Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SABOR FARMS,	)	Case No. 2013-CE-047-SAL
	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
OSCAR CARBALLO,	)	
	)	42 ALRB No. 2
	)	
Charging Party.	)	(April 28, 2016)
	)	
	)	

DECISION AND ORDER

On October 8, 2015, Administrative Law Judge William G. Kocol (the "ALJ") issued a decision in the above-captioned case concluding that Respondent Sabor Farms ("Sabor") unlawfully terminated Charging Party Oscar Carballo and a second employee, Itzel Blanquel, because they engaged in concerted activities protected by the Agricultural Labor Relations Act (the "ALRA" or "Act"). Sabor filed exceptions to the ALJ's decision generally disputing the ALJ's findings and legal conclusions, and the General Counsel of the Agricultural Labor Relations Board ("ALRB" or "Board") filed a single exception to the remedy ordered by the ALJ.

The Board has considered the ALJ's decision and the record in light of the exceptions and briefs and has decided to affirm the ALJ's rulings, findings,[1] and conclusions[2] in full, and to issue the attached order.

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[1] Sabor has excepted to some of the ALJ's credibility findings. The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of all the relevant 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.) The Board has carefully examined the record, and finds no basis for disturbing the ALJ's credibility determinations.

[2] Sabor cites *Nash-De-Camp Co. v. ALRB* (1983) 146 Cal.App.3d 92 in arguing that the conduct of Mr. Carballo and Ms. Blanquel did not constitute protected concerted activity under the Act. The analysis of protected concerted activity in the *Nash* case, as this Board has previously noted, is inconsistent with the decisional precedent of the National Labor Relations Board ("NLRB") under the National Labor Relations Act ("NLRA"). (See *T.T. Miyasaka, Inc.* (1990) 16 ALRB No. 16; see also *Fresh & Easy Neighborhood Market, Inc.* (2014) 361 NLRB No. 12, at pp. 3-6 [employee who solicited other employees to support her individual sexual harassment complaint was engaged in protected concerted activity, and noting that "an employee may act partly from selfish motivations and still be engaged in concerted activity, even if she is the only immediate beneficiary of the solicitation"]; *Wells Dairy, Inc.* (1987) 287 NLRB 827, 831-832 ["Under the Act, two is always enough, and there is no requirement that those who join in a common expression of concern act in larger numbers"].) This Board is statutorily required to follow the applicable precedents of the NLRA. (Lab. Code, § 1148.) Furthermore, the *Nash* decision is inapplicable as it involved different facts. In *Nash*, it was found that an employee complained about an error in his paycheck and referenced a similar error in his wife's paycheck "only incidentally." This "mere inquiry of a possible bookkeeping error" was of a "personal character" and was, therefore, according to the court, not protected. In the instant case, when Mr. Carballo and Ms. Blanquel left work, they did so together and in concert. Their refusal to work clearly arose out of an issue involving working conditions. Their concerted activity was protected under the ALRA.

(Footnote continued....)

(Footnote continued)
[*Fresh & Easy, supra*, 361 NLRB No. 12, at p. 5; *Accel, Inc.* (2003) 339 NLRB 1052 (Assembly line workers' walk-out to protest denial of a scheduled rest break was "plainly related to their terms and conditions of employment."].) Therefore, the rationale of the *Nash* decision does not apply to the instant case.

