

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

H & R GUNLUND RANCHES,	)	Case Nos.	2009-CE-063-VIS
INC., A California Corporation,	)		2009-CE-064-VIS
	)		2009-CE-067-VIS
Respondent,	)		2009-CE-068-VIS
	)		2010-CE-017-VIS
and)		
)		
REGINO PRIMITIVO,	)	39 ALRB No. 21	
MARIANO PRIMITIVO,)		
and Others,	)	(December 30, 2013)	
)		
<u>Charging Parties.</u>)		

DECISION AND ORDER

On July 1, 2013, Administrative Law Judge Mark R. Soble (“ALJ”) issued the attached decision, in which he found that H & R Gunlund Ranches, Inc. (“Employer”) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (“ALRA”)¹ by discharging, laying off, and failing to rehire employees who engaged in activity protected by the ALRA, namely, protesting a reduction in the piece rate and later filing charges with the Agricultural Labor Relations Board (“ALRB or Board”). The ALJ found that the Employer unlawfully discharged a pruning and tying crew on November 23, 2009, after members of the crew sought to have the previous year’s piece rates reinstated after the Employer announced a reduction in the rates. The ALJ also found that on December 3, 2009 the Employer unlawfully laid off these employees after

¹ The ALRA is codified at California Labor Code section 1140, et seq.

rehiring them the day before. Lastly, the ALJ found that the Employer unlawfully failed to rehire most of the crew in January 2010 and unlawfully failed to rehire four members of the crew for off-season hourly work that they had performed in previous years.

On July 25, 2013, the Employer filed numerous exceptions to the ALJ's decision, arguing that no violations were proven and that the complaint should be dismissed in its entirety. On August 22, 2013, the General Counsel of the ALRB filed a reply to the Employer's exceptions.

The Board has considered the Employer's exceptions, the reply thereto, and the entire record in this case and has decided to affirm the ALJ's decision that the Employer violated the ALRA by discharging employees on November 23, 2009, laying them off on December 3, 2009, and failing to rehire most of the employees in January 2010, all because they engaged in protected activity.² However, as explained below, we do not find the record evidence sufficient to find a violation with regard to the failure to

² Many of the ALJ's key factual findings were necessarily based at least in part upon credibility determinations. The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*S & S Ranch, Inc.* (1996) 22 ALRB No. 7.) In addition, it is both permissible and not unusual to credit some but not all of a witness's testimony. (*Suma Fruit International (USA), Inc.* (1993) 19 ALRB No. 14, citing 3 Witkin, Cal. Evidence (3d ed. 1986) §1770, pp. 1723-1724.) Our review of the record in this case has revealed no basis for disturbing the ALJ's credibility determinations.

rehire four members of the crew for off-season hourly work that they had performed in previous years.

DISCUSSION

Governing Principles

The General Counsel bears the initial burden of setting forth a prima facie case of retaliation for engaging in protected concerted activity. This is established by showing that: 1) the employee engaged in such activity; 2) the employer had knowledge of the activity; and 3) the adverse action taken by the employer was motivated at least in part by the protected activity. (*Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083; *Lawrence Scarrone* (1981) 7 ALRB No. 13.) The California Supreme Court approved this analytical framework in *Martori Brothers Distributors v. ALRB* (1981) 29 Cal.3d 721.

The third element of the prima facie case, showing some causal connection between the protected activity and the adverse action, may be established by either direct or circumstantial evidence. Direct evidence, which does not exist in most cases, would include statements admitting or implying that the protected concerted activity was a reason for the action. Where discriminatory motive is not apparent from direct evidence, there are a variety of factors that the Board and courts have considered in order to infer the true motive for the adverse action. Such factors may include: 1) The timing, or proximity of the adverse action to the activity; 2) disparate treatment; 3) failure to follow established rules or procedures; 4) cursory investigation of the alleged misconduct; 5) false or inconsistent reasons given for the adverse action, or the belated addition of

reasons for the adverse action; 6) the absence of prior warnings; and 7) the severity of punishment for the alleged misconduct. (*Miranda Mushroom Farm, Inc. et al.* (1980) 6 ALRB No. 22; *Namba Farms, Inc.* (1990) 16 ALRB No. 4.)

Once the ALRB's General Counsel establishes a prima facie case, the burden shifts to the employer to show that it would have taken the same adverse action even in the absence of the employee's protected concerted activity. (*J & L Farms* (1982) 8 ALRB No. 46; *Wright Line, a Division of Wright Line, Inc., supra*, 251 NLRB 1083.) To meet its burden the employer cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected concerted activity. (*Lawrence Scarrone, supra*, 7 ALRB No. 13; *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 399-403.)

In cases where the alleged retaliation is a refusal to recall or rehire, the General Counsel must establish, in addition to the other elements of a prima facie case, that the employee applied for an available position for which s/he was qualified and was unequivocally rejected. (*McCaffrey Goldner Roses* (2002) 28 ALRB No. 8; *Kawano, Inc. v. ALRB* (1980) 106 Cal.App.3d 937; *Vessey & Co. v. ALRB* (1989) 210 Cal.App.3d 629; *Giannini Packing Company* (1993) 19 ALRB No. 16.) In situations where the employer had a practice or policy of contacting former employees to offer them re-employment, this requirement can be satisfied by proof of the employer's failure to do so at a time when work was available. (*Giannini Packing Company, supra*, 19 ALRB No. 16.)

The Discharge of the Pruning and Tying Crew on November 23, 2009

There is no dispute that on November 21 and 23, 2009, the pruning and tying crew engaged in protected activity by protesting an announced reduction in piece rates and that protest included at least a brief work stoppage on November 23. Nor is it disputed that the Employer knew of this protected activity. Because we affirm the ALJ's pertinent credibility determinations we also affirm his factual finding that the crew was told it was discharged on November 23. Moreover, the comments and actions attributed to the Employer's supervisors and officers, including the contemporaneous calling of the California Highway Patrol to remove the crew from the property leaves no doubt as to the causal connection between the protected activity and the discharge of the crew.

Accordingly, the General Counsel established a prima facie case that the crew was discharged for engaging in protected activity. The Employer does not offer in defense a benign explanation for the discharge, but simply argues that the crew was not fired and was instead misinformed to that effect by representatives of California Rural Legal Assistance. However, the ALJ did not credit that version of events and instead credited, based in part on demeanor, testimony that agents of the Employer told the crew it was discharged.³ As we find no reason to disturb those credibility determinations, we

³ Even if the situation was beset by some degree of ambiguity, that is of no aid to the Employer here. A discharge occurs if an employer's conduct or words would reasonably cause employees to believe that they were discharged and in such circumstances it is incumbent upon the employer to clarify its intent. (*Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4; see also *American Protection Industries, et al.* (1991) 17 ALRB No. 21, ALJ dec., p. 18; *Ridgeway Trucking Co.* (1979) 243 NLRB 1048, enf'd (5th Cir. 1980) 622 F.2d 1222; *NLRB v. Trumbull Asphalt Company of* (Footnote continued....)

must conclude that the Employer failed to show that it would have taken the same action even in the absence of the employees' protected activity.⁴

The December 3, 2009 Layoff

On November 24, 2009, the Employer was served with two unfair labor practice ("ULP") charges based on the November 23, 2009 discharge. Several days later, on November 30, 2009, ALRB Regional Staff negotiated the reinstatement of the crew at the twenty five cents per vine piece rate with a return date of December 2, 2009.

Mariano Primitivo testified that this was communicated to him by ALRB field examiner Rey Valverde. The crew worked for the entire day on December 2, 2009, and then on the next day, they worked only until about 11:00 a.m., when Ranch Manager Manlio Moreno told the crew that pruning and tying work was done, and that they would be called back around January 15, 2010.

Retaliation against an employee for filing charges with the ALRB is a violation of section 1153, subdivision (d) of the ALRA. (*Kirschenman Enterprises, Inc.* (1986) 12 ALRB No. 2) The analytical elements of such a violation are identical to those

(Footnote continued)

Delaware (8th Cir. 1964) 327 F.2d 841, 843 ("It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated.") .)

