STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

P & M VANDERPOEL DAIRY Respondent, and JOSE NOEL CASTELLON MARTINEZ, Charging Party.	))))))))))	Case No. 2013-CE-016-VIS 40 ALRB No. 8 (August 28, 2014)

DECISION AND ORDER

Respondent P&M Vanderpoel Dairy (Respondent) operates a dairy in Tipton, California which falls within the jurisdiction of the Agricultural Labor Relations Act (ALRA or Act).[1] Respondent dairy is owned by Mike Vanderpoel (Mike) and is managed by his son, Matthew Vanderpoel (Matthew). This case arises from an unfair labor practice (ULP) charge filed on April 22, 2013, by Jose Noel Castellon Martinez alleging that Respondent violated the ALRA by firing him and four other workers on April 17, 2013, for engaging in protected concerted activity.

On April 28, 2014, Administrative Law Judge, James Wolpman (the ALJ) issued the attached recommended decision and order in which he found that Respondent violated section 1153(a) of the ALRA by discharging dairy workers Jose Noel Castellon

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

Martinez (Noel), Jorge Lopez, Jose Manuel Ramirez Corona (Jose), Juan Jose Andrade (Juan), and Alejandro Lopez Macias because they engaged in protected concerted activity. None of the employees in question are represented by a union.

The Board has considered the record and the attached ALJ decision in light of the exceptions and briefs and has decided to affirm the findings of fact, and conclusions of law of the ALJ, and responds to the exceptions and responses filed by the parties below.[2]

Summary of the Facts

The workers who testified at the hearing stated that they met in the morning on April 17, 2013, and discussed approaching Matthew to ask for a $1.00 per hour wage increase. They agreed to meet with Matthew around 6:00 p.m. which was just after the day shift ended and just before the night shift began. Workers present were Jose Noel Castellon Martinez, Jorge Lopez, Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias, Guadalupe Miguel Hernandez (known as Lupe). They also decided that Lupe Hernandez, who spoke English better than the rest of the group, would be the one to present their demand to Matthew.

As planned, about 6:00 p.m. on April 17, the workers approached Matthew, and met with him for about a half an hour in the milk barn. They met in an area off the milking parlor known as the "breezeway." Lupe spoke in English on behalf of the group

[2] We decline to grant the Request for Oral Argument filed by Respondent on June 25, 2014, given our treatment and discussion of the issues which triggered this request. See pages 15-16.

and told Matthew that the workers wanted a $1.00 per hour wage increase. Matthew testified that Lupe told him that if the workers' demand for a wage increase was not met, they would quit. The four workers who testified at the hearing stated that they never told Lupe to say that they would quit.[3] Noel Martinez testified that he could understand what Lupe said to Matthew and that he did not hear Lupe say "quit."

Matthew told the workers (in English with Lupe translating into Spanish) that a wage increase would only be given if milk production would increase and the workers got better with their procedure for milking. The workers continued to discuss the matter, expressing their concern that milk production would not increase at that time of the year because milk production decreases as the weather gets warmer.

At 6:44 p.m., Matthew left briefly to call his father, Mike Vanderpoel. Matthew testified that he told his father that the workers wanted a raise and would quit if they didn't get it. Mike arrived within about five minutes. The workers all testified that Mike was angry when he arrived, and that he began to yell at Noel Martinez. Matthew and Mike denied that Mike was yelling, but Matthew acknowledged that his father was unhappy with the situation and that he made that clear to the workers. Mike testified that he focused on Noel because he was close. Noel testified that Mike asked "do you want your job tomorrow, yes or no?" Noel testified that he was initially so intimidated he was speechless, but after a moment he asked Mike why he was being singled out. Mike just asked him again "do you want your job, yes or no?" Mike's testimony about this

[3] Lupe Hernandez did not testify at the hearing.

exchange differs. Mike stated that he first said to the workers "if you want to work, you can work. If you don't want to work you can go." Mike testified that none of the workers said anything, and so he repeated himself once or possibly twice. At 6:55 p.m., in front of the assembled workers, Mike called 911 to have law enforcement remove the workers from the dairy property. All of the workers left before the police arrived.

The workers all testified that because Mike was so loud and angry and because he called the police so quickly, they had no doubt that they were being fired. Noel and Juan Andrade testified they heard Mike use the Spanish word for "fired," although Jose Ramirez stated that he did not hear the word used, and Jorge Lopez did not mention the use of the word. Mike and Matthew denied using the word "fired."

The night shift was scheduled to start as the workers left the barn. Alejandro Lopez and Jesus Castrejon were scheduled to work the night shift. Jesus had not participated in the group meeting and worked the night shift. Alejandro left the meeting with his brother, Jorge and did not work. Jorge Lopez testified that as he and his brother were going to their cars in the parking lot, George Leney, who supervises another dairy owned by Mike Vanderpoel, but who lives at P & M Vanderpoel Dairy, approached the Lopez brothers and asked whether they wanted to stay and work. Jorge stated that they both told Leney "yes," but then Mike appeared and said "no work for you guys, get out."

Two days later, Juan Andrade and Alejandro Lopez went to the dairy to pick up their checks. Alejandro spoke to Matthew separately and Matthew offered his

job back.[4] Matthew testified that Alejandro was the only one who asked for rehire; however, Juan Andrade and Jose Manuel Ramirez both testified that after the meeting on April 17th, Matthew followed them outside and asked if they were going to come back to work. They replied that they wanted to work but "we were asking for a raise." Matthew then told them to leave. Juan and Jose both testified that they did not intend to make coming back to work contingent on their getting the raise.

ALJ's Decision

ALJ's Resolution of Conflicts in Testimony

The ALJ resolved a number of crucial conflicts in testimony as explained below. First, with respect to the issue of whether the workers discussed what they would do if their raise was denied, the ALJ credited the testimony of Juan Andrade, Jorge Lopez and Jose Manuel Ramirez who all stated that the workers had no further action planned besides asking for the raise. The ALJ did not credit Noel Martinez' statement that he told the group he would keep working there, but if he got a better opportunity somewhere else, he would leave. The ALJ reasoned that Noel, the charging party, testified more as an advocate than a witness.[5]

The ALJ found that none of the workers told Lupe to tell Matthew that the workers would quit if they did not get the raise. With respect to what transpired during

[4] Alejandro did not testify at the hearing.

[5] The ALJ found that the worker witnesses did their best to answer the questions posed to them in an honest and forthright manner, and that any inconsistencies in their testimony were insufficient to cast doubt on the substance of the credited testimony.

the meeting with Matthew, the ALJ considered the communication difficulties presented by the fact that all of the workers were Spanish speaking, although they testified that they could understand more English than they could speak. The fact that Matthew and Mike only understood and spoke a small amount of Spanish complicated communication considerably. The ALJ noted that while Matthew testified that Lupe said in English that the workers would quit if they did not get the raise, Noel (who claimed to understand what Lupe said to Matthew) testified that Lupe did not say the workers would quit. The ALJ found that because Matthew was a native English speaker, while Lupe and the other workers were not, the weight of the evidence favored Matthew's testimony that the group's spokesperson, Lupe, told him in English that the workers would quit if they did not get the raise.

The ALJ found that none of the workers, except Lupe, knew that a threat to quit had been made on their behalf. On the other hand, the ALJ found that Mike and Matthew believed in good faith that the workers would quit if they were not given a raise. The ALJ found that because the workers' chosen spokesperson created the misunderstanding, the responsibility for the confusion rested with the workers.

The ALJ credited the workers' testimony that Mike was angry, loud, hostile and intimidating. The ALJ also found Mike ignored Noel and the other workers when they reasonably asked why Mike was singling Noel out. Critically, the ALJ found that Mike re-opened the question of whether the employees wanted to work by demanding that the workers either work or get out. The ALJ also found that Mike gave the workers

little or no opportunity to respond to his question, and quickly resorted to calling 911. The ALJ found that all of the workers believed Mike was firing them.

The ALJ found that in the immediate aftermath of the meeting, Alejandro and Juan Lopez responded that they did want to keep their jobs when asked by George Leney and Matthew Vanderpoel. The ALJ credited the workers' testimony that when Mike learned of this, he ignored their choice and told them to "get out" because there was no more work for them.

The ALJ further found that when Matthew asked Juan Andrade and Manuel Ramirez whether they would be returning for their morning shift, they told him they wanted to "but we were asking for a raise." The ALJ credited Juan and Manuel's testimony that they did not intend to make coming back to work contingent on their getting the raise, but the ALJ found that because they mentioned the raise, this created an ambiguity. The ALJ found that Matthew did not explore the issue further, but ordered them to leave. The ALJ did not credit two of the workers' testimony that Noel directly told Mike he wanted to keep his job.

ALJ's Legal Analysis

The ALJ found, and there is no dispute, that the workers engaged in concerted activity in coming together to ask for a raise. The key question the ALJ's analysis addressed is whether the workers quit or whether they were fired.

Despite finding that the responsibility for the initial confusion about whether the worker were quitting was to be placed upon the workers, because it was their spokesperson who created the misunderstanding, the ALJ found that Mike Vanderpoel re-

opened the question of whether the employees would return to work; therefore, the ALJ reasoned, Mike was obligated to take into account the possibility that the workers had changed their minds or that he had misperceived their true intent. In support of his conclusion that the Vanderpoels were obligated to reassess the situation, the ALJ cited *Bromine Division, Drug Research, Inc.* (1982) 233 NLRB 253, 261; *Union Camp Corporation* (1972) 194 NLRB 933; and *Tenneco West Inc*. (1980) 6 ALRB No. 53, ALJD, pp. 25-26.

The ALJ found that the workers did manifest an interest in keeping their jobs as evidenced by the statements made by Alejandro and Juan Lopez, Juan Andrade and Manuel Ramirez immediately following the confrontation with Mike Vanderpoel. The ALJ further reasoned that Mike's hasty, angry preemptive conduct prevented the correction of the misunderstanding that the workers wanted to quit, and also led the workers to reasonably believe that they had been fired. The ALJ relied on the well-settled test applied by the National Labor Relations Board (NLRB) and ALRB that "the fact of discharge does not depend on the use of formal words of firing… It is sufficient if the words or actions of the Respondent would logically lead a prudent person to believe his tenure has been terminated." (*NLRB v. Turmball Asphalt Company of Delaware* (8th Cir. 1964) 327 F.2d 841, 843; *Ridgeway Trucking Co*. (1979) 243 NLRB 1048, enf'd (5th Cir. 1980) 622 F.2d 1222.) Moreover, the ALJ held that, since Mike Vanderpoel's conduct at the very least created ambiguity about the workers' employment status, the burden of the results of that ambiguity falls on the Respondent. (*Dole Farming, Inc.*

(1996) 22 ALRB No. 9 at pp. 3-5 citing *Brunswick Hospital* (1982) 2165 NLRB 803, 810.)

The ALJ then addressed the defenses raised by the Respondent in its post-hearing brief. First, the ALJ rejected the Respondent's argument that the workers' concerted activity was not protected because they stayed after work in a critical work area and essentially engaged in a "sit-down" strike. The ALJ found that the credited facts supported the conclusion that the workers planned their meeting after the end of the day shift and before the start of the night shift, not during work time. Moreover, during the time the workers met with Matthew, he did not tell them that the milk barn was not an appropriate place to meet or that they were interfering with production, and when Matthew left to call Mike, he let the workers stay there. When Mike arrived, he almost immediately asked the workers to leave, and as the ALJ pointed out, Mike did not order them to leave because they were disrupting work or milk production. Finally, the ALJ found that the Respondent offered no proof that the meeting had an effect on milk production. In support of his conclusion that the workers retained their protected status, the ALJ applied the factors set forth in *Quietflex Manufacturing Co.* (2005) 344 NLRB 1055, 1056-58, a case which analyzed which party's rights should prevail in the context of an on-site worker protest.

