STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SMITH PACKING, INC., Respondent, and, JOSE VASQUEZ, Charging Party.	Case No. 2018-CE-048-SAL **ERRATUM: REVISED DECISION AND RECOMMENDED ORDER ADDING PAGE NUMBERS TO DECISION AND RECOMMENDED ORDER ISSUED MAY 8, 2020. (NO OTHER CHANGES TO THE DECISION HAS BEEN MADE.)**

Appearances:

For General Counsel:
Silas Shawver, Deputy General Counsel, Sacramento, CA
Franchesca Herrera, Regional Director, Salinas, CA
Lumi Barba, Field Examiner, Salinas, CA

For Respondent:
Rafael Gonzalez, Esq., Mullen & Henzell, LLP, Santa Barbara, California

DECISION

Mary Miller Cracraft, Administrative Law Judge. The issue in this case is whether Smith Packing, Inc. (Respondent) violated Section 1153(a) of the Agricultural Labor Relations Act (the Act)[1] by discharging ten agricultural workers on August 27, 2018.[2] Prior to and on that date, the complaint alleges that these workers engaged in protected, concerted activity by complaining as a group about

[1] California Labor Code Secs. 1140-1166.3.
[2] All dates are in 2018 unless otherwise referenced.

a damaged harvest machine, lack of water, lack of gloves, and rejection of too much produce.[3]

Respondent is a California corporation with its principal place of business in Santa Maria, California. Respondent specializes in growing and harvesting iceberg lettuce in Santa Barbara and Monterey Counties. At all material times, Respondent was engaged in agriculture[4] and was an agricultural employer.[5] Owner Vernon Smith (V. Smith) and General Manager Anthony Smith (A. Smith) are statutory supervisors of Respondent with the authority to discipline and fire agricultural employees.[6]

The parties agree that Charging Party Jose Roberto Vasquez (J. Vasquez) and other members of the crew were engaged in harvesting lettuce in Santa Barbara County, California. The members of the crew were at all relevant times, agricultural employees.[7] Thus, the Agricultural Labor Relations Board (ALRB) has jurisdiction of this matter.

A. Background

On August 24 and 25 the ten alleged discriminatees[8] complained as a group about faulty equipment which, all parties agree, was causing lost wages. The parties agree that the last date worked by the alleged discriminatees was Saturday, August 25. On the next working day, Monday, August 27, the alleged discriminatees arrived for work but did not work. They complained on that date as a group about faulty equipment, a coworker, and lack of drinking water. They were

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[3] Jose Roberto Vasquez (J. Vasquez) filed the underlying unfair labor practice charge on August 28. A complaint issued on August 12, 2019 and a first amended complaint and backpay specification issued on September 24, 2019. Respondent duly answered these pleadings, admitting and denying various allegations. The hearing was held in Santa Maria on November 5, 2019. Prior to the hearing, the parties agreed to bifurcate the liability and backpay proceedings. Thus, only the liability phase of the pleadings was litigated at the November 5, 2019, hearing.

[4] As defined in Labor Code Sec. 1140.4(a).

[5] As defined in Labor Code Sec. 1140.4(c). Respondent stated in its brief that it was a farm labor contractor and custom harvester (p. 6, line 24). This statement will be treated as an inadvertent error. The parties stipulated that Respondent specializes in growing and harvesting lettuce. Neither the farm labor contractor issue nor the custom harvester issue was raised in pleadings, at hearing, or mentioned any further in Respondent's brief.

[6] Respondent admits that both V. and A. Smith are statutory supervisors within the meaning of sec. 1140.4(j) of the Act.

[7] The parties agree that the cutters were agricultural employees within the meaning of Labor Code section 1140.4(b).

[8] The ten workers who were allegedly unlawfully discharged will be referred to as the alleged discriminatees. In addition to J. Vasquez, these crew members were Antonio Gonzales, Denis Adelmo, Jose Argueta, Manuel de Jesus Velasco, Jose Abel Rivas, Eduardo Melendrez, Jose Benedicto Dias Andasol, Arturo Diaz, and Jamie Arias.

discharged on August 27, according to the General Counsel, or voluntarily left employment, according to Respondent.

In general, the lettuce is harvested in three steps: cutting, inspection, and washing/packing. Cutters such as the alleged discriminatees utilize a special knife with a long blade to cut each head of lettuce away from the roots. A ring at the end of the knife is used by the cutters to cut the core out of the head of lettuce. The cutters then place the harvested head of lettuce on a conveyor belt. The heads are held on the conveyer belt by teeth. The heads are conveyed to quality control to inspect and discard defective heads or loose leaves. Finally, the heads of lettuce are sent up another conveyer belt for further inspection, washing, and packing.

In addition to the workers who perform cutting, the crew consists of quality control, washers, packers, and a tractor driver. For payroll purposes, the entire crew is classified as cutters regardless of their function. There were about 18 total employees on the crew which the alleged discriminatees worked.

USDA quality standards plus specific customer standards are utilized by all quality control personnel including the crew's quality control employee Reina Rodas (R. Rodas). Her payroll classification is cutter, the same as the alleged discriminatees. R. Rodas spends her entire work day on the harvesting machine performing inspection. Her son, who is also classified as a cutter, spends his entire work day on the harvesting machine. Neither R. Rodas nor her son performed cutting work on the ground with the ten alleged discriminatees.

R. Rodas' brother Joaquin Rodas (J. Rodas) is the crew's foreman. The crew is supervised by Emmanual Hernandez (Hernandez). All of the alleged discriminatees are men. Other crews have both men and women performing the cutting work on the ground. In any event, all members of the crew are paid the same piece rate based on the number of bins harvested by the crew each day.

B. Credibility

Throughout this decision, it was necessary to make certain credibility determinations. The demeanor of each witness was assessed as well as the context of the witness' testimony, the quality of the witness' recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective

evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.[9] It is noted that 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's testimony.[10]

A final factor which may be utilized in making a credibility finding is failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent or under the party's control. In general, failure to call such a witness may allow the trier of fact to draw an adverse inference.[11]

C. Facts

1. Saturday, August 25, Work Stoppage

As the testimony below indicates, on Saturday, August 25, the ten alleged discriminatees quit working for about 15-20 minutes due to faulty equipment causing them to lose product and thus to lose pay. Respondent agreed to pay the crew for ten extra bins due to loss of product and the alleged discriminatees returned to work. There is no dispute on the record regarding these facts.

Two of the alleged discriminatees testified at the hearing: Jose Benedicto Dias (Dias)[12] and Denis Gomez (Gomez). Their testimony regarding the events of Saturday, August 25, was not disputed and was corroborated to some extent by both A. and V. Smith.

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[9] See, e.g., *Monterey Mushrooms, Inc.* (2019) 45 ALRB No. 1 at p. 2, fn. 1; *South Lakes Dairy Farm* (2013) 39 ALRB No. 1, pp. 3-4; *Double D Construction Group* (2003) 339 NLRB 303, 305; *Daikichi Sushi* (2001) 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group* (1996) 321 NLRB 586, 589, enfd. sub nom. (2003 D.C. Cir.) 56 Fed. Appx. 516; *Precoat Metals* (2004) 341 NLRB 1137, 1140 (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony).

[10] *Suma Fruit International (USA), Inc.* (1993) 19 ALRB No. 14, p. 4, fn. 5; *The Garin Co.* (1985) 11 ALRB No. 18, pp. 3-4; *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders* (2008) 352 NLRB 1262, 1262 fn. 2 (citing *NLRB v. Universal Camera Corp.*, (2d Cir. 1950) 179 F.2d 749, 754, rev'd. on other grounds (1951) 340 U.S. 474.

[11] See *P & M Vanderpool Dairy* (2014) 40 ALRB No. 8, p. 18 (relying on *The Garin Co.* supra; *Auto Workers v. NLRB* (D.C. Cir 1972) 459 F.2d 1329, 1336).

[12] "Dias" is the transcript spelling of the witness' name. The backpay specification lists his name as Jose Benedicto "Diaz" Andasol. Respondent's records utilized the name "Dias" consistently. See Jt. Exs. 6, 16, 26. The parties' briefs also use the name "Dias." Thus, based upon the spelling in the company records and the transcript, "Dias" will be used herein.