⁴ Interest on all back pay ordered by this Decision shall be calculated on a compounded daily basis, as set forth in *Kentucky River Medical Center* (2010) 356 NLRB No. 8 and clarified in *Rome Electrical Services, Inc.* (2010) 356 NLRB No. 38, rather than the simple interest method formerly used by both National Labor Relations Board ("NLRB") and the ALRB. The ALRB has consistently found NLRB precedent on this issue to be applicable under the ALRA. (See ALRA § 1148.)

involving other forms of protected activity, except that the causal connection must be shown to exist between the adverse action and the filing of the charge. (*Giannini Packing Corp.* (1993) 19 ALRB No 16, citing *The Garin Company* (1986) 12 ALRB No. 14; *McCarthy Farming Company, Inc.* (1982) 8 ALRB No. 78.) We affirm the ALJ's conclusion that the December 3 layoff was motivated by the filing of charges, as well as the earlier protected activity, and that the Employer's stated reasons for the abrupt layoff were pretextual.

One of the Employer's Vice Presidents, Gerald "Gere" Gunlund, admitted that he knew that he would not be keeping the workers for more than a day or two when he brought them back, as his only intention was to finish pruning and tying the field where they had stopped working on November 23. However, no one communicated this to the crew until 11:00 a.m. on December 3, 2009. Nor was there any evidence that the ALRB knew when reinstatement of the workers was negotiated that the reinstatement would only last for a day and a half.

As the ALJ observed, in previous years the pruning and tying crew worked from November through February. In addition, company records show that higher priced labor contractor (FLC) crews were utilized throughout the period after the layoff. While the Employer asserts that FLC crews were necessary to do repairs on the cross-arms and stakes in the two-wire trellis systems and that this comported with past practice, the record indicates that work also continued where the vines were grown on single wire trellis systems. Moreover, the FLC invoices merely reflect work "pruning and tying vines." Lastly, we agree that the Employer's claim that no one from the company was

capable of supervising pruning crews during Gere Gunlund's absence due to a surgical procedure is unconvincing, particularly in light of the lack of evidence that this was communicated to the crew or to the ALRB regional office prior to the negotiated December 2 reinstatement. We therefore affirm the ALJ's conclusion that the December 3, 2009 lay off was unlawful.

The Failure to Recall Most of the Crew in January 2010

As noted above, at the time the crew members were laid off on December 3, 2009 they were told that they would be recalled in January 2010. In fact, only a small portion of the crew was rehired in January even though there was work available for additional workers. Ranch Manager Manlio Moreno testified that he called at least a dozen members of the crew of approximately 67 to rehire them. However, he admitted that he did not keep track of who he called and did not follow up if his initial call was not answered.⁵ There was no evidence of any other efforts to contact the crew.

As the ALJ observed, had the Employer sincerely sought to rehire the crew, it easily could have made more comprehensive efforts to contact them, as promised on December 3, 2009. In light of the pre-existing *animus* toward the recent protected activity, this deviation from promised and normative recall procedures is more than sufficient to raise an inference that the failure to recall most of the crew in January 2010 was because of the prior protected activity. As the Employer failed to provide evidence that it would have taken the same action in the absence of the protected concerted

⁵ Moreno testified that he called Mariano Primitivo, but the ALJ credited Primitivo's testimony that he received no such call.

activity, the failure to recall most of the crew in January 2010 constituted a violation of section 1153, subdivision (a) of the ALRA.

The Failure to Recall Four Members of the Pruning and Tying Crew to Perform Hourly Spring-Time Work

The ALJ found that in at least the prior two years, 2008 and 2009, Regino Primitivo, Mariano Primitivo, Apolinar Primitivo, and Natalia Ordaz Lopez were among about a dozen members of the crew who were retained to perform off-season hourly work, but in 2010 they were not. The ALJ concluded that since that type of work was available in 2010, the failure to retain these four individuals was due to their prior protected activity and therefore was unlawful. While the ALJ's analysis is very sparse with regard to this allegation, it may be presumed that he viewed the failure to retain these four individuals simply as a continuation of the series of unlawful actions he previously found.⁶ However, as explained below, we find the record evidence insufficient to sustain this violation.

As noted above, in a refusal to recall or rehire case it must be shown that the employee applied for an available position for which he or she was qualified and was rejected, or that the employer had a practice or policy of contacting former employees to offer them re-employment and failed to abide by that practice. Because the crew size for the hourly spring work was only a fraction of the January crew size, there could be no guarantee of being retained for the hourly work. Therefore, there must have been a

⁶ While the failure to retain these individuals for off-season work was not one of the issues in dispute listed by the ALJ, apparently he viewed it as part of the alleged failure to recall after the December 3, 2009 layoff.

selection process for this work. Our review of the record reveals nothing regarding the normative selection process for this work, or even whether the four individuals asked for that work and were available to do it. In other words, the record does not indicate that they applied for the work and were rejected, or that under an established practice they should have been notified and offered the work but were not. Accordingly, this allegation must be dismissed.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act (“Act”; Labor Code § 1140, et seq.), the Agricultural Labor Relations Board (Board) hereby ORDERS that Respondent H & R Gunlund Ranches, Inc., a California Corporation, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging, laying off, failing to rehire or recall, or otherwise retaliating against any agricultural employee because the employee has engaged in protected concerted activity as defined in section 1152 of the Act; and,

(b) Otherwise interfering with or restraining any employee in the exercise of the rights guaranteed under section 1152 of the Act.

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

(a) Offer seasonal pruning and tying employment from November through February, or substantially equivalent positions if their positions no longer exist, to members of the pruning and tying crew found to have been unlawfully

discharged on November 23, 2009, unlawfully laid off on December 3, 2009, or unlawfully not recalled or rehired in January 2010.

(b) Make whole the agricultural employees who were discharged on November 23, 2009, unlawfully laid off on December 3, 2009, or unlawfully not recalled or rehired in January 2010 for all wages or other economic losses that they suffered as a result of their unlawful discharge, lay off, or failure to be recalled or rehired. The award shall also include interest to be determined in accordance with *Kentucky River Medical Center* (2010) 356 NLRB No. 8 and *Rome Electrical Services, Inc.* (2010) 356 NLRB No. 38.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll 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 request of the Regional Director, records shall be provided in electronic form if they are customarily maintained in that form.

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

(e) Post copies of the Notice, in all appropriate languages, at conspicuous places on Respondent's property, including places where notices to employees are usually posted, for sixty (60) days, the times and places of posting to be

determined by the Regional Director. Respondent shall exercise due care to replace any copies of the Notice which may be altered, defaced, covered or removed. Pursuant to the authority granted under section 1151, subdivision (a) of the Act, give agents of the Board access to its premises to confirm the posting of the Notice.

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

(g) Mail copies of the Notice, in all appropriate languages, within 30 days after the date this Order becomes final or thereafter if directed by the Regional Director, to all agricultural employees employed by Respondent from November 1, 2009, until the date of the mailing of the notice at their last known addresses.

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

(i) Notify the Regional Director in writing, within thirty days after this Order becomes final, of the steps Respondent has taken to comply with its

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

DATED: December 30, 2013

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, 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 that alleged we, H & R Gunlund Ranches, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging, laying off, and failing to rehire pruning and tying employees for protesting a reduction in their piece rate.

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 these 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 Board;
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 do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge, lay off, fail to rehire or otherwise retaliate against employees because they protest about their wages, hours or other terms and conditions of employment.

WE WILL offer the employees who were unlawfully discharged, laid off, or not rehired reinstatement to their former positions of employment, and make them whole for any economic losses they suffered as the result of our unlawful acts.

DATED: _____ H & R GUNLUND RANCHES, INC.

By: _____
(Name of representative, and title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One ALRB Regional Office is located at 1642 West Walnut Avenue, Visalia, CA 93277-5348. The telephone number for this ALRB Regional Office 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

H & R GUNLUND RANCHES, INC.
(Regino Primitivo, et al.)

Case Nos. 2009-CE-063-VIS, et al.
39 ALRB No. 21

Background

On July 1, 2013, Administrative Law Judge Mark R. Soble (“ALJ”) issued a decision in which he found that H & R Gunlund Ranches, Inc. (“Employer”) violated section 1153, subdivision (a) of the Agricultural Labor Relations Act (“ALRA”) by discharging, laying off, and failing to rehire employees who engaged in activity protected by the ALRA, namely, protesting a reduction in the piece rate and later filing charges with the Agricultural Labor Relations Board (“ALRB”). The discharge occurred on November 23, 2009, after members of the pruning and tying crew sought to have the previous year’s piece reinstated after the Employer announced a reduction in the rate. The layoff occurred on December 3, 2009, just one day after the Employer rehired the crew after they filed charges with the ALRB. The failure to rehire occurred in January 2010. The ALJ found an additional unlawful failure to rehire four members of the crew for off-season hourly work that they had performed in previous years. On July 25, 2013, the Employer filed exceptions to the ALJ’s decision, arguing that no violations were proven and that the complaint should be dismissed in its entirety. On August 22, 2013, the General Counsel of the ALRB filed a reply to the Employer’s exceptions.

