Morgan Hill, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KAWAHARA NURSERIES, INC.,	)	Case Nos. 2011-CE-004-SAL 2011-CE-005-SAL 2011-CE-006-SAL
Respondent,	)	
and	)	
ADIN VELASQUEZ, SIMON BLANCO and RUBEN COLIN JIMENEZ,	)	40 ALRB No. 11
Charging Parties.	)	(October 30, 2014)

DECISION AND ORDER

On January 14, 2014, Administrative Law Judge Douglas Gallop (the "ALJ") issued the attached decision in the above-captioned matter. Thereafter, Respondent Kawahara Nurseries, Inc. ("Kawahara" or the "Employer") and the General Counsel of the Agricultural Labor Relations Board (the "General Counsel") timely filed exceptions to the decision of the ALJ.

The Agricultural Labor Relations Board (the "ALRB" or the "Board") has considered the record and the ALJ's decision in light of the exceptions filed by the Employer and the General Counsel and has decided to affirm the ALJ's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. Background

a. The Parties and the Alleged Discriminatees

The Employer is a producer of bedding plants and an agricultural employer under the Agricultural Labor Relations Act (the "ALRA" or the "Act").[1] The Employer is owned by brothers David and John Kawahara. Its head of human resources is Anthony Banda ("Mr. Banda"). At all relevant times Keith Francis ("Mr. Francis") was the Employer's general manager. The Employer's principal operations are in Morgan Hill, California, but it also has operations in Gilroy, California.

The charging parties are former Kawahara employees Adin Velasquez ("Mr. Velasquez"), Simon Blanco Hernandez ("Mr. Blanco"), and Ruben Colin Jimenez ("Mr. Jimenez")[2]. Apart from the three charging parties, 11 other former Kawahara employees are named as alleged discriminatees. These are Reynel Lopez Rios ("Mr. Lopez"), Jose Anaya ("Mr. Anaya"), Manuel Hernandez Baez ("Manuel Hernandez"), Jaime Rodriguez Lopez ("Mr. Rodriguez"), Angelino Santos Gopar ("Mr Santos"), Sergio Corona ("Mr. Corona"), Jorge Hernandez Martinez ("Jorge Hernandez"), Neptali Robles Ayuso ("Mr. Robles"), Gabino Quezada ("Mr. Quezada"), Alberto Garcia ("Mr. Garcia"), and Marco Cordova ("Mr. Cordova") These 14 individuals will be referred to collectively as the "alleged discriminatees."

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

[2] Ruben Colin Jimenez is referred to as "Colin" in the ALJ's decision and certain other documents. However, based upon the General Counsel's representation that this individual's surname is "Jimenez", he will be referred to thusly herein.

2. The Business of the Employer

The Employer's business is seasonal, with its busy season beginning in January and peaking in March through May, while the summer months are slower. Due to the seasonal nature of its business, the Employer would typically take on additional employees around January and lay off employees in the summer months. However, prior to 2011, the Employer did not use "seasonal" employees, i.e. employees expressly hired only for a particular season. Rather, the Employer hired all employees as "full time" employees and, although there would typically be layoffs during the summer months, the Employer made an effort to retain as many employees as possible during the off-season.[3]

David Kawahara testified that, beginning in around 2006, a downturn in the overall economy caused the Employer's sales to flatten and it had difficulty raising prices. Due to the decline in business, the Employer was forced to reduce its employees' hours, which, according to David Kawahara, led to a great deal of unhappiness among the workforce. Beginning in 2008, the Employer's owners and senior managers began discussing a potential restructuring of the workforce. The plan that was under consideration involved reducing the full time workforce to a "core group." This group would then be supplemented by seasonal employees who would be retained as needed during the busy seasons. Although the plan was first discussed in 2008, it was not implemented at that time and it continued to be discussed in 2009.

[3] According to David Kawahara, the reason for this was that it could be difficult to recruit new employees in January as the busy season was beginning.

b. The UFW Organizing Campaign And Election

In late 2009, the United Farm Workers of America (the "UFW") commenced an organizing campaign at Kawahara. As a part of its campaign, the UFW held lunchtime meetings on the Employer's premises as well as after-work meetings in a parking lot across the street from the premises.[4] These meetings were attended by an average of 50-60 employees. The UFW also organized a lunchtime march through the Employer's premises as well as a demonstration at a pre-election conference held at a local hotel. Again, roughly 50 employees participated in these events.

The Employer stipulated that each of the 14 alleged discriminatees engaged in pro-UFW activity and further stipulated that it was aware of this fact. Additionally, there was uncontroverted evidence offered that many of the alleged discriminatees were particularly active in the pro-UFW campaign.

Prior to the election, the Employer held a series of meetings with its employees to encourage them to vote against the UFW. Meetings were held in every department. David Kawahara testified that he and his brother spoke at the meetings and told employees that "we didn't think the union was good for anybody."

The representation election was held on January 19, 2010 and the UFW did not receive a majority of the votes cast.

[4] All events referenced herein occurred in or around the Employer's Morgan Hill location unless otherwise noted.

c. The Development of "Expanded Evaluations"

The Employer had an existing employee performance evaluation system. Under this system, supervisors would evaluate employees by completing a one-page form, which was then discussed with the employee. In March 2009, the Employer implemented an "expanded evaluation" program. This program required supervisors to complete a more detailed evaluation form that, according to the Employer, required supervisors to rate each employee against the other employees in their departments, effectively creating a ranking of employees from best to worst. According to the Employer's witnesses, the evaluations were created specifically for the purpose of determining which employees would be retained as "core group" employees, and which would be laid off.

It was intended that the expanded evaluations be completed on a quarterly basis. The initial round of expanded evaluations was completed in or around March 2009. Supervisors were gathered in a room by the Employer's head of human resources, Mr. Banda, and instructed to complete the evaluations in the room and return them directly to Mr. Banda. Supervisors were instructed not to share the results of the evaluations with employees.[5] The Employer called four supervisors, each of whom

[5] Although at least some of the expanded evaluations were present during the hearing, for reasons that are not disclosed in the record, none of them were offered into evidence.

testified that he did not know the true purpose of the evaluations and did not take union activity into consideration when completing them.[6]

d. The 2010 Layoffs

In 2010, the Employer laid off a total of 60 employees over the course of 15 rounds of layoffs, which commenced in June 2010.[7] Each of the 14 alleged discriminatees was among those selected for layoff. The Employer contends that employees were selected for layoff based primarily upon their ranking in the expanded evaluations. However, although the separation forms that were generated for laid off employees stated that each employee "[s]cored the lowest on two consecutive company wide performance evaluations," Mr. Banda conceded that those selected for layoff did not necessarily have the absolute lowest scores but were "among the lowest" scorers. Additionally, Mr. Banda testified that factors such as disciplinary history were taken into account and that employees could be given "the benefit of the doubt" if they had showed improvement. There was also testimony that "staffing needs" played a role in selecting employees for layoff.

Mr. Banda announced the layoff decisions personally to the laid off employees, typically in small groups. Each laid off employee was told that the layoff

[6] These supervisors were Alberto George Carillo, Carlos Elizondo, Jaime Mendoza, and Fidel Elizondo.

[7] The ALJ stated that the Employer laid off 60 employees and also laid off 20 "seasonal workers" that year. The General Counsel excepts to this conclusion. [General Counsel Exception No. 4.] The Employer's records and the testimony of its witnesses were consistent that a total of 60 employees were laid off in 2010.

was due to a slowdown in work. Mr. Banda testified that, at the time the layoffs were announced, he had already decided that none of the laid off employees would be rehired due to their poor ratings on the expanded evaluations.[8] Nevertheless, it is undisputed that he did not disclose this to the laid off employees, but told each of them that he or she could reapply for work the next year.

e. Applications for Rehire in 2011

Five of the alleged discriminatees applied for rehire in early 2011.[9] These were Mr. Velasquez, Mr. Blanco, Mr. Jimenez, Mr. Rodriguez, and Mr. Santos. Each of them submitted an application directly to Mr. Banda. There is no dispute that the Employer was taking on employees at this time. Mr. Banda told each of them that he would call when work was available, or words to that effect. However, none of the alleged discriminatee applicants were called and none were offered employment.

Eight of the alleged discriminatees did not attempt to apply for rehire. These were Mr. Lopez, Mr. Anaya, Manuel Hernandez, Mr. Corona, Mr. Robles, Mr.

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[8] Mr. Banda's initial testimony was that, at the time the layoffs were announced, he had no intention of rehiring any of the laid off employees if they applied. He later changed his testimony and claimed that he made this decision sometime later but could not remember when he changed his mind. He claimed that he would have consulted with General Manager Keith Francis, but Mr. Francis did not corroborate that any such consultation took place. The ALJ noted the discrepancy in Mr. Banda's testimony but did not make a finding on this issue. We find that the preponderant evidence is that the decision had already been made when the layoffs were announced.

[9] A sixth alleged discriminatee, Jorge Hernandez, attempted to apply. However, because Mr. Banda was not present when he attempted to apply, he left his application outside Mr. Banda's door. The ALJ found, and we agree, that this application was ineffective.

Quezada, Mr. Garcia, and Mr. Cordova. Five of these individuals (Mr. Lopez, Mr. Anaya, Manuel Hernandez, Mr. Garcia, and Mr. Cordova) testified that they did not apply for rehire because they believed they had been laid off due to their support for the UFW and would not be rehired for that same reason. Mr. Robles testified that he "never thought of going back" to his former job. There was no testimony regarding the reason that Mr. Quezada did not apply. Finally, Mr. Corona testified that Mr. Banda told him when he was laid off that he (Mr. Banda) would call when there was work. However, the ALJ did not credit this testimony.

f. The Charges, the Complaint, and the Hearing

On February 8, 2011, Mr. Velasquez, Mr. Blanco, and Mr. Jimenez each filed charges alleging that the Employer refused to rehire them in retaliation for protected activities and for being union supporters. On December 14, 2011, an amended charge was filed asserting refusal to rehire allegations on behalf of the remainder of the alleged discriminatees except Mr. Cordova. A complaint issued on July 19, 2013, alleged the refusals to rehire to be unlawful and also alleged that the layoff of the alleged discriminatees was unlawful and further alleged that the Employer refused to rehire Mr. Blanco and Mr. Jimenez because they gave testimony on behalf of the UFW in an ALRB proceeding. Mr. Cordova was added as an alleged discriminatee in a later amendment to the complaint.

A four-day hearing before the ALJ was held between September 28, 2013, and October 3, 2013. Post-hearing briefs were filed by the General Counsel and the Employer (the UFW did not seek to intervene). The ALJ's decision issued on

January 14, 2014. The ALJ dismissed all but five of the layoff claims as untimely and found that, with respect to the timely layoff claims, the General Counsel had failed to establish a prima facie case that the layoffs were unlawfully motivated. The ALJ dismissed the rehire claims of those alleged discriminatees who did not apply for reemployment but found that the Employer unlawfully refused to hire the five alleged discriminatees who did apply for reemployment. Additionally, the ALJ found that the Employer refused to rehire Mr. Blanco and Mr. Jimenez because they had given testimony on behalf of the UFW in an ALRB proceeding.

Both the Employer and the General Counsel filed exceptions to the ALJ's decision.

3. Discussion

a. Procedural Challenge to the Employer's Exceptions

In her reply brief, the General Counsel argues that the Employer's exceptions should be dismissed because they fail to comply with Board regulation 20282(a), which requires exceptions to be supported by citations to the relevant portions of the record and the ALJ's decision. (Cal. Code Regs., tit. 8, § 20282, subd. (a).) While the Employer's exceptions fail to include any citation to the record, its supporting brief does include citations. While we decline to dismiss the Employer's exceptions in this case, parties filing exceptions with the Board are cautioned that they are expected to comply with the Board's regulations. Parties failing to comply with the regulations may be required to refile exceptions or non-compliant exceptions may be dismissed. (*JHP & Associates, LLC* (2003) 338 NLRB 1059, 1059, fn. 1.)

b. The Timeliness of the Layoff and Rehire Claims

Employer Exception No. 1 challenges the ALJ's rulings on the timeliness of the layoff and refusal to rehire claims. The ALJ found that the claims asserted in the amended charge and the complaint were "closely related" to the timely allegations asserted in the February 2011 charges under the applicable legal standard.[10] (*McCaffrey Goldner Roses* (2002) 28 ALRB No. 8, p. 4; *Redd-I, Inc*. (1988) 290 NLRB 1115, 1118; and see *Apollo Plating, Inc.* (1994) 313 NLRB 1348, 1348 (refusal to rehire allegation was closely related to unlawful layoff allegation.) He, therefore, found the claims timely, with the exception of the layoff claims of the nine alleged discriminatees whose layoffs occurred more than six months before the filing of the original charges.[11] We agree with the ALJ's conclusions. Employer Exception No. 1 is overruled.

c. The Allegations of Unlawful Layoffs

At issue are the layoff claims of Mr. Velasquez, Mr. Blanco, Mr. Rodriguez, Mr. Santos and Jorge Hernandez.[12] In cases involving allegations of

[10] The Employer cites *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209 and *George Arakelian Farms v. ALRB* (1986) 186 Cal.App.3d 94 in support of its exceptions. However, both of those cases deal with consideration of allegations that were *never* alleged in a complaint. Those cases are, therefore, inapposite.