Dias testified that his job as a cutter was to cut the lettuce from the ground, core it, remove damaged leaves, shake off dirt, discard unacceptable heads, and place acceptable heads of lettuce on a conveyor belt. Other members of the crew – who are not cutting but are nevertheless categorized as "cutters" - perform duties such as washing the lettuce, inspecting the lettuce, and packing the lettuce. A final member of the crew drives the tractor that pulls the harvesting equipment.

The conveyer belt on which the cutters place their harvested heads of lettuce has teeth on it to anchor or secure the lettuce as it proceeds up the belt. Dias explained that the teeth of the belt became a problem starting on Thursday, August 23. This caused some of the crew's harvested produce to fall to the ground after it was placed on the belt. Workers are prohibited from picking up fallen produce and putting it back on the belt. Nevertheless, the cutters carried on working that day and on the following Friday, August 24.

On Saturday, August 25, the teeth had continued to deteriorate or break off and the workers continued to work. Foreman J. Rodas approached the group around 9 a.m. and asked why the crew was throwing the lettuce down on the ground.[13] J. Vasquez told J. Rodas that they were not throwing it on the ground. Rather, the lettuce was falling off the belt due to equipment failure. Foreman J. Rodas said he would call Supervisor Hernarndez[14] to come and discuss the problem. Dias told J. Rodas that the workers would not continue working until the supervisor came to discuss the matter.

About 20 minutes later, Supervisor Hernandez arrived. J. Vasquez showed him the problem with the deteriorating teeth on the belt. Hernandez said he would pay the crew for ten lost bins to compensate for the lettuce falling off the belt. After being advised of this compensation, the alleged discriminatees continued working.

Alleged discriminatee Gomez testified that he worked as a cutter for Respondent for four or five weeks in the summer of 2018. He had worked for

[13] Dias was told that V. Smith was aware of the problem and had ordered a new part to take care of the issue. Respondent's invoice for the order, introduced during Respondent's case-in-chief, is dated August 28 for same day/next day delivery – need by August 28. (R.Ex. 52). General Manager A. Smith did not know if this new belt was for the crew's equipment. He did not order this belt.

[14] Supervisor Emanuel Hernandez was referred to as Manuel or Manny during the hearing.

Respondent in previous years. In August, he noticed a mechanical problem with the belt which caused lettuce to fall off the machine.

On Saturday, August 25, Gomez testified that the alleged discriminatees, as a group, reported this problem to Foreman J. Rodas. J. Rodas said he would speak to Supervisor Hernandez. The ten alleged discriminatees quit working for 15-20 minutes waiting for him.

Supervisor Hernandez spoke to A. Smith and told him the employees were asking for compensation for eight or ten bins of lost product. If Respondent did not make up the loss, "they were walking." A. Smith approved paying the crew for ten bins. Actually, according to A. Smith, the loss was only one-half bin so he knew he was authorizing nine and one-half bins overpayment but he told Hernandez, "That's okay. . . . Let's just pay them what you guys agreed on and get the orders out." [15]

According to Dias and Gomez, when Supervisor Hernandez arrived, he spoke to the crew and told them Respondent would pay the crew for the lost product. The ten alleged discriminatees estimated they were losing six to seven cases per day. Supervisor Hernandez told the crew they would be paid for ten extra cases per day. The ten alleged discriminatees returned to work.

Thus, in response to a complaint initiated by the ten alleged discriminatees as a group, Respondent offered compensation for the lost wages which were the result of lost product caused by faulty equipment. The ten alleged discriminatees continued working for the rest of the day.

2. Monday, August 27, Meeting in the Field

The next working day was Monday, August 27. A meeting in the field was scheduled for the beginning of the workday. The alleged discriminatees arrived at their start time for the day[16] and waited in their vehicles to speak with management. General Manager A. Smith arrived and spoke with the alleged

[15] These facts are based on the testimony of A. Smith. (Tr. 193-197).

[16] The testimony of the witnesses indicates start time for that day was either 6 a.m. or 7 a.m. It is unnecessary to resolve which of these times was applicable on August 27 as the exact time is not material to resolution of the issues herein.

discriminatees. The rest of the crew (tractor driver, inspector, washer, packers) remained at the equipment in the field, about 15 feet away. The teeth on the conveyor belt had not been repaired. Three witnesses testified regarding this meeting: Dias, Gomez, and A. Smith. There is little discrepancy in their testimony.

Dias testified that A. Smith asked, "What's going on here?" J. Vasquez attempted to respond stating that he would explain the problem with the machine to A. Smith. According to Dias, A. Smith said he was not going to listen to anyone. Dias asked why A. Smith was there if he did not even want to listen.[17] A. Smith said that he was not going to pay for the lettuce that had dropped. A. Smith then said, according to Dias, "Well, are you going to work or not? If you don't work you can leave and you can go work at another company." Dias asked A. Smith if he was letting them go or firing them. According to Dias, A. Smith responded, "You know, there are other companies. If you don't want to work here, you can go work at other companies." Dias then told the alleged discriminatees, "Well, then let's go to the office."

According to alleged discriminatee Gomez, on August 27 when the crew met in the field, they told A. Smith about the problem with losing produce due to equipment malfunction. A. Smith said that Respondent could not pay for product that is not received. A. Smith said, per Gomez, "Well, do you want to work? Because there are other companies where you can work besides this company." A coworker asked A. Smith if they were being fired and demanded their checks if they were being fired. A. Smith responded saying that he would give them their checks. The alleged discriminatees decided at this point to go to the office to get their checks. On cross-examination, Gomez testified that he did not hear A. Smith say that there was a job for them if they wanted to return to work.

A. Smith testified that on Saturday, August 25, he spoke to Supervisor Hernandez who told him that if the alleged discriminatees were not paid lost wages due to defective equipment, "they were walking." A. Smith approved the

[17] Dias also recalled that J. Vasquez complained to A. Smith that there were too many of the crew riding on the tractor and that some of them should be working on the ground cutting lettuce. Specifically, Dias recalled that J. Vasquez named the nephew of J. Rodas (son of his sister R. Rodas, the crew's quality control inspector) who also rode on the tractor as a person who should be working on the ground cutting.

supervisor's recommendation to pay the crew for ten extra bins to compensate for the loss.[18]

To further address the situation, A. Smith met with the crew in the field on Monday, August 27. According to A. Smith, he immediately told the crew to begin working. The alleged discriminatees said they were not going to do so. Instead, they wanted to talk about procedure and what was going on with the machine.[19] A. Smith testified that he told them, "Well, that's your decision. So if you don't want to go in [to the field], that's that – That's your decision."[20] "They" also mentioned there was a quality control person they did not need and there were "two guys on top." They said they (the alleged discriminatees) did a good enough job and they did not need any of that.

Somewhat incongruously, A. Smith testified initially that he never told the alleged discriminatees that it was their decision whether to stay or go "somewhere else" and then that he did tell them it was their decision to stay or go somewhere else.

> Q. Did you ever tell the employees that they could go look for work anywhere, somewhere else?
>
> A. No.[21]

Within minutes after this testimony, A. Smith was asked more or less the same question again and he testified that he did tell employees they could go somewhere else.

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[18] According to A. Smith, paying for ten extra bins on Saturday had greatly overcompensated the crew. Subsequent estimates made by the company indicated the crew might have been losing only one-half bin.

[19] A. Smith testified at another point that the issue of the broken equipment never came up while he spoke to the workers in the field. However, by his own admission, A. Smith testified that when he arrived, the workers wanted to discuss procedure and what was going on with the machine. Moreover, A. Smith testified that after the meeting in the field, when he called V. Smith to ask him to meet with the alleged discriminatees at the office, he told V. Smith that the issue to be discussed was belt malfunction and missing bins. Thus, A. Smith's testimony that the belt was not discussed in the field is discredited as internally inconsistent with other parts of his testimony. The testimony of Dias and Gomez regarding discussion of belt malfunction is credited. Both Dias and Gomez exhibited forthright demeanors evincing a determination to truthfully recall what was said. They were unequivocal on this point.

[20] At times, A. Smith testified in a non-responsive, lengthy narrative sprinkled with subjective, self-serving impressions and gratuitous information all of which are entitled to little weight. See, e.g., Tr. 172-174.

