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STATEMENT OF THE CASE

Lopez filed a charge with the Agricultural Labor Relations Board (Board) in Case 2016-CE-032-SAL on August 24, 2016, alleging that Monterey Mushrooms, Inc., (Respondent) violated section 1153(a) of the Agricultural Labor Relations Act (Act) by preventing him from engaging in protected concerted activity. On December 29, 2017, the Regional Director of the Salinas Regional Office of the Board issued a complaint alleging that Respondent violated section 1153(a) of the Act by prohibiting Lopez from speaking at a crew meeting about terms and conditions of employment and by threatening Lopez not to engage in protected concerted activity. Respondent filed a timely answer denying any wrongdoing.

I took testimony in this case on June 5, 2018, in Salinas, California. Having considered the entire record including the testimony of the witnesses and the briefs filed by General Counsel and Respondent, I make the following:

FINDINGS OF FACT

Respondent grows and harvests mushrooms at its facility in Salinas, California. Respondent admitted that it is an agricultural employer within the meaning of the Act. Since at least 1981, Lopez has been employed as an agricultural employee of Respondent harvesting mushrooms. Lopez supervisor, at all times material herein, was Raul Aguilar (Aguilar). Respondent has admitted that Aguilar is a supervisor within the meaning of the Act, having the authority to direct and discipline employees under his supervision.

The record reflects that Respondent made changes to the equipment its employees used to access the mushroom beds for harvesting. Instead of standing on 2x4 lumber to pick mushrooms on three levels, for safety considerations, Respondent implemented a scaffold or “ladder” system to climb to the picking trays. This change was implement on June 23, 2016¹, in the building where Lopez and crew eight, to which he was assigned, were working.

¹ All dates refer to 2016, unless otherwise indicated.

1 At about 5:45 a.m. on June 23, Lopez testified the he and several members of
2 crew eight including Nana, Omar Ortiz, Rogelio Ortiz and Jose Luis Guerro, gathered
3 and inspected the new scaffold system in Room 501 at Respondent's facility and began
4 to discuss among themselves how this new equipment would impact their pay. The
5 employees agreed generally that the use of the scaffolds would slow down their rate of
6 harvest and thus negatively impact their wages since they were paid piece rate. While
7 the employees were discussing the new scaffolding, supervisor Aguilar entered Room
8 501. According to Lopez, Aguilar walked up to Lopez and told him that they had an
9 upcoming crew meeting and don't give any opinions because I know something about
10 your vocabulary. When Lopez asked if this was something personal, Aguilar said take
11 it any way you want or forget about it. Lopez denied Aguilar told him not to use bad
12 language but rather told him not to give an opinion at the crew meeting.

13 At the crew meeting about 15 minutes later managers and supervisors were
14 present along with about 25 members of crew eight. During the course of the meeting,
15 none of the employees mentioned above brought up the subject of how the new scaffold
16 would affect their rate of pay.

17 Rogelio Ortiz (Ortiz) was a mushroom picker assigned to Respondent's crew
18 eight on June 23. Ortiz corroborated Lopez' testimony that before work on June 23, he,
19 Lopez and several other employees discussed the new scaffolding in Room 501. Ortiz
20 testified that Aguilar approached Lopez and told him there would be a meeting and he
21 did not want Lopez speaking because you know what already happened to you. Ortiz
22 said Aguilar also told Lopez because of the way Lopez talked, he did not want him
23 speaking at the meeting.

24 Respondent argues that Ortiz should not be credited because he is friendly with
25 Lopez and because he denied Lopez used profanity at work, while Lopez himself
26 concedes he uses profanity. Respondent contends that Ortiz agreed that Aguilar warned
27 Lopez not to use bad words on June 23.

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1 While Ortiz admitted he was friendly with Lopez, other than driving him to
2 work, he denied socializing with Lopez. I find no evidence of bias on Ortiz' part.
3 Further while Ortiz candidly admitted Aguilar told Lopez not to use bad language, this
4 is in no way inconsistent with his testimony that Aguilar did not want Lopez speaking
5 at the meeting. I credit Ortiz' testimony.

6 Jose Luis Guerrero (Guerrero) was another mushroom harvester on
7 Respondent's crew eight on June 23. Guerrero said he was among the employees
8 discussing the new scaffolding before work in Room 501 and how this would affect
9 their pay. While the employees were talking, Aguilar came up to Lopez and said he did
10 not want that type of comment made because if they heard these type of words Lopez
11 could be fired. According to Guerrero, Aguilar said he did not want Lopez talking
12 about working conditions. Lopez replied that he did not agree, that he was in favor of
13 the coworkers having the right to speak about conditions and equipment.

