

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

JOE PEDRO & SONS DAIRY,

Respondent,

and,

PLUTARCO RODRIGUEZ and JOSE
LUIS COVARRUBIUS,

Charging Parties.

Case No.: 2018-CE-004-VIS
2018-CE-005-VIS

**ORDER GRANTING MOTION TO
DEEM ALLEGATIONS IN THE
COMPLAINT ADMITTED, MOTION
FOR DEFAULT JUDGMENT AND
ORDER DENYING MOTION FOR
EXTENSION OF TIME TO FILE
ANSWER**

1. Procedural History

On December 31, 2018, the General Counsel issued a consolidated complaint in the above captioned case alleging that Joe Pedro & Sons Dairy, (Respondent) violated Section 1153(a) of the Agricultural labor Relations Act (Act) by interfering with, restraining and coercing Plutarco Rodriguez (Rodriguez) in the exercise of his right to engage in protected-concerted activity. General Counsel also alleged in the complaint that Respondent violated section 1153(a) and 1153(d) of the Act by terminating him because his son engaged in protected-concerted activity and because his son filed an unfair labor practice charge with the Agricultural Labor Relations Board (Board). The complaint further alleges that Respondent violated section 1153(a) of the Act by demoting and constructively terminating Jose Luis Covarrubias (Covarrubias) as a result of his exercise of his rights under section 1152 of the Act.

The complaint was served by certified mail on Respondent on December 31, 2018, together with portions of the regulations explaining the requirement for filing an

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answer, when and how it must be filed. The time for filing an answer expired at the close of business on January 14, 2019. Regulation section 20170 and 20230.

On January 18, 2019, General Counsel filed and served by certified mail on Respondent a Motion to Deem Allegations in the Complaint Admitted, and Motion for Default Judgment. In its motion, General Counsel took the position that since no answer had been filed by January 18, 2019, the time for filing an answer had expired and Respondent was in default under regulation sections 20230 and 20232. To date no answer has been filed nor has Respondent filed a response to General Counsel's Motion.

On January 29, 2019, Respondent filed and served on only the Charging Parties, according to Respondent's proof of service, a Motion for Extension of Time, Declaration of Joe Pedro in Support of Motion for Extension of Time, Declaration of Erika L. Rascon in Support of Motion for Extension of Time and Memorandum of Points and Authorities in Support of Motion for Extension of Time. These documents were served on the Executive Secretary and the General Counsel on January 31, 2019. On February 11, 2019, a proof of service was received by the Executive Secretary from Respondent claiming that these documents were also served on the Visalia Regional Office on January 30, 2019.

In its Motion for Extension of Time Respondent states that it did not receive the complaint herein until January 16, 2019. While Respondent Joe Pedro (Pedro) avers in his declaration that he was out of town on January 2, 2019, he provides no evidence concerning his whereabouts until January 16, 2016, when he claims he received a copy of the instant complaint. Respondent claims he was unable to speak with his attorney, Erika L. Rascon (Rascon) until January 22, 2019. Rascon avers that on an unspecified date the Visalia Regional Office denied her request for an extension of time to file the answer. Respondent and Rascon did not meet until January 25, 2019.

Rascon contends that there were extraordinary circumstances that prevented Respondent from filing a timely answer, citing regulation section 20192(a). It appears that the extraordinary circumstances Respondent relies upon are that Respondent was

out of town on January 2, 2019 and unavailable for service of the complaint on that date and that Respondent did not receive the complaint until January 16, 2019.

On February 1, 2019, the undersigned caused to be served on the parties an Order to Show Cause Why General Counsel's Motion to Deem Allegations in the Complaint Admitted, and Motion for Default Judgment Should Not be Granted.

On February 13, 2019, Respondent served its Response to Charging Parties' (sic) Order to Show Cause Why General Counsel's Motion to Deem Allegations in the Complaint Admitted, and Motion for Default Judgment Should Not be Granted. In addition Respondent refiled its Declarations of Joe Pedro and Erika L. Rascon in Opposition to General Counsel's Motion to Deem Allegations in the Complaint Admitted, and Motion for Default Judgment. In its Response Respondent contends it was not served with the complaint until January 16, 2019, when it received the complaint. In Respondent's reply to the Order to Show Cause it is claimed, without any supporting proof, that granting General Counsel's motion would cause Respondent irreparable harm. General Counsel has filed no response to the Order to Show Cause.

2. The Motion for Extension of Time to File the Answer

a. The Law

Section 20192(a) provides in pertinent part: "Extraordinary circumstances do at times occur which prevents parties or their counsel or representative from complying with the time limits contained in the regulations or orders of the Board for the filing and service of papers. . ." Regulation section 20192(b) provides in part: "Requests for extensions of time shall be filed or presented in the same manner as motions for continuances, except that, absent good cause shown, they are to be received at least three (3) calendar days before the due date of the papers to be filed. The request shall include the due date, the length of extension sought, the grounds for the extension, and the positions of the other parties, in the same manner as required for continuances in subsections 20190(c)(2) above."