[21] Tr. 176:19-21. See also another recitation: "The only thing I said pertaining to that was, 'It's your decision whether you into work or your decision whether you don't and you leave.'" Tr. 176:25-177:11.

Q. Did you ever tell employees anything like if they didn't like it, they could go elsewhere?

A. No. The only thing I remember telling them that would pertain to going in or out of the field, it was their decision.

Q. That's what you said?

A. Yeah. "It's your decision." I said, "Hey, there's a job for you. It's your decision to stay. It's your decision to go somewhere else. That – that's your decision." [22]

This last time through the scenario, A. Smith testified more freely about what he said in the field. This answer is logically consistent with the testimony of Dias and Gomez and with the subsequent testimony of all witnesses.

At this point, the testimony of the three witnesses is more or less consistent:

Dias: "Well, are you going to work or not? If you don't work you can leave and you can go work for another company."

Gomez: "Well, do you want to work? Because there are other companies where you can work besides this company."

A. Smith: "Hey, there's a job for you. It's your decision to stay. It's your decision to go somewhere else. That – that's your decision."

After making this statement, a response was made, according to A. Smith, "Well, you're firing us." A. Smith testified initially that he said, "No. No. No, I'm not firing you." Someone asked for checks. "Well, you're firing us. You have to give us our checks. That's the law." A. Smith's testimony that he said there's a job for you here and that he was not firing the employees is discredited. It is entirely inconsistent with his telling employees they could go "elsewhere," and his immediate action of ordering that checks be cut. Moreover, as discussed above, A. Smith's testimony was at times nonresponsive and at times peppered with gratuitous, self-serving observations. Thus, his demeanor indicated lack of attention in answering specific questions.

According to A. Smith, one of the group said they wanted to speak to Sonny (V. Smith). A. Smith responded, "Hey, I can get your checks. If you guys are asking for your checks, I can get them." A. Smith testified he then called V. Smith

[22] Tr. 186:9-18.

to ask him to come to the office and he also ordered that checks be cut for the ten alleged discriminatees.

No other witnesses were called regarding the conversation in the field on August 27. It is found that when faced with the group's desire to talk rather than to go into the field, A. Smith told them that they could go work somewhere else (per A. Smith) or to another company (per Dias and Gomez). Whether the words "somewhere else" or "another company" were used is a distinction without a difference. To the extent this distinction is material, it is found, based on their forthright demeanors, that the words used were "another company." A. Smith wavered too much on this point during his testimony and this inconsistency renders his claim that he used the term "somewhere else" as unworthy of belief.

Thus, it is found, based on the credible evidence of record, that A. Smith approved a pay differential of ten extra bins on August 25 to address the employees' work stoppage due to faulty equipment causing lost wages. On August 27, A. Smith was faced with another work stoppage and told the employees to get to work and refused to grant another pay differential. He told the alleged discriminatees that if they did not go to work in the field, they could leave and find work for another company. It is further found that A. Smith did not tell the workers that they were not fired. There is no dispute that the alleged discriminatees requested their paychecks after this exchange in the field. Further, there is no dispute that A. Smith told them they could collect their paychecks at the office and he ordered that their paychecks be cut.

3. Monday, August 27, Conversation Before Entering Office Building

Dias recalled that A. Smith followed the workers as they drove to the office. When they arrived at the parking area outside the office, A. Smith told the group they could not go inside. Dias responded that the workers wanted to go in to fix the problem. Dias testified that he further stated, "If you're not going to let us in because you're firing us, then let us go pick up our check." Without denying that the employees were fired, A. Smith responded, according to Dias, that the checks would not be ready until around 2 p.m. No other witness testified regarding this

conversation. Based on Dias's generally forthright demeanor, Dias's undisputed testimony is accepted as credible.

4. Monday, August 27, Meeting in the Office with Office Administrator

There is no dispute that the alleged discriminatees entered the office around 9 a.m. According to Karen Vasquez (K. Vasquez), office administrator and payroll clerk, she asked why they were there. Someone in the group said they wanted to speak to management and they were there for their checks.

During this conversation at her desk, K. Vasquez testified that not only did the workers state that they wanted to speak to management, "they mentioned about them being all men on the one crew and one female and they didn't think it was right for that one female to work [with] them."[23] According to K. Vasquez, she asked if they were not going to work anymore. "They"[24] said, "Well if she's there, we don't want to work."

Dias and Gomez testified that they told K. Vasquez that they were there for their checks. They denied hearing any of the alleged discriminatees tell K. Vasquez that they were upset with R. Rodas, the crew's quality control designee and the only woman on the crew, while they were meeting with the office administrator. In any event, the ten alleged discriminatees left after this to wait outside in their vehicles for the arrival of management.

Dias's and Gomez's testimony regarding whether dissatisfaction with R. Rodas was discussed during this brief meeting with K. Vasquez is credited. They impressed as thoughtful candid witnesses who were attempting to testify truthfully about the conversation with K. Vasquez. In fact, Dias admitted that in a later meeting, one of the ten alleged discriminatees did make comments of dissatisfaction with R. Rodas and did say something like it was either her or them. Such an admission, potentially against his interest, further bolsters this credibility finding.

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[23] At times, the testimony of the witnesses references a "female" or "woman" on the crew. It is understood that these references are to R. Rodas.

[24] K. Vasquez did not know who was speaking and explained that one of them spoke most of the time. She did not know which of the ten it was who spoke most of the time.

On the other hand, K. Vasquez, who testified at length about the short conversation at her desk and the later meeting with V. Smith, exhibited an understandable loyalty to her employer. At points in her testimony about R. Rodas, K. Vasquez appeared prone to exaggeration and inconsistency. Thus, as to her testimony that she asked the crew if they were not going to work anymore and the "spokesperson" repeatedly stated that the crew would not work with a woman during the meeting at her desk, her testimony is rejected as unbelievable.

K. Vasquez's normal duties as payroll clerk involve collecting time sheets, calculating pay, posting payroll information, and processing paychecks. Payroll is based on a work week of Monday through Sunday. Checks are typically cut on Monday or Tuesday with Friday's date. Employees receive checks on the following Friday. It was unusual to prepare checks with a date other than Friday, the normal payday.[25]

5. Monday, August 27, Meeting in the Office with V. Smith

Once V. Smith arrived, the ten alleged discriminatees joined him in the conference room. A. Smith did not join the meeting until much later. There is no dispute that CFO Jennifer [last name not provided] was also present. CFO Jennifer did not testify. After preparing the checks, K. Vasquez joined the meeting. K. Vasquez stated that her purpose in joining the meeting was to translate statements for CFO Jennifer, who did not understand Spanish. None of the witnesses knew why CFO Jennifer was present at this meeting. In any event, once K. Vasquez joined the meeting, there were 13 individuals in the office. Many of them were apparently talking at once. Under these circumstances, it would not be expected that each witness who testified about what was stated at the meeting heard each and every word uttered by other meeting participants.

Throughout the problems in the field and at the meeting in the office, Dias acted as a spokesperson for the group. Others who spoke out were Gomez and an alleged discriminatee named Jaime. According to Dias, V. Smith listened to the group's explanation about the equipment problems. Dias recalled that in addition

[25] K. Vasquez testified that Friday was the typical payday. She explained that she prepared the Monday, August 27, paychecks in an excess of caution – in case they were needed. She further testified that she could always void them if they were not needed. It may well be true that paychecks can be voided but this explanation as to why the checks were prepared – that checks could be voided - is not credited. It was not corroborated by A. Smith or V. Smith and appears to be an after-thought.

to explaining the equipment problem, the group told V. Smith that the foreman did not provide water and they wanted the company to fix the machine problem and they did not want to lose their jobs.

Dias recalled that there were also complaints about R. Rodas, the foreman's sister, who was in their crew as quality control. Dias told V. Smith that R. Rodas acted as if she had special rights. Dias explained that in other crews there are both men and women on the ground cutting the lettuce. [26]

Dias agreed on cross-examination that "that jerk" Jaime said something like it was either R. Rodas or the ten alleged discriminatees. According to Dias, Jaime qualified his statement immediately saying, "no, not fire her, just move her to another location."