The ALJ then rejected the Respondent's argument that the failure of the workers to apply for unemployment insurance was evidence that they had quit and were not fired. The ALJ cited no case law in support of this holding, merely stating that "the failure to seek unemployment benefits, especially in agriculture, where a large percentage

of the workforce is undocumented, is an insufficient basis to justify an inference that the workers had quit their employment."[6]

The ALJ rejected the Respondent's argument that the General Counsel's failure to take declarations from the worker witnesses prior to the hearing violated *Giumarra Vineyards, Corp.* (1977) 3 ALRB No. 21. The ALJ reasoned that *Giumarra*, which requires the Agricultural Labor Relations Board (ALRB or Board) to turn over worker witness statements only after they have testified at a hearing in order to protect their confidentiality, does not require that worker witnesses statements be taken in the first place.[7]

General Counsel's Exception

The General Counsel filed one exception to the ALJ's recommended order. The General Counsel argues that the Notice to Agricultural Employees attached to the

[6] During the hearing, the Respondent's counsel attempted to question a worker witness about the reason he did not file for unemployment insurance, and about the possible use of a false social security number. The Assistant General Counsel objected, and the ALJ surmised that what Respondent's counsel wanted "to prove his [immigration] status." To this Respondent's counsel replied "Yeah, and that's to test his credibility." (Hearing Transcript, page 103, lines 20-23.) The ALJ did not permit further questioning along these lines on the basis of Labor Code section 1171.5 and *Rivera v. Nibco, Inc.* (9th Cir. 2004) 364 F.3d 1057. Noel Martinez testified that he did not apply for unemployment, while the General Counsel stipulated that Jorge Lopez and Juan Andrade did not apply. The ALJ also noted that California Evidence Code section 787 excludes the use of specific instances of misconduct as character impeachment except for felony convictions reflecting honesty and veracity.

[7] The ALJ also rejected the Respondent's argument that the well-settled rule set forth in *Giumarra Vineyards, Inc., supra*, 3 ALRB No. 21 and codified in Board regulation section 20236 and 20274 prevents respondent employers from preparing adequate defenses in ALRB proceedings and constitutes "trial by ambush." (The Board's regulations are codified at Cal. Code of Regs., tit. 8, § 20100 et seq.)

ALJ's decision (pp. 26-27) does not adequately communicate in lay person's terms the effect of the Decision and Order and the employees' rights under the Act. She argues that the Regional Director should have discretion to draft the language to the notice. In the alternative, she argues that the language of the notice should be modified, and she attaches her suggested language on pages 6-8 of her Memorandum of Points and Authorities in Support of Exception to the Decision of the Administrative Law Judge dated May 22, 2014.

The Respondent filed a reply to the General Counsel's exception and argues that the General Counsel's proposed notice language is "oppressive, excessive and punitive."

Respondent's Exceptions

Respondent argues that Mike and Matthew Vanderpoel's testimony about the events of April 17, 2013, should be credited over that of the General Counsel's witnesses because those individuals lacked credibility and contradicted each other.

The Respondent's primary legal argument is that the ALJ improperly found that the workers were terminated. The Respondent argues that Mike Vanderpoel never told any of the workers that they were being fired. Respondent argues that Lupe Hernandez "repeatedly" told Matthew Vanderpoel that the employees would quit if they didn't get a raise, and that when they were told they were not getting a raise, some of the employees abandoned their jobs, quitting as Lupe said they would.

Respondent cites to *Nichols Farms* (1994) 20 ALRB No. 17 as being a case with facts similar to the instant case. In *Nichols Farms*, the Board found that workers

who left work without saying whether they were striking or quitting were engaged in unprotected conduct analogous to resignation. Respondent concedes that the Board stated that the mere fact that the employees left the workplace after they complained about their wages was not enough to establish that they had resigned. Rather the Board found resignation was established because there was evidence that two of the employees applied for unemployment benefits later and stated on their applications that they had quit.

The Respondent argues that the ALJ improperly failed to allow testimony on the reason why the employees did not file for unemployment, and if he had, the answer would have been that they did not do so because they quit.

In support of its argument that the dairy workers quit, the Respondent argues that the workers were bound by the threat to quit made by their selected interpreter, Lupe Hernandez, and cites *Rogers Foods, Inc*. (1982) 8 ALRB No. 19 at 16, fn. 23 and *Hansen Farms* (1976) 2 ALRB No. 161 in support of its position. The Respondent further argues that the Board should draw an adverse inference from General Counsel's failure to call Lupe as a witness, citing to California Evidence Code sections 412 and 413. The Respondent's position is that the Board should construe all inferences in favor of the Respondent and that the Board should essentially disregard the workers' testimony that they did not tell Lupe to tell Matthew they would quit if not given the raise.

The Respondent also excepts to the ALJ's finding that there was a reservation, qualification or continued interest in employment expressed by the workers

that served to counteract the workers' statement through their interpreter that they would quit if they did not get the raise. The Respondent further argues to the extent there was any ambiguity about the workers' intentions, it was the result of their not responding to Mike when he asked whether they wanted to work. The Respondent reasons that the workers could have resolved the ambiguity by simply coming to work the next day. The Respondent argues that *Dole Farming, Inc., supra*, 22 ALRB No. 9, cited by the ALJ for the proposition that where an employer's conduct creates an ambiguity about the workers' employment status, the burden of the results of that ambiguity falls on the employer, is inapposite to the instant case because the employees, not the Respondent created any ambiguity about employment status.

The Respondent characterizes the events of April 17, 2013, as a "work stoppage," and argues that because the workers stayed on the Respondent's property and would not leave when they were asked, Mike Vanderpoel acted reasonably by calling 911. In addition, the Respondent points out that by the end of the meeting the night shift was starting and milking was about 30 minutes behind schedule. In its exceptions, Respondent argues that the workers' concerted activity was not protected due to their remaining on the dairy property while not working. Respondent states that "protected activity needs to be off property," and cites to *Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469 and *NLRB v. Fansteel Metallurgical Corp.* (1939) 306 U.S. 240, cases in which

the court found that "sit-down strikes" or strikes where workers remain on an employer's property and exclude others from entry is not protected in some sense of the word.[8]

The Respondent reiterates its arguments that the General Counsel violated the Board's decision in *Giumarra Vineyards Corp., supra*, 3 ALRB No. 21, because the General Counsel did not take workers' declarations during the ULP investigation, and that even if the declarations had been taken and given to counsel at the hearing, the rule in *Giumarra Vineyards Corp*. generally prevented Respondent from preparing an adequate defense, constitutes "trial by ambush, and violates Respondent's constitutional rights."

Finally, the Respondent takes the position that the remedies ordered by the ALJ are punitive. Specifically, the Respondent argues that it should not have to mail copies of the Notice to Agricultural Workers to all agricultural employees employed during the period April 17, 2013 to April 17, 2014.

General Counsel's Reply to Respondent's Exceptions

The General Counsel filed a reply to the Respondent's exceptions in which she argues that there was no work stoppage on April 17, 2013, and that the workers' threat to quit as communicated through Lupe Hernandez was protected activity. The General Counsel argues that *Bromine Division, Drug Research, Inc., supra,* 233 NLRB 253, the case cited by the ALJ in support of his holding that the workers should be held to Lupe's communication about quitting, does not apply in the instant case because no

[8] Only *Fansteel* involved protected and unprotected activity under the National Labor Relations Act.

worker withheld labor, and the threat to quit was used as leverage to ask the Respondent for a raise.

She argues that in the context of a meeting outside of work hours, where there is no interruption of an employer's operations, statements that workers will quit if they don't get a raise should be seen as a negotiation tactic. The General Counsel further argues that under *Union Camp Corporation, supra,* 194 NLRB 933, the most the ALJ should have found was that Lupe made an "ambiguous statement of future intention" to quit which is insufficient to find that the workers actually quit.

The General Counsel's reply also contains several pages of discussion regarding why it was proper for the ALJ to prevent the Respondent's counsel from "harassing witnesses about their immigration status." In that discussion, the General Counsel states that Respondent's counsel admitted during the hearing that the question "did you apply for unemployment insurance benefits" was really about immigration status. She also states that Respondent's counsel "engaged in a series of offensive and shameless questions and accusations whose sole purpose was to intimidate … the witnesses … by raising the specter of immigration enforcement." The General Counsel further accuses Respondent's attorney of asking these questions "prompted by nothing more than the language Mr. Martinez spoke and the color of his skin."

Respondent's Request for Oral Argument

On June 25, 2014, the Respondent filed a Request for Oral Argument so that it could "fully respond to the inaccuracies, false statements and accusations contained in the General Counsel's reply to the Respondent's exceptions." The

Respondent argues that its counsel has been accused of racial prejudice without any supporting evidence, and that oral argument is required to rebut that claim. Respondent argues that its counsel permissibly attempted to cross-examine a witness about identity theft (e.g. the use of someone else's social security number), and moreover, Respondent's counsel did not, as General Counsel states, admit that counsel's questions were really about the witness' immigration status.

Discussion and Analysis

Request for Oral argument

We deny Respondent's request for oral argument because the parties' briefs and exceptions are sufficient for the Board to fully analyze the issues in the instant case; however, we strongly admonish the General Counsel for making serious, inflammatory accusations about Respondent's counsel's alleged racial motivations during the hearing in her reply to the Respondent's exceptions. These unsubstantiated accusations are inappropriate, and we caution the General Counsel that the only arguments that will be considered by the Board are those that are supported by the record.[9]

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[9] The General Counsel states in her Response to the Request for Oral Argument that she "did not say and does not argue now that the immigration status questions were raised as a result of 'racial prejudice,'" and that "the motivation behind the questions is not the issue; it is their highly damaging effect on witnesses." We do not accept this backpedaling explanation given the above quoted language that Respondent's questions were motivated by "the color of his skin."

ALJ's Credibility Determinations

Respondent urges the Board to overturn the ALJ's credibility determinations, arguing that the General Counsel's witnesses lacked credibility and contradicted each other.

The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3; *P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) In instances where credibility determinations are based on factors other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*S & S Ranch, Inc*. (1996) 22 ALRB No. 7.) In addition, it is both permissible and not unusual to credit some but not all of a witness's testimony. (*Suma Fruit International (USA), Inc.* (1993) 19 ALRB No. 14, citing *3 Witkin, Cal. Evidence* (3d ed. 1986) §1770, pp. 1723-1724.)

We find no reason to disturb the ALJ's credibility determinations. The ALJ found the worker witnesses' demeanor to be honest and forthright. The ALJ recognized that there were some inconsistencies in witness testimony; however, the ALJ found that these inconsistencies were minor and insufficient to cast doubt on the substance of their testimony. (*Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 248.) Moreover, the ALJ's credibility determinations are consistent with well-supported inferences in the record as a whole.

Adverse Inferences

We find no merit in the Respondent's argument that the Board should draw an adverse inference from General Counsel's failure to call Lupe Hernandez as a witness, and that the Board should essentially disregard the workers' testimony that they did not tell Lupe to tell Matthew they would quit if not given the raise.

In *The Garin Co.* (1985) 11 ALRB No. 18, the Board explained that in general, adverse inferences are permitted where a party fails to produce evidence or witnesses within its control, or introduces weaker or less satisfactory evidence than it is within its power to produce. (See Evid. Code § 412.) (See also *Auto Workers v. NLRB* (D.C. Cir. 1972) 459 F.2d 1329, 1336.) The failure to explain or deny evidence or facts, or the willful suppression of evidence relating thereto, permits the drawing of adverse inferences. (See Evid. Code § 413.) However, it is also clear that when a witness is available to either party, no unfavorable inference should be drawn from the failure to call that witness. (*Davis v. Franson* (1956) 141 Cal.App.2d 263, 270.)

Here, there is no indication that Lupe Hernandez was under the General Counsel's "control." Respondent does not argue that Lupe was unavailable to be called as a witness for Respondent. Moreover, California Evidence Code section 411 provides that, except where additional evidence is required by statute, direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact. Thus, the workers' credited testimony that they did not tell Lupe to tell the Vanderpoels they would quit if they were not given a raise was sufficient to establish the facts found by the ALJ.

Evidence Regarding Whether Workers Filed for Unemployment Insurance

With respect to Respondent's argument that the ALJ improperly failed to allow testimony on the reason why the employees did not file for unemployment, we agree that a simple inquiry into whether or not the workers filed for unemployment insurance benefits is permissible, as this can be probative of whether the employees quit or were fired. We are also of the view that generally, a respondent's counsel should be able to ask a witness on cross examination whether he did not apply for unemployment insurance because he quit. However, we concur with the ALJ's ultimate disposition of this issue, because during the hearing the examination of the witness quickly crossed over into the territory of the workers' immigration status, and it was proper for the ALJ to stop this line of questioning.[10] In any event the fact that an employee did not apply for unemployment insurance does not, by itself, support the inference that they did so because they quit.

The Workers' Protected Concerted Activity

Section 1152 of the ALRA grants agricultural employees the right, inter alia, "to engage in . . . concerted activities for the purpose of mutual aid and protection." Discrimination against employees for engaging in protected concerted activities is considered interference, restraint or coercion in the exercise of that right, in violation of section 1153(a). (*J & L Farms* (1982) 8 ALRB No. 46; *Lawrence Scarrone* (1981)

[10] See Labor Code section 1171.5.

