STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CALIFORNIA ARTICHOKE AND VEGETABLE CORPORATION dba OCEAN MIST FARMS,	)	Case Nos. 2012-CE-044-VIS 2013-CE-012-VIS
Respondent,	)	
and	)	
JUAN MARTIN HERNANDEZ and JAIME BOYZO ARAUJO,	)	41 ALRB No. 2 (April 7, 2015)
Charging Parties.	)	

DECISION AND ORDER

This case arises from unfair labor practice (ULP) charges filed on December 14, 2012 (Case No. 2012-CE-044-VIS or "2012 case") and April 8, 2013 (Case No. 2013-CE-012-VIS or "2013 case"), by Charging Parties Juan Martin Hernandez (Hernandez) and Jaime Boyzo Araujo (Boyzo Sr.), respectively. It is alleged in the 2012 case that on December 13, 2012, Respondent, California Artichoke and Vegetable Corporation dba Ocean Mist Farms (OMF or Respondent), violated section 1153(a) of the Agricultural Labor Relations Act[1] (ALRA or Act) by disciplining Hernandez, Boyzo Sr., and several other workers for engaging in protected concerted activity, namely leaving the job site (spinach fields in Coachella) in December of 2012 because the cold and rain had made working conditions unsafe. It is alleged in the 2013

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

case that in March of 2013, Boyzo Sr. asked for time off work in Coachella to go to the Castroville area to handle a family matter, a type of leave normally granted by Respondent, and was refused in retaliation for his participation in the December 13, 2012, walkout, in violation of section 1153(a). Boyzo Sr. returned to Salinas without permission, and Respondent deemed him to have voluntarily quit. The 2013 case further alleges that when Boyzo Sr. sought work at Respondent's Castroville spinach operations in April of 2013, he was unfairly denied rehire in violation of sections 1153(a) and (d), both in retaliation for his involvement in the December 2012 walkout, and for his perceived assistance to Hernandez and the Agricultural Labor Relations Board (ALRB or Board) in the filing of, and/or investigation into, the 2012 case.

The General Counsel of the ALRB filed a consolidated complaint against Valley Pride, Inc. (VPI) on December 31, 2013, alleging two causes of action pursuant to sections 1153(a) and 1153(d) of the Act, as described above: interference and restraint of agricultural employees in the exercise of their rights under the Act, and retaliation for involvement in the ALRB process. The General Counsel asserted, among other things, that the Charging Parties and the other affected employees were employed by VPI. On March 28, 2014, the General Counsel issued an amended complaint (Complaint) against Respondent, alleging that Respondent bore liability on the grounds that VPI was a farm labor contractor (FLC) that supplied the affected employees to Respondent.

The case was heard before Administrative Law Judge (ALJ) Douglas Gallop in Salinas, California on September 23-24, 2014. The ALJ issued his decision (ALJD) on December 1, 2014, finding that Respondent was liable for ULPs in both the

2012 and 2013 cases, as described below. Post-hearing briefs were timely received by November 5, 2014. Exceptions and Replies were timely received by February 13, 2015.

The General Counsel, in her exceptions brief, urged the Board to affirm the findings of the ALJ, and took exception only to the ALJ's refusal to rule on a motion she made during the first day of the hearing. Respondent filed 22 exceptions, disputing many of the ALJ's findings, and arguing that all the allegations should have been dismissed. The Board has considered the record and the ALJ's decision in light of the exceptions and briefs filed by the parties and affirms the ALJ's findings of fact and conclusions of law, and adopts his recommended decision and order.

BACKGROUND

Statement of Facts

Respondent and VPI are headquartered in the Castroville area, near Salinas. An agreement between VPI and Respondent (hereafter "the agreement" or "the contract") describes VPI as a "custom harvester and/or a farm labor contractor," and provides that VPI is to haul produce from the fields to locations designated by Respondent. The agreement also describes Respondent as a grower. Joseph Pezzini (Pezzini) is the Chief Operations Officer of Respondent, and is the President and Managing Officer of VPI. Although VPI purchases its own equipment, tools, and supplies, Respondent reimburses VPI for everything but harvesting equipment, which is depreciated. Respondent determines when and how much of a given crop is harvested, though VPI, per the agreement, has control over the manner in which the crop is harvested.

The agreement provides that VPI has control over hiring and certain conditions of its employees' work; however, the employees' pay stubs have the names of both companies on them. Furthermore, Respondent's personnel are involved in the investigation of disciplinary matters regarding VPI employees, and Respondent also requires VPI employees to attend safety training and meetings conducted by Respondent. VPI employees are covered by Respondent's workers' compensation insurance plan, and such employees report their claims to Respondent's safety manager, Francisco Olivarez (Olivarez).

In April of 2012, Boyzo Sr. and several other VPI employees were working as spinach harvesters in Castroville. On or about April 26, 2012, Boyzo Sr. and VPI employees from two crews (more than 20 workers in total) left work early and without permission, as the cold, rainy weather made the fields so wet and muddy that it was dangerous to continue working. Conditions were so slippery that there was a danger of injury. When the workers returned to work (the walkout lasted two days), they were compelled to attend a meeting with two VPI supervisors, as well as Olivarez. The VPI supervisors threatened to issue them disciplinary notices, and changed the work assignments of some of the older workers to more physically demanding jobs. Boyzo Sr. protested the actions of the VPI supervisors in a very vocal manner, and Olivarez ultimately overruled the supervisors. No one was disciplined over the incident, and no job assignments were changed. Hernandez was not involved in this walkout, as he was not working at the time.