Not only did Jaime retreat from his statement, it is found that Jaime acted alone in making this assertion. Dias distanced himself and the other alleged discriminatees from Jaime's statement by explaining that the issues with R. Rodas were favoritism because she is the sister of Foreman J. Rodas and she also exhibited what the alleged discriminatees perceived as overzealous quality control behavior, i.e., throwing away too much of the produce they had harvested. He also replied to Jaime that there was no reason to fire her. Thus it is found that even though Jaime may have stated that he wanted R. Rodas to be fired, he retreated from this request and the group did not embrace the request.

Respondent argues that Jaime's comments amounted to a conditional offer to return to work.[27] Because Jaime retreated from his comments and because the group did not adopt his comments, it is concluded that the group did not make a conditional offer to return to work based on the discharge of R. Rodas.

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[26] On cross-examination, Dias explained that the workers who performed cutting had expressed exasperation with R. Rodas because they believed she threw away too much of their produce and because she did not work cutting like in other crews where men and women worked together doing the cutting. Dias testified that R. Rodas appeared to get special treatment as the sister of the foreman and that she did whatever she wanted and sometimes she acted as if she were in charge of the crew.

[27] Respondent further asserts that this conditional offer to return supports an inference that the groups' objective and subjective belief that they had the option to return to work conditioned on R. Rodas being fired. This assertion is rejected because it has been found that the group did not adopt the request that R. Rodas be fired, because Jaime rescinded that request, and because direct evidence of subjective belief is not relevant to this inquiry. Rather, in order to determine if the alleged discriminatees reasonably believed they were discharged, the words and circumstances surrounding the event are the relevant inquiry.

Dias did not hear anyone ask whether R. Rodas would be present on the following work day.[28] Dias agreed that when Jaime asked that R. Rodas be fired, V. Smith said he was not going to fire her and Jaime said, "Well, if that's the case, then we're – then we're leaving." Jaime then said, according to Dias, "[N]o, not fire her, just move her to another location. Dias then added, "He [V. Smith] can't fire her because she hasn't – she hasn't done anything wrong." As the meeting broke up, Dias recalled that he spoke to V. Smith again and asked him if the issues could be fixed so they could keep their jobs. Dias added that the group wanted to go back to work. According to Gomez, V. Smith said, "I understand but you guys, you left the job."

On cross examination, Dias testified that when Jaime stated that R. Rodas should be fired, V. Smith responded that he could not fire her and Dias agreed with V. Smith and also told Jaime that R. Rodas could not be fired because she had not done anything wrong.[29] Dias agreed that Jaime then said, "Well, if that's the case, then we're – then we're leaving." When asked on cross examination if that was how the meeting ended, Dias responded, "Yes, just like that." It is found that this response on cross-examination is inconsistent with Dias's and Gomez's testimony on direct examination. On direct examination, Dias recalled that he disputed Jaime's request and that the meeting did not end with that request. Dias also testified that the meeting ended after A. Smith joined it and V. Smith referred the decision to him. As Dias testified, V. Smith said, "whatever [A. Smith] said over there, that's what it is." This detailed version of how the meeting ended is credited over the answer given on cross-examination.

Dias also testified that the group told V. Smith that they were willing to go back and work.[30] K. Vasquez recalled a similar statement: One of the group

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[28] Dias was asked a hypothetical question on cross examination: "If [V. Smith had agreed to remove [R. Rodas], would you have returned to work? Dias answered: "Yeah. Yeah. We wanted to go back to work if – and we just wanted them to put, you know, the – the – nephew down working on the rows, you know, and, you, know, to fix the machine. We wanted to go back to work." Further hypothetical questioning was cut off at this point. This exchange is not helpful in terms of proving or disproving any factual issue. Moreover, the answer is ambiguous were it entitled to any weight. Respondent's assertion that Dias's answer to this question confirms that the workers communicated that they were willing to return to work if R. Rodas was fired is rejected.

[29] Respondent asserts that Dias's testimony that he agreed with V. Smith that R. Rodas could not be fired because she had done nothing wrong is not credible given Dias's testimony that the crew was unhappy with her. It does not appear to be inconsistent with his other testimony and is not exactly self-serving testimony, as Respondent claims. On the whole, it is found that Dias's testimony on this point is credible based on his straight forward demeanor and the lack of testimony to the contrary.

[30] Gomez agreed on cross examination that V. Smith said the employees were good workers and that one of them had been there for several years. Gomez did not agree on cross examination that V. Smith told the workers that he

responded that they were not taking their checks – they were not quitting. In any event, V. Smith responded, "well, if – you know, whatever Anthony said over there, that's what it is." Dias questioned V. Smith, "Well, you know, who's the owner? Are you [V. Smith] the owner or is he [A. Smith] the owner?" V. Smith responded that they were both the owners.

After about an hour of lodging complaints and receiving no response from V. Smith or A. Smith, according to Dias, we kind of lost hope and asked for the checks. V. Smith answered that their checks would issue.

The alleged discriminatees left the meeting without their checks. They received their checks after the meeting. Dias agreed that neither V. Smith nor A. Smith told the alleged discriminatees that they were fired in so many words.

Gomez' testimony was similar. Once they arrived at the office, Gomez recalled that they spoke with V. Smith, told him about the problems with the machine, shortage of drinking water, and repeated to him what A. Smith had said, that is, if they did not want to work, they could go work for another company. V. Smith said, "I understand, but you guys left the job." One of his coworkers told V. Smith that they were all good workers and did not want to lose their jobs. According to Gomez, V. Smith agreed they were good workers but "it was what Anthony (A. Smith) said, and he basically just looked at [A. Smith]" "He didn't want to listen to us . . . he didn't hear us out." Gomez recalled the meeting ended when V. Smith told the workers it was what A. Smith said in the field and he turned and looked at A. Smith.

Gomez did not remember V. Smith saying that the alleged discriminatees still had their jobs or that he wanted them to keep working. Gomez did not recall anyone saying that if R. Rodas was there, they would not return to work or saying that R. Rodas should be fired. Gomez did recall a complaint about R. Rodas regarding whether she or her brother J. Rodas was the foreman, "Is it Reina (R.

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did not want them to leave. Gomez responded to the question, "At any time during this meeting did [V. Smith] tell the employees that he did not want them to leave?" by stating, "Yes, I remember that he said that he didn't want them to – that, you know, that he knew that the employees, that they were good workers and, you know, that one of [them] had been there for several years." Respondent argues that Gomez tried to "walk back" his answer and, when pressed, said he could not remember. Gomez' demeanor did not indicate that he was attempting to retreat or purposefully saying he could not remember. Rather, it indicated that he was trying to truthfully recapture the words used during the meeting. Thus, it is found that he did not agree on cross examination that V. Smith told the employees that he did not want them to leave but could not recall whether this was said.

Rodas) or Joaquin (J. Rodas)? Like who -- who are we supposed to listen to when – who are we supposed to take instructions from?"

K. Vasquez was present in order to translate for CFO Jennifer [last name unknown]. V. Smith was uncertain why CFO Jennifer was present at the meeting.[31] In any event, K. Vasquez estimated she went to the conference room about 5-10 minutes after the meeting began. K. Vasquez estimated the meeting lasted at least an hour – "It felt like more than an hour."

According to K. Vasquez, at various points in the meeting, both A. Smith and V. Smith told the alleged discriminatees that there was work available. K. Vasquez testified that the spokesperson for the group responded that they would not work with R. Rodas. "They" said they did not want R. Rodas on their crew. They asked if she could be moved to another crew and said they could not work with her. "We're all men on the crew. Why can't we just keep it that way?" And again, "Well, if she is [going to be there], we're not." And further, "[T]hey didn't feel like she did the same amount of work, that she shouldn't be there, that it should just be them, all men only, on the crew, just men, men, men." "And they kept on insisting, "With her, we're not working."

Towards the end of the meeting, A. Smith joined the group and said, according to K. Vasquez, "The work is there. The work is available if you guys want to continue working." One of the employees asked if R. Rodas would be there and A. Smith responded that she would. A. Smith told the group, according to K. Vasquez, that if they were not going to work, their checks were ready. One of the group responded that they were not taking their checks – they were not quitting.

