STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GEORGE AMARAL RANCHES, INC.,	)	Case No. 2013-CE-033-SAL
Respondent,	)	
and	)	
UNITED FARM WORKERS OF AMERICA,	)	40 ALRB No. 10 (October 15, 2014)
Charging Party & Intervenor.	)	

DECISION AND ORDER

This case arises from unfair labor practice (ULP) charges filed on June 17, 2013, by the United Farm Workers of America (UFW). It was alleged that on June 14, 2013, Respondent, George Amaral Ranches, Inc. (GAR or Respondent), violated the Agricultural Labor Relations Act (ALRA or Act) [1] when the owner of GAR, George Amaral (George), threatened and physically attacked UFW organizer Eulogio Donato in the presence of GAR employees. It was further alleged that when three GAR employees came to the scene of this incident, which occurred during their lunch break, George demanded they leave the area immediately, and then fired them when they failed to do so.

The General Counsel (GC) of the Agricultural Labor Relations Board (ALRB or Board) filed a complaint against GAR on August 23, 2013, alleging four causes of action pursuant to section 1153(a) of the Act: (1) assault on a union

[1] The ALRA is codified at Labor Code section 1140, et seq. All further statutory citations are to the Labor Code unless otherwise indicated.

representative in the presence of employees; (2) threats made to discourage union activity; (3) denial of access to represented employees; and (4) unlawful termination. The GC asserted, inter alia, that the employees were engaged in protected activity, as they went to the scene to investigate the confrontation between George and Donato.

An administrative hearing on this matter was held in Salinas, California, between January 15 and January 27, 2014. Administrative Law Judge (ALJ) Thomas Sobel issued the attached decision in this matter (ALJD) on May 22, 2014. In his decision, the ALJ found that GAR violated section 1153(a) of the Act when it threatened to call law enforcement on Donato due to his presence at a GAR worksite, and also when it fired the three employees who came to the scene of the confrontation between George and Donato. The ALJ further found that George struck Donato while attempting to take away his cell phone, but such striking did not constitute a ULP. The ALJ lastly found that the terminated employees unreasonably refused GAR's offer of reinstatement, and were not entitled to backpay.

It was also alleged that George pulled and dragged Donato in an effort to get Donato's cell phone, causing scratches on Donato's chest, and also that he threw a rock at Donato. The ALJ found that the pulling and dragging of Donato did not occur, and made no finding as to the throwing of the rock. It was further alleged that George told the three employees who witnessed the confrontation that unless they went back to their work area, he would call the police. The ALJ found that this did not occur.

All parties timely submitted their exceptions to the ALJD, and replies to said exceptions, by June 30, 2014. The GC disputed two of the ALJ's credibility

determinations, and also excepted to the ALJ's findings regarding the striking of Donato and the reinstatement issue. GAR filed 24 exceptions, disputing many of the ALJ's findings, and arguing that all the allegations should have been dismissed. The UFW disputed one of the ALJ's credibility determinations, argued that the ALJ failed to make a finding on a particular issue, and also excepted to the ALJ's findings regarding the striking of Donato and the matter of reinstatement.

The Board has considered the record and the ALJ's decision in light of the exceptions and briefs filed by the parties and affirms the ALJ's findings of fact and conclusions of law, and adopts his recommended decision, except where noted below.

BACKGROUND

Statement of Facts

The UFW was certified as the bargaining representative for GAR employees on July 24, 2012. A contract was not reached and the UFW petitioned for mandatory mediation and conciliation (MMC). A contract was reached via the MMC process, which went into effect July 18, 2013, after the incident giving rise to this case. (*George Amaral Ranches, Inc.* (2013) 39 ALRB No. 10.) In addition, before the contract was reached, the UFW and GAR made an agreement on post-certification access, which took effect on February 18, 2013. Per this agreement, union representatives could, after providing advance notice to GAR, take lunchtime access to GAR employees. Donato, from the time of certification through the time of the incident, often took access as many as three times per day, usually calling one of GAR's supervisors to provide notice. However, from January of 2013 through June of 2013, Donato did not provide notice

before taking access. Despite this failure, George was aware that Donato was taking access from January to June of 2013, yet never complained to the union regarding the lack of advance notice. George himself once confronted Donato in January of 2013 and reminded him that advance notice was required before taking access.

On June 14, 2013, GAR was harvesting and packing leafy greens, such as lettuce and broccoli, on land that it was leasing. The crew doing the work on the lettuce were employees of Green Pak (GP), a company owned by George Amaral's brother, Joe Amaral (Joe). However, the crew was using equipment marked as belonging to GAR. GP provided the crew with knives, gloves, and hair nets. Donato, without providing advance notice entered the area just before noon and observed the GP crew starting their lunch breaks. Donato asked a worker for whom he worked and received the answer "Amaral." Donato observed that equipment in the area (trailers, tractors, portable toilets) were marked "Amaral Ranches."

Donato also saw one Sergio Carillo at the scene. Donato knew Carillo from the time when Carillo had worked as a foreman for GAR in 2012. Donato spoke to Carrillo, who told him that the crew belonged to GP. Donato believed the crew to be GAR employees due to the markings on the equipment, so he began speaking with some of the workers, whereupon Carillo called Joe. A couple of workers told Donato that they worked for GP. Joe then arrived and loudly told Donato he could not be there, as the crew worked for GP and not GAR, and said he was going to call the sheriff. Joe told Donato that the crew was paid with GP checks.

Donato then asked another employee, one Ofelia Nunez, for whom she worked. When she replied that she worked for GP, Donato asked to see a pay stub. Joe then called 911, and also called George. George arrived at the scene and confronted Donato. Donato called 911 on his cell phone due to the heated nature of the exchange. George believed that Donato was recording the confrontation on his cell phone, and tried to take the phone, striking Donato's arm in the process.

Meanwhile, one Benito Olivera, a GAR employee from a different crew (picking broccoli), also on lunch break, went to his car to retrieve his lunch. From that vantage point, he observed the confrontation. He went back to where the rest of his crew was eating and informed two of his coworkers (Santiago Isidro and Salvador Martinez) about the incident. All three employees then went to the scene of the incident to see what was going on. The employees knew Donato, as they recognized him as a union representative. They also knew George, as he was their employer. They later testified[2] that they witnessed George pulling and dragging Donato. George told the employees that they could not be in the area. Isidro said that they were on their lunch break and were only watching the incident. George then made statements to the employees which reasonably caused them to believe that they were fired. George then saw that Donato was on his cell phone, and believed that Donato was making some sort of recording of him. The three employees testified that George then struck Donato while trying to take his cell

[2] The three employees did not speak Spanish or English, but testified in Mixteco, a language from the area of Oaxaca, Mexico. At the hearing, the interpreters worked from English to Spanish, Spanish to Mixteco, and Mixteco back to Spanish, then Spanish back to English. This caused the testimony of the employees to take a great deal of time.

phone, and threw a rock at Donato, whereupon Joe then physically restrained George from further confrontation with Donato, saying that this was no way to settle the matter.

The three employees then spoke with Donato for a time, after which Donato left the area. As the three employees left the property, George asked them to return to work, which they refused to do. The employees all repeatedly testified at the hearing that they were afraid of George in the wake of the incident (which lasted approximately thirty minutes), since he had just fired them and they had just seen him engage in a hostile confrontation with their union representative. However, Olivera and Isidro did return to work six days later, as the GC obtained a temporary restraining order (TRO) in the local superior court on June 19, 2013, which ordered GAR to reinstate the terminated employees.

The Administrative Law Judge's Decision

Credibility Determinations

The ALJ found that Olivera saw the cell phone incident while going to his car, then returned to his work area and informed Isidro and Martinez, whereupon the three employees went to investigate. GAR presented a witness who said that Olivera never went to his car, but rather received a cell phone call (presumably from Donato), which caused the three employees to go to the scene of the incident. Based on the details of Olivera's testimony, the ALJ credited his version of events.

The ALJ found that George did not pull and drag Donato, but that he did try to take Donato's cell phone, striking Donato in the process. The ALJ made this determination based on multiple inconsistencies in the testimony of all witnesses, stating

that determining what transpired was difficult, as he did not fully trust any of the witnesses, including Donato and George. Since George's striking of Donato while trying to take his cell phone was undisputed, the ALJ found that it occurred. The ALJ did not make any finding regarding the marks and scratches on Donato's chest, or the allegation that George threw a rock at Donato.

Access

With respect to Donato's taking access on the date of the incident without giving advance notice, the ALJ found that access was taken for a lawful purpose – the determination of whether GP employees were part of the bargaining unit. The ALJ relied upon *O. P. Murphy & Sons* (1978) 4 ALRB No. 106, *Holyoke Water Power Co.* (1985) 273 NLRB 1369, and *National Broadcasting Company, Inc.* (1985) 276 NLRB 118, in reaching this conclusion. The ALJ also found that the failure to give advance notice was excused, as the behavior of Joe and George indicated that they would not have permitted access even if notice had been given.

The question of GP's status

Despite GAR's arguments that GP was a custom harvester for GAR, the ALJ found that GP was a farm labor contractor for GAR, and thus its employees were represented by the UFW, and Donato had a right to take access to them. The ALJ applied the standards set forth in *Tony Lomanto* (1982) 8 ALRB No. 44 and *Ventura Coastal Corp.* (2002) 28 ALRB No. 6 in his analysis.

Threats to call law enforcement

The ALJ found that George violated section 1153(a) of the Act by threatening to call law enforcement on Donato. The ALJ also found that Joe was functioning as a farm labor contractor, which made his actions attributable to the Respondent according to the rule set forth in *Agricultural Labor Relations Bd. v. Vista Verde Farms* (1981) 29 Cal.3d 307. He therefore found that Joe also violated section 1153(a) of the Act when he threatened to call law enforcement on Donato, citing *Roadway Package Systems* (1991) 302 NLRB 961.

The striking of Donato

The ALJ found that George's striking of Donato while trying to take his cell phone was not a ULP, as George was trying to prevent Donato from recording him. From the testimony, Donato had called 911 and was holding his phone out so that the operator could hear George's yelling; however, from the testimony, it did not appear that the phone itself was recording the incident. The ALJ cited two cases in support of not finding a ULP: *M. Caratan* (1979) 5 ALRB No. 16, and *Mid-State, Inc.* (2000) 331 NLRB 1372. The ALJ reasoned that in the instant matter, the three employees who witnessed the confrontation between George and Donato understood that the confrontation arose because George wanted to prevent Donato from recording him, and under those circumstances, the striking of Donato did not violate the Act.

The termination and offer of reinstatement to the three employee witnesses

The ALJ also found that George gave the three employees reasonable cause to believe they had been fired, but did not find that he threatened to call the police on

them, citing *North American Dismantling Corp* (2000) 331 NLRB 1557 and *H & R Gunlund Ranches. Inc.* (2013) 39 ALRB No. 21. The ALJ further found that George made a valid offer of reinstatement, and that the employees' claim that they refused reinstatement out of fear was unreasonable. The ALJ thus concluded that they were not entitled to backpay. In support of this finding, the ALJ relied upon *Krist Oil Co., Inc.* (1999) 328 NLRB 825, *Batavia Nursing & Convalescent Inn* (1985) 275 NLRB 886, and *Sunol Valley Golf Club & Recreation Co.* (1993) 310 NLRB 357.

Exceptions to the ALJD

The General Counsel

The GC first excepted to the ALJ's finding that George did not pull and drag Donato, arguing that this finding is not supported by the evidence. The GC states that the ALJ's credibility determination conflicts with well-supported inferences from the record as a whole, and should be overturned, citing *UFW (Ocegueda)* (2011) 37 ALRB No. 3, and *S & S Ranch, Inc.* (1996), 22 ALRB No. 7. The GC also cited *Flexsteel Industries, Inc.* (1995) 316 NLRB 745, in support of the proposition that the testimony of a current employee (in this case, Olivera) that contradicts a supervisor's testimony is particularly reliable.

The GC argues in her second exception that the ALJ was wrong to find that George's striking of Donato in an attempt to take his cell phone was not a ULP because, according to the GC, a physical attack upon a union representative in the presence of employees constitutes a ULP.

In her third exception, the GC disputes the ALJ's finding that George did not threaten to call law enforcement on the three employees who came to the scene of the incident. The GC states that the ALJ's credibility determination conflicts with well-supported inferences from the record as a whole, and should be overturned, again citing *Ocegueda* and *S & S Ranch.*

In her fourth exception, the GC argues that the ALJ erred in finding that George made an unconditional offer of reinstatement and the three employees unreasonably rejected it. The GC further argues that the cases cited by the ALJ for this conclusion are distinguishable, and that the workers' fear was reasonable.

GAR

GAR filed 24 exceptions to the ALJD. In these exceptions, GAR argues that the ALJ erred as follows: in finding any violations of section 1153(a) of the Act; in making many erroneous findings of fact and credibility determinations; in finding that Donato properly took access; in finding that GP was a farm labor contractor for GAR, as opposed to a custom harvester; in finding George liable for a violation of the Act that was not alleged in the complaint; and in drafting the language in the Recommended Order and Notice to Agricultural Employees attached to his decision.

The UFW

In its first exception, the UFW argues that the ALJ failed to make a finding as to whether or not George threw a rock at Donato. In its second exception, the UFW disputes the ALJ's conclusion that George's striking of Donato in an attempt to take his cell phone was not a ULP. In its third exception, the UFW argues that the ALJ's finding

that George did not threaten to call law enforcement on the three terminated employee witnesses (hereafter "the three employees" or "the three men") was incorrect. The final UFW exception argues that the ALJ erred in finding that the three men unreasonably rejected George's offer of reinstatement after being fired.

GAR's Answering Brief to the GC's and UFW's exceptions

GAR maintained that the ALJ was correct to find that George did not drag and pull Donato. GAR further stated that the ALJ was correct to find that George's striking of Donato while trying to take his cell phone did not constitute a ULP. GAR also argued that the ALJ was correct to find that George did not threaten to call the police on the three employees. Finally, GAR claimed that the ALJ was correct to find that George made an unconditional offer of reinstatement to the three employees, and that the employees unreasonably rejected the offer.

The GC's reply to GAR's Exceptions

The GC filed a reply to GAR's exceptions in which she argues that said exceptions were procedurally defective in that they failed to comply with Board Regulation section 20282(a)(1).[3] The GC further states that GAR's exceptions are meritless as they are not supported by the facts, and the ALJ was correct in making the findings to which GAR excepts.