Chairman Gould concurs, noting that there are some cases interpreting the NLRA which have circumscribed employee protected concerted activity rights in other circumstances. (See Gould, *Recent Developments under the National Labor Relations Act: the Board and the Circuit Courts* (1981) 14 U.C. Davis L.Rev. 497; Cox, *The Right to Engage in Concerted Activities* (1951) 26 Ind. L.J. 319.) He would reject the reasoning of a number of these cases discussed in the aforementioned articles which limit employee rights as well as that contained in *Nash*. While there are no cases construing the Board's authority not to acquiesce in a District Court of Appeal's reversal of this Board's statutory interpretation and it would likely be futile not to follow the opinion in *Nash* if the *Nash* facts arose in the *Nash* district anew, Chairman Gould is of the opinion that a rule of acquiescence that obliges the Board to follow the opinion of a single court of appeal is inconsistent with the development of state-wide labor law, which is the role provided by the Legislature to this Board. Like the national Board, this Board has been entrusted to create and develop a coherent labor relations policy. (See, e.g., *San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 242 ["Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience."].) This statutory task can only be frustrated if the decision of a single court of appeal can alter or even reverse the course of the Board's doctrinal development for the entire state of California. Unlike the national Board, which, because it paints on a national canvas, can continue to develop doctrine despite suffering a contrary decision in a single circuit, *Acme Indus. Police*, 58 N.L.R.B. 1342, 1344-45 (1944); Samuel Estreicher and Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, (1989) 98 Yale L.J. 679, 705-712, for this Board to be bound by the decision of a single court of appeal opinion would produce the result that only aggrieved parties can ever trigger the kind of conflict in courts of appeal decisions which likely trigger Supreme Court review. To put it more graphically, respondents who are aggrieved by a Board order can continuously challenge Board precedent in every district (other than a district in which Board doctrine has already been upheld) until the Supreme Court of California speaks. On the other hand the Board, following its single opportunity to challenge an adverse ruling before the Supreme Court, is frozen and unable to seek enforcement of its expert judgment even though the Supreme Court may have denied review for reasons unrelated to the merits of the case (Cal Rules of Court Rule 8.500) and when the surest path to review, a split in the districts (Cal. Rules of Court, rule 8.500 (b)(1), has been foreclosed to it by a rule of acquiescence. This can hardly be consistent

(Footnote continued....)

ORDER

The Agricultural Labor Relations Board adopts the recommended order of the administrative law judge as stated in the October 8, 2015 Decision of the Administrative Law Judge and orders that the Respondent, Sabor Farms, its officers, agents, successors, and assigns, shall take the actions set forth in the order.

DATED: April 28, 2016

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

(Footnote continued)
with the Board's role as an expert independent administrative agency described in *Garmon.*

CASE SUMMARY

SABOR FARMS
(Oscar Carballo)

42 ALRB No. 2
Case No. 2013-CE-047-SAL

Background

On October 8, 2015, Administrative Law Judge William G. Kocol (the "ALJ") issued a decision concerning unfair labor practice allegations that Respondent Sabor Farms ("Sabor") terminated two employees for engaging in protected concerted activities in violation of section 1153(a) of the Agricultural Labor Relations Act (the "ALRA" or "Act"). The ALJ found that, under Sabor's normal assignment rotation system, the employees should have been assigned to work in the rear of Sabor's cilantro harvesting machine. However, a foreman directed the employees to work in front of the machine, an assignment that was appreciably more difficult than working behind the machine. The ALJ found that, after protesting that it was not their turn to work in front of the machine, the employees refused to perform the assignment and left work. The next day, Sabor informed the employees that they were being terminated for job abandonment. The ALJ found that the employees' conduct was concerted activity protected by the ALRA and that Sabor's termination of the employees on the basis of that conduct violated the Act. Sabor filed exceptions to the ALJ's decision. The General Counsel excepted only to the ALJ's decision not to order supervisor training as a remedy.

Board Decision

The Agricultural Labor Relations Board (the "ALRB" or "Board") affirmed the ALJ's rulings, findings, and conclusions in full and adopted the ALJ's recommended order.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SABOR FARMS,	)	Case No. 2013-CE-047-SAL
	)	
Respondent,	)	
	)	
and	)	
	)	
OSCAR CARBALLO,	)	
	)	
Charging Party.	)	

Appearances:

Anthony Raimondo
Jasmine Sham
Raimondo & Associates
Fresno, California
For Respondent

Franchesca Herrera
Jimmy Macias
Michael Marsh
Salinas ALRB Regional Office
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. I heard this case on August 18-19, 2015, in Salinas, California. The complaint alleges that Sabor Farms (herein Sabor) discharged Oscar Carballo and Itzel Blanquel because they engaged in protected concerted activities. Sabor filed an amended answer that, when read in conjunction with the formal papers, admits the allegations in the complaint concerning the filing and service of the charge, that Carballo and Blanquel were employees of Sabor, Sabor is an agricultural employer, Foothill Packing, Inc. (herein Foothill) supplies Sabor with agricultural employees, Juan Gonzalez was a supervisor of Sabor through Foothill, and that Marco Ramos was a former supervisor of Sabor through Foothill. Sabor denied that Diego Martinez was a foreman for Sabor through Foothill. Sabor also denied some factual allegations and admitted others. It denies that it had unlawfully terminated Carballo and Blanquel.

