

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DAVID ABREU VINEYARD)	Case Nos.	2017-CE-024-SAL
MANAGEMENT, INC.,)		
)		
Respondent,)		
)		
and)		
)		
JOSE MANUEL CAMPOS)		
PEREZ,)	45 ALRB No. 5	
)		
Charging Party.)	(July 1, 2019)	
_____)		

DECISION AND ORDER

On December 19, 2018, Administrative Law Judge John J. McCarrick (the “ALJ”) issued a decision and recommended order in the above-captioned case involving allegations that respondent David Abreu Vineyard Management, Inc. (“Respondent”) violated the Agricultural Labor Relations Act (the “ALRA” or “Act”) by terminating the employment of two agricultural employees because they engaged in activities protected by the Act. The ALJ found violations with respect to both employees and recommended a remedy. Respondent filed exceptions to the ALJ’s decision with the Agricultural Labor Relations Board (the “ALRB” or “Board”) pursuant to Labor Code section 1160.3 and California Code of

Regulations, title 8, section 20282, subdivision (a).¹ The General Counsel filed an answering brief.

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 findings and conclusions and to adopt the ALJ's recommended order as modified.²

The ALJ found that the General Counsel established a prima facie case that Respondent terminated brothers Jose Manuel Campos Perez ("Jose Manuel Perez") and Silvano Campos Perez ("Silvano Perez") because they engaged in concerted activity

¹ The General Counsel of the ALRB argues that Respondent's exceptions should be dismissed because they do not comply with section 20282 of the Board's regulations, which requires that "[t]he exceptions shall state the ground for each exception, identify by page number that part of the administrative law judge's decision to which exception is taken, and cite to those portions of the record which support the exception." (Cal. Code Regs., tit. 8, § 20282, subd. (a)(1).) The principal deficiency in Respondent's exceptions is that, rather than stating specific objections to particular findings or rulings of the ALJ, they set forth entire sentences and even a paragraph of the ALJ's decision without specifying what aspects of these passages are alleged to be in error. Nevertheless, Respondent does include a summary of the portions of the record relied upon and presents its legal arguments. While the Board has the discretion to dismiss exceptions that do not adequately identify the nature of the errors alleged to have been made, due to the limited scope of Respondent's arguments, we find that Respondent's exceptions are sufficiently identifiable to enable the Board to consider them, and dismissal is not warranted here.

² We have modified the ALJ's recommended notice mailing remedy to conform to the Board's standard remedy requiring mailing to employees employed during a one-year period commencing on the date of the unfair labor practice violation. (*Monterey Mushrooms, Inc.* (2019) 45 ALRB No. 1, pp. 12-13.) We have modified other portions of the ALJ's recommended order and Notice to Employees to conform to the Board's standard remedial language.

protected under the Act.³ No exception was taken to these findings and conclusions and they are affirmed.⁴

Because the General Counsel met its burden of establishing a prima facie case, the burden shifted to Respondent to prove by a preponderance of the evidence that it would have terminated the employees even absent their protected activity. Respondent contends that it did not bear the burden of persuasion on this issue but was merely required to introduce evidence of a legitimate reason for the terminations. In making this argument, Respondent cites only cases arising under other statutory schemes, such as the Fair Employment and Housing Act and Title VII of the Civil Rights Act of 1964, and

³ This conduct included complaints made by Jose Manuel Perez that his foreman, Gustavo Herrera Contreras (“Foreman Herrera”), made employees work on Sundays. Respondent questions why the General Counsel did not offer time records showing that Jose Manuel Perez actually worked on Sundays during the relevant period. Respondent presumably maintains copies of its own employees’ time records and had a full opportunity to present such evidence if it disproved Jose Manuel Perez’s claim. We find that the absence of the records does not undermine the ALJ’s finding that the complaints concerning Foreman Herrera were made.