[3] The Board's regulations are codified in title 8 of the California Code of Regulations, section 20100 et seq.

The UFW's Answering Brief to GAR's Exceptions

The UFW filed four answers in opposition to GAR's exceptions, as follows: (1) The ALJ was right to find that when Joe and George threatened to call the police on Donato, they violated section 1153(a) of the Act, and were properly held liable by the ALJ, even though this was not alleged in the complaint. Furthermore, the UFW argues that the matter was fully litigated, and the violation may be found even though it was not alleged in the complaint, per *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 251-252. (2) The ALJ was right to find that GP was a farm labor contractor, and not a custom harvester. (3) The ALJ was right to find that Donato's taking access on the day of the incident was lawful. (4) The ALJ's orders regarding notice for taking access and the posting of the Notice to Employees were proper, and GAR did not cite any authority for its exceptions.

DISCUSSION AND ANALYSIS

The Exceptions and Replies and Answers Thereto

As the analysis below discusses, we find the GC's second and fourth exceptions to be meritorious, as we agree that George's striking of Donato did constitute a violation of section 1153(a) of the Act, and also agree that the three employees are owed backpay, as their rejection of George's offer of reinstatement was reasonable under the circumstances. Insofar as the UFW's first and fourth exceptions are to these same issues, we find them to be meritorious as well. With respect to the remaining GC and UFW exceptions, as well as all of GAR's exceptions, we find them to be unsupported. A careful examination of the record reveals no factual or legal basis for reversing any of the

ALJ's findings or other determinations on the issues raised by said objections, and we affirm the ALJ's conclusions in all those regards.

We now address the point made by the GC in her reply to GAR's exceptions: that they were procedurally defective due to failure to comply with Board Regulation section 20282(a)(1). The GC argues that, while GAR filed 24 exceptions to the ALJ's decision, its brief contains only four sections, and GAR fails to specify which of its arguments relate to particular exceptions. Board regulation 20282(a)(1) provides: "The exceptions shall state the ground for each exception, identify by page number that part of the administrative law judge's decision to which exception is taken, and cite to those portions of the record which support the exception." The Board has held that failure to comply with Regulation 20282 is grounds for dismissing exceptions. (*Lassen Dairy, Inc.* (2009) 35 ALRB No. 7, p. 2, fn. 1; see also *S & J Ranch, Inc.* (1992) 18 ALRB No. 2.) However, the Board has declined to dismiss exceptions where compliance with the regulation is sufficient to allow the Board to identify the exceptions and the grounds therefore and address them on their merits. (*Lassen Dairy, supra,* 35 ALRB No. 7; see also *Warmerdam Packing Company* (1998) 24 ALRB No. 2; *Olson Farms/Certified Egg Farms, Inc.* (1993) 19 ALRB No. 20; *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11.)

GAR's supporting brief does not address each of the 24 exceptions on an individual basis, but rather consists of four sections, each one broadly applicable to several of the exceptions, but not addressing the exceptions with specificity. GAR does provide a summary table at the beginning of their exceptions which lists each exception

and identifies the corresponding page(s) in the ALJD. Not every exception in the table cites to the record, however. Although we would be justified in striking the objections not addressed in the brief, or in striking those that, in the summary table, do not cite to the record, we will not disallow GAR's exceptions on that basis, but admonish GAR to submit exceptions in the proper format in the future.

The ALJ's Credibility Determinations

The ALJ made credibility determinations regarding witnesses which we will not disturb. In accordance with *H & R Gunlund Ranches* (2013) 39 ALRB No. 21, p. 2, fn. 2, the Board will not overturn an ALJ's credibility determinations based on factors other than demeanor unless they conflict with well-supported inferences from the record considered as a whole. Furthermore, the Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3; *P. H. Ranch* (1996) 22 ALRB No. 1*; Standard Drywall Products* (1950) 91 NLRB 544.) Furthermore, 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.)

The ALJ recognized that there were inconsistencies in witness testimony; however, the ALJ thoroughly analyzed these inconsistencies and made factual findings despite them. These findings of fact, as well as the ALJ's credibility determinations, are consistent with well-supported inferences in the record as a whole. We find all

exceptions to the ALJ's findings of fact and credibility determinations to be unsupported, and affirm the ALJ's findings on those issues.

Access

We agree with the ALJ's findings regarding the legality of Donato taking access on the date of the incident – to wit, that he took access to determine whether GP employees were part of the bargaining unit, as well as to investigate working conditions. We also agree with the ALJ's finding that Donato's failure to give advance notice on the day of the incident was excused, as the behavior of Joe and George indicated that they would not have permitted access had notice been given. The ALJ properly applied *O. P. Murphy & Sons*, *Holyoke Water Power Co.* and *National Broadcasting Company* in his analysis. The ALJ properly cited, inter alia, the rule from *O. P. Murphy & Sons* (1978) 4 ALRB No. 106, that: "We hold that a certified bargaining representative is entitled to take post-certification access at reasonable times and places for any purpose relevant to its duty to bargain collectively as the exclusive representative of the employees in the unit." (*Id.*, p. 8.) This conclusion is bolstered by the fact that in *O. P. Murphy*, the union representative failed to give proper notice before taking access, yet the Board still found that the employer's hostile actions toward her, including threats to call law enforcement, violated section 1153(a) of the Act. (*Id.*, pp. 10-11.)

The question of GP's status

We agree with the ALJ's finding that GP was a farm labor contractor for Respondent, as opposed to a custom harvester. The ALJ properly applied the standards set forth in *Tony Lomanto* and *Ventura Coastal Corp.* in reaching this conclusion. In the

ALJD at pages 25-28, the ALJ provided a thorough legal analysis of this question, reasoning, on page 28:

> In view of the facts that Respondent leased the land, grew, sold, and transported the crop, that Green Pak had no investment in, and therefore, bore no risk of loss from failure of the crop, owned no equipment, and that Respondent has not shown that Joe's business decisions and judgments materially affected his opportunity for profit or loss, *Ventura Coastal, supra*, at p. 10, I find that Green Pak was functioning as an intermediate supplier of labor to a "farm operator" and, therefore, that its direct hires were part of the bargaining unit. Accordingly, whatever access rights the Union had, they extended to the lettuce crew.

Threats to call law enforcement

We concur with the ALJ's findings that both Joe and George threatened to call law enforcement on Donato, and that these actions constituted ULPs in violation of section 1153(a) of the Act. With respect to GAR's exception that the complaint did not allege that George threatened to call law enforcement on Donato, we concur with the ALJ's finding that this question was fully litigated. GAR cites *George Arakelian Farms* (1986) 186 Cal.App.3d 94, in support of its argument that the failure to so allege constitutes a violation of its due process rights. However, this argument is misplaced. That decision stated that a "violation not alleged in the complaint may nevertheless be found when the unlawful activity was related to and intertwined with allegations in the complaint and the matter fully litigated." (*Id.*, p. 103.) This principle follows National

Labor Relations Board (NLRB) precedent.[4] In *Doral Hotel & Country Club* (1979) 240 NLRB 1112, it was held that: "[I]t is well established that a violation not alleged in the complaint may nevertheless be found where, as here, the unlawful activity was related to and intertwined with the allegations in the complaint, and the matter was fully litigated before the Administrative Law Judge." (*Ibid*.)

The reasoning of *Doral Hotel* applies to the instant situation. George's threat to call the police on Donato was the subject of much testimony, and it intertwines with the allegations in the complaint. (See also *Superior Farming Co. v. ALRB* (1984) 151 Cal.App.3d 100, 112-113 (holding that the Board was justified in finding a ULP based on a theory of liability not asserted in the complaint where "[t]he pertinent facts . . . were established by independent testimony, and it cannot be said the matter was left unlitigated.").)

Therefore, we will not overturn the ALJ's conclusion that the question of whether George committed a ULP by threatening to call the police on Donato was fully litigated, and that said threatening did in fact constitute a ULP.

The striking of Donato

The ALJ found that George's striking of Donato while trying to take his cell phone was not a ULP, as George, believing Donato was recording him, was trying to prevent such recording. We disagree and find a ULP. As noted previously, Donato had a legal right to access GAR's property to determine the status of the GP employees and

[4] Section 1148 of the ALRA states that the Board shall follow applicable precedents of the National Labor Relations Act (NLRA).

investigate working conditions, and George's attempt to remove Donato from the property by threatening to call the police violated the ALRA. From the testimony, Donato had called 911 in response to George's belligerent and unlawful attempt to remove him and was holding his phone out so that the operator could hear George's yelling. The ALJ cited cases in support of not finding a ULP, but an analysis of those cases indicates support for the opposite conclusion – that striking Donato was, in fact, a ULP.

The ALJ first cited *M. Caratan* (1979) 5 ALRB No. 16, in support of his conclusion. He reasoned that this case held that an encounter between a supervisor and an employee that involved threats by the supervisor to call law enforcement did not violate the Act, as the matter had become personal. In *Caratan*, the supervisor and the employee first started arguing over travel pay. (*Id.*, p. 3.) The argument continued to a point where both individuals threatened to cause trouble, and each one challenged the other to a fight. (*Id.*, p. 3.) After the threats and challenges were made, the supervisor then told the employee he would call the sheriff's department. (*Id.*, p. 3.) The Board concluded that this statement did not violate section 1153(a) of the Act, as it was not made in response to the employee's engaging in protected activity. (*Id.*, p. 3.)

The ALJ next cited *Mid-State, Inc.* (2000) 331 NLRB 1372, in support of his findings. In that case, the NLRB stated: "The test in determining whether an employer's conduct constitutes unlawful threats of retaliation for employees' engaging in protected activity is whether the conduct may reasonably be said to have the tendency to interfere with the free exercise of employee rights under the [NLRA]." (*Id.*, p. 1372.)

Applying this rule in *Mid-State*, the NLRB found that remarks made in the presence of employees by supervisors to the effect that they would shoot or beat up a union representative were found not to be in violation of the National Labor Relations Act (NLRA), as the statements had no coercive effects against the employees in the exercise of their rights under the NLRA. (*Id.*, p. 1372.) This ruling was based on the findings that the supervisors in question made their remarks because they believed that the union had been spreading rumors about them, and the employees who heard the remarks understood that to be the reason, and did not interpret the remarks as a threat to the exercise of their rights. (*Id.*, p. 1372.)

The instant case is distinguishable from both *Caratan* and *Mid-State* as Donato was engaged in protected activity (taking access and investigating working conditions) and called 911 in response to George's reaction to his presence when George struck Donato in an attempt to take his cell phone away. There was no evidence that Donato engaged in any activity comparable to the activities involved in *Caratan* and *Mid-State* (i.e., provoking a fight or spreading rumors) that would have converted his protected conduct into unprotected conduct.[5]

[5] While George believed that Donato was using his cell phone to make a recording, the testimony was that Donato was using his phone to call 911 in response to George's aggressive behavior. To the extent that 911 calls are recorded, we view the recording of the call as incidental to Donato's purpose in making the call, which arose out of, and was in furtherance of, his legitimate taking of access. Furthermore, we note that the NLRB has held that a union representative may make recordings while engaged in protected activity on an employer's property, so long as such recordings are not used for threatening or coercive purposes. (*Randell Warehouse of Arizona, Inc*. (1999) 328 NLRB 1034, 1038 ("the Union's conduct, in photographing employees during the

(Footnote continued….)

The California Supreme Court has held that "*physical confrontations between union and employer representatives are intolerable under the Act.*" (*Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307, 316-317 (*emphasis in original*).) Such conduct is violative of the Act "[a]bsent compelling evidence of an imminent need to act to secure persons against danger of physical harm or to prevent material harm to tangible property interests" because it "has an inherently intimidating impact on workers and is incompatible with the basic processes of the Act." (*Ibid*.) Furthermore, "notwithstanding a union representative's technical trespass upon an employer's property, violent attacks upon him in the presence of the workers sought to be organized constitutes an unfair labor practice." (*Perry Farms, Inc. v. ALRB* (1978) 86 Cal.App.3d 448, 467.)

Additionally, the NLRB has found an employer liable for ULPs when its owner, as in the current matter, shoved a union representative, ordered the representative off the property, and threatened to call the police on the representative. (*Green Briar Nursing Home, Inc.* (1973) 201 NLRB 503.) Thus, we hold that George's unjustified actions with respect to trying to confiscate Donato's phone and striking him in the

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(Footnote continued)
distribution of union literature outside the Employer's premises, absent evidence of any express or implied threats or of other coercion, was not objectionable. Therefore, we need not examine the adequacy of the Union's explanation for its conduct."); *Mazzara Truck & Excavating Corp*. (2014) 2014 NLRB LEXIS 343, at pp. 23-25 (holding that a union representative's filming of employees on a job site in an attempt to record alleged safety violations is protected activity, unless such filming would be unduly intrusive into restricted work space and interfere with the work of the employees during working time).)

process during their confrontation did, in fact, violate Donato's access rights, have a coercive effect on the employee witnesses, and thus constituted a ULP.[6]

With respect to the lack of specific findings in the ALJ's decision regarding the cause of the scratches and marks on Donato's chest, a factual finding on that issue was unnecessary as it does not affect the resolution of any of the ULPs at bar. (*White Oak Coal Co., Inc.* (1989) 295 NLRB 567, at p. 569, fn. 13.) Regarding the UFW's exception that the ALJ failed to make a finding on the question of whether George threw a rock at Donato, we will likewise refrain from ruling on this exception because George's conduct towards Donato was a ULP whether or not he also threw a rock at him. Thus, any finding on the rock throwing would be cumulative and would not affect the remedy, and it is unnecessary for us to make a ruling on that particular issue. (*Dimensions in Metal, Inc.* (1981) 258 NLRB 563.)