Board Decision

The Board affirmed the ALJ’s decision that the Employer violated the ALRA by discharging employees on November 23, 2009, laying them off on December 3, 2009, and failing to rehire most of the employees in January 2010, all because they engaged in protected activity. The Board analyzed the record and the findings of the ALJ in light of the established standards for proving unlawful discharges, layoffs, or failures to rehire and found that with regard to these allegations all necessary elements had been proven. However, the Board reversed the ALJ’s finding that four members of the crew were unlawfully denied recall for off-season hourly work. In failure to rehire cases, it must be established that the employees applied for the work and were rejected, or that under an established practice they should have been notified and offered the work but were not. The Board’s review of the record revealed nothing regarding the normative selection process for this work or whether the four individuals asked for that work and were available to do it.

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

H & R GUNLUND RANCHES,	)	Case Nos.	2009-CE-063-VIS
INC., A California Corporation,	)		2009-CE-064-VIS
	)		2009-CE-067-VIS
Respondent,	)		2009-CE-068-VIS
	)		2010-CE-017-VIS
and	)		(Consolidated)
)		
REGINO PRIMITIVO,)		
MARIANO PRIMITIVO,)		
and Others,)		
)		
Charging Parties.)		

Appearances:

For the General Counsel:

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Alegria de la Cruz
Vivian Velasco Paz
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For the Employer:

Spencer H. Hipp
Ryan L. Eddings
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5200 North Palm Avenue, Suite # 302
Fresno, CA 93704-2225

On Behalf of Charging Party Regino Primitivo Gomez:

Felicia Espinosa
Laura Dawn Berumen
California Rural Legal Assistance, Inc.
2115 Kern Street, Suite # 370
Fresno, CA 93721

DECISION OF THE ADMINISTRATIVE LAW JUDGE

This matter was heard before Mark R. Soble, Administrative Law Judge (“ALJ”), State of California, at Spring Hill Suites, 1219 East Almond Avenue, Madera, California 93637, on the ten days of August 27, 28, 29 and 30, 2012, and September 4, 5, 6, 7, 10 and 11, 2012.

ISSUES

1.) Did H & R Gunlund Ranches, Inc. terminate the employment of one or more agricultural workers on November 23, 2009 and, if so, did this comprise an unfair labor practice?

2.) Did H & R Gunlund Ranches, Inc. terminate the employment of one or more agricultural workers on December 3, 2009 and, if so, did this comprise an unfair labor practice?

3.) In January 2010 and thereafter, did H & R Gunlund Ranches, Inc. fail to offer employment to one or more agricultural workers who worked during November and/or December 2009 and, if so, did this comprise an unfair labor practice?

FINDINGS OF FACT

A. Jurisdiction.

The charges were timely filed and served. During all relevant times, H & R Gunlund Ranches, Inc. (hereafter “employer” or “respondent”) was an employer within the meaning of California Labor Code section 1140.4, subdivision 1140.4, subdivision (c).

B. Unfair Labor Practices Complaint(s) and Answer(s).

On December 17, 2009, the General Counsel filed a consolidated complaint, which alleged the following:

1. On November 23, 2009, when a group of pruning and tying agricultural workers sought an increase in pay, the employer terminated those workers; and,
2. On December 3, 2009, the employer again terminated those workers, just one day after having rehired them on December 2, 2009; and,
3. Since that time, employer has failed to rehire these workers; and,
4. That employer's true motive for terminating and failing to rehire these workers is the workers' engagement in protected concerted activity and/or the workers' filing of unfair labor practice charges with the Agricultural Labor Relations Board ("ALRB").

On April 4, 2012, the General Counsel filed a second amended consolidated complaint which indicated that there were approximately sixty-two workers in the pruning and tying crew described above.

On July 20, 2012, the employer filed an amended answer to the second amended consolidated complaint. In this amended answer, employer concedes that the following persons were supervisors within the meaning of California Labor Code section 1140.4, subdivision (j):

- | | | |
|----|-------------------------|--------------------------|
| 1. | Russell Gunlund | Company president |
| 2. | Gerald ("Gere") Gunlund | Company vice president |
| 3. | Manlio Moreno | Company ranch foreperson |
| 4. | Manuel Serna | Company field supervisor |

At hearing, there was also undisputed evidence that Lance Gunlund served as a company vice president. Russell Gunlund is the father of both Gerald Gunlund and Lance Gunlund.

C. Witness Testimony, Credibility and Demeanor.

1. Background and witnesses

In November and December 2009, the employer owned about six hundred and forty acres of land. (5 RT 985:7-12 and 7 RT 1376:5-7) The company grew both grapes and almonds. The crew in question handled the pruning and tying of grapes.

Russell Gunlund (hereafter “Russell”, to distinguish among multiple family members with the last name of Gunlund) was president of the company. (5 RT 982:21-23) At all pertinent times, Lance Gunlund (“Lance”) was one of the vice presidents of the company. (5 RT 982:24-983:2 and 9 RT 1976:23-1977:3) At all pertinent times, Gerald Gunlund (“Gerald”) was an officer of H & R Gunlund Ranches. (5 RT 980:12-19) Gerald became vice president of the company in 1992 and his responsibilities progressively increased in the years that followed. (7 RT 1373:21-1374:18) Gerald was also known as “Gere”. Gerald was in charge of the vineyards, and Lance was in charge of the trees. (9 RT 1984:25-1985:9)

In 2009, Chalene Gunlund served as the trustee for the company’s pension plan. (9 RT 1962:20-24.)

For the past twenty years, Manlio Moreno (hereafter “Manlio”, as other workers share his last name) has been Gerald Gunlund’s brother-in-law. (2 RT 292:3-10, 5 RT 1039:16-17 and 6 RT 1140:4-9) Manlio Moreno started working for Gunlund in August 2009. (6 RT 1223:21-23) In October 2009, Moreno’s became the ranch foreman and served as Gerald Gunlund’s right-hand man. (6 RT 1233:20-1234:10) To some of the field workers, Manlio Moreno was also known as “Elias”. (5 RT 911:14-16)

Field supervisor Manuel Serna started working for Gunlund in 1989 or before. (2 RT 279:7-18) Serna had the authority to hire workers, but he did not have the authority to discipline or fire workers. (2 RT 282:12-19)

In November 2009, Christopher Frith worked for Gunlund, as a tractor driver and doing equipment maintenance and cleanup. (4 RT 774:3-15) Frith now works as a supervisor for Gunlund. (4 RT 774:16-19)

Field worker Regino Primitivo Gomez (hereafter “Regino”, as other workers share his last name) started working for Gunlund in 2006. (Court Reporter’s Transcript, volume one, at page eighty-two, lines 10-17, hereafter abbreviated as 1 RT 82:10-17) Regino has nine years of experience pruning grape vines. (1 RT 51:12-14) His wife, Marisela Bautista Martinez, also worked for Gunlund. (1 RT 160:11-13, 1 RT 161:18-162:4 and 2 RT 248:16-18)

Field worker Mariano Primitivo (hereafter “Mariano”, as other workers share his last name) started working for Gunlund in November 2004. (3 RT 501:9-10) His wife Natalia Lopez Ordaz also worked for Gunlund. (3 RT 501:11-16)

Field worker Pedro Martinez started working for Gunlund in 2005. (4 RT 790:1-3) Martinez speaks both Spanish and Triqui. (4 RT 816:6-15) More than twenty members of his crew spoke Triqui. (4 RT 816:24-817:1) His wife, Jacinta Martinez, also worked for Gunlund. (4 RT 790:6-10)

Field worker Valentin Patricio Lopez started working for Gunlund in 2005. (5 RT 895:24-896:1) His father also worked for Gunlund. (5 RT 897:14-21)

In November 2009, Silas Shawver and Ephraim Camacho were employees of California Rural Legal Assistance (“CRLA”). In November 2009, Shawver worked for CRLA and was based in their Fresno office. (9 RT 1993:18-20) Shawver now works for the ALRB as an Assistant General Counsel and Acting Regional Director. In November 2009, Camacho was a community worker for CRLA. (4 RT 678:11-25)

Jaime Sandoval is a cameraman and editor with Univision television group. (3 RT 615:12-25) Sandoval filmed one or more television segments related to this matter, but the undersigned did not rely upon those television segments in reaching this decision.