⁴ The ALJ found that Jose Manuel Perez and Silvano Perez’ May 13, 2017 conduct protesting Silvano Perez’ suspension constituted protected activity. We agree that this conduct, including Jose Manuel Perez’ telephone call to Foreman Benjamin Maldonado (“Foreman Maldonado”) on behalf of his brother and both brothers’ meeting with General Supervisor Ernesto Maldonado (“General Supervisor Maldonado”), was protected. (*Caval Tool Division, Chromalloy Gas Turbine Corp.* (2000) 331 NLRB 858, 862 [“The [NLRB] has consistently held that an employee who espouses the cause of another employee is engaged in concerted activity, protected by Section 7 of the [NLRA]”].) However, in his discussion of the General Counsel’s prima facie case, the ALJ noted the timing of the terminations in relation to the brothers’ complaints in March and April 2017, but he did not reference the May 13, 2017 conduct. We find that the proximity between the efforts of Jose Manuel Perez and Silvano Perez to contest the suspension and the terminations, which occurred the following business day, further supports the General Counsel’s prima facie case.

ignores completely authorities decided under the ALRA and the National Labor Relations Act (“NLRA”).⁵ (See *Kawahara Nurseries, Inc.* (2014) 40 ALRB No. 11, p. 24.) Put simply, Respondent’s position is contrary to well-established precedent under the NLRA and our Act.⁶

Applying the appropriate legal standard, the ALJ found that Respondent’s asserted legitimate reasons for the terminations were either false or non-existent and, thus, it was not necessary to determine whether the terminations would have occurred in the absence of the protected activity. (*Premiere Raspberries, LLC* (2013) 39 ALRB No. 6, p. 8 [“Where it is shown that the employer’s proffered reasons are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct”]; *K-Air Corp.* (2014) 360 NLRB No. 30, p. 9 [“Because the Respondent’s defenses were pretextual, there is no need to further assess them under *Wright Line*’s second step, which is applicable in mixed-motive cases”]; *Conley, supra*, 349 NLRB 308, 322.) Alternatively, the ALJ concluded that, even if it were necessary to determine whether Respondent would have

⁵ The ALRB is required to follow applicable precedents of the NLRA. (Lab. Code, § 1148.)

⁶ *Royal Packing Co.* (1982) 8 ALRB No. 74, p. 2 [holding that “once the General Counsel has carried its burden of proof as to the prima facie case, the burdens of production and persuasion shift to the employer, and a violation will be found, unless the employer proves by a preponderance of evidence that the adverse action would have been taken even absent the employee’s protected activity”]; *Martori Bros. Distributors v. ALRB* (1981) 29 Cal. 3d 721, 730; *Conley* (2007) 349 NLRB 308, 322, *enfd.* *Conley v. NLRB* (6th Cir. 2008) 520 F.3d 629, 637-638 [after the General Counsel establishes a prima facie case, “the burden of persuasion shifts to the employer to demonstrate by a preponderance of the evidence that it would have made the same decision regardless of the fact that the employees engaged in protected activity”], internal quotations omitted; *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 402-403.

terminated Jose Manuel Perez and Silvano Perez absent their protected activity, Respondent would not have met its burden.

Respondent argues that during its case-in-chief it elicited testimony that Jose Manuel Perez and Silvano Perez each engaged in “unacceptable conduct” in the workplace. Respondent asserts that the General Counsel’s failure to recall the brothers for rebuttal testimony constitutes an “adoptive admission” that they engaged in the misconduct allegedly supporting their terminations. Respondent specifically cites the testimony by Foreman Maldonado that Jose Manuel Perez made a threat against his life during a May 13, 2017 telephone conversation. Although not specifically cited in Respondent’s argument, there was also testimony that Silvano Perez habitually arrived to work late and left early and that, in April 2017, he threatened foreman Everardo Hernandez (“Foreman Hernandez”).

Respondent’s attempt to apply the adoptive admission rule in this fashion has no merit. The adoptive admission rule is an exception to the general rule that hearsay statements are inadmissible. (Evid. Code, § 1221.) It applies to an out-of-court statement directed to a party and accusing him or her of certain conduct to which the party is silent or fails to respond. Evidence of that out-of-court statement is admissible as an exception to the hearsay rule for the limited purpose of showing the party’s reaction to it, the theory being that a person accused of the conduct would deny it if untrue. Here, the evidence relied upon by Respondent was not excluded under the hearsay rule, but was admitted and considered. The adoptive admission rule has no applicability.