14 Respondent contends that Guerrero was not present at work on June 23 and
15 therefore his testimony should not be credited. Guerrero testified that he came to work
16 on June 23 around 5:00 a.m. and reported to Respondent's Human Resources Office
17 because he was lead person that day. Respondent's Human Resources Manager Elsie
18 Morales testified that Respondent's time record (Respondent's exhibit 1) for June 23
19 reflects that Guerrero punched in at 6:02 a.m.

20 While the record reflects that Guerrero could not have been at work on June 23
21 at 5:00 a.m., there is no evidence to support the argument that Guerrero could not have
22 been at work shortly before 6:00 a.m. to hear the conversation between Lopez and
23 Aguilar. While Guerrero may have been mistaken in his belief about the time he
24 arrived at work on June 23, this does not warrant discrediting the remainder of his
25 testimony. I will credit Guerrero's testimony and that he was present at the pre work
26 conversation on June 23 between Lopez and other employees and between Lopez and
27 Aguilar.

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1 Jose Ruiz Carranza (Carranza) was another of Respondent's employees assigned
2 to crew eight on June 23. Carranza was among the employees discussing the new
3 scaffolding before work. Carranza testified that Lopez told the employees that the new
4 scaffolding would make things worse because they would cause the pickers to make
5 less money. Aguilar entered Room 501 while Lopez was speaking. Aguilar told Lopez
6 he did not want him to start talking about anything because he was talking about things
7 that would rile people up. Aguilar said there would be a meeting later about the
8 scaffolding and he did not want people riled up. Carranza admits that Aguilar also told
9 Lopez not to use bad language.

10 Respondent contends that Carranza corroborates Aguilar's version of events that
11 Aguilar told Lopez not to use bad words and that Carranza did not hear the entire
12 conversation.

13 Carranza honestly testified that he heard Lopez use profane language with co-
14 workers. That Aguilar may have told Lopez not to use bad language does not establish
15 that was all Aguilar said. I found Carranza to be an honest, straightforward witness
16 who testified without contradiction. I credit Carranza's testimony that Aguilar told
17 Lopez he did not want him to start talking about anything because he was talking about
18 things that would rile people up.

19 Raul Aguilar has been employed by Respondent for over 40 years and has been a
20 harvesting supervisor for 20 years. On June 23, he was the supervisor for crew eight in
21 Building 501. According to Aguilar, shortly before work began on June 23, he heard
22 Lopez telling other employees that these fucking things (scaffolds) aren't going to
23 work. According to Aguilar, he told Lopez they were going to have a meeting to train
24 you on the new scaffolding. If you say something, do it in a good manner. Lopez
25 replied no one will change me. Aguilar told Lopez to remember the problem he had
26 with Carrillo. Lopez said I can't say anything and then Aguilar said you can speak but
27 in a good way.

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1 I credit Lopez' testimony over that of Aguilar. Lopez' open admission that
2 Aguilar mentioned his vocabulary lends further credence to his version of the facts.
3 Moreover, Lopez' testimony is corroborated by Ortiz, Guerrero and Carranza who all
4 said Aguilar told Lopez not to speak about the scaffolding at the crew meeting. While
5 Aguilar may have admonished Lopez about his colorful language, the story does not
6 end there as he also did not want Lopez to disrupt the crew meeting and so told him not
7 to speak up about the scaffolding and how it might affect wages.

8 THE LAW

9 Section 1153(a)(1) of the Act provides that "[i]t shall be an unfair labor practice
10 for an agricultural employer to ... interfere with, restrain or coerce agricultural
11 employees in the exercise of the rights guaranteed in Section 1152."

12 Section 1152 of the Act grants workers the right to "engage in other concerted
13 activities for ... mutual aid or protection."

14 In general, to find an employee's activity to be "concerted," it must be
15 engaged in, with or on the authority of other employees, and not solely by and on
16 behalf of the employee himself. (*Meyers Industries, Inc.* (1984) 268 NLRB 493,
17 remanded *Prill v. NLRB* (D.C. Cir. 1985) 755 F. 2d 955 and reaffirmed *Meyers*
18 *Industries, Inc.* (1986) 281 NLRB 882.)

19 The Board, as set forth in in *Nagata Brothers Farms* (1979) 5 ALRB No.
20 39, page 2, has long held:

21 The test for a violation of Section 1153(a) of the Act, like that for
22 A violation of its counterpart Section 8(a)(1) of the National Labor
23 Relations Act, does not focus on the employer's knowledge of the
24 law, on the employer's motive, or on the actual effect of the
25 employer's action. It is well settled that:

26 Interference, restraint and coercion under Section
27 8(a)(1) of the [N.L.R.A.] does not turn on the
28 employer's motive or on whether the coercion
succeeded or failed. The test is whether the employer
engaged in conduct which, it may reasonably be said,
tends to interfere with the free exercise of employee

1 rights under the Act. Cooper Thermometer Co., 154
2 NLRB 502, 503 n. 2, 59 LRRM 1767 (1965); American
3 Freightways Co., 124 NLRB 146, 147, 44 LRRM 1302
4 (1959).

