

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TEMPLE CREEK DAIRY, INC.,	)	Case Nos.	2009-CE-048-VIS
A California Corporation,	)		2009-CE-051-VIS
	)		2009-CE-052-VIS
Respondent,	)		
	)		
and	)		
	)	36 ALRB No. 4	
JOSE LUNA, JUAN MANUEL	)		
PACAS, and RAYMUNDO	)	October 29, 2010	
HERNANDEZ,	)		
	)		
Charging Parties.	)		
	)		

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**DECISION AND ORDER**

On August 5, 2010, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in the above-referenced case. The General Counsel alleged in the complaint that Temple Creek Dairy, a California Corporation, (Employer) violated section 1153(a) of the Agricultural Labor Relations Act (ALRA) by discharging Jose Luna, disciplining and discharging Juan Manuel Pacas, and refusing to rehire Raymundo Hernandez in retaliation for their protected concerted activities. The ALJ concluded that the General Counsel successfully proved the allegations regarding Luna and Pacas, but dismissed the allegation regarding Hernandez. The General Counsel timely filed exceptions to the failure to find a violation regarding the failure to rehire Hernandez, to which the Employer filed a reply. The Employer did not file exceptions to the findings of

violations regarding Luna and Pacas. Accordingly, this Decision addresses only the findings and conclusions relevant to the failure to rehire Hernandez.<sup>1</sup>

The Board has considered the record and the ALJ's findings of fact and conclusions of law in light of the exceptions and briefs filed by the parties and adopts the ALJ's findings of fact and conclusions of law regarding the failure to rehire Hernandez. The Board agrees with the ALJ that the record evidence is insufficient to establish any of the recognized exceptions to the general rule in failure to rehire cases that the employee must apply for rehire at a time when work is available. (*Tanimura & Antle, Inc.* (1995) 21 ALRB No. 12, at p. 10, fn. 7; *Prohoroff Family Farms* (1979) 5 ALRB No. 9, at p. 5.) Specifically, it was not proven that the Employer failed to follow an established rehire practice or otherwise made an effort to conceal the job openings so that Hernandez would not learn of them.

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<sup>1</sup> Absent the filing of exceptions, the decision of an ALJ becomes a final order of the Agricultural Labor Relations Board (Board), but the statement of reasons in support of the decision is without precedent for future cases. Where, as here, exceptions are taken only to a portion of the decision, the remainder of the ALJ's decision becomes a final order of the Board. (Cal. Code Regs., tit. 8, § 20286, subdiv. (a).)

## ORDER

Pursuant to Labor Code section 1160.3, Respondent Temple Creek Dairy, Inc., a California Corporation, and its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

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

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

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

(a) Rescind the discharges of Jose Luna and Juan Manuel Pacas and offer them immediate reinstatement to their former positions of employment or, if their positions no longer exist, to substantially equivalent employment, without prejudice to their seniority and other rights and privileges of employment.

(b) Expunge the discharge notices issued to Jose Luna and Juan Manuel Pacas, and the disciplinary notice issued to Juan Manuel Pacas, from their personnel files.

(c) Make whole Jose Luna and Juan Manuel Pacas for all wages or other economic losses they suffered as a result of their unlawful discharges, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. The award shall also include interest to be determined in the manner set forth in *E. W. Merritt Farms* (1988) 14 ALRB No. 5.

(d) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning August 1, 2009, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order. Upon the request of the Regional Director, payroll records shall be provided in electronic form if they are customarily maintained in that form.

(e) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

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

under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of the Notice.

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

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional Director, to all agricultural employees employed by Respondent at any time during the period July 30, 2009 to July 29, 2010, at their last known addresses.

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

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

Director periodically in writing of further actions taken to comply with the terms of this Order.

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

DATED: October 29, 2010

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

Willie Guerrero, Member

## NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by discharging and otherwise disciplining Jose Luna and Juan Manuel Pacas because they concertedly protested their conditions of employment.

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

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

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

**WE WILL NOT** discharge, discipline or otherwise retaliate against agricultural employees because they protest about their wages, hours or other terms or conditions of employment.

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

**WE WILL** offer Jose Luna and Juan Manuel Pacas immediate reinstatement to their former positions of employment or, if their positions no longer exist, to substantially equivalent employment, and make them whole for any loss in wages and other economic benefits suffered by them as the result of their unlawful discharges.

DATED: \_\_\_\_\_

TEMPLE CREEK DAIRY, INC.

By: \_\_\_\_\_  
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 1642 W. Walnut Ave., Visalia, California. The telephone number is (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE

## CASE SUMMARY

TEMPLE CREEK DAIRY, INC.  
(Jose Luna, Juan Manuel Pacas,  
Raymundo Hernandez)

36 ALRB No. 4  
Case Nos. 2009-CE-048-VIS  
2009-CE-051-VIS  
2009-CE-052-VIS

### Background

On August 5, 2010, Administrative Law Judge (ALJ) Douglas Gallop issued a decision in which he concluded that Temple Creek Dairy, a California Corporation, (Employer) violated section 1153(a) of the Agricultural Labor Relations Act (ALRA) by discharging Jose Luna and disciplining and discharging Juan Manuel Pacas in retaliation for their protected concerted activities. The ALJ dismissed an additional allegation that the Employer unlawfully refused to rehire Raymundo Hernandez due to his protected activity. The General Counsel timely filed exceptions to the failure to find a violation regarding the failure to rehire Hernandez, to which the Employer filed a reply. The Employer did not file exceptions to the findings of violations regarding Luna and Pacas. Accordingly, that portion of the ALJ's decision became final and the Board's decision addressed only the findings and conclusions relevant to the failure to rehire Hernandez.

### Board Decision

The Board summarily affirmed the ALJ's decision to dismiss the allegation that Hernandez was unlawfully refused rehire. The Board agreed with the ALJ that the record evidence was insufficient to establish any of the recognized exceptions to the general rule in failure to rehire cases that the employee must apply for rehire at a time when work is available. Specifically, it was not proven that the Employer failed to follow an established rehire practice or otherwise made an effort to conceal the job openings so that Hernandez would not learn of them.

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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

<b>In the Matter of:</b>	)	<b>Case Nos.</b> 2009-CE-048-VIS
	)	2009-CE-051-VIS
TEMPLE CREEK DAIRY, INC.,	)	2009-CE-052-VIS
A CALIFORNIA CORPORATION,	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>and</b>	)	
	)	
JOSE LUNA, JUAN MANUEL PACAS	)	
and RAYMUNDO HERNANDEZ,	)	
	)	
<b><u>Charging Parties.</u></b>	)	

Appearances:

Spencer H. Hipp  
Littler Mendelson  
Fresno, California  
For Respondent

Ellen C. Kennedy and Francisco T. Acheron, Jr.  
Visalia ALRB Regional Office  
For General Counsel

**DECISION OF THE ADMINISTRATIVE LAW JUDGE**

DOUGLAS GALLOP: I heard this unfair labor practice case at Visalia, California on April 27-30 and May 3, 2010. The case is based on charges filed by Jose Luna, Juan Manuel Pacas and Raymundo Hernandez, alleging that Temple Creek Dairy, A California Corporation, (hereinafter Respondent) violated section 1153(a) of the Agricultural Labor Relations Act (hereinafter Act) by discharging Luna, disciplining and discharging Pacas, and refusing to rehire Hernandez,<sup>1</sup> in retaliation for their protected concerted activities. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint alleging said violations. Respondent filed an answer denying the commission of unfair labor practices, and asserting affirmative defenses. The Charging Parties appeared at the hearing, but did not intervene. After the hearing, General Counsel and Respondent submitted post-hearing briefs, which have been carefully considered.

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

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<sup>1</sup> The complaint initially alleged that Respondent also unlawfully discharged Hernandez. General Counsel, at the prehearing conference, stated the only allegation that would be pursued with Hernandez was the refusal to rehire him.

## **FINDINGS OF FACT<sup>2</sup>**

### **Jurisdiction**

The charges were filed and served in a timely manner. Respondent dairy produces milk at its facility in Escalon, California, and is an agricultural employer within the meaning of section 1140.4(c) of the Act. While employed by Respondent, Luna, Pacas and Hernandez were agricultural employees within the meaning of section 1140.4(b). It is undisputed that at all times material to this case, Robert Eric Veneman and Fernando Manuel Nunes were supervisors of Respondent within the meaning of section 1140.4(j). Although Respondent refused to admit or stipulate to the supervisory status of Carlos Azevedo, it is clear, even from the testimony of Respondent's witnesses, including Azevedo, that he regularly exercises supervisory authority. The Complaint also designates Annserita (Ann) Voss, Respondent's Office Manager as a supervisor and agent. Her status will be discussed below.

### **The Alleged Unfair Labor Practices**

#### **Respondent's Operations**

Robert Veneman is Respondent's owner and Chief Executive Officer.