In the fall of 2012, a spinach crew, including Boyzo Sr. and Hernandez, travelled from Castroville to Coachella to perform harvesting work there. This crew consisted of about 25 workers – about 20 from Castroville, with the remainder from Coachella. On December 13, 2012, the weather was cold and foggy, and it began to rain at about 9 a.m., about two hours after work started. Although the workers from Castroville (including Hernandez and Boyzo Sr.) had been issued protective rain gear ("gear") in Castroville, most of them did not bring their gear to Coachella. At about 9:45 a.m., the workers requested that they be provided with gear. They continued to work until approximately 11:45 a.m., their normal lunchtime. The employees broke for lunch, but the gear had not yet arrived. By the time a VPI supervisor arrived with gear (about 12:30 p.m.), the workers decided they would leave work after lunch anyway, as they were so cold and numb the gear would not have helped, and the wet, muddy, slippery conditions made it too difficult and dangerous to continue working. Boyzo Sr. later testified that he did wear his gear that day, but it did not help, and the wetness and soil conditions made work too difficult.

VPI supervisors told the employees from Castroville that they could not leave, as they had been provided with gear previously, but the workers from Coachella could leave, as they had never been issued gear. The workers left despite this admonition. On December 14, 2012, all the employees returned to work. All the

workers from Castroville who had walked out the day before were disciplined. Hernandez was suspended[2], and Boyzo Sr. received a verbal warning.

After the December 2012 incident, VPI supervisor Rafael Haro, who had previously been cordial with Boyzo Sr., became unfriendly and hostile to him, and became generally unpleasant towards the crew. On March 13, 2013, about two weeks before the end of the Coachella harvest season, Boyzo Sr. requested time off to return to the Salinas area due to a family emergency. Although VPI had a policy to grant employees time off for such family matters, Boyzo Sr.'s request was denied by Haro on March 14, 2012. On March 15, 2012, Boyzo Sr. told his foreman he was leaving for Salinas to attend to his family, and did not return to work in Coachella. VPI sent Boyzo Sr. his final paycheck, accompanied by a letter stating that he had voluntarily quit without cause. In April of 2013, when the spinach harvest in Castroville began, Boyzo Sr. called Haro and sought to return to his former crew. Haro replied that no workers were needed; however, payroll records showed that there were several new hires that April[3].

The Administrative Law Judge's Decision

Credibility Determinations

The ALJ found, based on the testimony of Hernandez, Boyzo Sr., and several other witnesses, that the employees who walked off the job in December 2012 were justified in leaving, due to the safety concerns posed by the working conditions.

[2] This suspension gave rise to the 2012 case.

[3] The refusal to grant leave to Boyzo Sr., and the subsequent refusal to rehire him, gave rise to the 2013 case.

The ALJ further found that Respondent's refusal to grant Boyzo Sr. time off in March 2013, and its failure to rehire him in April 2013, when hiring was occurring at that time, were done in retaliation for his participation in the December 2012 walkout, despite testimony to the contrary from Respondent's witnesses.

Respondent's Defense of Statute of Limitations

Respondent argued that the allegations that the refusal to grant Boyzo Sr. time off in March of 2013, and the failure to rehire him in April of 2013, are time-barred, as these allegations involve conduct occurring more than six months before the issuance of either complaint in this matter. The ALJ found that the statute of limitations did not apply because the additional allegations were closely related to the original charges, as they arose out of the same protected concerted activity, were a continuation of the sequence of events in Boyzo Sr.'s employment, and involved the same supervisors. The ALJ relied upon several cases, to wit, *Kawahara Nurseries* (2014) 40 ALRB No. 11, *The Carney Hospital* (2007) 350 NLRB 627, *Success Village Apartments, Inc*. (2006) 347 NLRB 1065, and *Redd-I, Inc*. (1988) 290 NLRB 1115, in his analysis.

Respondent's Defense of Denial of Due Process

Respondent claimed that it was denied due process because the General Counsel did not take declarations from its witnesses. The ALJ found no violation, as such declarations are not required. (*P & M Vanderpoel Dairy* (2014) 40 ALRB No. 8.)

The Question of VPI's Status

Respondent argued that VPI was a custom harvester[4]. The ALJ found that VPI was a farm labor contractor (FLC) for Respondent, and thus Respondent was an appropriate agricultural employer of the affected employees[5]. The ALJ used the standards set forth in various cases, such as *Tony Lomanto* (1982) 8 ALRB No. 44, *George Amaral Ranches, Inc*. (2014) 40 ALRB No. 10, *San Joaquin Tomato Growers, Inc./LCL Farms, Inc*. (1993) 19 ALRB No. 4, *Jordan Brothers Ranch* (1983) 9 ALRB No. 41, and *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, in his analysis.

The Nature of the December 13, 2012 Walkout

The ALJ found that the employees who left work early on December 13, 2012, were engaged in protected concerted activity within the meaning of section 1152 of the

[4] An agricultural enterprise which provides labor and more, and typically does not own or lease land; but rather provides various agricultural services, particularly harvesting, to one or more land owners. The Board's general approach has been to review the whole activities of the enterprises involved and determine which enterprise has the most significant attributes of an employer, including the capacity to enter into a stable collective bargaining relationship. When a grower engages the services of a custom harvester, the custom harvester is often, but not inevitably, considered the agricultural employer for purposes of the Act. (*Tony Lomanto* (1982) 8 ALRB No. 44, pp. 3-4.)

[5] California Labor Code section 1682(b) defines an FLC as "any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to these persons." Section 1140.4(c) of the Act provides that workers provided to an agricultural employer by an FLC are employees of said agricultural employer for purposes of the Act.

