

DECISION AND ORDER

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Respondent filed exceptions to the ALJ's decision with the Agricultural Labor Relations Board (the "ALRB" or "Board") contesting the violation found by the ALJ along with aspects of the ALJ's recommended remedy. The General Counsel of the ALRB also filed exceptions, which were limited to remedial issues. The Board has considered the record and the ALJ's decision in light of the exceptions and briefs filed by the parties and has decided to affirm the ALJ's rulings, findings, and conclusions as modified in this Decision and Order.¹

1. Background

Respondent grows and harvests mushrooms at its 280-acre Royal Oaks facility in Monterey County, California. In June 2016, Respondent was preparing to implement new mushroom harvesting equipment meant to address safety concerns with Respondent's older equipment. The new equipment was generally referred to as "scaffolds" or "ladders." Respondent had decided to implement the scaffolds first on

¹ Respondent takes exception to a number of the ALJ's credibility determinations. 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, except as stated in this decision, finds no basis for disturbing the ALJ's credibility determinations.

“Level 500” of its facility and the members of “Crew 8” were to be the first to use it.²

Accordingly, Respondent planned to hold a meeting on June 23, 2016 at 6:00 a.m. in “Room 501” where the members of Crew 8 would be introduced to the scaffolds.

By about 5:45 or 5:50 a.m., the members of Crew 8 were gathering in Room 501. Among them was Francisco Lopez. Mr. Lopez was concerned that the scaffolds would slow down the rate of mushroom picking, especially for shorter or smaller workers, and, because they were paid on a piece rate basis, this would result in lower wages. Mr. Lopez discussed these issues with several other employees in Room 501. According to the credited testimony, Mr. Lopez told those with whom he was speaking that “those ladders weren’t going to work for us, because we were going to lose time,” and that “the shorter people were screwed, because then they would have to get up on those ladders and step on the supports anyway.”

As Mr. Lopez and the others were talking, supervisor Raul Aguilar entered Room 501 and heard Mr. Lopez talking about the scaffolding. According to the testimony credited by the ALJ, Mr. Aguilar approached Mr. Lopez and stated that there was going to be a meeting and he did not want Mr. Lopez to “opine on anything” because he “knew something” about Mr. Lopez’ “vocabulary.”³ Mr. Aguilar reminded Mr. Lopez that he had been disciplined in the past and that Mr. Aguilar could issue him a

² Respondent’s facility is situated on the side of a valley and Respondent designates each “level” on the slope from “Level 100” at the bottom to “Level 700” at the top.

³ By referencing Lopez’ “vocabulary,” Mr. Aguilar was referring to Lopez’ alleged usage of profanity.

disciplinary action or terminate him. When Mr. Lopez objected and asked Mr. Aguilar what his problem was and whether it was “something personal,” Mr. Aguilar told Mr. Lopez to “calm down” and stated “you take it any way you want or just forget about it.” At this point, the scaffolding meeting was being convened and Mr. Aguilar walked away to join the meeting.

2. Discussion

a. Factual Findings and Credibility Issues Concerning the Conversation Between Mr. Aguilar and Mr. Lopez

Respondent takes exception to some of the ALJ’s factual findings and credibility determinations. The critical factual issue in this case is whether Mr. Aguilar instructed Mr. Lopez not to speak at the scaffolding meeting rather than, as Respondent contends, merely admonishing him not to use profanity during the meeting. The ALJ weighed the evidence on this issue and credited the account given by Mr. Lopez, citing the fact that Mr. Lopez candidly admitted that Mr. Aguilar did mention Mr. Lopez’ “vocabulary” during the conversation and the fact that Mr. Lopez’ account was corroborated by other witnesses. While Respondent argues that the ALJ “clearly ignored” cross-examination testimony and asserts that unspecified witnesses “changed their testimony on cross-examination and repeatedly contradicted each other,” not a single example or citation to the record is provided. In fact, while those witnesses recalled the specific words used by Mr. Aguilar differently from Mr. Lopez, and from each other, they were consistent on the overall content of what he told Mr. Lopez: that he was not to speak at the upcoming meeting.