Respondent's cows are milked three times each day, thus necessitating three shifts of milkers. At the time the events herein transpired, Respondent employed 14 milkers, and

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<sup>2</sup> There are numerous conflicts in testimony, including many cases where witnesses called by a party testified in conflict with other witnesses called by that party, and in conformity with the opposing party's witnesses. Several of these conflicts are referred to herein. In cases where the conflict is not specifically noted, testimony consistent with the stated facts has been credited, and conflicting testimony, if any, discredited.

10 additional employees who performed labor outside the milking barn. Veneman is generally not involved in supervising Respondent's employees. Carlos Azevedo supervises the milkers on a day-to-day basis. Azevedo reports to Fernando Nunes, Respondent's Herd Manager who, in addition to supervising Respondent's employees, performs some veterinary work.

The dairy has one barn, containing two milking "parlors," referred to as "east" and "west." Each parlor has the same configuration, with two rows of 22 milking machines, located on each side of the parlor. Two milkers work in each parlor per shift, in the middle of the parlor, with the cows on the outside, behind the milking machines.

For each parlor, a group of cows will first be led by a milker into an open, fenced area to the rear of the barn, called the "wash pen," where the cow's undersides will be cleaned by a timed sprinkler system. A milker will then lead up to 188 cows into the drip area, to dry off. Once in the drip area, a "crowd control gate" is lowered from above, behind them. The gate may be electrified, but Respondent disconnected that feature several years ago. From the dripping area, cows are led through an opened gate into the milking parlor itself, one to each milking machine. Once the milking parlor is full, the gate is closed, and the cows remaining in the drip area wait until that group of cows is milked, and let out the front of the parlor, to return to their corral. At that point, the gate from the drip area to the milking parlor will be reopened, and the next group of cows in the drip area will be led in. The process continues, until the entire group of cows brought into the wash area has been milked.

As noted above, the crowd control gates close down from above the cows after they enter the drip areas. Initially set near the rear of the drip areas, the crowd control gates can be moved forward, to reduce the space in the drip areas as groups of cows enter the milking parlors. The purpose of this is to force the cows toward the front of the drip areas as space develops, thus encouraging them to enter the milking parlors when the gates thereto are opened. Each time a group of 44 cows is led into one of the milking parlors, the crowd control gate, activated by opening the gate to the milking parlor, automatically moves forward, at a slow pace, to reduce a set amount of space created by the vacating cows.

The crowd control gates may also be operated by panels containing operation buttons, used by the milkers, that are located toward the rear of each milking parlor. After all the cows in each parlor have been milked, the milkers press buttons that raise the crowd control gates, and move them back to the rear of the drip areas, until the next group of cows enters the drip areas, at which point, the crowd control gates are again lowered. Another button on the panel may be depressed to manually move the lowered gate forward, if the automatic function is leaving too much space in the drip area. This is particularly useful for new cows, who are less likely to move forward, out of habit.

Respondent considers it very important that the cows be kept calm, and allowed to move at their own pace, to the extent possible. If the cows are agitated, they become frightened, and have difficulty releasing their milk. Therefore, Respondent prohibits its

employees from “running,” or hurrying the cows, and has advised them of this.<sup>3</sup> Running the cows may be accomplished by physically striking the cows, or by closing the crowd control gate too quickly, to the point of striking the cows, and overcrowding them. Closing the crowd control gate too quickly may also result in a cow falling down, and being trampled by the others, or being strangled in the fence.

Respondent also considers it very important that the milkers “prime” each cow in the milking parlors prior to hooking up the milking machines. Priming is accomplished by manually taking a small sample of milk from the cow, and inspecting it for signs of mastitis. If the milk indicates mastitis is present, the cow is manually milked, and the milk discarded. Detection of mastitis results in avoiding contamination of the milk supply and early treatment of the disease. The disease is more easily cured in its early stages and, if allowed to progress, results in the cow becoming permanently unfit to use for milking purposes. Respondent has repeatedly advised its milkers they are required to prime the cows prior to milking them.<sup>4</sup> After the cows are milked, the milkers are supposed to apply tincture of iodine to their teats, for sanitary reasons.

### **The Discharge of Jose Luna**

Jose Luna worked for Respondent as a milker between about 1996 to 1999, when he returned to Mexico to get married. He returned to work in 2007. At the time of his

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<sup>3</sup> The motive for “running” the cows is apparently a desire to finish the milking sooner, so that the milker may go home.

<sup>4</sup> The motive for not priming the cows is again, apparently, a desire to complete the milking duties in less time.

discharge, Luna was a “relief” milker, meaning he worked shifts for employees on their days off. Because of this, he worked all three shifts, but normally worked in the west milking parlor.

On January 19, 2009,<sup>5</sup> Luna, who was not working, called his brother, who also worked at the dairy. His brother was angry, claiming Azevedo had caused some cows to escape, apparently from the wash area, and the workers had to round them up and wash them again. Luna called Azevedo, who denied releasing the cows. Luna would not accept Azevedo’s claim, and Azevedo laughed at him. Luna felt that Azevedo had intentionally released the cows, and at least implied this to Azevedo. Azevedo told Luna not to call him again, and hung up his telephone.

Azevedo reported the incident to Nunes, claiming Luna had threatened to hit him at the conclusion of their conversation. In his testimony, however, Azevedo testified that Luna told him he did not know whom he was “playing with,” and did not mention a threat by Luna to hit him. The following day, Luna was summoned to Nunes’ office. He brought his nephew, Jose de Jesus (Jesus) Ramirez, to act as his interpreter. Nunes, Azevedo and Ann Voss, who works in Respondent’s office two days each week, were present, in addition to an employee they had planned to use as an interpreter. Voss took notes of the meeting.

Luna denied having threatened to hit Azevedo. He was issued a written warning for calling Azevedo, and was instructed to bring any problems he had with Azevedo to

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<sup>5</sup> All dates hereinafter refer to 2009 unless otherwise indicated.

Nunes' attention, rather than confronting Azevedo directly. In response, Luna voiced complaints concerning Azevedo's conduct to Nunes, including provoking arguments among the workers, favoritism, laughing at workers or mocking them, and failing to perform repairs in a timely manner. Azevedo admitted provoking conflicts between the workers, because he felt it made them compete with each other, and thus, made them more productive. Azevedo blamed Luna for causing equipment failures.

Nunes and Azevedo have known each other for many years, and in addition to working together, are close personal friends. In his testimony, Nunes commented he felt Luna was lying when he criticized Azevedo, and took no disciplinary action based on Luna's accusations. Voss, in her testimony, commented she felt Luna was attempting to get Azevedo in trouble by his comments.

In late April, Azevedo found a device hanging on the crowd control gate panel in the west milking parlor. The device was made of thick wire, bent into two loops that would fit over the panel, exerting enough pressure to continually activate the button to move the crowd control gate.<sup>6</sup> Although the device was not in use at the time, Azevedo testified he surmised this function,<sup>7</sup> and brought the device to Nunes' office. Nunes was

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<sup>6</sup> The apparent reason for using such a device would be to eliminate the need for the milker to repeatedly walk over to manually depress the button. As noted above, Respondent considered the overcrowding that could result from over-activation of the crowd control gate to be a threat to the cows' safety and calm disposition, necessary for effective milk production.

<sup>7</sup> In addition to the location in which he found the device, Azevedo testified he could see how it would fit to activate the button, and recalled that he had repeatedly replaced broken buttons, only in the west milking parlor, prior to his discovery. Azevedo assumed the pressure of the device was causing the buttons to break.



not working at the time, so they did not discuss the device until the next time they were both working. When Azevedo told Nunes about the device, he said he would discuss the matter with Veneman and Voss. Azevedo asked all of the milkers who worked in the west milking parlor who had made the device. They all denied knowing who it was.

Respondent conducted a safety meeting on April 30, with Voss acting as spokesperson. Voss spoke in English, and employee, Miguel Cerrillo acted as the interpreter. At the meeting, Voss held up the device, told the employees it was prohibited, and anyone found with such a device in the future would be discharged. Someone called it a “Mickey Mouse” device, and the employees laughed.<sup>8</sup>

Azevedo testified that on July 23,<sup>9</sup> between 4:30 and 5:00 a.m., he discovered a similar device hooked up to the crowd control gate panel in the west milking parlor, continually activating the crowd control gate. Azevedo had heard the gate operating continuously, which should not be happening, so he went into the parlor. Luna and Omar Sanchez were the milkers working there at the time. Azevedo removed the device, and asked Sanchez, who was closer to him, who had installed it.