The termination of and offer of reinstatement to the three employees

The ALJ also found that George gave the three employees reasonable cause to believe they had been fired, but did not find that he threatened to call the police on them. The ALJ further found that George made a valid offer of reinstatement, and that

[6] We have stated above that Donato was excused under the circumstances from giving prior notice before taking access. However, we have previously held that, even where the giving of advance notice is not excused, an employer's excessive and unreasonable response to un-noticed access may violate the Act. (See *O.P. Murphy Produce Co., supra*, 4 ALRB No. 106, pp. 10-11 (even assuming the union failed to provide notice before taking access, the employer's surveillance of an organizer and attempts to have her arrested were "excessive and unreasonable reactions to her presence" and violated the Act).) Accordingly, even if GAR were entitled to rely on the notice requirement, we would find its response violative of the Act.

the employees' claim that they refused reinstatement out of fear was unreasonable, and therefore, they were not entitled to backpay. We agree with the ALJ that a valid offer of reinstatement was made; that is clear from the record. However, we disagree with the finding that the refusal to accept reinstatement was unreasonable.

The ALJ first cited *Krist Oil Co., Inc.* (1999) 328 NLRB 825, in support of his finding that the employees did not have a reasonable fear which would justify refusing George's offer to reinstate them. The ALJ correctly stated that *Krist Oil* held that an unlawfully terminated employee has the privilege to reject an offer of reinstatement, preserving the ongoing entitlement to reinstatement and backpay, where there is a reasonable fear of further discrimination. The ALJ then found that in the current case, the three employees had no such reasonable fear, as they only witnessed a confrontation over George's objection to Donato's recording of the incident. However, in *Krist Oil*, a wrongfully terminated employee, Creten, was twice offered reinstatement, but never responded to the offers. *(Id.*, pp. 825-826.) Creten claimed she feared mistreatment from the employer if she accepted reinstatement, based on the fact that another wrongfully terminated worker, Mains, who accepted reinstatement, suffered such mistreatment upon returning to work. (*Id.*, pp. 825-826.) The NLRB held that Creten's refusal to accept reinstatement was not reasonable, as she never responded to the employer at all or gave any reason for her failure to respond. (*Id.*, p. 828.)

Moreover, the evidence showed that Creten did not know of the mistreatment of Mains when she refused both offers. (*Id.*, p. 828.) The NLRB reasoned: "Thus, there is no basis in the record for a finding that Creten found it likely that she

would be subject to the same mistreatment of Mains if she accepted the offer of reinstatement, and no basis for a finding that she failed to accept the reinstatement offer for that reason in particular, or for such a reason in general, or for any reason at all." (*Id.*, p. 828.) By contrast, the three employees in the instant case all testified repeatedly that they feared George after witnessing the confrontation with Donato, which appears reasonable under the circumstances.

The ALJ then cited *Batavia Nursing & Convalescent Inn* (1985) 275 NLRB 886, quoting its language to the effect that: "An employer violates Section 8(a)(1) of the [NLRA] by assaulting a union representative in the presence of one or more employees under circumstances where an onlooker would likely infer from the assault that the employer would also retaliate in some fashion against an employee who supported the union." The ALJ again reasoned that since the encounter stemmed from George's objection to Donato recording him, the three employees had no reason to fear George, and thus their rejection of reinstatement was unreasonable. However, in *Batavia Nursing*, an attorney for an employer cursed at, punched, and shoved a union organizer in the presence of employees. (*Id.*, p. 889.) The NLRB found that this conduct constituted a ULP, for which the employer was liable, as the employee witnesses would likely have concluded that employer would retaliate against them if they supported the union. (*Id.*, p. 891.) We believe that a similar conclusion should be reached in the instant matter, especially as the three men testified that after seeing how George treated a union representative, they feared what he might do to them.

The ALJ's last citation in support of his finding that the three employees unreasonably rejected George's reinstatement offer, rendering them ineligible for backpay, was *Sunol Valley Golf Club & Recreation Co.* (1993) 310 NLRB 357. The ALJ did not cite any specific facts or language from that decision, but referred to page 375 thereof. On said page, the following language, presumably relied upon by the ALJ, is set forth: "An employer that, like Respondent, has unlawfully discharged an employee, may satisfy its legal obligation to reinstate the discriminatee and may toll its backpay liability by offering to reinstate the discriminatee, provided that it is a 'firm, clear and unequivocal' offer of reinstatement."

In *Sunol Valley*, a striking employee made two unconditional offers to return to work. (*Id.*, p. 374.) She was not reinstated, but about one month later, the employer sent her a letter stating she was eligible to return to work and to call to confirm her availability. (*Id.*, p. 375.) She did not respond, reasoning that she had already made two clear offers to return. (*Id.*, p. 375.) The NLRB held that the employer should have reinstated her immediately upon her first offer to return to work, and that its failure to do so was a violation of the NLRA. (*Id.*, p. 375.) Moreover, the letter sent by the employer did not constitute a valid offer of reinstatement, as it only stated that she was "eligible" to return – and as that was not a "firm, clear and unequivocal" offer, she was not obligated to respond. (*Id.*, p. 375.)

In the present situation, there is no question of whether there was a "firm, clear and unequivocal" offer for reinstatement as the ALJ concluded that while the three employees had reasonable cause to believe they had been fired, George made a valid

offer of reinstatement. The question is whether the three employees unreasonably refused reinstatement.

In the instant matter, the three employees testified that George was very angry with them for coming to the scene of the confrontation between Donato and himself. Isidro testified that George "had his face all red" as he confronted Donato and, as George approached, Isidro "felt like he wanted to fight with me." Martinez testified that George "shouted very loud" at the employees. The three employees then witnessed George physically strike their union representative while attempting to confiscate his phone. The three employees were then summarily (and unlawfully) terminated. Olivera testified that, as George was terminating them, he remained "very angry" and that the men initially asked to go back to work, but George told them not to waste their time, as they were fired. Regarding their reasons for not returning to work when George offered them reinstatement, each of the three employees testified that he was afraid of what George might do to him given how George had treated Donato.[7] Therefore, the direct evidence provided by the three employees indicates that, out of fear, they reasonably refused George's offer to reinstate them.

Other decisions would indicate that the three employees reasonably refused George's offer of reinstatement due to witnessing George and Donato's heated exchange,

[7] While two of the employees testified that their fear to return to work was based, in part, on George allegedly having thrown a rock at Donato, the ALJ did not make a finding as to whether that particular event occurred. However, apart from the alleged rock-throwing, the employees testified that their fear was based, in part, on the fact that George struck Donato on the arm (Isidro) and because he was angry and "fighting" with Donato (Martinez).

George trying to take Donato's cell phone, and striking Donato's arm in the process. In *NLRB v. Village IX, Inc.* (7th Cir. 1983) 723 F.2d 1360, the co-owner of a company, in the presence of employees, knocked down a union organizer who was putting leaflets on employees' cars in the company parking lot. (*Id.*, p. 1365.) The court held that this act violated the NLRA, as onlookers "would likely infer that if the company would assault an organizer it would also retaliate in some fashion against an employee who supported the union." (*Id*., p. 1365.) In *Heavenly Valley Ski Area* (1974) 215 NLRB 359, the owner of a ski resort threw a union organizer down a flight of stairs on company property while several employees watched, and the NLRB found this to be a ULP, as it would "tend to interfere with, restrain, and coerce the employees in the exercise of their rights...." (*Id.*, p. 361.) Moreover, the NLRB made this finding even though the employer was not unionized at the time of the incident, and the union organizer was speaking with guests of the resort, and not employees, when the incident occurred. (*Id*, p. 361.) Furthermore, the NLRB held that the incident placed employees in reasonable fear for the exercise of their rights, even if they did not know of the union organizer's status as such at the time of the incident, but only learned of it later. (*Id*, p. 361.) This decision was enforced by the Court of Appeals for the Ninth Circuit, which explained that "It is settled that employer assaults upon union agents in the presence of employees constitute a restraint and coercion of employees in the exercise of their rights...." (*Heavenly Valley Ski Area v. NLRB* (9th Cir. 1977) 552 F.2d 269, 273.) (See also *Domsey Trading Corp.* (1993) 310 NLRB 777, 778 (employees' rejection of reinstatement offers did not toll backpay where they learned from other employees that other reinstated employees were subjected to

threats, insults, and violence).) Also, it is settled that such assaults are by their very nature ULPs, as "Any conduct by an employer, the natural and probable tendency of which would be to interfere with the right, is made an unfair labor practice even though no showing is made as to what effect the conduct finally has on the employees." (*NLRB v. Mc Bride* (10th Cir. 1960) 274 F.2d 124, 127 (*citations omitted*).)

In light of George's behavior, which included attempting to unlawfully remove Donato from GAR's property when Donato had a legal right to be there, behaving in an angry and aggressive manner towards both Donato and the three employees, yelling at the employees and behaving as if he might fight with one of them, physically attacking Donato, and then angrily terminating the employees while they were engaged in protected activity, the employees' refusal to accept reinstatement was reasonable and did not toll GAR's backpay liability. We conclude that, although George's offer to reinstate the three employees was clear, their refusal to accept reinstatement was reasonable. We will award backpay for the three men from the date of the incident until the time of reinstatement pursuant to the TRO.

CONCLUSION

We hold that George's striking of Donato did, in fact, constitute a ULP under the Act. We further find that the three terminated employees were justified in rejecting their offer of reinstatement, as they had a reasonable fear of George at the time the offer was made, and that the employees are thus entitled to backpay. We affirm all of the ALJ's other findings and credibility determinations. We lastly uphold the ALJ's order, except insofar as it differs with these conclusions.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent George Amaral Ranches, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the United Farm Workers of America by interfering with Union's right to take access to meet and talk with Respondent's agricultural employees hired by a labor contractor where they are employed on Respondent's property or premises, at times agreed to by Respondent or, in the absence of such agreement, at reasonable times, for the purposes related to collective bargaining between Respondent and the UFW;

(b) Threatening to call the police while Union representatives are lawfully on our premises or property;

(c) Discharging or otherwise discriminating against agricultural employees because they engaged in protected concerted activity.

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

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

(a) Make Benito Olivera, Santiago Isidro, and Salvador Martinez whole for all wages and economic losses they suffered from on or about June 14, 2013, through

June 19, 2013, as a result of their discharges. Loss of pay or other economic losses are to be determined in accordance with established Board precedent. The award shall also include interest in accordance with *Kentucky River Medical Center* (2010) 356 NLRB No. 8, and *Rome Electrical Systems, Inc*. (2010) 356 NLRB No. 38;

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant and necessary to a determination by the Regional Director of the backpay amounts due under the terms of this Order. Upon request of the Regional Director, the records shall be provided in electronic form if they are customarily maintained in that form;

(c) Upon request, permit UFW representatives to meet with the employees provided by labor contractors on Respondent's property or premises where they are employed, at times agreed to by Respondent or in the absence of such an agreement, at reasonable times, for purposes related to collective bargaining;

(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.

(f) Arrange for a Board agent or representative of Respondent to distribute and read the attached Notice, in all appropriate languages, to its employees then employed in the bargaining unit on company time and property, at the times and places to be determined by the Regional Director. Following the reading, a 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 employee rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly employees to compensate them for lost work time during the reading and the question-and-answer period.

(g) Mail copies of the Notice in all appropriate languages within 30 days after the issuance of this order to all harvest employees employed by Respondent at any time after June 14, 2013 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 issuance of a final order in this matter.

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

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

DATED: October 15, 2014

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

William B. Gould IV, Chairman, CONCURRING,

I concur with the majority's affirmance of the ALJ's determination that the Respondent violated section 1153(a) of the Act by threatening to call law enforcement to remove Donato from Respondent's property and by firing the three employees who came to the scene of the confrontation between Donato and Amaral. I also concur with the majority's conclusion that the terminated employees were justified in refusing Respondent's offer of reinstatement. However, with regard to the Respondent's interference with the union organizer's access to the property, I conclude that Respondent violated the Act, but I do so on a different basis. Thus, here I concur in the majority's result , but provide a different rationale.

First, the ALJ relied on demeanor and credibility in determining that Amaral believed that he was being recorded by Donato, and in this respect, his finding warrants special deference by the Board. This ALJ finding is based not only on the ALJ's assessment of the demeanor and credibility of the respective witnesses involved in the incident and careful examination of the record, but also on his crediting of the testimony of the workers who themselves believed that Amaral's response was triggered

by his belief that he was being recorded. The ALJ found it significant that "the employees clearly understood — indeed, testified — that the reason George made contact with Donato was that he was trying to stop Donato from recording him." Thus, the ALJ relied upon testimony and demeanor of witnesses to arrive at this finding. Contrary to the majority's conclusions, we should not disturb it.

As the NLRB has said: "as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor." (*Standard Dry Wall Products, Inc.* (1950) 91 NLRB 544, 545.) Similarly, the United States Court of Appeals for the Ninth Circuit has refused to enforce a Board decision where it represented a "…discard [of] positive findings of credence in favor of inferences drawn from tenuous circumstances." (*Loomis Currier Service v. NLRB* (9th Cir. 1979) 595 F.2d 491, 499, citing *Pittsburgh v. Des Moines Steel* (1960) 284 F.2d 74, 87.) I recently emphasized the ALJ's vital role in the administrative process in my concurring opinion in *P & M Vanderpoel Dairy* (2014) 40 ALRB No. 8.

To repeat, again, it cannot be stressed enough that the role of the ALJ is vital to our processes. To fail to take this into account is to unnecessarily duplicate our procedures wastefully. The ALJ made appropriate findings here. He observed the witnesses and their demeanor and we promote the statutory procedure designed by the Legislature when we defer to his findings under such circumstances.

The majority notes that even if Donato had been making a video recording of the workplace to document issues of concern to represented employees, this would have constituted protected activity. However, the testimony accepted by the ALJ is that Amaral believed he personally was being recorded. This in sharp contrast to the scenarios presented in the cases cited by the majority. (*Randell Warehouse of Arizona, Inc., supra*, 328 NLRB 1034; a union representative's photographing employees during the distribution of union literature was protected; *Mazzara Truck & Excavating Corp., supra*, 2014 NLRB LEXIS 343; a union representative's filming employees on a job site to record alleged safety violations was protected.) Recordings or photographs of employees designed to further workplace organizational activity and to promote other workplace issues like health and safety are central to our Act. But the recording of an individual by himself in the manner both Amaral and the employees thought he was being recorded on its face has nothing whatsoever to do with protected union activity.

The majority nonetheless relies upon California Supreme Court authority (*Vista Verde Farms v. ALRB, supra*, 29 Cal. 3d 307) for the proposition that the violence engendered here must be deemed unlawful under our statute. In my judgment, this assertion is inaccurate. In *Vista Verde Farms*, a labor contractor (whose actions were attributable to the employer) arrived at a work camp where union organizers were speaking to employees, and immediately began violently and aggressively pushing and shoving two union organizers. When an employee interceded in order to explain why the organizers were there, the labor contractor continued to push them and challenged them to a fight.