Act. The ALJ reasoned that the employees did not initially refuse to work in the rain, but tried to work until they began to exhibit the symptoms of hypothermia, and their decision to leave was motivated by good faith health and safety concerns. Thus, the ALJ concluded, the walkout was protected concerted activity, in accordance with *NLRB v. Washington Aluminum Co*. (1962) 370 U.S. 9, *Gourmet Farms, Inc*. (1984) 10 ALRB No. 41, *Giannini Packing Co*. (1993) 19 ALRB No. 16, and *M. Caratan* (1978) 4 ALRB No. 83, as opposed to the sort of intermittent strike disapproved of by *Sam Andrews' Sons* (1983) 9 ALRB No. 24, *Polytech Inc*. (1972) 195 NLRB 695, and *Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369.

The Section 1153(a) Violation Related to the December 13, 2012 Walkout

The ALJ found that the discipline imposed on the workers who walked out on December 13, 2012, constituted a violation of section 1153(a) of the Act, as the workers were punished for engaging in protected concerted activity. The ALJ rejected Respondent's argument that the workers would have been disciplined even if the walkout were protected, as they were disciplined for failing or refusing to wear their gear. The ALJ reasoned that the disciplinary notices given to the affected employees all stated that the reason for discipline was leaving work early, and that Boyzo Sr. was disciplined even though he wore his gear on the day of the incident. Thus, the ALJ concluded that the disciplinary action taken against the affected employees, including Boyzo Sr. and Hernandez, constituted a ULP.

The Refusal to Grant Boyzo Sr. Time Off for His Family Emergency in March 2013

The ALJ also found that the evidence demonstrated that VPI did have a general policy of granting time off for family matters, and that Haro was known to be hostile to Boyzo Sr. after the December 2012 incident. Given the lack of explanation for VPI's departure from its normal policy, the ALJ concluded that the refusal to grant Boyzo Sr. time off in March of 2013 was done in retaliation for his protected concerted activity in December of 2012, and thus violated section 1153(a) of the Act.

The Refusal to Rehire Boyzo Sr. in April of 2013

The ALJ found that there was no evidence that VPI had a policy of contacting its workers for rehire. However, since the evidence showed that Boyzo Sr. applied for rehire at that time, and was rejected by Haro despite the fact that new workers were being hired, the ALJ concluded that this was a continuation of the unlawful retaliation against Boyzo Sr. stemming from the December 2012 incident, and was a ULP in violation of section 1153(a) of the Act. The ALJ relied on several ALRB decisions, namely, *McCaffrey Goldner Roses* (2002) 20 ALRB No. 8, *H & R Gunlund Ranches, Inc.* (2013) 39 NLRB No. 21, *Prohoroff Poultry Farms* (1979) 5 ALRB No. 9, and *Kyutoku Nurseries* (1982) 8 ALRB No. 98, in this analysis.

The ALJ further found that there was no violation of section 1153(d) of the Act, as the evidence failed to establish that VPI perceived that Boyzo Sr. participated in the investigation of the 2012 case (filed by Hernandez), or that such perception motivated VPI's refusal to rehire him. The ALJ cited *Baccus Farms* (1978) 4 ALRB No. 26, and *NLRB v. Scrivener* (1972) 405 U.S. 122, in support of this conclusion.

Exceptions to the ALJD

The General Counsel

The General Counsel, in her brief, described the ALJD as "well-reasoned and supported" and took exception only to the ALJ's refusal to rule on her September 12, 2014, motion to strike the Respondent's affirmative defense to her proposed backpay specification and to preclude further inquiry into immigration status. Respondent had raised an affirmative defense that Boyzo Sr. was not entitled to reinstatement or backpay, as he was an undocumented immigrant worker. The General Counsel had made the same motion at the prehearing conference about five months earlier, and did not seek review of the ALJ's denial of the motion. At the hearing, the ALJ refused to rule on the renewed motion, but bifurcated the hearing into ULP and compliance proceedings in order to avoid delay.

Respondent

Respondent filed 22 exceptions to the ALJD. In these exceptions, Respondent argues that the ALJ erred as follows: in finding liability for any ULPs in violation of section 1153(a) of the Act; in making many erroneous findings of fact and credibility determinations; in failing to find that the charges against Respondent were a violation of due process; in finding that VPI was an FLC, as opposed to a custom harvester; in finding that the employees disciplined after the December 2012 walkout were disciplined for walking off the job, as opposed to failing to bring their gear from Castroville to Coachella; and in drafting the language in the Recommended Order and Notice to Agricultural Employees attached to his decision.

Respondent's Brief in Response to the GC's Exception

Respondent maintains that the ALJ was correct to refrain from ruling on the GC's motion, and was also correct in bifurcating the hearing. Respondent states that no harm was caused by the ALJ's actions in this regard, and argued that the General Counsel's motion should be dismissed as untimely and duplicative

The General Counsel's Reply to Respondent's Exceptions

The General Counsel filed a reply to Respondent's exceptions in which she argues that Respondent's exceptions are meritless as they are not supported by the law and the facts, and the ALJ was correct in making the findings to which Respondent excepts.

As discussed below, the Board will affirm the ALJ's findings regarding the ULPs, and finds that the ALJ's decision to bifurcate the hearing was proper.

DISCUSSION AND ANALYSIS

The Exceptions and Replies and Answers Thereto

As discussed below, we find no reason to address the General Counsel's exception, and we agree that the ALJ properly found Respondent liable for violations of section 1153(a) of the Act. With respect to all of Respondent's exceptions, we find them to be unsupported. A careful examination of the record reveals no factual or legal basis for reversing any of the ALJ's findings or other determinations on the issues raised by said objections, and we affirm the ALJ's conclusions in all those regards.