FINDINGS OF FACT AND LEGAL ANALYSIS

I. Summary of the Case

As indicated, the complaint alleges that Sabor fired Carballo and Blanquel because of their protected concerted activity. Carballo and Blanquel complained about having to work in front of a harvesting machine out of the normal rotation. Working in front of the machine is more difficult than working elsewhere around the harvesting machine. Carballo and Blanquel then refused to work at the front of machine and attempted to contact their supervisor to protest the assignment. Sabor then terminated

their employment. The General Counsel contends that refusal to perform work was a work stoppage protected under *NLRB v. Washington Aluminum* (1962) 370 U.S. 9.

II. Facts

A. Harvesting Process

Sabor grows and harvests parsley, cilantro and other products. In September 2013, Sabor was harvesting its cilantro crop. In doing so, Sabor uses a big harvesting machine. When viewed from above, the core of the machine is rectangular in shape and sits on wheels. Extending out from the side of the core in a horizontal fashion on each side are long conveyer belts. Workers work behind the conveyor belts harvesting the cilantro, seven workers behind each of the two conveyer belts. The workers work in pairs and Carballo and Blanquel were one such pair. The workers work on their knees and crawl forward as the harvesting machine moves slowly forward. The workers use their left hand to gather a bunch of cilantro and then use a sharp knife with their right hand to cut the bunch of cilantro. They then lay down the knife, tie the bundle of cilantro and toss the bundle on the conveyer belt. The conveyor belts then carry the cilantro to packers who then pack it.

In addition to the two long horizontal conveyor belts described above, there are two shorter conveyer belts that extend vertically from the front of the harvesting machine. Two workers work between those two belts and two more work on the side of the belts, one on each side. They harvest the cilantro in the same fashion as previously described. Working in front of the harvesting machine is appreciably more difficult than working in the back. For one thing the area in the back of the machine is shaded whereas

the area in front is not. This, of course, causes the workers in front to get hotter and feel less comfortable than those in the back. In addition, supplies of water are kept nearer to the rear of the harvesting machine. This makes it harder for the workers in front to get the water and remain hydrated. Still another difference is that workers in the back are able to follow the machine to some degree at that own pace, whereas the workers directly in front of the harvesting machine are compelled to work at a pace that assures that the machine does not bump them from behind. Indeed, there are several emergency buttons available to workers at the front of the machine. When those buttons are pushed, the harvesting machine stops. Also, workers on the front of the machine occasionally bump into the vertical conveyor belts; this may cause bruising and small cuts. Finally, the workers behind the machine toss the harvested cilantro in a forward motion onto the conveyer belt. Workers in front toss the cilantro to the side; this is perceived to be more difficult. And while cuts may be a fact of life for workers who handle knives, the additional difficulties for workers working in front of the harvesting machine results in more frequent cuts for those workers. For these reasons workers prefer to work behind rather than in front of the harvesting machine.

Sabor uses a rotation system to assure that the workers share the additional burdens of working in front. The rotation system keeps the pair of workers together with their work partner. Stated differently, the workers rotate in pairs. A pair starts to the far

left behind the horizontal conveyor belt.[1] The next day the pair moves to the right and so on until there is only one space to the right of the pair. At that point one person of the pair moves to the right behind the horizontal conveyor belt and the other person moves up to the front of the machine to the left of the vertical conveyor belt. The next day the pair works between the vertical conveyor belts in front of the machine. The following day one person moves to the right of the vertical conveyor belts in front of the machine while the other person drops back to behind the horizontal conveyor belt in the back of the machine. Thereafter, the couple continues to move to the right behind the machine until they reach the end and start all over on the far left.