The National Labor Relations Board (NLRB) has held that a respondent's refusal or failure to claim certified mail or failure to provide for receiving service of certified mail does not constitute good cause for its failure to file an answer and cannot defeat the purposes of the National Labor Relations Act. *Kuhl Glass Corp., d/b/a/ Thermaglas & Koehler AG*, 317 NLRB No. 133, fn. 2 (1995) citing *Milwaukee Expediting Service*, 282 NLRB 210 fn. 6 (1982).

b. The Analysis

The initial issue for resolution is whether extraordinary circumstances exist under section 20192 warranting an extension of time for Respondent to file its answer to the complaint. General Counsel has taken no position on the Motion for Extension of Time.

First, Respondent has failed to comply with the requirements of section 20192. Respondent's Motion for Extension of Time does not include the due date of the Answer, the length of extension sought to file its answer, the grounds for the extension of time, or the positions of the other parties. While the motion alleges Respondent was not served with the complaint until it was received on January 16, 2019, no circumstances are set forth explaining why this is an extraordinary circumstance. Indeed other than averring that Respondent was out of town on January 2, 2019, no other explanation is given for why Respondent could not have received the complaint or made arrangements for receiving the complaint between January 3, 2019 and January 14, 2019, when the answer was due. The NLRB has found that a refusal to accept or claim certified mail or to make provision for its receipt does not establish good cause for failure to file an answer. *Kuhl Glass Corp., d/b/a/ Thermaglas & Koehler AG, supra; Milwaukee Expediting Service, supra*. If such failure does not establish good cause for failure to file an answer, it follows that the same set of facts cannot establish extraordinary circumstances. I find that Respondent has neither failed to establish extraordinary circumstances justifying an extension of time to file an answer nor satisfied the requirements of section 20192(b) by failing to provide a due date for the

filing the answer or the position of the other parties on granting an extension of time.

IT IS HEREBY ORDERED that Respondent's Motion for an Extension of Time is DENIED.

3. The Motion to Deem Allegations in the Complaint Admitted and Motion for Default Judgment

a. The Law

Regulation section 20166(a) provides that service of papers on other parties is accomplished by filing the papers with the Board and attachment of proof of service with the papers when filed with the Board.

CCP section 1013(a) provides:

In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address last given by that person or any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence. Service is complete at the time of deposit.

Section 20230 provides that Respondent shall file an answer within 10 days of the service of the complaint and section 20232 provides in pertinent part that, "Any allegation not denied (in an answer) shall be deemed admitted." In *Azteca Farms, Inc.*, (1992) 18 ALRB No. 15, and *Lu-Ette Farms, Inc.*, (1985) 11 ALRB No. 4, the Board affirmed the ALJs who found no good cause for Respondents' failure to timely file answers and who granted summary judgement on the pleadings.

In *All Star Seed Co.*, (2003) 29 ALRB No. 4 the Board found it appropriate to grant a motion for default judgment and applied a reasonable person standard in determining whether to grant relief from a Respondent's default in failing to

file a timely answer. The Board noted that California Code of Civil Procedure Section 473 governed relief from default judgments. At page four of its opinion the Board noted that ignorance of the law coupled with negligence in ascertaining the law's requirements will not justify relief from default, citing *Robbins v. Los Angeles Unified School District* (1992) 3 Cal App 4th 313.

The NLRB has provided guidance in granting motions for summary judgement where no timely answer has been filed. Section 102.20 of the NLRB's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days of the service of the complaint. This provision is similar to 8 C.C.R. section 20232. In *Rick's Painting & Drywall*, 338 NLRB 1091 (2003) and in *Patrician Assisted Living*, 339 NLRB 1153 (2003), the Board reaffirmed its long standing test that a respondent must show good cause to be relieved of its duty to file a timely answer. In *Rick's Painting*, *supra* at 1092, the Board dismissed the argument that respondent's pro se status established good cause for its failure to file an answer. The Board noted that the complaint clearly stated that failure to file an answer could result in complaint allegations being deemed admitted. In *Patrician*, *supra*, at 1154, the NLRB likewise rejected respondent's argument that it was without legal counsel as establishing "good cause." The Board also found that a claim to a meritorious defense will not be considered absent a showing of good cause.

b. The analysis

As found above, Respondent did not satisfy the requirements of section 20192 for an extension of time to file its answer. It is clear that the complaint herein was served on Respondent on December 31, 2018 and that the answer was due January 14, 2019. To date no answer has been filed. Since Respondent has offered no evidence explaining its failure or refusal to accept certified mail or to show that it made provision for its receipt between January 2^{case} and January 14, 2019, it failed to show extraordinary circumstances justifying an extension of time to file an answer. It has likewise failed to

show good cause to justify its failure to file an answer. The failure to accept service of documents cannot be allowed to defeat the purposes of the Act. *Kuhl Glass Corp., d/b/a/ Thermaglas & Koehler AG, supra; Milwaukee Expediting Service, supra.*

Accordingly, IT IS HEREBY ORDERED that General Counsel's Motion to Deem the Allegations of the Complaint Admitted and for Default Judgement is GRANTED.