Azevedo’s testimony concerning the rest of this incident came out in bits and pieces, through the course of direct and cross-examination. His eventual testimony was

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<sup>8</sup> The remark was variously attributed to Voss, Azevedo and a worker. The two loops in the device look vaguely like ears. The witnesses agree that Voss stated the device was prohibited, but some witnesses, including Luna and Juan Manuel Pacas, could not recall her stating future infractions would result in discharge. Inasmuch as one of General Counsel’s witnesses agreed this was said, Voss’s testimony on this point is credited.

<sup>9</sup> Nunes testified the device was found on approximately the same date.

that Sanchez initially told him he did not know who had installed the device, but that after he repeated the question two more times, Sanchez told him it was Luna, in Luna's presence. Luna did not deny having used the device. Azevedo, device in hand, proceeded out of the parlor, and Luna followed him, asking what he was going to do. Azevedo told him he was going to show it to Nunes, who would take whatever action he felt was appropriate. Luna asked him not to do this, to which Azevedo responded it was his job to do so.

Luna and Sanchez denied the July 23 incident took place.<sup>10</sup> Sanchez testified that in July, he only worked with Luna on the night shift, Thursday nights into Friday mornings. July 23, 2009 was a Thursday so, if Sanchez's testimony was correct, he would not have been working with Luna on that morning, as claimed by Azevedo. Sanchez testified he first started seeing the device after Rafael Gallegos returned from Mexico, in May, to resume his employment with Respondent. Sanchez further testified he had also used the second control panel device.

Azevedo testified Nunes was not present when he arrived at his office, so he left the device on his desk. Azevedo discussed the incident with Nunes the following morning. On cross-examination, Azevedo testified he explained to Nunes how he found the device. Nunes asked him which parlor it was in, and who were the milkers. Azevedo responded he found the device in the west milking parlor, and Sanchez and Luna were the

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<sup>10</sup> General Counsel questioned Luna as to whether an incident involving the control panel device took place on or about July 24 or 25. Since the event, as related by Azevedo, took place on July 23, the question was imprecise. The undersigned then asked if Luna had ever discussed the device with Azevedo, and he replied in the negative.

milkers. On further examination Azevedo added he told Nunes that Sanchez had implicated Luna. He also informed Nunes that Luna had followed him to the office, and Nunes told him not to worry. Azevedo further testified he asked Nunes if Luna was going to be written up, and Nunes replied he would discuss the matter with Veneman.

On cross-examination, Nunes testified he spoke with Azevedo about the device and, contradicting Azevedo, stated Azevedo told him he did not know whether Sanchez or Luna had installed it on the control panel. Nunes further testified he did not speak with Luna immediately about the device, because Veneman was on vacation, and he wanted to investigate prior to his return. Veneman, however, testified he did not go on vacation until July 25. Contradicting Nunes and Azevedo, Ann Voss testified that, to her knowledge, Nunes did not learn that Luna had fabricated the device until Sanchez stated this, during an interview on July 31, discussed below.

On cross-examination, Veneman testified, in detail, of having been told of the second device by Nunes on July 13, and instructing him to find out who had made it. Veneman further testified he asked Nunes, on July 20, if he had found out who had fabricated the device, and Nunes told him he had not. Later in his testimony, and after a lunch break, Veneman totally contradicted this testimony, and claimed he did not learn about the second control panel device until July 31.

Respondent gave Luna a verbal warning on July 28, memorialized in writing.<sup>11</sup> The written memo states, “To slow down because his all ways in hurry.” [Sic] Nunes and

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<sup>11</sup> General Counsel does not allege this as an unfair labor practice.

Azevedo testified as to Luna's alleged misconduct.<sup>12</sup> According to Azevedo, he observed Luna rushing the cows in and out of the barn, failing to prime them properly and rushing his co-workers. Azevedo testified he had spoken to Luna about this, but he did not slow his work pace. Azevedo told Nunes about this, who testified he also observed Luna's work, noting similar problems.

The disciplinary meeting was attended by Nunes, Luna and employee, Miguel Cerrillo, who acted as the interpreter. Nunes told Luna he was rushing his co-workers, which Luna denied. Luna testified Nunes told him he did not want to see him in his office again, and to return to work, an allegation denied by Nunes. Nunes and Cerrillo testified Luna told Nunes that Juan Manuel Pacas rushed through his work much faster than he, and was not priming the cows. Nunes told Luna he already was planning to speak with Pacas. Nunes testified he did not, at this meeting, or at any other time, question Luna as to his role in the creation or use of the second control box device.

Luna correctly assumed that Azevedo was the instigator in this warning. When he returned to his work area, he showed the warning letter first to his partner, and then other employees, asking if he had been pressuring them to work faster. During these conversations, other workers voiced complaints about their treatment by Azevedo, and they decided to circulate a petition letter, for Veneman and Nunes, citing those complaints. Luna and Primo Garcia, another milker, wrote the Spanish-language version of the letter, and Garcia's niece translated it into English, in a slightly different format.

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<sup>12</sup> Again, the apparent reason for working quickly would be to go home earlier. Nunes testified that Luna and his partner would always finish their shifts well before the others.

Luna circulated the petition at work and at a gas station on July 29. Twelve of the 14 milkers signed the English-language version, but the Spanish-language letter was available for them to read. Azevedo testified he observed Luna discussing his warning letter with other workers on July 28, and circulating the petition at work on July 29. Azevedo reported this to Nunes, who confirmed this in his testimony.

The English version of the letter reads as follows:

This is a letter to inform you about some issues that have been occurring at the dairy. We would like you to know our concerns because we don't know if you are aware of these problems. For example, Carlos has been discussing our personal information with other co-workers. He has favoritism with other co-workers. If Carlos is our supervisor we would like him to treat us with the same with [sic] respect. Also, we would like Carlos to keep personal information confidential. For example, if one of us tells Carlos a problem we would like him to be discrete and not tell other people about it to avoid conflicts with other co-workers. Also, if Carlos has something to say to us, to let us know in a private place.

The employees were unable to deliver the letter to Veneman, because he was on vacation. They attempted to deliver it to Nunes on July 29, but he was working outside with a veterinarian. On the morning of July 30, most of the employees who signed the petition went to Nunes' office to give him the letter.

Luna brought Jesus Ramirez with them, to act as an interpreter. According to Luna, Ramirez and other employee witnesses, Ramirez handed Nunes the letter, and began explaining it to him. Luna testified Nunes became very angry, while Nunes

testified he was surprised.<sup>13</sup> Nunes attempted to call Cerrillo on the telephone, to interpret, and then left the office to find him. Nunes told the workers he could not resolve the problem at that time, and would meet with them individually later.

Nunes testified that Luna voiced several complaints to him concerning Azevedo, and would not allow the other workers to speak, the latter contention being denied by Luna and other worker witnesses for General Counsel. Nunes testified he cut off the meeting, because Luna was not allowing the others to speak, a contention denied by General Counsel's witnesses. Cerrillo, called as a witness by Respondent, did not corroborate Nunes on this point. To the contrary, he testified Nunes told the workers he could not resolve the issue with all of them talking at once, so he would schedule individual meetings with them the following day.

Nunes spoke with Voss, and asked her to come in on July 31, to conduct the interviews and take statements.<sup>14</sup> Nunes decided to also ask employees, during the interviews, who had fabricated the second control panel device. On the morning of July 31, a notice was posted listing the interview times for the employees signing the petition. Luna's name was not on the list. Nunes testified that Luna was not interviewed, because he had already told him his complaints concerning Azevedo the day before. None of the

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<sup>13</sup> Nunes knew, from Azevedo, that the petition was being circulated. Cerrillo testified he knew the employees had gone to Nunes' office the day before to present it to them, and that he informed Nunes of this. Under these circumstances, it is difficult to understand why he would have been terribly surprised by the incident.

<sup>14</sup> Voss did not normally work on Fridays.

other witnesses testified that Luna had said anything to Nunes, beyond telling him the letter contained complaints about Azevedo's conduct.

Present at the interviews were the employee being interviewed, Nunes, Azevedo, Voss and Cerrillo, acting as interpreter. Voss asked the employees what, if any, were their complaints against Azevedo. Voss or Nunes then asked them if they knew who had fabricated the second device. Voss took written statements in English, and had Cerrillo translate them. The employees were then asked to sign the statements.

According to Voss, Cerrillo, Azevedo and Nunes, Omar Sanchez, during his interview, told them Luna had fabricated the second control panel device. In evidence is a signed statement from Sanchez, containing this allegation. Sanchez testified Nunes pressured him to disclose who had made the second control panel device, but denied telling Nunes it was Luna. Rather, he told him he did not know. Sanchez also stated Nunes told him he already knew who had fabricated the device. Sanchez denied that his statement was read to him prior to signing it. Rather, Cerrillo simply told him the statement contained what he had told them. Pacas also testified his statement was not translated for him, but another worker witness, Primo Garcia, testified Cerrillo translated his statement before he signed it.