Respondent claims that the ALJ should have discredited the testimony of Rogelio Ortiz due to Mr. Ortiz' friendship with Mr. Lopez and because Mr. Ortiz denied hearing Mr. Lopez use profanity at work while Mr. Lopez testified that he regularly did so. The ALJ found that Mr. Ortiz admitted "being friendly" with Mr. Lopez but that he denied socializing with him other than driving him to work. In fact, Mr. Ortiz testified that he and Mr. Lopez are "friends" and that they socialize at work, although not away from work. While we find that the ALJ partially mischaracterized Mr. Ortiz' testimony, we find nothing in the record that would require reversal of the ALJ's credibility determination.⁴ With respect to Mr. Lopez' use of profanity, Mr. Ortiz testified that he had only worked with Mr. Lopez for six months by the time of the June 23, 2016 incident. Thus, he may not have encountered Mr. Lopez' admitted use of profanity or Mr. Lopez may have chosen not to use profanity around Mr. Ortiz. In this latter respect, Mr. Lopez testified that he used profanity "with the ones that . . . I joke around with." Mr. Ortiz may not have been among that group. In sum, the ALJ did not regard this potential inconsistency to be grounds to discredit Mr. Ortiz' testimony and there is no basis to reverse the ALJ's conclusion in that regard.

⁴ Mr. Ortiz testified that he and Mr. Lopez discussed the case and that Mr. Lopez drove him to the hearing. However, having reviewed the testimony, we do not find any indication that Mr. Ortiz' testimony was rehearsed or coached. To the contrary, like all the other witnesses who testified about the conversation, Mr. Ortiz' testimony differed from that of Mr. Lopez concerning the specific details of the conversation with Mr. Aguilar. Furthermore, the ALJ, who observed Mr. Ortiz' live testimony, did not find any reason to discredit it.

One of Respondent's principal exceptions relates to the ALJ's decision to rely upon the testimony of Jose Luis Guerrero concerning the content of the conversation between Mr. Aguilar and Mr. Lopez. Respondent argues that Mr. Guerrero could not have been present in Room 501 at about 5:50 a.m. when the conversation occurred because Respondent's records show that he clocked in at 6:02 a.m. and, according to the testimony of Respondent's Human Resources Manager, he clocked in at the entrance to "Level 300," two levels removed from Level 500 and Room 501. It is possible that Mr. Guerrero neglected to clock in when he arrived and only did so later. However, Mr. Guerrero testified that he was also present when the scaffolding meeting was called to order at 6:00, meaning that he would have left the meeting either as it was commencing or after it began in order to clock in. Reconciling Mr. Guerrero's testimony with his clock-in time is particularly difficult if, as Respondent contends, he clocked in two levels away. Nevertheless, two other witnesses, Mr. Lopez and Jose Ruiz Carranca, testified that Mr. Guerrero was in Room 501 prior to the scaffolding meeting and Mr. Lopez not only remembered him being there but remembered seeing him setting up knives, gloves, and "tickets."⁵

Thus, there is conflicting evidence concerning Mr. Guerrero's movements on the morning of June 23, 2016. There was testimonial evidence that he was present in

⁵ Another witness, Rogelio Ortiz did not name Mr. Guerrero as being among those present while Mr. Aguilar testified that Mr. Guerrero was not present. However, all the witnesses agreed that Mr. Aguilar spoke only to Mr. Lopez and not to the other workers with whom Mr. Lopez had been talking. Thus, it is possible that Mr. Guerrero was present and Mr. Aguilar either did not notice him or forgot that he was there.

Room 501 before the scaffolding meeting, and, as the ALJ points out, the 6:02 a.m. clock-in time does not preclude him being present at that time. Nevertheless, scenarios that have Mr. Guerrero being present in Room 501 before the meeting, remaining there until the meeting was called to order, and then leaving to clock in are questionable, particularly if the clock-in occurred on Level 300. Ultimately, we find it unnecessary to resolve this issue. The ALJ's factual finding concerning the statements made by Mr. Aguilar is supported by the ALJ's credibility resolution in favor of Mr. Lopez, and the corroborating testimony of Mr. Ortiz and Jose Ruiz Carranca. We find that, even discounting Mr. Guerrero's additional corroborating testimony, the ALJ's factual finding is amply supported by the record. Accordingly, we decline to rely upon Mr. Guerrero's testimony concerning the issue of the content of the conversation between Mr. Aguilar and Mr. Lopez in reaching our conclusions herein.