Here there is one incident arising out of what Amaral and the workers credibly testified was a misunderstanding or misapprehension. Amaral, in reaching for Donato's cell phone in what was a mistaken belief that he was being recorded, made incidental contact with Donato's arm. All of this stands in sharp contrast to the facts in *Vista Verde Farms*. The ALJ's sound credibility determinations which accurately support the factual findings in this case are diametrically different from *Vista Verde Farms*. The majority therefore errs in its reliance upon that California Supreme Court precedent.

Nonetheless, a violation exists under the circumstances of this case because Amaral should not have even been present in the vicinity of Donato and the employees while Donato was taking access.[8] Organizational access entails union organizers' entering an employer's property for the purpose of "meeting and talking with employees and soliciting their support." (Cal. Code Regs., tit. 8, § 20900, subd. (e).) Unlike the NLRB, which permits organizational access on a case-by-case basis depending on whether alternative means of organizational communication exist, the ALRB has chosen to deal with this issue by exercising its rule-making powers. The ALRB determined that because in the agricultural setting, alternative means of communication for the purposes of organizing are never adequate (Cal. Code Regs., tit. 8, § 20900, subd. (c); see also *Tex-Cal Land Mgmt.* (1977) 3 ALRB No. 14, at p. 16), denial of organizational access constitutes an unfair labor practice. The ALRB adopted regulations defining the

[8] I agree with the majority's affirmance of the ALJ's analysis and conclusion that Donato's taking access under these circumstances was lawful.

parameters of reasonable organizational access. (Cal. Code Regs., tit. 8, §§ 20900-20901.) The California Supreme Court upheld the validity of these regulations in *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392. (See also *Sam Andrews' Sons v. ALRB* (1988) 47 Cal. 3d 157; *ALRB v. California Coastal Farms* (1982) 31 Cal. 3d 469.)

Outside of the agricultural arena, courts have given union activity on employer property more protection by concluding that states may expand the right to distribute literature at a shopping center, despite the owner's constitutional interest in his property. (*PruneYard Shopping Center v. Robbins* (1980) 447 U.S. 74; *Fashion Valley Mall LLC v. NLRB* (2007) 42 Cal.4th 850; cf. *Ralph's Grocery Store Co. v. United Food and Commercial Workers Union, Local 8* (2012) 55 Cal.4th 1083.)

The Board has extended this principle to the post-certification access arena. The Board determined in *O.P. Murphy Produce Co., Inc., dba O.P. Murphy & Sons* (1978) 4 ALRB No. 106 that a certified representative of agricultural employees is conditionally entitled to enter the employer's premises to discuss contract negotiations and to investigate working conditions. (See also *F & P Growers Assn. v. Agricultural Labor Relations Bd*. (1985) 172 Cal.App.3d 1127.) In *O.P. Murphy Co.*, the Board found that access was permitted to communicate with unit employees during the course of negotiations, in order to determine their wishes with respect to contract terms and proposals, to obtain current information about their working conditions, to form and consult with an employee negotiating committee, and to keep them advised of progress and developments in the negotiations. Moreover, the Board held that "[r]easonable

access and adequate communications between the employees and their bargaining agent is just as essential to meaningful collective bargaining negotiations as is contact and communications between the employer and its attorney, or other bargaining representative." (*O.P Murphy* at pp. 3-4.) This critical communication cannot take place where the employer or management intrudes.

The logical corollary of case law upholding the legality of union access is that under the limited circumstances when and where a union representative can properly be present on an employer's property, as a general proposition management cannot be present. An employer is excluded from the protected zone where a union is taking lawful access. Such access means that a union representative engages in a two-way dialogue with employees, and the employer is not permitted to observe or listen to union representatives and employees during the times permitted for access. This kind of union preparation for negotiations and the honest exchange of views, strategy and ideas about potential for compromise is vital to the collective bargaining process which ensues. (*National Labor Relations Board v. Insurance Agents* (1960) 361 U.S. 477.)

Here, Amaral had acquiesced to Donato's taking lunchtime access without prior notice for six months. The ALJ found that Amaral was aware that Donato was taking access. Donato was therefore on notice that Donato was engaging in protected communications with employees during their lunch break. Amaral's abrupt angry physical intrusion into the area where Donato was legitimately speaking to employees is comparable in major respects to unlawful surveillance, and it is this conduct that constitutes the violation here in this case. Though precedent on unlawful surveillance

provides guidance to us (*Opryland Hotel and United Food and Commercial Workers Union, Local 405* (1997) 323 NLRB 723; *National Steel and Shipbuilding Company* (1997) 324 NLRB 499), my conclusion about the unlawful conduct in question is rooted in the logical corollary to the above-referenced union access authority, and the quiet time that is a prerequisite for union-employee discussions regarding collective bargaining and negotiations.

Accordingly, I conclude that there was unlawful interference with employees' Section 1152 rights and a violation of Section 1153(a) of the Act. I do not rely on the rationale employed by the majority.

DATED: October 15, 2014

William B. Gould IV, Chairman

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by the United Farm Workers of America, in the Salinas Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint 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 threatening a union representative and interfering with the representative's lawful union activity on our job site.

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 interfere with UFW representatives' right to talk to our employees at reasonable times on property where our employees are working;

WE WILL NOT threaten to call the police while union representatives are engaged in lawful union activity on our premises or property;

WE WILL NOT discharge or otherwise discriminate against any of our agricultural employees because they have engaged in protected concerted activity.

WE WILL NOT in any like or related manner, refuse to bargain with the Union over wages, hours or conditions of employment, or interfere with, restrain or coerce employees from exercising their right under the Act.

WE WILL, as applicable, offer Benito Olivera, Santiago Isidro, and Salvador Martinez 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:

George Amaral Ranches, 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 Agricultural Labor Relations Board. One office is located at 342 Pajaro Street, Salinas, California. The telephone number is (831) 769-8031.

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

GEORGE AMARAL RANCHES, INC. Case No. 2013-CE-033-SAL
(United Farm Workers of America) 40 ALRB No. 10

Background

Charging Party & Intervenor, United Farm Workers of America ("UFW"), has been the certified collective bargaining representative for the agricultural employees of George Amaral Ranches, Inc. ("Employer") since July 24, 2012. On June 17, 2013, the UFW filed unfair labor practice ("ULP") charges against the Employer in the above-referenced case, alleging that, on June 14, 2013, its owner ("the owner") threatened and physically attacked (by dragging and pulling, striking, and throwing a rock) a UFW organizer in the presence of three employees, which resulted in minor injuries to the organizer (marks and scratches on his chest). It was further alleged that the owner then unlawfully terminated the three employees who witnessed the confrontation.

ALJ Decision

On May 22, 2014, the Administrative Law Judge ("ALJ") issued a decision is this matter, in which he found that the organizer legally took access to the Employer's area of operations on the day of the incident, as he was investigating the status of persons who, though performing work for Employer, were employees of a company called Green Pak. The ALJ also found that Green Pak was acting as a farm labor contractor for Employer. The ALJ concluded that both the proprietor of Green Pak and the owner had threatened to call law enforcement on the organizer, and that such threats, though not alleged in the complaint constituted ULPs, as they had been fully litigated at the hearing. The ALJ found that the Employer's owner did not drag and pull the organizer, but further found that he struck the organizer in an attempt to take the organizer's cell phone, and that this act did not constitute a ULP, as the owner believed that the organizer was using the phone to record their confrontation. The ALJ did not make any finding regarding the cause of the marks and scratches on the organizer's chest, or the alleged throwing of a rock. The ALJ finally held that the three employees had reasonable cause to believe they had been fired, but were not entitled to backpay, as the owner made them a valid offer of reinstatement a few minutes after firing them, and their rejection of this offer was unreasonable.

The Employer filed exceptions to the ALJ's decision, arguing that the Board should overturn all findings of violations. The General Counsel (GC) and the UFW filed exceptions arguing, inter alia, that the ALJ erred in not finding the striking of the organizer to be a ULP, and also in finding that the three employees unreasonably rejected Employer's offer of reinstatement.

Board Decision

The Board affirmed all the ALJ's credibility determinations. However, the Board rejected the ALJ's conclusion that the striking of the organizer did not constitute a ULP, and also rejected the ALJ's conclusion that the three terminated employees unreasonably rejected their valid offer of reinstatement. The Board concluded that, under settled caselaw, the striking of the organizer by the owner in the presence of the employees was a ULP. The Board further held that, having witnessed the confrontation between the organizer and the owner, the employees had a reasonable fear of the owner at the time the reinstatement offer was made, and that they were entitled to backpay. The Board affirmed all of the ALJ's other findings and determinations, as well as the ALJ's order.

Chairman's Concurrence

Chairman Gould authored a concurrence in which he agreed that the organizer had legally taken access on the day of the incident, and that Employer's threat to call law enforcement on the organizer constituted a ULP. He also agreed that the three terminated employees reasonably rejected their offer of reinstatement. With respect to the organizer's taking access on the day of the incident, the Chairman agreed that Employer's interference with such access constituted a ULP, but provided a different rationale. The Chairman would not have overturned the ALJ's finding that the owner believed that the organizer was recording him, nor would he have overturned the ALJ's conclusion that, because of such belief, the striking of the organizer was not a ULP. Rather, the Chairman would have found a ULP based upon the owner being present in the vicinity while the organizer was taking access, as such presence violated the protected zone in which the organizer and the employees were engaged in protected communications pursuant to lawful access.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GEORGE AMARAL RANCHES, INC.,	)	Case No. 2013-CE-033-SAL
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA,	)	
	)	
	)	
Charging Party & Intervenor.	)	

Appearances:

Robert Carrol
Alison Torbitt
Aldo Ibarra
NIXON PEABODY, LLP
for Respondent

Edgar Aguilasocho
UNITED FARM WOKERS OF AMERICA
for Charging Party & Intervenor

Stanley Marubayashi
Alegría De La Cruz
Sylvia Bueno
for General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge: This case was heard by me in Salinas, California on January 15, 16, 17, 21, 22, and 27, 2014. [1]

I

JURISDICTION

Upon charges duly filed by Intervenor, the United Farmworkers of America, (hereafter the Union), an admitted labor organization, General Counsel alleges that Respondent, George Amaral Ranches, Inc. (hereafter Respondent or Amaral), an admitted agricultural employer, violated Labor Code Sections 1153(a) and (c) in the ways to be described below.

II

INTRODUCTION

The allegations in this case arise from UFW organizer's Eulogio Donato's taking post-certification access on June 14, 2103 to a crew supplied by another entity called Green Pak that was harvesting lettuce grown by Respondent in a field leased by Respondent. General Counsel contends that because Green Pak was functioning as a labor contractor for Respondent the Union had a right to take post-certification access to Green Pak's direct hires. Respondent contends that Green Pak was a custom harvester and, as an agricultural employer in its own right, was not subject to the agreement, but that even if it were, because Donato took access for reasons not authorized by applicable

[1] As a result of an error in the delivery of transcripts and of a subsequent request for an extension of time to file them, briefs were not filed until April 11, 2014.

precedent and without providing proper notice, both Respondent and the owner of Green Pak were privileged to treat him as a trespasser.[2]

General Counsel also alleges that, upon being informed that Donato was taking access to the Green Pak employees by Green Pak's owner Joe Amaral, Respondent's owner, George Amaral[3], rushed to the field and physically attacked Donato, pulling him by the shirt away from the lettuce crew, and as the incident evolved, threw a stone at him before physically attacking him again. While Respondent denies that George manhandled Donato or threw a stone at him, it does admit that George and Donato had a brief struggle over possession of Donato's cellphone while Donato was calling 911, and further admits that George accidentally struck or grazed Donato on the arm during the struggle. However, Respondent contends that the incident was too trivial to count as an unfair labor practice.

Finally, General Counsel alleges that when four of Respondent's employees came to witness what was happening between George and Donato, George threatened to call the police and to fire them if they did not return to their crew, and thereafter did fire three of the employees who refused to go back. Respondent contends that George did not fire the employees, but that they quit.

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[2] California Penal Code Section 602(o) specifically exempts "lawful labor union activities which are permitted to be carried out on the property by the Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act" from the trespass statute. The access question in this case, therefore, is whether or not Donato's taking access was "lawful" or "permitted to be carried out on the property" under the ALRA.

[3] Respondent's owner, George Amaral, and Green Pak's owner, Joe Amaral, are brothers. For convenience, I will refer to them as George and Joe.

Before recounting the parties' versions of the various events outlined above, and for a reason that will become clear later, I must mention that the alleged discriminatees, Benito Olivera, Santiago Isidro, and Salvador Martinez, are Mixteco and generally speak their own language.

III

STATEMENT OF FACTS

The certification and the access agreement

The Union was certified as the representative of Respondent's employees on July 24, 2012. Although Respondent and the Union could not reach a final agreement on their own, and the Union would petition for MMC in order to obtain one, the parties did make an agreement on post-certification access. The access agreement was effective on February 18, 2013. The MMC agreement did not go into effect until after the events in this case took place.[4] *George Amaral Ranches, Inc.* (2013) 39 ALRB No. 10.

Under the access agreement, properly "authorized and identified" Union representatives were permitted to take lunchtime access "regarding the administration of the agreement" [5] provided that the Union gave advance notice about when and where it

[4] General Counsel contends that the fact that the Union resorted to MMC to obtain a contract is evidence of Respondent's anti-union animus. The statute does not require the parties to agree, Labor Code Section 1155.2(a), even if it now permits interest arbitration as a spur to collective bargaining.

[5] As there is no evidence of any other provisional agreements between the parties, I do not understand this condition as having any relevance to the matter before me.

wanted to take access. The Union also agreed not to disrupt or interfere with company operations.

Donato testified that he took access almost daily, three times a day, from the time the Union was certified. He testified that he typically called a supervisor named Felipe to tell him he was coming out. Although Respondent did not deny that it either had a supervisor named Felipe or that Felipe was among the persons designated by it to receive notice, the Union concedes that from January to June 2013 Donato never provided notice that he was going to take access, Post-Hearing Brief p. 3. I take this as an admission. [6]

When asked if he knew Donato was taking access, George replied, "No, I didn't really know what he was doing there. He didn't call me and ask me, so I don't know what he is doing there." RT I: 98. Since 'not knowing what someone is doing there' is not the same as 'not knowing that someone is there', I find that George was aware Donato was taking access.