5 A supervisor's warning to an employee not to engage in protected activity
6 would reasonably tend to interfere with the free exercise of section 7 rights to
7 engage in protected concerted activity under the NLRA. (*Double D Construction*
8 *Group, Inc.*(2003) 339 NLRB 303; *Penn Tank Lines, Inc.* (2001) 336 NLRB
9 1066, 1068.)

10 THE ANALYSIS

11 When Lopez, Ortiz, Guerrero and Carranza gathered together at 6:00 a.m.
12 and discussed the new scaffolding and how it would affect their wages and other
13 conditions of employment, they were clearly engaged in protected concerted
14 activity within the meaning of the Act. Supervisor Aguilar heard the substance
15 of much of this conversation and made it a point to tell Lopez that he should not
16 mention the scaffolding or how it might affect wages at the upcoming crew
17 meeting. Aguilar's admonition to Lopez, in the presence of other employees,
18 was plainly designed to chill Respondent's employees Lopez, Ortiz, Guerrero
19 and Carranza in the exercise of their rights under section 1152 of the Act to
20 engage in protected concerted activity and violated section 1153(a) of the Act as
21 alleged in the complaint. (*Nagata Brothers Farms, supra*, 5 ALRB No. 39,
22 *Double D Construction Group, Inc., supra*, 339 NLRB 303; *Penn Tank Lines,*
23 *Inc., supra*, 336 NLRB 1066.)

24 CONCLUSIONS OF LAW

25 By prohibiting Francisco Lopez from discussing Respondent's new
26 scaffolding and how it might affect employee's terms and conditions of
27 employment, Respondent violated section 1153(a) of the Act.

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1 **ORDER**

2 Pursuant to Labor Code section 1160.3, Respondent, Monterey
3 Mushrooms, Inc., its officers, agents, labor contractors, successors and assigns
4 shall:

5 1. Cease and desist from:

6 (a) Prohibiting its employees from engaging in protected-concerted
7 activity protected under section 1152 of the Agricultural Labor Relations Act
8 (Act).

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

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

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

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

22 (c) Arrange for a representative of Respondent or a Board agent to
23 distribute and read the attached Notice, in all appropriate languages, to all
24 employees then employed, on company time and property, at time(s) and place(s)
25 to be determined by the Regional Director. Following the reading, the Board
26 agent shall be given the opportunity, outside the presence of supervisors and
27 management, to answer any 19 questions the employees may have concerning the
28 Notice or their rights under the Act. The Regional Director shall determine a

1 reasonable rate of compensation to be paid by Respondent to all non-hourly wage
2 employees in order to compensate them for time lost during the reading of the
3 Notice and the question-and-answer period.

4 (d) Mail copies of the attached Notice, in all appropriate languages,
5 within 30 days after the issuance of this Order. to all agricultural employees
6 employed by Respondent at any time during the period September 27, 2013, to
7 date, at their last known addresses.

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

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

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17 Dated: August 28, 2018

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John J. McCarrick
Administrative Law Judge, ALRB

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1 NOTICE TO AGRICULTURAL EMPLOYEES

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3 After investigating charges that were filed in the Salinas Regional Office
4 of the Agricultural Labor Relations Board (ALRB), the General Counsel of the
5 ALRB issued a complaint alleging that we had violated the law. After a hearing
6 at which all parties had an opportunity to present evidence, the ALRB found that
7 we had violated the Agricultural Labor Relations Act (Act) by prohibiting
8 employees from engaging in protected concerted activity. The ALRB has told us
9 to post and publish this Notice.

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

- 12
13 1. To organize yourselves.
14 2. To form, join or help a labor organization or bargaining representative~
15 3. To vote in a secret ballot election to decide whether you want a union to
16 represent you.
17 4. To bargain with your employer about your wages and working
18 conditions through a union chosen by a majority of the employees and
19 certified by the ALRB.
20 5. To act together with other workers to help and protect one another.
21 6. To decide not to do any of these things.

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23 Because you have these rights, we promise that:

24 WE WILL NOT prohibit you from engaging in protected concerted
25 activity.

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

DATED: _____

MONTEREY MUSHROOMS, INC. By:

(Representative) (Title)

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