2. Pruning and tying of grapes

Pruning and tying is typically done during the month of November through the month of February. (1 RT 70:25-71:2, 3 RT 502:3-9 and 7 RT 1382:7-9)

Regino testified that pruning the vines increases the production of quality grapes. (1 RT 70:13-18) Regino removes the dead vines that are typically brown or black, and ties approximately eight of the good canes to a horizontal wire system. (1 RT 49:23-50:2, 1 RT 50:25-51:4 and 1 RT 63:23-64:1) The pruners used scissors or shears that were approximately fourteen inches long and normally wore long-sleeved shirts and gloves to avoid getting cut by branches or stung or bitten by insects. (1 RT 78:19-79:6 and 1 RT 79:14-80:10) Regino typically worked in a row that had one hundred and eight grape vines, and was able to complete approximately one full row per day. (1 RT 85:4-11)

Workers are paid by the number of vines that he prunes and ties (e.g., piece rate), as opposed to receiving hourly wages.¹ (1 RT 68:9-11 and 3 RT 502:22-24) All of the workers were always paid at an identical piece rate to each other. (3 RT 520:23-25) The completed rows are recorded on a small card. (1 RT 13-86:2) There was no evidence presented that the company terminated any of the pruning and tying crew members for job performance reasons.

There was a slight divergence among witnesses as to the typical hours worked by the pruning and tying crew. Pedro Martinez testified that the crew typically worked six days a week from approximately 7:00 a.m. to 4:00 p.m., and at least forty hours per week. (4 RT 857:4-22 and 4 RT 862:9-14) The crew would work from sunrise to sunset, which was approximately sixty hours. (4 RT 858:15-859:25) Valentin Patricio Lopez testified that the crew typically worked from 6:30 or 7:00 a.m. until 5:00 p.m., taking a twenty to thirty minutes lunch break. (5 RT 901:21-903:6 and 5 RT 927:10-18) Gerald Gunlund testified that the pruning and tying of grapevines would start when there was enough sunlight to see and would end by 4:30 p.m. (7 RT 1389:5-18 and 7 RT 1391:1-15)

For the reasons discussed *infra*, any discrepancy in the typical work hours is not necessary to determine whether or not an unfair labor practice occurred. However, it does appear common that the workers worked as much as nine hours per day, six days per week.

¹ Both Mariano and Valentin Patricio Lopez also testified that they were paid based upon the number of vines that they prune and tie (e.g., piece rate), as opposed to receiving hourly wages. (3 RT 502:22-24 and 4 RT 896:2-7)

3. Shortly after the pruning and tying season commenced in November 2009, field workers heard rumors that the company would reduce the piece rate paid for pruning and tying grape vines

For calendar year 2009, the pruning and typing work started on November 16, 2009. (3 RT 507:3-5) Both Regino and his wife worked during November 16-22, 2009. (1 RT 175:4-12) During that week, he and his wife worked approximately 53-54 hours. (1 RT 157:5-11 and 1 RT 161:5-9) In November 2009, Manuel Serna was his foreman. (1 RT 92:12-19) In November 2009, Serna told Regino that the piece rate for pruning and typing would be twenty-five or twenty-six cents. (1 RT 96:13-18 and 1 RT 97:6-13) Regino then heard from some of his coworkers that the piece rate would be reduced down to fifteen cents. (1 RT 97:24-98:2)

4. Saturday, November 21, 2009

Regino and his coworkers spoke to Serna on Saturday morning, November 21, 2009, and Serna told them that he did not know anything about a change in the piece rate. (1 RT 99:13-18) Serna told them that he would talk to Gerald Gunlund and get back to them on Monday. (1 RT 99:19-24)

Later in the day, the crew spoke with Manlio Moreno and Gerald Gunlund. Pruning and typing crew workers told Manlio, in the presence of Gerald Gunlund, that they wanted the previous year's piece rate. (6 RT 1273:7-1276:7) Manlio told the workers that the piece rate would be twenty cents, also in Gerald's presence. (6 RT 1277:4-11 and 8 RT

1715:9-1717:12) Shortly thereafter, Manlio confirmed the rate with Gerald, who was standing next to him, and repeated the company's position to the workers. (6 RT 1277:12-1279:15) The field workers then finished their work for Saturday. (1 RT 99:25-100:3) The workers typically did not work on Sundays. (1 RT 100:19-23)

5. Company's purported reason for the change in piece rate

Gerald stated that before the company lowered the pruning and tying piece-rate in November 2009, Manlio did some timed pruning and tying to make sure that workers could make the minimum wage under the new rate. (6 RT 1184:4-9, 6 RT 1188:9-13, 6 RT 1190:4-18, 8 RT 1689:11-25 and 8 RT 1692:7-24) Gerald stated that the company did not consider lowering the rates until after the results of Moreno's time-trials.² (6 RT 1178:17-1179:2) The time-trials involved timing Manlio on a single occasion for a three-hour time period.³ (8 RT 1693:25-1694:4) In fact, prior to the time trials, Gerald testified that he did not have a preconceived idea as to whether the piece-rate might be going up or down. (7 RT 1393:5-8 and 8 RT 1693:18-21) Gerald conceded that none of the workers were told about the time-trials in connection with the announcement of the lowered piece-rate. (6 RT 1179:3-12)

² However, the testimony of ranch foreperson Manlio Moreno contradicted this testimony. Manlio testified that the trials were conducted to see what piece-rate was required in order for the company to pay the minimum wage. (6 RT 1241:18-1242:1 and 6 RT 1246:18-20)

³ The company did not introduce any testimony as to whether it considered whether work could be completed faster if a worker did not have to pace himself for a workday that was longer than three hours. The company also did not introduce any plausible testimony as to why they did not simply look at the median and average piece-rate totals for members of the pruning and tying crew in the preceding year. (8 RT 1698:16-23 and 8 RT 1699:14-19) As a result, I found both Gerald and Manlio's testimony on this subject to be unpersuasive.

6. Monday, November 23, 2009

a. Manlio Moreno reaffirmed the company's position

On Monday, November 23, 2009, the Pruning and tying crew arrived for work, dressed in work clothes and ready to start. (1 RT 100:7-8, 1 RT 101:22-102:2, 1 RT 102:10-11 and 1 RT 126:4-7) The workers asked Manlio Moreno (who some of them knew as Elias) about the piece rate. (1 RT 102:15-17) Manlio reaffirmed that the piece rate would be fifteen cents for pruning and twenty cents for both pruning and tying. (1 RT 104:14-20) The workers were unhappy with this change, as it was six cents less per piece than what had been paid the previous year. (1 RT 105:10-23) The workers then stood around, hoping that the company would change its mind. (1 RT 109:20-24)

b. Manlio Moreno spoke with Silas Shawver

i. Manlio Moreno's version of the conversation with Shawver

On Monday morning, November 23, 2013, Manlio saw in the field a husky redheaded man with whom he was unfamiliar.⁴ (6 RT 1295:4-20 and 6 RT 1290:18-1291:3) Manlio spoke to the man who first responded in “broken” Spanish and later started responding in English. (6 RT 1296:8-16) Shawver asked Manlio for the owner's telephone number. Manlio states that he told Shawver that he did not have the owner's telephone number, a

⁴ Based upon a preponderance of the evidence, namely the testimony of both Manlio and Shawver, it appears that the person described by Manlio was in fact Shawver. (6 RT 1301:12-20 and 9 RT 2010:11-2013:24)

statement which Manlio testified at hearing was a truthful statement at the time. (6 RT 1303:14-18 and 6 RT 1297:1-24)

Manlio testified that he then drove to the company office to get Gerald's telephone number and came across Lance Gunlund in the office. (6 RT 1304:12-14) Manlio told Lance that there was a crowd of workers that wanted to get paid last year's piece rate and that Lance told him to go ahead and pay the previous year's piece-rate. (6 RT 1304:22-1306:13) Manlio then reached Gerald and told him what Lance had said, and Gerald told Manlio to go ahead and give the workers the previous year's piece rate and to make it retroactive to the start of the season. (6 RT 1306:23-1307:5) Manlio states that he then communicated that information to Shawver the same day. (6 RT 1307:6-12 and 6 RT 1308:12-17) Manlio also told the same information to the Cortez brothers. (6 RT 1310:10-15)