The Statute of Limitations Issue

Respondent argued, at the pre-hearing conference and in its closing brief, that the original charge in the 2013 case alleged only that Boyzo Sr. and others engaged

in protected concerted activity by engaging in the December 2012 walkout, and that because the allegations concerning the refusal to grant Boyzo Sr. time off in March 2013, and the failure to rehire him in April 2013 were not made until the filing of the Complaint on March 28, 2014, they are time-barred by the statute of limitations. Section 1160.2 of the Act provides that no complaint may issue on a ULP occurring more than six months before the filing of a charge with the Board. However, as discussed above, the ALJ found that the new allegations involving Boyzo Sr. were closely related to the original charge, arose out of the same protected concerted activity, were subject to the same defenses as the original charge, and thus were not time-barred.

We concur with the ALJ's conclusion. The ALJ properly applied considerable case precedent to his analysis and findings on this issue. The case of *Redd-I, Inc.* (1988) 290 NLRB 1115, relied upon by the ALJ, is illustrative. In that case, an employee named Kelley was terminated on August 19, 1985, and a ULP charge naming that employee and eight others as discriminatees was filed on September 30, 1985. (*Ibid.*) The charge was withdrawn on November 14, 1985, and another charge was filed on January 6, 1986, alleging ULPs against the other eight employees named in the September 30 charge, but not Kelley. (*Ibid.*) On March 3, 1986, the charge was amended to include seven more employees who had been laid off on August 15, 1985, but Kelley was still not included. (*Ibid.*) On May 6, 1986, the Charging Party requested to amend the charge to include Kelley, and at the hearing on May 8-9, 1986, the National Labor Relations Board's (NLRB's) General Counsel moved to amend the complaint to

include Kelley, but the ALJ denied the motion as violative of the six-month statute of limitations, and the General Counsel excepted to this. (*Ibid.*)

The NLRB found merit in the exception, and remanded the matter to the ALJ, reasoning that:

> Even though Kelley's discharge occurred more than 6 months before the General Counsel's motion to amend the complaint, we would not find the amendment barred under Section 10(b) as the judge did, because the discharge occurred within 6 months of a timely filed charge and the alleged violation appears to be closely related to the allegations of that charge.
>
> ...
>
> In applying the traditional "closely related" test in this case, we will look at the following factors. First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the [National Labor Relations] Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.
>
> Here, the facts show that Kelley's discharge occurred within 6 months before the filing of the timely charge in this case. Further, the untimely allegation concerning Kelley's discharge is of the same class as the other layoff and discharge allegations in the timely charge because they all

> involve retaliation against union activities in violation of Section 8(a)(3). (*Id.* at pp. 1115-1119.)

The NLRB also reasoned that it existed to advance the public interest, not to adjudicate private controversies, and there would be no justification for such "precise particularizations" of charges, especially because "[w]hen there is a pending timely charge on file, however, a respondent has no such right to assume his liability is extinguished; nor can he claim a lack of notice, at least about closely related allegations." (*Id.* at pp. 1117-1118.) In the instant matter, a careful examination of the record reveals no legal or factual basis for overruling the ALJ's conclusion in this regard. The ALJ properly weighed all the evidence and applied the standards set forth by precedent, as described above. We affirm the ALJ's finding that the allegations concerning the failure to grant Boyzo Sr. time off and the failure to rehire him were not barred by the statute of limitations.

The ALJ's Credibility Determinations

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

(1950) 91 NLRB 544.) Furthermore, it is both permissible and not unusual to credit some but not all of a witness's testimony. (*Suma Fruit International (USA), Inc.* (1993) 19 ALRB No. 14, citing 3 Witkin, Cal. Evidence (3d ed. 1986) §1770, pp. 1723-1724.)

The ALJ thoroughly analyzed all witness testimony and made factual findings based upon the same. These findings of fact, as well as the ALJ's credibility determinations, are consistent with well-supported inferences in the record as a whole. We find all of Respondent's exceptions to the ALJ's findings of fact and credibility determinations to be unsupported, and affirm the ALJ's findings on those issues.

The Question of VPI's Status as an FLC or a Custom Harvester

We agree with the ALJ's finding that VPI was a farm labor contractor for Respondent, as opposed to a custom harvester.

In the ALJD at pages 19-20, the ALJ reasoned:

> Valley Pride, Inc. is clearly a farm labor contractor, since it is licensed as such, and provides labor for a fee. Based on the record, it is not also a custom harvester. The only service it provides to Respondent, not commonly provided by other farm labor contractors, is that it delivers the produce to Respondent's coolers. It only bears the risk of loss while transporting the crops, and possibly in those few instances where it has an ownership interest in the land. Furthermore, there is little, if any evidence that Valley Pride's business decisions affect the opportunity for profit or loss in the harvests . . . .
>
> Valley Pride does not have total control over the harvest, since Respondent determines which fields are to be harvested, the amount of produce to be harvested, and inspects the produce for quality and packing. Valley Pride does not market the produce, and does not ship it to market. There is insufficient evidence to determine whether Valley Pride

> furnishes sufficient specialized equipment to consider this to be a factor in favor of custom harvester status.
>
> Valley Pride does not have exclusive control over the terms and conditions of employment of its employees. Respondent sets a number of minimum standards for these conditions. It also provides safety training and workers compensation counselling and assistance. Respondent also sets minimum and maximum staffing levels. As discussed above, Respondent's managers assist in the investigation of disciplinary matters, and in at least one case, a manager attended a disciplinary meeting and overruled the actions of Valley Pride's supervisor.