[11] The alleged discriminatees whose layoff claims were found to be untimely were Mr. Jimenez, Mr. Lopez, Mr. Anaya, Manuel Hernandez, Mr. Corona, Mr. Robles, Mr. Quezada, Mr. Garcia, and Mr. Cordova. The General Counsel has not excepted to the dismissal of these claims.

[12] Because the remainder of the layoff claims were dismissed as untimely, we will generally discuss only the facts relating to those individuals with timely claims.

(Footnote continued….)

discrimination in employment arising under Labor Code section 1153(a) and (c), the General Counsel has the initial burden of establishing a prima facie case. (*California Valley Land Co., Inc*. (1991) 17 ALRB No. 8, p. 6-7.) In order to establish a prima facie case, the General Counsel must show by a preponderance of the evidence that the alleged discriminatees engaged in protected activity, that the employer knew or suspected such conduct, and that there was a causal relationship between the employees' protected activity and the adverse employment action on the part of the employer (i.e., that protected activity was "a motivating factor"). (*Ibid; Woolf Farming Co. of California, Inc*. (2009) 35 ALRB No. 2, p. 1-2; *Wright Line* (1980) 251 NLRB 1083, 1089.) If the General Counsel establishes the prima facie case, the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that the adverse action would have been taken even absent the employee's protected activity. (*Royal Packing Co*. (1982) 8 ALRB No. 74, p. 1-2; *Nakasawa Farms* (1985) 10 ALRB No. 48, p. 8-9; *Woolf Farming Co. of California, Inc., supra*, 35 ALRB No. 2, p. 1-2.)

1. The General Counsel's Prima Facie Case

In this case, the Employer stipulated that the alleged discriminatees engaged in protected activity and it was aware of this fact. Accordingly, the first two

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(Footnote continued)
However, as the ALJ correctly noted, the facts relating to the alleged discriminatees whose claims were untimely may be considered as background to shed light on the Employer's motivation. (*ALRB v. Ruline Nursery Co*. (1981) 115 Cal.App.3d 1005, 1014 ("while occurrences within a six-month period preceding the filing of a charge, in and of themselves may constitute unfair labor practices, earlier events may be utilized to shed light on the character of those events"); *Machinists Local Lodge 1424 v. NLRB* (1960) 362 U.S. 411, 416-417.)

elements of the prima facie case are established. The ALJ concluded that the General Counsel did not establish that protected activity was a motivating factor in selecting the alleged discriminatees for layoff. The General Counsel takes exception to this conclusion.[13] [General Counsel Exception No. 1.] We conclude that the General Counsel did establish a prima facie case that the layoffs of the alleged discriminatees were unlawfully motivated and further conclude that the Employer did not prove that it would have made the same decisions absent the protected conduct of the alleged discriminatees.

Where there is no direct evidence of an employer's anti-union animus, motivation "can be inferred from circumstantial evidence based on the record as a whole." (*Robert Orr/Sysco Food Services, LLC* (2004) 343 NLRB 1183, 1184.) In such circumstances, the Board may look to "such factors as inconsistencies between the proffered reasons for the [adverse action] and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records

[13] The General Counsel also excepts to the ALJ's conclusion that the Employer decided to restructure its workforce at all, essentially contending that the restructuring plan was a sham. [General Counsel Exception No. 7.] We find, in agreement with the ALJ, that the General Counsel did not establish that the restructuring plan itself was a fabrication. The General Counsel also objects to the ALJ's statement that the General Counsel did not contest the lawfulness of the layoff of the 46 employees not named in the Complaint. [General Counsel Exception No. 5.] The General Counsel's position is that there were employees other than the alleged discriminatees who were laid off based upon their union activity. Regardless of the General Counsel's belief in this regard, the only employees whose layoffs are alleged to be unlawful are those who are named in the complaint.

or offenses, deviations from past practice, and proximity in time of the [adverse action] to the union activity." (*Ibid*. (bracketed material supplied).)

The Employer contends that, as part of an effort to restructure its workforce, it conducted "expanded evaluations" of its employees and those evaluations revealed that the alleged discriminatees were among the poorest performers in their respective departments. Mr. Banda also testified that, in addition to the results of the evaluations, consideration was given to employees' disciplinary history and whether there was any reason why an employee should be given the "benefit of the doubt."

The ALJ stated that "being chosen for layoff did not mean that the worker was one of the worst employees in Respondent's 2010 workforce" but that it was "apparent that the most unsatisfactory workers in 2010 . . . were discharged." [ALJ Dec. p. 30.] The ALJ further stated with respect to the disciplinary records purportedly relied upon by the Employer that there was no evidence that the underlying discipline was unlawful.[14] We disagree with this analysis and conclude, to the contrary, that the

[14] The ALJ also stated that the General Counsel "failed to establish that the skills and abilities of the alleged discriminatees, even if good or excellent, were superior to those who were retained, or to suggest who, other than those with lower seniority, should have instead been released." [ALJ Dec., p. 32.] The General Counsel argues in support of her Exception No. 8 that the ALJ improperly required that the General Counsel prove that each of the alleged discriminatees had superior qualifications to those employees who were not selected for layoff. However, the ALJ did not state that proving superior qualifications was required, but only noted that this had not been shown. We agree with the General Counsel that a showing that alleged union supporters who were laid off had superior qualifications to employees who were not laid off, while it certainly may bolster a claim of unlawful motivation, is not a required element of the General Counsel's prima facie case under the *Wright Line* standard. (See *M.W. Kellogg Constructors, Inc*. (1986) 273 NLRB 1049, 1050 (Presuming that laid off employees were less qualified than other

(Footnote continued….)

evidence concerning the work and disciplinary history of the alleged discriminatees supports an inference of unlawful motivation.

Mr. Santos had been working for the Employer for over ten years when he was laid off, meaning that, in all previous rounds of layoffs, he had not been judged to be among the most expendable employees. Furthermore, Mr. Santos had a long and apparently excellent employment record before the Employer claimed that his job performance suddenly and dramatically deteriorated to the point where he was among the worst performers in his department. The Employer claimed that Mr. Santos had developed "attitude" problems. The National Labor Relations Board ("NLRB") has noted that phrases such as "bad attitude" are sometimes used as code for union activity and are viewed with suspicion. (*Denholme & Mohr, Inc*. (1988) 292 NLRB 61, 67 ("the convenience with which an employer may . . . disguise an unlawful motivation by referring to an employee's 'bad attitude' has long been recognized.").) There was no evidence that Mr. Santos had any disciplinary history until after the commencement of the UFW organizing campaign and other employees who were disciplined for similar conduct were not selected for layoff. Likewise, Jorge Hernandez was placed at or near the bottom of the expanded evaluations although he had a history of positive performance evaluations and his supervisor conceded that, as recently as mid-2009 he regarded him as

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(Footnote continued)
employees on the ground that the general counsel did not offer evidence regarding their qualifications "improperly . . . shifted to the General Counsel the burden of proof a respondent must meet under Wright Line.") However, because the ALJ did not actually require such a showing, General Counsel Exception No. 8 is overruled.

a "great" or even "excellent" employee. With the exception of Jorge Hernandez, who was disciplined in 2009, and Mr. Rodriguez, with respect to whom no discipline was cited, all of the discipline cited dated from after the commencement of the UFW organizing campaign. Furthermore, none of the employees had more than one disciplinary incident and, in each case, the Employer had issued similar discipline to employees who were not laid off.[15]

As stated previously, the facts pertaining to alleged discriminatees whose layoff claims were not timely may be considered as background evidence. That evidence further confirms a pattern of employees with extensive histories of positive evaluations suddenly being rated poorly after they became involved in pro-UFW activities along with union supporters being disciplined, apparently for the first time, after engaging in union activities. For example, Mr. Jimenez, much like Mr. Santos, had a long employment history featuring multiple positive performance evaluations and pay increases. Yet, after the commencement of the UFW campaign, the Employer claimed that Mr. Jimenez' performance declined and he developed "attitude problems" and he was selected for layoff. Similarly, Mr. Lopez received positive evaluations in 2007 and late 2009 and his

[15] Mr. Blanco and Jorge Hernandez were employed in the Employer's merchandising department as "mobile merchandisers." The Employer claimed that changed demands from one of its major clients caused the Employer to eliminate its mobile merchandisers and only the leads were retained. However, the Employer's hiring records show that it hired five seasonal employees in the mobile unit in March 2011 and another in April 2011 and there was testimony that at least two of these were converted to full time status. Furthermore, in its May 2011 position statement, when the Employer explained the basis for laying off Mr. Blanco along with fellow merchandiser, Mr. Jimenez, it did not reference any changes in the mobile unit but claimed that they were laid off according to the Employer's ordinary layoff procedures.

supervisor testified that he was a "good" worker. Nevertheless, he was rated poorly on the expanded evaluations and was selected for layoff. The record also reflects no discipline with respect to four of the alleged discriminatees whose claims were untimely until the commencement of the UFW campaign after which each of them was disciplined.

Accordingly, the evidence concerning the work and disciplinary histories of the alleged discriminatees supports the General Counsel's prima facie case.[16]

Apart from the evidence concerning the work and disciplinary histories of the alleged discriminatees, there are other factors that support an inference of unlawful motivation. It is well-established that, where an employer is accused of committing an unfair labor practice, the fact that the employer has committed other contemporaneous unfair labor practices may serve as circumstantial evidence of the employer's unlawful motivation. (*Waste Management of Arizona, Inc*. (2005) 345 NLRB 1339, 1341 ("Proof of an employer's animus may be based on circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices"). The ALJ

[16] The General Counsel argues that the ALJ incorrectly found the evidence regarding the seniority of the employees selected for layoff to be inconclusive. [General Counsel Exception No. 6.] The Employer's witnesses testified that seniority was not considered in selecting for layoffs except in "tiebreaker" situations. However, the Employer's "Downsizing/Reduction in Force" policy does state "length of service" as one of the factors to be considered. It is noteworthy that the alleged discriminatees (i.e. individuals who were known UFW supporters) comprised over half of the 27 employees selected for layoff who had at least one year of service time, including the only three employees selected who had over nine years of service time. If the laid off employees were ranked 1-60 from highest seniority to lowest, the alleged discriminatees would occupy ranks 1-3, 9-10, 17-23, and 28-29. Thus, we find the evidence relating to the service time of those selected for layoff, while not conclusive, does support the General Counsel's prima facie case.

found, and we agree, that the Employer unlawfully refused to rehire applicants due to their protected activities. Accordingly, the fact that the Employer contemporaneously committed other unfair labor practices favors an inference of unlawful motivation with respect to the layoffs.

Anti-union speeches made by an employer, even if not unlawful, are regarded as evidence of anti-union animus. (*Overnite Transportation Co*. (2001) 335 NLRB 372, 375 fn. 15 (statement in employee handbook that "this Company values union-free working conditions" was not unlawful but was "indicative of animus"); *Sunrise Health Care Corp*. (2001) 334 NLRB 903, 903 ("while protected speech, such as an employer's expression of its views or opinions against a union, cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer.").) Here, it is undisputed that the Employer gave speeches to employees clearly signaling its opposition to the UFW. Accordingly, this factor favors the General Counsel's prima facie case.

