STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WONDERFUL ORCHARDS, LLC,	)	Case No. 2016-CE-023-VIS
Respondent,	)	
and	)	
IMELDA VAZQUEZ-LOZANO,	)	
Charging Party.	)	46 ALRB No. 2 (April 21, 2020)

DECISION AND ORDER

On September 12, 2019, Administrative Law Judge Mary Miller Cracraft (ALJ) issued a decision and recommended order in this matter involving allegations that respondent Wonderful Orchards, LLC (Respondent) violated the Agricultural Labor Relations Act (ALRA or Act) by terminating a crew of eight agricultural employees because they engaged in activity protected under the ALRA. The ALJ found that a violation of the Act was established and recommended a remedy. Respondent has filed exceptions with the Agricultural Labor Relations Board (ALRB or Board) challenging the ALJ's decision and the recommended remedy.

The Board has considered the ALJ's decision, the record, and the exceptions and briefs filed in the case and has decided to affirm the ALJ's rulings, findings, and conclusions,[1] and to adopt the recommended order as modified herein.[2]

Background

Respondent has agricultural operations in California's San Joaquin Valley region. It obtains some of its agricultural workers from a farm labor contractor called

[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. 2; *P.H. Ranch* (1996) 22 ALRB No. 1, p. 1, fn. 1; *Standard Drywall Products* (1950) 91 NLRB 544, 545.) 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, p. 4.) 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, p. 4, fn. 5, citing 3 Witkin, Cal. Evidence (3d ed. 1986) § 1770, pp. 1723-1724.) The Board has examined the record and finds no basis for disturbing the ALJ's credibility determinations.

[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.) Additionally, the ALJ's recommended order did not include a provision requiring offers of reinstatement to the unlawfully terminated employees. Such a provision is a standard remedy in unlawful termination cases and is necessary to restore employees to the position in which they would have been absent the unlawful conduct. (*Sunrise Mushrooms, Inc*. (1996) 22 ALRB No. 2, p. 54.) Because the ALJ's recommended Notice to Employees included language on reinstatement, the omission appears to have been an inadvertent error. We shall modify the recommended order to include this provision. (*Mor Food N' Fun* (1987) 282 NLRB 1285, 1287.) We also have made other modifications to the recommended order and notice to conform to the Board's standard remedial language.

Family Ranch. The events at issue in this case occurred in December 2016 at Respondent's pomegranate orchard in Kings County, California.

Charging Party Imelda Vazquez-Lozano (Vazquez-Lozano), along with Dominga Hernandez Ortuno (Hernandez) and six other workers, were hired by Respondent through Family Ranch on December 27, 2016, to weed pomegranate trees, which involves cutting down weeds with hoes.[3] Vazquez-Lozano was responsible for transporting her seven coworkers to and from work in a van.[4] These eight individuals will be referred to as the "van crew." The van crew was supervised by a foreperson named Alicia Prudencio (Prudencio). There were other workers weeding in the area, at least some of whom were taken to work by Prudencio in another vehicle.

The van crew worked without unusual incident on December 27. However, Prudencio expressed concern with the pace at which the van crew was working and asked Vazquez-Lozano to help make sure they kept up. The van crew reported for their second day of work on December 28. Early in the day, the pace of work again became an issue. Prudencio repeatedly admonished the van crew to work faster, stating that her own supervisor wanted the pace of work to increase and that the work was not economical for the company at the slower pace. Vazquez-Lozano, on behalf of her crew, responded that

[3] All dates are in 2016 unless otherwise noted.

[4] Other than Vazquez-Lozano and Hernandez, the names of the members of the van crew were not identified at the hearing.

there were older workers among her crew and they could not keep the pace that Prudencio was demanding.[5]

Approximately two hours into the workday, Prudencio stopped work and called an impromptu meeting of the van crew. Brenda Torres (Torres), a Family Ranch safety employee, was also nearby. Prudencio complained again that they needed to work faster.[6] Vazquez-Lozano again objected on behalf of the crew, telling Prudencio that she could not expect the same pace of work from older workers as she did from younger ones. Prudencio then stated that if they did not want to work, they should put down their

[5] Vazquez-Lozano also testified that she complained at the beginning of the workday that Prudencio had not brought clean drinking water. The ALJ found that both Vazquez-Lozano and Prudencio were intelligent articulate witnesses. However, when Hernandez was called as a witness by the General Counsel, she was not asked by the General Counsel about the lack of fresh water. Based on this lack of corroboration, the ALJ drew an adverse inference, sided with Prudencio on this issue, and rejected this allegation. Respondent argues that this should have led the ALJ to discredit Vazquez-Lozano's testimony on other issues and complains that the ALJ failed to address the impact of the discredited testimony. However, the fact that a witness' testimony is not credited on one issue does not require the ALJ to discredit the remainder of the witness' testimony. (See *Suma Fruit International* (*USA*), *Inc*., *supra*, 19 ALRB No. 14, p. 4, fn. 5; *Garvey Marine, Inc. v. NLRB* (D.C. Cir. 2001) 245 F.3d 819, 825; *State Plaza, Inc*. (2006) 347 NLRB 755, 755, fn. 2 ["nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony"], quoting *NLRB v. Universal Camera Corp*. (2d Cir. 1950) 179 F.2d 749, 754.) Based upon our review of the record, including Vazquez-Lozano's testimony on the drinking water issue, we find no basis to overrule the ALJ's credibility determinations with respect to this witness.

[6] Respondent argues that Prudencio did not admonish the crew to work faster but only asked them "as a favor" to prune the weeds closer to the ground. We agree with the ALJ that this claim is implausible. We note that Prudencio herself testified that the pace of work was an issue on the first day of work and that, in testifying about the events of December 28, she stated that the van crew was "already slower than everybody else and they wanted to work even slower than that."

tools and leave.[7] At this, Vazquez-Lozano and the rest of the van crew began to leave. Prudencio did not take any action to prevent this.

As the crew was leaving, an individual named "Crystal" or "Chris" (hereinafter Crystal) approached the crew in order to get them to sign their timesheets. Vazquez-Lozano told the crew not to sign anything because it was unfair that Prudencio was "kicking us out like that . . . [a]nd if we signed it, it's almost as if we were telling them that we were leaving voluntarily." The record supports the conclusion that this statement was made and heard by both Prudencio and Torres. Vazquez-Lozano and Hernandez each testified that Vazquez-Lozano stated that the van crew was being kicked out or fired when presented with the timesheets and the ALJ credited their testimony on this issue.[8]

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[7] We find no basis to disturb the ALJ's decision to credit the testimony of Vazquez-Lozano and Hernandez concerning this statement over the account given by Respondent's witnesses that the van crew abruptly left after Prudencio politely asked them to weed closer to the ground. Both Vazquez-Lozano and Hernandez testified that Prudencio also stated "just drop your hoes and you can leave." However, it appears that the ALJ found that only the "work or leave" statement was made and not the more direct instruction to leave. Because we find that, under the circumstances, a reasonable employee would construe the "work or leave" statement to be a termination, we need not reach the issue of whether Prudencio also stated "drop your hoes and you can leave."

[8] During the hearing, questions arose concerning the meaning of the Spanish word "corriendo" used by Vazquez-Lozano. The interpreter stated that the word can be used colloquially to mean "run out" or "kicked out" or, alternatively, to mean "fired." Vazquez-Lozano clarified that she intended to state that she had been terminated. Hernandez also testified that when Vazquez-Lozano told the crew not to sign the timesheets she stated that they had been "fired." While neither Prudencio nor Torres testified that Vazquez-Lozano stated that she was being fired or kicked out, both of them agreed that they heard her tell the crew not to sign the timesheets. While the ALJ did not make a finding on this factual issue, we conclude that the record supports the conclusion

After Vazquez-Lozano had reached and boarded her van, Torres approached and asked Vazquez-Lozano to wait and talk to her. Vazquez-Lozano declined to speak to Torres at that time. She did get out of the van to ask Torres for the telephone number of the Labor Commissioner or the "farmworker union." After this, Vazquez-Lozano and the van crew apparently departed. Vazquez-Lozano filed a charge with the ALRB that same day alleging that she and her coworkers were unlawfully terminated for complaining about working conditions.