B. Terminations

On September 25, 2013,[2] Carballo and Blanquel reported for work. After the customary pre-work exercises they placed themselves in the positions behind the harvesting machine in normal rotation order; they had just completed their normal rotation through the positions in front of the harvesting machine. However, another pair of workers did not show up for work. So Foreman Diego Martinez asked Carballo and Blanquel to work in those positions, one of which was in front of the machine. Carballo and Blanquel did as requested and worked in those position, Carballo in the front of and Blanquel behind the harvesting machine.

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[1] G.C. Ex. # 1 is a drawing of the harvesting machine with the placement of workers around it.

[2] All dates are in 2013 unless otherwise indicated.

The next day, September 26, Carballo and Blanquel placed themselves back in rotation behind the harvesting machine and began working. After working there a few minutes Foreman Martinez arrived and directed Carballo and Blanquel to work in the center positions in the front of the harvesting machine. This time, however, Carballo protested "Why should we go there? It's not our turn." Martinez replied that the rotation would continue that way. Carballo replied that they weren't supposed to be working in those center positions and that Martinez should put the persons who are supposed to be there in the center positions. Martinez then said that Carballo and Blanquel could either work in front of the machine or they could leave the field. Carballo said that they wanted to speak to a supervisor. Martinez turned around and left the area in his station wagon. Carballo and Blanquel waited for about 20-30 minutes in the area where the workers had parked their cars, about 100 meters from harvesting machine. No supervisor arrived so they got in their car to go home. On their way they encountered Supervisor Juan Gonzalez driving his vehicle. They honked the horn in an effort to get Gonzalez to stop, but he continued on his way. Carballo and Martinez continued home. At 8 a.m. Carballo went to Foothill's office and spoke to Ariana L. Hernandez-Regalado, who works in Foothill's human resources department. Carballo told her what had happened earlier that day.

On September 27 Carballo and Blanquel arrived to work at the regular time and were prepared to sign in. However, Foreman Martinez instructed them not to sign in and directed them to speak with Supervisor Marco Ramos. Ramos, in turn, told them that

they could not work because they had abandoned the work the previous day. Carballo explained that they had not abandoned the work but instead they were told by Foreman Martinez to leave. But Ramos was not swayed and again said that they had abandoned the work. Carballo and Blanquel then left. A termination notice completed by Foreman Martinez, dated September 26, indicates that Carballo and Blanquel were discharged and reads "Reason for Discharge: Voluntarily left work. Resigned. Abandonment of the job and left before signing."

C. Credibility Resolution

The facts that describe the rotation system of workers around the harvesting machine are based on a composite of the credible testimony of Carballo, Blanquel, Guillermina Robles Hernandez, Felipe Robles and others. Except for a few instances of momentary confusion, those facts are uncontested. The facts concerning the additional difficulties workers experience when working in front of the harvesting machine are based on the testimony of these same witnesses. Indeed, Juan Gonzalez Morales, who works as a supervisor for Sabor and was called as a witness for Sabor, admitted that the rotation system was needed because workers at the front of the machine "get tired easier." I have considered the testimony of Foreman Diego Martinez. He testified that there is no difference in the "work" performed by the cilantro harvesters and that the "work" is not more difficult in any of the positions around the machine. He claimed that the reason for the rotation was so that workers could rotate into the packer positions so that they can rest their knees. His explanation as to why the workers had to rotate

between the front and back of the machine was that it "has to be even." I do not credit this testimony. Martinez's demeanor was entirely unconvincing. His testimony seemed internally contradictory. And his testimony in this regard is uncorroborated. Finally, as explained below, other parts of his testimony in context were simply unbelievable. I note, however, there is no reliable evidence upon which I can make a finding on specifically how many more lacerations occurred while working in front of the machine than in the back. At one point Carballo testified that he might cut himself three times while working in front of the machine for four days. I conclude that this testimony is exaggerated and do not credit it. Likewise I do not credit the list of lacerations produced by Sabor. While Hernandez-Regalado, who works in human resources and who authenticated the list, appeared to sincerely believe the list contained all lacerations experienced by the cilantro harvesters during that period of time, I conclude that it is only a listed of *reported* cuts and that minor cuts are not reported. I base this conclusion on the admission of Juan Gonzalez Morales who works as a supervisor for Sabor. His duties include the production, quality, and harvesting of cilantro. At one point Gonzalez admitted that when a worker cuts himself the worker reports it to the foreman of the crew who then reports it to him; only if it is something "very serious" do they then they report it to human resources.