In finding that the General Counsel established a prima facie case, we also rely upon the fact that the Employer has presented shifting and inconsistent justifications for its layoff decisions. It is well-established that the giving of shifting or inconsistent explanations constitutes "strong circumstantial evidence of the existence of an undisclosed and forbidden motive." (*Giannini Packing Corp*. (1993) 19 ALRB No. 16, p. 17; *S. Kuramura, Inc*. (1977) 3 ALRB No. 49, p. 12 (the giving of "shifting reasons" for a discharge indicates that those reasons are "mere pretenses for an anti-union cause."); *Peter Scalamandre & Sons, Inc*. (2000) 330 NLRB 1191, 1197 (noting that the NLRB

"has long held that unlawful motivation may be found where an employer provides false or shifting reasons for its actions.").)

In this case, when the Employer announced the layoffs to employees, it told them that they were being laid off due to lack of work and chose not to disclose that it was restructuring the workforce or that they had been selected based on the results of the expanded evaluations. The ALJ found this omission to be "not surprising," positing that the Employer may not have wished to make employees' privy to the rankings of other employees or to "agitate" employees who were being laid off, a conclusion to which the General Counsel excepts. [General Counsel Exception No. 3.] In fact, the Employer's witnesses did not offer either of these factors as reasons for not disclosing the true reasons for the layoffs to employees, nor did they articulate any substantial reason for providing employees with a reason that represented a half-truth at best. Furthermore, Mr. Banda told each of the laid off employees that they could reapply for work the next season although he had already decided that they would be categorically ineligible for rehire. Although the Employer was not under any legal duty to be candid with its employees, its behavior evidences a desire on its part that the employees it was laying off not learn the true reasons for its actions, which is indicative of unlawful motive.

Even more telling is the Employer's position statement, which it submitted to the ALRB's Salinas Region in May 2011. In explaining the process through which employees were selected for layoff, the Employer cited its employee handbook and claimed that, while the layoffs that occurred in 2010 were "more widespread due to a decrease in business," the Employer followed "the very same policies as used in the past"

in effectuating the layoffs." There was no mention of a restructuring of the workforce or the use of expanded evaluations. It was only later that the Employer claimed that the 2010 layoffs were conducted in order to implement a restructuring of the workforce and that the Employer did not use "the very same policies as used in the past," but rather created the expanded evaluation system, which, according to the Employer, existed outside the normal policies applicable to employee evaluations, and was developed specifically for the purpose of selecting employees for layoff.

In *Black Entertainment Television, Inc*. (1997) 324 NLRB 1161, the employer submitted a position statement to the NLRB that asserted that it laid certain employees off because it had reduced production of the television program "Our Voices" and needed fewer employees as a result and also that employees were selected for layoff due to poor performance or disciplinary problems. However, at the hearing, the employer contended that the layoffs resulted not only from the reduction of "Our Voices" but also reductions of several other programs, and that employees were selected for layoff based upon the results of a "skills matrix" prepared by one of the employer's managers. The NLRB relied on these "shifting explanations," noting that "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." (*Id*. at 1161.) The NLRB's reasoning applies with equal force in this case.

Furthermore, while the Employer contended that the expanded evaluations were developed for the purpose of selecting the employees to be laid off to effectuate the restructuring, the e-mails sent by Mr. Banda at the time concerning the expanded

evaluations make no mention of what the Employer now contends were their intended purpose. Rather, Mr. Banda's e-mails state that the expanded evaluations would be "used to measure past performance, set expectations for the future, and help determine areas for improvement." He also cautioned that "[u]ndeserved low ratings may result in poor performance" while "[u]ndeserved high ratings may result in complacency," considerations that would be largely or entirely inapplicable if the purpose of the evaluations was to select employees for layoff and were not to be shared with employees. It is also noteworthy that the Employer did not offer a single e-mail, memorandum or other record that referenced the planned restructuring or the true purpose of the expanded evaluations and the two e-mails that it did introduce do not mention the restructuring and are inconsistent with the purported purpose of the expanded evaluations. This, in conjunction with the fact that, as discussed above, the Employer's first position statement made no mention of the restructuring or the expanded evaluations, casts doubts on the truthfulness of the Employer's account of the reasons why the alleged discriminatees were selected for layoff and justifies the drawing of an inference of unlawful motivation.

The ALJ credited the testimony of the Employer's supervisors that they did not know that the expanded evaluations were to be used in layoffs, were not instructed to take union activity into account when completing the expanded evaluations and did not actually do so. The ALJ's determination does not appear to have been based upon demeanor and, in fact, the ALJ did not state any basis for crediting this testimony. The Board will overturn an ALJ's non-demeanor credibility determinations where they conflict with well-supported inferences from the record considered as a whole. (*Woolf*

Farming Co. of California, supra, 35 ALRB No. 2, p. 2 (*citing S&S Ranch, Inc*. (1996) 22 ALRB No. 7).) In this case, the record indicates that expanded evaluations were being conducted even after the Employer began laying employees off in June 2010 and the supervisors' denials that they had no idea that the evaluations were being used to select employees for layoffs are not believable. Furthermore, the supervisors' bare denials that union activity played a role in the ranking of employees on the expanded evaluations are insufficient to overcome the substantial evidence in the record warranting the drawing of an inference that union activity was a motivating factor in the selection of the alleged discriminatees for layoff.

For the foregoing reasons, we find, contrary to the ALJ, that the General Counsel established a prima facie case that the layoff of the five alleged discriminatees who asserted timely claims were unlawful.[17]

2. The Employer's Rebuttal

Having found that the General Counsel established a prima facie case, we further find that the Employer failed to establish that it would have selected the alleged

[17] The General Counsel argues that the ALJ erroneously found that the timing of the layoffs, which occurred six months or more after the Employer became aware of the alleged discriminatees' protected activities, was not indicative of unlawful motivation. [General Counsel Exception No. 2.] We have noted above the fact that the performance ratings of some of the alleged discriminatees underwent sudden and drastic decline and others began to be disciplined only after they began engaging in protected activity, which warrants an inference of unlawful discrimination. However, given the distance in time between the protected activity and the layoffs, we agree with the ALJ that the temporal proximity between the protected activity and the layoffs, standing alone, does not strongly support an inference of unlawful motivation. In any event, the other factors discussed herein are sufficient to support an inference of unlawful motivation.

discriminatees for layoff absent their protected activities. This conclusion is supported by the factors discussed above, including the work and disciplinary history of the alleged discriminatees, the Employer's commission of contemporaneous unfair labor practices, and presentation of shifting and inconsistent justifications for its actions.

In his decision, the ALJ emphasized the fact that there were employees who engaged in protected activities who were not selected for layoff. The General Counsel excepts, arguing that the treatment of other union supporters is irrelevant to the issue of whether the Employer discriminated against the alleged discriminatees. [General Counsel Exception No. 9.] The ALJ is correct that there were some employees who were active in the UFW campaign who were not selected for layoff in 2010.[18] While the treatment of other known union supporters may be relevant, it is well-established that "a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." (*Lucky Cab Co*. (2014) 360 NLRB No. 43 p. 22; *Surgener Electric, Inc*. (2007) 349 NLRB 463, 464 (rejecting argument that employer's hiring of union members negated union animus because "a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents.") Accordingly, the fact that there were UFW supporters,

[18] The ALJ also noted that the Employer was aware that substantial numbers of employees either voted for the UFW in the election or attended pro-UFW meetings and demonstrations. However, there was no evidence that the Employer knew the identities of the majority of those who attended the meetings and demonstrations, and it presumably had no way of ascertaining which employees voted in favor of UFW representation during the election. Accordingly the fact that any of these individuals were not selected for layoff does not aid the Employer's defense.

even prominent supporters, who were not selected for layoff does not negate the Employer's unlawful intent with respect to those who were selected for layoff.[19]

For the foregoing reasons, we reverse the ALJ and find that the Employer unlawfully laid off Mr. Velasquez, Mr. Blanco, Mr. Rodriguez, Mr. Santos and Jorge Hernandez.

d. The Allegations of Unlawful Failure to Rehire

The ALJ dismissed the rehire claims of nine of the alleged discriminatees on the basis that they failed to apply for reemployment. We affirm this conclusion. The General Counsel argues that those alleged discriminatees who failed to apply were excused because their applications would have been futile. [General Counsel Exception No. 10.] The requirement that an employee asserting a refusal to hire claim have applied for employment may be excused if the employee had "a reasonable belief that application would be futile." (*Tsukiji Farms* (1998) 24 ALRB No. 3, p. 64; see also *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 365-368.) We affirm the ALJ's conclusion that the application requirement was not excused in this case, as the Employer did not "convey[] to employees a clear message that further applications would be futile." (*Grand View Heights Citrus Assoc*. (1986) 12 ALRB No. 28, p. 6; *Duke Wilson Co*. (1986) 12 ALRB No. 19, pp. 25-27.)

[19] Furthermore, two of the individuals the employer cited as active UFW supporters who were not laid off testified that they were subjected to increased pressure at work and were unfairly disciplined after the election.

We further agree with the ALJ that the Employer unlawfully refused to rehire the five alleged discriminatees who did submit applications for reemployment. The Employer argues that the ALJ incorrectly ruled that the General Counsel did not have to show that alleged discriminatees who applied were "unequivocally rejected." The Employer argues, in essence, that, because Mr. Banda never told the applicants that they would not be hired, they cannot be held to have been unequivocally rejected. However, we conclude that, even if the General Counsel is required to show that the applicants were unequivocally rejected, the fact that the Employer indisputably refused to rehire the applicants, combined with Mr. Banda's testimony that the Employer had decided that they would be treated as categorically ineligible for rehire, constituted unequivocal rejection of their applications.

The Employer takes issue with the legal standard used by the ALJ to evaluate the Employer's motivation in connection with the General Counsel's prima facie case. The Employer contends that the General Counsel must establish not merely that protected activity was a "motivating factor" for the Employer's action (the standard applied by the ALJ) but must establish that unlawful considerations were a "substantial motivating factor." The Employer cites *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 in support of this proposition. That case, however, involved a pregnancy discrimination claim arising under the Fair Employment & Housing Act and is not binding on the Board's analysis of unfair labor practice claims. It is firmly established under the precedents of this Board and the NLRB that the General Counsel must prove that unlawful considerations played some role in the employment decision; i.e that such

considerations were a "motivating factor" or a "substantial or motivating factor." (*Premiere Raspberries, LLC* (2013) 39 ALRB No. 6 (*Nordstrom* (1989) 292 NLRB 899, 899; *NLRB v. Transportation Management Corp*. 462 U.S. 393, 400-403.) Accordingly, the ALJ applied the correct legal standard.

The Employer makes the same argument with respect to the standard applied by the ALJ to the claims that the Employer refused to rehire Mr. Blanco and Mr. Jimenez due to their having given testimony on behalf of the UFW at an ALRB investigative hearing. We reach the same conclusion with respect to those claims and affirm the ALJ. The Employer argues that the ALJ's decision cannot stand because, while there were six employees who testified on behalf of the UFW at the investigative hearing, only two of these were denied rehire. However, as discussed above, the fact that an employer does not systematically eliminate all pro-union employees does not establish that it did not retaliate against some of them. Furthermore, the Employer concedes that Mr. Blanco and Mr. Jimenez were the only employees among the six who testified at the investigative hearing who applied for reemployment.

ORDER

Pursuant to Labor Code section 1160.3, Respondent Kawahara Nurseries, Inc., its officers, agents, labor contractors, successors, and assigns shall:

1. Cease and desist from:

    a. Discharging, laying off, refusing to rehire, or otherwise discriminating against any agricultural employee with regard to hire or tenure of employment, because the employee has joined,

supported, or assisted the United Farm Workers of America, or any other labor organization.

b. Refusing to rehire any agricultural employee because he or she has testified at a hearing conducted by the Agricultural Labor Relations Board.

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

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

a. Offer Adin Velasquez, Simon Blanco Hernandez, Ruben Colin Jimenez, Jaime Rodriguez Lopez, Angelino Santos Gopar, and Jorge Hernandez Martinez employment in the job classifications in which they were most recently employed by Respondent, or, if their positions no longer exist, to substantially equivalent employment, without prejudice to their seniority and other rights and privileges of employment.

b. Make whole Adin Velasquez, Simon Blanco Hernandez, Jaime Rodriguez Lopez, Angelino Santos Gopar, and Jorge Hernandez Martinez for all wages or other economic losses they suffered as a result of their unlawful layoff, to be determined in accordance

with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. The award shall also include interest to be determined in accordance with *H&R Gunlund Ranches, Inc*. (2013) 39 ALRB No. 21.

c. Make whole Adin Velasquez, Simon Blanco Hernandez, Ruben Colin Jimenez, Jaime Rodriguez Lopez, and Angelino Santos Gopar for all wages or other economic losses they suffered as a result of their unlawful denial of rehire, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the denial of rehire. The award shall also include interest to be determined in accordance with *H&R Gunlund Ranches, Inc*. (2013) 39 ALRB No. 21.

d. In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning July 30, 2010, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records, and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

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

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

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

time lost during the reading of the Notice and the question-and-answer period.

h. Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time during the period July 30, 2010 to January 16, 2012, at their last known addresses.