7 ALRB No. 13; *Miranda Mushroom Farm, Inc., et al*. (1980) 6 ALRB No. 22; *NLRB v. Washington Aluminum Co.* (1960) 370 U.S. 9; *Phillips Industries, Inc.* (1968) 172 NLRB 2119, at p. 2128.)

In order to be protected, employee action must be concerted in cases not involving union activity. This generally means that the employee must act in concert with, or in coordination with others. (*Meyers Industries, Inc.* (1984) 268 NLRB 493, revd. (1985) 755 F.2d 1481, decision on remand, (1986) 281 NLRB 882, affd. (1987) 835 F.2d 1481, cert. denied, (1988) 487 U.S. 1205.) The subject itself must involve collective as well as individual employment conditions. The law contemplates "that an employee may…be motivated both by self-interest and collective well-being." (*NLRB v. White Oak Manor* (4th Cir. 2011) 452 Fed. Appx. 374, 381; cf. , *Fortuna Enterprises, LP v. NLRB* (D.C. Cir. 2011) 665 F.3d 1295.) The object of protected concerted activity includes conduct arising from any issue involving employment, wages, hours, and working conditions. The means through which such activity may be manifested include protests, negotiations and refusals to work, arising from employment-related disputes. (*NLRB v. Washington Aluminum Co.* (1960) 370 U.S. 9; see also *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41; *J & L Farms, supra,* 8 ALRB No. 46; *Lawrence Scarrone, supra,* 7 ALRB No. 13; *Miranda Mushroom Farm, Inc., et al., supra,* 6 ALRB No. 22; *Giumarra Vineyards, Inc.* (1981) 7 ALRB No 7.) And, of course, it is axiomatic that protected concerted activity engaged in by employees may be on company property. (E.g., *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793.)

Where economic pressure is engaged in, the protected nature of the activity does not depend on the reasonableness of the demands. Activity which would otherwise be protected will only lose that status if it is unlawful, violent, in breach of contract or indefensibly disloyal. (See *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4, at p. 2, fn. 3.)

There is no dispute that on April 17, 2103, the workers engaged in concerted activity by asking for a raise. As discussed above, we affirm the ALJ's pertinent credibility determinations, thus we affirm his factual finding that the workers reasonably believed that they had been terminated. We also uphold the ALJ's finding that Mike Vanderpoel's hasty, angry conduct, including his calling of 911 to remove the workers from the property prevented any clarification of the situation. Moreover it is well-settled that a discharge occurs if an employer's conduct or words would reasonably cause employees to believe that they were discharged and in such circumstances it is incumbent upon the employer to clarify its intent. (*H& R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21, p. 5. fn, 3; *Lassen Dairy, Inc.* (2009) 35 ALRB No. 7, citing *Boyd Branson Flowers, Inc.*, supra, 21 ALRB No. 4)

As discussed above, the ALJ found that none of the workers, except Lupe, knew that a threat to quit had been made on their behalf. On the other hand, the ALJ found that during the meeting with the workers, Mike and Matthew believed in good faith that the workers would quit if they were not given a raise. In her reply to the Respondent's exceptions, the General Counsel urges the Board to hold that "[i]n the context of a meeting outside work hours in which workers are asking for better working

conditions, statements that workers will quit if they do not get a raise should be seen…as a negotiating tactic and attempt to convince the employer to concede to the workers' demand." We need not address the question of whether such activity is protected under the ALRA inasmuch as the ALJ ultimately rejected the argument that the employees had actually quit.[11]

The Employer's defense, besides the argument that the workers were not fired, is that the workers' concerted activity was not protected due to their remaining on the dairy property while not working. We find that the facts do not support a finding that a sit-down strike or even a work stoppage occurred in this case, but rather the employees specifically chose to approach Matthew between shifts when no one was working. The discussion was peaceful, the delay of the evening milking session was brief, and there was no evidence that milk production was negatively impacted. Respondent cites to no authority that merely engaging in concerted activity on an employer's property is, in and

[11] Board Member Shiroma notes that NLRB case law has held under analogous circumstances that where employees conditionally threaten to quit, the conduct is protected. (See *Martin dba Nemec Combustion Engineering* (1952) 100 NLRB 1118, 1123, enf'd (9th Cir. 1953) 207 F.2d 655; *Southern Pine Electric Cooperative* (1953) 104 NLRB 834, enf'd (5th Cir. 1955) 218 F.2d 824 (holding "a threat to quit in the future, designed to induce the Respondent to act favorably regarding their wage demand . . . constituted concerted activity for their mutual aid and protection, within the meaning of the Act."); *Empire Gas, Inc*. (1981) 254 NLRB 626; Compare, *Crescent Wharf and Warehouse Company* (1953) 104 NLRB 860 (threat to quit was not conditional, but rather constituted an actual resignation.) Section 1148 of the ALRA states that the Board shall follow applicable precedents of the National Labor Relations Act (NLRA). (*Giumarra Vineyards Corp*. (2005) 31 ALRB No. 6, p. 4, fn. 3; *Perez Packing, Inc*. (2014) 40 ALRB No. 1, p. 5, fn. 4.)

of itself, unlawful or unprotected. Clearly under the standards of *Atlantic Steel Co.* (1979) 245 NLRB 814, the activity in question remained protected.[12] Neither was the conduct here violent, in breach of contract or indefensibly disloyal, or profane which would render otherwise protected conduct unprotected. (*Boyd Branson Flowers, Inc., supra*, 21 ALRB No. 4.; *Plaza Auto Center, Inc. v. NLRB* (2011) 664 F.3d 286, 292 citing *Trus Joist MacMillan* (2004) 341 NLRB 369 at 371.)

We disagree that *Quietflex Manufacturing Co., supra,* 344 NLRB 1055, relied on by the ALJ, applies to this case, because *Quietflex* involved an on-site work stoppage, which we do not have here.[13]

Giumarra Vineyards Rule

We find no merit in Respondent's argument that the General Counsel was required to take workers' declarations during the unfair labor practice investigation. The ALJ is correct that the rule in *Giumarra Vineyards, Inc., supra*, 3 ALRB No. 21 and codified in Board regulation section 20236 and 20274, requiring worker witness

[12] *Atlantic Steel* was adopted by the ALRB in *David Freedman & Co. Inc*. (1989) 15 ALRB No. 9. In determining whether an employee's conduct causes him to lose the protection of the Act, *Atlantic Steel* requires the Board to carefully balance the following factors:

1. The place of the discussion,
2. The subject matter of the discussion,
3. The nature of the outburst, and
4. Whether the outburst was in any way provoked by an unfair labor practice of the employer.

[13] We note that *Quietflex* has been criticized for providing little guidance to parties as to how they will conduct themselves. (See, *Fortuna Enterprises v. NLRB* (D.C. Cir. 2011) 665 F.3d 1295,1300 ("*Quietflex* may be incapable of predictable application.")

declarations to be turned over to counsel only after the worker testifies, applies only if worker declarations are taken in the first place. In addition, we decline to revisit Respondent's "trial by ambush" arguments. These arguments were considered and rejected in *Giumarra*, as well as in numerous cases involving the NLRB, which has the same restrictions on discovery.

The Remedy

We reject Respondent's argument that the one-year mailing requirement is punitive. The one-year mailing period has long been one of the Board's standard remedies. In *Nish Nororian Farms v. ALRB* (1984) 35 Cal.3d 726, the California Supreme Court approved the Board's notice remedies and noted that the mailing requirement was properly designed to reach both past and present employees who might not have learned of an employer's conduct.

The Board declines to give the Regional Directors the discretion to draft the Notice to Agricultural Employees in this case or future cases. As for the proposed revisions to the Notice, the Board declines to adopt the General Counsel's proposed language in this case; however, in the future, the Board may consider, either through rulemaking or adjudication, whether the Notice language merits revisions.

Conclusion

For the reasons discussed above, we affirm the ALJ's conclusion that Respondent violated section 1153(a) of the ALRA by discharging dairy workers Jose Noel Castellon Martinez, Jorge Lopez, Jose Manuel Ramirez Corona, Juan Jose Andrade, and Alejandro Lopez Macias because they engaged in protected concerted activity.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, Respondent P & M Vanderpoel Dairy, its officers, agents, successors and assigns, are ordered to:

1. Cease and desist from:

(a) Discharging, laying off, failing to rehire or recall, or otherwise retaliating against any agricultural employee because the employee has engaged in union or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) Otherwise 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 that are deemed necessary to effectuate the policies of the Act:

(c) Rescind the discharges of Jose Noel Castellon Martinez, Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias, and Jorge Lopez and offer those who have not already been reinstated immediate reinstatement to their former position of employment or, if their position no longer exists, to a substantially equivalent position, without prejudice to their seniority and other rights of employment.

(d) Make Jose Noel Castellon Martinez, Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias, and Jorge Lopez whole for all wages or other economic losses they suffered as a result of Respondent's unlawful discharges on April 17, 2013, to be determined in accordance with established Board

precedent. The award shall also include interest in accordance with *Kentucky River Medical Center* (2010) 356 NLRB No. 8 and *Rome Electrical Services, Inc.* (2010) 356 NLRB No. 38.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, time cards, personnel records, and all other records relevant and necessary for a determination, by the Regional Director, of the economic losses due under this Order. Upon request of the Regional Director, payroll records shall be provided in electronic form if they are customarily maintained in that form.

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

(g) Post copies of the Notice, in all appropriate languages, at conspicuous places on Respondent's property, including places where notices to employees are usually posted for sixty (60) days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed. Pursuant to authority granted under Labor Code section 1511(a), give agents of the Board access to its premises to confirm the posting of the Notices.

(h) Arrange for Board agents to distribute and read the Notice, in all appropriate languages, to all of its agricultural employees on company time and property, at times and places 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 any non-hourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(i) Mail copies of the Notice, in all appropriate languages, within 30 days after this Order becomes final or thereafter if directed by the Regional Director, to all agricultural employees employed by Respondent at any time during the period from April 17, 2013 to April 17, 2014.

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

(k) Notify the Regional Director in writing, within 30 days after the date of this Order becomes final, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

DATED: August 28, 2014

Genevieve A. Shiroma, Board Member

MEMBER RIVERA-HERNANDEZ, Concurring and Dissenting

I concur in the result reached by the majority and concur with the majority's analysis except as it relates to the decision that it is not necessary to reach and decide the issue of whether the threat to quit made by the employees herein constituted protected activity under the Agricultural Labor Relations Act (ALRA).

I write separately to express my view that, not only does Section 1152 of the ALRA protect employees who concertedly threaten to resign in support of legitimate demands concerning their terms and conditions of employment, the Agricultural Labor Relations Board (ALRB) is required to so hold in this case and, by declining to do so, the majority opinion fails to provide a complete analysis concerning the allegation that the Employer herein unlawfully terminated a group of its employees.

In this case, the Employer contended that the General Counsel did not prove that a group of employees was unlawfully terminated after they demanded a wage increase and threatened to quit if it was not granted because the employees, according to the Employer, quit and were not terminated. The majority finds, and I agree, that the employees were, in fact, terminated.

Because the employees were terminated, the Board is presented with the distinct issue of whether the termination was unlawfully based upon the employees' protected activity. The majority holds that the employees' demand for a wage increase was protected activity, and clearly it was. However, the majority concludes that it need not reach the issue of whether the employees' threat to quit if their wage demands were not met was also protected. I must disagree.

In order to conclude that the Employer's conduct was unlawful, we must determine the basis for the termination either through direct or circumstantial evidence. Where it is undisputed that an employer's action was based upon protected activity, and provided that the conduct of the employee did not cause him or her to lose the protection of the ALRA, no further inquiry into the employer's motivation is necessary. (*Elmore Co*. (2002) 28 ALRB No. 3, pp. 11-12; *Nor-Cal Beverage Co., Inc.* (2000) 330 NLRB 610, 611-612.) However, where an employer is motivated in part by protected activity, and in part by unprotected activity, a "dual motivation" analysis is applied and the issue becomes whether the employer would have reached the same decision even in the absence of the protected activity. (*Signal Produce Co.* (1985) 10 ALRB No. 23, p. 5; *H&R Gunland Ranches, Inc*. (2013) 39 ALRB No. 21, pp. 3-4.)[14] Accordingly, unless it

[14] As Chairman Gould correctly points out in his concurring and dissenting opinion, the United States Supreme Court's decision in *Transportation Management Corp*. (1983) 462 U.S. 393 is "applicable precedent with regard to dual motivation." Thus, if a dual motivation analysis were used in lieu of finding both the threat to quit and wage demand protected activity, the analysis would be consistent with *Transportation Management*, as that case upheld the NLRB's "*Wright Line*" burden-shifting framework used in dual motivation cases, which continues to be applied by the NLRB and this

(Footnote continued….)

is found that the Employer was motivated solely by the demand for a raise, and not by the threat to quit, which the majority does not explicitly do, we must determine either that the threat to quit is protected, in which case no further inquiry into motivation is necessary, or that it is not protected, in which case a "dual motivation" analysis is required. To fail to do so is not to exercise "restraint." Rather, it renders the majority's analysis of the fundamental issue of the basis of the Employer's conduct incomplete and flawed.

