow cashed that check anyway.

³⁵ The ALJ finds that whether or not Weerasekera was present for this conversation is relevant only as an exercise to measure witness credibility and recall. It does not determine the important issue of whether *someone* was translating from English to Spanish (and vice versa), when Falco told Castillo that he needed to report to the weeding crew, as well as Castillo's responses thereafter.

³⁶ The ALJ did seriously consider whether Castillo's outburst "You can't do that, I'm with the union" might have caused Falco to recommend termination rather than suspension, but the record does not include evidence to support that theory.

14. Alfredo Rios received warning notices in late December 2008 and early January 2009 for an unexcused absence of two days and for taking an employee with him on a work trip to Compton with first obtaining a supervisor's approval. These incidents played little or no role in HerbThyme's decision to terminate Rios.

15. There were two instances in which the company suspected Rios of submitting false reimbursement receipts. The company truck used diesel and the receipts turned in by Rios seemingly were instead for gasoline. HerbThyme did not issue a formal warning to Rios regarding these receipts and, even if the issue was listed in Falco's recommendation to Hoehn, the reimbursement issue was not a significant basis in HerbThyme's decision to terminate Rios.

16. Rios took the company's inoperable ATV to a repair shop as requested. There is no evidence that the company ever issued a check to pay for the ATV repairs. At some point, Rios then picked up the unrepaired all-terrain vehicle and took it to his residence. Rios may have intended to try to repair the vehicle himself. In any event, when requested, Rios returned the vehicle to HerbThyme. This incident was not a significant factor in HerbThyme's decision to terminate Rios.

17. Prior to January 29, 2009, there were a couple of instances which caused Falco to suspect that Rios might be drinking at the workplace, but Falco did not have enough evidence to feel sure about it or to act on his concern. These instances involved speculative circumstantial evidence offering little or no proof that Rios had actually drank alcohol during work hours. Ironically and inconsistently, Falco thereafter proceeded to

have Rios drive the company truck. Falco and Rios clearly had multiple occasions on which they spoke together in English.

18. On January 29, 2009, Sabla spoke with Rios. This conversation occurred a few minutes after Rios' work day had ended. Sabla briefly yelled or spoke harshly at Rios for not having better assisted with the labeling of certain bags of product. Sabla then went to the cooler and packing room area. A few minutes later, Rios showed up and began yelling at Sabla, who then yelled back in turn. The mutual yelling caught Richard Trujillo's attention and he observed Rios with his right hand on Sabla's chest and with his left hand on Sabla's arm. From the positioning of Rios and Sabla, it appeared to Trujillo that Rios was the aggressor. Trujillo, and as well Jaghamah a moment thereafter, separated Rios from Sabla. Both Trujillo and Jaghamah smelled beer or alcohol on Rios' breath.

19. Between January 29, 2009 and February 3, 2009, Sabla, Jaghamah and Trujillo all failed to report the altercation between Rios and Sabla to Falco. In the case of Sabla and Jaghamah, they made a deliberate decision not to bring the matter to Falco's attention.

20. On January 31, 2009, Sabla twice telephoned Falco and reported to him that he suspected Rios of drinking alcohol during the work day. In each instance, Sabla failed to mention the physical altercation between him and Rios just two days earlier. At this juncture, Sabla wanted Falco to terminate Rios, but his concealed motive was the skirmish between the two men that had occurred two days earlier, not anti-union animus.

21. Falco proceeded to have Rios drive the company truck notwithstanding the new alcohol allegations that were raised.

22. On February 4, 2009, Richard Trujillo mentioned to Falco the incident involving Rios and Sabla. Falco then inquired with Jaghamah and Sabla regarding the physical altercation between Rios and Sabla.

23. Falco contacted Hoehn on February 4, 2009, and recommended that the company terminate Rios. On February 5, 2009, without any further investigation, Hoehn then decided to terminate Rios. At this juncture, Falco and Hoehn did not know that the union was going to subpoena Rios to appear at an ALRB hearing. If Falco and/or Hoehn knew that Rios had served as a union crew representative, it was not a factor in their decision to terminate him.

24. HerbThyme took no disciplinary action against the other union election observer, Leodario Villava Gatica.

25. HerbThyme did not take any disciplinary action against the multiple employees other than Rios who were subpoenaed by the union to testify at a hearing involving HerbThyme.

26. Exhibit E-r does demonstrate that HerbThyme was interested in the eventual possibility of union decertification, but the exhibit also demonstrates that management viewed the likelihood of such an occurrence rather pessimistically. Moreover, no evidence was presented at hearing to establish that HerbThyme viewed either Castillo or Rios as active or relevant union leaders, or that their termination would have any impact on the workers' labor organizing activities.