Setting aside Respondent’s legal theory, to the extent that Respondent is arguing that the ALJ erroneously failed to draw an adverse inference from the General Counsel’s

decision not to recall Jose Manuel Perez and/or Silvano Perez in rebuttal, we reject that argument. An administrative law judge has the discretion to draw an adverse inference when a party fails to produce a witness or evidence under its control or fails to explain or deny evidence or facts. (*California Artichoke & Vegetable Corp.* (2015) 41 ALRB No. 2, p. 22; *EYM King of Missouri, LLC* (2018) 355 NLRB No. 5, pp. 16-18 [appropriateness of drawing an adverse inference depends on the circumstances and lies within the judge's discretion].) However, Jose Manuel Perez and Silvano Perez were each called as witnesses. They were each subject to cross-examination and Respondent was free to question them about the alleged threats. Furthermore, Jose Manuel Perez testified about his conversation with Foreman Maldonado. Likewise, Silvano Perez testified about his attendance and denied that he had attendance issues. The ALJ credited this testimony and Respondent provides no reason to overrule that credibility determination. (*Monterey Mushrooms, Inc., supra*, 45 ALRB No. 1, p. 2, fn. 1 [the Board will not overrule an ALJ's non-demeanor credibility determinations "unless they conflict with well-supported inferences from the record considered as a whole"].)

Silvano Perez did not testify about the alleged April 2017 confrontation with Foreman Hernandez. However, Respondent did not attempt to cross-examine him concerning the alleged incident. Furthermore, Respondent also did not call Foreman Hernandez for firsthand testimony concerning the incident, choosing instead to rely upon General Supervisor Maldonado's second-hand account of it. The ALJ was not required to credit this testimony merely because it was un rebutted. (*South Lakes Dairy Farm* (2013) 39 ALRB No. 1, at ALJ Dec. p. 11, fn. 5; *Pacific Coast M.S. Industries Co., Ltd.* (2010) 355 NLRB 1422, 1426; *Operative Plasterers' & Cement Masons' International Association, Local 394 (Burnham*

Brothers, Inc.) (1973) 207 NLRB 147, 147.) We find that ALJ's decision to discredit General Supervisor Maldonado's testimony concerning the alleged incident was supported by the record. In any event, General Supervisor Maldonado did not testify that he relied upon the alleged incident in making the termination decision, testifying instead that he terminated Silvano Perez due to attendance issues and disruptive gossiping. Finally, even if some incident had occurred between Silvano Perez and Foreman Hernandez in April 2017, the fact that Respondent did not deem the incident to be grounds for termination or even written discipline at that time negates any claim that it would have terminated Silvano Perez in May 2017 based upon the incident.

Thus, we affirm the ALJ's conclusion that Respondent did not meet its burden to rebut the prima facie case established by the General Counsel and, accordingly, that Respondent violated Labor Code section 1153, subdivision (a) by terminating Jose Manuel Perez and Silvano Perez because they engaged in concerted activities protected under the ALRA.

ORDER

Pursuant to Labor Code section 1160.3, Respondent David Abreu Vineyard Management, Inc., its officers, agents labor contractors, successors, and assigns ("Respondent") shall:

1. Cease and desist from:
 - a. Terminating its employees for 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. Offer Jose Manuel Campos Perez and Silvano Campos Perez immediate reinstatement to their former or substantially equivalent employment without prejudice to their seniority or other rights and privileges of employment.
 - b. Make Jose Manuel Campos Perez and Silvano Perez whole for all losses of wages and other economic losses they have suffered since May 15, 2017 as a result of their 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 is 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 Jose Manuel Campos Perez and Silvano Campos Perez and sent to the ALRB's Salinas Regional Office (the "Region"), which will

thereafter disburse payment to Jose Manuel Campos Perez and Silvano Campos Perez;

- c. Preserve and, upon request, make available to the ALRB or its agents for examination and copying, all records 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. Upon request of the Regional Director, sign the Notice to Agricultural Employees (the "Notice") attached hereto and, after its translation by an ALRB 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 that has been altered, defaced, covered, or removed.
- f. Arrange for a representative of Respondent or an ALRB 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 ALRB 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 thirty (30) days after the date this Order becomes final to all agricultural employees employed by Respondent at any time during the period May 15, 2017, to May 14, 2018, 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 date this Order becomes final.