This analysis is consistent with the cases cited by the ALJ. Most notably, in *San Joaquin Tomato Growers, Inc. / LCL Farms, Inc., supra,* (SJTG/LCL), the Board held that LCL, which claimed custom harvester status, was in fact an FLC. (*Id.* at p. 5.) The Board reasoned that although LCL was responsible for hiring, firing, compensation, and supervision of employees, this was typical for an FLC. (*Id.* at p. 8.) Moreover, the control SJTG exerted over the harvest (dictating the fields to be picked, the amount to be picked, and degree of ripeness desired) was a factor strongly indicating that LCL was not a custom harvester. (*Ibid.*) The Board also held that although LCL did bear some of the risk of loss, which normally weighs in favor of custom harvester status, such a characteristic was not determinative, and the overall weight of the evidence demonstrated that LCL was an FLC. (*Id.* at pp. 8-11.) The ALJ's analysis in this case is strikingly similar to that of the Board's in SJTG/LCL, and we concur with it. Moreover, the ALJ's analysis of the facts in this matter is consistent with the holding in *Rivcom Corp. v. ALRB, supra,* which held that even a custom harvester may be considered a joint employer with a grower when the evidence indicates that for labor relations purposes, the

two entities operate as a single enterprise. (*Id.* at p. 769.) The Board has clarified the *Rivcom* analysis and held that, regarding the question of which of two entities is the more appropriate for stable collective bargaining purposes: "The touchstone of this subsequent inquiry is the determination of which entity has 'the more substantial long-term interest in the ongoing agricultural operation.'" (*Henry Hibino Farms, LLC* (2009) 35 ALRB No. 9, pp. 3-4.) We agree with and affirm the ALJ's conclusion that Respondent is the more suitable entity in this matter.

Respondent's exceptions 1-4 and 15-16 dispute the ALJ's finding that VPI was an FLC, as opposed to a custom harvester. A careful examination of the record reveals no legal or factual basis for reversing this finding or overruling the ALJ's conclusion in this regard. The ALJ properly weighed all the evidence and applied the standards set forth by precedent, as described above. There was ample testimony supporting the ALJ's findings regarding the issues disputed in exceptions 1-3, where Respondent argued that the ALJ mischaracterized and wrongly interpreted Pezzini's testimony. Regarding exception 3, Pezzini testified that Olivarez has consulted with VPI's operations manager on disciplinary matters, as well as other subjects such as workers' compensation, as VPI has no dedicated employee for such situations, and thus turns to Olivarez to handle them. Exception 4, regarding an indemnification clause in the agreement, is not relevant either factually or legally. Moreover, the evidence indicated that under the relationship between VPI and OMF, VPI was essentially guaranteed a profit. We find these exceptions to be unsupported, and affirm the ALJ's findings on these issues.

The ULPs

The ALJ's findings and legal reasoning as to how Respondent violated section 1153(a) of the Act, described above, are based on his correct interpretation of the relevant law, as well as his astute application of said law to the facts of this matter. Three of the precedents used by the ALJ are particularly persuasive. In the case of *Gourmet Farms, supra,* the Board found that an employee who was terminated after speaking up on behalf of numerous workers in protest against changed rules concerning the use of personal vehicles and transportation expenses had engaged in protected concerted activity. (*Id.* at pp. 6-8.) In *M. Caratan, supra,* the Board found that two employees who were terminated after walking off the job due to suffering injuries because of a lack of proper equipment had been constructively terminated in violation of sections 1153(a) and (c) of the Act, as their conduct was protected concerted activity. (*Id.* at pp. 3-6.)

Washington Aluminum Co., supra, is also particularly apt, as in that case, the U.S. Supreme Court held that a group of workers who walked off the job in a machine shop due to unreasonably cold working conditions were engaged in protected concerted activity. (*Id.* at pp. 14-17.) Tellingly, the High Court explained, at page 16:

> Nor can we accept the company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable "cause" for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant.

Furthermore, the ALJ properly distinguished cases where work stoppages were not found to be protected concerted activity, such as *Bertuccio v. ALRB, supra,* which held that a walkout due to the worker's subjective discomfort at picking lettuce in the rain did not constitute protected activity. (*Id.* at p. 1404.) The key distinguishing factor between protected and unprotected activity is that employees may not seek to maintain the benefits of paid employee status while simultaneously refusing to perform all the work they were hired to perform; i.e., a work stoppage is not protected where it is part of a plan or pattern of intermittent actions inconsistent with a genuine strike or genuine performance of the work normally expected by the employer. (*Polytech, Inc.* (1972) 195 NLRB 695, 696.) The ALJ correctly found that the facts of the instant case demonstrated that working conditions were objectively dangerous, which justified his conclusion that the affected employees engaged in protected concerted activity, and not an action inconsistent with VPI's or Respondent's legitimate expectations of its workers.

Respondent's exceptions 5-7 and 17-18 challenge the ALJ's findings regarding the working conditions. The correctness of the ALJ's findings thereto was discussed above. A careful examination of the record reveals no legal or factual basis for reversing these findings or overruling the ALJ's conclusions, especially given the testimony regarding VPI's practices regarding leave for family emergencies. Exception 5, which argued that the ALJ erred in finding that the conditions during the December 2012 walkout were the same with or without gear, lacks merit, as the ALJ's quote is an accurate description of Boyzo Sr.'s testimony. Exceptions 6-7, which disputed that another employee, one Francisco Martinez, was disciplined for the December 2012

walkout, also lack merit, as the record supports the ALJ's findings, and the matters excepted to are irrelevant to the ultimate issues in this case. We find these exceptions to be unsupported, and affirm the ALJ's findings on these issues.