b. Legal Issues Pertaining to Protected Concerted Activity and Interference Therewith

Respondent also takes issue with the ALJ's analysis of the legal issues in the case. Respondent argues that Mr. Lopez was not engaged in protected concerted activity when he was approached by Mr. Aguilar. However, the record is clear that, at the time that he was approached by Mr. Aguilar, Mr. Lopez was speaking to a group of fellow employees about a new harvesting system that they would shortly be expected to

use and the impact that the new system would have on employee wages.⁶ The ALJ correctly found that this was protected concerted activity. (*Troxel Co.* (1991) 305 NLRB 536, 539 [“Although each individual might have expressed their own opinion, just as they might in a union meeting, it was the conversation about working conditions which was concerted”]; *Automatic Screw Products Co, Inc.* (1992) 306 NLRB 1072, 1072 [employees’ discussion of their salaries is “an inherently concerted activity clearly protected by [the NLRA]”]. *Triana Industries, Inc.* (1979) 245 NLRB 1258, 1258 [“such discussion [of wages] may be necessary as a precursor to seeking union assistance and is clearly concerted activity”].) Furthermore, Mr. Aguilar’s instruction to Mr. Lopez sought to limit Mr. Lopez’ future conduct, namely speaking at the scaffolding meeting, conduct which would also constitute protected concerted activity. (*Anheuser-Busch, Inc.* (2001) 337 NLRB 3,11 [“employee questions and comments concerning working conditions raised at a group meeting by an employee clearly come within the definition of concerted activity”], quoting *Neff Perkins Co.* (1994) 315 NLRB 1229, 1229, fn. 1.)

Respondent further argues that it had a legitimate and substantial interest in enforcing its existing policy against the use of profanity in its workplace. Respondent cites *M.B. Zaninovich, Inc. v. ALRB* (1981) 114 Cal.App.3d 665, 679, fn. 5, in which the appellate court stated that an “important qualification” on the general rule against coercion of employees in the exercise of their rights under the Act “is whether the

⁶ There was also testimony from multiple witnesses that Mr. Lopez was not the only member of the group who spoke on this subject but, instead, multiple members of the group were speaking about the scaffolds.

employer conduct advances a substantial and legitimate company interest in plant safety, efficiency or discipline.” However, the basis of the ALJ’s conclusion that Respondent violated the Act was that Mr. Aguilar did not merely caution Mr. Lopez against using profanity but went further and instructed him not to speak at all. (*Anheuser-Busch, Inc.*, *supra*, 337 NLRB 3, 10 [employer violated NLRA when it told employee who had, contrary to instructions, spoken at a captive audience meeting, “If you speak again at a communications meeting, you will be fired”].)

Respondent takes exception to the ALJ’s factual finding that no employees spoke at the scaffolding meeting, arguing that, not only did employees speak, but they asked questions about the very topics about which Mr. Lopez had been speaking prior to the meeting. We note that both Mr. Lopez, whose testimony the ALJ generally credited, and Carlos Gutierrez, the supervisor who led the meeting, testified that employees spoke during the meeting and asked questions concerning pay rates. Thus, the weight of the evidence is that employees did speak at the meeting. Nevertheless, as Respondent concedes, the legal test for unlawful employee coercion is whether the employer’s conduct would tend to coerce a reasonable employee in the exercise of his or her rights. (*S&J Ranch, Inc.* (1992) 18 ALRB No. 2 p. 9 [“an objective test is applied to determine if the employer’s conduct would reasonably tend to interfere with protected rights”].) Whether particular employees subjectively felt coerced is not a relevant consideration, nor is the employer’s subjective intent. (*Ibid.*) Therefore, the fact that other employees felt free to speak at the scaffolding meeting is

not relevant.⁷ We agree with the ALJ that Mr. Aguilar's conduct would coerce a reasonable employee in the exercise of the statutory rights protected by the Act.

c. Remedial Issues

Having found that Respondent violated Labor Code section 1153, subdivision (a)(1), the ALJ set forth a recommended remedy, including the Board's standard remedies calling for the dissemination of a "Notice to Agricultural Employees" ("Notice") via posting, mailing, reading, and provision to new hires. Both Respondent and the General Counsel took exception to aspects of the recommended remedy. We adopt the ALJ's recommended remedies as modified herein.