The facts concerning September 25, the first day that Carballo and Blanquel worked out of rotation in the front of the harvesting machine, are based on the credible and unrebutted testimony of Carballo and Blanquel. The facts concerning the positions worked by Carballo and Blanquel on the prior days are based on a composite of the

testimony of Blanquel and Carballo as corroborated by Felipe Robles. In doing so I considered the fact that on cross-examination Carballo completely contradicted his direct testimony concerning where he worked the days before. However, based on my observation of his demeanor, particularly when I questioned him at that time, I conclude that Carballo was momentarily confused and had lost his train of thought. I have also considered the time and attendance records introduced by Sabor. Those records appear to show that Carballo did not work for two consecutive days in the days prior September 25. But Sabor did not offer the time records of Blanquel and I infer that it did not do so because they would have corroborated her testimony to some degree. I further infer that it is highly unlikely she would appear at work without her work partner. In any event, I credit the testimony of the witnesses over Carballo's time and attendance records.

The facts the next day, September 26, are based on the testimony of Carballo and Blanquel. Both impressed me as doing their best to accurately relate these facts without omission or embellishment. Moreover, Guillermina Robles Hernandez and Felipe Robles corroborated their testimony. I have again considered the testimony of Foreman Diego Martinez. Martinez testified that on September 26 Carballo said that he and Blanquel would not work in front of the machine. According to Martinez, Carballo did not explain why they would not work there and again according to Martinez he did not reply to Carballo; Carballo and Blanquel then left the field. It strikes me as unlikely that Carballo and Blanquel would simply refuse to work in the front of the harvesting machine without giving an explanation, especially given the fact that the day before they had worked up front out of rotation. Then Martinez claims he called his superior and

explained that "there are two persons that don't want to go up front" and his superior said "to tell them to wait a short period of time. They did not wait. They left." Yet in a report made of the incident Martinez made no mention of his superior telling him to have Carballo and Blanquel wait until he got there. I have also considered the testimony of Maria Martinez Becerra; she worked with Carballo and Blanquel harvesting cilantro in 2013. She claimed that on September 26 Carballo took what should have been her position behind the harvesting machine. She then complained to the foreman who then told Carballo to move to the front. She then heard Carballo tell Blanquel that they were leaving and Blanquel reluctantly left with Carballo. I do not credit this uncorroborated testimony. Martinez' demeanor was unconvincing and based upon the record as a whole it seems very unlikely that the facts were as simple as she portrayed them to be. Moreover, this testimony was contradicted by Foreman Diego Martinez, who admitted that no workers complained that Carballo and Blanquel were working out of rotation that day. I have also considered the testimony of Marco Antonio Ramos who worked as a supervisor in 2013 for Foothill. He testified that he received a call from Diego Martinez who said that Carballo did not want to work in the front position and had abandoned his job and left the field. Ramos instructed Martinez to inform Carballo to wait there, that Ramos would come to the area in about ten minutes. But when Ramos arrived, Carballo had already left. Ramos' testimony strikes me as credible, but of course he has no direct knowledge of what the events of September 26 and there is no credible evidence that Foreman Diego Martinez relayed the request for Carballo to remain on the site until

Ramos arrived. To the contrary, it appears that Carballo and Blanquel had left the field and were waiting in the parking area for a supervisor to arrive.

I have also considered the testimony of Ariana L. Hernandez-Regalado, who works in Foothill's human resources department. Hernandez-Regalado testified that Carballo came into the office and asked to speak to someone. He complained to Hernandez-Regalado that he wasn't happy with harvesting in front of the machine, he did not want to do so and he had left the jobsite. According to Hernandez-Regalado, Carballo said that he "had been harvesting the day before and did not want to rotate. The foreman was rotating the employees and he did not want to rotate into a position." But it strikes me as unlikely that Carballo would come to the human resources department and complain about being part of the regular rotation. I do not credit this testimony. Hernandez-Regalado continued, explaining that she told Carballo that what he did would be considered job abandonment, and that he had refused to work where he was being assigned to work and he had left the field. According to Hernandez-Regalado, Carballo replied that "he understood that he left the field, that he had abandoned the job." Again, I think it unlikely that Carballo would make a separate trip to the human resources department to do no more than admit he quit his job. A somewhat more accurate version is recounted in the report completed by Hernandez-Regalado shortly after Carballo's visit. In that report Hernandez-Regalado indicated that Carballo had indeed complained about again having to work in front again the day after he had agreed to work in front out of rotation.