Despite Donato's regular failure to provide notice, there was only one previous dispute over access between him and George before the incident that gave rise to this case took place. Because General Counsel and Intervenor rely on this incident as both proof of anti-union animus and proof that George threatened to do what he finally did in June, I will consider it first.

[6] *United Technologies Corp.* (1993) 310 NLRB 1126, fn. 1, enf'd (2nd Cir. 1994) 29 F3d 621. In her Post-Hearing Brief, General Counsel states that Donato provided no notice that he was taking access in the month prior to June 2013.

The incident of January 2013

On direct examination, Donato testified that, as he was leaving one of Respondent's fields in January after having taken access, George drove up to him and told him he had no right to be there. Donato responded that he was just leaving and, in the event, he did have a right since the crews were on lunch break. On cross-examination, Donato added that George also said, "I am going to fuck you" [RT I: 145]. Donato also acknowledged that George mentioned the possibility that Donato might get stuck because the road was wet.

George testified that, as he was driving along the road leading to the ranch, he saw a vehicle backing out of a field some distance away. He continued onto the ranch towards the vehicle and asked the driver, who turned out to be Donato, what he was doing there. Donato asserted that it was lunchtime and he had a right to be there. According to George, he did not dispute the right, but told Donato he was supposed to call before he came out[7] and that he had to go out another way because the road was wet. When Donato said he knew how to drive the road, George replied to the effect that the road was narrow and that, if Donato were to get stuck, farming operations would be held up. The incident ended with Donato's backing out of the field.

[7] Donato denied that George said he was supposed to call. Juan Morales Moran, the Union's contract administrator, testified that after certification the parties quickly came to an understanding about post certification access, which included the same notice provisions that the later February agreement contained [RT II: p. 45.] Although Moran also testified he wasn't sure the understanding was "official" because the parties were still negotiating, [RT II: 46], I find both parties understood that organizers were supposed to call before they came out and I, therefore, find that George told Donato he was supposed to call.

In view of Donato's initial failure to mention the apparently reasonable grounds of George's expressed concern, his testimony about this incident seems distilled in order to exemplify a hostility to access on George's part that, in light of the amount of access Donato took without notifying George and without incident, is not apparent from the record as a whole. I, therefore, decline to treat the incident as evidence of animus. Moreover, considering the amount of access Donato took between January and June, if George's comment to Donato were a threat, there were plenty of occasions in which it could have been made good. I decline to rely on this episode as prefiguring what happened in June 2014.

The relationship between Respondent and Green Pak

Respondent Amaral is owned by George. Respondent grows and ships various crops, including broccoli, lettuce, cabbage, cauliflower, and carrots. According to George, he uses a number of companies to "get product out of the field", which I take to mean "harvest." Besides Green Pak, some of the companies he uses are Dole, Tanimura and Antle, Duda, GVE, Taylor, and Fresh Express (Chiquita.) According to George, when harvesting and packing "leafy greens", such as lettuce, the heavy equipment and the bathrooms used in the field have to be certified as "washed, detailed and chlorined" by an independent company. Thus, his equipment was being used by Green Pak on June 14, 2013 because Green Pak was harvesting an order George had received for Sunsation, which required such certification and Respondent's equipment had been so certified. When Green Pak uses Amaral's equipment, it is either billed directly for the use

or the cost of using it is deducted from the commission Green Pak receives on each box packed.

Green Pak, formed in March 2013, is owned by Joe. Although Green Pak has an office at the same address as Respondent's ranch office, it also has an office in Joe's home. Joe described Green Pak as a custom harvester, which harvests and packs for a number of companies, including, besides Respondent, Dole, Tanimura and Antle, D'Arrigo, Duda, and C & G, a company owned by another Amaral brother named Carlos.[8] Sergio Carrillo, a foreman for Green Pak added that Green Pak harvests for Church Brothers. During 2013, Green Pak harvested for Respondent more than five times, and when it did so, the produce was shipped by Respondent's trucks. When Green Pak harvested for other growers, the product might be hauled in those companies' trucks or by C & G, GTO, Duda, or even by Respondent. When Green Pak harvested for Respondent, it received a commission of 35% of the price Respondent received per box. Green Pak supplied knives, gloves and hair nets to the workers. Only the knives were specialized; the gloves and hair nets could be bought anywhere such things were sold.

The allegation of interference with access on June 14, 2013

Donato enters Metzger

To get from the public road to where the incident with the lettuce crew took place, Donato entered a dirt road, drove about ¼ - ½ mile before coming to another dirt road that intersected the first and turned right. RX1 is a photograph of the dirt road which

[8] On page 87, Vol. IV of the transcript, C & G is spelled phonetically as CNG, See also, RT IV: 88.

lies below that right turn and which borders the field where the lettuce crew was working. The lettuce field is not visible since it lies to the left side of the road in the photograph. The photograph also depicts the ditch alongside the road where the lettuce crew was sitting and eating their lunches during the early stages of the episode: it is visible between the road and the ribbon of green that runs along the edge of the triangle-shaped field on the right side of RX1.

What may not be immediately apparent in the photograph is the dirt road Donato first traveled before he turned towards the lettuce crew. Upon examination, the road is visible as a thin brown stripe that runs below the blue rectangular patch on the left side of the photograph and continues more or less horizontally across the photograph until it disappears. In RX1a, the intersection of the two roads is indicated by a small circle next to a "C." It was at this intersection that the members of the Contreras crew parked their cars. The distance between where Contreras's crew parked their cars and where the incidents alleged in the complaint took place assumed importance during the hearing because, as will be seen, one of the alleged discriminatees in this case testified he became aware of what was happening between George and Donato while he was at the parking area and was able to see and hear what was happening on the road below.[9]

[9] The parties and I made a site visit for the purpose of determining whether or not it was possible to hear what was happening on the road below the parking area. Since the incident took place along a dirt road with few markers, it is not surprising that there was no agreement about exactly where it took place, but there was agreement that it was between 750 and 1000 feet from the parking area. We then stood at 750 and 1000 feet below the parking area (as measured by a cell-phone "app") while a party representative

(Footnote continued….)

Donato and Joe

Donato estimated that he was on the first dirt road before the turn-off to Metzger a little before noon. There is no need to rely on admissions about his practice generally to find that Donato did not notify Respondent that he was coming out on this day; he admitted that he did not.

As Donato approached the intersection described above, Respondent's broccoli crew, under foreman Aurelio Contreras, which was to take lunch that day around 12:10, was still at work. Donato bypassed that crew to head towards another crew in the field below. This was the Green Pak crew hired by Joe Amaral. Donato testified that he had earlier tried to take access to Joe Amaral's crews, but Joe "ran him off" contending his crews were not in the unit. RT I: 95 The Union continued to believe that Joe's employees belonged in the unit.[10]

(Footnote continued)
went to the parking area and raised his or her voice to see what was possible for those of us on the road to hear from each distance.

At 750 feet, the Regional Director raised her voice to a level she described as one she might use in reprimanding her children. She could be heard. At 1000 feet, Respondent's Counsel could be heard only dimly when he shouted at the top of his lungs, which means that unless George and Donato purposely raised their voices in order to be heard from that distance, which I tend to doubt, it is unlikely they would have been heard from the parking area. At 750 feet someone at the parking area was within earshot of what was happening outside the lettuce field.

[10] The Union filed charges over these incidents alleging diversion of unit work. At various times, both General Counsel and Intervenor sought to elicit testimony from Donato that he was taking access to the lettuce crew in order to investigate these charges, which are not included in this complaint. When the matter first came up, Respondent moved to strike the testimony, and I granted the motion to strike on the grounds that I did not understand the statute to authorize a union to take access to investigate unfair labor

(Footnote continued….)

As Donato approached this crew in his car, they were breaking for lunch. According to him, he did not initially recognize anyone in the crew, which was why, even before he stopped, he asked a worker coming out of the field for whom he worked. The worker told him, "Amaral." Before getting out of the car, Donato took some pictures of the equipment in the field. Pictures of tractors and bathrooms with "Amaral Ranches" signs on them and pictures of trailers with "AR", which, in the absence of any other explanation, I take to mean "Amaral Ranches", welded onto their frame are in evidence. Although one cannot see a label on the packing boxes in the pictures, Donato testified that he recognized Respondent's name on them, and the crew's foreman, Sergio Carrillo, testified the crew was packing into Respondent's boxes.

Donato testified that, besides seeing equipment bearing Amaral labels or initials, he recognized Sergio Carrillo as someone who had been a foreman for Respondent in 2012 and some workers who had been with Carrillo's crew when Carrillo worked for Respondent. Upon greeting Carrillo, Donato asked him whether he had "gone back" to Amaral. Carrillo responded that this was not an Amaral crew, but a Green Pak crew. Donato was skeptical because of the presence of equipment bearing Respondent's

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(Footnote continued)
practice charges that it has filed. Although a union has a right to obtain information relevant to its duty to bargain, which includes the processing of grievances, I have found no case in which it has been held entitled to take access to obtain information to support charges it has filed. Indeed, the national Board has held that a union is not even entitled to obtain information from an employer relevant to charges it has filed. See, e.g. *Pepsi Cola Bottling Co.* (1994) 315 NLRB 882, Enf'd in pertinent part, (4th Cir. 1996) 96 F3d 1439.

name. As Donato testified, he did not want to leave without determining whether the crew was an Amaral crew. [RT I: 213] While Donato was occupied, Carrillo took the opportunity to call Joe.

According to Donato, he next introduced himself to some of the crew taking their lunch and told them not to be concerned about his taking pictures; he was from the union, which had been certified. He told them that Carrillo had said the crew was not with Amaral, but with Green Pak. Donato admitted that one female crew member and then another said they worked for Green Pak.

Joe arrived while he was talking to the crew.

Both men agree that, upon Joe's arrival, he loudly told Donato he had no right to be there, the crew was not Respondent's, and that he was going to call the sheriff. According to Donato, at some point Joe told him he paid with Green Pak checks, and Joe asked a female crew member to show Donato a check stub. According to Joe, shortly after he told Donato that the crew was a Green Pak crew, Donato asked how he was to know that, at which point a female crew member, who was sitting along the ditch having lunch, volunteered that they were paid by Green Pak, whereupon Donato asked her for a pay stub.

The woman, Ofelia Nunez, testified that, as she and another woman were sitting and eating their lunch along the ditch in RX1 and RX1(a), a man whom she identified as Donato came, took some pictures, and sat down to talk to them. According to her, it was Donato who asked her for whom she worked and when she told him it was

Green Pak[11], Donato asserted that it was not Green Pak but Respondent and asked her for a check. Nunez further testified that Donato had come with a clipboard with some lines on it and asked her to write her name there; indeed, she also testified that Donato solicited signatures for the entire time he was there. I credit Nunez and Joe that it was Donato who asked Nunez for a check; since it was Donato who was, as he put it, "doubtful" about the identity of the crew's employer, it seems more likely than not that it would have been he who asked for proof about who was paying the crew.

In the meantime, Joe called 911 and George.[12]

Donato and George

Up to this point, there have been few material differences between the parties' accounts. With the arrival of George, their accounts begin to diverge seriously and I must relate them more or less separately since there is no way to coherently merge them. Put simply, Respondent contends that a major part of General Counsel's case has been made up out of whole cloth. General Counsel and Respondent contend that a major part of Respondent's case is fabricated.

General Counsel's/Charging Party's version

[11] She indicated she was somewhat annoyed by the request and answered him loudly. While Respondent cites Nunez's testimony in its Post-Hearing Brief, See, p. 6, it does not argue that, in "annoying" her, Donato violated the terms of the agreement and I conclude that his interrupting her lunch did not.

[12] Joe's call was not the only one to 911. As will be discussed, George called 911 and Donato called 911. The sheriffs did eventually come, but they did not come to the lettuce field. They met the protagonists some distance away from the crew after the incident was over.

Donato testified that while he was talking to Joe, George arrived "at a high rate of speed" and came running towards him, saying, "Now you are really going to fuck yourself." As soon as he came upon him, George grabbed Donato by the shirt collar and started to drag him "with all his strength" away from the crew, tearing a button from Donato's shirt and leaving scratch marks on his neck and chest. Pictures of Donato, taken sometime between an hour and an hour and a half later, are in evidence as GCX2. The pictures show inflamed areas on Donato's neck and chest that appear to be scratch marks.[13]

Donato testified that, while he was being pulled, he had a clipboard under his left arm, which he retained while taking his cellphone out of his pocket with his free hand. He first tried calling the Union legal department but, failing to reach it, succeeded in calling, and was on the phone with, 911 while he was being pulled. When asked whether there were any workers nearby, Donato testified there were some:

> Q: And when George first grabbed you how far away were those workers?
>
> A: About 10-15 feet, if that much.
>
> Q: Apart from those workers that you said were 10-15 feet away, do you know if any other agricultural workers saw you?
>
> A: Yes.
>
> Q: How do you know that?

[13] Donato testified that after the incident, he showed his chest to the sheriffs who merely looked. There is no evidence he was asked if he wanted to file a complaint or that he asked to do so. I find this puzzling.

A: Because I saw that there were four workers from another crew that were arriving.[14] [RT I: 106.]

The four whom he was referring to were the alleged discriminatees, Olivera, Isidro, Martinez, and another employee named Daniel Coronado. The crew they were from was that of Aurelio Contreras. Donato knew the four men were members of Contreras's crew because Olivera and Isidro had been in negotiations with him and he had seen Martinez and Coronado when he took access to Contreras's crew.

How the alleged discriminatees came on the scene

At this point, I must suspend the narrative and back up in order to relate the parties' different accounts of how the alleged discriminatees happened to be on the scene.

It is undisputed that Aurelio Contreras's crew was eating lunch by their foreman's truck near AC in RX1a. It is also clear from the weight of the testimony that from where the crew was taking lunch they could not have seen what was happening between Donato and George on the road below. Olivera, however, testified that he was not with his crew at the time, but had gone to his car to get his lunch because he had forgotten it. From that vantage point, he could see and hear the incident between George and Donato as it unfolded.[15]

[14] Although on cross-examination, Donato testified that what he meant by "arriving" was that the four workers were about ¼ - ½ mile away when he first saw them, I decline to rely on his estimate of distance. Most of the distance estimates in this case seem crafted for narrative purposes.