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

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

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

DATED: October 30, 2014

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged that we, Kawahara Nurseries, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by laying off Adin Velasquez, Simon Blanco Hernandez, Jaime Rodriguez Lopez, Angelino Santos Gopar, and Jorge Hernandez Martinez and by refusing to rehire Adin Velasquez, Simon Blanco Hernandez, Ruben Colin Jimenez, Jaime Rodriguez Lopez, and Angelino Santos Gopar because they supported the United Farm Workers of America (UFW) and by refusing to rehire Simon Blanco Hernandez and Ruben Colin Jimenez because they testified at a hearing conducted by the ALRB.

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

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

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the 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 lay off, refuse to rehire, or otherwise discriminate against agricultural employees because they join, support or assist the UFW, or any other union, or because they testify at hearings conducted by the ALRB.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in your exercise of the rights listed above.

WE WILL offer Adin Velasquez, Simon Blanco Hernandez, Ruben Colin Jimenez, Jaime Rodriguez Lopez, Angelino Santos Gopar, and Jorge Hernandez Martinez employment in the positions they previously held, or, if their positions no longer exist, to substantially equivalent employment, and make them whole for all losses in pay or other economic losses they suffered as the result of our unlawful conduct.

DATED: KAWAHARA NURSERIES, 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 St., Salinas, California 93901. 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

KAWAHARA NURSERIES, INC.
(Adin Velasquez, et al.)

40 ALRB No. 11
Case Nos. 2011-CE-004-SAL, et al.

Background

On January 14, 2014, Administrative Law Judge Douglas Gallop (the "ALJ") issued a decision concerning unfair labor practice ("ULP") allegations that Kawahara Nurseries, Inc. (the "Employer") unlawfully laid off supporters of the United Farm Workers of America (the "UFW") and later refused to rehire said supporters (the "alleged discriminatees"). The ALJ found that all the allegations were closely related to allegations that were timely asserted in the initial charges and were therefore timely, with the exception of layoffs occurring more than six months prior to the filing of the initial charges. The ALJ found that the General Counsel failed to establish a prima facie case that the layoffs of the alleged discriminatees were unlawfully motivated. The ALJ also dismissed the rehire claims of alleged discriminatees who had failed to apply for rehire but found that those who did apply were unlawfully rejected. Finally, the ALJ found that two of the alleged discriminatees were unlawfully denied rehire because they had given testimony in an ALRB proceeding. Both the Employer and the General Counsel filed exceptions.

Board Decision

The Agricultural Labor Relations Board (the "Board") upheld the ALJ with respect to the timeliness of the claims, and the rehire claims but reversed the ALJ with respect to the layoffs. The Board found, contrary to the ALJ, that the General Counsel established a prima facie case that the layoffs were unlawful, relying on the work and disciplinary histories of the alleged discriminatees, the commission of contemporaneous ULPs and anti-union statements by the Employer, and the presentation of shifting and inconsistent justifications for the Employer's actions. The Board further found that the Employer failed to establish that it would have made the same decisions in the absence of the alleged discriminatees' protected conduct, rejecting the Employer's contention that the fact that there were UFW supporters who were not laid off precluded a finding of unlawful motive. The Board found that denials by the Employer's supervisors that they took union support into account in completing "expanded evaluations" that were used in the layoff selection process, which were credited by the ALJ, were insufficient to overcome the substantial evidence in the record warranting drawing an inference of unlawful motivation.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KAWAHARA NURSERIES, INC.,	)	Case Nos. 2011-CE-004-SAL
	)	2011-CE-005-SAL
Respondent,	)	2011-CE-006-SAL
	)	
and	)	
	)	
ADIN VELASQUEZ, SIMON BLANCO and RUBEN COLIN JIMENEZ,	)	
	)	
Charging Parties.	)	
_____	)	

Appearances:

Patrick S. Moody
Barsamian & Moody, P.C.
Fresno, California
For Respondent

Cristina Pena and Stanley Marubayashi
Salinas ALRB Regional Office
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case on September 30 through October 4, 2013 at Salinas, California. It is based on charges filed and served on February 8, 2011 by Adin Velasquez, Simon Blanco Hernandez (Blanco) and Ruben Colin Jimenez (Colin), alleging that Kawahara Nurseries, Inc. (hereinafter Respondent) violated section 1153(a) and (c) of the Agricultural Labor Relations Act (Act), by refusing to rehire them after an economic layoff, in retaliation for their union and other protected activities. More than ten months later, the United Farm Workers of America (hereinafter Union or UFW) filed an amended charge in Simon Blanco's case, alleging that Respondent unlawfully refused to rehire an additional ten employees for their union and other protected activities, and naming itself as the Charging Party.[1] The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a Complaint and Amended Complaint (hereinafter complaint), not only alleging these violations, but adding an additional alleged discriminatee, and contending that all 14 of the layoffs themselves were unlawful. General Counsel further added allegations contending Blanco and Colin were also refused rehire because they testified at a Board hearing on challenged ballots.[2] Respondent filed answers denying the commission of unfair labor

[1] Respondent denies it was served with the amended charge until the hearing, but presented no testimony on this issue. In evidence are a proof of service by certified mail for the amended charge and a United States Postal Service tracking information document showing the amended charge was delivered to Respondent's Morgan Hill, California facility on December 14, 2011. The Agency's official case file also contains a receipt card showing that Stephanie Carrillo signed for the letter.

[2]The complaint lists all of the alleged discriminatees and the Union as charging parties. At the hearing, the undersigned ruled that only the original charging parties could hold that status, and struck the other named charging parties from the caption of the complaint. General Counsel also issued a backpay specification, in conjunction with the

practices, and asserting affirmative defenses. Among said defenses, Respondent contends that all complaint allegations, other than those asserted in the original charges are time-barred.[3] On December 19, 2013, the parties filed briefs, which have been carefully considered.

Upon the entire record in this case, including the testimony, documentary evidence, briefs and oral arguments made by counsel, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction

The charges were filed and served in a timely manner, as to the allegations contained therein. Respondent produces bedding and flowering plants, and is an agricultural employer within the meaning of section 1140.4(c) of the Act. It employs agricultural employees in Morgan Hill, Gilroy and San Lorenzo, California, with the most working in Morgan Hill, and the least in San Lorenzo. Respondent also employs field merchandizers, who deliver plants to Respondent's commercial customers and set up displays. These workers do not report to any of Respondent's facilities. They are distinguished from mobile merchandisers, who perform similar job duties, but pick up the plants at Respondent's facilities, and may perform additional duties at those locations, as required.

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amended complaint. Respondent moved to sever the backpay proceeding, and the undersigned granted the motion. General Counsel moved to strike one of the reasons given for granting the motion, which was denied, at the hearing.

[3] This defense was not raised in the answer to the original complaint, but appeared in Respondent's answer to the amended complaint.

While employed by Respondent, the alleged discriminatees were agricultural employees within the meaning of section 1140.4(b). Respondent admits that the individuals mentioned herein as supervisors occupied such status, within the meaning of section 1140.4(j). It is undisputed that the Union is a statutory labor organization as defined by section 1140.4(f).

The Union Organizing Campaign

According to General Counsel's witnesses, the organizing campaign began in the fall of 2009. The campaign took place off-site until late December, when the Union began taking access to Respondent's facilities. On January 12, 2010, the Union filed a petition for certification in Case No. 2010-RC-001-SAL, and an election was conducted on January 19. Challenged ballots were determinative.

Following a Regional Director's report, partially overturned by the Board,[4] and an investigative hearing and report, largely reversed by the Board,[5] most of the challenged ballots were counted. Pursuant to the Board's order, two final tallies of ballots issued, on January 13, 2012, showing that the Union failed to obtain a majority of the 165 ballots cast. If the field merchandisers[6] were included in the bargaining unit, the Union lost the election by 17 votes, but if they were placed in a separate unit, the election was a tie.

[4] (2010) 36 ALRB No. 3.

[5] (2011) 37 ALRB No. 4.

[6] None of the alleged discriminatees worked as field merchandisers, while three were mobile merchandisers. None of the statistical information discussed herein pertains to the field merchandisers, unless otherwise indicated.

The Union and Other Protected Activity of the Alleged Discriminatees

All but one of the alleged discriminatees worked at, or out of the Morgan Hill facility. The other worked in Gilroy. Twelve of the alleged discriminatees[7] and three of the Union's organizers testified as to the Union and other protected conduct engaged in by the 14 workers. Respondent stipulated that it knew or suspected that all but one of these workers (Marco Antonio Cordova) supported the Union, as of the time it implemented the adverse employment actions complained of herein. Some of these workers engaged in home visits and other discussions with co-workers, talking up the Union, before the Union began taking access in December 2009. Other than as detailed below, there is no evidence proving that Respondent was aware of these activities. A few of the witnesses testified they solicited co-workers to sign Union authorization cards. Again, there is no evidence that Respondent knew this. Many of the workers testified they wore Union buttons at work. One witness testified that over 30 employees wore Union buttons at the Morgan Hill facility, although another worker testified he was the only button-wearer in his department.

Once the Union began taking access, many of the alleged discriminatees attended meetings conducted at Respondent's facilities, and across the street from Respondent's Morgan Hill plant, in plain sight of management and supervisory personnel driving out of that location. About 50 to 60 workers attended these meetings. Many of the alleged discriminatees joined a loud, pro-Union march through Respondent's Morgan Hill facility during the Union's lunch time access period on January 12, 2010. Estimates

[7] Adin Velsaquez and Gabino Quezada did not testify.

varied, but it appears that about 60 employees joined the march. Nine of the alleged discriminatees attended the pre-election conference on January 14, 2010, in support of the Union. One witness estimated that about 50 Union supporters in all attended the conference. What follows is a summary of these workers' visible involvement in the Union campaign, beyond what has already been discussed:

Simon Blanco: Blanco worked as a mobile merchandiser. He and Adin Velasquez, another mobile merchandiser, spoke in favor of the Union in the Morgan Hill employee lunch room, and discussed unionization with Supervisor, Alberto George Carrillo (George). Blanco, Velasquez and George are friends. Blanco asked George if he would be fired if he supported the Union, and George told him he would not. George admitted that he discussed the Union with Blanco, Velasquez and another employee. Anthony Banda, Respondent's Human Relations Manager, testified he learned about the Union sympathies of Respondent's workers, inter alia, from the supervisors, in December 2009.

Blanco was called to testify by the Union in the hearing on challenged ballots, which was conducted on December 16 and 17, 2010. The undersigned takes judicial notice of the transcript in that hearing. It shows that the Union called six employee witnesses, of whom two are alleged as discriminatees. Respondent's records show that one of the other witnesses quit shortly before the hearing, another was employed as of the hearing and quit several months later, a third was on disability, eligible for rehire, and the fourth was still employed as of this hearing. Blanco and Ruben Colin, the alleged

discriminatees who were called to testify by the Union, had already been laid off prior to the hearing on challenged ballots.

One of Blanco's co-workers testified that Blanco spoke in favor of the Union at a meeting conducted by Respondent's labor relations consultant(s). Blanco testified he told Respondent's owners, at a meeting they conducted at the Gilroy facility that workers had been fired during a previous union organizing drive, and one of the owners denied this had taken place. David Kawahara, one of Respondent's owners, denied that employees spoke up at the meetings he and his brother conducted. Respondent has not been found to have previously discharged any employee for supporting a union.

Adin Velasquez: As noted above, Velasquez also worked as a mobile merchandiser, and did not testify. Blanco testified as to Velasquez's conversations about the Union with Alberto George. Blanco further testified that Velasquez told Respondent's labor relations consultant(s), at a meeting, that Respondent had not resolved employee complaints about favoritism after the last Union campaign, and asked how they could trust Respondent now.