As noted above, Cerrillo testified Sanchez stated that Luna had made the device. Cerrillo also testified Nunes told the milkers Respondent already knew who made the device, but just wanted to hear it from them. Nunes testified that he "might have" told employees he already knew who made the device. Voss, in her testimony, denied Nunes

stated he knew who made the device, and claimed he hardly said anything throughout the interviews.

It is undisputed that an employee, interviewed after Sanchez, stated that Rafael Gallegos had made the first control panel device, but he did not know who made the new one. Respondent never disciplined Gallegos for this, and its managers never discussed the matter with him. Gallegos did not sign the petition, and was not interviewed by Respondent on July 31.

Given this morass of conflicting and inconsistent testimony, it is difficult to conclude that Respondent has preponderantly established that Azevedo “caught” Luna using the control panel device or, as will be discussed below, any of the factual elements of its defense. Aside from the conflicts in testimony between Respondent’s witnesses. Azevedo was certainly not, in general, a credible witness. He appeared defensive and uncertain in his testimony, and was seemingly unable to give a full rendition of any event at one time. Under no circumstances could one depend on him to give a fully accurate account of such things as the date an event took place, or the details thereof.

On the other hand, while Azevedo was fully capable of adding clumsy and untrue embellishments to his testimony, the undersigned doubts that he has the intelligence or sophistication to invent, out of whole cloth, entire sequences of events to bolster Respondent’s case. Given Azevedo’s questionable reliability, the undersigned has looked to secondary sources in order to determine his credibility as to discovering Luna using the



prohibited control panel device.<sup>15</sup> First of all, both Sanchez and Cerrillo, called as witnesses by the opposing sides, testified Nunes told the milkers he already knew who fabricated the second device on July 31, and Nunes testified he might have said this. Therefore, it is found that he indeed made the statement.

The only plausible way Nunes would have “known” this, prior to the interviews, would have been that Azevedo had reported his discovery and Sanchez’s accusation to him. Therefore, it is found that Azevedo discovered the device in the west milking parlor, during Sanchez’s and Luna’s shift on July 23, or on some other date prior to July 25, and that Sanchez told Azevedo that Luna was the one using the device. Azevedo reported all of this to Nunes, who took no action for a week or longer, even though he conducted a disciplinary interview with Luna on July 28. It is further found that on July 31, Sanchez told Voss and Nunes that Luna had fabricated the second device, and on the same day, another employee told them Gallegos had invented the first device.

Robert Veneman testified he made the decision to discharge Luna.<sup>16</sup> On July 31, while on vacation, he received a telephone call from Voss. According to Veneman, Voss told him, “We found the one who made the override for the cow gate.”<sup>17</sup> Veneman asked who it was, and Voss named Luna. Veneman asked what they were going to do, and

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<sup>15</sup> General Counsel alleges that Azevedo engaged in many fabrications, designed to bolster Respondent’s defense. At the same time, as discussed below, General Counsel urges the undersigned to credit testimony that Azevedo, in effect, admitted Respondent’s unlawful discharge of Luna, hardly a sophisticated maneuver.

<sup>16</sup> TR Vol. III, pages 513 and 575.

<sup>17</sup> Notably, on direct examination, Veneman did not contend this was the first time he had been informed of the second device.

Voss asked him what he wanted them to do. Veneman told her to terminate Luna's employment.

Voss testified that after the employee interviews on July 31, Nunes said *he* would have to discharge Luna, and to contact Veneman to arrange for him to sign the final paycheck. According to Voss she telephoned Veneman, told him they had found a second device, and that Luna had made it. She told Veneman that Nunes wanted to discharge Luna, and Veneman said to go ahead. Nunes testified he made the decision to discharge Luna, and had Voss contact Veneman to come in to sign the discharge notice and final checks.

Nunes told Voss to prepare a discharge letter for Luna, and his final checks. The discharge letter reads:

One [sic] January 20, 2009 you received a written warning. This warning was because you had made a threatening phone call to Carlos. At that time you said you would take all problems regarding Carlos to Fernando to have them handled.

One [sic] July 28, 2009 Fernando spoke with you about not rushing through your work and running the cows. This was only a written warning and was in no way a threat to your employment at Temple Creek Dairy. instead [sic] of choosing to do your job the correct way or bringing the problem back to Fernando you wrote a petition and had many of your co-workers sign it. The petition was another attack on Carlos and had nothing to do with the verbal warning you had received on July 28. After receiving the petition Fernando, Ann and Carlos, with Miguel translating, met with each employee who signed the petition to try to understand the situation.<sup>18</sup> During the meetings it was discovered that most employees thought they were signing a petition saying that you were a good worker and did not run the cows. When also questioned about the wire invention that was put on the crowd gate to hold it open, we were told that you had invented

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<sup>18</sup> As will be discussed further below, this is not correct. Raymundo Hernandez was unable to attend the interview scheduled for him.

it and had installed it on the crowd gate. At our last company meeting all employees were told that no more inventions were allowed on the dairy and any employee found to have installed one would be fired.

At this time you have broken the agreement made in the January 20, 2009 written warning not to threaten Carlos. You have lied to fellow employees about the paper you were having them sign and you made and installed an invention to hold crowd [sic] after being warned you would be fired. On these grounds we are terminating your employment at Temple Creek Dairy.

Respondent presented no evidence showing Luna threatened Azevedo between January 20 and the creation of this letter. With respect to Luna having lied to fellow employees about the purpose of the letter, Luna, corroborated by other worker witnesses, credibly testified that when employees signed the English-language version, the Spanish-language version was available for them to see. Voss testified she asked each employee interviewed if he had read the letter, and noted the response in the statements she prepared. Respondent scheduled 11 employees to be interviewed on July 31. General Counsel introduced nine employee statements from these meetings. Respondent did not introduce the statement, if any, from Servando Mora, an employee scheduled for an interview, but Luna credibly testified he observed Mora read the letter repeatedly prior to signing it. In their statements, three workers stated they did not read the letter before signing it. One of these stated he does not read English or Spanish. While two of these employees (including the one who cannot read), in their statements, claimed they thought the purpose of the letter was to show that Luna was a good worker, none of them contended Luna told them this. Therefore, Voss' contentions that "most" of the workers thought the letter was for this purpose, and Luna said this to them, have been shown to be

false.<sup>19</sup> At no time prior to his discharge did Respondent's managers ask Luna if he had misrepresented the petition.

Veneman testified he read the discharge letter and signed it on August 1. Nevertheless, Respondent contends that its contents, other than the part about the second crowd control panel device, should be disregarded as stated reasons for Luna's discharge, since Voss was merely citing all the disciplinary material in his personnel file. This is rejected. Voss directly participated in most of the disciplinary incidents involving Luna and in the investigation of the letter. Voss worked closely with Nunes and was Respondent's designated agent for preparing the letter.

Veneman directed Azevedo to call Luna in to speak with him. Azevedo did this, but Luna told him he would not be able to arrive until later than the time scheduled. When Azevedo reported this to Veneman, he told Azevedo to give the letter and checks to Luna when he arrived, because Veneman had to leave the dairy.

Luna brought Jesus Ramirez with him to the office, to act as his interpreter at the anticipated meeting with Veneman. Instead, Azevedo, who speaks Spanish, met with him. The discharge letter and final checks were contained in a sealed envelope, and Luna did not have Ramirez open it until after they left. According to Ramirez, Azevedo told Luna he was fired (or laid off), and Luna asked for the reason. Azevedo replied he did not know, and that information was in the letter. As they were leaving, Azevedo told Luna that if he had not opened his mouth, none of this would have happened. Luna

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<sup>19</sup> Given the proximity of the petition to Luna's complaints about the written warning, it is not surprising that those who did not read the petition might think that was its purpose.

responded he had his rights as a worker. Azevedo sort of laughed, and walked away. Ramirez denied that Luna threatened Azevedo. Luna testified Azevedo put his finger to his lips, and told him he should have kept quiet. When Azevedo asked if he was angry, Luna told Azevedo he was happy that he would not have to work for Azevedo and Nunes anymore. Luna denied threatening Azevedo during this incident.

Azevedo denied Veneman told him the envelope contained discharge documents. Veneman told him to give Luna the envelope, and to tell him the purpose was explained by its contents. Azevedo assumed it was a discharge letter, because the envelope was accompanied by a booklet from the California Employment Development Department, that Respondent gives to employees when their employment is terminated. Azevedo told Luna he was being fired, and Luna asked to speak with Veneman. Azevedo responded to come in to speak with Veneman the following Monday. Azevedo testified Luna became agitated at that point and told him “they” did not know whom they were playing with. Azevedo told Luna he did not want to hear it, and again advised him to speak with Veneman on the following Monday. Azevedo denied telling Luna that none of this would have happened, if Luna had kept his mouth shut.