Having so found, I find, in accordance with the pleadings:

1. On December 31, 2018, the Visalia Regional Director issued a Consolidated Complaint against Respondent Joe Pedro & Sons Dairy, (Respondent) and on that same date, a copy was served by certified mail on Respondent, along with a fact sheet advising Respondent of the need to file an answer.
2. No answer to the Consolidated Complaint was timely filed to date.

I, therefore find:

- a. A true and correct copy of the original charge in case 2018 CE 004 VIS was filed on March 30, 2018, by Plutarco Rodriguez (Rodriguez) and served on Respondent on the same date. The charge alleged that on or about February 19, 2018, Arturo Magana (Magana) terminated Rodriguez in retaliation for Rodriguez' son filing charges with the ALRB. A true and correct copy of the original charge in case 2018 CE 005 VIS was filed on April 18, 2018, by Jose Luis Covarrubias (Covarrubias) and served on Respondent on the same date. The charge alleged that on or about April 16, 2018, Magana demoted Covarrubias due to his and others' protected concerted activity of complaining to owner Rick Pedro about the preferential treatment of workers by Magana.

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- b. Respondent has at all times been an agricultural employer engaged in agriculture in Visalia, California within the meaning of Section 1140.4(a) and (c) of the Agricultural Labor Relations Act (Act).
- c. At all times material Rodriguez and Covarrubias were agricultural employees within the meaning of section 1140.4(b) of the Act and were employed by Respondent.
- d. At all times material Magana was a supervisor for Respondent within the meaning of section 1140.4(j) of the Act with authority to direct the work of agricultural employees and to discipline them.
- e. On several occasions in January 2018, Angel Ismael Rodriguez, the son of charging party Rodriguez, along with co-workers Covarrubias and three other co-workers spoke with each other about how supervisor Magana mistreated them.
- f. On about January 29, 2018, Angel Ismael Rodriguez, Covarrubias, Jesus Ramirez Covarrubias and Marvin Cobian Hernandez complained to Rick Pedro about Magana's treatment of them. They told Rick Pedro that when they complained to Magana, he said, "If you don't like it, leave." They also complained that Magana had failed to promote Covarrubias to assistant foreman as former supervisor Frank Pedro had promised. Rick Pedro told Covarrubias that he would get a trial period as assistant foreman.
- g. On February 9, 2018, Magana terminated the employment of Angel Ismael Rodriguez.
- h. On February 11, 2018, Rodriguez asked Magana why his son Angel Rodriguez had been terminated.
- i. On February 19, 2018, Magana terminated Rodriguez' employment.

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- j. From January 29, 2018 to April 16, 2018, Magana did not assign Covarrubias any assistant foremen tasks, instead assigning those tasks to his brother in law.
- k. On or about April 2, 2018, Magana demoted Covarrubias to relief worker, providing Covarrubias fewer days of work and less pay.
- l. On about April 16, 2018. Magana told Covarrubias he was permanently assigned to the relief worker position.
- m. On April 16, 2018, Covarrubias resigned his position with Respondent due to onerous working conditions.
- n. By threatening employees who were complaining about working conditions that if you don't like it, leave, Respondent violated section 1153(a) of the Act in retaliation for employees engaging in protected concerted activity protected under section 1152 of the Act.
- o. By terminating Rodriguez in retaliation for his son's exercise of protected concerted activity, Respondent violated Section 1153(a) of the Act.
- p. By terminating Rodriguez in retaliation for his son's filing an unfair labor practice with the Board, Respondent violated section 1153(a) and (d) of the Act.
- q. By demoting Covarrubias to the relief position for engaging in protected concerted activity, Respondent violated section 1153(a) of the Act.
- r. By creating working conditions that were so onerous that a reasonable person would be compelled to resign, Respondent constructively discharged Covarrubias in violation of section 1153(a) of the Act for engaging in protected-concerted activity.