[15] Isidro and Martinez corroborated Olivera's testimony that he went to his car.

As Olivera was at his car[16], he saw a truck coming up the road, driving so fast it raised a cloud of dust before it was stopped by another truck in the road upon which Olivera briefly lost sight of it until the latter truck moved and the first truck continued on to where Donato was with the lettuce crew. Olivera saw George get out of the truck and, waving his arms, move hurriedly towards Donato. When George reached Donato, he grabbed him by the shirt and tried "to get him out of there to leave" because, as he testified, "the crew that was there wasn't his." [RT II: 70.]

Olivera further testified that upon seeing what was happening to Donato, he returned to his crew and told Isidro, Martinez and Coronado that George was pulling Donato by the shirt to get him out of there. The four men decided to go see what was happening.

When he testified on direct examination, Isidro testified that Olivera told him and his crewmates that he saw George pulling Donato by the shirt [RT II: 123]; on cross-examination, he testified that Olivera told them Donato and George were "fighting" [RT II: 148]. In his declaration in support of General Counsel's application for injunctive relief, Isidro declared that Olivera told the men that he saw Donato being yelled at by

[16] Olivera testified that he was approximately 25 meters from where Donato and the crew were. "Q: When you were at your car and you saw Mr. Donato speaking with the workers, how far away was Mr. Donato and the workers? INTERPRETER: From him? Q: From where you were? A: About 25 meters. [RT II: 66-67; RT II: 103.] As noted above, the parties agree that the distance from the parking area to the site of the incident was no less than 750, and may have been as great as 1000, feet.

George.[17] See, GCX 5, Isidro Declaration. When pressed on cross-examination, Ysidro testified that what he meant when he testified Olivera told them he saw the two men "fighting" was that Olivera told them the two were "yelling loudly." [RT II: 151-152.] For his part, Martinez testified Olivera told them there was an argument.

According to Aurelio Contreras, however, Olivera never went to his car; rather, he and his companions were with the crew eating lunch when Olivera received a phone call and spoke to someone in a language he recognized as Mixteco. Although he did not know what was being said, he saw the four men get up and leave the crew shortly afterwards.

For now, I will resume General Counsel's/Charging Party's version with the four men leaving their crew, as everyone agrees they did, to see what was happening on the road below.

General Counsel's version resumed

Olivera testified that as the four approached Amaral and Donato, George came towards them shouting they couldn't be there. When Isidro replied they were on break, George said that if they didn't go back, he was going to call the police. At the threat to call the police, Coronado left the scene to return to the crew and I will not refer to him again. According to Olivera, after Isidro responded that it didn't matter if George

[17] On cross-examination, when Isidro was asked about his declaration in which he stated that Olivera told him and his crewmates that George was "yelling" at Donato, he initially denied that it was his signature on the page, contending that he did not sign like that [RT II: 148], before confirming that it was his signature. Isidro's initial attempt to disavow his previous statement in an apparent attempt to preserve his testimony causes me to suspect his candor.

called the police because they were simply watching, George said, "[they] were fired because [they] did not mind him." Martinez corroborated Olivera's testimony that after Isidro replied they were on break, George threatened to call the police and told them they were fired.

When first questioned, Isidro corroborated Olivera's testimony about George's saying they did not have a right to be there and his replying that they were on their own time; he also added that George also told them if they didn't "[go][18] back he was going to call the police because you joined the union and you fight with me and are just looking for trouble." [RT II: 119] When questioned by Intervenor, he testified that George said: "because of you and the union [he] didn't have workers" and "they go on strike" [RT II: 137.][19] Neither Olivera nor Martinez mentioned George's making any references to the Union, to losing workers, or to workers' going on strike. In view of the failure of the other alleged discriminatees to mention any of the anti-union statements Isidro attributed to George and Isidro's false initial denial of his previous statement, I decline to credit his testimony about the anti-union statements.

When asked what Donato was doing while the men were speaking to George, all of General Counsel's witnesses agree that he was on the phone. They also

[18] The transcript, RT II:128, l. 20 has ""if you don't *know* back." "Know" is hereby corrected to read "go."

[19] Although Donato testified he was by now on the phone to 911, he testified he could hear the workers say they were not going to leave and George say, "They had nothing to do there. That because of this asshole and the union, he was losing workers." [RT I: 110] In view of my doubts about Donato as a witness, I decline to credit words he puts in George's mouth.

agree that when George saw Donato on the phone, George told Donato that if he was recording him to stop and thereupon picked up a stone and threw it at Donato. All of General Counsel's witnesses testified that Donato ducked and the stone missed. Donato admitted that he was holding the phone at arm's length because the 911 operators told him not to say anything, but to hold it so they could hear what was happening. Donato admitted, in other words, that George was being recorded.

Donato and the discriminatees also agree that when Donato dodged the stone, George reached for it in an attempt to snatch it away, but failing to do so as Donato held it out of his reach, George struck or hit Donato on the arm. General Counsel's witnesses also agree that Joe now restrained George, telling him this was no way to settle matters.

The aftermath: George and the alleged discriminatees

When he first testified about what happened after Joe separated George from Donato, Olivera stated that George got in his truck and left to go to Contreras's crew while he, Isidro, and Martinez stayed talking to Joe. Later, he testified that after George returned and the three men "wanted to go back to the crew and start working", George told them "don't even waste your time because you're fired." [RT II: 84, 85] On cross-examination, he testified that after he and Isidro and Martinez went to get their bags, George came over to talk to them: "[M]aybe he wanted to talk to us and tell us (inaudible) but he at that moment got a phone call and we just left and we didn't want to talk to him." [RT II: 114; See also, RT II: 115: "We didn't want to talk to him because he had already fired us and so we left."]

Isidro testified that, as the men were about to leave, George asked them to return to work: "[W]e were going to get into the truck. He followed us and he told us to go back to work." [RT II: 134]

> Q: [By Respondent's Counsel]: After he took the call, do you remember that Mr. Amaral kept asking you to stay because he needed to get the orders filled and he needed work[ers] because he had orders he needed to have filled?
>
> A: [Isidro] I don't remember right now. But when he took the call, he said, "wait and we'll talk in a minute." And we didn't wait.
>
> Q: As you were leaving, do you remember [him] begging you to stay because he needed the workers?
>
> A: He did ask us to stay, but he had already fired us and if he – if Eulogio [Donato] being a representative of the union, he had pulled him by the shirt and he hit him on the arm, what could we expect [from] him. [RT: II 162-163; See also, RT: 135.]

Martinez corroborated Isidro's testimony that George asked them to stay:

> Q: [General Counsel]: What else did George say to you after telling you you were fired?
>
> A: And then when he saw that we were getting out bags, then he came over to us and started to tell us not to leave because he wanted us to stay and work because he didn't have any more workers. [RT III: 9; See also, RT: 36]

Like Isidro, Martinez testified that they did not stay because they had seen George "angry and fighting with somebody else. So we got scared and left." [RT II: 39.]

<u>Respondent's version</u>

Green Pak foreman Sergio Carrillo testified that he saw George come to the field and observed him get out of his truck and walk towards Donato who was then 30 – 40 feet away. Carrillo heard him shout, "Leave my property you have nothing to do here.

This crew is my brother's." The next thing he saw was Donato with his cellphone extended away from his body and George's trying to reach for and grab it, hitting Donato on his wrist when he missed. Carrillo also heard George say, "Don't record me or don't talk", but he was too far away to hear much more. He then saw Joe get between the two men and calm George down, after which he saw George walk over to take the license plate of Donato's car and make a phone call before George got into his truck to drive towards "three men who were coming." When asked if he saw George at any time grab Donato, he said no; when asked if he saw George punch Donato, he said no; when asked if he ever saw George throw a rock at Donato, he said no.

Joe corroborated Carrillo's testimony that when George emerged from his truck, he went towards Donato, telling him loudly, "You have to leave; you can't be here in this crew." When Donato told him he was recording him, George told him that he could not and went after the phone. As Donato held it out of reach, George grabbed for it but missed and his hand came down across Donato's arm. Joe intervened, telling George to let it be.

After George broke off the encounter to go to his truck, Joe heard Donato making a phone call, speaking first in Spanish saying he was getting "beat up", before lapsing into another language, which he thought he recognized as Oaxacan.[20] After the phone call in Oaxacan, Joe saw some people walking down the road about "half-to three

[20] The language is spelled phonetically in the transcript as "Wahacan." As noted above, the alleged discriminatees are Mixteco, a group that generally hails from the Mexican state of Oaxaca. The transcript is hereby corrected to read "Oaxacan."

quarters of a mile away." RT IV: 39 Joe testified that George got in his truck to go meet the men and that when he did so, he was about 25 feet away where Joe was, which was close enough for him to hear George tell them to "go back to work." RT IV: 42 Upon being asked if he ever saw George grab and try to drag Donato, Joe testified that he did not. Upon being asked if he ever saw George throw anything at Donato, he testified that he did not.

Green Pak crew member Nunez testified that she saw George arrive slowly and get out of his car, but she went to wash her hands and she did not see what happened immediately after he arrived.[21] She also recalled Donato's using his cellphone to record George, but she did not see George throw anything at Donato.

George testified that he received a call sometime around 12:10 or 12:15 from Joe telling him someone was bothering the crew and would not leave. He got to the ranch about 10 minutes later, but was stopped by a truck near a pea picking crew that was on break. According to George, he was not driving fast at any time. The crews were at lunch and since they typically ate their lunch on the side of the road, it would have been

[21] Respondent contends that Nunez testified she took her break before the "incident". See, Post-Hearing Brief, p 7. To the extent Respondent is referring to the struggle over the cellphone, Respondent is correct. However, Nunez testified that she was taking her break when George first arrived and did not see what happened immediately upon his arrival [RT III: 170], which was when Donato and Olivera testified the incident took place.

dangerous to drive too fast along the road.[22] After waiting for the road to clear, he continued towards the lettuce crew. Upon arriving he saw Joe, Donato and Carrillo. He got out of his truck, approached Donato, and told him that he had no right to be there because he did not call and because it was the wrong crew. When Donato insisted he had a right to be there because it was lunchtime. George told him he was in the wrong and asked him to call his supervisor. George also told him he was going to call the sheriff.

Meanwhile, Donato had a phone in his hand and was placing calls. George heard him make one call in a language George knew was not Spanish, and which he thought might be Mixteco. George admitted that when he heard Donato's speaking what he thought might be Mixteco, he "panicked" because he thought Donato might be "calling the crews off."[23]

According to George, Donato continued placing calls and finally held the phone up and towards his face as if he were recording him. George asked if he was and when Donato acknowledged that he was, George tried to get the phone, admittedly swiping Donato across the wrist as he tried, and failed, to do so. It was at this point that George, too, testified that Joe intervened, telling him to let the matter go.

When asked if he grabbed Donato by the shirt and dragged him, George testified that he did not; when asked if he ever threw anything at Donato, George said he

[22] I credit George as to this. Moreover, having driven in a caravan along the roads inside the ranch during the site visit, there is no question that even driving slowly on them would raise a cloud of dust.

[23] Joe testified that Donato made the call in Mixtec after George's encounter with Donato over the cellphone; George placed it before.

did not. When asked if there was anything that he did to Donato that would have caused the inflammation on Donato's chest pictured in GCX 2, George said no. Indeed, George testified that Donato was not even wearing the shirt he is pictured as wearing in GCX 2. According to George, the shirt was a brown checkered shirt as opposed to the striped black shirt that Donato is wearing in the photograph.[24]

The alleged discriminatees arrive

Upon direct examination, George testified that as he looked down the road about 300 feet, he saw "four guys coming" and he got in his truck to drive to meet them. Upon being questioned further by Respondent's counsel, George expanded the timeline and added that after Joe intervened, he called the sheriff who told him to get Donato's license number. He now recalled that it was as he was taking the license number that he saw the "guys coming." Because it was too far to walk, he drove to meet them.

Upon meeting up with the employees, he asked where they were going. Olivera said they got a call from Donato and had come to see what was happening. George told them they were not to go over there; it was not their crew. Olivera answered that they would go back to their crew at the end of the lunch hour. George then said, "If you do not go back to work you will lose your jobs. And they said, well we'll make it back in time. I said, you're going to be late, it is far away. I says, and furthermore, I don't want you guys over there, you don't belong over there, you don't have no business over there."

[24] Joe testified Donato was wearing a striped shirt.

Aftermath: George and the alleged discriminatees

As Olivera, Isidro and Martinez went over to talk to Donato, George left them to go to Contreras's crew. As he came back from speaking to Aurelio, he passed the discriminatees who, by now were getting ready to leave. According to him, he told them it was okay they were late; they could go back to work, but the men refused to stay, saying they had already been fired.

IV

FINDINGS OF FACT/CONCLUSIONS OF LAW

Green Pak: Labor Contractor or Custom Harvester?

Using the multi-factor analysis[25]: in *Tony Lomanto* (1982) 8 ALRB No. 44, as a kind of checklist, the parties sketched the operations of both Respondent and Green

[25] Among the factors relied upon in *Tony Lomanto*, *supra*, include:

1) Who exercises managerial control over the various farming operations? Who has day-to-day responsibility?
2) Who decides when to plant, when to irrigate or harvest, which fields to work on?
3) Who is responsible for performing the farming operations?
4) Who provides the labor? Does the provider also supervise the labor?
5) Does someone provide equipment of a costly or specialized nature?
6) Who is responsible for hauling the crop to be processed or marketed?
7) Who owns or leases the land?
8) On what basis are any contractors compensated and who bears the risk of crop loss?
9) Do the parties have any financial or business relationships with each other, outside of the issue in this case? What form of business organization is each party to the case?
10) How do the parties view themselves, i.e., does the grower/landowner consider the contractor a custom harvester? If other growers enter into similar arrangements with the contractor, what are their views?

(Footnote continued….)