K. Vasquez's repeated testimony that the ten alleged discriminatees would only work with an all-male crew, without corroboration from A. Smith or V. Smith, raises concerns as to the reliability of her testimony on this point and her testimony is therefore discredited on this issue. Certainly, all parties agree that the topic of R. Rodas's job performance was discussed. To the extent that K.

[31] CFO Jennifer did not testify. It is perhaps curious that she was not called to corroborate the testimony of A. Smith and K. Vasquez. However, no adverse inference is drawn from failure of Respondent to call this witness. Apparently she did not speak Spanish and listened to the conversation through translation of K. Vasquez. K Vasquez testified about her recollection of what was said at the meeting.

Vasquez's testimony indicates that dissatisfaction with R. Rodas's job performance was discussed, her testimony is credited. K. Vasquez did not recall that the meeting ended by the employees refusing to work with R. Rodas. Rather, K. Vasquez recalled that the meeting ended with employees being told if they were not going to work, their checks were ready. K. Vasquez heard an employee state that they were not quitting and there would not take their checks. This testimony is also credited.

V. Smith testified that he was called back from Salinas to meet with the crew. According to V. Smith, when A. Smith called him to return from Salinas, A. Smith told him that there was an issue with a belt and missing bins and that, "people didn't want to work and that I needed to come down to make sure that they did not leave." A. Smith did not come into the meeting until toward the end. Once the crew was in the conference room with him, V. Smith asked what the issues were. He testified:

> And they just pounded me with Reina [R. Rodas]. They were not happy with QC. They weren't happy with what she was doing. And I mean, and all of them – there was – more than one person was talking. There were two guys that were talking mainly and I can't remember their names. . . . And they just started really talking bad about her, about she can't work. And they were making comments about their grandmother can outwork her. . . . They – and they went on and on and on and on and on and just, really, you know, they wanted her gone.
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> * * * * *
>
> I told them that, you know, if there's an issue with her, that we would look into it and we would try to resolve it, but I really needed them to go back to work. And I needed them to go back that day.

According to V. Smith, he tried to steer the meeting towards the issue of the machine but the crew continued to talk about R. Rodas. They wanted her gone. V. Smith's testimony is credited to a certain extent. However, his recollection that the one-hour meeting in his office was entirely about dissatisfaction with R. Rodas is not credible. His testimony that there were

statements made about the workers' unhappiness with R. Rodas is credited and is consistent with the testimony of Dias, Gomez, and the credited portion of K. Vasquez' testimony. These witnesses agreed that R. Rodas' job performance was a subject of worker complaints.

However, V. Smith's testimony that there was no discussion about the faulty equipment is incredible given the circumstances leading up to the meeting. V. Smith claimed that the workers pounded him with issues about R. Rodas and he was unable to steer the conversation to the conveyer belt. This testimony is incredible for two reasons. The first is that the workers, who have been credited based on their demeanor, as well as A. Smith's undisputed testimony is that the workers wanted to resolve the machinery issue "at the top" with V. Smith. The second is that it is nonsensical that after the meeting in the field on Saturday over the equipment issue and after confronting A. Smith in the field on Monday, again due to the equipment issue, that the workers would suddenly change course and never mention the equipment during their meeting with top management about one hour after the meeting in the field.[32] Thus, the testimony of Dias and Gomez that the group presented complaints to V. Smith about the faulty equipment as well as mentioning lack of water and perceived problems with R. Rodas is credited. V. Smith's testimony that the group presented concerns only about R. Rodas is not credited.

According to V. Smith, he told the ten alleged discriminatees that he needed them to figure the situation out with A. Smith. "Let me call him back in and then hopefully we can . . . come to agreement and you guys can go back to work." Further, V. Smith testified, "I really thought, at that time, that they would go back to work." This testimony is credited.

When A. Smith came into the meeting, according to V. Smith, A. Smith asked what had been figured out. According to V. Smith, one of the employees asked if R. Rodas would be there and A. Smith replied that she would be. One of the alleged discriminatees said, "Then we're not going to go back to work." They left at that point. This portion of V. Smith's testimony is discredited. It is inconsistent with the testimony of Dias, Gomez, K. Vasquez.

[32] Both A. Smith and V. Smith are owners of the company.

According to A. Smith, when he came into the conference room towards the end of the meeting, he testified that V. Smith said, "Okay, well, you know, Anthony's the manager, so I'm going to let him handle this," and he turned to me. A. Smith testified that he asked the group, "Where are we at?" "Are you guys going back to work?" Someone asked, "Are you going to fire the girl?" When A. Smith said he was not firing her, that this was the first complaint he had received about her, and that he could not fire anyone without an investigation, "they" said, "Okay, well, then we're leaving" and they walked out. As found above, the testimony of Dias, Gomez, and K. Vasquez is that the meeting ended differently. For the reasons articulated above, Dias and Gomez were credible witnesses. The testimony of A. Smith and V. Smith that the faulty equipment was not discussed at all is incredible and unworthy of belief.

As far as the specific words used to end the meeting, the testimony of Dias and Gomez is credited. Gomez recalled that the meeting ended when V. Smith told the workers it was what A. Smith said in the field. Dias recalled the meeting ended when V. Smith referred the decision to A. Smith. Dias spoke to V. Smith against and asked him if the issues could be fixed so they could keep their jobs. He added that the group wanted to go back to work. K. Vasquez also heard an employee state that they were not quitting and were not taking their checks. Her testimony corroborates that of Gomez and Dias.

The testimony of Dias and Gomez that neither A. Smith nor V. Smith told the ten alleged discriminatees they could return to work is credited. Respondent relies on "undisputed evidence" that there is a shortage of locally available workers to fill harvesting positions. Thus, Respondent claims it must be logically inferred or inherently probable that A. Smith would not have told employees to go to other companies if they did not want to work for Respondent.

A. Smith testified that "there's a shortage of people . . . . and we weren't on the program to have anybody else there but locals. . . ." V. Smith testified that Respondent absolutely needed these employees to continue working and Respondent was never able to replace them. No payroll documents were introduced to corroborate these statements. The statements themselves are vague and self-serving. It cannot be found, based on these statements, that Respondent would not have wanted to fire the alleged discriminatees because there was a shortage of workers.

This finding is reinforced by further testimony. A. Smith testified that he did not want to lose that crew, especially on a Saturday, because there were trucks already there. This testimony might be interpreted to mean that losing the crew on another day – not Saturday – would not be as detrimental. Thus Respondent's evidence that it did not fire the crew on Monday, August 27, because it would have been detrimental to its business is rejected based on these findings.

It is found that during the August 27 meeting in the office, complaints were made about faulty equipment, water, and the favoritism or behavior of R. Rodas in rejecting too much produce, acting as if she was in charge, and not working as fast as they thought she should.[33] It is found that neither A. Smith nor V. Smith made any attempt to address any of these issues except to reject them.[34] In fact, the undisputed evidence supports a finding that A. Smith told the employees in the field that he would not compensate them, as he did on the prior Saturday, for lost product caused by the faulty equipment.

There is no dispute and it is found that toward the end of the meeting in the office on Monday, August 27, V. Smith told the ten alleged discriminatees that whatever A. Smith said was the final word. Further, it is found that A. Smith had previously told the employees they could go to work under their current conditions or go to work "for another company." There is no dispute and it is found that the ten alleged discriminatees were given their paychecks on Monday, August 27.

On August 27, notices of employee status change were completed identically for the ten alleged discriminatees checking "Voluntary Quit" and commenting for each of them "Employee refuses to work."[35] On September 4, Respondent offered reinstatement to the alleged discriminatees "to your previous position effective immediately, on the same terms and conditions of employment that previously applied."[36]

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[33] The Complaint alleges that the employees complained about four working conditions – the damaged harvesting machine, the lack of water, the lack of gloves, and the quality control person. There is no evidence that lack of gloves was mentioned by the alleged discriminatees at any time. This allegation is thus dismissed.

[34] Even were their testimony fully credited, which it is not, their testimony that they wanted the alleged discriminatees to return to work were based on their giving up their stated needs for improvement in their working conditions.

[35] These status change notices are somewhat ambiguous. A "voluntary quit" may be how Respondent saw the situation subjectively but the comment that the employees refused to work indicates a connection to the work stoppage.