III. Legal Analysis

I apply *Meyers Industries, Inc.* (1984) 268 NLRB 493, remanded *Prill v. NLRB* (D.C. Cir. 1985) 755 F. 2d 955 and reaffirmed *Meyers Industries, Inc.* (1986) 281 NLRB 882, to determine whether Blanquel and Carballo were unlawful fired. In general, to find an employee's activity to be "concerted," it must be engaged in, with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Agricultural Labor Relations Act (Act), and the discharge was motivated by the employee's protected concerted activity. I address each of these issues in turn.

First, the activity at issue was clearly concerted; Blanquel and Carballo, as a working team, protested and then refused to perform their latest assignment to the front of the machine. In its brief Sabor argues that the conduct was not concerted because Blanquel was not an active participant in the protest but was instead merely an obedient spouse. I reject that contention because it is unsupported by credible evidence. To the contrary, I conclude Blanquel knew of the nature of the protest and willingly participated in the refusal to perform the work at the front of the machine. Sabor obviously knew of the concerted nature of the protest. It knew that Blanquel and Carballo, a working team, together first protested and then together refused to perform the assignment.

I next conclude that their activity in refusing to perform the assignment was protected under the Act. It involved a term and condition of employment that they perceived to be unfairly applied to them; their being required to perform the more difficult task of working in the front of the harvesting machine and outside the normal rotation. On point are *NLRB v. Washington Aluminum, supra,* 370 U.S. 9, and *Ocean Mist Farms* (2015) 41 ALRB No. 2, at pages 19-20 (pending appeal). The work stoppage was nonviolent, not in breach of any contract, and Blanquel and Carballo conducted themselves in an appropriate manner. Sabor argues:

> The right to strike is not the right to sporadically walk off the job with impunity whenever the employee does not like his work assignment.

I agree. But I emphasize that this is *not* a case where employees simply refused to perform a normal function of their job because they did not like the task; a different conclusion might result in such a case. Remember, Carballo and Blanquel did not refuse to perform their normal rotation in front of the harvesting machine. To the contrary they had just completed that normal rotation. Nor did they refuse to occasionally perform work up front out of rotation; they agreed to do so the day after they had completed their normal rotation up front. It was only after what would have been their fifth consecutive workday up front did they say enough was enough. Under these circumstances that Act protects employees who concertedly protest this perceived unfair

treatment. Citing *Yale University* (1999) 330 NLRB 246, Sabor argues that the work stoppage was not protected because it was a partial strike. In that case the National Labor Relations Board (NLRB) held:

> We agree with the judge that the TFs' strike was partial, and, thus, unprotected by the Act. The judge found that the grade strike began on December 7, when the GESO membership voted to conduct the strike, or, at the latest, on December 13, when TFs began to refuse directives to turn in grades or materials necessary to compute grades. Between December 7, 1995, and January 2, 1996, most teaching fellows continued to perform job-related duties, including meeting discussion sessions, proctoring exams, and grading student materials. Even after the original January 2, 1996 grade-submission deadline, the date on which the General Counsel contends the strike began and TFs ceased working, some TFs "were prepared to write, and apparently wrote, letters of evaluations and recommendation for their students," which the judge found to be a "regular, if not required, aspect of their work." Clearly, as the judge concluded, from December 7 (or, at the latest, December 13) and continuing beyond January 2, 1996, the TFs were both working and striking. This, the judge found, constituted a classic partial strike, which lies outside the protection of Section 7 of the Act. See *Valley City Furniture Co.*, 110 NLRB 1589, 1594–1595 (1954), enfd. 230 F.2d 947 (6th Cir. 1956). The judge also based his partial strike conclusion on the testimony of several TFs, as well as a stipulation by the General Counsel, that the intent of the grade strike was solely to withhold grades for the fall 1995 semester and was not to withhold teaching services for the spring 1996 semester. Based on this evidence, the judge concluded that had the grade strike continued into the spring semester, the TFs planned to teach, and probably would have taught, in that semester while still withholding grades for the fall semester. This, too, the judge found, was incompatible with a full strike, and thus constituted conduct outside of the protection of the Act. We agree with the judge's analysis of the record and his legal conclusion derived therefrom. Based on our review, we believe the judge reasonably determined from the facts developed during the General Counsel's case-in-chief that the grade strike commenced, at the latest, on December 13, when TFs began withholding papers and test materials. Further, the judge correctly found that after December 13 the TFs continued to perform other