With respect to the refusal to rehire Boyzo Sr., the ALJ properly applied various precedents in support of his conclusion that OMF violated section 1153(a) of the Act by such refusal. The case of *Giannini Packing Co., supra,* states that in a refusal to rehire case, it must be shown that the affected employee applied for work at a time when it is available. (*Giannini Packing Co.* at ALJD p. 15.) The ALJ correctly applied this test to the facts of this case, and found that the evidence showed that Boyzo Sr. made such proper application at a time when Respondent was hiring, and was denied rehire in violation of the Act.

Respondent's exceptions 8 and 19-21 argue that the ALJ erred in finding that the refusal to rehire Boyzo Sr. constituted a violation of the Act. The ALJ properly weighed the evidence and correctly interpreted the applicable law in making his finding. A careful examination of the record reveals no legal or factual basis for reversing this finding or overruling the ALJ's conclusion. On exception 8, which argued that the ALJ misstated Haro's testimony, Respondent misstates the ALJD. A foreman testified that Haro said that no leave requests would be granted close to the end of the harvest. The ALJ pointed out that although Haro was called as a witness by Respondent, he was not asked to respond to the foreman's testimony, nor did he explain why he did not follow the usual policy of granting Boyzo Sr. time off for a family emergency. 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 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.) Thus, the ALJ's conclusion in this regard was justified.[6] Exceptions 19 and 21, which alleged that there was no *prima facie* showing that the refusal to rehire Boyzo Sr. violated the Act, are without merit for the reasons discussed above. Furthermore, Respondent failed to provide any authority in support of exception 20, which argued that the ALJ failed to consider outside factors that might have affected the decision not to rehire Boyzo Sr., rendering it without merit. We find these exceptions to be unsupported, and affirm the ALJ's finding on this issue.

Regarding the conclusion that Respondent did not violate section 1153(d) of the Act by refusing to rehire Boyzo Sr., the ALJ properly applied the test set forth in *NLRB v. Scrivener, supra,* at page 123: that it is a ULP for an employer to "dismiss or demote any employee for making a complaint or giving evidence with respect to an

[6] Even if Haro's failure to offer any explanation as to why he denied Boyzo Sr.'s request for time off were disregarded, we would find that a prima facie case was established. Boyzo Sr. clearly engaged in protected activity, which was known to Respondent. The timing of the events, along with Haro's sudden hostility to Boyzo Sr. after the December 13 incident and his departure from Respondent's usual policy regarding time off, justified the drawing of an inference of discriminatory motivation. Respondent failed to rebut the inference of unlawful motivation created by the establishment of the prima facie case, particularly given its failure to ask Haro to offer any legitimate reason for his decision.

alleged violation." However, the ALJ rightly concluded that there was insufficient evidence presented that VPI ever knew that Boyzo Sr. was involved with the 2012 case, or that knowledge of such participation motivated its refusal to rehire him.

Respondent's exceptions 9-10 dispute the ALJ's conclusions regarding the alleged violation of section 1153(d) of the Act. Exception 9 argued that the ALJ incorrectly described alleged violations of section 1153(d) as violations of section 1153(a). Exception 10 argued that the ALJ was wrong to find that the section 1153(d) allegations were closely related to the section 1153(a) allegations. A careful examination of the record reveals no merit to these exceptions, as the additional allegations (refusals to grant time off and to rehire were retaliation for protected concerted activity, or for perceived cooperation with the ALRB in the investigation of the 2012 case) would constitute violations of both 1153(a) and 1153(d), and the closely related nature of the allegations was discussed previously. Furthermore, the ALJ cured any misstatement by referring to 1153(d) later on in the discussion of the additional allegations. Moreover, as the ALJ ultimately did not find any violation of section 1153(d), the exceptions would be moot. We find these exceptions to be without merit.

We agree with the ALJ's findings and conclusions, and affirm them in their entirety.

Due Process Issues and Miscellaneous Exceptions by Respondent

Respondent's exceptions 11-14 object to the ALJ's conclusion that the General Counsel's failure to provide witness declarations, affidavits, or investigation notes did not violate due process. As described above, the ALJ ruled, properly, that, per the holding of

P & M Vanderpoel, supra, declarations are not required. Moreover, notes would clearly fall within the attorney work product privilege, and would also be protected from disclosure due to sections 20236 and 20274 of the Board's regulations[7]. A careful examination of the record reveals no legal or factual basis for reversing this finding. We find these exceptions to be legally unsupported, and affirm the ALJ's findings.

Respondent's exception 20 disputed the ALJ's recommended order as overbroad and punitive. Respondent provided no citations or authority in support of this exception. The ALJ's order is proper, as it is consistent with other such notices. We find this exception to be unsupported, and affirm the ALJ's order.