Ruben Colin: Colin worked as an order puller. As noted above, he was also called to testify by the Union in the hearing on challenged ballots. On February 16, 2010, the Union filed a charge against Respondent in Case No. 2010-CE-006-SAL, alleging that Respondent's supervisors were unlawfully harassing 15 Union adherents, five of whom, including Colin, are named herein. Anthony Banda received the charge, and then read it to the supervisors accused of unlawful conduct therein. The charge was dismissed.

Sergio Corona, Manuel Hernandez Baez (Hernandez) and Jaime Rodriguez Lopez (Rodriguez): Corona worked as a mover, while Hernandez and Rodriguez worked as pullers. They were also named in the charge.

Jose Anaya: Anaya worked as a puller. He was one of four Union observers in the election. Two were laid off in 2010, while two were not.

Neptali Robles Ayuso (Robles): Robles worked as an irrigator and plant fertilizer. He was a Union observer at the election, and one of the main employee organizers at Respondent's Gilroy facility.

Gabino Quezada: Quezada worked as a puller. As noted above, he did not testify. Other witnesses testified that Quezada wore several Union buttons at work.

Reynel Lopez Rios (Lopez): A Union organizer, but not Lopez, testified that Lopez led the march through Respondent's Morgan Hill facility. According to the organizer, but again not Lopez, Lopez told supervisor, Fidel Elizondo, to take a good look at him, as Elizondo slowly drove by one of the outdoor meetings. Marco Cordova, but not Lopez, testified that Lopez told a labor relations consultant, at a meeting, that Respondent's employees had the right to support, or not to support the Union.

Angelino Santos Gopar (Santos), Marco Cordova, Alberto Fabian Garcia and Jorge Hernandez Martinez (Hernandez) : Santos and Cordova worked as production employees, Garcia as a puller and Hernandez as a mobile merchandiser. There were no additional Union activities established for these employees, beyond the group activities described above.

Respondent's Election Campaign and Alleged Unlawful Animus

Respondent opposes unionization and hired labor relations consultants to speak out against the Union at employee meetings. As noted above, the Kawahara brothers also spoke with the workers, and urged them to vote no in the election. The complaint does not allege that any of these individuals violated the Act during these meetings.

Manuel Hernandez testified that on an unspecified date after the election, at an unidentified location, he heard supervisor Fidel Elizondo say that "all the fucking rebels are going to pay." This allegation does not appear in the complaint, and was not mentioned at the prehearing conference or in General Counsel's opening statement. Hernandez's testimony was not corroborated, and Hernandez was not asked to give a prehearing declaration, as was the case with most of General Counsel's witnesses. Under these circumstances, the allegation bears the earmarks of a recent fabrication.

Since Hernandez failed to give even an approximate date when the statement was allegedly made, it is impossible to discern whether it was before any or all of the layoffs took place, or the performance evaluations relied upon by Respondent were made. In any event, Elizondo denied making any such statement, and his denial is credited, on the basis of the respective demeanors of these two witnesses, and the circumstances delineated above.

One of General Counsel's witnesses testified that supervisor Alberto George stood on a mound of soil and watched one of the after-work access meetings for about five minutes. George testified that the mounds are on Respondent's property in Morgan Hill, and he is required to ascend them in the performance of his job duties. Sergio Corona

testified that during one of these meetings, a supervisor identified only as "David" appeared to take a photo of the workers with his cellphone. The complaint names David Perez as a supervisor, but there is no evidence as to what his job duties are, or that he played any role in making the layoff decisions. As noted above, these meetings were openly held in a location where Respondent's supervisors commonly pass by on their way to and from work. Neither of these incidents is alleged as a violation in the complaint, and no mention was made of them prior to the hearing.

General Counsel also called known Union activists and current employees Cesar Ramirez Narajo (Ramirez) and Miguel Angel Ramirez Morales (Ramirez), who testified that although they were not laid off in 2010, Respondent has pressured and disciplined them in retaliation for their Union activity, and in Cesar Ramirez's case, for testifying in the hearing on challenged ballots. There are no allegations in the complaint concerning these witnesses. Their testimony primarily consisted of their opinions that they have been treated unfairly, because they engaged in protected activity.

The 2010 Layoffs

Prior to 2010, Respondent employed seasonal and year-round workers, including all of the alleged discriminatees. Respondent commonly refers to year-round employees as "fulltime" workers. Respondent usually began laying off seasonal employees in about June, when their work declined. Respondent's managers would inform the supervisors how many workers needed to be laid off, and the supervisors would decide who would be selected. Although Respondent did not lay off its year-round workers, it reduced their work hours, as their labor requirements diminished.

David Kawahara and former General Manager Keith Vincent Francis credibly testified that Respondent's sales were flat, while its costs rose, during the Bush-era recession, commencing in 2006. As the result, his company's net profits declined. In response, the hours of year-round workers were sharply cut, in 2007 and 2008, making some workers unhappy.[8] Kawahara, and other managers, including Francis, decided to change the workforce configuration, retaining a "core" group of workers fulltime and year-round, while hiring new workers only on a seasonal basis.

Prior to 2010, workers were usually evaluated on their work performance when they received raises, which were not guaranteed at any point in their employment. In evidence are such evaluations for about a third of the alleged discriminatees, rating them as good or excellent workers.[9] Some of the pay increases were the result of workers being assigned to higher-paying job classifications, and were not accompanied by performance reviews. The record does not show how often other workers received pay increases, or the results of their job performance evaluations, so this evidence offers limited insight as to the relative quality of the work performance of these individuals. Similarly, while two of Respondent's supervisors testified that a few specified workers named herein were good, or excellent workers, this, in itself offers only limited insight as to how they compared with their co-workers.

The credible evidence by Respondent's witnesses establishes that Respondent's managers began discussing laying off year-round employees in 2008. In March 2009, at

[8] None of General Counsel's witnesses disputed this testimony.

[9] These include Ruben Colin, Angelino Santos, Reynel Lopez, Jorge Hernandez and Sergio Corona.

least six months before the Union organizing campaign, Respondent distributed a new, more detailed performance evaluation to its supervisors. Unknown to the supervisors, Respondent intended to use the evaluations to decide who to keep as "core employees," and who to lay off.[10] Unlike the seasonal layoffs, the decisions on which year-round employees to lay off would be made by higher management.

Respondent's supervisors were instructed to not inform workers of the new evaluations, or to advise them of the results. The evaluations had ratings in more areas than the other appraisals, and also asked the supervisors to comparatively rank the workers in their departments. All of the employees' ratings appeared in the same department evaluations. The supervisors completed the evaluations three or four times each year. Respondent's supervisors credibly denied that union considerations influenced the performance scores given to the workers.

Respondent laid off 60 year-round employees in a series of layoffs between June 10 and November 30, 2010.[11] Respondent also laid off 20 seasonal workers that year. Over 90 other employees left in 2010 for other reasons, primarily discharges (29) and

[10] In response to this evidence, that Respondent implemented the new evaluations before the UFW organizing campaign, General Counsel, well into the hearing, established that Teamsters Local 89 had filed a Notice of Intent to Take Access, and Notice of Intent to Organize, in January and March 2009, respectively. General Counsel then contended, for the first time, that the new performance evaluations were in response to that organizing campaign, and then were used to unlawfully implement the instant layoffs, when Respondent learned of the UFW's organizing drive. The parties stipulated that the Teamsters did not actually take access, and there is no evidence of what role the alleged discriminatees took in the earlier campaign, if any, or that Respondent was aware of any supporting activity by specific employees.

[11] Respondent also laid off three year-round field merchandisers. General Counsel contends that all of the field merchandisers voted against the Union.

voluntary quits. Anthony Banda testified that although he was only minimally involved in the decision to lay off year-round workers, he made the decisions as to who would be laid off, subject to consultation with Keith Francis.[12]

Banda testified that he relied most heavily on the performance evaluations, and secondarily on a review of the employees' personnel files. Banda testified that he generally did not rely on seniority in deciding who to lay off, although he would do so in cases where the employees' abilities and other desirable traits were equal. Respondent's written policies in effect for determining reductions in force included work performance evaluations, skills and abilities, and length of service.

When laid off, the employees were given written termination reports, which only designated the separation as a layoff. Banda informed most of the employees of their layoffs. He told them the layoffs were due to a reduction in work, and no negative references were made as to their work performance. Most of General Counsel's witnesses testified that Banda told them they could apply for work at a later date, which Banda corroborated. A few of General Counsel's witnesses testified he did not inform them they could reapply, and one claimed Banda told the workers he would call when work was available.[13] Banda was not asked to respond to this additional testimony.

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[12] There is no evidence that any of Banda's selections were overruled.

[13] This was Sergio Corona, who was laid off with a group of other workers on June 10, 2010. Respondent's records show that it laid off 24 workers on that date, of which three are alleged discriminatees. Alberto Garcia attended the layoff meeting and, contradicting Corona, testified Banda told them they could reapply for work the following year. Manuel Hernandez, who was laid off that day, but was informed of his separation by telephone, also testified that Banda told him he could reapply for work. Given this contradiction, and the testimony of the other witnesses, Corona's claim that

Respondent also created separation records, which were not provided to the employees. On each separation record, it is noted that the employee had scored the lowest aggregate performance score among the employees in his department, in the two most recent reviews. While these notations are not entirely accurate,[14] General Counsel does not dispute that the workers with the lower scores were chosen for layoff.

As noted above, none of the alleged discriminatees, or the Union, filed charges alleging the layoffs were unlawful. At the hearing, however, several witnesses denied that work was slow when they were laid off, and claimed they knew Respondent was lying to them about this, since the real reason for their separation was retaliation for their Union activity. In support of this, they testified that there was plenty of work, their hours had not been reduced, they were good, if not exemplary employees and Respondent had traditionally used seniority in determining layoffs.

General Counsel does not claim that the 46 other layoffs of year-round employees in 2010 were unlawful. General Counsel contends that these 14 workers were selected for layoff in retaliation for their Union activity. In support, General Counsel argues that less experienced and less senior employees were retained, while the alleged discriminatees, all of whom were superior employees, were laid off.

Banda stated he would call employees for work, at the time of their layoffs, is not credited.

[14] Since some of the layoffs involved a number of workers in the same departments, all did not receive the lowest scores. Banda testified that, in fact, those laid off received among the lowest scores.

With respect to seniority, of the 60 2010 layoffs of year-round employees, 31 were hired in 2010, including one alleged discriminatee.[15] Twenty-five of the laid off employees were hired in 2007, 2008 and 2009, of whom 10 are alleged as discriminatees, and 15 are not. Four of the laid off employees were hired in 2000 through 2003, of whom three are alleged discriminatees,[16] and one is not.

Six of the alleged discriminatees last worked as order pullers. All were hired prior to 2010. Their supervisor, Alberto George, admitted that five pullers hired in 2010 were not laid off. A total of 15 pullers were laid off in 2010, of whom nine were hired during that year. George credibly testified he did not make any of the layoff decisions, and did not know that the performance evaluations were to be used as a determining factor. George credibly denied giving employees lower scores on their performance evaluations because they supported the Union, or that anyone told him to do this.

Three of the alleged discriminatees last worked in the production department. They were all hired prior to 2010. Their supervisor was Jaime Mendoza. Respondent laid off a total of 13 production employees in 2010, including an additional employee hired before 2010. General Counsel questioned Mendoza concerning two production workers allegedly hired in 2010, but not laid off. Mendoza testified that one was rehired in 2010, after previously working for Respondent, and could not recall when the other was hired. Mendoza credibly denied that he knew the performance evaluations were

[15] Jaime Rodriguez testified he was hired in 2009, but both his termination notice and separation report state he was hired in 2010.

[16] These are Ruben Colin, Neptali Robles and Angelino Santos. Colin was originally hired in 1999, left for a period of time, and returned in 2001.

going to be used to determine layoffs, or Union considerations motivated how he rated workers in his department.

Charging Parties Adin Velasquez and Simon Blanco, and Jorge Hernandez last worked as mobile merchandisers. All were hired before 2010. Their supervisor was Fidel Elizondo. They, along with two other merchandisers, were laid off in 2010. Respondent's records show that an additional six merchandisers quit or were discharged in 2010. The uncontroverted evidence shows that, due to one of Respondent's commercial customer's demands, only three of the mobile merchandisers remained employed by the end of 2010. Those three were the lead merchandisers. Elizondo credibly denied knowing that the performance evaluations would be used to determine layoffs, or that Union considerations influenced how he rated workers in his department.