On December 29, Jacinto Alavez (Alavez), Prudencio's supervisor, spoke with Vazquez-Lozano on the telephone. He offered the van crew work on the following day under a different foreperson, but Vazquez-Lozano declined because they had already secured alternative employment. When Alavez asked why she had left, Vazquez-Lozano responded that Prudencio was "rushing" and "harassing" people and she was "very demanding."

Discussion

The principal issue raised by Respondent's exceptions is whether the ALJ erred in finding Respondent terminated the van crew.[9] In order for an involuntary

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that Vazquez-Lozano stated that she believed she was being fired and that both Prudencio and Torres heard the statement.

[9] Respondent filed exceptions relating to the ALJ's conclusions that Vazquez-Lozano and the van crew engaged in protected activity and that Respondent's termination of the van crew was unlawfully motivated. Respondent did not offer any argument or authority in support of these exceptions in its supporting brief and, therefore, those issues are waived. (*Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, p. 9 [party waived objection where an exception was unsupported by any argument or authority].) Even had the issues been briefed, however, we would uphold the ALJ's conclusions on these issues. The

discharge of an employee to occur, it is not necessary that the employer explicitly state that the employee is discharged. (*Ridgeway Trucking Co*. (1979) 243 NLRB 1048, 1048 ["the fact of discharge does not depend on the use of formal words of firing"].) Rather, the Board has held that a discharge occurs when "an employer's conduct or words would reasonably cause employees to believe that they were discharged . . . ." (*P&M Vanderpoel Dairy* (2014) 40 ALRB No. 8, p. 21; *H&R Gunlund Ranches, Inc*. (2013) 39 ALRB No. 21, p. 5, fn. 3; *Ridgeway Trucking Co., supra*, 243 NLRB 1048, 1048; *Lance Investigation Service, Inc*. (2003) 338 NLRB 1109, 1109-1110.) The analysis focuses on the perspective of the employee, not the employer, and whether the employee reasonably believed that a termination had occurred. (*Dole Farming, Inc.* (1996) 22 ALRB No. 8, p. 2, fn. 3.)

The Board has recognized that "[d]isputes over whether employees voluntarily quit or were discharged after engaging in protected activity often include circumstances steeped in ambiguity . . . ." (*Dole Farming, Inc., supra*, 22 ALRB No. 8, p. 2, fn. 3.) In these situations, the employer may contend that it did not intend to

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General Counsel did not litigate this case on a theory that the van crew's departure constituted a protected work stoppage. However, when employees concertedly withhold their labor to protest working conditions that they find unreasonable, unfair, or unsafe, their conduct is protected under the Act and they may not be subjected to discipline or termination based upon that conduct. (See *Washington Aluminum Co*. (1962) 370 U.S. 9, 15-16; *Sabor Farms* (2016) 42 ALRB No. 2, at ALJ Dec. p. 13; *California Artichoke and Vegetable Corp*. (2015) 41 ALRB No. 2, p. 19.) Respondent's position that that Prudencio did not terminate the van crew would mean that the van crew would have collectively left the job site after complaining about pace of work demands that they found unreasonable and unfair. However, because we agree with the ALJ that the van crew was terminated, we need not reach this issue.

terminate the employees and they should be deemed to have voluntarily resigned. However, if the employer's acts "created a climate of ambiguity and confusion which reasonably caused [employees] to believe that they had been discharged or, at the very least, that their employment status was questionable . . . the burden of the results of that ambiguity must fall on the employer." (*Ibid*.) To avoid this result, the employer must clarify the ambiguity over employment status that its conduct created. (*H&R Gunlund Ranches, Inc*., *supra*, 39 ALRB No. 21, p. 5, fn. 3; *P&M Vanderpoel Dairy, supra,* 40 ALRB No. 8, p. 21.)

Both the Board and the NLRB have found that conditional "work or leave" statements can support a reasonable belief that a termination has occurred, depending on the surrounding circumstances. (*Ridgeway Trucking Co., supra*, 243 NLRB 1048, 1048-1049 [truckers reasonably believed they had been terminated when employer told them to get in their trucks or leave the premises]; *Teresa Coal Co, Inc*. (1981) 259 NLRB 317, 318-319 [finding termination where protesting employees were told to work or go home]; *P&M Vanderpoel Dairy, supra*, 40 ALRB No. 8, pp. 3-4, 21 [finding termination where employees demanding wage increase were told "if you don't want to work you can go"].)

We agree with the ALJ's conclusion that a termination occurred. We note that there was no testimony that anyone on the crew refused to work or threatened to refuse to work. Vazquez-Lozano had merely objected that the crew could not physically maintain the increased pace demanded by Prudencio. It was Prudencio who halted the work and, in response to the continued objections to her exhortations to work faster, stated that if the crew did not want to work, they should leave. Given that it had already

been explained that, due to the presence of older workers, the faster pace could not be achieved, a reasonable employee would construe Prudencio's statement as a termination.

Respondent argues that Vazquez-Lozano could not have reasonably believed that she had been terminated because she was aware that Prudencio did not have the authority to terminate employees without approval from her own supervisor. However, the legal test requires the Board to view the circumstances from the perspective of the employee, not the employer. The record shows that Prudencio communicated to the van crew that her boss had told her that the van crew must work faster. We find dubious the proposition that Vazquez-Lozano would assume that Prudencio had decided to terminate an entire crew without being authorized to do so. Indeed, Vazquez-Lozano testified that she did not question Prudencio's authority to terminate the crew in part because it was done in the presence of Torres. We find that Vazquez-Lozano reasonably believed that when Prudencio, an admitted statutory supervisor, stopped the van crew's work and terminated the crew, the termination was authorized by Respondent. (*Orland Park Motor Cars, Inc*. (2001) 333 NLRB 1017, 1057 [although supervisor lacked authority to terminate, the relevant issue was "whether employees could reasonably believe that [the supervisor] was conveying to them the substance of a decision made not by [the supervisor], but by [the employer]"].)

Respondent further argues that the ALJ failed to consider its efforts to clarify that the van crew was not terminated. However, Prudencio's direction to work or leave was, at the very least, ambiguous and we find that subsequent events, far from clarifying that the van crew was not terminated, would have confirmed the initial

impression created by Prudencio that a termination had occurred. The van crew began to depart after Prudencio told the crew that they should leave if they did not want to work. As they departed Crystal asked Vazquez-Lozano to sign timesheets. Vazquez-Lozano told the van crew not to sign them, stating that they were unfairly being kicked out or fired and signing would create the impression that they were leaving voluntarily. As discussed above, we find that Prudencio heard these statements. Yet, despite being on notice that the van crew believed that they were being terminated, Prudencio did not make any attempt to tell the crew otherwise. This would only have strengthened the van crew's reasonable belief that they had been terminated. Indeed, it strongly suggests that Prudencio intended to dismiss the crew.