Contrary to Chairman Gould's concurring and dissenting opinion, an analysis that reaches the issue of the protected status of the conditional threat to quit is not inconsistent or at variance with the ALJ's opinion. The ALJ was presented with a demand for a wage increase coupled with a threat to quit if the demand was not met and found that this conduct represented protected concerted activity. [ALJ Dec. pp. 18, 21 & 24.] I agree. Nowhere does the ALJ suggest that the employees' threat to quit was unprotected activity. Rather, he viewed their entire course of conduct as protected. This is in line with the series of NLRB decisions cited by Member Shiroma clearly finding that threats to quit in support of wage demands constitute protected activity.[15] Finding

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(Footnote continued)
Board. (See *Evolution Mechanical Services, Inc*. (2014) NLRB No. 33, pp. 2-4; *Sam Andrews' Sons* (1985) 11 ALRB No. 5, p. 2 fn. 3 (citing *Transportation Management* and applying dual motive analysis.) The Board has continued to utilize that analysis in its most recent cases involving issues of employer motivation. (*H&R Gunland Ranches, Inc., supra,* 39 ALRB No. 21, pp. 3-4; *Premiere Raspberries, LLC* (2013) 39 ALRB No. 6, pp. 12-13.)

[15] *Martin dba Nemec Combustion Engineering* (1952) 100 NLRB 1118, 1123, enf'd (9th Cir. 1953) 207 F.2d 655; *Southern Pine Electric Cooperative* (1953) 104 NLRB 834, enf'd (5th Cir. 1955) 218 F.2d 824; *Empire Gas, Inc*. (1981) 254 NLRB 626; Compare, *Crescent Wharf and Warehouse Company* (1953) 104 NLRB 860 (threat to

(Footnote continued….)

the employees' threat to quit to be protected is also consistent with holdings of the NLRB that Section 7 of the NLRA (analogous to Lab. Code section 1152) is to be construed broadly. (See *Rhee Bros., Inc.* (2004) 343 NLRB 695, 709 ("Congress intended that the protections of Section 7 be 'broadly construed'") (quoting *NLRB v. Parr Lance Ambulance Service* (7th Cir. 1983) 723 F.2d 575, 577); *Georgia Farm Bureau Mutual Insurance Companies* (2001) 333 NLRB 850, 850 ("Employees' activities are protected by Section 7 if they might reasonably be expected to affect terms or conditions of employment.") This is particularly true where, as here, employees were not represented by a union and had to "speak for themselves as best they could." (*Rhee Bros., Inc., supra,* 343 NLRB 695, 709 (quoting *NLRB v. Washington Aluminium Co.* (1962) 370 U.S. 9, 14).) Declining to reach the issue of whether a threat to quit is protected activity does not uphold the ALJ's rationale, but rather limits and undermines it.

The ALRA requires the Board to "follow applicable precedents of the National Labor Relations Act . . ." even in situations where the Board might arrive at a

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(Footnote continued)
quit was not conditional, but rather constituted an actual resignation). Chairman Gould's dismissal of these cases as "NLRB holdings of six decades ago" does not account for the fact that the NLRB has applied this rule as recently as 1981. (See *Empire Gas, Inc., supra,* 254 NLRB 626, 630 (a "threat to quit sometime in the future, designed to induce their employer to act favorably with regard to their grievances . . . clearly constituted concerted activity for their mutual aid and protection.").) Furthermore, so far as I am aware, there have been no subsequent decisions of the NLRB or this Board overruling or undermining the above-cited precedent in this area. Notably, the Employer did not even contend that the employees' threat to quit was in any way unprotected. In any event, even if we were assessing this issue without the benefit of applicable precedent, I would find the employees' threat to quit to be protected.

different conclusion in the absence of federal precedent. (Lab. Code § 1148.) Thus, in *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 75, the California Supreme Court, in construing the ALRA, found that "Labor Code section 1148 permits – indeed mandates – us to follow the federal precedents." While the Board "may diverge from federal precedents if the particular problems of labor relations within the agricultural context justify such treatment," no such conditions present themselves with respect to this issue. (*Triple E Produce Corp. v. ALRB* (1983) 35 Cal.3d 42, 48.)

While Member Shiroma cites the NLRB authority holding threats to quit to be protected, declining to reach the issue of the protected status of such activity fails to clearly extend the protections of NLRB precedent to these agricultural employees and provide certainty to the parties involved. Agricultural employees should know that, when they use one of the few means they have to exert economic pressure on their employers in support of legitimate workplace demands, a concerted threat to resign, the ALRA protects such conduct and they may not lawfully be punished for it. Yet, the majority seems to strain to decline to reach this issue, though it is clearly presented in this case.

Finally, to find the threat to quit is protected concerted activity would not "discard" the ALJ's credibility determinations as Chairman Gould contends. To the contrary, none of those determinations would be overturned. Rather, it would be consistent with the ALJ, and in accord with ALRB precedent and the applicable precedent of the NLRB, that the employees' conduct was protected and the Employer's decision to terminate the employees on the basis of such conduct was unlawful.

Accordingly, Chairman Gould's claims that an acknowledgement of the protected status of the employees' conduct would waste administrative resources and undermine the substantiality of the Board's order are unfounded.

Dated: August 28, 2014

CATHRYN I. RIVERA-HERNANDEZ, Board Member

CHAIRMAN GOULD, Concurring and Dissenting

"Silence is true wisdom's best reply." [16]

I concur with Member Shiroma's opinion except insofar as it (1) discusses the so called right to threat to quit issue; (2) relies upon an "applicable precedent" analysis; and (3) discusses *Quietflex Manufacturing Co., supra,* 344 NLRB 1055 as "applicable precedent." On these three issues I dissent. [17]

The General Counsel in her brief contends without citation that the workers' threat to quit as communicated through Lupe Hernandez was protected activity, in that "…it was made in the context of a negotiation meeting over the workers' wages, and, as such, can only be reasonably viewed and understood as a legitimate negotiating tool…." Prompted by this invitation to consider new issues beyond the concerted and protected protest about wages involved in this case -- the only issue before us -- the majority opinion reaches out to address and resolve an issue which the ALJ did not

[16] Euripides, Fragments

[17] Cf. *Chicago Local No. 458-3M, Graphic Communications International Union, AFL-CIO v. NLRB* (D.C. Cir. 2000) 206 F.3d 22, 31, affirming *White Cap, Inc.* (1998) 325 NLRB 1166.

address or resolve, and thus unnecessarily involves us in making findings which are inconsistent with or at variance with his opinion.

The principles of restraint adumbrated in the constitutional context have some applicability to the inevitable lure of addressing all statutory questions in the world, even those not before us.[18] Member Shiroma purports to avoid this avenue by acknowledging my point—yet her opinion provides pronouncements on the right to threaten to quit and characterizes relevant NLRB holdings of six decades ago as "applicable precedents of the National Labor Relations Act, as amended." (Lab. Code § 1148.) Assuming arguendo that the use of the word "Act" in section 1148 means "Board" as Member Shiroma appears to contend,[19] I would opine on this issue when it is

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[18] See Justice Brandeis' concurring opinion addressing the issue of judicial restraint in the constitutional context. (*Ashwander v. Tennessee Valley Association* (1936) 297 U.S. 288, 341.) I have used this approach under the NLRA two decades ago in *Angelica Healthcare* (1995) 315 NLRB 1320, FN 5; Cf. *B E &K Construction Co. v. NLRB* (2002)536 U.S. 516, 548.

[19] I concede that the Board seems to have latched on to any NLRB decision as "applicable precedent" notwithstanding the numerous Board and judicial overrulings of such precedent (See *Artesia Dairy* (2007) 33 ALRB No. 3, mod. (2008) 168 Cal.App.4th 598; *South Lakes Dairy Farm* (2010) 36 ALRB No. 5; *Kawahara Nurseries, Inc.* (2011) 37 ALRB No. 4; *Corralitos Farms, LLC* (2013) 39 ALRB No. 8 -- cases in which the Board followed and applied *Oakwood Healthcare, Inc*. (2006) 348 NLRB 686 and *Croft Metals, Inc.* (2006) 348 NLRB 717 as precedent even though those cases overruled other "precedents" themselves), and the fact that the statute speaks of "applicable precedents" of the National Labor Relations Act itself and not those of the National Labor Relations Board. I note that the NLRB has frequently reversed itself in many areas and that the Board is sometimes at odds with numerous circuit courts of appeals. (William B. Gould IV (1993) *Agenda for Reform: The Future of Employment Relationships and the Law*; Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw* (1962) 30 U. Chi. L. Rev. 78; Clyde W. Summers, *Politics, Policy Making, and the NLRB*, (1954) 6 Syracuse L. Rev. 93; W. Willard Wirtz, *New National Labor Relations Board: Herein of "Employer Persuasion,"* (1954) 49 Nw. U. L. Rev. 594.) Apparently these

(Footnote continued….)

presented and briefed to us,[20] notwithstanding the attractiveness of the issue's substantive merit.

The ALJ found that the violative retaliation in question arose because of a concerted employee protest over working conditions without any reference to or reliance upon the threat to quit. Again, the ALJ opinion, like the General Counsel's brief, does not cite any relevant cases on the threat to quit issue, and the ALJ Order does not mention employer adverse treatment because of or interference with a threat to quit as activity which is to be prohibited.[21] Indeed, the ALJ made credibility determinations through

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(Footnote continued)
issues have not arisen in the past here at the ALRB in connection with the "applicable precedent" language in the ALRA. Most certainly, for instance, I do not regard *Quietflex Manufacturing Co., supra,* 344 NLRB 1055 as "applicable precedent" within the meaning of our Act, and I would not follow it in any context because of its convoluted and imprecise standards. (Accord, *Fortuna Enterprises v. NLRB* (D.C. Cir. 2011) 665 F.3d 1295, 1300. *Quietflex* "might be incapable of predictable application.") Curiously, Member Rivera-Hernandez references the California Supreme Court's mandate to follow federal precedent in *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 75, but her opinion, like that of Member Shiroma, begs the question of how "applicable precedent" is to be defined. In any event, I am not compelled to propose an answer to the "applicable precedent" conundrum, given that the "applicable precedent" issue is not properly before us.

[20] I must confess that in my 53 years of labor law work I have never reflected on the new issue which Member Rivera-Hernandez reaches out to address, nor was I aware of the precedent involved—precedent which was never cited or relied upon by the ALJ or the General Counsel in this proceeding. But of course, I welcome the opportunity to address and discuss it if and when it is properly before us in a future case.

[21] To this Member Rivera-Hernandez says "…unless it is found that the Employer was motivated solely by the demand for a raise, and not by the threat to quit, which the majority does not explicitly do, we must determine either that the threat to quit is protected, in which case no further inquiry into motivation is necessary, or that it is not protected, in which case a 'dual motivation' analysis is required…[n]owhere does the ALJ suggest that the employees' threat to quit was unprotected activity. Rather, he

(Footnote continued….)

which he concluded that Mike Vanderpoel's conduct made it impossible for the matter to be discussed. The ALJ did this through inferences, credibility determinations and his observation of the demeanor of the witnesses.