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- i. Notify the Regional Director in writing within thirty (30) days after the date this Order becomes final, 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: July 1, 2019

Cathryn Rivera-Hernandez, Member

Isadore Hall III, Member

Barry D. Broad, 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 had 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 terminating employees for engaging in protected concerted activity. The ALRB has told us to post and publish this Notice. We will do what the ALRB has ordered us to do.

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 it is true that you have these rights, we promise that:

WE WILL NOT discharge employees because they engage 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.

WE WILL offer to Jose Manuel Campos Perez and Silvano Campos Perez reinstatement to their former or substantially equivalent position 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:

DAVID ABREU VINEYARD
MANAGEMENT, 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

**DAVID ABREU VINEYARD
MANAGEMENT, INC.**
(Jose Manuel Campos Perez)

45 ALRB No. 5

Case No. 2017-CE-024-SAL

Background

The General Counsel alleged that Respondent David Abreu Vineyard Management, Inc. (“Respondent”) violated the Agricultural Labor Relations Act (the “Act”) by terminating employees Jose Manuel Campos Perez (“Jose Manuel Perez”) and Silvano Campos Perez (“Silvano Perez”) because they engaged in activities protected by the Act. An administrative law judge (the “ALJ”) found that the employees engaged in protected activities by complaining about working conditions and by protesting the suspension of Silvano Perez. The ALJ further found that, due to the temporal proximity between the protected activity and the terminations and the employer’s presentation of shifting or non-existent reasons for the terminations, the General Counsel established a prima facie case of unlawful motivation. Thus, the burden of persuasion shifted to Respondent. However, the ALJ concluded that Respondent’s proffered legitimate reasons for its actions were unworthy of belief or nonexistent and, therefore, it was unnecessary to determine whether Respondent would have terminated the employees in the absence of their protected activity. Alternatively, the ALJ concluded that, even if it were necessary to make that determination, he would conclude that Respondent would not have terminated the employees absent their protected activity. Accordingly, the ALJ found a violation of Labor Code section 1153, subdivision (a) and recommended a remedy.

Board Decision

Respondent filed exceptions to the ALJ’s decision with the Agricultural Labor Relations Board (“Board”). The Board affirmed the ALJ’s decision. The Board rejected Respondent’s argument that, once the General Counsel established a prima facie case, only a burden of production shifted to Respondent, concluding that Respondent’s position was contrary to well-established precedent. The Board also rejected Respondent’s argument that the ALJ should have treated the alleged failure of the two employees to deny that they engaged in workplace misconduct as “adoptive admissions” establishing that they did engage in such misconduct. The Board further found that, while the ALJ has the discretion to draw an adverse inference from the absence of a witness or evidence, in this case, the employees gave credited testimony concerning some of the alleged misconduct, and, as to the remaining allegation, the ALJ discredited the witness making the allegation.

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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

DAVID ABREU VINEYARD)	Case No. 2017-CE-024-SAL
MANAGEMENT, INC.,)	
)	
Respondent,)	
)	
and,)	
)	
JUAN MANUEL CAMPOS PEREZ ¹ ,)	DECISION AND RECOMMENDED
)	ORDER
)	
Charging Party.)	
_____)	

Appearances:

For the General Counsel:
Franchesca Herrera, Regional Director
and Jessica Melgar, Assistant General Counsel

For the Respondent:
James R. Rose, Attorney
(Buchalter, A Professional Corporation)
St. Helena, California

DECISION

John J. McCarrick, Administrative Law Judge. This case presents a credibility determination as to why Respondent terminated brothers Jose and Silvano Campos Perez in May 2017.

STATEMENT OF THE CASE

Jose Manuel Campos Perez (Jose Perez) filed a charge with the Agricultural Labor Relations Board (Board) in Case 2017-CE-024-SAL on June 23, 2017, alleging that David Abreu Vineyard Management, Inc., (Respondent) violated sections 1152 and 1153 of the Agricultural Labor Relations Act (Act) by terminating Jose Perez and Silvano Campos Perez (Silvano Perez) for engaging in protected concerted activity.

¹ At the hearing, the complaint was amended to reflect charging party's correct name Jose Manuel Campos Perez. There was no objection from Respondent.

On January 26, 2018, the Regional Director of the Salinas Regional Office of the Board issued a complaint alleging that Respondent violated sections 1152 and 1153 of the Act by terminating Jose and Silvano Perez and by suspending and Silvano Perez for five days for engaging in protected concerted activities including complaining about working conditions. Respondent filed a timely answer denying any wrongdoing.