Pak. Respondent contends that Green Pak satisfies enough of the indicia recited by the Board as indicative of custom harvester status to be considered one: Joe has his own foremen and his own crews, works for multiple growers, supplies his own equipment, is compensated by a commission on each box, is organized separately from Respondent, is wholly owned by Joe, and is viewed as a custom harvester by both Joe and George.[26] General Counsel acknowledges that Green Pak hired and supervised the lettuce crew, but contends that Respondent should be considered the employer of the lettuce crew because it leased the land on which the lettuce was grown and grew, sold, and arranged for hauling and transporting the crop.[27]

(Footnote continued)

11) How long has each party been entering into arrangements of the kind at issue in the case? What is each party's investment in that line of business and how easily could it be liquidated?
12) What continuity of employment relationship exists between any of the parties and the agricultural employees involved in the case, i.e., did harvest employees also work before or after the harvest for any of the parties?
13) Ultimately, who is the "employer" for collective bargaining purposes and what is the correct legal status of each of the parties?

[26] Respondent contends that Joe meets "10 of the 13" factors the Board relies on to find custom harvester status. In this case, some of the factors seem duplicative. Thus, Respondent counts the fact that George is *sole* owner of Respondent and Joe is the *sole* owner of Green Pak separately from both the fact that neither has an investment in the other's business and the fact that Respondent and Green Pak are separate legal entities. See Post-Hearing Brief, p. 24

[27] George testified that he made all the arrangements for "distributing" the crop. RT VI: 8. I should add that based upon Nunez's testimony that she did not work for Respondent, Respondent argues there is no "continuity of employment" between the two entities. This overlooks Donato's testimony that he recognized various members of the lettuce crew as well as Carrillo as having worked for Respondent the previous season. The record is too sparse to make any finding on this factor.

In *Ventura Coastal Corporation* (2002) 28 ALRB No. 6, the Board had to determine if certain employees, whose eligibility to vote had been challenged, were employees of the named employer, Ventura Coastal, or of Gilbert Gomez, whom the employer contended was a custom harvester. Among other things, the contract between Ventura and Gomez provided that Gomez was a custom harvester, that he provided all equipment, controlled all employees, and exercised day-to-day control over harvesting operations. Noting that the equipment Gomez supplied was neither costly nor specialized, which is clearly the case with respect to the equipment provided by Green Pak in this case, the Board declined to consider the provision of what equipment Gomez did supply as a major indicia of custom harvester status. It further discounted the fact that Gomez had control over hiring, firing, and discipline on the grounds that such functions are typical farm labor contractor functions. The Supreme Court has similarly discounted such indicia:

> The ALRA expressly excludes both a "farm labor contractor" and "any [other] person supplying agricultural workers to an employer" from the otherwise expansive definition of "agricultural employers" subject to the Act. A farm operator who "engages" the labor supplier is "deemed the [statutory] employer for all purposes" of the statute. [Cite.]
>
> In these provisions, the ALRA's drafters directly addressed the widespread practice of obtaining field workers from intermediate suppliers of labor who retain ostensible control over hiring, firing, wages, and working conditions. The Act sought to bypass the intermediate employment relationship and to "establish [an] 'industrial' bargaining unit scheme, with collective bargaining directly between growers and unions." [Cite.]
> *Rivcom Corporation v Agricultural Labor Relations Board* (1983) 34 Cal 3d 743, 768:

The remaining factor that the Board has found determinative of custom harvester status is the fact that Green Pak is compensated by a commission on each bin packed as opposed to a percentage over-ride on his labor costs. However, in a number of cases, the Board has also held that compensation on a per unit basis is not compelling evidence of custom harvester status. See, *San Joaquin Tomato Growers* (1994) 19 ALRB No. 4 and cases cited at p. 3. (See also, *Ventura Coastal Corporation*, supra, where the Board says that "even if Gomez did receive some of his income from paying the harvesters less than the bin rate paid him by the employer, that compensation would still be a "fee" under the labor contractor licensing statute.")

In view of the facts that Respondent leased the land, grew, sold, and transported the crop, that Green Pak had no investment in, and therefore, bore no risk of loss from failure of the crop, owned no equipment, and that Respondent has not shown that Joe's business decisions and judgments materially affected his opportunity for profit or loss, Ventura Coastal, supra, at p. 10, I find that Green Pak was functioning as an intermediate supplier of labor to a "farm operator" and, therefore, that its direct hires were part of the bargaining unit. Accordingly, whatever access rights the Union had, they extended to the lettuce crew.

The Union's access rights

Discussion of a union's post-certification access rights to members of the unit must begin with *O.P. Murphy* (1978) 4 ALRB No. 106, the first case in which the Board held there was such a right. The Board explained:

> As the certified union is the agent and representative of all the employees in the bargaining unit, it is essential that it have access to, and communications with, the unit employees in order to determine their wishes with respect to contract terms and proposals, and to obtain current information about their working conditions, to form and consult with an employee negotiating committee, and to keep them advised of progress and developments in the negotiations.
> *O.P. Murphy*, supra, 4 ALRB No. 106 at p. 3.

The Board said that it would consider the need for such access on a case-by-case basis but set out "guidelines" for considering these cases:

> While we will look at the facts of each case to determine the extent of the need for post-certification access, we start with the presumption that no alternative effective channels of communication exist. We hold that a certified bargaining representative is entitled to take post-certification access at reasonable times and places for any purpose relevant to its duty to bargain as the exclusive representative of the employees in the unit. * * * Where the bargaining representative wishes to observe employees while they are working, in order to obtain information for job evaluations, to conduct safety inspections, or for similar purposes, we shall follow applicable NLRB precedent.
> *O.P. Murphy*, supra, 4 ALRB No. 106 at p. 8-10.

Relying on the Board's language that a union has the right to take access "for any purpose relevant to its duty to bargain as the exclusive representative of the employees in the unit", General Counsel contends that Donato was entitled to take access because Green Pak's employees were employees of Respondent and because he discussed negotiations.

Relying on the Board's decision in *Triple E Produce Corp*. (1997) 23 ALRB No. 4, which held that *O.P. Murphy* permits access to communicate with employees about the progress of negotiations, to ascertain their wishes with respect to

contract terms and proposals, and to investigate working conditions[28], Respondent contends that Donato had no right to take access at all since the investigation of the unfair labor practice charges is not only not among the ones identified by the Board in *Triple E*, but also was ruled improper by me.

Triple E does appear, as Respondent contends, to either clarify or narrow one of the guidelines for permitting access set out in *O.P. Murphy*. Thus, where *O.P. Murphy* distinguishes between access sought for "any purpose relevant to the union's duty as exclusive representative" (with respect to which access is generally permitted), and access sought for informational purposes (with respect to which it will apply NLRA precedent), *Triple E* seems to limit the first pole to access sought *only* for the purpose of communicating with employees about the negotiation process itself. The applicability of NLRA precedent regarding access sought for informational purposes remains unaffected by virtue of Labor Code Section 1148.

Based upon Donato's testimony that "when" he took access in June he discussed negotiations, General Counsel and Intervenor contend that Donato had such discussions with the Green Pak crew. However, there is no specific evidence to support this contention. Donato did introduce himself and say he was with the Union and that it

[28] In *Triple E*, the Board emphasized that "the legitimate purpose[s] of post-certification access [are] to communicate with unit employees about the progress of contract negotiations, and to obtain current information about their working conditions, as well as their wishes with respect to contract terms and proposals," *Triple E Produce Corp*, Op cit. at p. 4. And in *Triple E Produce Corp.* (1997) 23 ALRB No. 6 at p. 3, the Board held that a union "is conditionally entitled to enter the employer's premises to discuss contract negotiations and to investigate working conditions."

was certified and he did, apparently, ask members of the crew to sign something; but neither General Counsel nor Intervenor presented any evidence that he either said anything about negotiations or asked any of the employees about what they might want from union representation, and Nunez testified that he did not even explain what he was asking the crew to sign. I cannot find that Donato took access to discuss negotiations or to find out what, if anything, the crew wanted out of them.

I also reject General Counsel's argument that, merely because I have found Green Pak to be a labor contractor, he had a right to take access to the crew. While the right to post-certification access depends upon the certification, it does not flow directly from it: there must be some other identifiable purpose entailed by the certification to justify it. If, for example, Donato had sought access to Contreras's crew, which was indisputably part of the unit, he still would have had to meet one of the Board's guidelines to be entitled to take it.

It remains to consider Respondent's argument that Donato had no lawful purpose at all. Putting aside for the moment, the question of the effect of Donato's failure to notify Respondent that he was coming out to its fields, as Donato bypassed the Contreras crew because it was still working, he came upon another crew in a field leased by Respondent. The crew was using Respondent's equipment, and after asking an employee for whom he worked and being told it was "Amaral", Donato recognized a foreman and several other crew members whom he knew had worked for Respondent. It is true that he observed all this against a background of suspicion that Respondent was 'diverting' unit work, but these suspicions did not conjure up a crew that had enough of

the hallmarks of one of Respondent's crews to cause Donato to reasonably conclude that the crew might be part of the unit,[29] and, as he testified, to seek information about whether or not it was.[30]

Was this purpose within the Board's guidelines?

Although General Counsel contends that Donato was entitled to take access because the question whether or not the employees of the lettuce crew were employees of Respondent is relevant to the Union's duty to bargain *as* the exclusive representative of the lettuce crew, the argument is question begging since Donato's purpose was to determine *if* the Union was their exclusive representative. It seems to me, therefore, that this case falls closer to the second pole of the Board's guidelines in *O.P. Murphy*, namely, "to obtain information", with respect to which it will apply NLRA precedent.

Generally speaking, under the NLRA, a union has the right to obtain information relevant to the performance of its representational duties. *Fafnir Bearing Co.*

[29] Although Respondent contends that as soon as either Carrillo or Joe told him the crew was not Amaral's but Green Pak's, in *In re Catalano* (1978) 29 Cal 3d 1, 17, our Supreme Court has held that "union representatives performing lawful union activity at a jobsite do not [trespass] by refusing to accede to an arbitrary request by the owner the owner." Accordingly, if Donato's taking access was lawful, he was not required to leave upon being requested to do so.

[30] I have not found any Board case, and the parties have not cited any, on the question of a union's right to take post-certification access to seek information to determine if 'disputed' unit employees are in the unit. In *Robert H. Hickam* (1982) 8 ALRB No. 102, the Board did hold that the union had a right to take access to employees the employer contended were not in the unit, but the access sought in that case was specifically found by the Board to be for the purpose of discussing contract negotiations with the disputed employees, who had voted without challenge in the election, and not to determine *if* they were in the unit. Op. cit. at p. 15.

v NLRB (2nd Cir. 1966) 362 F2d 716, 721.[31] However, under NLRA precedent, a union is not entitled to access merely because the information it seeks to obtain from access is relevant to its duties as collective bargaining representative:

> While the presence of a union representative on the employer's premises may be relevant to the union's performance of its representative duties . . . that alone [does not obligate] an employer to open its doors. Rather, each of two conflicting rights must be accommodated.
>
> * * *
>
> Where it is found that responsible representation can be achieved only be the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end.* * * On the other hand, where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.
> *Holyoke Water Power Co.* (1985) 273 NLRB 1369, 1370, enf'd (1st Cir. 1985) 778 F2d 49, 53, cert den. 477 U.S. 905 op. cit. at 1370

Accordingly, under *Holyoke Water*, the lawfulness of Donato's taking access to the lettuce crew turns on whether or not the Union could have obtained information relevant to the question of Respondent's relation to Green Pak by any other

[31] In *Bud Antle* (2013) 39 ALRB No. 12, the union requested information about the employer's use of labor contractors (and custom harvesters) in connection with various grievances it had filed. The employer refused to provide the information. The Board held that information about labor contractor-supplied employees is presumptively relevant to a union's duties as certified representative and the union was entitled to receive it. Since, in cases involving custom harvesters, the Board still has to determine whether the farm operator or the custom harvester is the most appropriate employing entity to bear the responsibility for collective bargaining, *Rivcom Corp*. op. cit. at 976, *Henry Hibino* (2013) 35 ALRB No. 9, p. 4, it follows that information about the relationship between the custom harvester and the farm operator is also presumptively relevant.

means than by taking access to the crew. Since both Joe and George took the position that the lettuce crew was not Respondent's, it is reasonable to infer that George would have refused to comply with a Union request for information concerning Respondent's relationship with Green Pak. Accordingly, I find that Donato's taking access to obtain what information he could get by taking access, such as photographing the equipment and talking to the Green Pak employees to see how they were paid, was a "lawful" purpose.

The closest NLRB case I have been able to find supports this conclusion. In *National Broadcasting Company, Inc.* (1985) 276 NLRB 118, the NLRB permitted a union to take access to an employer's production trailer to determine for itself who was performing unit work. In that case, the union was the certified representative of a unit consisting of, among other TV staff, "cuers" located in the employer's non-studio facilities. "Cuers" give audio or visual commands to technical personnel to perform specific functions. The union had become concerned that the work of cuers was being performed by the employer's producers rather than by unit personnel and grieved the matter. The union requested access to the employer's remote facility to observe a live broadcast in order to see if the producer was performing unit work. Although initially denied permission to enter, a union field representative did so anyway and observed the producer "cueing." Subsequent requests to take access to the remote facility were denied and the union filed charges. The Board held the Union was entitled to take access for informational purposes:

> [We] held in *Holyoke Water Power Co*. [Cite] that in cases involving a union's request for access to an employer's premises for informational purposes, [we] will apply a balancing test . . . which seeks to accommodate both the employer's . . .

> right to control its property and the employees statutory right to proper representation by their union. * * * We agree with the [ALJ] that the information sought by the Union was clearly relevant to . . . the Union's general purpose in policing its collective bargaining agreements. . . .

Since Donato's taking access for the purpose of determining whether Green Pak employees were part of the certified unit is analogous to determining who is performing unit work, I conclude that his taking access for that purpose was lawful.[32]

This still does not end the matter. Relying on both *O.P. Murphy* and the access agreement, Respondent contends that Donato's failure to give Respondent notice that he was coming out abrogates whatever right to take access the Union might have had. In O.P. Murphy, the Board held that "[a]bsent unusual circumstances, the labor organization must give notice to the employer and seek his or her agreement before entering the employer's premises." *O.P. Murphy*, supra, at p. 5.