[36] At hearing, the parties stipulated to the authenticity and admissibility of all but two exhibits. One of them, Respondent Exhibit 68, is an August 29 email from Respondent's counsel to the Regional Office of the ALRB. The

D. Analysis

1. The Alleged Discriminatees Were Discharged

Initially it must be determined whether the alleged discriminatees were discharged or whether they voluntarily quit. As the Board has noted, disputes over whether employees have voluntarily quit or were discharged after engaging in protected activity often include circumstances steeped in ambiguity.[37] Further,[38]

> It is well-settled that a discharge occurs if an employer's conduct or words would reasonably cause employees to believe that they were discharged and in such circumstances it is incumbent upon the employer to clarify its intent.

Moreover:[39]

> In order for an involuntary discharge of an employee to occur, it is not necessary that the employer explicitly state that the employee is discharged. Rather, the Board has held that a discharge occurs when "an employer's conduct or words would reasonably cause employees to be believe that they were discharged . . . ." The analysis focuses on the perspective of the employee, not the employer, and whether the employee reasonably believed that a termination had occurred.

And finally:[40]

> . . . [E]mployees, particularly unrepresented employees, who concertedly leave work over a complaint without clearly stating if

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email sets forth Respondent's position in the investigation and ends with an offer of reinstatement to all employees who quit their employment on August 27. This exhibit is admitted.

[37] *Dole Farming, Inc.* (1996) 42 ALRB No. 8, p. 2, fn.3; cited in *Wonderful Orchards, LLC,* supra, 46 ALRB No. 2, p. 7.

[38] *Sandhu Brothers Poultry and Farming* (2014) 40 ALRB No. 12 at 22-23 (citations omitted).

[39] *Wonderful Orchards, LLC,* supra, 46 ALRB no. 2, pp. 6-7 (citations omitted); see also *Boyd Bronson Flowers, Inc.* (1995) 21 ALRB No. 4, p. 2, fn. 4, cited by General Counsel (employer violates Act by causing employees to reasonably believe they were discharged even if employer did not intend to convey that message).

[40] *Nichols Farms* (1994) 20 ALRB No. 17, pp.1-2, cited by the General Counsel.

they are striking or quitting, may be properly viewed as engaged in a protected work stoppage, unless some other fact shows that they have quit.

In arguing that it did not discharge the alleged discriminatees, Respondent notes agreement on the record that at no time did any agent of Respondent actually use the words, "You're fired," or any similar unambiguous statement. Respondent claims it did not tell the workers to go to other companies, but agrees it may have stated that they could go "elsewhere" if they did not want to work for Respondent. Respondent notes that if an ambiguity was created by telling employees they could go "elsewhere," this ambiguity was immediately resolved when A. Smith responded to employees by telling them they were not fired. However, A. Smith's testimony that he told employees they could go "elsewhere" and that they were not fired has been discredited. Thus, A. Smith did not resolve the ambiguity in his statements.

Surrounding circumstances reinforce a finding that employees reasonably believed they were discharged. The parties had already experienced a work stoppage on Saturday, August 25. The employees gave no indication that they were quitting on that date, just as they gave no indication they were quitting on Monday, August 27. Rather, on August 25, the employer and the employees were fully aware that the employees had stopped working in order to address an important term of their employment – wages lost due to faulty equipment. According to A. Smith, he was advised by Supervivsor Hernandez that the employees would walk if the situation was not remedied.

It is found that this prior experience on Saturday, August 25, clearly established that the employees were engaged in a work stoppage over their lost wages. The same thing happened when they returned to work on Monday, August 27, and found that the equipment had not been repaired. Thus Respondent already had a history and perspective on exactly what the employees' intentions were on Monday, August 27, because it had already experienced this scenario on the previous work day. In fact, A. Smith believed he had overpaid the workers on Saturday, August 25. When he arrived on Monday, August 27, he told the workers he would not pay for anymore lost produce.

Respondent claims that it paid for ten extra bins on Saturday, August 25, in order to keep the crew. From this premise, Respondent argues that it did not want to lose the crew. In fact, A. Smith testified that he didn't want to lose that crew, "and especially on a Saturday. You've got trucks there already." However, this statement is ambiguous regarding the point for which it is asserted. Perhaps the reason employees were paid the ten-bin wage differential on Saturday was due to waiting trucks rather than an unconditional desire not to lose the crew. This argument is, thus, rejected.

Other surrounding circumstances include a statement to Dias by A. Smith in the parking lot just before the alleged discriminatees entered the office building. Dias requested, "If you're not going to let us in [to the office] because you're firing us, then let us go pick up our check."[41] To which A. Smith responded, without protesting that the workers were not fired, that the checks would not be ready until 2 p.m. Further, K. Vasquez, testified that she was told to prepare the checks by A. Smith just after the meeting in the field.[42] This instruction basically "sealed the deal," so to speak, on discharge.[43] K. Vasquez also testified that when A. Smith stated to the ten alleged discriminatees at the end of the meeting in the office, "If you're not going to work, your checks are ready," one of the group responded that they would not take their checks. They were not quitting.

In fact, the alleged discriminatees received their paychecks on Monday, August 27, which was not a regular pay day. This circumstance is consistent with discharge. Finally, the meeting in the office ended when Dias told V. Smith that the group was willing to go back to work. V. Smith noted that the workers had left their jobs and responded, well, whatever A. Smith said, that's what it is. Thus V. Smith adopted A. Smith's statements in the field. All of these surrounding

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[41] See *Dole Farming, Inc.* (1996) 22 ALRB No. 8, ALJD p. 32, cited by General Counsel (employee requests for immediate payment of wages is an indication that employees reasonably believe they have been discharged).

[42] K. Vasquez testified that during the meeting in the office on August 27, A. Smith told the group that if they were not going to work, their checks were ready. K. Vasquez recalled one of the group responding that they were not taking their checks – they were not quitting. In any event, they were given their paychecks immediately thereafter. Employee paychecks were always issued on Fridays – not on Monday. Thus, issuance of these paychecks on Monday was an unusual event and indicative of discharge.

[43] The General Counsel received payroll records on the morning of the hearing. These records were unredacted and could not be offered during the course of the hearing. Following redaction, on November 27, 2019, the General Counsel moved for admission of these records as General Counsel Exhibit 1. Respondent objected to this exhibit based on relevance, hearsay, and foundation. For the reasons advanced in the General Counsel's argument, General Counsel Exhibit 1 is admitted.

circumstances indicate the ten alleged discriminatees were discharged. There is no evidence which indicates that they quit.

Thus, it is concluded that there is no credible evidence that A. Smith's statement in the field that it was the employees' decision to stay or to go to another company was clarified. In fact, A. Smith's unresolved statement was later adopted by V. Smith. Both A. Smith and V. Smith stood by those words. Surrounding circumstances reinforce the fact that the employees were being discharged. Thus, it is concluded that the employees reasonably understood that they were discharged.

Although it is an unfair labor practice to discharge employees for engaging in a protected work stoppage,[44] the parties agree that this case should be analyzed pursuant to the shifting burden of proof set forth in *Wright Line*.[45] As utilized by the ALRB, the *Wright Line* analysis is applied as follows: [46]

> In discrimination cases under Labor Code section 1153, subdivisions (a) and (c), the General Counsel has the initial burden of establishing a prima facie case. The General Counsel must show by a preponderance of the evidence that the employees engaged in protected concerted activity, the employer knew of or suspected such activity, and there was a causal relationship between the employees' protected activity and the adverse employment action on the part of the employer (i.e., the employee's protected activity was a "motivating factor" for the adverse action). (*Kawahara Nurseries, Inc.* (2014) 40 ALRB No. 11, p. 11, citing *California Valley Land Co.*,

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[44] *NLRB v. Washington Aluminum* (1962) 370 U.S. 9, 15-17 (after complaining for days about miserably cold working conditions, walkout of seven non-union employees who had made numerous complaints about the broken furnace was protected and it was unfair labor practice to fire them for leaving their positions); *Ocean Mist Farms* (2015) 41 ALRB No. 2, pp. 19-20 (*Washington Aluminum* is particularly apt in case where seven employees were disciplined for protected, concerted walkout). See also, *Sabor Farms* (2016) 42 ALRB No. 2, ALJD at 15-17 (After pre-hearing conference in which ALJ questioned whether pleadings were really about a protected work stoppage, at beginning of hearing General Counsel changed theory from discharge for protected concerted activity of complaining about a work assignments to discharge for engaging in a protected work stoppage. Under the new work stoppage theory, a *Wright Line* analysis was unnecessary. The Board affirmed the ALJ's conclusion that it was unlawful to discharge employees for engaging in a protected work stoppage. The ALJ relied on *NLRB v. Washington Aluminum*, supra. See also *Wonderful Orchards, LLC* (2020) 46 ALRB No. 2, pp. 6-7, fn. 9 (noting that the General Counsel did not litigate that case on a protected work stoppage theory). Although in the instant case the General Counsel utilized terminology in its brief regarding a protected work stoppage, the General Counsel did not specify this theory at the hearing.