Sergio Corona is the only alleged discriminatee who last worked as a mover. He was hired in 2009. His supervisor was Carlos Elizondo. Corona was laid off on June 10, 2010, along with four other movers, all of whom were hired in 2010.[17] General Counsel contends that three movers hired in 2010 were not laid off, although Elizondo could only recall, with certainty, that one of these was hired in that year. Elizondo credibly denied knowing that the job performance evaluations were going to be used to determine layoffs, or that Union considerations influenced how he rated employees in his department.

Neptali Robles worked as an irrigator and fertilizer at the Gilroy facility. As noted above, Robles served as a Union observer at the election. Robles was hired in 2001.

[17] Elizondo could only recall one other mover who was laid off, but Respondent's Exhibit 1 shows that five movers were laid off on that date.

Respondent laid off six Gilroy workers in 2010, including Robles. One of these other workers was hired in 2007, and another in 2003. The evidence does not disclose what job duties the other five workers performed. Although Robles' supervisor did not testify, it is undisputed that Robles received the lowest aggregate job performance evaluation scores at that facility.

Banda testified that he also considered disciplinary notices and memos for other workers when making the layoff decisions. He testified that Robles was selected for layoff, because he received the lowest job performance evaluations,[18] and had been repeatedly counseled for poor irrigation and fertilizing work. A memo to this effect, dated April 7, is in Robles' personnel file.

Marco Cordova had received a verbal warning on May 1, 2010. There is no other discipline mentioned in his personnel file. Cordova testified that he had received two wage increases accompanied by positive job performance evaluations, but these were not placed into evidence. Cordova claimed he was made a lead worker, which Respondent's witnesses dispute.

Alberto George testified that although Ruben Colin did not receive any formal disciplinary notices, shortly prior to his layoff, there had been problems with him leaving work early on short notice, and an incident involving a co-worker, which are noted in a

[18] The job performance evaluations were not offered into evidence. General Counsel contends it was Respondent's burden of proof to do this. The undersigned disagrees. If General Counsel is contending that Respondent's stated reliance on the evaluations is false, or was applied in a discriminatory manner, this would constitute circumstantial evidence of unlawful motivation, part of General Counsel's prima facie case. In any event, the evaluations were provided to General Counsel, and the contention that the alleged discriminatees received among the lowest scores was not disputed.

memo referring to incidents culminating on June 3, 2010, and placed in Colin's personnel file. At the hearing on challenged ballots, Colin testified that he had been demoted from being a lead puller, and did not get along with the employee who replaced him in that capacity. Nevertheless, Colin was a long-term employee, who had consistently been rated as a good or excellent employee in Respondent's original evaluations, and had received a positive evaluation and a wage increase as recently as October 2009. Respondent did not give any employee a wage increase in 2010.

Angelino Santos had received a warning for being involved in a preventable accident while driving a forklift, and had been placed on probation for one year, in August 2010. Santos had previously been given good or excellent job performance evaluations and discretionary wage increases. Jaime Mendoza, Santos' supervisor, testified that he issued lower evaluation scores to Santos in the new evaluation, because of the accident and because his relationships with co-workers had deteriorated. Santos was one of 13 workers who were laid off in his department, of whom 10 are not alleged as discriminatees.

Simon Blanco was one of several employees given written warnings for going to an adult club during their lunch hour, using a company vehicle. Blanco credibly testified he was not the driver, and it was not his idea to go to the club. Adin Velasquez had received a verbal warning for failing to report he would miss work. Gabino Quezada had received two verbal warnings for incidents involving other employees. One of the incidents involved horseplay, and the other worker also received a verbal warning. Jose Anaya had received a verbal warning several months before he was laid off, for unsafe

driving. He received a written warning, about three weeks prior to his layoff, for refusing to follow orders, and using foul language. Alberto Garcia, about two months prior to his layoff, had received a written warning for an altercation with a co-worker, who was also disciplined.

Jorge Hernandez received a written warning, almost 18 months before he was laid off, for driving in an unsafe manner. Supervisor Elizondo admitted Hernandez was an excellent employee, and that he gave him an excellent performance review in late May 2009, after the written warning, to support a wage increase. On June 8, however, Elizondo submitted a much less favorable comparative evaluation for Hernandez, which was not shown to him. Elizondo was not asked to explain the discrepancy. Both of these reviews took place months before the Union organizing campaign.

Respondent did not contend that Jaime Rodriguez, Manuel Hernandez, Reynel Lopez or Sergio Corona had been disciplined, prior to their layoffs. It is, however, undisputed that Corona directed foul language at Banda when informed of his layoff.

The Refusals to Rehire

As noted above, this represented the first layoff of Respondent's non-seasonal workers. Respondent's downsizing policy states that employees who lose their jobs for this reason have no recall rights to the same, or similar positions. The policy, however, does not state that such employees cannot be considered for rehire. As discussed above, Banda told many of the workers, at the time of their layoffs, that they could apply for work in the future.

Respondent was accepting applications for employment in early January 2011, in anticipation of its busy season. It was only offering seasonal employment at the time. Respondent's records show that, in fact, it hired new employees in all of the departments in which the alleged discriminatees had previously worked, commencing on January 17.

Adin Velasquez and Simon Blanco submitted written applications for rehire, dated January 2, 2011. Jaime Rodriguez and Ruben Colin submitted applications dated January 3, and Angelino Santos submitted an application dated February 1. Jorge Hernandez testified that he accompanied Velasquez and Blanco when they picked up applications from Banda and, because Banda was not present when he returned to submit his application, he left it in front of Banda's door. Banda denied having received Hernandez's application. It is found that both testified truthfully on this issue.

The applications stated that they were seeking their former positions, and/or any opening. The workers marked the "fulltime" box, and did not check the box for seasonal work. Although Respondent initially made much of this, many of the 2011 applicants who were hired also checked the "fulltime" box, and did not check the "seasonal" box on their applications. The alleged discriminatees who submitted their applications directly to Banda testified he told them there was no work available, but he would contact them when there were openings. Banda, in his testimony, did not deny making these statements, and the witnesses' testimony is credited. It is undisputed that Banda did not thereafter contact any of these applicants.

In a position statement to the Salinas regional office dated May 20, 2011, one of Respondent's attorneys stated that the workers who submitted applications were not

rehired because they were only seeking "fulltime," e.g. year-round work, and only seasonal work was available. At the prehearing conference, conducted on September 12, 2013, Respondent's attorneys went a step further, contending that the applicants were offered seasonal work, and refused it.

At the hearing, Banda did not contend that the applicants stated they would only accept seasonal work, that he offered them such work or that they refused it. The applicants credibly testified that no such work was offered, and if it had, they would have accepted it. The only testimony initially elicited by Respondent regarding the refusals to rehire was that Banda did not rehire any of the 60 employees who were laid off in 2010.

In response to questions by the undersigned, Banda testified that even though he told employees, at the time of their layoffs, that they could apply for work in the future, he, at that time, had no intention of rehiring them, due to their comparatively low job performance evaluations. On cross-examination, Banda reversed himself on this, stating he decided not to rehire the workers at a later date. On further questioning by the undersigned, Banda testified he did not know when or why he changed his mind about rehiring any of the laid off workers. Banda testified he believes employees laid off in 2010, but not identified as being Union supporters, were among those applying for rehire. Banda, however, was unable to name any such applicant, and although Respondent maintained all of the 2011 applications, none was produced for such a laid off worker.

As noted above, Respondent's supervisors testified concerning prior discipline to, and other shortcomings in the work performance of some alleged discriminatees. None, however, testified that these were unacceptable employees, and in some cases, they

admitted they were good, or even "magnificent" workers. Jaime Mendoza, Angelino Santos' supervisor, testified he was unaware that Santos had applied for rehire. Banda, in his testimony, did not contend that he consulted with any of the supervisors regarding whether they wanted those who had applied to be rehired. Rather, he made these decisions on his own.

Respondent hired 82 new workers in 2011, of which two were office/professional employees. Of the remaining 80, some new employees were hired into all of the departments in which the alleged discriminatees had worked. They were all hired as seasonal employees, but almost half were subsequently converted to year-round status. Many of the others quit or were discharged, while some were laid off. Banda credibly testified that those converted to year-round status replaced "core" employees who had quit, been discharged or left for some other reason.[19]

As noted above, Velasquez, Blanco and Hernandez last worked for Respondent as mobile merchandisers. Respondent first hired new workers in that department in 2011 on March 2, when it hired at least three. Respondent hired between nine and eleven new mobile merchandisers in 2011, as seasonal employees.[20] Of these, all but two had quit or

[19] Respondent's records largely corroborate this testimony. Thirty-two of the 80 2011 seasonal hires were still working near the end of that year. Of the 113 employees who quit or were discharged in 2011, only 35 non-clerical/professional workers in this group had been hired prior to 2010. Thus, the records indicate a net loss of three "core" employees in 2011.

[20] Per General Counsel's Exhibit 28. Respondent's Exhibit 2 and General Counsel's Exhibits 28 and 29 are not co-extensive. Workers are counted if their names appear on any list. The records do not identify the hire date of two of the merchandisers discharged in 2011, so it is not clear if they were 2011 seasonal hires, or core employees.

been discharged by the end of May 2011.[21] The records also show that at least two merchandisers hired prior to 2009 were discharged in 2011. Thus, at least two of the new hires in that department became year-round employees.

Colin and Rodriguez last worked as pullers, and Respondent's records show it discharged a puller, hired in 2007, on January 5, 2011, and then hired a new employee in that job classification on January 17 (G.C. Exhibits. 28 and 29). Respondent hired two more pullers on February 1. Santos last worked as a production employee, and Respondent's records show it hired two new employees in his department on the same day he applied. Colin and Santos again applied for work with Respondent in 2012, but were not rehired.

Gabino Quezada did not testify, and there is no evidence showing why he failed to apply for rehire. Jose Anaya testified that he did not apply, because he knew he was laid off due to his support of the Union, and Respondent would not give him a job. Anaya was aware that Rodriguez and Colin had applied, and had not been rehired. Similarly, Alberto Garcia testified that he did not apply, because he knew that "a lot" of others had submitted applications, but none was rehired. In addition, Garcia had obtained new employment. Manuel Hernandez testified he did not apply, because there was no reason to. Banda would "do the same thing" to him as he did to his co-workers, e.g. not rehire him. Reynel Lopez testified that he did not apply, because he assumed Respondent did not want the employees it had laid off, and Banda had not told him he could apply.

[21] Respondent's records show that none of these workers was a seasonal layoff; however, Respondent's work typically diminishes beginning in June.

Sergio Corona testified that he did not apply because Banda told the workers he would call them, at the time of their layoff; however, as noted above, that testimony has not been credited. Neptali Robles testified that he did not apply, because he never considered returning to work for Respondent. Marco Cordova testified he did not apply because Respondent knew how to contact him, and he did not believe he would be rehired.

ANALYSIS AND CONCLUSIONS OF LAW

The Statute of Limitations Defense

Section 1160.2 of the Act prohibits the prosecution of allegations which took place more than six months before the filing and service of a charge. An amended charge may add new allegations which took place more than six months prior to the amended charge, so long as they are closely related to the original charge, and do not allege violations occurring more than six months prior to the original charge. In determining whether the new allegations are closely related to those in the original charge, three factors are considered: (1) whether the new allegations involve the same legal theory; (2) whether the otherwise untimely allegations arose from the same factual circumstances or sequence of events; and (3) whether the respondent would raise similar defenses to the allegations. *The Carney Hospital* (2007) 350 NLRB 627 [183 NLRB 1162]; *Success Valley Apartments, Inc.* (2006) 347 NLRB 1065, at pages 1066 – 1067; *Redd-I*, Inc. (1988) 290 NLRB 1115 [129 LRRM 1229].

Respondent cites *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, at pages 251-252 [216 Cal.Rptr. 685], in urging dismissal of the additional allegations. In that case, which was decided prior to the more recent NLRB decisions cited above, the California

Supreme Court held that allegations involving cutting off a union organizer's vehicle and using vulgar language toward another union organizer were not sufficiently intertwined with incidents alleged in the complaint, involving hitting a union organizer's vehicle and making vulgar references to the other organizer, to permit the finding of violations as to the former incidents. In this case, however, the amended charge refers to the identical conduct, refusing to rehire former employees. In addition, the court, in *Harry Carian Sales*, emphasized the facts that the violations were not alleged in any charge or complaint and thus, the appellant had not been apprised that it might be found to have committed the additional unfair labor practices.