The General Counsel's Exception

The General Counsel, in her supporting brief, argued that Respondent could not raise Boyzo Sr.'s immigration status as a bar to backpay unless it could show that it had actual knowledge that he lacked authorization to work during or prior to the backpay period, citing the California Supreme Court's recent holding in *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407. The record indicates that Respondent retained a private investigator who ran variations of Boyzo Sr.'s name "thru the Social Security System" and failed to find any matches. (General Counsel's Motion to Strike Respondent's First Affirmative Defense to Back Pay Specification, p. 12.) In *Salas,* plaintiff employee (Salas) was an undocumented worker who fraudulently used another person's social security number (SSN) to obtain employment. (*Id*. at p. 417.) After an

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

on-the-job injury, Salas sued his employer, claiming discrimination under the California Fair Employment and Housing Act (FEHA), and before trial, announced that he would invoke his Fifth Amendment right against self-incrimination if asked about his immigration status. (*Id.* at pp. 416-417.) Employer conducted an investigation and obtained substantial evidence that Salas had provided false information to gain employment. (*Id.* at p. 417.) The trial court denied employer's motion to dismiss, but the Court of Appeal held that Salas's claim was barred by *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, which held that backpay could not be awarded to an illegal immigrant, as his employment had been obtained by criminal fraud. (*Salas, supra,* at pp. 418-420.)

The California Supreme Court reversed and remanded, holding that the proper procedure in a situation where an employer learns, after an allegedly wrongful termination or refusal to hire, of information that would have justified such termination or refusal to hire, was to calculate backpay from the date of the unlawful discharge to the date that the new information was discovered. (*Id.* at p. 429.) This adopted the procedure specified by the U. S. Supreme Court in *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362.

The General Counsel further cites *Flaum Appetizing Corp.* (2011) 357 NLRB No. 162, in support of her argument that her motion should have been granted. In *Flaum*, the employer filed an affirmative defense against the NLRB Acting General Counsel's (AGC's) backpay compliance specification, on the grounds that the alleged discriminates were undocumented aliens and thus precluded from receiving any backpay.

(*Id.* at pp. 6-9.) The AGC requested a bill of particulars, and the employer submitted a document stating that the discriminatees had obtained work via fraudulent identifications, and the employer did not learn of this until "a number of the alleged discriminatees" testified under oath that they had engaged in fraud. (*Id.* at pp. 9-11.) The document did not specify dates, names, or describe the nature of the fraudulent documents/identifications supposedly used. (*Id.* at p. 11, fn. 4.) The AGC stated that the employer's bill of particulars was insufficient, and requested a more detailed bill, which the employer never provided. (*Id.* at p. 11.)

While litigating the propriety of the bill, the employer served the discriminatees with burdensome subpoenas duces tecum demanding, inter alia, passports, identifications, birth certificates, social security cards, marriage licenses, voter registrations, and education documents. (*Id.* at pp. 12-13.) The NLRB eventually granted the AGC's motion for partial summary judgment and also struck the employer's affirmative defense. (*Id.* at pp. 33-34.) The NLRB reasoned that employers could not use affirmative defenses to "engage in a fishing expedition" to discover evidence supporting those defenses. (*Id.* at p. 19.) The NLRB added that allowing an affirmative defense in every compliance case, even in the absence of factual foundation, would be an abuse of the NLRB's processes and a waste of resources. (*Id.* at pp. 30-31.)

It is noteworthy that, on January 1, 2014, Labor Code section 244(b) took effect. That statute provides:

> Reporting or threatening to report an employee's, former employee's, or prospective employee's suspected citizenship

> or immigration status, or the suspected citizenship or immigration status of a family member of the employee, former employee, or prospective employee, to a federal, state, or local agency because the employee, former employee, or prospective employee exercises a right under the provisions of this code, the Government Code, or the Civil Code constitutes an adverse action for purposes of establishing a violation of an employee's, former employee's, or prospective employee's rights. As used in this subdivision, "family member" means a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.

On its face, this raises the concern whether Respondent may have violated the law by hiring a private investigator to look into Boyzo Sr.'s immigration status. However, *Salas*, which was decided June 26, 2014, did not question the propriety of the employer's investigation into Salas's immigration status. The Court in *Salas* was concerned with the application of Labor Code section 1171.5 to the case, and whether that section was pre-empted by federal immigration law. (*Salas, supra*, at p. 415.) Section 1171.5 provides (***emphasis added***):

> The Legislature finds and declares the following:
>
> (a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.
>
> (b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws ***no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and***

> ***convincing evidence that the inquiry is necessary in order to comply with federal immigration law***.
>
> (c) The provisions of this section are declaratory of existing law.
>
> (d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Salas held that section 1171.5 was not pre-empted insofar as it permitted an award of lost wages to an unlawfully terminated illegal immigrant employee for the period before the employer discovered that the employee was an illegal immigrant. (*Salas, supra*, at pp. 426-427.) Here, the ALJ bifurcated the ULP and compliance proceedings. Whether *Salas* or *Flaum* or the provisions of Labor Code sections 244(b) and 1171.5 have any relevance to this matter will be determined during the compliance phase of this matter. The Board affirms the ALJ's decision to so bifurcate these proceedings.

CONCLUSION

We hold that the discipline of employees for their participation in the December 2012 walkout, as well as the refusal to grant personal time off to and refusal to rehire Boyzo Sr., did, in fact, constitute ULPs under the Act. We further hold that all the affected employees who suffered wage or other economic loss due to Respondent's actions are thus entitled to appropriate makewhole. We affirm all of the ALJ's other findings and credibility determinations. We lastly uphold the ALJ's order in this matter.

ORDER

Pursuant to Labor Code section 1160.3, Respondent, California Artichoke and Vegetable Growers Corporation, dba Ocean Mist Farms, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Disciplining, denying requests for leaves of absence, refusing to rehire or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in concerted activities protected under section 1152 of the Agricultural Labor Relations Act (Act).

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

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

   (a) Rescind the disciplinary notices issued to members of the spinach harvesting crew in Coachella on or about December 14, 2012, and expunge such notices from their personnel files.