Manlio testified that he did not tell Shawver that the workers were fired. (6 RT 1319:23-25) Nor did Manlio tell any crew members that they were fired. (6 RT 1320:7-9) Manlio further testified that Shawver stated that the workers wanted to get paid immediately, but that Manlio told him the best that he could do was to have checks available the next morning. (6 RT 1307:12-16) Manlio also explained that, in 2009, the payroll information was typically submitted to their bookkeepers on sometime between Sunday afternoon and early Monday morning. (6 RT 1326:22-1327:25) For that reason, the payroll data for the previous week had already been submitted by the time Manlio returned to the office on Monday morning, November 23, 2013, resulting in a need for the company to generate a second check for the difference in the before and after piece-rate. (6 RT 1328:19-1330:16)

ii. Shawver’s version of the conversation with Manlio Moreno

Shawver spoke with a company supervisor⁵ who said the company was offering the workers a piece rate of twenty cents for pruning and tying work. (9 RT 2010:5-12 and 9 RT 2011:23-2012:7) Shawver claims that he also asked the supervisor a leading question, “So you’re firing these workers?” and that the supervisor nodded his head and then left.⁶ (9 RT 2014:7-18)

iii. Shawver’s testimony is credited and Moreno’s version is not

I did not find Manlio to be a credible witness. His claim of having offered the twenty-five cents piece rate to the pruning and tying workers is not credible. Had Manlio made this offer, the workers would have had little motive to continue their protest later in the day. Further, had Manlio made such an offer, the company would not have needed to pay the workers the next day. (3 RT 540:9-19) Moreover, the company would have expected the workers to show up the next day and would have set up the field with the bathrooms for the workers, etc. (6 RT 1286:21-23) Gerald did not know if the company set up the bathrooms for the workers on Tuesday, November 24, 2009, or Wednesday, November 25, 2009. (8 RT 1726:23-1727:4) The company would not have taken water and bathrooms out to the fields if they did not expect any workers to show up. (8 RT 1727:25-1728:1)

⁵ Based upon a preponderance of the evidence, I find that this conversation did occur and that the identity of the supervisor in question was Manlio Moreno.

⁶ While Shawver was a creditable and even highly persuasive witness for most of his testimony, Shawver appeared more hesitant when describing this exchange between him and Moreno. For reasons discussed *infra*, the alleged unfair labor practice does not turn on whether Shawver spoke that precise phrase, nor does it turn on whether Moreno thereafter nodded or not.

If Manlio's testimony is to be credited, he told the workers that they could have exactly what they requested, namely the previous year's piece rate for pruning and tying grape vines, but that the workers then continued to protest and disperse even after being victorious in their negotiations. Manlio did not give any plausible explanation as to why the workers failed to resume their duties.

In contrast, Shawver's version is much more consistent with the subsequent actions of the workers and company officers, and is thus credited.

c. Russell Gunlund drove by and told the workers that they were fired

Later that day, Russell Gunlund arrived. (1 RT 110:6-10) Russell talked to Manuel Serna. (1 RT 110:8-12) Regino heard Russell say "Fuck you people" and gestured for the workers to go home. (1 RT 110: 8-23 and 1 RT 112:7-10) Shawver also heard one of the ranch owners state that the field workers were fired.⁷

Shawver testified that when Russell Gunlund arrived at the location of the workers, Russell was very angry and belligerent. (9 RT 2019:13-2020:7) Shawver explained to Russell his understanding that Manlio had just fired the workers, to which Russell responded, "Okay, then they're fired." (9 RT 2026:7-21)

⁷ Based upon a preponderance of the evidence, I find that this conversation did occur and that the identity of the owner in question was Russell Gunlund. While neither party called Russell Gunlund as a witness, Shawver did see Russell Gunlund at the hearing and identified him as likely being the same person. (9 RT 2044:11-14 and 9 RT 2046:6-16)

d. Russell Gunlund and/or his subordinates called the CHP and local Sheriff to remove the pruning and tying crew

i. Regino Primitivo Gomez' testimony

Shortly thereafter, the California Highway Patrol ("CHP") drove by. (1 RT 116:2-4) The workers explained to the CHP officer that they were asking their boss for a raise and the officer left. (1 RT 119:17-22, 1 RT 120:7-8 and 3 RT 531:3-5) About an hour later two representatives from California Rural Legal Assistance ("CRLA") arrived. (1 RT 121:1-11) After that, at around 9:00 a.m., Russell returned along with a uniformed Sheriff. (1 RT 121:16-25, 1 RT 133:4-14 and 1 RT 135:10-14) Russell and the Sheriff talked and then the Sheriff then asked the workers to show him identification. (1 RT 131:1-5 and 1 RT 133:7-9) The workers then left and went to a park in Caruthers at around 9:30 a.m. or 10:00 a.m. and were later met by ALRB staff. (1 RT 132:13-18, 1 RT 135:17-25 and 1 RT 141:5-6) Media and union personnel also visited them at the park. (1 RT 139:22-140:14 and 3:547:23-548:1)

ii. Christopher Frith's testimony

In November 2009, Frith worked for Gunlund, as a tractor driver and doing equipment maintenance and cleanup. (4 RT 774:3-15) Frith now works as a supervisor for Gunlund. (4 RT 774:16-19) In November 2009, he called the Sheriff's Office and told them that the pruning and tying workers were trespassing. (4 RT 773:5-9 and 4 RT 774:22-25) Frith stated that "he did not remember" whether or not Russell Gunlund was present when he made the telephone call to the Sheriff. (4 RT 784:5-7) Frith first stated that he did not recall whether he told any of the Gunlund managers or supervisors that he had called the sheriff, but later admitted to telling supervisor Manlio Moreno within the hour. (4 RT 776:18-777:10)

Frith also admitted to later telling owner Russell Gunlund that he had told the Sheriff. (4 RT 781:3-5)

I did not find Frith to be a credible witness. Before calling the Sheriff, it would have been very easy for Frith to check with his supervisor, Manlio Moreno, or with one of the owners, with whom his family had been long-time friends. Frith was evasive in his answers as to whether and when he discussed the call with Moreno and Russell. Russell himself managed to arrive on the scene at almost the same time as the Deputy Sheriff. And Russell himself did not take the stand. Under the circumstances, based upon the preponderance of the evidence, I conclude that either Moreno or Russell was present when Frith called the Sheriff, or alternatively that he conferred with them either before or immediately after his telephone call.

iii. Ibrahim Hilal's testimony

Ibrahim Hilal is a farmer. (10 RT 2095:15-18.) Hilal sometimes goes to have breakfast and/or visit with the Gunlund family. (10 RT 2096:2-8) On one day, Hilal was riding with Russell Gunlund (Gerald's father) in Russell's pickup truck. (10 RT 2095:24-2097:15) Hilal saw more than fifty workers on strike. (10 RT 2101:8-12 and 10 RT 2097:15-19)

Hilal testified that either Russell or Christopher called the CHP and the Sheriff, and that he was there when the Sheriff arrived. (10 RT 2124:22-2125:19) Hilal later added that Russell called the CHP and that since result that didn't satisfy Russell, then Christopher or both of them called the Sheriff. (10 RT 2132:2-23) Hilal was sure that Russell knew that the Sheriff was coming in advance and recalled Christopher telling Russell that the Sheriff would be coming. (10 RT 2132:24-2133:15)

iv. Silas Shawver's testimony

Shawver testified that shortly after the ranch owner arrived, a Fresno County Deputy Sheriff arrived at the scene. (9 RT 2020:9-15) The owner, the Deputy Sheriff and Shawver then had a three-way conversation in English. (9 RT 2024:7-24) During that conversation, the owner stated that the workers were fired and he asked the Deputy Sheriff to remove the workers from his property, stating that the workers were trespassing. (9 RT 2026:3-21 and 9 RT 2028:22-2029:7) The Deputy Sheriff then asked the workers for identification and Shawver, Camacho and the workers left for a park in Caruthers. (4 RT 718:3-7 and 9 RT 2029:10-2030:24)

Accordingly, the undersigned finds, on Monday, November 23, 2009, Russell Gunlund told the field workers that they were fired and additionally called (or directed a subordinate employee to call) law enforcement authorities to have the workers removed from his company's property.