Respondent also cites *George Arakelian Farms v. ALRB* (1986) 186 Cal.App.3d 94 [230 Cal.Rptr. 428] in support of its position. In that case, the California Court of Appeal refused to enforce a portion of the Board's order finding a unilateral wage increase for the year prior to the wage increase alleged in the unfair labor practice charge and complaint. The court noted that the appellant had, at no time prior to the issuance of the administrative law judge's decision, been apprised that it might be found to have violated the Act by its earlier conduct. Therefore, it was not apparent that it would have articulated the same defense for the two wage increases.

The original charge in Case No. 2011-CE-005-SAL alleged that Respondent unlawfully refused to rehire Simon Blanco, and the two other charges herein alleged the same conduct toward other employees. The amended charge added additional employees who were also allegedly refused rehire. Respondent was fully advised of the additional allegations prior to the hearing, and they were fully litigated. The amended allegations

involve the same sections of the Act, the same managers, the contention that all of the refusals to rehire were in retaliation for Union activity and involve at least some of the same legal defenses. Accordingly, since the other layoffs took place within six months of the filing and service of Blanco's charge, these allegations are timely. See *Rogers Foods, Inc.* (1982) 8 ALRB No. 19.[22]

General Counsel, has added an alleged discriminatee, and alleged that all of these workers were unlawfully laid off, more than six months prior to the issuance of complaint. The case law permits this course of action, again if the additional allegations are closely related to the original charge, utilizing the same considerations. *Redd-I, Inc.*, supra, *Detroit Newspaper Agency*, et al. (2000) 330 NLRB 524 [166 LRRM 1163]; *Richard A. Glass Company, Inc.* (1988) 14 ALRB No. 11. In light of the analysis above, there is little problem finding the addition of Marco Cordova to the employees allegedly denied rehire for unlawful reasons was timely. The allegations that the layoffs, themselves, were unlawful, while not identical, involve the same section of the Act as the refusals to rehire, the same alleged unlawful motivation, the same managers, some of the

[22] In *McCaffrey Goldner Roses*, et al. (2002) 28 ALRB No. 8, the Board required that an alleged discriminatee have clear and unequivocal notice that the respondent was refusing to recall him, before commencing the six-month period. Contrary to Respondent's contention, in its brief, the undersigned does not believe that General Counsel must establish a clear and unequivocal rejection of an application as part of the prima facie case, unless she is attempting to establish that Respondent announced it was not going to hire anyone who engaged in Union activities. The failure to hire, if positions were open or if Respondent had plans to hire workers, satisfies this element of the violation.

same alleged discriminatees, the same sequence of events[23] and the same primary legal defense. Respondent had notice of these allegations, and they were fully litigated. Therefore, it is concluded that these allegations are closely related.

The majority of the layoff allegations cannot be considered, however, because they took place more than six months prior to the filing and service of the original charges.[24] The layoffs represented a "final adverse decision," and therefore, the statute of limitations began at that time. Even if not advised of all the reasons for their layoffs, if the employees suspected the action was discriminatory, as several of them testified, they should have filed charges within six months. *McCaffrey Goldner Roses, et al.,* supra; *Old Dominion Freight Line, Inc.* (2000) 331 NLRB 111 [171 LRRM 1373]. The circumstances surrounding these layoffs, however, will be considered as background evidence in determining whether the alleged subsequent refusals to reinstate were lawful, and whether the layoff allegations of those within the statute of limitations may be sustained. *Richard A. Glass Company, Inc.,* supra.

Finally, the complaint alleges that Ruben Colin and Simon Blanco were denied rehire, because they testified for the Union in the hearing on objections. These allegations were not the subject of a charge, and the complaint issued more than six months after the refusal to rehire them. Although these allegations involve a different section of the Act, section 1153(d), and a different specific motivating factor, they are

[23] In *Redd-I, Inc.,* supra, the NLRB held that it is immaterial whether the new allegations took place before or after the original conduct alleged in the charge.

[24] This includes the initial layoffs of all of the alleged discriminatees except Adin Velasquez, Simon Blanco, Jorge Hernandez, Jaime Rodriguez and Angelino Santos.

otherwise very similar to the Union-related allegations. They involve two of the Charging Parties, the same managers, the same adverse employment action and the same basic theory of anti-Union retaliation, with the same legal defenses. Therefore, it is concluded that these allegations are timely, since they took place within six months of the filing and service of the charges. See *NLRB v. Martin,* et al. (C.A. 9, 1953) 207 F.2d 655 [33 LRRM 2046].

The Layoffs

In order to establish a prima facie case of unlawful retaliation against employees for engaging in union activity, General Counsel must show that the employees engaged in such activity, the employer had knowledge thereof (or suspected this), and the union activity was a motivating factor in an adverse employment decision. Once the prima facie case has been established, the burden shifts to the employer to show that the adverse action would have been taken, even absent the union activity. If the reasons given for the decision are found to be a mere pretext, the inquiry into the employer's defense ends there. *Wright Line, A Division of Wright Line, Inc.* (1980) 251 NLRB 1083 [105 LRRM 1169], enfd. (CA 1, 1981) *NLRB v. Wright Line, Inc.*662 F.2d 899 [108 LRRM 2513], cert. denied (1982) 455 U.S. 989 [109 LRRM 2079]. General Counsel has established that the alleged discriminatees engaged in Union activity, and Respondent stipulated it knew or suspected that all but one was a Union supporter, at the time of the layoffs.[25]

[25] Although Respondent denied knowledge of Marco Cordova's Union activity, it did not ask Banda to specifically deny this. Cordova's Union activities were not conspicuous. In light of the other findings and conclusions herein, Respondent's knowledge of Cordova's protected activities is not determinative.

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

The timing of the layoffs, six months and longer after the UFW organizing campaign began, and Respondent became aware of, or suspected these workers' support, is not indicative of unlawful motive.[26] Also telling is the fact that Respondent had planned to change its workforce configuration, and implemented the new performance evaluations, well prior to the Union campaign. In this regard, General Counsel has failed to prove its belated theory that the plan to lay off employees, in part using the enhanced

[26] General Counsel contends that a lapse of up to one year between Respondent's knowledge of the workers' Union activity, in December 2009, and their layoffs constitutes proximate timing in this case, but the case law does not support this contention. Simon Blanco postulated that as soon as Respondent won the election, it laid off the workers. The Board's order, that most of the challenged ballots should be counted, issued on November 22, 2011, and the Final Tally of Ballots issued on January 13, 2012. Respondent began laying off workers on June 10, 2011, and Blanco was laid off on September 28.

performance evaluations, was implemented in response to the Teamster organizing campaign. Thus, this important circumstantial factor has not been established.

The remaining circumstantial evidence is inconclusive, and insufficient to establish that Respondent targeted Union supporters for the layoffs. As a preliminary matter, being chosen for layoff did not mean that the worker was one of the worst employees in Respondent's 2010 workforce. Staffing requirements were important preliminary considerations. It is apparent that the most unsatisfactory workers in 2010, numbering almost 30, were discharged. In any event, the supervisors' denials that Union considerations influenced how they rated the alleged discriminatees have been credited.

General Counsel contends there was no economic need to lay off the alleged discriminatees, while at the same time not disputing the validity of the other 46 layoffs. The anecdotal testimony of some of General Counsel's witness is outweighed by the credible testimony of Respondent's witnesses, and the historical ebb and flow of Respondent's business. Furthermore, the records show that Respondent's year-round workforce, if anything, declined in 2011.

General Counsel contends that a prima facie case has been established, because Banda did not cite any job-related deficiencies to the workers when they were laid off, their layoff notices only cited economic grounds and Respondent, in its first position statement, only mentioned economic grounds and specified disciplinary actions. General Counsel further contends that Respondent's failure to discuss the new evaluations with the workers violated its policies, and is thus incriminating. General Counsel also

contends that Respondent violated its own policy by not giving advance notice of the layoffs to the workers.

It is not surprising that Respondent did not inform the workers or supervisors that it planned to lay off a large portion of its workforce, or that the new evaluations would be a prominent factor in making the reduction-in-force decisions.[27] It is also not surprising that Respondent would not disclose to the workers how their supervisors compared them with the others in their departments. To disclose the new evaluations to the workers would have also made them privy to the evaluations of other workers in their departments. There was certainly no need to agitate employees who were being laid off, by citing deficiencies in their work performance. Respondent's policy to give advance notices of layoffs was not absolute. In any event, the layoffs took place in several stages, with only three of the alleged discriminatees being let go in the first round.

With respect to Respondent's first position statement, it was, at the time, responding to charges involving only the Charging Parties herein, and the statement referred to each of them. Although Respondent did not specifically mention the new job performance evaluations, it did refer to its policies and procedures, which list job performance evaluations as the first consideration for layoffs. In any event, Respondent

[27] It does not appear that Respondent was required to give notice of the layoffs under the Worker Adjustment and Retraining Notification (WARN) Act. That legislation covers private-sector employers with 100 or more employees, excluding those who have worked less than six out of the prior 12 months, to give at least 60 days of notice prior to mass layoffs. Many of Respondent's employees did not satisfy the six-month requirement.

has extensively documented the new evaluations, and they are clearly not a recent fabrication or after-the-fact justification.

General Counsel also cites Respondent's failure to follow seniority, as indicative of unlawful motive. As discussed above, Respondent's policy only listed length of service as one factor in determining layoffs and, as interpreted by Banda, it played a minor role in his decisions. In any event, 21 of the first 24 workers laid off were 2010 hires, as were ten more laid off later in the year. As further discussed above, the evidence regarding seniority is inconclusive, since many employees with equivalent lengths of service, who were not identified as being Union supporters, were also laid off.

General Counsel contends that Respondent improperly considered unfair or irrelevant prior discipline in selecting these employees for layoff. It is clear this was a secondary factor considered by Banda, and while General Counsel may feel that the discipline was unfair, the evidence fails to show it was unlawful. In this regard, other workers were also disciplined for engaging in the same conduct as the alleged discriminatees. General Counsel has failed to establish that the skills and abilities of the alleged discriminatees, even if good or excellent, were superior to those who were retained, or to suggest who, other than those with lower seniority, should have instead been released.

General Counsel contends that the surveillance and photographing of the parking lot meetings shows Respondent's animus toward the workers who supported the Union. With respect to the incident where Alberto George was seen standing on the mound of soil, even if the testimony does establish that he was observing the meeting, the mere

observance of union activity openly conducted at or near an employer's premises does not constitute unlawful surveillance. *Key Food Stores Cooperative, Inc.* (1987) 286 NLRB 1056 [129 LRRM 1172]; *Southwire Company* 277 NLRB 377 [121 LRRM 1305]. Assuming the testimony does establish that supervisor David Perez photographed employees at one meeting with his cellphone, the National Labor Relations Board (NLRB) has held that photographing employees engaged in union activity, even if done openly, presumptively constitutes unlawful surveillance. *F.W. Woolworth Co.* (1993) 310 NLRB 1197 [143 LRRM 1187]. There is, however, no evidence that Perez played any role in the decision to lay off or not rehire any of the alleged discriminatees. Under these circumstances, Perez's isolated, alleged conduct adds very little to the prima facie case.

There is, in fact, substantial circumstantial evidence that Respondent did not target Union supporters for the layoffs. While General Counsel is not required to show that all employees who engage in protected activities suffer adverse employment consequences, or that the protected conduct of any alleged discriminatee is particularly significant, the treatment of others who engage in such activities is relevant. The record shows that by the time Respondent began implementing the layoffs, it was aware that as many as half of the collective bargaining unit had voted for the Union, and that many of its workers had signed authorization cards. Respondent was also aware that many workers had attended Union meetings, the Morgan Hill demonstration and the pre-election conference. The Union had identified a number of its supporters, in unfair labor practice charges, and four workers had served as Union observers at the election. Nevertheless, a substantial

percentage of those workers were retained, including several of the most visible Union supporters.

Therefore, in considering the record as a whole, the evidence of alleged inconsistent statements, failures to follow procedures and shifting defenses is insufficient to affirmatively establish that unlawful considerations were a motivating factor in the layoffs. The credible evidence shows that Respondent determined to reduce and change the configuration of its workforce well prior to the Union campaign, implemented the new performance evaluations to determine who would be laid off, also commencing prior to the campaign, and selected workers for layoffs, primarily on the basis of those evaluations. Since General Counsel has failed to establish a prima facie case that the layoffs were motivated by considerations which are prohibited by the Act, these allegations will be dismissed.