I am troubled by Donato's failure to give notice, but, as I have already found, it is clear that, had he given the notice required by *O.P. Murphy* and the agreement, Respondent would not have agreed to permit access to the lettuce crew. Since the purpose of the notice is to give an employer the opportunity to agree to permit access, where the record is clear that such agreement would not have been forthcoming, I find

[32] See also, *In re Catalano*, supra, in which the Supreme Court held that union stewards were entitled to take access to third-party property to ensure that contractual standards were being adhered to. Since, under our Act, certifications underlie all contracts, information sought for the purpose of 'policing' certifications would appear equally appropriate.

this to be one of those "unusual circumstances" in which the failure to give notice is excused.

Accordingly, I find that Donato was entitled to take access to the lettuce crew.

What happened between George and Joe on June 14, 2013?

Joe's Threat/George's Threat

Joe has admitted that he loudly told Donato he could not take access to the lettuce crew and that he told him he was going to call the sheriff. Threats by an employer to call the police are violations of Section 1153(a). *Roadway Package Systems* (1991) 302 NLRB 961. Since I have found Joe was functioning as a labor contractor, his acts are attributable to Respondent. *Agricultural Labor Relations Bd. v. Vista Verde Farms* (1981) 29 Cal 3d. 307

George also admitted that he threatened Donato with the police. Although not alleged in the complaint, I find this matter was fully litigated. Since this was in front of the employees in the lettuce crew, I find that George, too, violated the Act in this respect.

Did George Manhandle Donato?

Determining what happened when George first came on the scene is made difficult because I do not fully trust any of the witnesses, starting with Donato and George.

I have already discounted some of Donato's testimony on the ground that he was deliberately misleading about the January incident. I have also found, contrary to

his testimony, that it was he, not Joe, who asked Nunez for her check, and I have concluded that his testimony about George's speeding to the lettuce crew was exaggerated. In view of the Union's admission that Donato never notified Respondent about his coming out to take access, his testimony about his notifying Felipe must be construed as misleading.

I am also troubled by his description of the vigor of George's attack upon when, according to his own account, he was able to retain control of a clipboard tucked under his arm and use his cellphone to call the Union's legal department and then 911 while being dragged across the road by George "with all his might" for up two minutes. Moreover, since everyone agrees that Joe intervened to stop George from struggling with Donato over possession of a cellphone "because it was no way to settle things", it makes no sense to me that Joe would have stood by while his brother attacked Donato far more aggressively for up to two minutes. All of these elements make me wary about accepting Donato's uncorroborated testimony.

George, too, has given me reason to distrust him. I have remarked on the inconsistency between his testimony about the shirt Donato was wearing on June 14th and that of Joe, who testified Donato was wearing a shirt with the same pattern as the one he is seen wearing in GCX 1. George's insistence on putting Donato in a different shirt seems more consistent with an attempt to cast doubt on the authenticity of the photographs in evidence than it does with the record as a whole.

What I have so far not mentioned is Aurelio Contreras's and George's testimony that the person who identified himself and testified as "Salvador Martinez" was

an imposter, despite the fact that the handwriting exemplar the supposed imposter provided on the spot appears identical to the signature made by the person who signed as "Salvador Martinez" on Respondent's crew sheet dated June 14, 2013: "forging" a signature to match one the witness had not even seen when he provided the exemplar cannot be "dumb luck." Finally, if, as George testified, the incident with the cellphone was over when the discriminatees were no less than a football field away, and he had to drive to intercept them, how could they have heard, as they testified even before he did, that George was objecting to Donato's recording him?

Because of my doubts about both Donato's and George's reliability as witnesses, the credibility of the corroborating witnesses is critical. Here, too, there are no reliable guides. While Respondent's witnesses corroborate George's account, since their testimony is more or less in lockstep with his, and because I have doubts about his credibility, their testimony is not of much help. Moreover, the only presumptively non-interested witness in this case, Nunez, was – too conveniently – not present during the crucial first moments of the encounter.

This leaves Olivera as the only other witness who testified he saw what happened and he, too, has given me some reason to doubt his candor. I have already noted that the question about what could be seen or heard from the parking area assumed considerable importance at the hearing. Although the parties' representatives agreed that the parking area was between 750 and 1000 feet from the site of the incident, Olivera testified that he was only 25 meters – less than 100 feet – from where George encountered Donato, an estimate so far outside the agreed upon range that it seems less

likely due to a mistake than to aim at satisfying any doubts about whether or not he could see or hear what was happening on the road below the parking area. I am also troubled by his testimony that after George spoke to the alleged discriminatees, they wanted to go back to work, but he told them not to waste their time. This is so out of keeping with the rest of the workers' testimony about their being afraid to return to work, as well their admission that George later told them they could return to work, that I decline to credit it.

Despite my sense that Olivera sought to burnish his qualifications as a witness to what took place between Donato and George, for the reason stated below, I find that he did witness the first moments of their encounter. It will be recalled that both George and Olivera testified that George's way to the lettuce crew was blocked by a truck in the road and he could only proceed to the crew after the truck moved. Since Olivera testified before George did, and so far as the record shows, could only have known that George was stopped by a truck if he had seen it happen, and the only way he could have seen it happen was if he was not with his crew but at the parking area, I find that Olivera was, as he testified, at the parking area. It follows, therefore, that I do not credit Contreras' testimony that Olivera was eating with his crew.

Olivera testified he saw George pulling Donato by the shirt. Isidro testified that Olivera told him and his crewmates that he saw George "pulling" Donato by the shirt and also that Olivera told them he saw the two men "fighting"; but he also acknowledged that when he said Olivera said he saw the two men "fighting", he meant that Olivera told them he saw an argument. Martinez testified that Olivera told them that there was an argument. As I stated at the hearing, two people who are "yelling" or "arguing" with each

other are often said to be "fighting"; but, in the absence of irony, it does not seem likely that someone who has just witnessed a person being "pulled" would report that he had seen an argument or merely heard yelling. Since the demonstration proved that it was possible for Olivera to have heard George and Donato "arguing" or "yelling", and since two of the alleged discriminatees testified that Olivera told them there was an argument, I find that Olivera told his crew-crewmates that he heard George yelling at Donato.

Did he see more than what he told his crewmates he heard?

On this record, I am not satisfied that he did. At bottom, the difference between the parties' versions of events comes down to whether or not George and Donato had one 'physical' encounter or two, with Donato insisting that George "came after" him twice and George only once. Despite this, Donato himself appeared to collapse the two episodes into one when he testified that when George "first" grabbed him, the four workers were already coming down the road. However, all Olivera, Isidro, and Martinez testified that they saw when they were on the road was the incident with the cellphone, not any "pulling and dragging", which is consistent with Respondent's version of events that the only physical encounter between the two men was over the cellphone.

Accordingly, I do not find that George pulled and dragged Donato.[33]

[33] I do not have to determine how Donato received the scratches on his chest; I need only determine, based upon this record, whether General Counsel proved that George caused them.

Did George Threaten to and Fire the Alleged Discriminatees?

When the four members of Contreras's crew came down to see what was happening to Donato, they were clearly engaged in protected activities for they were assisting their union representative; moreover, they were on their own time since it was their lunch break. Although the employees testified that George said he fired them and George that he only said "if you do not go back to work you will lose your jobs", since the employees did not go back to work[34] upon being told to so, they reasonably concluded they had been fired. *North American Dismantling Corp*. (2000) 331 NLRB 1557.

> The test for determining whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead employees to believe that they had been discharged. *NLRB v Hilton Mobile Homes*, (8th Cir. 1967) 387 F2d 7 and 'the fact of discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated.' *NLRB v Turnball Asphalt Company of Delaware*, (8th Cir. 1964) 327 F,2d 841, 843" *Ridgeway Trucking Co*. (1979) 243 NLRB 1048, 1048-1049 (enf'd. 5th Cir. 1980) 622 Fd.2d 1222.

See, *H & R Gunland Ranches. Inc*. (2013) 39 ALRB No. 21. P. 5, fn.3.

George denied threatening to call the sheriff on the employees; the employees testified that he did. George admitted that he panicked when he saw the discriminatees coming down the road because he thought they had been "called off." His testimony on this point seemed quite genuine. It makes no sense to me, therefore, that he

[34] Respondent does not dispute that the employees were on break during the encounter.

would threaten to call the police, especially in light of my finding that he later asked the men to stay. Even though I find that he gave the employees reasonable cause to believe they were fired when they refused to return to their crew, I do not find that he threatened to call the police.

Did George Violate the Act when He Tried to Get the Cellphone?

There is no question that George tried to take the cellphone away from Donato and that he struck him while doing so. Respondent contends that the blow was too 'soft' to count as an unfair labor practice. There is no need for me to weigh the blow; it is clear from the testimony that Donato gave George reason to believe that he was being recorded and that the employees understood George was objecting to being recorded. The encounter, such as it was, had nothing to do with Donato's protected activities, and I do not think it can reasonably have been construed as such.

In *M. Caratan* (1979) 5 ALRB No. 16, the Board held that threats to call the sheriff made by a supervisor against an employee did not violate the Act when they were uttered in the context of mutual threats to fight even though the confrontation grew out of an earlier discussion about travel pay. The Board concluded, "On the basis of these facts, we find that [the supervisor] did not threaten to have [the employee] arrested because of his protected concerted activities, seeking travel pay for employees", but because the encounter *had become* personal.

In *Mid-State, Inc.* (2000) 331 NLRB 1372, the national Board held that the following statements did not violate the Act: 1) a statement by a statutory supervisor that if a union representative came to his home, he would "fill his butt with lead, Florida law

says I can defend my property that way", because it was made in the context of a general discussion among employees voicing their displeasure about home visits; 2) a statement by the same supervisor that he would "kick [a union representative's] ass" because it was made in the context of a discussion about the union's circulating a false rumor about him; and 3) a comment by another supervisor to an employee that he would kick an employee's butt if he called him a liar again. The Board explained:

> The test in determining whether an employer's conduct constitutes unlawful threats of retaliation for employees' engaging in protected activity is whether the conduct may reasonably be said to have the tendency to interfere with the free exercise of employee rights under the Act. Concerning [the first two remarks] , it is quite apparent . . . that these were the result of the [supervisor's belief] that the Union was spreading rumors that [he] was secretly a member of the Union, and that he had a strong dislike of the [Union representative] whom he held accountable for the rumors. *More significantly, as . . . the record shows, employees were aware of the reason for [the supervisor's] statements. * * * In these circumstances, we agree with the judge that the [supervisor's] statements would not reasonably have the tendency to interfere, restrain, or coerce employees in the exercise of their section 7 rights.*
>
> We also agree with the judge [with respect to statement No. 3.] that there was nothing to show that the employee believed that [the] remarks were related to the Union or protected activities. There was nothing said to [the employee by the supervisor] to lead the employee to believe that the confrontation was linked to Section 7 activities. Ibid

In this case, the employees clearly understood – indeed, testified – that the reason George made contact with Donato was that he was trying to stop Donato from recording him. In such circumstances, I conclude George did not violate the Act in trying to take the cellphone and in striking Donato while doing so.

I dismiss this allegation of the complaint.

Did the discriminatees reasonably refuse a valid reinstatement offer?

But if the discriminatees reasonably construed George's "order" to them to go back as terminating them if they failed to do so, I also find that prior to their leaving, George made a valid offer of reinstatement. General Counsel and Intervenor rely on the testimony of the discriminatees that because they witnessed what George had done to Donato, they feared what he would do them if they went back to work. It is clear that a discriminatee may reject an offer of reinstatement where he or she has a *reasonable* fear that unlawful conduct would be directed against them, *Krist Oil Co*. (1999) 328 NLRB 825, 830, but whether or not the fear is reasonable is a question of fact. *Batavia Nursing Inn* (1985) 275 NLRB 886. ["An employer violates section 8(a)(1) of the Act by assaulting a union representative in the presence of employees under circumstances *where an onlooker would likely infer* from the assault that the employer would also retaliate in some fashion against an employee who supported the union." Op. cit. at p. 891.] Since I have found that the employees only witnessed an encounter occasioned by George's objection to being recorded. Moreover, two of the three discriminatees worked for George for over a decade and a third for two seasons, apparently without ever having any cause to fear him. Under the circumstances, I find rejection of the offer was unreasonable and the discriminatees are not entitled to backpay.[35] *Sunol Valley Golf Club* (1993) 310 NLRB 357, ALJD, at 375.

[35] The discriminatees have been reinstated pursuant to an injunction.

RECOMMENDED ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent George Amaral Ranches, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the United Farmworkers of America by interfering with Union's right to take access to meet and talk with Respondent's agricultural employees hired by a labor contractor where they are employed on Respondent's property or premises, at times agreed to by Respondent or, in the absence of such agreement, at reasonable times, for the purposes related to collective bargaining between Respondent and the UFW;

(b) Threatening to call the police while Union representatives are lawfully on our premises or property;

(c) Discharging or otherwise discriminating against agricultural employees because they engaged in protected concerted activity.

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

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

(a) Upon request, permit UFW representatives to meet with the employees provided by labor contractors on Respondent's property or premises where they are employed, at times agreed to by Respondent or in the absence of such an agreement, at

reasonable times, for purposes related to collective bargaining;

(b) 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.

(c) Post copies of the Notice in all appropriate languages at conspicuous places on Respondents' 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.

(d) Arrange for a Board agent or representative of Respondents to distribute and read the attached Notice, in all appropriate languages, to its employees then employed in the bargaining unit on company time and property, at the times and places to be determined by the Regional Director. Following the reading, a 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 employee rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly employees to compensate them for lost work time during the reading and the question-and-answer period.

(e) Mail copies of the Notice in all appropriate languages within 30 days after the issuance of this order to all harvest employees employed by Respondent at any time after June 14, 2103 at their last known addresses.

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

(g) 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.

Dated: May 22, 2014

THOMAS SOBEL
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed by the United Farmworkers of America, in the Salinas Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint 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 failing to supply the Union with information to which it was entitled under the Act

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 interfere with UFW representatives' right to talk to our employees at reason`nable times on property where our employees are working;

WE WILL NOT threaten to call the police while union representatives are engaged in lawful union activity on our premises or property;

WE WILL NOT discharge or otherwise discriminate against any of our agricultural employees because they have engaged in protected concerted activity.

WE WILL NOT in any like or related manner, refuse to bargain with the Union over wages, hours or conditions of employment, or interfere with, restrain or coerce employees from exercising their right under the Act

DATED:

George Amaral Ranches, 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 Agricultural Labor Relations Board.