Ramirez, at least, was a far more credible witness than Azevedo, from the standpoint of his demeanor, which was confident, and the consistency of his testimony. In evidence is a notation written by Voss, that Azevedo told her Luna had threatened him. Assuming he told her this, Azevedo was probably exaggerating, or fabricating the allegation. Accordingly, Ramirez’s version of the meeting is credited.

After Luna filed his charge in this matter, the Visalia ALRB Regional Office asked for a response from Respondent. Veneman assigned this task to Voss, who prepared a letter to the Region. Veneman testified, rather surprisingly, that he did not read it before he signed, because he did not realize the importance of the letter. Assuming Veneman was truthful in this testimony, which is doubtful, it further exemplifies his remoteness from the decision to discharge Luna, and Voss's standing as Respondent's knowledgeable designated agent for that purpose. The letter is undated, but was received on August 17. It reiterates Respondent's version of the January 20 disciplinary meeting, the April 30 safety meeting, and the July 28 verbal warning. The letter continues as follows:

Jose thought Carlos had reported him and formed [sic] the enclosed letter and had fellow employees sign it. He did not go to Fernando with a problem like he had been instructed to do in January. He presented this letter to Fernando and after reviewing the letter Fernando scheduled a meeting with each of the employees who had signed the letter to listen to their concerns and a translator was provided. I have enclosed a copy of a signed document that was a summary of each meeting with the individual employees. During the interviews we discovered that some of the employees didn't even know what they were signing. Some thought they were signing a letter saying that Jose was a good worker or not hurrying through the milking. Some just signed the letter because they didn't want to make Jose angry. The guys from the west pit would not sign the letter and then Jose told the other milkers they were snitching on everyone. . . .<sup>20</sup>

The decision was made to terminate Jose Luna's employment with us due to the fact that he did not heed the warning from Jan. [sic] 2009 to take all problems regarding Carlos to Fernando, for threatening Carlos over the phone, for running through his work and installing an invention on the crowd gate. . . .

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<sup>20</sup> Respondent introduced no evidence at the hearing substantiating the latter two accusations, and neither appears in the discharge letter.

## **The Discharge of Juan Manuel Pacas**

Juan Manuel Pacas was employed by Respondent as a milker from April 23, 2004 until his discharge on August 13, 2009. Prior to July 2009, Pacas had not received any disciplinary notices from Respondent. Pacas signed the letter to Nunes and Veneman, and attended the meeting on July 30, where Ramirez presented the letter to Nunes. Pacas, corroborated by Luna and employee, Primo Garcia, testified he attempted to speak to Nunes at the meeting. Luna and Garcia testified they knew Pacas wished to speak, because he raised his hand. Instead of permitting him to speak, Nunes told Pacas (through Cerrillo) he wanted to speak with him, in what turned out to be a disciplinary meeting. Raymundo Hernandez also testified Pacas raised his hand, but said it was later that Nunes (through Cerrillo) told Pacas he wanted to speak with him.<sup>21</sup> Nunes denied seeing Pacas raise his hand at the meeting, and testified he had already planned to speak with Pacas prior thereto.

The undersigned generally found Pacas to be a more convincing witness, from the standpoint of his demeanor, than was Nunes. Pacas was corroborated by two other witnesses on this point, including a current employee of Respondent (Garcia). Nunes' testimony on many issues in this case was either not corroborated, or was contradicted, by other witnesses called by Respondent.

Voss and Nunes interviewed Pacas concerning the letter, on July 31. Pacas cited a number of complaints concerning Azevedo's conduct as supervisor, the most of any

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<sup>21</sup> Ramirez and Cerrillo did not corroborate Pacas on this point, but did not deny that he raised his hand at the meeting.

employee.<sup>22</sup> Azevedo initially denied being upset by Pacas' statements. After being confronted with Pacas' complaints, as set forth in Voss' notes, Azevedo testified he was "kind of upset," but not "real upset." Pacas testified that after relating his problems with Azevedo, during the interview, Azevedo's attitude toward him became hostile. Azevedo denied this. Pacas was definitely more credible than Azevedo, and he is credited.

Veneman testified he made the decision to discharge Pacas for insubordination during a disciplinary meeting concerning his work performance. Azevedo testified he observed Pacas failing to prime cows before milking them, and inadequately cleaning his work area, on several occasions in July. Azevedo further testified he spoke to Pacas four times about this prior to any formal disciplinary action being taken, and reported each counseling to Nunes. Nunes related one occasion where Azevedo complained to him about Pacas' work, prior to the initial imposition of discipline. According to Azevedo, Pacas told him he knew how to perform his job duties, when Azevedo spoke with him.

Pacas denied he ever failed to prime cows or inadequately performed his cleanup duties. Pacas testified the only time Azevedo spoke with him about his work performance was on July 12, when he claimed Pacas was not properly hosing down his work area. Pacas' contention was corroborated by Miguel Cerrillo who, on cross-examination, testified Nunes told Pacas, on July 31, that Azevedo had previously spoken to him once about his work performance.

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<sup>22</sup> Given Azevedo's presence at the interviews, and the taking of statements from the employees, it comes as no surprise that most of the workers made few, if any complaints against Azevedo.



Nunes, corroborated by Cerrillo, testified that when he issued Luna the July 28 warning letter for rushing the cows and his co-workers, Luna told him Pacas was in more of a hurry than he, and was not priming the cows. Nunes told Luna he would be speaking with Pacas about this. Luna did not specifically deny making this statement in his testimony concerning the July 28 warning letter, but was not asked whether he made the statement. Assuming Luna made this statement, the undersigned has come to the conclusion this initiated the allegations, by Nunes and Azevedo, that Pacas was not priming the cows, rather than any personal observations of this on their part.

Nunes testified he called Pacas in to speak with him after the workers gave him the protest letter on July 30, since he had already intended to speak with him. Nunes did not, however, have a prepared disciplinary notice at the meeting, as was his practice, undercutting his claim that he had previously planned this meeting.<sup>23</sup> According to Nunes, when he asked Pacas why he was not priming the cows and cleaning his work area, Pacas laughed at him, rather than responding. Nunes asked Pacas why he was laughing, but Pacas said nothing. Having received no response to his concerns, Nunes told Pacas he would be receiving a warning letter the following day.

Pacas testified that on July 30, after the protest letter was presented to Nunes, he went, as directed, to Nunes' office. Jesus Ramirez went with him, but was not allowed to interpret, that function being assigned to Cerrillo. Nunes asked him why he was not applying tincture of iodine to the cows' teats after milking them, rather than failing to

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<sup>23</sup> Even the verbal warning to Luna, on July 28, was memorialized in writing.

prime the cows, and he asked who was saying this. Pacas told Nunes he was doing his job properly. Nunes continued repeating the accusation, and Pacas again asked who had told him this. Nunes responded it was Azevedo. Pacas denied Nunes told him he appeared amused. Pacas also denied Nunes told him he would be receiving a disciplinary notice the following day. Pacas repeated that he was doing his job, and Nunes told him to leave.

Ramirez corroborated Pacas' contention that the criticism leveled at him by Nunes at the meeting was his purported failure to apply tincture of iodine to the cows after they were milked. Ramirez also could not recall any mention being made, at the meeting, of Pacas receiving a warning letter for his conduct. On the other hand, Ramirez, contradicting Pacas, testified Nunes repeatedly asked Pacas why he appeared to be amused. Pacas responded he was not amused, and was performing his job duties correctly. Ramirez was not asked whether Pacas was laughing at the meeting.

On direct examination, Miguel Cerrillo, after beginning to relate what took place at the July 30 meeting, testified he had no recall thereof, apparently because he felt he was confusing it with Pacas' interview on July 31. On cross-examination, Cerrillo recalled that Nunes did cite the failure to prime cows and not cleaning properly as the work deficiencies. In addition, Cerrillo recalled Nunes telling Pacas he would have a write-up for him the following day. On the other hand, Cerrillo corroborated Pacas' contention that he repeatedly disputed these allegations, and when told Azevedo had observed the misconduct, denied Azevedo had spoken to him about it.

As detailed above, there are several versions of what took place at this meeting. Most notably, no one corroborated Nunes' contention that Pacas was laughing at him. As found above, Pacas was a more credible witness than Nunes, and was at least partially corroborated by the other witnesses, including Cerrillo. As the person who would most likely have the best recollection of what took place, due to his personal involvement, (along with Nunes, who was not credible,) Pacas' version of this meeting is credited.

After Pacas' interview regarding the protest letter on July 31, Nunes gave him a written warning stating he had failed to prime cows and was not properly performing his cleanup duties. Pacas credibly testified that the only issue discussed concerned his cleanup duties. Pacas told Azevedo he knew Pacas cleaned the barn, and Azevedo replied he did not clean well.