   (b) Make whole Jaime Boyzo Araujo (Boyzo Sr.), as the result of the unlawful refusal to rehire him, and Juan Martin Hernandez, Jaime Adrian Boyzo Alcantar and Francisco Javier Martinez, as a result of their unlawful suspensions, for all wages or other economic losses they suffered, to be

determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful refusal to rehire or suspensions. The award shall also include interest to be determined in accordance with *Kentucky River Medical Center* (2010) 356 NLRB No. 8, and *Rome Electrical Systems, Inc.* (2010) 356 NLRB No. 38.

(c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning December 14, 2012, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

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

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

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

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time during the period December 14, 2012, to December 13, 2013, at their last known addresses.

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

(i) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps Respondent has taken to comply

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

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

DATED: April 7, 2015

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

NOTICE TO AGRICULTURAL EMPLOYEES

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

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

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

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

Because you have these rights, we promise that:

WE WILL NOT refuse to rehire, deny requests for leaves of absence, discipline, or otherwise retaliate against agricultural employees because they protest about their wages, hours or other terms or conditions of employment.

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

WE WILL offer Jaime Boyzo Araujo immediate employment to his former position, and will make him, along with Juan Martin Hemandez, Jaime Adrian Boyzo Alcantar and Francisco Javier Martinez whole for any loss in wages and other economic benefits they suffered as the result of our unlawful conduct.

DATED: _____

CALIFORNIA ARTICHOKE AND
VEGETABLE GROWERS
CORP., dba OCEAN MIST FARMS

By: _____
(Representative) (Title)

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

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

CALIFORNIA ARTICHOKE AND VEGETABLE GROWERS CORP. dba OCEAN MIST FARMS
(Juan Martin Hernandez & Jaime Boyzo Araujo)

Case Nos. 2012-CE-044-VIS
2013-CE-012-VIS
41 ALRB No. 2

Background

Charging Parties, Juan Martin Hernandez & Jaime Boyzo Araujo ("Hernandez" and "Boyzo Sr."), were agricultural employees of Valley Pride, Inc. ("VPI"), a farm labor contractor ("FLC") for California Artichoke and Vegetable Growers Corp. dba Ocean Mist Farms ("Employer"). On December 14, 2012, Hernandez filed unfair labor practice ("ULP") charges against the Employer in case no. 2012-CE-044-VIS ("2012 case"), alleging that, on December 13, 2012, Employer unlawfully disciplined Hernandez, Boyzo Sr., and several other employees for engaging in protected concerted activity (by walking off the job due to very cold, wet weather which made working conditions too dangerous to continue). On April 8, 2013, Boyzo Sr. filed case no. 2013-CE-012-VIS ("2013 case") charging ULPs against the Employer for refusing him time off for a family emergency in March 2013 (which caused him to quit), and failing to rehire him in April 2013 – all allegedly done in retaliation for Boyzo Sr.'s participation in the December 2012 walkout, and for Boyzo Sr.'s perceived assistance to Hernandez in the filing of, and investigation into, the 2012 case.

ALJ Decision

On December 1, 2014, the Administrative Law Judge ("ALJ") issued a decision in this matter, in which he found that the workers who participated in the December 2012 walkout were engaged in protected concerted activity, as the walkout was motivated by legitimate health and safety concerns. The ALJ then found that the discipline taken against the workers after the walkout constituted a ULP in violation of section 1153(a) of the Agricultural Labor Relations Act ("Act"). The ALJ further found that the Employer violated section 1153(a) by refusing to grant Boyzo Sr. his requested time off, and by failing to rehire him, as such refusals were retaliatory. The ALJ rejected the claim of a section 1153(d) violation in the 2013 case, finding no evidence the Employer perceived that Boyzo Sr. was involved with the filing or prosecution of the 2012 case, or that such perception motivated any retaliation against him. The ALJ held that all the affected employees were owed makewhole for any and all economic losses suffered due to the ULPs. The ALJ rejected the Employer's argument that the 2013 case was time-barred by the statute of limitations, as the allegations therein were closely related to original charges timely filed by Boyzo Sr., arose out of the same protected concerted activity, and were a continuation of the sequence of events in Boyzo Sr.'s employment, involving the same supervisors. The ALJ further rejected the Employer's claim that the lack of declarations from the General Counsel's witnesses at hearing constituted a denial of due process. The ALJ lastly rejected the Employer's claim that VPI was a custom harvester,

and that VPI, rather than the Employer, should bear liability for any ULPs, finding that VPI was an FLC.

The Employer filed exceptions to the ALJ's decision, arguing that the Board should overturn all findings of violations. The General Counsel filed an exception arguing that the ALJ's decision should be affirmed, but that the Board should find that the ALJ was wrong in refusing to rule on her motion, made on the first day of the hearing, alia, to strike the Employer's affirmative defense to her proposed backpay specification, and to preclude inquiry into the immigration status of one of the affected employees. The ALJ refused to rule on this motion, bifurcated the hearing, and limited the hearing to the merits of the ULPs, leaving any ramifications about makewhole due to immigration status for the compliance phase of the matter.

Board Decision

The Board affirmed all the ALJ's findings and credibility determinations, and approved the decision to bifurcate the matter. The Board concluded that, given the evidence on record, and under recent caselaw, it would decline to rule on the General Counsel's exception. The Board held that although the immigration status of the particular affected employee might well affect his makewhole, his immigration status, and its effect, if any, would have to be determined during the compliance phase of this matter. The Board affirmed all of the ALJ's other findings and determinations, as well as the ALJ's order.

***