I took testimony in this case on September 18, 2018, in St. Helena, 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, maintains and harvests grapes for winemaking in the Napa Valley of California. Respondent admitted that it is an agricultural employer within the meaning of the Act. The record establishes that brothers Jose and Silvano Perez have been employed as agricultural employees of Respondent harvesting and maintaining wine grapes. At all times material herein, Ernesto Maldonado, Benjamin Maldonado and Gustavo Herrera Contreras were Respondent's supervisors, Respondent having admitted that they have the authority to direct and discipline employees under their supervision.

Jose Perez has been employed by Respondent as a field worker since about March 2009. Jose Perez has worked for Respondent year round, full time. His immediate supervisor from January 2017 to May 15, 2017² was Gustavo Herrera Contreras (Herrera). Silvano Perez was employed by Respondent as a field worker harvesting and maintaining grapes since about April 2016 and worked at the Angwin ranch from January to May 2017. Silvano had various supervisors while working for Respondent, including Ernesto Maldonado, Chava Lua, Miguel and Herrera. The record reflects that if an employee needed time off, they made that request to Herrera or to next level supervisor Ernesto Maldonado one to four days in advance.

Both Jose and Silvano Perez testified that they had a bad relationship with supervisor Herrera. According to both, Herrera screamed at employees in the presence of other employees, threatened employees and required Sunday work. Jose Perez said he spoke with other employees about these issues frequently and spoke to general supervisor Ernesto Maldonado about Herrera's treatment of employees two or three times, including on March 20. Other employees were present on March 20 when Jose Perez spoke with Ernesto Maldonado about Herrera's screaming at employees, threatening them and requiring Sunday work. Jose Perez and another employee named Benito asked Ernesto Maldonado if they could be moved to another ranch because of Herrera. Silvano Perez testified that while working in the vineyard on several hot days in April 2017, drinking water was too far away from the workers. When Silvano complained to supervisor Lua, Lua asked if Silvano was fucking around. Silvano spoke to other workers about the lack of water and he talked about the problem with Ernesto Maldonado.

On about May 10, Jose Perez told Ernesto Maldonado he needed a day off to have his car repaired. Maldonado said Jose Perez could take the day off but to send his brother Silvano Perez to have the car repaired because Maldonado needed Jose Perez to work. Jose Perez called the

² All dates refer to 2017, unless otherwise noted.

ranch where his brother was working to tell them his brother would not be at work. Supervisor Miguel said that was alright and Silvano Perez said he would take the car for repairs. Silvano took the car for repairs on May 12 and returned to work at Angwin on Saturday May 13. At 9:00 a.m. on May 13 at Angwin, Benjamin Maldonado approached Silvano and told him he was fed up with him and was going to lay him off for a week. When Silvano said he did not understand, Benjamin said I'm not talking about this anymore

On May 13, Jose and Silvano Perez met with Herrera and Herrera said Silvano was laid off for a week. After hearing this, at 10:15 a.m. Jose Perez called foreman Benjamin Maldonado and asked why Silvano was being laid off since Silvano had permission to be absent. While giving no explanation for Silvano's layoff, Benjamin Maldonado said that both Silvano and Jose were lazy and good for nothing. Maldonado called Jose's mother a fucking bitch. Jose Perez told Maldonado go fuck yourself.

That same day at about 10:30 a.m., Ernesto Maldonado called Jose Perez and said he wanted to talk to Jose and Silvano Perez at their place of residence. They met there at 11:00 a.m. Silvano asked Ernesto who Benjamin Maldonado was to lay him off. Ernesto said he would cut the layoff down by three days. When Silvano asked if he was going to be paid, Ernesto said no but to show up on the day he gave him. Jose asked why Benjamin had suspended Silvano when Ernesto had given permission for him to be absent. No explanation was given.

On Monday May 15, Jose Perez went to work at Rancho La Bota at 6:00 a.m. At 3:15 p.m. Herrera gave Jose Perez a check and said David Abreu was firing him. When Jose asked why he was being fired, Herrera told him to talk to Ernesto Maldonado. That day at about 4:00 p.m. Jose Perez called Ernesto Maldonado and said are you firing me? Maldonado said he was without giving an explanation and asked where Silvano Perez was. When Jose asked if Maldonado was firing Silvano, Maldonado said he was again without an explanation.