After issuing the warning,<sup>24</sup> Nunes testified he asked Joe Viera, an outside employee, and also his brother-in-law, to check to see if Pacas was now priming the cows. Viera testified he briefly observed Pacas performing his milking duties, and he was not priming the cows. Viera reported this to Nunes. As noted above, Pacas denied ever failing to prime cows.

Nunes reported these events to Veneman, and asked him to attend a meeting with Pacas, where, purportedly, he would be given a final warning to prime the cows. Nunes claimed he wanted Veneman to be present, so Pacas would understand the gravity of the

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<sup>24</sup> Veneman circumstantially placed this as having occurred on or about August 10.

situation. Veneman testified Nunes told him he had tried to counsel Pacas, but was not getting anywhere with him.

The meeting took place on August 13. Veneman, Nunes, Pacas and Cerrillo, acting as interpreter, were present. Voss was in her office, close enough to hear what took place. Voss testified she had filled out a portion of a disciplinary notice, stating Pacas was still not priming the cows, and she gave this to Veneman. Inasmuch as this was purported to be a disciplinary notice to be handed to Pacas, the undersigned finds it strange that no box was checked stating the level of discipline being imposed.

Veneman testified he related the prior history of the problem, and informed Pacas that Nunes had someone look in on him, and he was still not priming the cows. Veneman asked Pacas if he was going to prime the cows, to which Pacas responded, "Nope." This angered Veneman, and the conversation deteriorated. Veneman told Pacas he was getting a full paycheck, but only doing half a job. Pacas laughed at him. Veneman asked Pacas if he was going to do his job, and Pacas laughed again. At that point, Veneman told Pacas they would prepare his final check. Veneman took the written warning into Voss' office, told her they were discharging Pacas, and to prepare his final check. While they were waiting for Voss to do this, Pacas asked Veneman, who his best employee was. Veneman responded he was. Pacas asked if Veneman would give his best employee a second chance, but Veneman proceeded with the discharge.

Nunes testified Pacas was sarcastic during the interview, based on his question about Respondent's best employee, but did not state he was laughing. Nunes did not corroborate Veneman's testimony, that Pacas replied, "Nope," when Veneman asked him

if he was going to prime the cows. Voss testified she heard Pacas “chuckling,” when Veneman told him he was still failing to prime the cows. After she heard Pacas ask Veneman who Respondent’s best employee was, Veneman came into her office, told her Pacas was not going to prime the cows, and to prepare his final checks.<sup>25</sup> Veneman gave her the disciplinary notice she had prepared, and she added to it that Pacas’ employment was being terminated.

Pacas testified that on the day of his discharge, his final check was already prepared, when he entered the office. Veneman asked him why he was not doing his job. He told Veneman he was doing his work, and Nunes told him this was his only response. Pacas continued denying he was not performing his job duties, at which point, Veneman gave him his final paycheck. Pacas agreed he asked Veneman who was Respondent’s best worker, but that this took place after he had been discharged. Pacas denied ever refusing to prime the cows. Pacas denied being given a copy of his discharge notice, or having seen it at the meeting.

Miguel Cerrillo, called as a witness by Respondent, more closely corroborated Pacas’ testimony than Veneman’s. According to Cerrillo, Nunes began the meeting by telling Pacas he had already been warned for not priming the cows and inadequately performing his cleanup duties. On cross-examination, Cerrillo added:

Fernando started the meeting probably about 10:00, and was telling [Pacas] why he was getting called, and [told] him why he’s leaving the dairy,

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<sup>25</sup> Veneman testified that this exchange took place after he told Voss to prepare the final checks.

because he was already warn[ed] once so there is no reason to give him another one.

On direct examination, Cerrillo testified Veneman told Pacas the warning system was for the purpose of advising employees of their job-related problems. He further testified that Veneman, later in the meeting, told Pacas he had wanted to give him a chance to improve, but given his refusal to improve, he would discharge Pacas. On cross-examination, however, Cerrillo stated:

That was – I don't really [remember] exactly what he said. I remember it was just saying, well you already got one, there is no reason to talk to you again. We tried to give you a chance and you didn't take it, so we got [sic] to take different steps.

According to Cerrillo, Pacas responded he did not understand the allegations, because he was priming the cows and performing his cleaning duties. Veneman told Pacas that *Azevedo* (not *Viera*) had seen him not priming the cows<sup>26</sup> and not properly cleaning, but he still did not care. Cerrillo did not corroborate Veneman's claim, that Pacas responded, "Nope," when Veneman asked if he was going to prime the cows. To the contrary, Cerrillo stated that Pacas repeatedly claimed he was doing his job. Pacas told Veneman that nobody is perfect. In response to a leading question, Cerrillo testified Pacas was smiling during the meeting, but did not contend he laughed.<sup>27</sup> Cerrillo initially denied Pacas was given a copy of his discharge notice, but then stated this took place.

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<sup>26</sup> As noted above, Veneman testified Nunes had "someone" look in on Pacas, apparently referring to *Viera*.

<sup>27</sup> Cerrillo had earlier testified that Pacas, when given the warning letter on July 31, had given an ironic-looking smile, which he interpreted as signifying disagreement.

Again, there are many versions of what led to Pacas' discharge. It seems unlikely that Pacas, who had worked for several years without incident, would suddenly cease performing his work properly, and would continue to do so, even after he received a warning letter. Furthermore, Luna had been discharged, shortly after his leadership role in the protest letter, and Pacas had strongly criticized Azevedo during his interview. Under these circumstances, it appears even less likely that Pacas would have laughed at Respondent's managers, and flatly refused to prime the cows. Viera, who testified to observing Pacas not priming cows, is related to Nunes, and cannot be considered an unbiased witness. His allegations are denied by Pacas, who was at least as credible as a witness. Furthermore, as noted above, Cerrillo testified Veneman told Pacas that Azevedo, not Viera, had observed him not priming the cows. Therefore, Respondent has not preponderantly established that Pacas engaged in this misconduct.

Most notably, on the question of insubordination, the only witness corroborating Veneman on his claim that Pacas laughed at him was Voss, who herself was not at all credible as a witness.<sup>28</sup> No one corroborated Veneman's testimony, that Pacas refused to prime cows during the meeting. Accordingly, it is found that Respondent, in fact, had determined to discharge Pacas prior to the meeting, and that it went, essentially, as related by Pacas, although he may have ironically smiled at Veneman and/or Nunes during the disciplinary meetings.

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<sup>28</sup> Voss was clearly hostile to both Luna and Pacas, both in her demeanor, and the many slanted, inconsistent and indeed, false statements she wrote concerning these incidents.

## **The Refusal to Rehire Raymundo Hernandez**

Raymundo Hernandez was hired by Respondent as a milker on June 9. Hernandez worked the night shift, and was off on Thursdays. Hernandez heard about the job from his cousin, Marcos Gomez, who works at the dairy as a milker. Hernandez and Gomez live together. Hernandez had applied for work in May, and was hired by Azevedo on a temporary basis, to fill in for an injured milker, until his return. Hernandez's address and telephone number are on his application, which was retained by Respondent.

Hernandez signed the petition letter criticizing Azevedo's performance as supervisor. He attended the meeting where the letter was given to Nunes, but did not speak out. Nunes testified he was vaguely aware of Hernandez's presence with the other employees. Hernandez was scheduled for an interview on July 31, about the protest letter. Hernandez saw the schedule, but did not attend the interview, because he had to take his wife to the hospital.

Azevedo told Hernandez, in the early morning of July 31 that he was no longer needed, because the injured worker was returning. According to Hernandez, Azevedo returned and told him to take a day off, and he would let him know (apparently about future work) through his cousin, Gomez.<sup>29</sup> Gomez later informed Hernandez that Luna and Pacas had been discharged. Hernandez did not contact Respondent about returning,

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<sup>29</sup> Azevedo testified he informed Hernandez of his layoff on July 29, and this was his last day of work. Hernandez was a more credible witness than Azevedo, and the chronology of events more closely supports Hernandez's testimony concerning the date of his layoff. If July 29 had been Hernandez's last day of work, Respondent would not have placed his name on the list of employees to be interviewed, posted on July 31.



because by the time his cousin informed him about the openings, the positions had already been filled.

Azevedo testified that it is his practice, when Respondent needs a new worker, to announce the opening to the employees, who may pass this on to prospective applicants. When the worker was injured, in June, he told the employees there was a temporary opening, due to the injury. Gomez told Azevedo he knew someone who might be interested, and this led to Hernandez's hire. Azevedo testified he told Hernandez, when he laid him off, to keep in touch with him about future work. According to Azevedo, he asked Hernandez for his telephone number, but Hernandez told Azevedo to contact him through his cousin.

General Counsel contends that on the morning of July 31, Azevedo already knew that Luna was going to be discharged and, therefore, would have offered Hernandez his job at that time, instead of laying him off, but for his participation in the protest. This allegation is not established by sufficient record evidence. Furthermore, Azevedo would have been unlikely to offer Hernandez Luna's job prior to his discharge, on August 1, since there is a good chance Luna would have found out about this.