Respondent argues that the noticing remedy is overbroad. It argues that posting, mailing and reading of the Notice should be limited to the members of Crew 8. However, Respondent cites no authority for the proposition that the noticing remedies should be limited to the members of the crew in which the unlawful conduct took place. (*Vincent B. Zaninovich & Sons, Inc.* (1999) 25 ALRB No. 4 p. 2, fn. 2 ["As this Board's adherence to standard remedies has served to further the purposes and policies of the Act, it is incumbent upon respondents to demonstrate compelling reasons for departing from such remedies"].) Moreover, workers' knowledge of employee misconduct typically is not limited to the crew directly affected by the employer's misconduct. (*M. Caratan, Inc.* (1980) 6 ALRB No. 14 p. 5

⁷ While the subjective reactions of employees to unlawful conduct are not relevant, we do note that Mr. Lopez testified that he believed that he was prohibited from speaking at the meeting and did not, in fact, speak at it. Additionally, there was no evidence that any of the employees who heard Mr. Aguilar's statement spoke at the meeting.

[agricultural workers generally speak to one another about an employer's unlawful conduct].) Respondent cites *M.B. Zaninovich, Inc. v. ALRB*, *supra*, 114 Cal.App.3d 665 but the rationale of that case is inapplicable. *M.B. Zaninovich, Inc. v. ALRB* involved a violation that the reviewing court found to be "isolated and technical" and, because the unlawful conduct involved a refusal to rehire a group of three former employees, which occurred "in the privacy of a supervisor's office," there was no evidence that word of the violation would have spread to other employees.⁸ Here, the violation was not "technical" but implicated the substantial right of employees to communicate their concerns regarding wages and working conditions to other employees. Furthermore, the violation occurred not in private but in a room where an entire crew was assembling for a meeting. There was also evidence that the members of Crew 8 frequently work alongside other crews.⁹

Thus, we find that the noticing limitation advocated by Respondent is not appropriate. However, there is evidence in the record that Respondent has operations in California in locations other than the Royal Oaks facility as well as operations outside of California. The record is silent concerning whether there are agricultural employees employed

⁸ The appellate court itself emphasized the narrowness of its holding, stating that in "the typical case where the employer's illegal conduct is visible to others" the Board's standard noticing remedies will be held appropriate. (*M.B. Zaninovich, Inc. v. ALRB*, *supra*, 114 Cal.App.3d 665, 689-690; see also *Vincent B. Zaninovich & Sons* (2008) 34 ALRB No. 3 [noting the "peculiar facts" of the appellate case]; *Nish Noroian Farms v. ALRB* (1984) 35 Cal.3d 726 distinguishing *M.B. Zaninovich, Inc. v. ALRB* and holding that where employer's violation was known to employees, it was neither isolated nor technical].)

⁹ Mr. Lopez, for example, testified that, on June 23, 2016, he began the day working with Crew 8, next worked alongside Crew 7, and later Crew 5.

at these other California operations and, if so, how many or whether there is any interchange between those facilities and the Royal Oaks facility. The applicable certification, however, limits the bargaining unit to agricultural employees at the Royal Oaks facility. In light of these circumstances, and the particular facts of this case, we find it appropriate to apply the noticing remedies to the members of the Royal Oaks bargaining unit. (*D'Arrigo Co. of California* (1987) 13 ALRB No. 1; *J.R. Norton Co.* (1987) 13 ALRB No. 21.)