Though the ALJ found that the weight of the evidence favored Matthew's testimony that the workers' spokesperson, Lupe, voiced a threat to quit if the raise was not given, he found that none of the workers, save Lupe, had any reason to believe that a threat to quit had been made on their behalf, because none of the other workers told Lupe to threaten Matthew with quitting if the wage increase was not forthcoming. Management, on the other hand, the ALJ found, believed in good faith that the workers planned to quit unless their demand was met.[22] While the ALJ placed the responsibility

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(Footnote continued)
viewed their entire course of conduct as protected." The difficulty here is that there is nothing whatsoever in the opinion or order to support the latter assertion, i.e. that their "entire" activity was protected or unprotected or even at issue. With regard to the former point I am rather baffled. The applicable precedent with regard to dual motivation is *NLRB v. Transportation Management Corp*. (1983) 462 U.S. 393. (Cf. *Frick Paper Company, d/b/a Paper Mart* (1995) 319 NLRB 9, 14, Chairman Gould, concurring.) Indeed, *NLRB v. Transportation Management Corp.* is "applicable precedent," and I am not sure that Member Rivera-Hernandez adheres to that holding in the main text of her opinion. In any event, it does not matter as dual motivation is not at issue, and I fail to understand why we must accept this point when the ALJ opinion in no way makes any finding about it, addresses, discusses or decides it. The case before us involves a protected employee protest about wages.

[22] Even if the retaliation was in response to the Respondent's good faith reliance upon the statements of the interpreter, Lupe Hernandez, this can be irrelevant. (See *NLRB v. Burnup & Sims, Inc.* (1964) 379 U.S. 21, where an employer discharged two employees upon being erroneously advised that they, while soliciting another employee for union membership, had threatened to dynamite company property if the union did not receive collective bargaining authorization. The Court held that "in the context of the record § 8 (a)(1) [of the NLRA] was plainly violated, whatever the employer's motive.")

for this confusion on the workers, he ultimately found that Mike Vanderpoel reopened the question of whether the employees would return to work, and therefore, the Vanderpoels were obligated to take into account the possibility that they have misperceived the workers' true intent.

Accordingly, the ALJ relied on demeanor and credibility in determining the basis for the Respondent's action, and in this respect, his finding warrants special deference by the Board. As the NLRB has said: "as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor." (*Standard Dry Wall Products, Inc.* (1950) 91 NLRB 544, 545.) Similarly, the United States Court of Appeals for the Ninth Circuit has refused to enforce a Board decision where it represented a "…discard [of] positive findings of credence in favor of inferences drawn from tenuous circumstances." (*Loomis Currier Service v. NLRB* (9th Cir. 1979) 595 F.2d 491, 499, citing *Pittsburgh v. Des Moines Steel* (1960) 284 F.2d 74, 87.)

Moreover, the ALJ has a vital role in the administrative process. It is both wasteful and inefficient to discard it. The NLRB recognized this important role in the mid-1990s by instituting reforms such as assigning settlement judges (NLRB Rules and Regulations Manual section 102.35(b)), and giving ALJ's the discretion to issue bench decisions. (NLRB Rules and Regulations Manual section 102.35(a)(10); *NLRB v. Beverly Manor Nursing Home* (1st Cir. 1999) 174 F.3d 13, 35, enfg. (1998) 325 NLRB 598.)

Penultimately, the majority opinion is troublesome for other reasons. Not only does it place an unnecessary burden upon agency resources, it also makes the Board's Order vulnerable at the stage of judicial review.[23] Where demeanor and credibility and inferences drawn from them are at the heart of the ALJ's decision as here, it is especially important for us to defer to the ALJ ruling and, in the process, conserve our own taxed resources. This is because, as the Supreme Court has advised us under the circumstances of this case the support for our conclusion will be "less substantial."[24]

Finally, even without all of the above considerations, I would want briefing from all of the parties before taking the step of relying on NLRB decisions from nearly 60 years ago which do not appear to have been relied upon in recent years by either the NLRB or our agency. At a minimum, more deliberation is required.

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[23] See *Universal Camera Corp. v. NLRB* (1951) 340 U.S. 474, 496 "[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has lived with the case has drawn conclusions different from the Board's when he has reached the same conclusion." (*Joy Silk Mills, Inc. v. NLRB* (D.C. Cir. 1950) 185 F.2d 732, 742; Accord *Pease Co. v. NLRB* (6th Cir. 1981) 666 F.2d 1044, 1047-48.)

[24] *Universal Camera Corp. v. NLRB, supra, 340 U.S. 474.*

Accordingly I concur in the result and the affirmance of the ALJ decision, but dissent from that portion of the majority's reasoning which provides answers to questions not before us.

Dated: August 28, 2014

WILLIAM B. GOULD IV, Chairman

CASE SUMMARY

P & M VANDERPOEL DAIRY Case No. 2013-CE-016-VIS

40 ALRB No. 8

Jose Noel Castellon Martinez,
Charging Party

This case arises from an unfair labor practice (ULP) charge filed on April 22, 2013 by Jose Noel Castellon Martinez alleging that Respondent, P&M Vanderpoel Dairy, violated the ALRA by firing him and four other workers on April 17, 2013, for engaging in protected concerted activity.

The workers at the dairy desired a raise and agreed that they would, as a group, approach Matthew Vanderpoel (Matthew), dairy manager, just after the day shift ended and just before the night shift began to request the raise. The workers decided that Lupe Hernandez (Lupe), who spoke English better than the rest of the group, would be the one to present their demand to Matthew. Lupe told Matthew that the workers wanted a $1.00 per hour wage increase. Matthew testified that Lupe told him that if the workers' demand for a wage increase was not met, they would quit. The four workers who testified at the hearing stated that they never told Lupe to say that they would quit.

After his discussion with the workers, Matthew called his father, dairy owner Mike Vanderpoel (Mike) who arrived at the dairy within about five minutes. The workers all testified that Mike was angry when he arrived, and that he began to yell at Noel Martinez. Mike asked "do you want your job tomorrow, yes or no?" Noel testified that he was initially so intimidated he was speechless, but after a moment he asked Mike why he was being singled out. Mike asked again "do you want your job, yes or no?" and then said "you can leave, you don't have a job here anymore." Then in front of the assembled workers, Mike called 911 to have law enforcement remove the workers from the dairy property. All of the workers left before the police arrived.

The Administrative Law Judge's Decision

The Administrative Law Judge (ALJ) found that Respondent violated Section 1153(a) of the Act by discharging the workers for engaging in protected concerted activity.

The ALJ found that none of the workers told Lupe to tell Matthew that the workers would quit if they did not get the raise. On the other hand, the ALJ found that group's spokesperson, Lupe, told Matthew in English that the workers would quit if they did not get the raise. The ALJ found that because the workers' chosen spokesperson created the misunderstanding, the responsibility for the confusion rested with the workers. On the other hand, the ALJ found that Mike re-opened the question of whether the employees

wanted to work by demanding that the workers either work or get out, and therefore, was obligated to take into account the possibility that the workers had changed their minds or that he had misperceived their true intent. The ALJ found that the workers did manifest an interest in keeping their jobs. The ALJ further reasoned that Mike's hasty, angry preemptive conduct prevented the correction of the misunderstanding that the workers wanted to quit, and also led the workers to reasonably believe that they had been fired.

The ALJ rejected the Employer's argument that the workers concerted activity was not protected because they stayed after work in a critical work area and essentially engaged in a "sit-down" strike. In support of his conclusion that the worker retained their protected status, the ALJ applied the factors set forth in *Quietflex Manufacturing Co.* (2005) 344 NLRB 1055, 1056-58, a case which analyzed which party's rights should prevail in the context of an on-site worker protest. The ALJ then rejected the Employer's argument that the failure of the workers to apply for unemployment insurance was evidence that they had quit and were not fired. In doing so, the ALJ stated that "the failure to seek unemployment benefits, especially in agriculture, where a large percentage of the workforce is undocumented, is an insufficient basis to justify an inference that the workers had quit their employment." Finally, the ALJ rejected the Employer's argument that the General Counsel's failure to take declarations from the worker witnesses prior to the hearing violated *Giumarra Vineyards, Corp.* (1977) 3 ALRB No. 21.

The Board Decision

The Board affirmed the findings of fact and conclusions of law of the ALJ, and responded to the parties' exceptions and responses as summarized below. Member Rivera-Hernandez issued a concurring opinion and Chairman Gould issued a concurring and dissenting opinion.

The Board denied the Respondent's request for oral argument because the Board found the parties' briefs were sufficient for the Board to analyze the issues in this case; however, the Board admonished the General Counsel for making unsubstantiated, inflammatory accusations about Respondent's counsel's alleged racial motivations in her reply to the Respondent's exceptions.

The Board rejected the Respondent's argument that adverse inferences should be drawn from the General Counsel's failure to call Lupe Hernandez as a witness, as nothing in the record indicated that Lupe Hernandez was not also available to be called as Respondent's witness. With respect to Respondent's argument that the ALJ improperly failed to allow testimony on the reason why the employees did not file for unemployment insurance, the Board agreed that a simple inquiry into whether or not the workers filed for unemployment insurance benefits is permissible, and generally, a respondent's counsel should be able to ask a witness on cross examination whether he did not apply for unemployment insurance because he quit. However, the Board agreed with the ALJ's ultimate disposition of this issue, because during the hearing the examination of the

witness quickly crossed over into the territory of the workers' immigration status, and it was proper for the ALJ to stop this line of questioning.

The Board found that the facts did not support a finding that a sit-down strike or even a work stoppage occurred in this case, but rather the employees specifically chose to approach Matthew between shifts when no one was working. The Board disagreed that *Quietflex Manufacturing Co., supra,* 344 NLRB 1055, relied on by the ALJ, applies to this case, because *Quietflex* involved an on-site work stoppage.

The Board declined to revisit Respondent's "trial by ambush" arguments, and affirmed the ALJ's holding that the rule in *Giumarra Vineyards, Inc., supra,* 3 ALRB No. 21 and codified in Board regulation section 20236 and 20274, requiring worker witness declarations to be turned over to counsel only after the worker testifies, applies only if worker declarations are taken in the first place.

With respect to the notice and mailing remedy, he Board rejected Respondent's argument that the one-year mailing requirement is punitive. The Board declined to give the Regional Directors the discretion to draft the Notice to Agricultural Employees in this case or future cases. As for the General Counsel's proposed revisions to the Notice, the Board declined to adopt the proposed language in this case; however, the Board noted that in the future, it may consider whether the Notice language merits revisions.

In her reply to the Respondent's exceptions the General Counsel urged the Board to hold that "[i]n the context of a meeting outside work hours in which workers are asking for better working conditions, statements that workers will quit if they do not get a raise should be seen…as a negotiating tactic and attempt to convince the employer to concede to the workers' demand." The majority opinion states that there is not a need to address the question of whether such activity is protected under the ALRA inasmuch as the ALJ ultimately rejected the argument that the employees had actually quit. Board Member Shiroma noted in a footnote that NLRB case law has held under analogous circumstances that where employees conditionally threaten to quit, the conduct is protected.

Board Member Hernandez-Rivera agreed with the result reached by the majority but wrote separately to express her view that Section 1152 of the ALRA protects employees who concertedly threaten to resign in support of legitimate demands concerning their terms and conditions of employment, and that the Board was required to so hold in this case. Member Rivera-Hernandez stated that the conclusion that the employees were terminated raised the distinct issue of whether the termination was unlawfully based upon the employees' protected activity. She stated that, unless the majority found that the employer was motivated solely by the wage demand, which it had not explicitly done, the Board needed to determine either that the threat to quit is protected, in which case no further inquiry into motivation would be necessary, or that it is not protected, in which case a "dual motivation" analysis would be required. Member Rivera-Hernandez stated

that her analysis was consistent with the ALJ's opinion, which found the employees' entire course of conduct to be protected, and was also consistent with NLRB authority holding threats to quit under analogous circumstances to be protected. Member Rivera-Hernandez noted that the Board is required to follow the applicable precedents of the NLRA and that failing to reach the issue of the protected status of the threat to quit failed to extend the protections of NLRB precedent to the agricultural employees and provide certainty to the parties involved. Member Rivera-Hernandez stated that by reaching this issue she would not discard the ALJ's credibility determinations, which she would uphold in their entirety.

Board Chairman Gould wrote a separate opinion concurring with Member Shiroma's opinion except insofar as it (1) discussed the so called right to threat to quit issue; (2) relied upon an "applicable precedent" analysis; and (3) discussed *Quietflex Manufacturing Co., supra,* 344 NLRB 1055 as "applicable precedent." With respect to the General Counsel's argument that the workers' threat to quit as communicated through Lupe Hernandez was protected concerted activity, Chairman Gould dissented from the majority's reasoning on this issue because the ALJ did not address or resolve this issue in his opinion and unnecessarily involved the Board in making findings inconsistent with or at variance with the ALJ. Chairman Gould stressed that the ALJ found that the retaliation in question arose because of a concerted employee protest over working conditions without any reference to or reliance upon the threat to quit. Further, the ALJ opinion did not cite to any relevant cases on the threat to quit issue, and the ALJ Order does not mention employer adverse treatment because of or interference with a threat to quit as activity which is to be prohibited. Significantly, the ALJ made credibility determinations through which he concluded that Mike Vanderpoel's conduct made it impossible for the matter to be discussed. Chairman Gould observed that the ALJ did this through inferences, credibility determinations and his observation of the demeanor of the witnesses, and Chairman Gould emphasized that where demeanor and credibility and inferences drawn from them are at the heart of the ALJ's decision as here, it is especially important for the Board to defer to the ALJ ruling and, in the process, conserve the Board's own taxed resources, and avoid making the Board's Order vulnerable at the stage of judicial review.