Azevedo testified that when Luna, and then Pacas were discharged, he told the workers, including Gomez, that there were openings for milkers. In the case of Luna, he did this at about 2:00 p.m., on August 1. Azevedo did not personally invite Hernandez to return to work, because he assumed Gomez would inform Hernandez about the openings. Inasmuch as Hernandez did not contact Respondent for rehire while these openings existed, others were hired to replace Luna and Pacas.

General Counsel contends that Azevedo did not advise Gomez of the job openings. Although Azevedo specifically testified that Gomez's shift began at 2:00 p.m., General Counsel points to evidence that Gomez was working the night shift at the time, and therefore, would not have been present when Azevedo announced the positions. General Counsel also contends that Azevedo's frequent fabrications and embellishments justify a conclusion that he was unlawfully motivated in not rehiring Hernandez. Gomez did not testify at the hearing.

Voss and Azevedo testified that a replacement worker for Luna was hired on August 5. Their testimony is at least circumstantially corroborated by a receipt for Respondent's employee handbook, signed by the employee, on that date. Therefore, although General Counsel contends the new employee was hired earlier, their testimony on this point is credited. The replacement for Pacas was hired on August 14, the day after his discharge.

### **ANALYSIS AND CONCLUSIONS OF LAW**

Section 1152 of the Act grants agricultural employees the right, inter alia, "to engage in . . . concerted activities for the purpose of mutual aid and protection." Discrimination against employees for engaging in protected concerted activities is considered interference, restraint or coercion in the exercise of that right, in violation of section 1153(a). *J. & L. Farms* (1982) 8 ALRB No. 46; *Lawrence Scarrone* (1981) 7 ALRB No. 13; *Miranda Mushroom Farm, Inc., et al.* (1980) 6 ALRB No. 22; *NLRB v. Washington Aluminum Co.* (1960) 370 U.S. 9; *Phillips Industries, Inc.* (1968) 172 NLRB 2119, at page 2128 [69 LRRM 1194].

In order to be protected, employee action must be concerted, in cases not involving union activity. This generally means the employee must act in concert with, or on behalf of others. Protected concerted activity includes conduct arising from any issue involving employment, wages, hours and working conditions. Protests, negotiations and refusals to work, arising from employment-related disputes are protected activities.

*Meyers Industries, Inc.* (1984) 268 NLRB 493 [115 LRRM 1025], rev'd (1985) 755 F.2d 1481, decision on remand, (1986) 281 NLRB 882 [123 LRRM 1137], aff'd (1987) 835 F.2d 1481, cert. denied, (1988) 487 U.S. 1205; *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41. The merits of the work-related complaint are not determinative, so long as the activity is not pursued in bad faith. This is often true even if the employees stop working in pursuing the protest. *Giannini Packing* (1993) 19 ALRB No. 16; *M. Caratan, Inc.* (1978) 4 ALRB No. 83.<sup>30</sup>

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

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<sup>30</sup> The Fifth Circuit of the California Court of Appeal affirmed the unfair labor practices, but remanded the case to the Board on portions of the remedy ordered, in an unpublished decision issued on January 17, 1980. See (1980) 6 ALRB No. 14, for the decision on remand.

direct or circumstantial evidence. Direct evidence would include statements admitting or implying that the protected concerted activity was a reason for the action. The timing, or proximity of the adverse action to the activity is an important circumstantial consideration. Timing alone, however, will not establish a violation. Other circumstantial evidence includes disparate treatment; interrogations, threats and promises of benefits directed toward the protected activity; the failure to follow established rules or procedures; the cursory investigation of alleged misconduct; the commission of other unfair labor practices; false or inconsistent reasons given for the adverse action; the absence of prior warnings and the severity of the punishment for alleged misconduct. *Miranda Mushroom Farm, Inc., et al., supra; Namba Farms, Inc.* (1990) 16 ALRB No. 4.

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

A protest by two or more employees, concerning the work-related conduct of a supervisor, is considered protected concerted activity. *Woolf Farming Co. of California, Inc., et al.* (2009) 35 ALRB No. 2; *Trompler, Inc.* (2001) 335 NLRB 478 [172 LRRM 1144]. The evidence shows that Luna took a leadership role in the protest against Azevedo, and Respondent was aware of this. There is no evidence that Luna, to the extent he shared the various criticisms of Azevedo found in the letters, knowingly falsified any of the accusations. The reference to Azevedo discussing the “personal

information” of employees, while perhaps inartfully phrased,<sup>31</sup> hardly renders the petition, as a whole, unprotected. Similarly, the fact that a few of the petition signers did not read the Spanish-language version, and signed to support Luna’s protest of the verbal warning he received on July 28, does not render Luna’s conduct unprotected. In this regard, it is considered protected concerted activity for employees to protest discipline imposed on a co-worker. *Yamamoto Farms* (1981) 7 ALRB No. 5.

There is ample evidence of animus toward Luna’s protected activity, to find it was a motivating factor in his discharge. Luna was discharged shortly after the protest. Respondent was clearly angered by his criticisms of Azevedo, and considered him a liar. It has also been found that Azevedo, who was fully aware of the situation, made a thinly veiled reference to Luna’s protected concerted activity as the reason for his discharge. The discharge letter and response to the charge sent to the Regional Office specifically refer to his protected activity, incorrectly contending that he was properly discharged for the manner in which he pursued the protest.

The discharge letter to Luna claims Luna broke an agreement, made during his disciplinary meeting on January 20, to bring complaints about Azevedo to Nunes. In fact, the agreement was that Luna would not confront Azevedo with his complaints, and Luna did not repeat that conduct. Furthermore, the letter falsely accuses Luna of misrepresenting the contents of the petition to his co-workers.

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<sup>31</sup> The testimony shows that the employees were referring to Azevedo disclosing work-related problems of employees to others.

Respondent's position statement, written about two weeks after Luna's discharge, again refers to his unsubstantiated misconduct in circulating the protest letter. It adds additional unsubstantiated allegations. Respondent therein contends that some workers signed the petition because they feared Luna would be angered if they did not. In addition, the statement adds an allegation that Luna told employees that those who refused to sign the petition were "snitching on everyone." No evidence was presented supporting either allegation.

The position statement cites Luna's alleged threat to Azevedo in January as a reason for his discharge. This was not cited as a reason for the action in the discharge letter. The statement also cites Luna's alleged running of the cows as a reason for his discharge. The discharge letter specifically states that said conduct had nothing to do with Luna's termination. Given the direct evidence of animus toward Luna's protected concerted activity, and the circumstantial inferences raised by the unsubstantiated, inconsistent reasons set forth by Respondent for his discharge it is concluded that General Counsel has established a prima facie case of unlawful retaliation.

Respondent contends that it has rebutted the prima facie case, because Luna would have been discharged, absent his protected activity, for fabricating the second crowd control panel device. Said conduct is stated, as a reason for the discharge, in both the discharge letter and the position statement. Contradicting this is Azevedo's statement to Luna, when handing him the discharge letter, that "none of this" would have happened, if Luna had "kept his mouth shut." Furthermore, Azevedo, when informing Nunes of his discovery of the second device, indicated Luna should be written up, not discharged.

Inasmuch as Nunes heavily relied on Azevedo's disciplinary recommendations, it is probable that if any discipline would have been imposed, absent Luna's protected activity, it would have been less than termination, irrespective of what was said at the April safety meeting.

Aside from this, it is Respondent's burden of proof to show it would have discharged Luna, absent his protected concerted activity. Although the undersigned, based on collateral testimony, rather than the unreliable assertions of Respondent's managers and agents, has concluded that Luna probably used the prohibited device, the numerous conflicts in testimony by Respondent's witnesses, in themselves, preclude a finding that it has satisfied its burden. Respondent has established that employees were warned, three months earlier, that if an employee fabricated another such device, but it did not discharge Luna for said alleged conduct until after he took a leadership role in the protest.

The record fails to adequately explain why this delay took place. Veneman and Nunes alternated in claiming responsibility for the discharge decision. Veneman contradicted himself as to whether he learned of the second device before or after he went on vacation. The evidence shows that Nunes already "knew" Luna had fabricated the device on July 23, or even earlier, yet he took no action. Even if Veneman had left for vacation, Nunes could have contacted him on his cell phone, as Voss purportedly did on July 31.

The evidence strongly implies that the questioning of employees as to who had fabricated the second device during the interviews concerning the protest letter was

merely a showpiece for Nunes' predetermined intention to discharge Luna, once he played a leadership role in the protest. Nunes obtained no new evidence against Luna during the interviews. To the contrary, he heard that another employee had fabricated the first device, thus raising the possibility he also invented the second. Thus, at the least, while Luna might have been caught using the second device, it was entirely possible that someone else had fabricated it. Rather than pursuing this possibility further, Nunes proceeded with the discharge, without even speaking with Luna, who he met with on July 28, or the other employee. Based on all the above considerations, it is concluded that Respondent violated section 1153(a) by discharging Jose Luna.