Ernesto Maldonado testified that in 2017 he spoke to Silvano Perez about his work performance once. Maldonado said in April 2017, one supervisor Everardo Hernandez, said Silvano assaulted him. Maldonado's explanation of the nature of the assault is that Silvano stood up to Hernandez and Hernandez had to back off. There is no written record of the alleged assault and no evidence of any disciplinary action taken against Silvano. Maldonado also said he heard complaints from supervisors Lua and Everardo Hernandez that Silvano was keeping his own hours. According to Maldonado, Silvano left whenever he wanted. Again there is no record of these complaints in Silvano's personnel file and no evidence of a warning or other disciplinary action. Maldonado testified that Respondent has a progressive disciplinary policy that consists of a verbal warning, written warning and further discipline based upon the severity of the violation. He admitted that disciplinary warnings go into an employee's personnel file.

Maldonado testified that he fired Silvano because of his hours, because he had created a problem with his brother over being suspended and because he was disruptive and gossiped. General Counsel's exhibit 1 is the notice of termination for Silvano Perez. The notice states: "Reason for leaving work . . . Worker was threatened."³ Maldonado testified that the threat mentioned in the notice of termination was the alleged April 2017 assault.

³ General Counsel's exhibit 1 and transcript page 100, lines 4-5.

Benjamin Maldonado testified that Silvano Perez only worked for him a few times yet he testified he had problems with Silvano leaving work early or showing up late. Other than Silvano's termination notice there was no evidence produced, including time cards, showing unauthorized absences. In May, Benjamin Maldonado suspended Silvano for failing to show up for work. Benjamin Maldonado also said he spoke to Jose Perez on the phone in May when Jose asked why he was suspending Silvano. According to Benjamin Maldonado, Jose called him a stupid asshole, told him to go fuck yourself, and threatened to kill him. According to Benjamin Maldonado he told Ernesto Maldonado about the threat. Despite the threat on his life, no report was made to the police or to David Abreu. While Benjamin Maldonado said he made a note of this threat and sent it to Respondent's office, no such note was offered into evidence. Benjamin conveniently testified that he had no recollection of what he said to Jose Perez other than that Silvano did not like to work.

Gustavo Herrera Contreras gave rather cursory testimony that Silvano worked for him for three days in 2017. He denied that Jose Perez or any other employees complained to him about working conditions, including abusive conduct to workers.

Salvador Lua Sandoval, one of Respondent's supervisors testified that in 2017, Silvano Perez worked for him for about four months. In his abbreviated testimony, Lua denied receiving complaints about drinking water from Silvano Perez. Lua also complained that Silvano left work early. No evidence was produced that Lua or any other supervisor warned Silvano about his hours and there is no evidence such a problem was recorded in Silvano's personnel file.

CREDIBILITY

Both Jose and Silvano Perez testified without contradiction concerning the facts surrounding their terminations. They gave detailed and accurate information and their testimony had a ring of truth to it. Jose admitted using profanity in his conversation with Benjamin Maldonado, while Maldonado has no recollection of responding in kind. It is significant to note that Respondent has a progressive disciplinary policy and that written warnings go into an employee's file. However, no evidence was produced by Respondent concerning Silvano's alleged multiple absences from work nor did Respondent produce the written note allegedly prepared by Benjamin Maldonado regarding Jose's alleged death threats. I find that both Jose and Silvano Perez were credible witnesses and I will credit their testimony.

While Respondent's witnesses gave testimony concerning work related problems with Silvano Perez, Respondent proffered no evidence concerning work related issues with Jose Perez. The only evidence Respondent offered concerning Jose Perez was the May phone conversation between Benjamin Maldonado and Jose Perez wherein Maldonado alleged that Perez threatened him. I do not credit Maldonado's testimony that Jose Perez threatened him, noting particularly Respondent's failure to produce the written document corroborating Benjamin Maldonado's testimony. Further, there is no written record of the alleged threat involving Silvano Perez that occurred over a month before his termination. It is not surprising that this alleged threat was not reduced to writing since standing up in front of a supervisor can hardly be described as a threat. Moreover, Ernesto Maldonado who made the decision to terminate the Perez brothers, testified he fired Silvano because of his hours, because he gossiped

and was disruptive. This testimony conflicts with the reasons given in Silvano Perez' written termination document. Such conflicting reasons for a termination are hallmarks of pretextual justifications for terminations. When there is a conflict between the testimony of the Campos brothers and Respondent's witnesses, I do not credit any of Respondent's witnesses.