With respect to the majority's emphasis that section 1148 of the ALRA requires that the Board "follow the applicable precedents of the National Labor Relations Act," and because past NLRB case law has held that a conditional threat to quit is protected, and thus the Board was required rely on that case law, Chairman Gould opined that the majority opinion begs the question of how "applicable precedent" was to be defined. Chairman Gould stated that in any event, he was not compelled to propose an answer to the "applicable precedent" conundrum, given that the "applicable precedent" issue was not properly before the Board. Finally, Chairman Gould stated that he would want briefing from all of the parties before taking the step of relying on NLRB decisions from

nearly 60 years ago which do not appear to have been relied upon in recent years by either the NLRB or the ALRB.

***

This Case Summary is furnished for information only, and is not the official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICUTURAL LABOR RELATIONS BOARD

In the Matter of	
P&M VANDERPOEL DAIRY,	Case No. 2013-CE-016-VIS
Respondent,	
and	
JOSE NOEL CASTELLON MARTINEZ,	
Charging Party.	

Appearances:

For the General Counsel:
Abdel Nassar
Silas M. Shawver
Visalia Regional Office
1642 West Walnut Avenue
Visalia, CA 93277

For the Respondent:
Howard Sagaser
Ian B Wieland
7550 North Palm Avenue, Suite 201
Fresno, CA 93271

DECISION OF ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN. Administrative Law Judge: I heard this unfair labor practice case at Visalia, California on February 11 & 12, 2014.

I. PROCEDURAL HISTORY

On April 22, 2013, Jose Noel Castellon Martinez filed unfair labor practice charge No. 2013-CE-016-VIS with the Visalia Office of the Agricultural Labor Relations Board (ALRB or Board), against P & M Vanderpoel Dairy, alleging that it violated the Agricultural Labor Relations Act (Act) by terminating him and four other workers for engaging in concerted protected activity. (Board Exhibit 1.)

On December 24, 2012, the Regional Director of the Visalia Office issued a Complaint alleging that P & M Vanderpoel Dairy violated Sections 1153(a) of the Act by threatening its employees with arrest and firing them for seeking a wage increase. (Board Exhibit 2.) On January 9, 2014, P&M Vanderpoel Dairy filed its Answer denying the alleged violations and raising a number of affirmative defenses. (Board Exhibit 3.)

After the hearing, the parties filed briefs, on April 7, 2014.

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 fact and conclusions of law.

II. ADMISSIONS AND STIPULATIONS: JURISDICTIONAL AND SUBSTATIVE

a. On April 22, 2013, the Charging Party filed charge 2013-CE-016. The charge was served on the Respondent on April 22, 2013.

b. At all time material herein, P&M Vanderpoel Dairy was an agricultural employer within the meaning of Sections 1140.4(a) & (c) of the Act. Vanderpoel is a California corporation with its principal place of business located at 9535, Avenue 160, Tipton, California 93272, where it engages in the production of milk.

c. Mike Vanderpoel is an owner of P&M Vanderpoel and was an agent and a statutory supervisor as defined in Labor Code section 1140.4(j) at all relevant times.

d. Mathew Vanderpoel is a manager at P&M Vanderpoel and was an agent and a supervisor as defined in Labor Code section 1140.4(j) at all relevant times.

e. George Leney is a manager at P & M Vanderpoel and was an agent and a supervisor as defined in Labor Code section 1140.4(j) at all relevant times.

f. At the prehearing conference the parties stipulated that Martinez, Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias, and Jorge Lopez were agricultural employees as defined in Labor Code section 1140.4(b) during all relevant times and that all except Alejandro Macias were replaced by the Respondent.

III. BACKGROUND

The Respondent P&M Vanderpoel Dairy, located in Tipton CA, is one of two medium size dairies owned primarily by Michael Vanderpoel (referred throughout the transcript and this decision as "Mike"). His son, Matthew Vanderpoel (referred throughout as "Matthew") is 19 years old. Matthew began working part time at the dairy during his high school years; upon graduation in June 2012, he began working full time and was promoted to Manager in December 2012, four and a half months before the events in question. He supervises a work complement of approximately seven employees

in caring for and milking approximately 1200 cows. Mike Vanderpoel sees his function as teaching and guiding his son; in April 2013 Mike estimated that he spent 25% of his time at the dairy.

Cows are milked twice a day, beginning at 7 a.m. and at 12 midnight. One day-shift Milker arrives around at 6:30 a.m. and another at 7:00 a.m., followed by a Relief Milker who arrives around 9:30 a.m. and works a split shift. At night a similar schedule is followed. A straight time shift normally runs 10 hours, with varying, but frequent overtime. In addition, there are two Outside workers who rake beds, move cows, treat sick or injured cows, break twine on the bales, move heifers, and perform other routine tasks. In April 2013, all workers received a uniform straight-time hourly wage of $8.00, and were paid bi-weekly—every other Monday.

Because of the dairy's moderate size, many of the formalities typical of larger operations are absent. There is no employee handbook, no system of written warnings, and no formal disciplinary procedure. Time keeping is loose. Employees not infrequently neglect to punch in or out. Matthew often overlooks their failings and is himself often imprecise in calculating their overtime. However, where it comes to the actual operation of the dairy—the care of herd and maintenance of the facilities—both Matthew and Mike are scrupulous taskmasters.

At the time of the alleged unfair labor practice, employer had a work complement of seven: Juan Andrade (hired about 6 months before the incident usually referred in testimony to as "Juan" or sometimes as "Andrade"), Jorge Lopez (hired about 4 months before the incident and usually referred to as "Jorge"), Alejandro Lopez (Jorge's brother,

referred to as "Alejandro"), Jose Manuel Ramirez (first hired in 2009 and referred to as "Jose"), Guadalupe Miguel Hernandez (referred to as "Lupe" or "Miguel Hernandez"), Jose Noel Martinez (hired December 29, 2012, and usually referred to in testimony as "Noel" or sometimes as "Martinez"), and Jesus Castrejon (just hired and referred to as "Jesus").

All of the workers are Spanish speaking. Those who testified acknowledged that they were not proficient in English, noting that their ability to understand English exceeded their ability to speak it. As for Matthew and Mike, the situation was just the reverse. Both had some difficulty in understanding and speaking Spanish. However, the evidence establishes that Matthew—using the Spanish he knew and the English his workers understood, augmented at times by signs and gestures—was able to explain, direct and oversee the many—at times complex—day-to-day operations at the dairy. And the same was no doubt true of Mike.

IV. THE TESTIMONY

A. Events Leading Up To Meeting of April 17th.

Several months earlier, Jose Manuel Rameriz and Juan Andrade had approached Matthew to ask for a wage increase. [RT I:154; II: 17-20] Matthew told them that he would have to take it up with his father and that he would get back to them. [RT I:154; II: 153-154] A week or so later Matthew told Juan that he would be getting an extra $20 per week, but not to tell Jose. [RT I:156] Nothing came of that offer or their earlier request. [RT I:155; II:20] Eventually, Juan received a 10¢ increase, which he considered a mockery. [RT I:162-163]

There may have been a meeting among the workers prior to April 17th to discuss the need for a wage increase. [RT I:168] Jose Ramirez has one occurring a week or so earlier [RT II:39], and Noel and Juan Andrade remember one on the evening of April 16th. [RT I:59; II:168] Being a new employee, he was at first hesitant, but when they met the next day, he agreed to join with the group. [RT I:61-62] Jorge Lopez does not recall meeting as a group before the 17th. [RT I:195]

All agree that they did meet late in the morning of April 17th to discuss meeting with Matthew that evening to present their demand for a one-dollar an hour wage increase. [RT I:47, 61-62, 141-142, 195; II:40] They agreed that the best time to do so was about 6:00 p.m., when the day shift ended and Matthew was available. [RT I:142]

Juan Andrade, Jose Ramirez and Jorge Lopez all testified that there was no discussion of what they would do if their demand was not met. [RT I:142-143, 196: II:21] Quitting was never mentioned as a response or a possibility. Noel Martinez testified differently:

> Q What was discussed, do you remember?
>
> A Yeah, for example I said, "If they don't give us a raise I'm going to continue working here, but if I get a better opportunity somewhere else then I'll leave. . . ." [RT I:63.]

At some point, either that morning or when they assembled in the barn that evening, they selected Guadalupe, who spoke English better than the rest, to present their demand. [RT I:21, 63-64; II:17]

Around 6:00 p.m. one of the workers approached Matthew who was headed for the barn to tell him that they wished to meet. [RT II:174-175]

B. The Meeting between Matthew Vanderpoel and the Workers on the Evening of April 17th

The meeting began just after the day shift ended and shortly before the night shift began—somewhere between 6:00 an 6:30p.m.—in the Milk Barn. [RT I:108-109, 139, 144] Six of the seven workers were present: Jose Noel Martinez, Juan Andrade, Jorge Lopez, Alejandro Lopez, Jose Manuel Ramirez, and Guadalupe Miguel Hernandez. [RT I:22, 138, 187] While one worker has Jesus Castrejon present, the others describe him as a non-participant who remained outside the barn. [I:178; II:109] All told, the meeting lasted a half an hour or so. [RT I:109, 198-199] The first 20 minutes was taken up with the presentation of the workers demands, Matthew's response, and the workers rejoinder. [RT II:133-134] After that Matthew left to call his father and report what had happened. [RT I:188-189] He then returned to the Barn to await Mike's arrival. During the ensuing 5 minutes or so there was some further discussion with and among the workers. [RT I:147]

As one would expect, there are differences among the witnesses as to sequence of events and exactly what was said. What is clear is that Lupe, as their designated English spokesperson presented—either immediately or early on—their demand for an increase in the hourly wage from $8.00 to $9.00, and justified that demand on the basis the workers financial needs and what other dairies were paying. [RT I:88-89, 139-140, 144, 187-188; II:132]

Matthew, the only native English speaker in attendance, testified that Lupe not only presented the demand for a higher wage, but went on to say in English that if their demand was not met, the workers would quit. [RT II:132, 182-183]

Four of the other five workers[1] testified that Lupe was never instructed to say they would quit if they did not get the increase and that they never heard him use the word "quit" in speaking to Matthew. [RT I:146, 196; II:12, 21] Only Noel claimed to have fully comprehended what Lupe said to Matthew. [RT I:89] Since Lupe did not testify, that leaves the word of a native English speaker who claims Lupe said "quit" against the word of non-English speaker—Noel—who claims he did not.

Matthew replied, by most accounts, in English which Lupe, in turn, translated for the benefit of the others: (1) that it was not for him to decide but for his father; and (2) that he and his father had discussed the possibility of an increase and determined that it would only be forthcoming if work improved to the point were there was additional milk production.[2] [RT I:144; II: 132-133, 183]

At that point the other workers began to participate in the discussion, insisting that they worked hard but, even if they were to work harder, milk production would probably

[1] Jose Lopez' brother, Alejandro, who eventually was rehired, did not testify.

[2] During testimony concerning what was said at the meeting, Respondent posed a number of hearsay objections directed at the admission of statements made by Lupe concerning what had been said to him in English by Matthew. While a hearsay objection might well be taken to the truth of a statement made by a translator to a witness who did not comprehend what a declarant stated because it was in a language he did not understand, here I have not relied on the truth of such statements, only that they were made by Lupe to the worker who testified. In addition, in situations where a worker claimed to understand the English used by Matthew, I have accepted those statements to the extent that I believe the worker did understand what was said in English.

not increase since warmer weather was coming and milk production naturally diminishes with the seasonal increase in temperature. [RT I: 34, 147; II:133, 185]

Matthew understood some of what they were saying but continued to maintain his position that there would be no increase in wages without an increase in production. The discussion continued in that vein, with no mention by the other workers of quitting until Matthew left briefly to call his father, and resumed—again with no mention of quitting—when he returned. [RT I:146-147]

When the call to Mike was made at a 6:44 p.m. (Joint Ex. 2, p. 7), he was in his truck, about 5 minutes away. [RT II:107, 134, 190] Mathew testified, "I told him that the guys wanted a raise, and that they would quit if they didn't get it. And I told him . . . exactly what I had told them [in response]." [RT II:134; and see II:84, 98]

C. Mike Vanderpoel's Arrival and Meeting with the Workers

The meeting with Mike was brief. Little more than 5 minutes elapsed before he telephoned 911 at 6:55p.m. to summon the police. (Joint Ex. 2, p. 7.)