- s. In the complaint General Counsel requests as a remedy that Respondent's supervisory personnel be compelled to attend training. General Counsel provides no persuasive argument in its Motion to Deem Allegations of the Complaint Admitted as to why the standard remedies would be insufficient to address Respondent's unlawful conduct. While not diminishing the seriousness of the unfair labor practices committed herein, there is no evidence that Respondent has a history of committing violations of the Act such as were found here. I find that the Board's standard remedies sufficient to remedy Respondent's unlawful conduct. *United Farm Workers of America*, (2018) 44 ALRB #6 at page 13.

ORDER

By the authority of section 1160.3 of the Act, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Joe Pedro & Sons Dairy, its agents and officers, successors and assigns are ordered to do the following:

1. Cease and desist from:
 - a. Unlawfully threatening its agricultural employees with termination for engaging in protected concerted activity protected under section 1152 of the Act.
 - b. Unlawfully demoting its agricultural employees because they have engaged in activity protected by section 1152 of the Act.
 - c. Unlawfully discharging its agricultural employees because they or other employees have engaged in activity protected by section 1152 of the Act.

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- d. Unlawfully discharging its agricultural employees because they or other employees have filed unfair labor practice charges protected by section 1152(d) of the Act.
 - e. In any like or related manner interfering with, restraining or coercing its agricultural employees in the exercise of their rights guaranteed by section 1152 of the Act.
2. Take the following affirmative action, necessary to effectuate the policies of the Act:
- a. Offer Plutarco Rodriguez and Jose Luis Covarrubias immediate reinstatement to their former or substantially equivalent employment without prejudice to their seniority or other rights and privileges of employment;
 - b. Make Plutarco Rodriguez and Jose Luis Covarrubias whole for all wages and economic losses they have suffered since on or about February 19, 2018 and April 2, 2018 respectively, as a result of their demotions and discharges. Loss of pay or other economic losses are to be determined in accordance with established Board precedent. Such amounts shall include interest to be determined in the manner set forth in *Kentucky River Medical Center* (2010) 356 NLRB No. 8 and excess tax liability to be computed in accordance with *Tortillas Don Chavas* (2014) 361 NLRB No. 10, minus tax withholdings required by federal and state laws. Compensation shall be issued to Plutarco Rodriguez and Jose Luis Covarrubias and sent to the Region, which will thereafter disburse payment to Plutarco Rodriguez and Jose Luis Covarrubias;
 - c. Preserve and, upon request, make available to the Board or its agents for examination and copying, all record relevant and necessary to a determination by the Regional Director of the back pay amounts due under the terms of this Order. Upon request of the Regional Director, the records shall be provided in electronic form if they are customarily maintained in that form;

- d. Sign the attached Notice to Employees and, after its translation by a Board agent(s) into all appropriate languages, as determined by the Regional Director, reproduce sufficient copies in each language for all purposes set forth in this Order;
- e. Mail copies of the Notice, in all appropriate languages, within 30 days after the date of this Order becomes final, or when directed by the Regional Director, to all agricultural employees employed by Respondents at any time during the period from February 19, 2018 until February 19, 2019;
- f. Post copies of the Notice, in all appropriate languages, in conspicuous places on Respondent's property for a 60-day period, the period and place(s) of posting to be determined by the Regional Director, and exercise care to replace any Notice which may be altered, defaced, covered or removed. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of the Notice;
- g. Arrange for a representative of Respondent or a Board agent(s) to distribute and read the Notice in all appropriate languages to all of Respondents' agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent(s) 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 Respondents to all non-hourly wage employees in order to compensate them for time lost at the reading and during the question and answer period;
- h. Provide a copy of the attached Notice to each agricultural employee hire to work for Respondents during the one-year period following the date this Order becomes final and;

- i. Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondents have taken to comply with its terms. Upon request of the Regional Director, notify them periodically thereafter in writing of further steps taken until full compliance with the Order is achieved.

Dated: March 1, 2019

JOHN J. MCCARRICK
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. Because we did not contest such charges by timely filing answer to the complaint, the ALRB deemed the allegations to be true and found that we violated the Agricultural Labor Relations Act (ALRA) by threatening and discharging an employee for complaining about the terms and conditions of his employment.

The ALRB has told us to post and publish this Notice. We will do what the ALRB has ordered us to do.

We also want to inform you that the ALRA 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 it is true that you have these rights, we promise that;

WE WILL NOT threaten employees with discharge because they engage in protected-concerted activity.

WE WILL NOT discharge or demote employees who engage in protected-concerted activity or who file charges with the ALRB.

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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 ALRA.

WE WILL offer to Plutarco Rodriguez and Jose Luis Covarrubias reinstatement to their former or substantially equivalent positions of employment and make them whole for all loss of pay or other economic loss they have suffered as a result of our unlawful conduct.

Dated: _____

By: _____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 1642 West Walnut Avenue, Visalia, California, 93277-5348. The telephone number is (559) 627-0995.

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

DO NOT REMOVE OR MUTILATE