VI. APPLICATION OF LAW TO FACTS

The ALRA exists in pertinent part to protect the right of agricultural workers to engage in concerted activities for the purpose of mutual aid or protection. (ALRA § 1140.2) In this matter, the General Counsel must show by a preponderance of the evidence that Heriberto Castillo and/or Alfredo Rios engaged in protected concerted activities, that HerbThyme had knowledge of such activities, and that there was some connection or causal relationship between the protected activity and the discharge.

(*California Valley Land Co., Inc., and Woolf Farming Co. of California, Inc.* (1991), 17 ALRB No. 8, pp. 6-7 (citing *Verde Produce Company* (1981), 7 ALRB No. 27))

A. Castillo Engaged in Protected, Concerted Activities.

There is no doubt that Castillo engaged in a protected, concerted activity when he served as a union election observer. (*Martori Brothers Distributors* (1979), 5 ALRB 47) By challenging the right of supervisor Sabla to vote, Castillo was again engaged in protected concerted conduct.

B. Rios Engaged in Protected, Concerted Activities.

Rios testified that he told Jaghamah that he had been selected as a union crew representative. This testimony was not refuted. Clearly, serving as a union crew representative constitutes protected, concerted activity. Rios also appeared at an ALRB hearing pursuant to a union subpoena. Rios' appearance at the hearing also constitutes protected, concerted activity. (ALRA § 1153, subdivision (d))

C. HerbThyme Knew That Castillo Engaged in Protected, Concerted Activities.

Supervisors Sabla and Jaghamah both saw Castillo serving as a union election observer. While Falco joined HerbThyme a couple of weeks after the representation election, the ALJ concludes that, if upon being suspended Castillo dramatically waved his union card in the manner that Falco and Sabla testified, it is more likely than not that either Sabla or Jaghamah would have shortly thereafter mentioned to Falco that Castillo had served as the union election observer.³⁷

D. It is Difficult to Ascertain the Timing of When HerbThyme Learned of the Union Subpoena Requiring Rios to Testify.

Based on Rios' un-refuted testimony, Jaghamah knew that long before Rios' termination that Rios had been selected as a union crew representative. There was no direct evidence that Jaghamah passed that information along to Falco or Hoehn. However, based on the email exchange between Falco and Hoehn regarding the possibility of decertification, the ALJ is inclined to believe that Falco and Hoehn were at least somewhat interested in learning which employees were union activists and that Falco would have made occasional inquiries on that topic with his line supervisors.

With respect to the union subpoena, Rios testified that he gave the subpoena to Sabla on Wednesday, February 4, 2009. Sabla testified he received the subpoena from Rios on Thursday, February 5, 2009, and that he promptly passed the subpoena along to

³⁷ The ALJ finds that Falco and Hoehn were likely both aware that Castillo had served as a union election observer at the time HerbThyme made the decision to terminate Castillo. This finding makes moot the question of whether Sabla and Jaghamah's knowledge of Castillo's election role must be imputed to the company in the absence of such knowledge by higher-level management. (See *Dr. Philip Megdal* (1983) 267 NLRB No. 24 [113 LRRM 1138])

Falco. Finally, Falco testified that he did not see the subpoena until Friday morning, February 6, 2009, and that the decision to terminate Rios had already been made two days earlier. Neither side presented documentary evidence to support their timetable.

Given the various incidents of misconduct that HerbThyme attributes to Rios, the close timing of Rios' termination and his union subpoena certainly seems more than coincidental. This raises the question of whether HerbThyme perceived Rios as a problem employee and it was the subpoena that inappropriately pushed HerbThyme into acting, or whether instead, Rios or union representatives saw telltale signs that Rios might be terminated and subpoenaed him to appear at the hearing with the hope of somehow salvaging his employment with the company.

Based upon a preponderance of the evidence, the ALJ finds that HerbThyme received the subpoena from Rios only after they had decided to terminate his employment. This finding is primarily based on the ALJ finding Falco's testimony on that subject to be more persuasive than testimony on the same subject from Rios.³⁸

E. The ALJ Finds That There Was No Causal Connection Between Castillo's Service as an Election Observer and His Termination for Insubordination.

The parties basically offer two different factual scenarios of what took place. HerbThyme states that Castillo was an eight week employee who was insubordinate and refused a work assignment. If Castillo was an hourly employee with eight weeks of

³⁸ Rios testified that, on the occasion that he handed his subpoena from the union to line supervisor Sabla, Rios was told by Sabla that he would be fired. If true, this could be an indicator that, at that time, Sabla was aware that Falco had already taken steps to terminate Rios, given that Sabla himself did not have unilateral authority to terminate employees. However, because the ALJ is not persuaded that Sabla spoke those specific words to Rios, conducting an analysis of the attributed language is arguably a moot exercise.

tenure, who acted insubordinately in refusing a work assignment despite being offered several opportunities to reconsider, then there was no evidence presented at hearing that HerbThyme took lesser disciplinary action against other similar situated employees who had no (or lesser) union ties.³⁹ Instead, however, the General Counsel argues that HerbThyme's claims are not simply pretextual, but rather completely fictional.