All of the workers testified that Mike arrived angry and began yelling at Noel Martinez. [RT I:35, 143, 149, 183; II:30-32] Juan Andrade testified that his behavior was consistent with his history as a stern taskmaster who, on previous occasions, expressed considerable anger in situations where he felt that work had not been properly performed. [RT I:143] Matthew and Mike both denied that he was yelling during the meeting, but Matthew acknowledged that his father was unhappy with the situation and let the workers know it. [RT II:191-192]

All of the workers have him directing his initial comments at Noel and only later as including themselves as well. [RT I:35-37, 143, 147-148, 190; II:30-31] Mike says he focused on Noel simply because he was nearest, but that he meant to include everyone. [RT II:94]

According to Noel, Mike asked, "Do you want your job tomorrow, yes or no?" [RT I:36] and testified that Mike's demeanor was so intimidating that he was initially speechless; when he recovered, he asked why he was being singled out. [RT I:36, 46, 106; and see I:191, 201] Mike just asked again, "Do you want your job? Yes or No?" [RT I:36] At that point, Noel testified,

> "[J]ust when I answered back the second time that why was he asking me he became more upset. And he said, 'You can leave, you don't have a job here anymore.' He didn't want me there anymore and he was going to give me three minutes to leave. And he put his hand like this, he tried to push me." [RT I:37; see also I:35-36]

Mike's testimony differs in several respects: He first said, "If you want to work, you can work. If you don't want to work you have to go."[3] [RT II:87, 113-114] Receiving no answer, he repeated this a second and possibly a third time. [RT II:87] He makes no mention of giving Noel "three minutes" to leave, and denies trying to push him. [RT I:37]

Two workers—but not Noel himself—have Noel saying that he did indeed want to keep his job. [RT I:147; II:60] One worker has Mike speaking with Lupe, before turning to Noel. [RT II:58] Noel and two other witnesses testified that Mike eventually gestured

[3] This quote is more consistent with the workers testimony that Mike did not simply "ask" them to leave but "told" them to go or to "get out." [*cf.* I:179-180, 191]

for them to leave. [RT I:38, 150, 190] No one other than Noel testified that Mike tried to push him or called him a "wetback" or a "bitch." [RT I:38]

Mike testified that, having received no response to the repeated choice to work or leave, he decided to have the workers removed so that the next shift could begin. He therefore showed them his cell phone as he dialed 911 to request police assistance. [RT II:87-88, 197] He testified that Juan Andrade then motioned to the others that they should leave. [RT II:205] All did so before the police arrived.

Uniformly, the workers testified that the Mike's loud and angry statements, coupled with his almost immediate resort to the police, left no doubt in their minds that they were being terminated. [RT I:70, 148-149, 186, 189-190: II:30-33] Noel testified that Mike told him, "You don't have a job here anymore." [RT I:51] Both Noel and Juan Andrade testified that Mike actually used the Spanish word for "fired;" Jose Rameriz did not hear the word used [RT I:41; II:69], and Jorge Lopez does not mention Mike's use of the word. Mike denies doing so; as does Matthew. [RT II:92, 199]

D. Subsequent Events

Alejandro Lopez and Castrejon were scheduled to work that evening. The others had completed their work for the day and would normally have come in the following day. Jesus had not participated in the meeting and did work that evening, along with Matthew and Mike. Alejandro did not. As he left the meeting in the company of his brother Juan Lopez, George Leney, who supervises the other dairy but lives at Vanderpoel site, approached them and asked whether, "You guys wanted to stay to

work?" Both said yes, but at that moment Mike Vanderpoel arrived and told them, "No more work for you guys. Get out." [RT I:204-205]

Mike was concentrating on getting the dairy back on line and does not recall what happened after the meeting ended. [RT II:91]

Two days later, when Juan and Alejandro went to the dairy to pick up their checks. Alejandro spoke separately with Matthew and was given his job back. Juan was not. [RT I:206-209]

Matthew acknowledged that, after the meeting, he asked Alejandro, "If he wanted to keep his job, to which he replied, 'Yes.'" [RT II:140] The next day, when he came to pick up his check,

> "I asked him, 'How come they said they were going to quit?' And he just kind of looked at me. And then I asked him if he wanted to work without the raise, and he said, 'Yes.' And I put him to work." [RT II:141]

According to Matthew no one else requested rehire. However, both Juan Andrade and Jose Manuel Ramirez testified that Matthew followed them out of the meeting and asked, "Hey are you going to come back to work?" [RT I:150; II:33] To which they replied that they wanted to return, but "we were asking for a raise." [RT I:150; II:34] At that, Matthew ordered them to leave. RT I:169; II:34-35] Both testified that it was not their intention to make their return contingent on receiving the raise. [RT I:152; II:36, 60]

Noel testified that, before leaving, he attempted to go to the nearby area in the barn where he customarily kept his non-work clothing. Mike blocked his path, and angrily told him that the police were on their way and he would be arrested unless he left

immediately. [RT I:42] When he asked about his check, Mike said he did not know when it would be ready. [RT I:64-65] Mike, as noted above, has no recollection of what occurred after the meeting.

Once outside, Noel encountered Matthew who told him that his check would be available the next day, but despite repeated efforts, it took him two weeks to get it. [RT I:66-68]

At some point—either that night or the next day—Noel has Matthew asking if he was going to return to work. Noel then testified that, "Since I was fired I couldn't." [RT I:44-45] It is unclear whether that comment was actually made to Matthew or was simply an explanation offered at hearing for his not returning to work.

Matthew testified that, other than Alejandro, none of the workers asked to return. [RT II:141-142]

V. FACTUAL FINDINGS AND LEGAL ANALYSIS

While there is consistent testimony about many of the crucial events occurring before, during and after April l7th, about others there are significant conflicts in testimony. Those conflicts are best resolved by carefully examining what happened before the meeting with Matthew, during that meeting, when Mike appeared, and afterwards.

A. Events Prior to the Meeting.

There is no question that most of the employees were unhappy with the $8.00/hr. wage they were receiving. Nor is there any question that a number of them eventually got together and decided to approach Matthew Vanderpoel about a $1.00/hr. raise. There

is, however, a conflict in the testimony as to whether they considered a course of action should their request be denied. Three witnesses testified that the issue was never addressed; only the Charging Party, Noel Martinez, claims otherwise. I credit the other three, not only because Noel was the lone witness who so testified, but also because he, unlike the others, testified more as advocate than as a witness. I find therefore that, beyond requesting the wage increase, the workers had no further action planned. The most that can be said of their mutual intent is that they would cross that bridge when it came.

Although it is uncertain just how or when they decided to utilize Lupe as their spokesperson, it is clear that they did so and that he was selected because he spoke and understood English better than the rest. I find, however, that no one told him to threaten Matthew with quitting if the increase was not forthcoming. That issue, as noted above, simply was not raised.

Finally, they decided to meet with Matthew at the conclusion of the day shift when most workers would be present and when he was likely to be available at the Milk Barn.

B. The Meeting with Matthew

The testimony establishes that the meeting began shortly after 6 p.m. and lasted 20 minutes or so; at which point Matthew left briefly to call his father, then returned, spending another 5 minutes or so with the workers before Mike arrived.

Six workers attended the meeting: Jose Noel Martinez, Juan Andrade, Jorge Lopez, Alejandro Lopez, Jose Manuel Ramirez, and Guadalupe Miguel Hernandez. The

only one not in attendance was the newly hired Jesus Castrejon, who was scheduled to work that evening and remained outside the barn during the meeting.

Early on, probably at the very beginning of the meeting, Lupe, acting as their spokesperson, presented, in English, their demand for an increase in the hourly wage from $8.00 to $9.00, and justified that demand on the basis the workers financial needs and what other dairies were paying.

At that point, a critical conflict in testimony occurs. Matthew has Lupe saying *in English* that the workers would quit if they did not get the increase. Lupe was not called to testify. Noel, who is not a native English speaker, claims that he understood all that Lupe said and at no point did he say that the workers would quit if they did not get the raise. The other workers conceded that they did not understand all that Lupe said in English, but said they did not hear him use the word "quit."

Matthew is a native English speaker; Noel is not. The other workers admitted that they did not fully understand what Lupe said in English. Under those circumstances—and absent some other ground for discrediting Matthew—the weight of the evidence favors Matthew's insistence that the workers' spokesperson voiced the threat to quit unless the increase was given.[4] While Matthew did, I believe, downplay the hostility expressed by his father later on, that is not enough to discredit this crucial testimony.

[4] At one point, Matthew, who had the same problem with Spanish that the workers had with English, claims that he heard the workers tell Lupe in Spanish that they would quit if they did not receive the wage increase. [RT II:133]. I accept the workers testimony that they did not mention quitting to anyone for the same reason. I accepted Matthew's testimony as to what Lupe said to him in English; namely, that their testimony, as native

There is no disagreement that in response to Lupe's demand, Matthew said that it was ultimately up to his father to determine whether an increase would be forthcoming but it was unlikely he would do so unless work improved to the point where there was additional milk production. Nor is there any dispute that the other workers understood his position, for they then entered into the discussion and pointed out, in some mix of Spanish and English, that due to the warmer weather, an increase in milk production was doubtful. The discussion continued back and forth in that vein with no mention by any worker other than Lupe of quitting. Toward the end, Matthew left to call his father and reported to him that the workers had threatened to quit unless they received an additional $1.00/hr. He then returned to the meeting, and the discussion continued, again with no further mention of quitting, until Mike Vanderpoel arrived about 5 minutes later.

Before turning to the meeting with Mike, it is important to understand the state of mind both of management and of the workers at the conclusion of their meeting with Matthew. None of the workers, save Lupe, had any reason to believe that a threat to quit had been made on their behalf; as far as they were concerned, their concerted request for a wage increase had—tentatively at least—been denied. Nothing else about their present or prospective employment status had changed. Management, on the other hand, believed in good faith that the workers planned to quit unless their demand was met. That misapprehension was due to Lupe's failure to accurately portray their intention.

Spanish speakers, as to what was said or not said in Spanish to Lupe is more reliable than his.

Since Lupe was functioning as their spokesperson, the responsibility for the confusion must rest with them.

C. The Meeting with Mike.

Mike did not take kindly the threat that his son reported. I fully credit the workers testimony that he arrived angry and continued to express his anger throughout the meeting by speaking aggressively and loudly—"yelling" is how they uniformly describe it.[5] If anything, the intimidating manner he adopted was exacerbated by his size (6'5") and his admitted concentration a single worker (Noel), rather than the group at large.[6] And it is consistent with the workers perception of him as a stern taskmaster in his dealings with them.

As far as Mike was concerned, the request for a wage increase had already been disposed of by Matthew, so he did not address it. Given what he had heard, he could likewise have treated the threat to quit as a *fiat accompli* and simply ordered the workers to leave the premises. But he did not. Instead, he revisited what he understood to be the threat to quit, and in an angry, loud, and intimidating manner, gave Noel the choice to either return to work or "get out". When Noel repeatedly—and reasonably—asked why he was being singled out, Mike did not respond, but simply reiterated his demand that he

[5] Both Mike and Matthew sought, as one would expect, to downplay the level or anger and hostility displayed by Mike. Given the circumstances of the meeting and the personality involved, I find the consistent views of the workers in attendance more convincing.

[6] Mike himself admits focusing on one worker, but claims that was simply his way of approaching a group situation. Be that as it may, such an approach was reasonably understood by the workers to be unjustly aimed at Noel. Indeed, several spoke up and asked why he was focusing on Noel. They, too, were ignored by Mike.

return to work or get out, at some point making it clear that his remarks applied to the others as well.[7] Then, giving them little or no opportunity to respond, he brandished his cell phone and in their presence called 911 and requested police assistance in removing them from the premises.

The workers uniformly testified that they were taken aback by Mike's conduct and believed that he meant to terminate their employment. All left before the police arrived.

At this point it is fair to ask whether, having reopened the question of whether the employees would return to work, the employer was entitled to stand firm on Lupe's original statement that the workers would quit if they did not get a raise, or whether it was obliged to take into account the possibility that they had changed their minds or that it had misperceived their true intent.