[45] *Wright Line, A Division of Wright Line, Inc.* (1980) 251 NLRB 1083, 1087, enfd. (1st Cir. 1981) 662 F.2d 899, cert. denied (1982) 455 U.S. 989; approved, *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393.

[46] *Gerawan Farming, Inc.* (2019) 45 ALRB No. 7, pp. 3-4, 5.

Inc. (1991) 17 ALRB No. 8, pp. 6-7; *Woolf Farming Co. of California, Inc.* (2009) 35 ALRB No. 2, pp. 1-2; *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083, 1087.)

With respect to the third element of causal connection, the Board may infer a discriminatory motive from direct or circumstantial evidence. (*New Breed Leasing Corp. v. NLRB* (9th Cir. 1997) 111 F.3d 1460, 1465.) Where discriminatory motive is not apparent from direct evidence, there are a variety of factors that the Board and courts have considered in order to infer the true motive for the adverse employment action. Such factors may include: (1) the timing or proximity of the adverse action to the activity; (2) disparate treatment; (3) failure to follow established rules or procedures; (4) cursory investigation of alleged misconduct; (5) false or inconsistent reasons given for the adverse action, or the belated addition of reasons for the adverse action; (6) the absence of prior warnings; and (7) the severity of punishment for alleged misconduct. (*Aukeman Farms* (2008) 34 ALRB No. 2, p. 5, citing *Miranda Mushroom Farm, Inc. et al.* (1980) 6 ALRB No. 22; *H & R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21, pp. 3-4.)

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Once the General Counsel has established a prima facie case of discrimination, the burden shifts to the employer to prove that it would have taken the same action in the absence of the protected conduct. (*Gerawan Farming, Inc.,* supra, 45 ALRB No. 3, p. 12; *H & R Gunlund Ranches,* supra, 39 ALRB No. 21, p. 4; *Wright Line*, supra, 251 NLRB 1083, 1087.) "[I]t is not sufficient for the employer simply to produce a legitimate basis for the action in question. It must 'persuade' by a preponderance of the evidence that it would have taken the same action in the absence of protected conduct." (*Conley* (2007) 349 NLRB 308, 322, enfd. *Conley v. NLRB* (6th Cir. 2008) 520 F.3d 629, 637-638; *David Abreu Vineyard Management, Inc.* (2019) 45 ALRB No. 5, p. 4, fn. 6.)

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, and there is no need to perform the second part of the *Wright Line* analysis. (*Premiere Raspberries, LLC dba Dutra Farms* (2013) 39 ALRB No. 6, p. 8, citing *Limestone Apparel Corp.* (1981) 255 NLRB 722, enfd. (6th Cir. 1981) 705 F.2d 799; *Conley*, supra, 349 NLRB 308, 322.)

2. The General Counsel Has Satisfied the Initial *Wright Line* Burden of Proof

Utilizing this shifting burden, a preponderance of the evidence indicates that the General Counsel has shown that the alleged discriminatees were engaged in concerted activity – a work stoppage – the employer knew of the activity, and there was a direct causal connection between the work stoppage and the discharges.

• The Alleged Discriminatees Were Engaged in Protected Concerted Activity

Section 1153(a) of the Agricultural Labor Relations Act (ALRA) prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their rights to, inter alia, engage in concerted activities for their mutual aid and protection. To be concerted, the employee's actions must be linked to those of his coworkers.[47] To be protected, the activity must have a goal of seeking mutual aid or protection to improve terms and conditions of employment.[48]

First, it is obvious that the action of the ten alleged discriminatees was concerted. Indeed, the record clearly demonstrates that the ten alleged discriminatees consistently acted together as a group. Respondent does not contend that the alleged discriminatees were not engaged in concerted activities.

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[47] *Quicken Loans, Inc.* (2014) 367 NLRB No. 112, slip op. at 3, quoting *Fresh & Easy Neighborhood Market* (2014) 361 NLRB 151, 153. See generally *Meyers Industries, Inc. (Meyers I)* (1984) 268 NLRB 493, remanded *Prill v. NLRB* (D.C. Cir. 1985) 755 F.2d 955 and reaffirmed *Meyers Industries, Inc. (Meyers II)* (1986) 281 NLRB 882.

[48] Id.

Second, the groups' concerns were focused on mutual aid or protection. Employees who are seeking to improve their terms and conditions of employment or otherwise seeking to improve their lot as employees are engaged in mutual aid or protection.[49] The original object of the alleged discriminatees' group activity was faulty equipment which caused lost wages. Wages clearly constitute a protected subject.[50] Availability of water, another term and condition of employment, was also mentioned.[51] A later object of the group activity was a crew member's behavior in rejecting harvested produce, acting like she was the boss, and not performing professionally in their opinion. This constitutes another protected aspect of their working conditions.[52] Accordingly, it is found that the ten alleged discriminatees were engaged in concerted activity with a goal of seeking to improve terms and conditions of their employment, i.e., they were engaged in protected concerted activity.

- **There is No Dispute that Respondent Had Knowledge that the Alleged Discriminatees were Engaged in Protected Concerted Activity**

As set forth in the facts above, Respondent was first alerted to a work stoppage on Saturday, August 25, when it received word through Supervisor Hernandez that the ten alleged discriminatees had ceased working due to faulty equipment which caused them loss of wages. A. Smith approved paying the crew for ten lost bins to remedy the situation that day. The alleged discriminatees accepted this remedy and returned to work. Thus, it is found that Respondent was aware of the protected concerted activity of the ten alleged discriminatees on Saturday, August 25.

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[49] *Eastex, Inc. v. NLRB* (1978) 237 U.S. 556, 565.

[50] *Mini Ranch Farms* (1981) 7 ALRB No. 48 at 12 (concerted action which involves employment, wages, and working conditions constitutes protected concerted activity); see also, *Harry Carian Sales* (1983) 9 ALRB No. 13, as modified regarding notices (1984) 10 ALRB No. 51 (discharge for discussing working conditions violates the Act); *Cordúa Restaurants, Inc.* (2019) 368 NLRB No. 43, at 17-19 (citing *Grand Sichuan Restaurant* (2016) 364 NLRB No. 151, at 1 fn. 2; *Montgomery Ward & Co.* (1965) 156 NLRB 7, 9-10).

[51] *Sandhu Brothers Poultry and Farming* (2014) 40 ALRB No. 12, pp. 25-26, 32-33; *Tex-Cal Land Management* (1982) 8 ALRB No. 85, pp. 10-11, ALJD pp. 75-76; *Pappas & Co.* (1979) 5 ALRB No. 2, p. 2.

[52] *Sandhu Brothers Poultry and Farming,* supra, 40 ALRB No. 12 at 31-33 (Concerted activity directed toward rude, belligerent, overbearing behavior which has direct impact on employees' work constitutes protected activity); see generally, *Boyd Bronson Flowers, Inc.*, supra, 21 ALRB No. 4, p. 2 fn. 3 (protected status of concerted demands concerning wages or working conditions does not depend on reasonableness of demands; activity that would be otherwise protected loses its protected status only if it is unlawful, violent, in breach of contract, or indefensibly disloyal; *Fresh & Easy Market, supra,* 361 NLRB 151, 155-156 (complaint about abusive behavior was for purpose of mutual aid and protection); *Arrow Electric Co.* (1997) 323 NLRB 968, ALJD 970 (work protest over rule, belligerent behavior impacted employees and their ability to work), enfd. (6th Cir. 1998) 155 F3d 762.