Finally, there was no evidence proffered explaining why Jose Perez' was fired. While there was discredited testimony given about a threat made by Jose Perez to Benjamin Maldonado, Respondent never offered evidence that this is why he was fired.

THE LAW

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

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

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. (*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.)

In order to establish that an employee's discipline or termination for engaging in protected concerted activity violated section 1153(a)(1) of the Act, the burden is on the General Counsel to establish that the employee engaged in protected concerted activity, that the employer knew of those activities and that there is a connection between those activities and the decision to terminate. Once the General Counsel makes out a prima facie case of unlawful termination, the burden shifts to the employer to establish that it would have engaged in the adverse action independent of the protected activity. (*Wright Line*, 251 NLRB 1083 (1980).) The element of animus or nexus toward protected concerted activity and the discriminatory conduct, may be established in several ways including the timing of the discrimination⁴ as well as shifting reasons for the employer's adverse action.⁵ However, if it is established that the employer's proffered rationale for the terminations are pretextual, the *Wright Line* shifting burdens do not apply as pretext establishes that the employer's justifications did not exist or were not in fact relied upon. (*Limestone Apparel Corp.*, 255 NLRB 722 (1981).)

THE ANALYSIS

I. The Terminations of Jose and Silvano Campos

The complaint at paragraphs 45, 47, and 48 allege that Respondent violated Sections 1153(a), 1152, and 1153 of the Act by interfering with, restraining and coercing Jose and Silvano

⁴ *Northern Wire Corp. v. NLRB*, 887 F. 2d 1313, (7th Cir. 1989)

⁵ *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263 (7th Cir. 1987)

Perez in the exercise of their rights under Section 1152 of the Act and by terminating Jose and Silvano Perez.

The record establishes that both Jose and Silvano Campos engaged in protected concerted activity in early 2017. The evidence reflects that they both complained about working conditions including foreman Herrera's treatment of employees, the availability of drinking water, threatening employees, Silvano Perez' suspension and requiring Sunday work. These activities were engaged in with fellow employees present and in fact other employees made similar complaints about working conditions. These complaints about working conditions were known to both first line supervisors and to higher level supervisor Ernesto Maldonado. Thus, the first two elements of General Counsel's case have been established, employees' protected concerted activity and employer knowledge of those activities. The causal connection between the Campos brothers' protected concerted activity and Respondent's adverse action is established in two ways. First, the protected concerted activity was engaged in proximately to their terminations. Complaints about working conditions were made by Silvano and Jose to Respondent in March and April 2017. The firings occurred May 15. This timing coupled with Respondent's shifting reasons for the Silvano's termination together with the absence of any explanation whatsoever for Jose's termination establishes the requisite causal connection between the Campos brothers' protected concerted activity and the reason Respondent terminated them, their protected concerted activity. General Counsel has satisfied its burden of establishing that Respondent unlawfully terminated the Campos brothers. I find further that in view of the pretextual nature of Respondent's proffered defenses, i.e., the reasons given for the Campos brothers' terminations either did not exist or were false, the shifting burden of *Wright Line* does not apply in this case and/or Respondent's defenses amount to pretext and therefore do not satisfy its burden of establishing that it would have fired the Campos brothers in the absence of their protected concerted activity.

2. The Suspension of Silvano Campos

The complaint herein at paragraphs 45 and 46 alleges as a First Cause of Action that Respondent violated Section 1152 and 1153(a) of the Act by suspending Silvano Campos for five days. Subsequent to the hearing, on December 14, 2018, in response to my Order to Show Cause, General Counsel moved to withdraw its First Cause of Action. There being no objection and good cause being shown, I grant General Counsel's motion to withdraw its First Cause of Action.

CONCLUSIONS OF LAW

By terminating Jose and Silvano Perez Respondent violated Sections 1152 and 1153(a) of the Act.