The Refusals to Rehire

The ALRB has long held that in order to establish a prima facie case that an employer has refused to rehire workers, based on their Union activities, the same elements discussed above must be established and, additionally, it generally must be shown that the worker applied for work at a time it was available. Where an employer has a practice or policy of contacting employees to offer them re-employment, this requirement may be satisfied by proof that the employer failed to do so when work became available. In such cases, if the evidence otherwise establishes a discriminatory motive for the refusal to recall or rehire, the discrimination begins when work becomes available. *McCaffrey Goldner Roses*, et al., supra; *H & R Gunlund Ranches, Inc.* (2013)

39 NLRB No. 21; *Prohoroff Poultry Farms* (1979) 5 ALRB No. 9; *Kyutoku Nurseries* (1982) 8 ALRB No. 98. Where an employer announces that it will not rehire former workers because of their protected activity, this may relieve workers in that class of having to apply at all, if work becomes available. *J.R. Norton v. ALRB* (1987) 192 Cal.App.3d 874, at page 904 [238 Cal.Rptr. 87]; *Abatti Farms*, et al. (1979) 5 ALRB No. 34; *Kawano, Inc. v. ALRB* (C.A. 4, 1980) 106 Cal.App.3d 937 [165 Cal.Rptr. 492]. Even in such cases, the alleged discriminatee must either apply for rehire, or it must be credibly established that he or she was dissuaded from doing so by the unlawful statement. *Tsukiji Farms* (1998) 24 ALRB No. 3, at ALJD pages 64 – 66.

In 2000, the NLRB, in response to the refusals of some courts of appeal to enforce its remedial orders in refusal to hire cases,[28] issued its decisions in *FES (a Division of Thermo Power)* (2000) 331 NLRB 9 [164 LRRM 1065] and (2001) 333 NLRB 66 [166 LRRM 1166], enfd. (C.A. 3, 2002) 301 F.3d 83 [170 LRRM 2729]. The NLRB's General Counsel must now establish, in the prima facie case: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements for the positions for hire, or in the alternative, that the employer has not adhered to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision to not

[28] The primary reason for the refusals to enforce were that the NLRB had found refusal to hire violations absent direct evidence that positions were open for the discriminatees, permitting this to be litigated in compliance proceedings. The courts disagreed, finding that "job matching" had to be established at the hearing on the merits.

rehire the applicants. The undersigned does not believe this is substantially different than the elements already in place at this Agency.

It is undisputed that nine of the alleged discriminatees did not apply for rehire. Although Banda testified he decided to not rehire any of the employees he laid off, this did not constitute an unequivocal statement made *to the workers* which would have made it futile for them to reapply. The credible evidence shows he either told the workers they could reapply, or said nothing to them on the subject. Furthermore, even in his testimony, Banda did not state or imply that he would refuse to rehire workers in a protected class, because many more workers who were laid off were not identified as Union supporters. Therefore, the alleged discriminatees were required to reapply. Since the record either does not show why they did not apply for rehire, or the reasons given were based only on their personal opinions, it is concluded that the failures of Reynel Lopez, Sergio Corona, Neptali Robles, Gabino Quezada, and Marco Cordova to seek rehire require the dismissal of those allegations.

With respect to Jose Anaya, Alberto Garcia and Manuel Hernandez, it is concluded that their knowledge that others had applied and not been rehired was insufficient to excuse them from applying, under the facts presented herein. If they had discussed what transpired with those who did apply, they reasonably would have also been told Banda had stated he would call the applicants when work became available. Thus, although the others had not immediately been hired, this in itself was insufficient to show it would have been futile for these employees to apply. As noted above, Alberto Garcia also testified that he had obtained other employment by the time Respondent

began hiring in 2011. In any event, the undersigned is not persuaded, from their testimony, that any of them would have applied, even absent their knowledge that other applicants had not been hired immediately. Accordingly, the allegations regarding the failure to rehire these employees will also be dismissed. *Tsukiji Farms,* supra.

It is concluded that the attempted application by Jorge Hernandez was ineffective. Leaving his application by Banda's office door was careless, and Hernandez failed to explain why he could not have left it with someone else, returned when Banda was present or mailed it. Under these circumstances, since Banda did not receive the application, this allegation will be dismissed. See *B&C Contracting Co.* (2001) 334 NLRB 218 [167 LRRM 1161] and *Allied Mechanical Services, Inc.* (1995) 320 NLRB 32 [151 LRRM 1304].

With respect to the remaining alleged discriminatees, the section 1153(c) prima facie cases for the refusals to rehire them suffer from some of the same weaknesses as the initial layoffs: lack of timing, no credible direct evidence of unlawful motivation and only minimally relevant evidence of one unrelated, isolated unfair labor practice. Nevertheless, although Respondent's policy states that workers separated through a reduction in force are not automatically entitled to rehire, it was not free to administer its policy in an unlawful manner. To contend that workers were laid off because Respondent believed they were the most expendable in the employee pool, as was the case here, is considerably different than contending they were ineligible for rehire, because their work performance was unacceptable. In this regard, slightly lower job

performance evaluation ratings may have justified selections for layoff, but hardly established that employees were unfit for rehire.

It is noted that Banda did not contend that the applicants' prior disciplinary histories were a factor in refusing to rehire them, as opposed to his testimony concerning the initial layoff decisions. In any event, while the discipline cited may have been relevant in determining who was going to be laid off, it was, for the most part, far too minimal and, in some cases, remote in time to establish that these were undesirable employees.[29] The validity of Banda's proffered reason for not rehiring these employees is further undercut by his failure to even advise their supervisors, who had worked with them on a daily basis, that they had applied. If their unacceptability as employees was truly the ground for not even interviewing them, the supervisors' opinions would have certainly been relevant, and sought out. In this regard, it is noted that Banda left it up to the supervisors to interview and hire the 2011 applicants, except for these five workers.

It is concluded that General Counsel has established a prima facie case that Union considerations were a motivating factor in the refusals to rehire Adin Velasquez, Simon Blanco, Ruben Colin, Jaime Rodriguez and Angelino Santos. All were known Union activists who applied for positions they were qualified to perform, at a time Respondent was hiring, or had plans to hire employees in those positions. Furthermore, since Banda

[29] Respondent has established that there were serious, ongoing problems with Neptali Robles' work performance, and it is undisputed that Sergio Corona used foul language when informed of his layoff. Since the allegations regarding these employees will be dismissed on other grounds, it is unnecessary to decide whether these factors would also warrant dismissal.

stated he would contact them if work became available, they did not need to submit additional applications.

Respondent proffered glaringly inconsistent reasons for the refusals to rehire those workers who applied, prior to the hearing, than it asserted thereat. The claim that the workers were offered seasonal positions and rejected them has been demonstrated to be false. Anthony Banda was the decision-maker regarding the rehires, and acted as the non-attorney management representative at the hearing. Absent an explanation to the contrary, it is inferred that he made these representations to the attorneys, or at least concurred with them.

Banda's fallback position at the hearing, that the workers were not rehired because of their comparatively low performance evaluations, was anything but convincing. In his initial testimony on this issue, Banda only stated he did not hire any of the employees who were laid off. He later admitted he had told at least some of the employees, at the time of their layoffs, that they could reapply, and then contradicted himself as to when he decided not to rehire any of them. Even then, Banda was unable to name any laid off employee not identified as a Union supporter who applied for rehire. Finally, Banda could not even give a reason for changing his mind as to whether he would rehire the laid off workers.

Given the demonstrably false reasons given prior to the hearing, changed to a poorly explained, largely unsupported rationale at the hearing, it is concluded that to the extent that Respondent's defense is not a pretext, it has failed to establish that absent

those considerations, it still would not have rehired them. Accordingly, by said conduct, Respondent violated section 1153(a) and (c) of the Act.

Section 1153(d) of the Act makes it unlawful to retaliate against an agricultural employee for filing charges or given testimony in a Board proceeding. The elements of proof for an unlawful refusal to rehire under this section are the same as those in cases of retaliation for union activity, except that the prohibited consideration is different. Once a prima facie case is established under this section, the burden shifts to the respondent to show it would have taken the adverse action, absent the filing of charges, or giving testimony. *The Garin Company* (1986) 12 ALRB No. 14.

It is undisputed that Simon Blanco and Ruben Colin testified for the Union in the Board hearing on challenged ballots. Respondent was a party at that hearing, and obviously was aware that they testified. Although other employees testified and were not laid off in 2010, Blanco and Colin were the only ones who were denied rehire. The timing of the testimony, in December 2010, is proximate to their applications for rehire, in early January 2011.

Given the close timing of their testimony to the refusals to rehire them, and the initially false, and then largely unsubstantiated explanations given by Respondent, it is concluded that General Counsel has established that Blanco's and Colin's participation in the hearing were motivating factors in the decision to not rehire them and, to the extent Respondent's defenses are not pretexts, it has failed to show they still would not have been rehired. Accordingly, Respondent, by its conduct, violated section 1153(a) and (d).

THE REMEDY

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

With respect to backpay, Velasquez and Blanco formerly worked as mobile merchandisers. Since Respondent first hired new workers in that classification on March 2, 2011, their backpay periods will commence on that date. Since at least two mobile merchandisers hired in 2011 became year-round workers, their backpay will continue until Respondent offers them employment. Colin and Rodriguez both worked as pullers. Since Respondent did not require following seniority in rehiring employees, both of their backpay periods will commence on January 24, 2011, the midpoint between the dates Respondent hired the first two new workers in that classification. In the absence of proof that the hire of new production workers on February 1, 2011 preceded Angelino Santos' application on that date, this is when his backpay will commence. Since Respondent converted seasonal employees hired in 2011 to year-round status in these classifications, the backpay for Colin, Rodriguez and Santos will also continue until Respondent offers them employment.

The Board has adopted the NLRB's holding that interest on backpay awards be compounded on a daily basis, as requested by General Counsel. *H & R Gunlund Ranches, Inc.*, supra, adopting *Jackson Hospital Corporation d/b/a Kentucky River Medical Center* (2010) 356 NLRB 1 [189 LRRM 1280]. The undersigned agrees that NLRB precedent now also requires that employees be compensated for any adverse tax consequences resulting from a lump-sum payment of backpay. *Latino Express, Ltd.* (2012) 359 NLRB 1 [194 LRRM 1309]. Board precedent already provides for reimbursement of expenses incurred while seeking employment, also sought by General Counsel.

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

ORDER

Pursuant to Labor Code section 1160.3, Respondent, Kawahara Nurseries, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Refusing to rehire, or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment, because the employee has joined, supported or assisted the United Farm Workers of America, or any other union, or testified at a hearing conducted by the Agricultural Labor Relations Board.

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

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

(a) Offer Adin Velasquez, Simon Blanco, Ruben Colin Jimenez, Jaime Rodriguez Lopez and Angelino Santos Gopar employment in the job classifications in which they were most recently employed by Respondent or, if their positions no longer exist, to substantially equivalent employment, without prejudice to their seniority and other rights and privileges of employment.

(b) Make whole Adin Velasquez, Simon Blanco, Ruben Colin Jimenez, Jaime Rodriguez Lopez and Angelino Santos Gopar for all wages or other economic losses they suffered as a result of their unlawful denial of rehire, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. The award shall also include interest to be determined in accordance with *H & R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21.

(c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning January 17, 2011 preserve and, upon request, make available to the Board or its agents

for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

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

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

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all no

hourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time during the period January 17, 2011 to January 16, 2012, at their last known addresses.

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

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

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

Dated: January 14, 2014

_____

Douglas Gallop
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by refusing to rehire Adin Velasquez, Simon Blanco, Ruben Colin Jimenez, Jaime Rodriguez Lopez and Angelino Santos Gaspar, because they supported the United Farm Workers of America (UFW), and because two of these employees testified at a hearing conducted by the ALRB.

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

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

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

Because you have these rights, we promise that:

WE WILL NOT refuse to rehire, or otherwise retaliate against agricultural employees because they join, support or assist the UFW, or any other union, or because they testify at hearings conducted by the ALRB.

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

WE WILL offer Adin Velasquez, Simon Blanco, Ruben Colin Jimenez, Jaime Rodriguez Lopez and Angelino Santos Gopar employment in the positions they previously held, 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 the unlawful refusal to rehire them.

DATED: _____ KAWAHARA NURSERIES, INC.

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 342 Pajaro St., Salinas, California 93901. 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