The ALJ finds that Castillo did refuse his work assignment. This may have occurred because Castillo found Sabla arrogant and weeding onerous.⁴⁰ Alternatively it may have occurred because Falco failed to explain that certain seasonal tasks were complete and no longer required workers. Or it may have even occurred because Rios initially misinformed Castillo that he was assigned to assist him.⁴¹ However, under any of these scenarios, HerbThyme supervisors saw Castillo repeatedly refuse to accept a work assignment with the weeding crew under Sabla's supervision. Even if Castillo did not initially hear Sabla call his name, there were thereafter three separate times when supervisors directed Castillo to report to Sabla. Based upon a preponderance of the evidence, Castillo's insubordination is the reason why HerbThyme chose to terminate an

³⁹ Interestingly, if the ALJ accepts as accurate most of the testimony of HerbThyme's supervisors, the company repeatedly gave Rios chance after chance, while it acted swiftly and decisively to terminate Castillo after a single incident. On the other hand, Rios' English skills and valid driver's license were useful assets to the company, and Castillo had only been employed with HerbThyme for approximately eight weeks at the time of the alleged insubordination.

⁴⁰ It should be noted that to establish a prima facie case of ALRA § 1153, subdivision (a), constructive discharge, the General Counsel must show a causal connection between the employee's protected concerted activities or union activity and the employer's assignment of new and onerous working conditions causing the employee to quit. (*Superior Farming Company* (1982), 8 ALRB No. 40) However, when an employer changes an employee's duties for work related reasons rather than to inhibit employee organization, the change in duties is lawful. (*Karahadian Ranches, Inc.*(1979), 5 ALRB No. 37)

⁴¹ Even if Rios had initially misinformed Castillo, later in the morning, Castillo was given additional opportunities to join the weeding crew. While in that scenario any initial confusion might have led Castillo to genuinely believe that HerbThyme was treating him unfairly, it would nonetheless not connect the Castillo termination decision to some form of company-held union animus.

employee with eight weeks of tenure, not Castillo's service as a union election observer, which occurred prior to when farm manager Falco joined HerbThyme.

F. The ALJ Finds That There Was No Causal Connection Between Rio's Protected, Concerted Activities and His Termination.

HerbThyme claims that Rios physically pushed his supervisor, had alcohol related incidents, and committed other lesser offenses. The ALJ finds that there was a physical altercation between Rios and Sabla. While Sabla may have initially yelled at Rios, Rios was thereafter the aggressor locating Sabla, putting his hand on Sabla's chest, and pushing him.

The ALJ finds that, based on Trujillo's credible testimony, Rios had been drinking prior to his altercation with Sabla. The ALJ also finds that Sabla was truthful when he testified seeing Rios carry beer from a mini-mart during his lunch break. Moreover, the ALJ finds that Sabla made multiple other comments to Falco seeking to tie Rios to the use of alcohol, whether or not these other comments were biased or even accurate. Based upon a preponderance of the evidence, the ALJ finds that these factors are the reasons why Rios was fired. The General Counsel presented no evidence of other HerbThyme employees who drank on the job and/or assaulted their supervisors and who were then retained by the company. Nor was there any evidence presented that any company supervisors other than Jaghamah even knew that Rios had served as a union crew representative. Thus, the ALJ finds that there is no causal connection between Rios' union service and his termination. Similarly, since the ALJ has found that HerbThyme

learned of Rios' union subpoena only after the company made the termination decision, there is no causal connection between the subpoena and Rios' termination.⁴²

VII. ORDER

For the reasons stated in this decision, the ALJ finds that the two consolidated complaints should both be dismissed in their entirety.

Dated: November 17, 2009

MARK R. SOBLE
Administrative Law Judge, ALRB

⁴² Even if Falco and Hoehn inaccurately testified as to the timing of their knowledge of the union subpoena to Rios, the evidence shows that no disciplinary action was taken against any of the other HerbThyme employees that also received subpoenas requiring them to appear at the ALRB hearing, a hearing that focused on the appropriate scope of the bargaining unit. Paired with the ALJ's finding that, on January 29, 2009, Rios initiated a physical altercation with a supervisor while under the influence of alcohol, it is apparent that HerbThyme is fully able to demonstrate that it would have terminated Rios even if he had not been subpoenaed by the union. (See *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, approving *Wright Line, Inc.* (1980) 251 NLRB 1083)