The propriety of such a reassessment has long been recognized by the NRLB in situations involving striker status:

> "Where a striker has directly communicated to the employer his intention to quit, however, there must be some showing of reservation or qualification or continued interest before the Board will ignore that stated intention. (Citing cases)." *Bromine Division, Drug Research, Inc.* (1982) 233 NLRB 253, 261.

There is no reason why that policy should not apply with equal vigor to employees engaged—as this group was—in protected, concerted activity. *Union Camp Corporation*

[7] Two workers testified that Noel actually told Mike that he wanted to keep his job. I do not accept that testimony. Noel himself, who was the direct focus of Mike's remarks, testified in detail about what was said, but never mentioned being afforded even an opportunity to say he wanted to keep his job. I find his testimony to be more consistent with the overall tenor of the meeting. Besides, given his stance as more of an advocate than the rest (*supra*, p. 15), had he said such a thing, he most certainly would have testified to it.

(1972) 194 NLRB 933; *Tenneco West, Inc*. (1980) 6 ALRB No. 53, ALJD, pp. 25-26. That being so, the question is whether the workers manifested a "continued interest" in retaining their employment.

To answer that question, it is necessary to consider Mike's conduct during the meeting in the context of the events that occurred immediately after.

D. The Aftermath of the Meeting with Mike

There is undisputed testimony that, as Alejandro left the meeting with his brother Juan Lopez, they encountered manager George Leney, who asked them directly whether they wanted to stay on to work. They answered, without qualification, that indeed they did. When Mike showed up and learned what had transpired, he ignored their choice, saying, "No more work for you guys. Get out." Matthew himself acknowledged that as they were leaving the meeting, he also asked Alejandro whether he wanted to keep his job, and received an unqualified "Yes."

Juan Andrade and Manual Ramirez testified that, as they left the meeting, Matthew asked them whether they would be returning for their morning shift. To which they replied that they did but "we were asking for a raise." Both testified that they did not intend to make their return contingent on a raise, but their mention of it did create an ambiguity.[8] Rather than explore it further, Matthew simply ordered them to leave.

[8] I do not accept Matthew's testimony that the only person he spoke to after the meeting was Alejandro. Andrade's and Ramirez' testimony was consistent and they honestly admitted that they said they were still asking for a raise—a statement, which because of its ambiguous nature, was not in their interest.

Those incidents, coming as they did, moments after the meeting, and involving 4 of the 6 workers who attended, indicate that had the meeting been conducted without anger and intimidation and had it not been peremptorily aborted by the summoning of the police, the true intent of the workers would have emerged; i.e. the desire for an increase in wages, but no intention to terminate their employment if it was not immediately forthcoming. Instead, Mike's conduct—hasty, angry and preemptive—not only prevented the correction of the misapprehension which Lupe's unauthorized statement had created but led the workers to conclude that they had been terminated. In that regard, the NLRB has ruled, in a case involving a similar factual situation, that:

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

In *Dole Farming, Inc*. (1996) 22 ALRB No. 9 our Board explained:

> "In determining whether or not a striker has been discharged, the events must be viewed through the striker's eyes and not as the employer would have viewed them. The test to be used is whether the acts reasonably led the strikers to believe they were discharged. If those acts created a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer." *Id.* pp. 3-5, fn. 3, quoting *Brunswick Hospital* (1982) 2l65 NLRB 803, 810.[9]

[9] The Board has long adhered to the *Ridgeway Trucking* analysis when presented with facts analogous to those at hand. *Pappas & Company* (1979) 5 ALRB No. 52; *American*

Here, the comments made—and immediately rejected by management—of 4 of the 6 workers involved to the effect that they wished to continue their employment, coming as those comments did moments after a meeting during which they had angrily been told to work or get out and threatened with police intervention, further substantiated their reasonable belief that they had been terminated and that their termination was due to their participation in protected concerted activity. Since that conduct instilled in the workers a reasonable belief, "that they had been discharged or, at the very least, their employment status was questionable because of their [participation in concerted protected activity], the burden of the results of that ambiguity must fall on the employer." *Dole Farming, Inc.*, *supra*, pp. 2-3, fn. 3

E. Defenses

The Respondent attempts to avoid that conclusion by arguing that the workers forfeited their protected status by convening the meeting in a work area and remaining there for an unreasonable period.

The evidence does not support that argument. In accordance with the plan they had formulated earlier, they made their request at the end of the day shift and before the night shift began to meet in a place which was convenient to all. During the 30 minutes they were meeting with Matthew, he at no time indicated that the milk barn was an inappropriate place to meet or that they were interfering with production; and, when he left to call his father, he in no way objected to having them await Mike's arrival in the

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Protection Industries (1991) 17 ALRB No. 21, ALJD pp. 19-20; *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4, p. 2, fn. 4; *H & R Gunlund Ranches, Inc*. (2013) 39 ALRB No. 21, p. 5, fn. 3.

barn. When Mike arrived, he demanded that they get out, but offered no explanation or justification for his demand, which they reasonably believed was an out and out firing, not a request to leave because production was being disrupted. In any event, his meeting with them lasted only 5 minutes or so, at which point they left. Finally, Respondent offered no proof that the meeting had any concrete effect on milk production.

In *Quietflex Manufacturing Co*. (2005) 344 NLRB 1055, 1056-58, the Board analyzed the factors which should be considered in determining which party's rights should prevail in the context of an on-site worker protest. Applying those standards to the facts at hand leaves no doubt that the conduct of the workers was and remained protected: (1) the reason for the stoppage was a protected request for a wage increase; (2) the meeting was peaceful; (3) there is no proof that production was interfered with or that the employer was denied access to the area; (4) there was no grievance procedure available to the workers; (5) workers were not told to leave until the very end of the meeting, and then left within 5 minutes; (6) the meeting lasted less than an hour;[10] and

[10] The NLRB addressed the duration issue in detail in footnote 15 of its decision, *Id.* at 1059-60:

> "See *City Dodge Center* (1988) 289 NLRB 194, fn. 5 (stoppage protected where all employees left the plant within 2 hours); *Golay & Co.* (1966) 156 NLRB 1252, fn. 6 (protected stoppage lasted 1-1⁄2–2 hours); *Liberty Natural Products,* (1991) 314 NLRB 630, fn.10 (protected stoppage lasted 15–30 minutes); *Central Motors Corp.*, 269 NLRB 209 (1984) ("shortlived" stoppage was found protected); *Kenneth Trucks of Philadelphia*, 229 NLRB 815 (1977), enf'd. 580 F.2d 55 (3d Cir. 1978) (protected stoppage lasted one half hour); *Benesight, Inc*., 337 NLRB 282 (2001) ("brief" work stoppage protected by Sec. 7); compare, *Cambro*, 312 NLRB 634 (1993) (approximately 4-hour stoppage resulted in forfeiture of Act's protection); *Waco, Inc*., 273 NLRB 746 (1976) (3-1⁄2 hour stoppage overstepped the boundary of a protected, spontaneous work stoppage)."

(7) the workers were unrepresented by a union. Respondent next relies on the fact that none of the workers filed for unemployment as proof that they quit their employment.

The failure to seek unemployment benefits, especially in agriculture, where a large percentage of the workforce is undocumented, is an insufficient basis to justify an inference that the workers had quit their employment.[11]

Next, the employer argues that the witness disclosure rule established in *Giumara Vineyards Corp*. (1977) 3 ALRB No. 21, prevents a respondent from preparing an adequate defense. The same contention was raised and disposed of in *Dole Farming, Inc*., *supra:*

> "The Employer asserts that the rule of *Giumarra Vineyards Corp.* (1977) 3 ALRB No. 21, codified in Regulation 20236 (Cal. Code Regs., tit. 8, § 20236), which protects the confidentiality of worker witnesses until after they have testified, prevents a respondent from having an opportunity to prepare an adequate defense and allows the General Counsel to withhold exculpatory evidence. These arguments were considered and rejected in *Giumarra*, as well as in numerous cases involving the National Labor Relations Board (NLRB), which has the same restrictions on discovery. We decline to revisit this well-settled issue." *Id.* fn. 2.Respondent also suggests that the General Counsel's failure to take statements from several witnesses violated *Giumarra*. Not so. *Giumarra* disclosure comes into play where statements are taken; it does not require that they be taken.

[11] At hearing, the Respondent sought to go beyond the failure to file for unemployment, and question employees as to their immigration status and possible use of false identification. I excluded all such inquiry on the basis of Labor Code section 1171.5 and *Rivera v. Nibco Inc.*, 364 Fed.3d 1057 (9th Cir. 2004). Furthermore, Respondent's attempt to go further and question the witnesses' use of false identification is not permissible impeachment. California Evidence Code section 787 excludes the use of specific instances of misconduct as character impeachment except for felony convictions reflecting honesty and veracity.

Next, Respondent attacks the conduct of the investigation by the General Counsel. None of the facts adduced indicated that the General Counsel acted improperly in conducting its investigation. Respondent goes on to claim numerous inconsistencies in the workers testimony in their contact with ALRB representatives. The questioning in this regard was confusing, at best, and concerned such things as the dates of interviews, who conducted the interviews and where they were held—all information collateral to the charges herein. I find that the workers did their best to answer the questions posed in an honest and forthright manner. As for other alleged inconsistencies in testimony, I have addressed and resolved those that are germane to the issues of the case based on my reconstruction of the incidents which occurred on April 17, 2013, and my assessment of the demeanor and creditability of those involved (*supra*, pp. 14-23). I find that such inconsistencies in the testimony of principal witnesses as do exist are "insufficient to cast doubt of the substance of credited testimony." *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 248.

VI. CONCLUSIONS OF LAW

By discharging the workers who engaged in protected activity for the purpose of mutual aid and protection, as described above, Respondent has interfered with, restrained, and coerced its employees in the exercise of the right guaranteed them in Section 1152 of the Act, in violation of Section 1153(a).

RECOMMENDED ORDER

I therefore recommend to the Board that, pursuant to section 1160.3 of the Agricultural Labor Relations Act, Respondent P&M Vanderpoel Dairy, its officers, agents, successors and assigns, be ordered to:

1. Cease and desist from:

(a) Discharging, laying off, failing to rehire or recall, or otherwise retaliating against any agricultural employee because the employee has engaged in union or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) Otherwise 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 that are deemed necessary to effectuate the policies of the Act:

(c) Rescind the discharges of Jose Noel Castellon Martinez, Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias, and Jorge Lopez and offer those who have not already been reinstated immediate reinstatement to their former position of employment or, if their position no longer exists, to a substantially equivalent position, without prejudice to their seniority and other rights of employment.

(d) Make Jose Noel Castellon Martinez, Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias,[12] and Jorge Lopez whole for all wages or other economic losses they suffered as a result of Respondent's unlawful discharges on April

[12] Macias appears to have been deprived on one or more shifts before he was rehired.

17, 2013, to be determined in accordance with established Board precedent. The award shall also include interest to in accordance with *Kentucky River Medical Center* (2010) 356 NLRB No. 8 and *Rome Electrical Services, Inc.* (2010) 356 NLRB No. 38.

(e) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, time cards, personnel records, and all other records relevant and necessary for a determination, by the Regional Director, of the economic losses due under this Order. Upon request of the Regional Director, payroll records shall be provided in electronic form if they are customarily maintained in that form.

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

(g) Post copies of the Notice, in all appropriate languages, at conspicuous places on Respondent's property, including places where notices to employees are usually posted for sixty (60) days, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed. Pursuant to authority granted under Labor Code section 1511(a), give agents of the Board access to its premises to confirm the posting of the Notices.

(h) Arrange for Board agents to distribute and read the Notice, in all appropriate languages, to all of its agricultural employees on company time and property, at times and places 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 any non-hourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(i) Mail copies of the Notice, in all appropriate languages, within 30 days after this Order becomes final or thereafter if directed by the Regional Director, to all agricultural employees employed by Respondent at any time during the period from April 17, 2013 to April 17, 2014.

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

(k) Notify the Regional Director in writing, within 30 days after the date of this Order becomes final, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

Dated: April 28, 2014

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JAMES WOLPMAN
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged P&M Vanderpoel Dairy violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that it did violate the law by discharging Jose Noel Castellon Martinez, Jose Manuel Ramirez Corona, Juan Jose Andrade, Alejandro Lopez Macias, and Jorge Lopez on April 17, 2013.

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

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

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

Because you have these rights, we promise that:

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

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

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

DATED: P&M VANDERPOEL DAIRY

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.