> duties, such as meeting with students, grading materials, writing letters of evaluation, and preparing for the next term's classes. Thus, as the judge found, the TFs "sought to bring about a condition that would be neither strike nor work." *Valley City*, 110 NLRB at 1595. We also agree with the judge that the TFs planned to continue withholding the fall 1995 grades even after the spring 1996 semester began. Since the TFs planned to otherwise perform work in the spring of 1996, they were planning to work and strike at the same time.

(*Id.*, at p. 247.) In that case it is clear that the employees sought to partially withhold the services while continuing to perform other duties while expecting to be paid. Here, Blanquel and Carballo did not withhold only some of their services while continuing to perform others. They simply refused to perform the work at the front of harvesting machine because they felt, based on objective factors, that the assignment was unfair. Finally, I have concluded above that Carballo and Blanquel were terminated because they engaged in a protected work stoppage.[3]

As Sabor correctly points out, during the prehearing conference in this case it appeared that the General was contending that Carballo and Blanquel were fired for complaining about the assignment rather because of their refusal to work. I then specifically asked the General Counsel if he was contending that Carballo and Blanquel had engaged in a protected work stoppage. I allowed the General Counsel time to consider his response and consult privately with his superiors. The General Counsel then explicitly stated that he was *not* contending that those workers had engaged in a protected

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[3] Because this is not a mixed motive case, I do not apply *Wright Line* (1980) 251 NLRB 1083.

work stoppage. I then noted in my Prehearing Conference Order "The General Counsel revealed that the General Counsel was not contending that the two workers engaged in a protected work stoppage to protest their assignment." However, during the opening statements at the trial the General Counsel made just this argument and admitted that he was changing his legal theory. Although I acknowledged I had discretion to prohibit the General Counsel from making this argument and require him to adhere to the Prehearing Conference Order, I nonetheless allowed the General Counsel to proceed with his legal theory. Sabor now asks me to reconsider my ruling "since the General Counsel did not afford the Respondent ... their due process rights." I agree that the General Counsel appears to be unaware of the need for the Government to accord litigants due process. The General Counsel could have filed a motion before trial requesting to be relieved from its commitment under the Prehearing Conference Order. It could have at least notified Sabor prior to the hearing of what it would attempt to do at the trial. But in any event, Sabor has not shown that it was prejudiced by my ruling. In this regard at the trial I assured Sabor that:

> [A]t the close of the General Counsel's case ... if you want to break even for a matter of hours or a matter of days -- I know were [sic] supposed to go day-to-day – but if at the end of their case if you can tell me you really need time and we need to come back, because now you need to prepare another witness or get another witness or whatever it is, you tell me that. And I'm going to be inclined to grant that. And also, even during the presentation of the General Counsel's case if there's something that you think you need an additional time on, either to prepare for cross or if something comes up that you weren't ready for, tell me and we'll deal with that. And maybe we can only go so far. ... And let me know at any point whether you fell you're being prejudiced and I'll assess it.

Under these circumstances I conclude that Sabor has been accorded due process.