7. The pruning and tying crew resumes work on December 2, 2009

Regino testified that the workers resumed their positions starting on December 2, 2009. (1 RT 141:12-14) Regino learned that they could come back to work from ALRB staff. (2 RT 248: 8-12) The workers were told that they would be paid at the earlier twenty-six cents piece rate. (1 RT 141:15-21)

Mariano gave similar testimony in this regard. ALRB agent Rey Val Verde told Mariano that he could go back to work on December 2, 2009. (3 RT 594:10-19) When Mariano came back to work on December 2, 2009, Manlio Moreno told him that the pruning and tying rate would be twenty-six cents. (3 RT 563:9-21)

8. The pruning and tying crew was laid off on December 3, 2009

According to Regino, after working for the two days of December 2-3, 2009, the workers were told that by the company that they would be called back to work around January 15, 2009. (1 RT 142:5-10) At that juncture, Regino knew that the company had pruning and tying work remaining for the workers to complete. (1 RT 142:13-20)

Similarly, according to Mariano, on December 3, 2009, Manlio Moreno told them that the work was done because the rancher was not going to be around and that he would call the workers in January. (3 RT 567:1-14) Mariano knew that as of December 3, 2009, there were still fields left that needed pruning and typing. (3 RT 569:8-21)

After Manlio Moreno told Pedro Martinez that there was no more work, Martinez, his wife, and other crew members, later saw farm labor contractor employees doing the pruning and tying of grapes during the months and in the fields normally handled by his crew. (4 RT 822:18-21, 4 RT 832:4-833:12, and 4 RT 842:3-843:12)

Valentin Patricio Lopez gave similar testimony. He testified that Manlio Moreno told the workers on December 3, 2009 that the season had ended, that the boss was going on vacation, and that he would call them when there was more work. (5 RT 934:1-4) On December 3, 2009, Lopez saw other fields needing pruning and typing that had typically been handled by his crew. (5 RT 934:12-22)

9. Employer's purported explanation for the December 3, 2009 layoffs

When the workers came back on December 2, 2009, Gerald already knew that he was not going to be keeping them for more than a day or two, yet he declined to tell them until the day that the crew was let go. (6 RT 1148:9-20 and 8 RT 1747:14-22) By the time the

workers came back on December 2, 2009, Gerald also knew that some of them had filed charges with the ALRB, and was not happy about it. (6 RT 1167:21-1168:7 and 6 RT 1174:9-19)

Gerald was gone from his ranch for three weeks starting on December 10, 2009. (6 RT 1157:5-9) This time period included two days when Gerald was in Fresno for a surgical procedure. (9 RT 1919:2-16) At that time, Manlio Moreno, Alfredo Moreno and Roberto Moreno all worked as either foreperson or field supervisors on his ranch.⁸ (6 RT 1195:17-25) Alfredo and Roberto had been field supervisors for Gunlund for at least five years and did at least some work during those five years with the pruning and tying crew. (6 RT 1196:1-23) Alfredo and Roberto supervised the pruning and tying crew on the day and a half that they worked during December 2-3, 2009.⁹ (7 RT 1410:2-8) Gerald's father, Russell, and his brother, Lance, were also at the ranch during those three weeks, though Gerald indicated that Lance was busy during that time period and Russell had no desire to supervise a crew. (6 RT 1152:5-1163:17)

Gerald testified that there were three different reasons why the crew was let go on December 3, 2009. (6 RT 1146:22-1147:22) First, Gerald said that the company was working on a process to track employee hours to comply with the Labor Commissioner. (6 RT 7-11 and 8 RT 1777:25-1778:8) Second, Gerald said that some of the workers had given the

⁸ Alfredo Moreno and Roberto Moreno are not related to Manlio Moreno. (6 RT 1198:4-8) Roberto Moreno is now deceased. (6 RT 1242:18-21)

⁹ Manlio Moreno testified that in January and February 2010, the pruning and tying crew was supervised by Alfredo Moreno, Roberto Moreno and Blaz Vega, and that Manlio oversaw the three supervisors. (7 RT 1490:10-23)

field supervisors a “bad time” on the first day that they returned. (6 RT 1147:10-13) Third, Gerald stated his wife saw workers near their home and that the next field to prune would have been nearby the house. (6 RT 1147:13-17)

Gerald was not persuasive with respect to the Labor Commissioner rationale. Starting on December 2, 2009, the company used a sign-in sheet which kept track of worker hours. (6 RT 148:25-1149:6 and 7 RT 1593:8-15; General Counsel’s exhibit number 34) With respect to Gerald’s second rationale, his testimony was not specific enough to convince the fact-finder that the workers’ actions rose to a level to make the layoff anything other than a pretext. Nor was the third rationale persuasive. Gerald did not testify that there were no fields slightly further from his house available for the crew to do pruning and tying.¹⁰

On December 3, 2009, there were hundreds of acres of grapevines remaining that needed to be pruned and tied. (5 RT 1062:7-20) In December 2009, the company used a farm labor contractor crew to do pruning and tying. (8 RT 1748:15-23) Gerald testified that one of the reasons for using more farm labor contractor workers during the season starting in November 2009 was because he wasn’t there for a few weeks in December 2009. (5 RT 1069:18-1070:15) In December 2009, Gunlund paid farm labor contractors a piece rate of 49.4 cents for pruning and tying grapevines, which includes a piece rate of thirty-eight cents plus an additional commission of 11.4 cents. (5 RT 1068:5-16 and 5 RT 1072:4-7) For the season starting in November 2009, Gerald conceded that the company used more farm labor contractors than during the previous season. (5 RT 1068:17-1069:9)

¹⁰ Gerald did testify that he was usually the person who decided which field to prune next. (8 RT 1725:20-1726:1)

10. Company action with respect to the pruning and tying crew in January 2010 and thereafter

Regino testified that he was not called back to work in January 2010 or thereafter as he had been told would occur. (1 RT 142:11-12) I found Regino to be a credible witness.

Mariano also testified that no one from the company ever called him to return to work after December 3, 2009. (3 RT 569:24-570:7) I found Mariano to be a credible witness.

Pedro Martinez also testified that neither Manlio Moreno nor other company employees in January 2010 or thereafter ever called him offering work. (4 RT 836:13-20) I found Pedro Martinez to be a credible witness.

Similarly, Valentin Patricio Lopez testified that Manlio Moreno never called him to come back to work in January 2010 or thereafter. (5 RT 935:24-936:1) I found Valentin Patricio Lopez to be a credible witness.

Gerald testified that he directed Manlio to contact the direct hire workers upon his return to the farm in approximately late December 2009 or the first part of January 2010. (6 RT 1158:15-1159:23) Gerald indicated that he left it to Manlio's discretion which workers that he contacted. (8 RT 1779:13-22) Gerald did not tell Manlio not to discriminate against workers who had previously complained about their wage rate. (8 RT 1790:5-8) Gerald testified that his company did not have any records showing that Manlio attempted to contact the pruning and tying workers. (6 RT 1163:1-11) Respondent's exhibits 22, 24 and 26 show direct-hire workers who did pruning and tying in late December 2009 and early January 2010. (9 RT 1864:17-1867:3)

Manlio testified that sometime after December 3, 2009, Gerald told him to contact as many of the pruners as possible. (7 RT 1438:16-1439:10) Manlio testified that he called at least a dozen workers. (7 RT 1440:1-25) In December 2009, approximately between the 10th and 24 days of the month, some calls were made from the office telephone, and other calls were made from his cellular telephone. (7 RT 1452:6-10, 7 RT 1577:13-14 and 7 RT 1579:4-23) Manlio did not attempt to call any of the workers in months other than December 2009. (7 RT 1577:16-24) Manlio did not keep track of who he called and he did not follow up if a worker did not answer following his initial call. (7 RT 1586:1-10) In total, Manlio called fifteen to twenty of the pruning and tying workers, typically calling between 10:00 a.m. and 2:00 p.m. during the work day, reaching “several” of them. (7 RT 1586:11-15 and 7 RT 1582:15-1583:8)

Manlio stated that one of the workers that he called was Mariano Primitivo. (7 RT 1440:9-16 and 7 RT 1580:10-1582:16) The company did not send letters to any of the workers. (7 RT 1448:9-14 and 7 RT 1589:3-9) Manlio did not ask Gerald how the company communicated with the workers in order to get them back for work on December 2, 2009. (8 RT 1654:17-21) Nor did Manlio try to contact the ALRB or CRLA to communicate with the workers. (7 RT 1453:18-24)

The undersigned credits Mariano’s testimony that Manlio did not telephone him to offer work after December 3, 2009. Based upon a preponderance of the evidence, Manlio Moreno does appear to have brought back a handful of the employees from the pruning and tying crew with whom he was personally most comfortable.

11. Ascertaining which workers were members of the pruning and tying crew during the pertinent time periods

a. The undersigned found the typed “records” of Manuel Serna to be unreliable

Manuel Serna testified that he had maintained handwritten notes that he took in 2009 to keep track of which workers were doing pruning and tying for Gunlund, but that he threw out his handwritten notes about a month before the hearing. (2 RT 329:19-25) Serna later stated that he may have “burned” his handwritten notes rather than throwing them out. (2 RT 448:3-15 and 2 RT 450:14-18) Serna claimed that he typed up this list on his computer contemporaneously because he might otherwise “lose” his handwritten version. (2 RT 339:6-8) At the hearing, Serna stated that he was unable to read parts of the typewritten documents because his glasses broke two days before the hearing. (2 RT 472:21-23)

I did not find Serna to be a credible witness and in reaching this decision I did not rely upon Serna’s purported typed records.

b. The parties agree that employer’s records show approximately seventy pruning and tying workers during November 16-23, 2009

In their respective post-hearing briefs, the parties agree that the following sixty-seven workers were members of the pruning and tying crew during November 16-23, 2009.