Respondent also objects to the portion of the ALJ's recommended remedy that provides that the Regional Director is to determine a reasonable rate of compensation for non-hourly wage employees (i.e., piece-rate employees) to compensate them for time lost during the notice-reading and following question-and-answer session. Respondent argues that there is a rate established in Respondent's collective bargaining agreement for time spent in meetings. However, the Board's remedy is designed to compensate employees for time spent during the noticing session when they would otherwise have been working. (*Peter D. Solomon and Joseph R. Solomon dba Cattle Valley Farms/Transco Land and Cattle Co.* (1983) 9 ALRB No. 65 p.19 [Board ordered regional director to determine reasonable rate of compensation paid to all non-hourly wage employees to compensate for lost time at notice reading and question/answer session.] To the extent that the meeting rate would be lower than employees' rate of pay while working, it would not be an appropriate compensatory measure. We affirm this aspect of the ALJ's recommended remedy.

Respondent points out that the ALJ's recommended remedy would require Respondent to mail copies of the Notice to its agricultural employees employed "at any time

during the period September 27, 2013, to date.” We agree that the mailing period is erroneous. The Board standard remedy includes mailing of notices to agricultural employees employed during a one-year period commencing on the date of the violation. (*P&M Vanderpoel Dairy* (2014) 40 ALRB No. 8, p. 24; *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11, p. 28; *Vincent B. Zaninovich & Sons, Inc., supra*, 25 ALRB No. 4, p. 2, fn. 2.) Accordingly, we modify the ALJ’s recommended remedy to require mailing to bargaining unit employees employed at any time during the period beginning June 23, 2016, and ending June 22, 2017.

The ALJ’s recommended remedy limits the employee question-and-answer session to follow the notice-reading such that the Board agent is to answer “any 19 questions” that employees may have. The General Counsel excepts to this limitation. The limitation to 19 questions appears to be a typographical error and we shall modify the recommended remedy accordingly. (See *Peter D. Solomon and Joseph R. Solomon dba Cattle Valley Farms/Transco Land and Cattle Co., supra*, 9 ALRB No. 65, pp. 13-14 [length of employee question-and-answer session “is best determined in each instance by the Regional Director who is in the best position to make an informed decision”]; *Jasmine Vineyards, Inc. v. ALRB* (1980) 113 Cal.App.3d 968, 983 [“we should presume that the Board representatives will be impartial in their explanation of employee rights and will not utilize any more company time than is reasonably necessary to answer employee questions”].)

Finally, the General Counsel excepts to the ALJ’s denial of a supervisor training remedy. We find that, under the circumstances of this case, such a remedy is not warranted and affirm this aspect of the recommended remedy. (*United Farm Workers of America*

(*Lopez*) (2018) 44 ALRB No. 6; *United Farm Workers of America (Olvera)* (2018) 44 ALRB No. 5; *Sabor Farms* (2015) 42 ALRB No. 2.)

ORDER

Pursuant to Labor Code section 1160.3, Respondent Monterey Mushrooms, Inc. (“Respondent”), its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
 - a. Prohibiting its employees from engaging in concerted activity protected under section 1152 of the Agricultural Labor Relations Act (the “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 that are deemed necessary to effectuate the policies of the Act:
 - a. Upon request of the Regional Director, sign the attached Notice to Agricultural Employees (“Notice”) and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.
 - b. Post copies of the Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the periods and places of posting to be determined by the Regional Director, and exercise due care to

replace any Notice which has been altered, defaced, covered, or removed.

- c. Arrange for a representative of Respondent or a Board agent to distribute and read the Notice, in all appropriate languages, to all bargaining unit employees then employed, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, Board agents shall be given opportunity, outside the presence of supervisors and management, to answer any questions 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.
- d. Mail copies of the Notice, in all appropriate languages, within 30 days after the issuance of this Order to all bargaining unit employees employed by Respondent at any time during the period June 23, 2016 to June 22, 2017, at their last known addresses.
- e. Provide a copy of the Notice to each bargaining unit employee hired to work for Respondent during the twelve-month period following the date of the issuance of this Order.

- f. Notify the Regional Director in writing, within thirty days after the date of the 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: January 2, 2019

Genevieve A. Shiroma, Chairwoman

Cathryn Rivera-Hernandez, Member

Isadore Hall III, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed with the Salinas Regional Office of the Agricultural Labor Relations Board (the "ALRB"), the General Counsel of the ALRB issued a complaint alleging that we violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB determined that we had violated the Agricultural Labor Relations Act (the "Act") by prohibiting employees from engaging in concerted activity protected by the Act. 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;
6. To decide not to do any of these things.