As indicated above, at one point the General Counsel appeared to argue that Carballo and Blanquel were fired because they complained about having to work up front and not because they refused to work there. However, the General Counsel does not make that argument in its brief. I conclude the General Counsel has abandoned this argument and I do not address it. At another point the General Counsel argued that the Blanquel and Carballo were protected in their refusal to work up front because working there repeatedly constituted an "abnormally dangerous" working condition. That argument too is not made in the General Counsel's brief. I conclude that this argument too has been abandoned. Finally, in complaint and thereafter the General Counsel requested a novel remedy: that Sabor's supervisors be required to undergoing a training session provided by the General Counsel concerning Sabor's obligations under the Act. When I pointed out that the NLRB does provide such a remedy, the General Counsel assured me that it would point out in his brief why the unique nature of agricultural labor requires that remedy. Again, however, the brief is silent on this matter. Under these circumstances I deny the request for any special remedies.

CONCLUSIONS OF LAW

By terminating the employment of Blanquel and Carballo, Sabor violated section 1153, subdivision (a) of the Act.

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ORDER

Pursuant to Labor Code section 1160.3, Respondent, Sabor Farms, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Discharging 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 discharge notices Oscar Carballo and Itzel Blanquel on or about September 27, 2013, and expunge such notices from their personnel files.

(b) Make whole Oscar Carballo and Itzel Blanquel, as a result of their unlawful terminations, 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 discharges. 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 September 27, 2013, 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, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any

questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(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 September 27, 2013, to date, 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.

DATED: October 8, 2015

William G. Kocol
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by discharging 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 discharge 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 Oscar Carballo and Itzel Blanquel immediate employment to their former positions, and will make them whole for any loss in wages and other economic benefits they suffered as the result of our unlawful conduct.

DATED: _____

SABOR 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 342 Pajaro Street, Salinas California. The telephone number is (831) 769-8031.

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

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On October 8, 2015, I served the within DECISION OF THE ADMINISTRATIVE LAW JUDGE on the parties in said action, by certified mail at Sacramento, California addressed as follows:

CERTIFIED MAIL

Anthony Raimondo
Jasmine Sham
Raimondo & Associates,
A Law Corporation
7080 N. Marks Ave., Ste. 117
Fresno, CA 93711
Fax: (559) 432-2242

Franchesca Herrera, Acting Regional Director
Jimmy Macias
Michael Marsh
Salinas ALRB Regional Office
342 Pajaro Street
Salinas, CA 93901
Fax: (831) 769-8039

HAND DELIVERED

Mark Woo-Sam
Acting General Counsel
ALRB
1325 J Street, Suite 1900-A
Sacramento, CA 95814

CERTIFIED MAIL

Oscar Carballo
914 Acosta Plaza, #73
Salinas, CA 93905

Executed on October 8, 2015, at Sacramento, California. I certify (or declare), under penalty of perjury that the foregoing is true and correct.

Leslie Soule

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE AND BY FACSIMILE AND CERTIFIED MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 J. Street, Suite 1900-B, Sacramento, California 95814.

On April 28, 2016, I served the **DECISION AND ORDER 42 ALRB No. 2** on the parties in said action, via facsimile at Sacramento, California addressed as follows:

VIA FACSIMILE, ELECTRONIC MAIL AND CERTIFIED MAIL

Anthony Raimondo
Gerardo V. Hernandez
Jasmine Shams
Raimondo & Associates
7080 N. Marks Avenue, Suite 117
Fresno, California 93711
fax: (559) 432-2242
apr@raimondoassociates.com
gvh@raimondoassociates.com
js@raimondoassociates.com

Franchesca Herrera
Michael I. Marsh
Jimmy Macias
Salinas ALRB Office
342 Pajaro Street
Salinas, California CA 93901-3423
fax: (831) 769-8039
fherrera@alrb.ca.gov
mmarsh@alrb.ca.gov
jmacias@alrb.ca.gov

***U.S. MAIL (Courtesy Copy)**
Oscar Carballo
914 Acosta Plaza, #73
Salinas, California 93905

HAND DELIVERED

Julia Montgomery
ALRB
Office of the General Counsel
1325 J Street, Suite 1900-A
Sacramento, California 95814
julia.montgomery@alrb.ca.gov

Executed on **April 28, 2016**, at Sacramento, California. I certify (or declare), under penalty of perjury that the foregoing is true and correct.

Sonia Louie