Based upon the undersigned’s review of employer’s records, those workers include the following:

1. Francisco Altahua
2. Herasmo Altahua

3. Adam Sanchez Betancourt
4. Alfredo Panzo Calihua
5. Eliseo Panzo Calihua
6. Ernesto T. Calihua
7. Pedro Tehuintle Calihua
8. Ermi Lopez Castro
9. Agraciano Chamorro
10. Pablo Chavez
11. Irvin Uriel Ruiz Cortes
12. Carlos Cruz Cortez
13. Miguel Olivares Cortez
14. Agustin Cortez Cruz
15. Margarita Ramirez Cruz
16. Fernando M. De Jesus
17. Apolinar Primitivo Gomez
18. Regino Primitivo Gomez
19. Guadalupe Gonzalez
20. Hector Gonzalez
21. Zeferino Gonzalez
22. Jacinta Rojas H.
23. Manuel Ramirez Herrera
24. Amelia Ruiz Jimenez

25. Fausto Tiburcio Jimenez
26. Guillermo Cortes Jimenez
27. Natividad Martinez Jimenez
28. Jacinta Martinez Lopez
29. Hilario Hernandez M.
30. Alfonso Primitivo Martinez
31. Eugenia Lopez Martinez
32. Faustino Regino Martinez
33. Juliana Martinez
34. Macario P. Martinez
35. Mariano Primitivo Martinez
36. Maricela Bautista Martinez
37. Mario Patricio Martinez
38. Regina Lopez Martinez
39. Santa Rejin Martinez
40. Zeferino Porfirio Martinez
41. Adriana Mendoza
42. Luis Mendoza
43. Adelina Bautista Merino
44. Teresa Bautista Merino
45. Javier Cruz Nicolas
46. Enedino de Jesus Olivares

47. Natalia Lopez Ordaz
48. Afor Panzo Panzo
49. Pedro Martinez Primitivo
50. Jose Juan Perez Quezadas
51. Eduardo Chavez Quintero
52. Jose Samudio R.
53. Natalia Bernardos Ramires
54. Andres Ramirez
55. Ignacio Hernandez Regino
56. Roberto Hernandez Regino
57. Juan Hernandez Rodriguez
58. Susano Meza Rodriguez
59. Sergio Quiahua Sanchez
60. Antonio Cortes Santiago
61. Benito Cortes Santiago
62. Miguel Cortes Santiago
63. Jose F. Morales Serrano
64. Samuel Temoxtle T.
65. Aaron Tehuyntle Temoxtle
66. Omar Tiburcio
67. Adelaido Q. Zoquitecah

12. Witness testimony supports the addition of two names to the pruning and tying crew during November 16-23, 2009

Witness testimony also supports the conclusion that Valentin Patricio Lopez and Erika Primitivo Rojas were part of the pruning and tying crew during November 16-23, 2009. (5 RT 908:19-913:12 and 3 RT 531:3-532:3) The witness testimony is bolstered by the sign-in sheets for December 2-3, 2009, which show both Valentin Patricio Lopez and Erika Primitivo Rojas working on both of those two days. (General Counsel's Exhibit No. 34, pages bates-stamped HR008457 and HR008460)

There was insufficient witness testimony or credible documentary evidence to add further persons to the list of pruning and tying employees that worked during November 16-23, 2009.

13. Prior to November 2009, the employer had offered off-season employment to certain members of the pruning and tying crew

Prior to November 2009, the employer had retained at least four members of the pruning and tying crew to do other off-season hourly work.

In March and April, Mariano was one of maybe a dozen workers who worked for \$8.00 per hour weeding around grape vines, fixing stakes, and tying almond trees. (3 RT 580:1-581:5) Company records also indicate that Regino Primitivo, Apolinar Primitivo and Natalia Ordaz Lopez (Mariano's spouse) had also done hourly work for the employer in Spring 2008 and Spring 2009.

14. According to company records, approximately 18 of these 69 workers were employed by the company on or after January 1, 2010

According to company records, the following eighteen members of the pruning and tying crew worked for the employer on or after January 1, 2010:

1. Adam Sanchez Betancourt
2. Ernesto T. Calihua
3. Pedro Tehuintle Calihua
4. Pablo Chavez
5. Guadalupe Gonzalez
6. Hector Gonzalez
7. Fausto Tiburcio Jimenez
8. Guillermo Cortes Jimenez
9. Juan Hernandez Rodriguez
10. Susano Meza Rodriguez
11. Sergio Quiahua Sanchez
12. Antonio Cortes Santiago
13. Benito Cortes Santiago
14. Miguel Cortes Santiago
15. Samuel Temoxtle T.
16. Aaron Tehuyntle Temoxtle
17. Omar Tiburcio
18. Adelaido Q. Zoquitecah

15. The employer used higher-costing farm labor contractor employees to partially make up the work lost by the layoff of the pruning and tying crew

Shortly after releasing the pruning and tying crew, the employer retained farm labor contractor workers to prune its grapevines. (General Counsel's Exhibit No. 22, pages bates-stamped HR012857, HR012850 and HR012851) In 2007, the employer used significantly less farm labor contractor workers and, in 2008, the company did not use farm labor contractor workers at all for pruning and tying of grape vines.

When factoring in both the piece-rate and the commission, in December 2009 and January 2010, the employer paid the farm labor contractors between fifty percent and one hundred percent more than they had previously paid their direct-hire pruning and tying crew. (General Counsel's Exhibit No. 22, pages bates-stamped HR012857, HR012850 and HR012851) Clearly, the pruning and tying work existed at that time and, clearly, at that juncture, the employer was motivated by factors other than getting the lowest possible piece rate.¹¹

¹¹ Gerald Gunlund testified that the farm labor contractor workers were used only on fields requiring some grape stake and/or cross-arm repair. (8 RT 1749:6-21) Based upon a preponderance of the evidence, the undersigned finds that that explanation to be unpersuasive given the sudden spike in farm labor contractor worker usage immediately after the layoff of the pruning and tying crew.

ANALYSIS AND CONCLUSIONS OF LAW

- A. The employer committed an unfair labor practice on Monday, November 23, 2009 when Russell Gunlund fired the workers and called law enforcement to have the workers removed from his property**

The employer committed an unfair labor practice on Monday, November 23, 2009 when Russell Gunlund fired the workers and called law enforcement to have the workers removed from his property.

On Monday morning, November 23, 2009, most of the pruning and tying crew stopped working in an attempt to induce their employer to restore the previous year's piece rate. This type of withholding of labor is sometimes referred to as an economic strike. This is protected concerted activity pursuant to California Labor Code section 1152. *Royal Packing Co.* (1982) 8 ALRB No. 16, pp. 2-3.

Russell Gunlund knew that the pruning and tying crew was seeking better wages when he told the workers that they were fired. In addition to the knowledge of other supervisors that might be imputed to him, the situation was described by Silas Shawver directly to Russell Gunlund. There can be no doubt that the workers understood that Russell Gunlund had fired them. In particular, Silas Shawver credibly testified that Russell Gunlund told him that the workers were fired. As a result, there is no need to dissect the nuances of Russell's profanity and gestures, as was done in *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4, p. 16.

It was clearly the workers' protected activity itself that motivated Russell Gunlund to fire the pruning and tying crew. *See Miranda Mushroom Farm, Inc. et. al.* (1980), 6 ALRB No. 22 (direct evidence includes expression of anger by a supervisor to the protected activity). In the instant case, Russell Gunlund was angry and requested multiple law enforcement agencies to have the workers removed from his property. The employer did not offer an alternative motive for Russell Gunlund's actions, nor did any of the parties call Russell Gunlund as a witness at the hearing. By firing the workers, the employer violated California Labor Code section 1153, subdivision (a).