REMEDY

As a remedy for the violations of the Act found General Counsel seeks that Respondent be required to read and mail to all of its employees the attached Notice to Employees. In addition General Counsel seeks a further remedy that Respondents' supervisory personnel attend a training session conducted by the ALRB regarding employees' rights under the Act.

General Counsel contends that the standard remedies of posting, mailing and reading the Notice to Employees is necessary because the evidence reflects that Respondent's unlawful conduct was neither isolated nor minimal. I agree. The Board has broad discretion in fashioning remedies to effectuate the purposes of the Act. (*United Farm Workers of America*, (2018) 44 ALRB No. 6 at p.13.) In addition, any departure from the Board's standard non-economic remedies of posting mailing and reading notices must be established by Respondent by compelling evidence. (*Id.* at 13.) The evidence shows that Respondent's unlawful conduct occurred in the presence of many employees and the Perez brothers' protected concerted activity occurred at different locations in the presence of multiple employees. I find no compelling reasons herein to depart from the Board's standard non-economic remedies.

General Counsel argues that Respondent's supervisory personnel be compelled to attend training because employee concerns about supervisors commission of unfair labor practices can only be addressed through ALRB training. General Counsel provides no persuasive argument 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*, *supra* at p. 15.)

ORDER

Pursuant to Labor Code section 1160.3, Respondent, David Abreu Vineyard Management, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
 - (a) Terminating its employees for engaging in protected-concerted activity 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 act which are deemed necessary to effectuate the policies of the Act:
 - (a) Offer Jose Manuel Campos Perez and Silvano Campos Perez immediate reinstatement to their former or substantially equivalent employment without prejudice to their seniority or other rights and privileges of employment;
 - (b) Make Jose Manuel Campos Perez and Silvano Campos Perez whole for all wages and economic losses they have suffered since on or about May 15, 2017, as a result of their 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 Jose Manuel Campos Perez and Silvano Campos Perez and sent to the Region, which will thereafter disburse payment to Jose Manuel Campos Perez and Silvano Campos Perez;

- (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) 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 thirty (30) days after the issuance of this Order to all agricultural employees employed by Respondent at any time during the period May 15, 2017, 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: December 19, 2018



John J. McCarrick
Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was 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 terminating employees for engaging in protected concerted activity. 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 discharge employees who engage 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 ALRA.

WE WILL offer to Jose Manuel Campos Perez and Silvano Campos Perez reinstatement to their former or substantially equivalent position 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 342 Pajaro Street, Salinas, California 93901. The telephone number is (831) 769-8039.

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
(Code Civ. Proc., §§ 1013a, 2015.5)

CASE NAME: DAVID ABREU VINEYARD MANAGEMENT, INC., Respondent,
and JUAN MANUEL CAMPOS PEREZ, Charging Party

CASE NO: 2017-CE-024-SAL

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 action. My business address is 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On July 1, 2019, I served the within DECISION AND ORDER [45 ALRB No. 5] on the parties in said action, by EMAIL and/or CERTIFIED U.S. MAIL and placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follows:

James R. Rose, Esq.
Buchalter Law Firm, A.P.C.
1230 Pine Street
St. Helena, CA 94574

Email/Certified Mail
jrose@buchalter.com
9414 7266 9904 2968 9488 49

Courtesy Copy to:
Mr. Juan Manuel Campos Perez
1109 Silverado Trail South
St. Helena, CA 94574

Email/Certified Mail
No Email on File
9414 7266 9904 2968 9488 32

Franchesca Herrera, Regional Director
Jessica N. Melgar
ALRB Salinas Regional Office
342 Pajaro Street
Salinas, CA 93901

Certified Mail only
fherrera@alrb.ca.gov
jmelgar@alrb.ca.gov
9414 7266 9904 2968 9488 25

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Julia L. Montgomery, General Counsel
Silas Shawver, Deputy General Counsel
Audrey Hsia, AGPA
Agricultural Labor Relations Board
1325 J Street, Suite 1900-A
Sacramento, CA 95814

Email
jmontgomery@alrb.ca.gov
sshawver@alrb.ca.gov
Audrey.Hsia@alrb.ca.gov

Executed on July 1, 2019, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct



Caroline Molumby
Legal Secretary