Because you have these rights, we promise that:

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

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

CASE SUMMARY

MONTEREY MUSHROOMS, INC.
(Francisco Lopez)

45 ALRB No. 1
Case No. 2016-CE-032-SAL

Background

Respondent Monterey Mushrooms, Inc. (“Respondent”) planned to implement a new “scaffolding” system for the harvesting of Mushrooms. It scheduled a meeting to introduce the new system to one of its crews. As the crew gathered prior to the meeting, charging party Francisco Lopez discussed the scaffolds with other employees. In the course of the conversation, he stated his opinion that the scaffolds would be difficult for shorter or smaller employees to use and that they would slow down harvesting, leading to lower wages for piece-rate employees. Supervisor Raul Aguilar approached Mr. Lopez and told him not to “opine on anything” at the meeting due to his “vocabulary” (meaning his use of profanity). An administrative law judge (the “ALJ”) credited Mr. Lopez’ account over Mr. Aguilar’s claim that Mr. Lopez was only instructed not to use profanity and concluded that, by instructing Mr. Lopez not to speak at the meeting, Respondent violated section 1153, subdivision (a)(1) of the Agricultural Labor Relations Act (the “Act”)

Board Decision

The Agricultural Labor Relations Board (the “ALRB” or “Board”) considered exceptions filed by Respondent and the ALRB’s General Counsel. Respondent argued that the time card of one of the witnesses who testified showed that he could not have been present at the relevant time. The Board found it unnecessary to resolve this issue because Mr. Lopez’ account was corroborated by two additional witnesses. The Board agreed with the ALJ that Mr. Lopez was engaged in protected concerted activity when he was approached by Mr. Aguilar and Mr. Aguilar’s instruction would reasonably tend to restrain employees in the exercise of their rights under the Act. The Board rejected Respondent’s argument that the noticing remedy should be limited to Mr. Lopez’ crew and ordered noticing of all members of the bargaining unit. The Board corrected certain errors in the ALJ’s recommended order but otherwise adopted the order.

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

1 STATE OF CALIFORNIA
2 AGRICULTURAL LABOR RELATIONS BOARD
3

4 MONTEREY MUSHROOMS INC.,

5 Respondent,

6 and,

7 FRANCISCO LOPEZ,

8 Charging Party.
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CASE NO. 2016-CE-032-SAL

DECISION AND RECOMMENDED
ORDER

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13 Appearances:

14 For the General Counsel:

15 Franchesca Herrera, Regional Director

Jessica Melgar, Assistant General Counsel

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17 For the Respondent:

James K. Gumberg, Atty. (Patane, Gumberg and Avila, LLP) Salinas, California
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20 DECISION

21 **John J. McCarrick, Administrative Law Judge.** This case presents a
22 credibility determination as to what took place at the charging party Francisco Lopez'
23 (Lopez) workplace on June 23, 2016.

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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:

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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 implemented on June 23, 2016¹, in the building where Lopez and crew eight, to which he was assigned, were working.

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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 Guererro, 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 Rojelio 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 *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
(1959).

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

9 THE ANALYSIS

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

23 CONCLUSIONS OF LAW

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

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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.

16
17 Dated: August 28, 2018

18
19 *cm* John J. McCarrick
20 *for* John J. McCarrick
21 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.

22
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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1 WE WILL NOT in any like or related manner, interfere with, restrain or
2 coerce employees from exercising their rights under the Act.

3
4 DATED: _____

5
6 MONTEREY MUSHROOMS, INC. By:

7
8 _____
9 (Representative) (Title)

10 If you have any questions about your rights as farm workers or about this
11 Notice, you may contact any office of the ALRB. One office is located at 342
12 Pajaro Street, Salinas California. The telephone number is (831) 769-8031. This
13 is an official notice of the Agricultural Labor Relations Board, an agency of the
14 State of California.

15 **DO NOT REMOVE OR MUTILATE**
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