Unlike Prudencio, Torres did attempt to speak to Vazquez-Lozano before she left the orchard. By the time Torres approached, Vazquez-Lozano had already boarded the van. According to the testimony credited by the ALJ, Torres asked the van crew to wait and stated that she was going to speak to them but the van crew declined to speak with her. Respondent contends that Torres' actions satisfied Respondent's duty to clarify that the van crew was not being terminated. However, there is no evidence that Torres stated to the van crew that they had not been terminated. Instead, she asked them to stay and talk to her for an unspecified reason. She was actually the second person to ask the van crew to wait, the first being Crystal who had just asked that they stop and sign papers that Vazquez-Lozano believed would prejudice her position that they had been involuntarily terminated. While Vazquez-Lozano admitted that she did not know why Torres wanted her to wait, the duty to clarify the situation lay with Respondent and

Torres' request for the crew to wait did not satisfy this burden. Finally, Vazquez-Lozano did later get out of the van and ask Torres for contact information for a union or the Labor Commissioner. Although these questions evidenced Vazquez-Lozano's continued belief that she had been terminated, Torres did not take this final opportunity to clarify the situation but only responded that she did not have the information.[10]

Respondent also relies on the telephone conversation that took place between Vazquez-Lozano and Alavez on December 29. We do not find that conversation relevant to the issue of whether the van crew was terminated.[11] By the time Alavez spoke with Vazquez-Lozano, the termination had already occurred. Indeed, the entire crew had already been forced to forego most of the day's pay for December 28 and Vazquez-Lozano had found alternative employment for her crew. (*Tubari Ltd., Inc*. (1988) 287 NLRB 1273, 1285 [where supervisor told employee to "go home" but later told him he

[10] Torres testified that, as the van crew was departing, she spoke to an unidentified member of the crew and told her that she could stay and work. However, this individual stated that she had to leave because Vazquez-Lozano was her ride. The ALJ declined to make a factual finding as to whether this conversation occurred as she deemed it irrelevant. We agree that, assuming the conversation occurred, it does not affect the outcome. Prudencio terminated Vazquez-Lozano knowing that she was the driver for the rest of the crew. Torres telling one member of the crew that she could stay and work while her driver and the rest of her crew left would have been inadequate to meet Respondent's duty to clarify the situation if the statement was not conveyed to the rest of the crew, or at least to Vazquez-Lozano, which Torres did not do.

[11] To the extent, however, that Alavez's December 29 offer constituted a valid offer of reinstatement to the van crew, our order would not require it to make another reinstatement offer. Alavez's offer, if a valid reinstatement offer, further would operate to limit Respondent's backpay liability. However, these are matters to be addressed in subsequent compliance proceedings.

could come back the next day, latter statement was "too late" because the employee had already been terminated]; *Shenandoah Coal, Inc., supra*, 305 NLRB 1071, 1073-1074 [finding termination established where employee stated he was quitting because, at the time the employee made the statement, he had already been terminated].) Furthermore, the contention that Vazquez-Lozano did not believe she had been terminated is undermined by the fact that, the day before her conversation with Alavez, she filed a charge with the ALRB in which she stated under penalty of perjury that she and her crew were terminated for complaining about working conditions.[12]

Remedy

Respondent excepts to the ALJ's recommended remedy. It argues that the remedial order should be directed to the farm labor contractor, Family Ranch, or should be limited to employees supplied by Family Ranch. We reject this argument. It is well-established that farm labor contractors are excluded from the definition of "agricultural employer" under the Act. (Lab. Code, § 1140.4, subd. (c).) Rather, "[t]he employer engaging such labor contractor . . . shall be deemed the employer for all purposes . . . ." (*Ibid*.; *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, 768.)

Respondent also objects to the noticing components of the ALJ's recommended remedy, arguing that there was no evidence that employees outside of the

[12] Respondent argues that Vazquez-Lozano essentially staged her own termination and that of her seven coworkers as part of a pre-arranged plan to fabricate a lawsuit against Respondent. The ALJ discredited testimony that, as she was leaving, Vazquez-Lozano threatened to sue Prudencio and stated that she had a lawyer. We affirm the ALJ's credibility determinations.

van crew itself were aware of the unlawful terminations or were impacted by them. Respondent relies on *M.B. Zaninovich, Inc. v. ALRB* (1981) 114 Cal.App.3d 665, where the appellate court reversed the Board's notice reading and mailing remedy because the violation was "isolated and technical" and occurred "in the privacy of a supervisor's office."[13] The court, however, acknowledged the unusual nature of the facts involved in that case, and stated that the Board's standard remedies would be appropriate in the typical case where the illegal conduct is either visible to others or flagrant in nature. (*Zaninovich v. ALRB, supra,* 114 Cal.App.3d 665, 689-690; see also *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"].)

In this case, the violation was not technical but involved the suppression of employees' substantial right to act concertedly for the purpose of protesting working conditions they found unfair or unreasonable. Their supervisor's response to the protected activity was to impose the harshest available sanction, terminating the entire eight-worker crew. (*Aukeman Farms* (2008) 34 ALRB No. 2, p. 7 ["Firing an employee has been characterized as the industrial equivalent of capital punishment"].) Furthermore, the violation did not occur "in the privacy of a supervisor's office" but in an

[13] The employer in that case, after entering into a settlement agreement with the ALRB's General Counsel, refused to rehire three former employees because it believed the employees had already declined reinstatement under the terms of the settlement agreement.

orchard where 35 to 38 individuals were working. We find that the noticing remedies recommended by the ALJ are justified and consistent with Board precedent. (See, e.g., *David Abreu Vineyard Management, Inc*. (2019) 45 ALRB No. 5, pp. 7-10 [noticing remedy ordered where employer terminated two employees for engaging in protected activity]; *Diepersloot* (2018) 44 ALRB No. 12, pp. 10-14 [ordering notice to all employees as a remedy where employer threatened, terminated, and refused to rehire a single employee]; *Gerawan Farming, Inc*. (2018) 44 ALRB No. 11, pp. 13-15 [ordering notice to all employees as a remedy where employer failed to respond to union information request]; *Sabor Farms*, *supra*, 42 ALRB No. 2, at ALJ Dec. pp. 18-20 [ordering notice to all employees where employer terminated two employees for engaging in protected concerted activities]; *California Artichoke and Vegetable Corp*., *supra*, 41 ALRB No. 2, pp. 28-32 [ordering notice to all employees where employer disciplined approximately 25 workers for engaging in protected concerted activity]; *Sandhu* (2014) 40 ALRB No. 12, pp. 40-44 [ordering notice to all employees as a remedy where employer terminated one employee who engaged in protected activity]; *Kawahara Nurseries, Inc*. (2014) 40 ALRB No. 11, pp. 25-29 [ordering notice to all employees as a remedy where employer laid off 14 employees based on union activity]; *P&M Vanderpoel Dairy*, *supra*, 40 ALRB No. 8, pp. 24-27 [ordering notice to all employees as a remedy where employer terminated five employees for engaging in protected concerted activity].)

ORDER

Pursuant to Labor Code section 1160.3, Respondent Wonderful Orchards, LLC, its officers, agents, labor contractors, successors, and assigns shall:

1. Cease and desist from:

   (a) Discharging or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in concerted activities protected under section 1152 of the Act.

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

2. Take the following affirmative actions, which are deemed necessary to effectuate the policies of the Act:

   (a) Rescind the discharge notices or any other such personnel notation regarding the events of December 28, 2016, of the van crew and expunge such notices from its files.

   (b) Offer Imelda Vazquez-Lozano, Dominga Hernandez Ortuno, and other members of the van crew full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights or privileges of employment, and make them whole for all wages or other economic losses they suffered as a result of their unlawful terminations, to be determined in accordance with

established Board precedent. The award shall include interest to be determined in accordance with *Kentucky River Medical Center* (2010) 356 NLRB 6 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 Imelda Vazquez-Lozano, Dominga Hernandez Ortuno, and the other employees and sent to the ALRB's Visalia Regional Office, which will thereafter disburse payment to them.

(c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning December 28, 2016, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records, and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

(d) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto, and, after its translation into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and

place(s) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time during the period December 28, 2016, to December 27, 2017, 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.

(i) Notify the Regional Director in writing, within 30 days after the date this order becomes final, of the steps Respondent has taken to comply with its terms. Upon the 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: April 21, 2020

Isadore Hall III, Member

Barry D. Broad, Member

Ralph Lightstone, Member

Cinthia N. Flores, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed with the Visalia Regional Office of the Agricultural Labor Relations Board (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 (Act) by terminating employees for engaging in protected concerted activity. The ALRB has told us to 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 these 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 Board.
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 discharge you because you complain about wages, hours, and working conditions on behalf of yourself and your coworkers.

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 Imelda Vazquez-Lozano, Dominga Hernandez Ortuno, and the van riders who accompanied them on December 28, 2016 immediate employment to their former positions or, if those positions are no longer available, to substantially equivalent positions.

WE WILL make whole Imelda Vazquez-Lozano, Dominga Hernandez Ortuno and the van riders who accompanied them on December 28, 2016, for all wages or other economic losses that they suffered as a result of our unlawful discharge of them.

WONDERFUL ORCHARDS, LLC

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 Agricultural Labor Relations Board. One office is located at 1642 West Walnut Avenue, Visalia, California. 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

CASE SUMMARY

WONDERFUL ORCHARDS, LLC (Imelda Vazquez-Lozano)

46 ALRB No. 2
Case No. 2016-CE-023-VIS

Background

The General Counsel alleged that respondent Wonderful Orchards, LLC (Respondent) unlawfully terminated a crew of eight employees, including charging party Imelda Vazquez-Lozano, because they complained about working conditions. An administrative law judge (ALJ) found that the crew engaged in protected activity by complaining about the pace of work required by their foreperson, Alicia Prudencio, and that Prudencio terminated the crew in response.

Board Decision

The Agricultural Labor Relations Board (ALRB or Board) affirmed the ALJ's decision. The Board agreed with the ALJ that Vazquez-Lozano and her crew reasonably believed Prudencio was terminating them when she stated that the crew should put down their tools and leave if they did not want to work. The Board further found that Prudencio was aware that her statement had caused the crew to believe they had been terminated and Prudencio did not do anything to clarify the situation or prevent the crew from leaving, which contributed to the crew's reasonable belief that they had been terminated. Respondent contended that its duty to clarify the situation was satisfied when a safety employee asked the crew to wait and talk to her. However, the Board rejected this contention because the individual never told the crew they were not being terminated and did not explain why she wanted them to wait. The Board adopted the ALJ's recommended remedy with some modifications to conform to the Board's standard remedies.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WONDERFUL ORCHARDS, LLC, Respondent, and, IMELDA VAZQUEZ-LOZANO, Charging Party.	Case No. 2016-CE-023-VIS **DECISION AND RECOMMENDED ORDER**

At issue in this proceeding is whether Charging Party Imelda Vazquez-Lozano (Vazquez-Lozano) and her seven ride-share coworkers (together with Vazquez-Lozano, the van crew)[1] were unlawfully discharged on December 28, 2016[2] because of their protected concerted activity, as the General Counsel claims, or whether they voluntarily quit, as Wonderful Orchards, LLC (Respondent)[3] claims. Hearing was held in Visalia, California on June 4, 2019.[4]

All parties were afforded full opportunity to present witnesses and exhibits and to examine and cross-examine witnesses. On the record, as a whole, and after thorough consideration of briefs filed by the parties, the following findings of fact and conclusions of law are made.

The van crew was employed on various dates in 2016 including December 27 and 28.[5] On those dates, the van crew as well as other workers performed duties related to weeding

[1] There is no dispute that the van crew were at all relevant times agricultural employees within the meaning of §1140.4(b) of the Agricultural Labor Relations Act (the Act).

[2] All dates are in 2016 unless otherwise referenced.

[3] The parties agree that Respondent was at all relevant times an agricultural employer within the meaning of §1140.4(a) and (c) of the Act.

[4] The parties agree that the Agricultural Labor Relations Board has jurisdiction of this dispute.

[5] Vazquez-Lozano testified that she worked three days in December. She did not recall the specific dates. When asked if she worked two or three days, Vazquez-Lozano said, "I can't remember very well." The complaint alleged and the answer admitted that Vazquez-Lozano and the van crew worked on only two days, December 27 and 28. Moreover, van rider Dominga Hernandez Ortuno (Hernandez) recalled that the van crew worked on only two

pomegranate trees at a Respondent orchard. The van crew was hired to perform this work for Respondent by Family Ranch, a farm labor contractor.

Vazquez-Lozano drove the van crew on December 27 and 28. They worked nine hours on December 27 but left the site after only two hours on December 28. Their forewoman was Alicia Prudencio (Prudencio).[6]

The complaint alleges that on December 28 Vazquez-Lozano and others in the van crew complained about the lack of clean drinking water and the pace of work being required by Prudencio. After the workers complained, the complaint alleges that Respondent terminated the van crew in retaliation for their protected, concerted activity, thus violating §1153(a) of the Act.[7]

Witness credibility has been assessed relying on various factors. Initially, it is observed that all of the witnesses testified about events that occurred two and one-half years prior to the hearing. Thus, due to passage of time, the ability of witnesses to recall the exact dates and sequence of events is understandable.[8] The entire record has been reviewed and the demeanor of all witnesses carefully observed.

Other than passage of time and the demeanor of each witness, the factors which have been considered include the quality of testimony, apparent interests of witnesses, inherent probabilities in light of other events, corroboration or the lack of it, consistencies or inconsistencies within the testimony of each witness as well as between witnesses with similar apparent interests.[9] Where there is inconsistent evidence on a relevant point, credibility findings are incorporated into the analysis that follows.

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days. Thus, consistent with the record and the parties' agreement, the dates of work, December 27 and 28, will be utilized.

[6] Respondent's Answer admits that Prudencio was considered a supervisor within the meaning of §1140.4(j) of the Act in that she had responsibility in the interest of the employer to direct employees using the exercise of independent judgment. Respondent denied that Prudencio had authority to discipline workers under her supervision.

[7] Complaint ¶¶ 14-15. The complaint also alleges a threat of discharge at ¶¶ 16-17. This theory was not specifically discussed at the hearing or in post-hearing briefs. No findings regarding this theory will be made herein.

[8] The transcript contains witness testimony of statements or conversations within quotation marks. The quotation marks, although correctly used by the transcriber, are not viewed as an indication that the witness recalled the exact wording of the conversation. No witness confirmed the exact words utilized.

[9] *NLRB v. Walton Mfg. Co.* (1962) 369 U.S. 404, 408. See also, *Monterey Mushrooms, Inc.* (2019) 45 ALRB No. 1 at 2, fn. 1; *Double D Construction Group, Inc.* (2003) 339 NLRB 303, 305; *Daikichi Sushi* (2001) 335

FRESH WATER

Vazquez-Lozano testified that on December 28, there was no fresh water when the van crew arrived. When she and others in the van crew asked about this, forewoman Prudencio told Vazquez-Lozano and her coworkers that the water had not yet arrived, according to Vazquez-Lozano. Vazquez-Lozano testified that she herself then provided the van riders with water from the van.

Vazquez-Lozano's testimony[10] in this regard was as follows:

A. Just that morning, when we arrived, she [Prudencio] was telling us about the cut we had to make. . . . And we wanted water and there was no water. She had some jugs of water but they were dirty. And so, I got the jug out of my van so they could drink water.

Q. And who discovered that the water was dirty?

A. The ones that I had given a ride to.

Q. And did you address that concern with Ms. Alicia Prudencio?

A. She's the one that they asked the water from and she said that the water hadn't been brought yet. And the ones that were there were dirty.

Q. And who asked Ms. Prudencio for the water?

A. I don't know who takes the water for her.

Q. No. Who asked Ms. Prudencio for the clean water?

A. I did.

Q. Were any other workers --

A. I just said -- I just said, "Alicia, there's no water. The water that's here is dirty."

Q. Were any other workers present at the time that you said this?

A. Yes, the same ones that she gives a ride to.

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NLRB 622, 623, enfd. (D.C. Cir. 2003) 56 Fed. Appx. 516. Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Suma Fruit International (USA), Inc.* (1993) 19 ALRB No. 14, p. 4 fn. 5; *Jerry Ryce Builders, Inc.* (2008) 352 NLRB 1262, 1262 fn. 2; *Daikichi Sushi*, supra at 622.

[10] Tr. 14:5-15:3.

Forewoman Prudencio testified that she was responsible for the fresh water, which she provided each day. She denied that Vazquez-Lozano or the van crew complained about fresh water on the last day the van crew worked. Although van rider Dominga Hernandez Ortuno (Hernandez) was called as a witness by the General Counsel, she was not asked about any lack of fresh water.

With regard to the fresh water, both Vazquez-Lozano and Prudencio were intelligent, articulate witnesses. Both gave the impression that they were attempting to provide a truthful rendition of the events without elaboration or exaggeration. Nevertheless, there is absolutely no explanation for the failure of Hernandez to corroborate Vazquez-Lozano's testimony regarding the water.

Accordingly, assessing credibility as between Vazquez-Lozano and Prudencio regarding fresh water, Prudencio is credited due to an adverse inference drawn from lack of corroboration from Hernandez of Vazquez-Lozano's testimony.[11] Thus, it is found that there was no dispute regarding fresh water on December 28.

PACE OF WORK

On December 28, Prudencio made several requests that the van crew work more quickly. Both Vasquez-Lozano and van rider Hernandez testified that they told Prudencio that they could not work as fast as Prudencio was indicating. They also called to her attention the fact that the van crew's hoes had not been sharpened. Prudencio sharpened them and admonished the crew to work faster.

After the van crew had worked about two hours on December 28, Prudencio called a meeting of the van crew plus several other workers because they were working more slowly than

[11] An adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. *Flexsteel Industries*, 316 NLRB 745, 757-758 (ALJD) (1995) enfd. mem. (5th Cir. 1996) 83 F.3d 419 (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact); see generally, *P & M Vanderpoel Dairy* (2014) 40 ALRB No. 8 at p. 18 (adverse inferences permitted where a party fails to produce evidence or witnesses within its control); *Martin Luther King, Sr., Nursing Center* (1977) 231 NLRB 15 fn. 1 (adverse inference appropriate where no explanation as to why supervisors did not testify).

the other workers. Prudencio told them, according to Vazquez-Lozano, that Prudencio's boss was pressuring her to get them to work more quickly because at their slower pace, the work would be too expensive.

Hernandez as well as Prudencio agreed that Vazquez-Lozano told Prudencio at the meeting that the people in the van crew were not happy or comfortable working at a faster pace. According to Vazquez-Lozano, Prudencio told them to work harder and faster. As the group continued working, Prudencio repeated her admonition to them to work harder, to try harder, "You guys are getting left behind. My boss is pressuring me."[12]

Prudencio agreed that she called a meeting of the van crew on the morning of December 28. However, she testified that she asked the van crew to, "please, as a favor, cut it down shorter." Even though Prudencio agreed that her supervisor brought it to her attention that among the crew of 35-38 workers, the van crew plus a few others were behind everyone else, she testified that it was the request to cut the weeds shorter that precipitated the van crew leaving.

According to Vazquez-Lozano, however, it was the pace of work that was at issue. Vazquez-Lozano testified that Prudencio demonstrated a faster method of hoeing to the crew. Vazquez-Lozano eventually objected, "Alicia, Alicia, you can't be demanding the same kind of work from these people at the same pace that you would require from – from younger people."[13] Prudencio, according to Vazquez-Lozano, responded that if we did not want to work we should just put down our hoes and leave. Further, Prudencio said, "Okay, just drop the hoes and you can leave."[14]

Van rider Hernandez recalled that Prudencio said, "if we didn't want to work, that we should just leave, that we should -- should not be there."[15] Vazquez-Lozano responded,

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[12] Tr. 19:2-7.

[13] Respondent's witnesses did not refute that Vazquez-Lozano made this statement.

[14] Tr. 20:8-22.

[15] Tr. 58:10-13.

according to Hernandez, "Well, we got fired, so let's leave."[16] The van crew put down their hoes at the edge of the field and started to walk to the van.

Thus, neither Vazquez-Lozano nor Hernandez testified that Prudencio explicitly told them they were fired. Vazquez-Lozano and Hernandez agreed that Prudencio said if they did not want to work, they should put down their tools and leave. Prudencio made no effort to prevent the van crew from leaving, according to Vazquez-Lozano.

Although Prudencio recalled that the van crew and several others were not working as fast as the rest of the crew of 35 to 38 workers, she testified that when she called together the van crew plus the other three, she asked them, "please, as a favor, cut it down shorter."[17] At that direction, according to Prudencio, Vazquez-Lozano spontaneously instructed the van crew: "Let's all leave. We're not here doing piecework. They're – this is – this is backbreaking."[18] Prudencio testified, "And then they just off [and] left. And – and I was simply just asking them, please, as a favor, to cut the weeds down shorter because it had been brought to my attention."[19] Prudencio denied saying, "If you don't want to work, put down your tools and leave. . . ."[20]

After this, according to Prudencio, the van crew threw down their hoes and left. Prudencio explained that she did not have the authority to discharge a worker. Prudencio's responsibility was to report any issue to her supervisor, Jacinto Alavez Mendoza (Alavez). The supervisor makes disciplinary decisions. As relates to the van crew, Prudencio testified that she did not recommend that they be discharged.

Prudencio and Vazquez-Lozano both recalled that Brenda Torres (Torres), who registers employees on behalf of Family Ranch, was in the area when the van crew left the field. On

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[16] As explained by the Interpreter, Vazquez-Lozano used the word "corriendo" which he stated meant "fired," or "run off," or "kicked out." When the witness was asked by the Interpreter for clarification of the words used by Prudencio, "Did you mean that you were being run out or asked to leave or did you feel like you were being fired from your job?" (Tr. 22:2-5), Vazquez-Lozano stated, "I feel like we were fired from the job because she [Prudencio] said, 'You can put down your hoes and you can leave.'" Tr. 21:5-25.

[17] Tr. 82:18-21.

[18] In response to the leading question, "And did [she] say something like vamonos or let's go?" Tr. 84:2-5.

[19] Tr. 83:20-23.

[20] Tr. 85:24-86:1; 86:19-21; and further, Q: Did you kick them off the job site? A: No." 86:22-23.

December 28, Torres was at Respondent's pomegranate orchard where the van crew was working. Torres testified that she was close enough to hear the interchange between Vazquez-Lozano and Prudencio. According to Torres, after Prudencio asked the crew to cut the weeds shorter, Torres testified that Vazquez-Lozano and the van crew threw their hoes down and Vazquez-Lozano told the van crew, "Let's go." According to Torres, Prudencio did not fire the van crew.

Torres went further, however. Torres, but not Prudencio, recalled that as the van crew was leaving, Prudencio told the van crew they were not fired, they had their jobs:[21]

> Q: And did Alicia [Prudencio] say to the group, if you don't want to work, then you can leave?
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> A: Alicia just told them, "We have work here and it has to be done. I'm telling you how the work has to be done because I'm told how the work has to be done. But you have your job here. No one's being fired."
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> Q: She said, "no one's being fired?
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> A: Yes, in general.

This portion of Torres testimony, in particular, was exaggerated and overly analytical for the work place. Moreover, it was not corroborated by Prudencio. Torres' testimony that in the heat of a job action, Prudencio spontaneously told the van crew they were not fired, that they had their jobs,[22] defies credulity, especially since Torres and Prudencio agree with Vazquez-Lozano and Hernandez that Prudencio did not tell them they were fired. Consequently, Torres' testimony is discredited regarding what was said by Prudencio to the van crew as they departed on December 28.

Further, Prudencio's denial that she told the van crew they should leave is contextually inexplicable.[23] According to Prudencio, the van crew left after she asked them, "as a favor," to

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[21] Tr. 91:21-92:3.

[22] "We have work here and it has to be done. I'm telling you how the work has to be done because I'm told how the work has to be done. But you have your job here. No one's being fired." Tr. 91:23-92:1.

[23] Torres was asked if Prudencio fired the van crew and responded "no." This does not negate a statement attributed by Vasquez-Lozano and Hernandez to Prudencio to the effect: if you don't want to work, you should leave.

cut the weeds shorter. In fact, both Prudencio and Torres testified that after Prudencio instructed the van crew and others to cut the weeds shorter, Vazquez-Lozano said, "Let's go." Then the van crew threw down their tools and left.

It makes no sense that after driving to a jobsite, the van crew would forego a full day's pay after being asked to cut the weeds shorter. Prudencio acknowledged that the van crew wanted to work more slowly. Her testimony that the van crew left after being told to cut the weeds shorter "as a favor" is discredited as implausible.

It is concluded that the testimony of Vazquez-Lozano and Hernandez is credible. Both were straight-forward, thoughtful, and clear regarding the events of their departure on December 28. Their testimony was consistent and plausible. They did not obviously inject self-serving or exaggerated monologue into their recollections. They agreed that at no time did Prudencio tell them they were fired even though this admission might be against their interest.

Thus, based on the credible evidence, it is found that on December 28, Prudencio repeatedly admonished the van crew to work faster and held a meeting ordering the crew to work faster. Vazquez-Lozano objected on several occasions throughout the day referencing the van crew's distress at the pace of work being ordered. Hernandez made a similar complaint to Prudencio. Prudencio testified that the entire van crew objected to the faster pace. After two hours of this back and forth, the van crew was required at a meeting to perform at a faster pace. Vazquez-Lozano again objected to the requirement to work faster. Prudencio told the van crew if they did not want to work, they should put down their tools and leave.

Whether a worker has been discharged does not turn on the employer's choice of words.[24] No magic words are necessary for employees to conclude that they are no longer wanted.[25] Rather, the words or conduct is examined to determine if a worker would reasonably

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[24] *Ridgeway Trucking Co.* (1979) 243 NLRB 1048, 1048-1049 enfd. (5th Cir. 1980) 622 F.2d 1222 (determination of whether or not an employee has been discharged does not turn on employer's choice of words).

[25] See *Poly-America, Inc. v. NLRB* (5th Cir. 2001) 260 F.3d 465, 477 (test of whether an employee is discharged depends on the reasonable inferences employees could draw from the language used by the employer).

believe that she had been discharged.[26] Based on the content and context of this exchange, it is found that the words "if we didn't want to work we should just put down our hoes and leave"[27] would reasonably be viewed by an employee as discharge of the van crew.[28]

The Act provides that workers have the right to engage in concerted activities for mutual aid and protection.[29] Interference, restraint, or coercion of employees in the exercise of the right to engage in concerted activities is an unfair labor practice in violation of the Act.[30] In order for activity to be concerted, the activity must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee herself.[31] Raising any issue involving employment, wages, hours, and working conditions constitutes protected conduct.[32]

Whether an employee has engaged in concerted activity is a factual question based on the totality of the evidence.[33] In a group setting, a concerted objective may be inferred from a variety of factors such as an individual protest of a term or condition of employment which affects others at a meeting which affords the first opportunity to object.[34]

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[26] See, e.g., *P & M Vanderpoel*, supra, 40 ALRB No. 8 at p. 21 (discharge occurs if an employer's conduct or words would reasonably cause employees to believe that they were discharged); *Dole Farming, Inc.* (1996) 22 ALRB No. 8, p. 2-3 fn. 3 (events must be viewed through the workers' eyes as to whether they reasonably believed they were discharged); *Flat Dog Productions, Inc.* (2000) 331 NLRB 1571, 1571 enfd. (9th Cir. 2002) 34 Fed.Appx. 548 (in determining whether an employee has been discharged, the events must be viewed through the employee's eyes; climate of ambiguity and confusion may reasonably cause employees to believe that discharge has occurred).

[27] Tr. 20:1-4.

[28] See, e.g., for a similar holding: *Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4, p. 2, fn. 4 (response to request to workers' request for guarantee of hours was reasonably interpreted as discharge: "the raise was at their homes, there was no more work for them, and to go.")

[29] Sec. 1152 of the Act; see also Sec. 7 of the National Labor Relations Act (NLRA), 29 U.S.C. §157, to the same effect.

[30] Sec. 1153(a) of the Act; see also Sec. 8(a)(1) of the NLRA to the same effect.

[31] *Meyers Industries (Meyers I)* (1984) 268 NLRB 493, remanded sub nom. *Prill v. NLRB* (D.C. Cir. 1985) 755 F.2d 941, cert. denied (1985) 474 U.S. 948, on remand *Meyers Industries (Meyers II)* (1986) 281 NLRB 882, affd. sub nom. *Prill v. NLRB* (D.C. Cir. 1987) 835 F.2d 1481, cert denied (1988) 487 U.S. 1205.

[32] *J & L Farms* (1982) 8 ALRB No. 46, p. 3, fn. 3 (any issue directly involving the employment, wages, hours and working conditions of employees qualifies as a subject matter for protected concerted activity); *Miranda Mushroom Farm, Inc.* (1980) 6 ALRB No. 22, pp. 20-21 (employee who made complaint about occupational safety designed to benefit all employees is engaged in protected, concerted activity).

[33] *Meyers II*, supra, 281 NLRB at 886.

[34] *Chromalloy Gas Turbine* (2000) 331 NLRB 858, 863, enfd. (2d Cir. 2001) 262 F.3d 184; *Whittaker Corp.* (1988) 289 NLRB 933, 934.

Initially, it must be determined whether Vazquez-Lozano and Hernandez engaged in protected concerted activity. "To be protected under Section 7 [the NLRA counterpart to ALRA Section 1152] of the Act, employee conduct must be both concerted and engaged in for the purpose of mutual aid or protection. Whether an employee's activity is concerted depends on the manner in which the employee's actions may be linked to those of her coworkers.[35] The concept of mutual aid or protection focuses on the goal of the activity, i.e., whether the employee or employees are seeking to improve terms and conditions of employment.[36]

The facts, detailed above, show that Vazquez-Lozano and Hernandez explicitly voiced concerns about the pace of the work throughout the two hours the van crew worked on December 28 and at a meeting that day. Vazquez-Lozano did not complain alone, and the topic, the pace of the work, was not an individual concern. Indeed, Prudencio agreed that Vazquez-Lozano was speaking on behalf of the van crew. I therefore find Vazquez-Lozano and Hernandez engaged in concerted activity[37] on behalf of the van crew.

Usually cases involving alleged discriminatory discipline are analyzed under *Wright Line*.[38] However, an employee's discipline independently violates protected worker rights, regardless of the employer's motive or a showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity."[39] *Wright Line* does not apply to situations where a causal connection between the worker's protected activity and the employer's

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[35] *NLRB v. City Disposal Systems* (1988) 465 U.S. 822, 831.

[36] *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565.

[37] The evidence establishes that Hernandez shared Vazquez-Lozano's concern about the pace and spoke out about it shortly before the meeting. Two employees are always sufficient to constitute concerted activity. *Wells Blue Bunny* (1987) 287 NLRB 827, 831-832 enfd. in relevant part (8th Cir. 1989) 865 F.2d 175. Therefore, it is unnecessary to determine whether Vazquez-Lozano acted individually to induce group action. In other words, the activity in this case was not mere "individual griping." As the NLRB stated in *Meyers II*, supra. at 887, "*Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, *as well as* individual employees bringing truly group complaints to the attention of management. (Emphasis supplied.)

[38] (1980) 251 NLRB 1083 enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982) approved by *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395.

[39] *Burnup & Sims, Inc.* (1981) 256 NLRB 965, 965 and 976; enfd. (5th Cir. 2008) 280 Fed.Appx. 366.

conduct that is alleged to be unlawful may be presumed.[40] In fact, the sole question in the face of such a causal connection is whether the worker's actions removed her from the protection of the Act.[41]

As detailed above, Vazquez-Lozano, Hernandez, and the entire van crew were disciplined for the protected concerted activity of raising a concern about the pace of work in conversations with Prudencio throughout the first two hours of the day and at a group meeting called by Prudencio. Immediately after the group meeting where they once again complained, they were fired. The causal connection could not be clearer. This was a mass discharge. The entire van crew was discharged. They rode together and had no way home except to leave with Vazquez-Lozano.

Where an employer engages in a mass discharge for the purpose of discouraging employees from engaging in protected concerted activity, the General Counsel need not establish each individual employee's participation in or support of the protected activity.[42] For instance, according to Torres, one of the van crew [no name was given] paused on the way to the van and spoke with her. Torres asked her why she was leaving. The van crew worker explained that she did not know what was going on but she had to leave because the van was her ride. Torres was then asked, "Did she say she wanted to stay and work?"[43] According to Torres, the van rider said she wanted to stay and work but Vazquez-Lozano was her only ride.

Assuming this testimony were credited, it would nevertheless be irrelevant. The specific activity of each individual in the van crew need not correlate with her discharge. The issue is

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[40] See e.g., *Burger King* (2016) 365 NLRB No. 16, slip op. at 1, fn. 4, enfd. (8th Cir. 2017) 696 Fed.Appx. 759; *Atlantic Scaffolding Co.* (2011) 356 NLRB 835, 838-839; *ALCOA* (2002) 338 NLRB 20, 22.

[41] *Atlantic Steel Co.* (1979) 245 NLRB 814, 816 (employee engaged in protected conduct loses the protection of the Act by opprobrious conduct).

[42] See, e.g., *Delchamps, Inc.* (2000) 330 NLRB 1310, 1315, 1317; *Weldun Int'l, Inc.* (1996) 321 NLRB 733, 734, 748 enfd. mem. in relevant part (6th Cir. 1998) 165 F.3d 28.

[43] Tr. 93:8.

whether the van crew was discharged as a group due to the protected concerted activity of some in the group.[44]

The General Counsel has established that the mass discharge was implemented in retaliation for the protected activity of employees.[45] Here the "dramatic timing" of the mass discharge "hard on the heels" of the protected concerted activity strongly supports a finding of discriminatory motivation.[46] Accordingly, the General Counsel has proven that Respondent violated Section 1153(a) of the Act as alleged in complaint paragraphs 14 and 15.

Were it necessary to assess these facts under *Wright Line,* the same result would be found. This test has a shifting burden analysis. In general, the General Counsel must establish by a preponderance of the evidence that the protected conduct was a "substantial" or "motivating" factor.[47] The ALRB utilizes the *Wright Line* shifting burden of analysis.[48] In order for the General Counsel to satisfy the initial burden, she must show (1) that the employee engaged in protected activity, (2) that the employer knew the employee engaged in protected, and (3) the employer bore animus toward the employee's protected activity.[49] Animus may be established through direct evidence or may be inferred from circumstantial evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired,

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[44] *ACTIV Industries, Inc.* (1985) 277 NLRB 356 fn. 3 (mass discharge of employees was unlawful and thus General Counsel not required to show a specific correlation between each's employee's activity and his discharge; rather, General Counsel must establish that the mass discharge was in retaliation for the protected activity of some).

[45] *Hudson Moving & Storage Co.* (1997) 322 NLRB 1028, fn. 6 and 1033 (mass discharge shown to be motivated by protected activity); *We Can, Inc.* (1994) 315 NLRB 170, 171 (mass discharge implemented in retaliation for protected activity); *Pyro Mining Co., Inc.* (1977) 230 NLRB 782 fn. 2 (same).

[46] *Saigon Gourmet Restaurant, Inc.* (2009) 353 NLRB 1063, 1065 (dramatic timing of mass discharge hard on the heels of learning of workers' overtime demands); *American Wire Products, Inc.* (1994) 313 NLRB 989, 994.

[47] In *Wright Line,* supra, 251 NLRB at 1089, the NLRB adopted the reasoning of the United States Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle* (1977) 429 U.S. 274, 287, with an initial burden to show that protected conduct was a substantial or motivating factor in the adverse employment decision. If this is shown, then the employer must show by a preponderance of the evidence that it would have made the same decision even in the absence of protected conduct.

[48] See, e.g., *Sam Andrews' Sons* (1987) 13 ALRB No. 15, slip op. at 6-7; *California Valley Land Co., Inc.* (1991) 17 ALRB No. 8, p. 7.

[49] *Sandhu Brothers Poultry and Farming* (2014) 40 ALRB No. 12, p. 14.

and disparate treatment of discharged employees all support inferences of animus and discriminatory motivation.[50]

If the General Counsel establishes activity, knowledge, and animus, the burden shifts to the employer to show that it would have taken the same action in the absence of the employees' protected activity.[51] An employer may not simply present a legitimate reason for its action. Rather, it must persuade by a preponderance of the evidence that the same action would have been taken in the absence of the protected conduct.[52]

Here the credited evidence indicates that after Vasquez-Lozano and Hernandez spoke on behalf of the van crew during the course of the first two hour worked on December 28 and admonitions about achieving a quicker pace of work continued, another discussion was called to address the slower speed of work of the van crew and three other workers. Vasquez-Lozano spoke at this meeting in a group context objecting to the working conditions announced at that time by Prudencio. Vazquez-Lozano explicitly spoke on behalf of herself and others – citing older workers on the van crew specifically. Vazquez-Lozano stated that Prudencio could not be demanding the same kind of work from the assembled slower workers at the same pace that was required from younger workers. Vazquez-Lozano's action in speaking up on behalf of herself and the van crew about terms and conditions of employment constituted protected, concerted activity.[53]

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[50] *H & R Gunland* (2013) 39 ALRB No. 21, pp. 3-4 (in order to infer true motive of adverse action a variety of facts may be used including timing, disparate treatment, failure of follow established rules, cursory investigation, false or inconsistent reasons, absence of prior warnings, and severity of the punishment); *Medic One, Inc.* (2000) 331 NLRB 464, 475 (ALJD: evidence of suspicious timing, false reasons, departures from past practice, prior tolerance of same behavior, and disparate treatment support inference of animus).

[51] *Wright Line,* supra, 251 NLRB at 1089.

[52] See, e.g., *Bruce Packing Co.* (2011) 357 NLRB 1084, 1086, enfd. in relevant part (D.C. Cir. 2015) 795 F.3d 18.

[53] *Greater Omaha Packing Co., Inc.* (2014) 360 NLRB 493 fn. 3 enfd. in relevant point (8th Cir. 2015) 790 F.3d 816 (when employees protested the speed of the conveyor chain, which they had raised on previous occasions, they were engaged in protected activity); *Peck, Inc.* (1984) 269 NLRB 451, 454 (ALJD: parties readily conceded that complaint about the speed of the assembly line uttered on behalf of the speaker and others on the assembly line constituted protected concerted activity).

Prudencio, a statutory supervisor whose knowledge is imputed to the Respondent,[54] knew of Vasquez-Lozano's statements of concern for her coworkers. The credited evidence indicates that Prudencio immediately told the van crew that if they did not want to work, they could leave. This statement was clearly a reaction to Vasquez-Lozano's statement about the pace of work. Thus, by the timing of the discharge immediately following Vasquez-Lozano's voicing of objections, animus has been proven.

Accordingly, it is concluded that the General Counsel has shown by a preponderance of the evidence that protected activity was a motivating factor for the retaliation. As mentioned above, upon making this showing, the burden shifts to the employer to present evidence that the adverse action would have been taken in any event, even in the absence of protected concerted activity.

Respondent's defense, however, did not focus on this element of the *Wright Line* burden of proof and there is no showing that Respondent would have discharged the van crew in the absence of the protected concerted activity. Rather, Respondent asserts that the van crew departed on its own volition in order to set up a bogus litigation against Respondent. In a departure conversation between Prudencio and Vazquez-Lozano, according to Prudencio, when Torres asked the van crew to sign paperwork, Vazquez-Lozano told them not to sign anything – that Prudencio, "was going to have to face the consequences, that she was going to sue me."[55] "She already had someone to speak with, with an attorney."[56] Torres confirmed only that Vazquez-Lozano told Prudencio that she already "had an attorney that they were going to talk to."[57]

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[54] A supervisor's knowledge of protected concerted activities is imputed to an employer in the absence of credible evidence to the contrary. See *State Plaza Hotel* (2006) 347 NLRB 755, 756-757; *Dobbs Int'l Servs* (2001) 335 NLRB 972, 973.

[55] Tr. 87:1-4.

[56] Tr. 92:12-18.

[57] Tr. 93:24-94:3.

Vazquez-Lozano recalled speaking with Torres after the van crew were already in the van. Vazquez-Lozano testified that she asked Torres for the phone number for the Labor Commission or the Farmworkers Union. Torres told Vazquez-Lozano she did not know the number. Vazquez-Lozano denied that she told Prudencio, "I have a lawyer." Vazquez-Lozano's version of these events is credited. She was very forthright and sincere in denying the varied version of events to set up a bogus lawsuit as told by Prudencio and Torres.

Respondent also relies on a telephone conversation between Family Ranch supervisor Alavez[58] and Vazquez-Lozano. Respondent argues that during this conversation Vazquez-Lozano did not tell Alavez that the crew was fired which proves they were not fired. Respondent is correct that Vazquez-Lozano did not testify that she told Alavez that the van crew was fired. This is consistent with her version of the events. Literally, the van crew was not told they was fired. They were told to put down her tools and leave.

Alavez and Vazquez-Lozano agreed regarding the content of their conversation. After leaving work on December 28, Vazquez-Lozano testified she received a phone call from Alavez who offered the van crew work on the following day with a different foreperson. Vazquez-Lozano declined, "No, thanks. We've already got work in Paso Robles."[59] Further, Alavez asked why Vazquez-Lozano and the van crew left. Vazquez-Lozano responded, "Because your foreperson is demanding too much and doesn't let people work comfortably."[60]

Alavez testified that he called Vazquez-Lozano after the van crew left the site on December 28.[61] In addition to offering the van crew work on the following day with a different

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[58] In December 2016, Alavez worked at Respondent's pomegranate ranch.

[59] Tr. 24:22-23.

[60] Tr. 24:24-25:1.

[61] According to Alavez, he called Vazquez-Lozano on the day the van crew left but his call went through to voice mail and he left a message. He testified he actually spoke to Vazquez-Lozano on the following day. To the extent that the testimony regarding the date of the parties actually spoke might be relevant, it is found that they spoke on December 29. Alavez recollection regarding this date was more detailed than Vazquez-Lozano's recollection. Vazquez-Lozano's recollection of exact dates was vague.

supervisor, he asked her why the van crew had left the job. Vazquez-Lozano responded that Prudencio was "very demanding."[62]

According to Alavez, Vazquez-Lozano did not tell him that Prudencio had fired the crew or kicked them off the job. Vazquez-Lozano did not complain to Alavez about drinking water. When Alavez offered her work on a different crew. Vazquez-Lozano said, "no, she wanted to go to Paso Robles because they would pay more per hour in working in grapes."[63] This conversation between Alavez and Vazquez-Lozano does not provide insight into whether Prudencio told the van crew to put down their tools and leave. In fact, if anything, it bolsters the general credibility of Vasquez-Lozano because she and Alavez totally agreed regarding what was said in their phone conversation.

Accordingly, based on the credible evidence as found above, it is concluded that by the mass discharge of the van crew, Respondent retaliated against the workers due to their protected concerted activity and thus violated the Act. In doing so, Respondent violated Section 1153(a) of the Act by the mass discharge of the van crew.

REMEDY

It is recommended that Respondent be ordered to cease and desist from discharging or retaliating against any agricultural employees due to their protected concerted activities and to take certain affirmative actions deemed necessary to effectuate the Act.

ORDER

Pursuant to Labor Code section 1160.3, Respondent Wonderful Orchards, LLC, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

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[62] Tr. 101:17-19.

[63] Tr. 101:19-22.

(a) Discharging or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in concerted activities protected under section 1152 of the Act.

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

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

(a) Rescind the discharge notices or any other such personnel notation regarding the events of December 28, 2016, of the van crew and expunge such notices from its files.

(b) Make whole Imelda Vasquez-Lozano, Dominga Hernandez, and other members of the van crew for all wages or other economic losses they suffered as a result of their unlawful terminations, to be determined in accordance with established Board precedent. The award shall include interest to be determined in accordance with *Kentucky River Medical Center* (2010) 356 NLRB 6.

(c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning December 28, 2016, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records, and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

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

(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

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Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondent at any time during the period December 28, 2016, to date, at their last know 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 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms. Upon the request of the Regional Director, the Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

Dated: September 12, 2019

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL WORKERS

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these 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 Board.
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 discharge you because you complain about wages, hours, and working conditions on behalf of yourself and your co-workers.

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

WE WILL offer Imelda Vazquez-Lozano, Dominga Hernandez, and the van riders who accompanied them on December 28, 2016, immediate employment to their former positions or, if those positions are no longer available, to substantially equivalent positions.

WE WILL make whole Imelda Vazquez-Lozano, Dominga Hernandez, and the van riders who accompanied them on December 28, 2016, for all wages or other economic losses that they suffered as a result of our unlawful discharge of them.

WONDERFUL ORCHARDS, LLC

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 Agricultural Labor Relations Board. One office is located at 1642 West Walnut Avenue, Visalia, California. 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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

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

Case Name: WONDERFUL ORCHARDS, LLC, Respondent and,
IMELDA VAZQUEZ-LOZANO, Charging Party.

Case No.: 2016-CE-023-VIS

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

On **Thursday, September 12, 2019**, I served the within **DECISION AND RECOMMENDED ORDER** on the parties in said action, by **U.S. CERTIFIED MAIL RETURN RECEIPT REQUESTED AND/OR EMAIL** 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 follow:

Joie Marie Gallo, Esq. Victoria Rose, Assistant Roll Law Group, PC 11444 West Olympic Boulevard Los Angeles, CA 90064-1557	**Email/Certified Mail** joie.gallo@roll.com victoria.rose@roll.com 9414-7266-9904-2968-9438-99
Ms. Imelda Vazquez-Lozano P.O. Box 2728 Huron, CA 93234	**Certified Mail only** No Email on File 9414-7266-9904-2968-9439-05
Chris A. Schneider, Regional Director Xavier Sanchez, Assistant General Counsel Veronica Cervantes, Field Examiner Laura Camero, Legal Secretary ALRB Visalia Regional Office 1642 West Walnut Avenue Visalia, CA 93277-5348	**Email/Certified Mail** cschneider@alrb.ca.gov Xavier.Sanchez@alrb.ca.gov Veronica.Cervantes@alrb.ca.gov Laura.Camero@alrb.ca.gov 9414-7266-9904-2968-9439-12
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ALRB General Counsel
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Sacramento, CA 95814

Email only
jmontgomery@alrb.ca.gov
sshawver@alrb.ca.gov

Executed on **Thursday, September 12, 2019**, at Sacramento California. I certify under penalty of perjury that the foregoing is true and correct.

Annamarie Argumedo
Senior Legal Typist

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

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

Case Name: WONDERFUL ORCHARDS, LLC., Respondent, and, IMELDA VAZQUEZ-LOZANO, Charging Party.

Case No.: 2016-CE-023-VIS

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

On **April 21, 2020**, I served the within document, **DECISION AND ORDER [46 ALRB NO. 2]** on the parties in said action, as follows:

- **By Email and Certified Mail with Return Receipt** by placing a true copy thereof enclosed a sealed envelope with postage thereon fully prepaid, with return receipt requested, in the United States mail at Sacramento, California, addressed as follows:

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Los Angeles, CA 90064-1557

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Patrick S. Moody, Esq.
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Fresno, CA 93711

Email/Certified Mail
laborlaw@theemployerslawfirm.com
9414-7266-9904-2968-9480-61

Courtesy Copy To:
Ms. Imelda Vazquez-Lozano
P. O. Box 2728
Huron, CA 93234

Certified Mail only
No Email on File
9414-7266-9904-2968-9480-78

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Sacramento, CA 95814

Email Only
jmontgomery@alrb.ca.gov
Nancy.Craig@alrb.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 21, 2020,** at Sacramento, California.

Annamarie Argumedo
Senior Legal Typist