**B. The employer committed an unfair labor practice on
Wednesday, December 3, 2009 when it laid off most of the
pruning and tying crew**

On Tuesday, December 2, 2009, Gerald Gunlund deliberately brought back the pruning and tying crew for just a day and a half. (6 RT 1148:9-20 and 8 RT 1747:14-22) At this juncture, Gerald knew that some members of the pruning and tying crew had filed charges with the ALRB, and Gerald was not happy about it. (6 RT 1167:21-1168:7 and 6 RT 1174:9-19)

As discussed *supra*, the employer selectively allowed certain crew members to continue working and the undersigned finds the alleged reasons offered by Gerald as to the remainder to be mere pretexts. Vines remained to be pruned, with some of those fields undoubtedly further from his home than others, a variety of supervisory alternatives existed, and yet higher-cost farm labor contractor workers were instead brought in to bridge the labor gap.

In previous years, the pruning and tying crew worked from November through February. (1 RT 70:25-71:2, 3 RT 502:3-9 and 7 RT 1382:7-9) It is an unfair labor practices for an employer to lay off employees early in retaliation for their protected concerted activities. *Sandrini Brothers* (9182) 8 ALRB No. 68, pp. 38-41; *Lightning Farms* (1986) 12 ALRB No. 7, pp. 10-12.

By its early layoff of all or most of the pruning and tying crew, the employer violated California Labor Code section 1153, subdivision (a).

C. The employer committed an unfair labor practice by refusing to rehire three-fourths of the pruning and tying crew in January 2010

To establish a *prima facie* case of discriminatory refusal to rehire, the General Counsel must establish by a preponderance of the evidence that the worker(s) engaged in protected activity, that the employer had knowledge of such activity, and that there was some causal relationship between the protected activity and the failure to rehire. *Ukegawa Brothers, Inc.* (1983) 9 ALRB No. 26, p. 35 (citing *Verde Produce Company* (1981) 7 ALRB No. 27). In the instant case, the General Counsel has shown that the employer had pruning and tying work available in January 2010 and the employer did not present evidence to dispute that contention. As discussed *supra*, the employer was aware of the workers protected, concerted activity.

The employer did not offer any legitimate reason for not contacting three-fourths of the former pruning and tying crew in January 2010. The employer could have tried reaching those workers through the ALRB like it did in December 2009, but it did

not. The employer could have tried contacting the CRLA to reach the workers, but it did not. The employer could have tried to mail notices to the workers' addresses on file, but it did not. Instead, based upon a preponderance of the evidence, Manlio Moreno simply selectively called the members of the pruning and tying crew with whom he felt most comfortable, which meant excluding the workers who had tried to negotiate wages and who had led a brief economic strike. At this juncture, the piece-rate was no longer an issue as the company paid the past year's piece rate to the workers on December 2-3, 2009. By having the work available and refusing to rehire three-fourths of the pruning and tying crew in January 2010, the employer violated California Labor Code section 1153, subdivision (a).

D. The employer committed an unfair labor practice by refusing to rehire four members of the pruning and tying crew who had previously been given Spring-time hourly work

Prior to November 2009, such as in Spring 2008 and Spring 2009, the employer had retained pruning and tying crew members Regino Primitivo, Mariano Primitivo, Apolinar Primitivo and Natalia Ordaz Lopez to do other off-season hourly work, such weeding around grape vines, fixing stakes, and tying almond trees.

The employer did not dispute that this work remained available in Spring 2010 and thereafter. By having the work available and refusing to rehire these four workers for Spring hourly work, the employer violated California Labor Code section 1153, subdivision (a).

ORDER

Pursuant to California Labor Code section 1160.3, Respondent H & R Gunlund Ranches, Inc., a California Corporation, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise retaliating against any agricultural employee, or changing any condition or term of employment, because the employee has engaged in protected concerted activity under California Labor Code section 1152; and,

(b) Otherwise interfering with or restraining any employee in the exercise of the rights guaranteed under California Labor Code section 1152.

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

(a) Offer seasonal pruning and tying employment from November through February, or substantially equivalent positions if their positions no longer exist, to the following fifty-one workers: (1) Francisco Altahua, (2) Herasmo Altahua, (3) Alfredo Panzo Calihua, (4) Eliseo Panzo Calihua, (5) Ermi Lopez Castro, (6) Agraciano Chamorro, (7) Irvin Uriel Ruiz Cortes, (8) Carlos Cruz Cortez, (9) Miguel Olivares Cortez, (10) Agustin Cortez Cruz, (11) Margarita Ramirez Cruz, (12) Fernando M. De Jesus, (13) Apolinar Primitivo Gomez, (14) Regino Primitivo Gomez, (15) Zeferino Gonzalez, (16) Jacinta Rojas H., (17) Manuel Ramirez Herrera, (18) Amelia Ruiz Jimenez, (19) Natividad Martinez Jimenez, (20) Jacinta Martinez Lopez, (21) Hilario Hernandez M., (22) Alfonso Primitivo Martinez, (23) Eugenia Lopez Martinez, (24) Faustino Regino Martinez, (25) Juliana Martinez,

(26) Macario P. Martinez, (27) Mariano Primitivo Martinez, (28) Maricela Bautista Martinez, (29) Mario Patricio Martinez, (30) Regina Lopez Martinez, (31) Santa Rejin Martinez, (32) Zeferino Porfirio Martinez, (33) Adriana Mendoza, (34) Luis Mendoza, (35) Adelina Bautista Merino, (36) Teresa Bautista Merino, (37) Javier Cruz Nicolas, (38) Enedino de Jesus Olivares, (39) Natalia Lopez Ordaz, (40) Afor Panzo Panzo, (41) Pedro Martinez Primitivo, (42) Jose Juan Perez Quezadas, (43) Eduardo Chavez Quintero, (44) Jose Samudio R., (45) Natalia Bernardos Ramirez, (46) Andres Ramirez, (47) Ignacio Hernandez Regino, (48) Roberto Hernandez Regino, (49) Jose F. Morales Serrano, (50) Valentin Patricio Lopez, and (51) Erika Primitivo Rojas.

(b) Offer Spring-time hourly employment, or substantially equivalent positions, should these positions no longer exist, to the following four workers: (1) Regino Primitivo, (2) Mariano Primitivo, (3) Apolinar Primitivo, and (4) Natalia Ordaz Lopez.

(c) Make whole the agricultural employees who were discharged on November 23, 2009 for all wages or other economic losses that they suffered as a result of their unlawful discharge. The award shall reflect any wage increase or bonus given by Respondent since the unlawful discharges. The award shall also include interest to be determined consistent with Board precedent.

(d) Make whole the agricultural employees who were discharged on December 3, 2009 for all wages or other economic losses that they suffered as a result of their unlawful discharge. The award shall reflect any wage increase or bonus given by Respondent since the unlawful discharges. The award shall also include interest to be determined consistent with Board precedent.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant to a determination of the backpay and/or make whole amounts due those employees under the terms of the remedial order as determined by the Regional Director.

(f) Upon request of the Regional Director, sign the attached Notice to Employees embodying the remedies ordered. After its translations by a Board agent into all appropriate languages, as determined by the Regional Director, Respondent shall reproduce sufficient copies of the Notice in each language for all purposes set forth in the remedial order.

(g) Mail copies of the Notice, in all appropriate languages, including but not limited to Spanish and Triqui, within thirty days after the date of issuance of a final remedial order, to all agricultural employees employed by Respondent at any time from November 1, 2009, until the date of the mailing of the notice.

(h) Post copies of the Notice, in all appropriate languages, in conspicuous places on Respondent's property for sixty days, and exercise due care to replace any Notice which may be altered, defaced, covered or removed.

(i) Arrange for a Board agent to distribute and read the Notice in all appropriate languages to all of its agricultural employees 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 order to compensate them for lost time at this reading and during the question-and-answer period.

(j) Provide a copy of the Notice to each agricultural employee hired to work for the company for one year following the issuance of a final order in this manner.

(k) Notify the Regional Director in writing, within thirty days after the date of issuance of this order, of the steps Respondent had taken to comply with its terms, and, continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: July 1, 2013.

Mark R. Soble
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 that alleged we, H & R Gunlund Ranches, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by discharging pruning and tying agricultural employees for protesting a reduction in their piece rate.

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 these rights:

1. To organize yourselves;
2. To form, join or help unions;
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 Board;
5. To act together with other workers to help and protect one another; and,
6. To decide not to do any of these things.

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

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

WE WILL offer the employees who were discharged on November 23, 2009, and/or December 3, 2009, immediate reinstatement to their former positions of employment, and make them whole for any losses they suffered as the result of our unlawful acts.

DATED: _____ H & GUNLUND RANCHES, INC.

By: _____

(Name of representative, and title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One ALRB Regional Office is located at 1642 West Walnut Avenue, Visalia, CA 93277-5348. The telephone number for this ALRB Regional Office 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