As further set forth in the facts above, A. Smith was present in the field on Monday, August 27, when the alleged discriminatees again refused to work due to faulty equipment. A. Smith refused to pay for lost bins on that date. A. Smith reported to V. Smith that the group of ten alleged discriminatees were once again refusing to work and requested that V. Smith drive back to Santa Maria to address the situation. Thus, on Monday, August 27, Respondent had knowledge of the ten alleged discrimrinatees' protected concerted activity.

- **There Is a Direct Causal Connection Between the Discharge of the Alleged Discriminatees and Their Protected, Concerted Activity**

In analyzing whether there is a causal connection between the protected activity and the discharges, there is no need to rely on an inference of discriminatory motive based on circumstantial evidence. Here the direct evidence establishes motive. There can be no dispute that the reason for the discharges was the employees' work stoppage due to faulty equipment and rejection of too much produce. Those were the only factors mentioned in the field on August 27. The alleged discriminatees were immediately told if they did not want to work for Respondent, they could leave and go to another company. Moreover, just after this meeting A. Smith ordered K. Vasquez to prepare checks for the ten alleged discriminatees. Thus, their discharge in the field, later ratified in the office, was directly due to their protected concerted activity.

3. The Record is Devoid of Credible Evidence that the Alleged Discriminatees Would Have Been Fired Absent the Work Stoppage

An employer may defend a prima facie case by the General Counsel by showing that it would have taken the same action in any event. In fact, the employer's defense is that the employees refused to work and quit their jobs voluntarily. This defense is not supported by the record.

Rather, the record reflects that the employees reasonably understood from the words used in the field and ratified in the office that they had been discharged. Toward the end of the meeting in the office, according to V. Smith, he turned the meeting over to A. Smith saying A. Smith is the manager and he would let A. Smith handle the situation. In effect, this statement by V. Smith ratified A. Smith's

handling of the situation in the field and his statement that the employees could go elsewhere.

Respondent claims that it paid for 10 extra bins on Saturday, August 25, in order to keep the crew. From this premise, Respondent argues that it did not want to lose the crew. A. Smith testified that when he spoke to Supervisor Hernandez on Saturday, August 25, and approved paying for 10 additional bins to cover lost product, Supervisor Hernandez told him that if the alleged discriminatees were not paid for the lost wages due to defective equipment, "they were walking." A. Smith testified that he didn't want to lose that crew, "and especially on a Saturday. You've got trucks there already." And later, "I said 'Okay. Let's get the orders done.'"

Accepting A. Smith's testimony on this point, it does not tend to prove that Respondent did not want to lose the crew. At best, it may indicate that Respondent did not want to lose the crew on Saturday when it already had trucks waiting to haul the produce away. When the same concerns were raised by the crew in the field early on Monday, A. Smith told the crew he would not pay for lost bins that day even though the conveyor belt had not been repaired on Monday. Respondent argues that V. Smith drove from Salinas to Santa Maria in order to meet with the crew and that this deviation in his regular schedule supports an inference that he did not want to lose the crew. Whatever his subjective belief was in driving back to Santa Maria, his credible testimony does not support an inference that he wanted to keep the crew. In fact, A. Smith's credited testimony indicates that he turned the meeting over to V. Smith and told the alleged discriminatees that V. Smith was in charge.

Having considered the entire record and Respondent's arguments regarding whether the ten alleged discriminatees were discharged, it is found that Respondent has not presented sufficient evidence to prove its *Wright Line* defense that the alleged discriminatees voluntarily left work. In fact, based upon the credible evidence and on the record as a whole, it is concluded that the alleged discriminatees were discharged because they engaged in protected concerted activity.

E. Remedy

It is recommended that Respondent be ordered to cease and desist from discharging or retaliating against any agricultural employee due to his or her

protected concerted activity. It is further recommended that Respondent be ordered to take certain affirmative actions deemed necessary to effectuate the Act. Specifically, Respondent must rescind the discharge notices or other personnel notation. Having already offered the ten alleged alleged discriminatees reinstatement, Respondent must make them whole for loss of wages or other economic losses due to their unlawful discharges. In order to effectuate the policies of the Act, Respondent must provide notice to all employees.

RECOMMENDED ORDER

Pursuant to labor code section 1160.3, Respondent Smith Packing, Inc., 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 August 27, 2018 and expunge such notices from its files.

(b) Having already offered reinstatement to these employees, it must make whole Jose Vasquez, Antonio Gonzales, Denis Adelmo, Jose Argueta, Manuel de Jesus Velasco, Jose Abel Rivas, Eduardo Melendrez, Jose Benedicto Dias Andasol, Arturo Diaz, and Jamie Arias 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 Jose Vasquez, Antonio Gonzales, Denis Adelmo, Jose Argueta, Manuel de Jesus Velasco, Jose Abel Rivas, Eduardo Melendrez, Jose Benedicto Dias Andasol, Arturo Diaz, and Jamie Aria, and sent to the ALRB's Salinas 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 August 27, 2018, 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 by a Board Agent, 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 August 27, 2018, 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 this order becomes final, 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: Friday, May 8, 2020.

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL WORKERS

After investigating charges that were filed with the Salinas 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 order 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 as a group about faulty equipment, lack of water, and a quality control person you believe is rejecting too much produce or because you stop working as a group due to these concerns about your working conditions.

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

WE HAVE already offered immediate employment to these employees and **WE WILL** make whole these employees - Jose Vasquez, Antonio Gonzales, Denis Adelmo, Jose Argueta, Manuel de Jesus Velasco, Jose Abel Rivas, Eduardo Melendrez, Jose Benedicto Dias Andasol, Arturo Diaz, and Jamie Arias - for all wages or other economic losses that they suffered as a result of our unlawful discharge of them.

DATED: _____

SMITH PACKING, INC.

By: _____
Rafael Gonzalez, Esq.
Mullen & Henzell, LLP

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 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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE
(Code Civ. Proc., 1013a, 2015.5)

Case Name: SMITH PACKING, INC., Respondent and,
JOSE VASQUEZ, Charging Party.

Case No.: 2018-CE-048-SAL

I am a citizen of the United States and a resident of the County of Yolo. 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 **Wednesday, May 13, 2020**, I served the within **NOTICE OF ERRATUM: REVISED DECISION AND RECOMMENDED ORDER ADDING PAGE NUMBERS TO DECISION AND RECOMMENDED ORDER ISSUED MAY 8, 2020. (NO OTHER CHANGES TO THE DECISION HAS BEEN MADE.) AND ERRATUM: REVISED DECISION AND RECOMMENDED ORDER ADDING PAGE NUMBERS TO DECISION AND RECOMMENDED ORDER ISSUED MAY 8, 2020. (NO OTHER CHANGES TO THE DECISION HAS BEEN MADE.)** on the parties in the above-entitled action as follows:

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

Brian T. Daly, Esq. Rafael Gonzalez, Esq. Mullen & Henzell, LLP 112 E. Victoria Street Santa Barbara, California 93101	bdaly@MullenLaw.com rgonzalez@MullenLaw.com 9414-7266-9904-2968-9474-91
Mr. Jose Vasquez 319 E. Bunny Avenue, Apt. 13 Santa Maria, California 93454	No Email on File 9414-7266-9904-2968-9475-07

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- **By Email** to the persons listed below and addressed as follows:

Franchesca Herrera, Regional Director	fherrera@alrb.ca.gov
Michael Marsh, Assist. Gen. Counsel	Michael.Marsh@alrb.ca.gov
Lumi Barba, Field Examiner	Lumi.Barba@alrb.ca.gov
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ALRB Salinas Regional Office	
342 Pajaro Street	
Salinas, California 93901-3423	
Julia L. Montgomery, General Counsel	jmontgomery@alrb.ca.gov
Silas Shawver, Deputy General Counsel	sshawver@alrb.ca.gov
1325 J Street, Suite 1900-A	
ALRB Office of General Counsel	
Sacramento, California 95814	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **Wednesday, May 13, 2020**, at Sacramento California.

Annamarie Argumedo
Senior Legal Typist