Juan Manuel Pacas also participated in the protest. Pacas had earlier attempted to speak out to Nunes, when the protest letter was delivered to him, and was immediately called in for a verbal warning. The only credible evidence of possible misconduct by Pacas was Azevedo's criticism of his cleanup work, two weeks earlier. It appears that Azevedo frequently criticized the work performance of employees, without formally disciplining them, and certainly not two weeks later.

As the employee most vocal in criticizing Azevedo during the employee interviews, Pacas assumed a leadership role. At the same meeting, he was issued a written warning for essentially the same conduct as he had already received the verbal warning. Pacas was discharged about two weeks after his interview. By the date of Pacas' discharge, Veneman had read the protest letter, reviewed the interview notes and discussed the matter with Nunes. Thus, Respondent was fully aware of Pacas' prominent protected activity, and the record shows it harbored considerable animus



toward such conduct, including the unlawful discharge of Luna. Therefore, it is concluded that General Counsel has established a prima facie case that Respondent unlawfully disciplined and discharged Pacas.

The testimony of Respondents' managerial witnesses, to show that Pacas would still have been disciplined and discharged absent his protected activity was, if anything, even more conflicting than their testimony concerning Luna. Again, and for this reason alone, the undersigned would conclude that Respondent has failed to establish its burden of proof, to rebut the prima facie case. Thus, Azevedo's testimony, that he spoke with Pacas four times before the initial discipline is contradicted not only by Pacas, but also by Respondent's other witnesses. This leads to the conclusion that a minor complaint by Azevedo, two weeks earlier, led to a verbal warning when Pacas tried to speak out on July 30. Nunes' testimony, that he took further disciplinary action after the verbal warning, because Pacas laughed at him when verbally counseled, has been discredited, because all of the other witnesses contradicted him. In any event, Pacas was disciplined twice for the same alleged conduct, most of which has been found not to have occurred.

As discussed above, it appears unlikely that as a long-term employee, with no prior disciplinary history, Pacas would not only suddenly commence disregarding his job duties, but would openly and admittedly continue to do so after being disciplined, and after the discharge of Luna. Even if Viera's testimony was credited, Respondent contends Pacas was discharged for insubordination, and not for dereliction of his job duties. Based on the credible testimony of Pacas and Cerrillo, that Pacas was told he was discharged for poor work performance, corroborated by the absence of any box being

checked on the notice to show what other discipline had been contemplated, it is concluded that the allegation of insubordination was a pretext. In any event, Respondent has failed to establish that Pacas was insubordinate. Veneman's testimony concerning Pacas' alleged insubordination has not only been denied by Pacas, but is unsupported by Nunes and Cerrillo. It has been established that Pacas repeatedly denied engaging in misconduct. Even if this could be considered insubordination, it was not cited as such by Veneman.

Based on all the above considerations, it is concluded that Respondent violated section 1153(a) by disciplining and discharging Juan Manuel Pacas.

The evidence shows that Raymundo Hernandez signed the protest letter and attended the meeting where it was given to Nunes. Respondent was aware that Hernandez signed the petition, and Nunes admitted being vaguely aware of Hernandez's presence when it was presented to him. Thus, General Counsel has established that Hernandez engaged in protected concerted activity, and that Respondent was aware of this.

Hernandez's participation in the protest was limited and minimal. He did not attend an interview to discuss the letter, or otherwise speak out against Azevedo. Hernandez was not rehired after Luna's discharge, shortly after he was laid off, or after Pacas was discharged, about two weeks later. The only other evidence presented showing a causal link between the failure to rehire Hernandez and his protected activity is Respondent's unfair labor practices against Luna and Pacas. Thus, at best, General Counsel has established a tenuous showing of unlawful motivation.

In cases involving a refusal to rehire, General Counsel must usually also establish that the alleged discriminatee applied for work at a time it was available. *Prohoroff Family Farms* (1979) 5 ALRB No. 9; *Kawano, Inc. v. ALRB* (C.A. 4, 1980) 106 Cal.App. 3d 937, at page 943 [165 Cal.Rptr. 492]. This element need not be established if General Counsel establishes that it would have been futile for the employee to have applied. *J. R. Norton v. ALRB* (C.A. 4, 1987) 192 Cal.App. 3d 874, at page 904 [238 Cal.Rptr. 87]; *Imperial Asparagus Farms* (1994) 20 ALRB No. 2. General Counsel may also establish a violation if it is established that the respondent employer had a policy of contacting employees for rehire, but discriminatorily failed to follow this practice with respect to the alleged discriminatees. *Kyutoku Nurseries, Inc.* (1982) 8 ALRB No. 98.

It is undisputed that Hernandez at no time applied for rehire with Respondent. There is no evidence that Respondent, by its conduct, demonstrated it would have been futile for him to have applied. Hernandez, in his testimony, did not contend Azevedo agreed to personally contact him when openings arose. Rather, Hernandez claimed Azevedo agreed to contact him through his cousin.

It was not illogical or devious for Azevedo to have announced the first job opening when he did, shortly after Luna's discharge, given Respondent's staffing requirements. Even if Gomez was not present when Azevedo made the announcement, it is almost inconceivable that he would not have become aware of this well before August 5, the date Respondent hired Luna's replacement. Thus, it appears likely that either Gomez did not timely inform Hernandez of the opening, or if he did, Hernandez took no action. The evidence to establish that Respondent concealed the opening after Pacas' discharge is

even weaker, since Pacas was replaced the following day. Thus, it is even more likely that Gomez did not inform Hernandez about this opening until after the position was filled. In any event, there is insufficient evidence to show that Azevedo intentionally concealed these openings, so that Hernandez would not learn of them.

Therefore, it is concluded that Hernandez was required to apply for work as the openings occurred, and his failure to do so precludes the finding of a prima facie case of unlawful retaliation against him. Accordingly, that allegation will be dismissed.

### **THE REMEDY**

Having found that Respondent violated section 1153(a) of the Act, I shall recommend that it cease and desist there from and take affirmative action designed to effectuate the purposes of the Act. In fashioning the affirmative relief delineated in the following Order, I have taken into account the entire record of these proceedings, the character of the violations found, the nature of Respondent's operations, and the conditions among farm workers and in the agricultural industry at large, as set forth in *Tex-Cal Land Management, Inc.* (1977) 3 ALRB No. 14.

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

## ORDER

Pursuant to Labor Code section 1160.3, Respondent, Temple Creek Dairy, Inc., A California Corporation, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
  - (a) Discharging, disciplining or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in concerted activities protected under section 1152 of the Agricultural Labor Relations Act (Act).
  - (b) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.
2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:
  - (a) Rescind the discharges of Jose Luna and Juan Manuel Pacas, and offer them immediate reinstatement to their former positions of employment or, if their positions no longer exist, to substantially equivalent employment, without prejudice to their seniority and other rights and privileges of employment.
  - (b) Expunge the discharge notices issued to Jose Luna and Juan Manuel Pacas, and the disciplinary notice issued to Juan Manuel Pacas, from their personnel files.

- (c) Make whole Jose Luna and Juan Manuel Pacas for all wages or other economic losses they suffered as a result of their unlawful discharges, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. The award shall also include interest to be determined in the manner set forth in *E. W. Merritt Farms* (1988) 14 ALRB No. 5.
- (d) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning August 1, 2009, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.
- (e) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.
- (f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property, for 60 days, the period(s) and place(s) to be determined by the Regional Director, and exercise due

- (g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.
- (h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time during the period July 30, 2009 to July 29, 2010, at their last known addresses.
- (i) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order in this matter.

- (j) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.
3. All other allegations contained in the Complaint are hereby dismissed.

Dated: August 5, 2010

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Douglas Gallop  
Administrative Law Judge, ALRB



## NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by discharging and otherwise disciplining Jose Luna and Juan Manuel Pacas, because they concertedly protested their conditions of employment.

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

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

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

**WE WILL NOT** discharge, discipline or otherwise retaliate against agricultural employees because they protest about their wages, hours or other terms or conditions of employment.

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

**WE WILL** offer Jose Luna and Juan Manuel Pacas immediate reinstatement to their former positions of employment or, if their positions no longer exists, to substantially equivalent employment, and make them whole for any loss in wages and other economic benefits suffered by them as the result of their unlawful discharges.

DATED: \_\_\_\_\_

TEMPLE CREEK DAIRY, INC.

By: \_\_\_\_\_  
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 1642 W. Walnut Ave., Visalia, California. The telephone number is (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE