STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

OCEAN MIST FARMS,	)	Case No. 2017-CE-006-VIS
	)	
Respondent,	)	
	)	
and,	)	
	)	
JUAN ANTONIO ORTIZ,	)	**DECISION AND**
	)	**RECOMMENDED ORDER**
Charging Party.	)	
_____	)	

Appearances:

For the General Counsel:
Julia L. Montgomery, Sacramento, California
Chris Schneider, Regional Director, Visalia, California
Christopher Mandarina, Assistant General Counsel, Indio, California
Nancy Craig, Assistant General Counsel, Sacramento, California (on brief)
Berenice Venegas, Field Examiner, Indio, California

For Respondent:
Howard A. Sagaser, Fresno, California
Ian B. Wieland, Fresno, California (on brief)

At issue in this case is whether Ocean Mist Farms (Respondent), through its farm labor contractor (FLC) Valley Pride, Inc. (VPI), violated Section 1153(a) of the Agricultural Labor Relations Act (the Act or the ALRA)[1] by threating to call police and suspending three agricultural workers[2] on February 18, 2017.[3] The complaint alleges that on that date, for safety reasons, the three workers engaged in

[1] Cal. Lab. Code §§ 1140-1166.3.
[2] The unfair labor practice charge in this case was filed by agricultural worker Juan Antonio Ortiz (Ortiz) on April 28, 2017.
[3] All dates are in 2017 unless otherwise referenced.

a work stoppage during a period of heavy rainfall. The complaint further alleges that the suspension was in retaliation for the work stoppage. Respondent denies that it or VPI violated the Act.

Consolidated with the complaint is a backpay specification. Respondent asserts that the specification fails to take into account the alleged discriminatees' refusal to work for a portion of February 18. Thus, Respondent contends that the specification does not utilize a reasonable method of computing the make whole remedy.

On the record as a whole,[4] and after thorough consideration of briefs filed by all parties, the following findings of fact and conclusions of law are made.

JURISDICTION

Respondent is an agricultural employer[5] operating a farming business growing spinach in Riverside County, California. VPI conducts spinach harvesting operations for Respondent in Riverside County. Respondent denies that VPI is a farm labor contractor, as alleged in the complaint, and asserts that it is a custom harvester. Thus, Respondent argues that as a custom harvester, VPI is the statutory employer.

Supervisors for VPI are Juan Cruz (Supervisor Cruz) and Rafael Haro (Supervisor Haro). Field Operations Manager Daniel Gomez (OM Gomez) and Foreman Juan Martin Hernandez (Foreman Hernandez) are also employed by VPI. Respondent admits that of these individuals, Supervisor Cruz, Supervisor Haro, and Foreman Hernandez are supervisors within the meaning of the Act.[6] Their hierarchical ranking from lowest to highest is from Foreman Hernandez to Supervisor Cruz[7] to Supervisor Haro.

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[4] Specific credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to the factual findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[5] Respondent admits it is an agricultural employer within the meaning of §§ 1140.4 (a) and (c) of the Act.

[6] Sec. 1140.4(j) of the Act. All supervisory allegations were denied in Respondent's Answer to the Complaint . However, pursuant to Respondent's January 16, 2020 List of Undisputed Facts, the supervisory status of Supervisors Cruz and Haro and Foreman Hernandez was admitted.

[7] Supervisor Haro described Supervisor Cruz, who is no longer employed by VPI per Respondent attorney Sagaser, as his assistant.

There is no dispute that the three workers who were suspended, Juan Antonio Ortiz (Ortiz), Fabian Ruiz (Ruiz), and Esau Flores (Flores) (jointly, the alleged discriminatees) were agricultural employees within the meaning of the Act.[8] Thus, the Agricultural Labor Relations Board (ALRB) has jurisdiction of this matter.

BACKGROUND

Respondent's Coachella Valley spinach fields are the site of this controversy. In general, spinach is harvested by crews of approximately 20 workers who are assigned places ahead of, on top of, beside, and behind a moving harvesting machine. The machine has four "arms," two extending from each side of the machine. About four workers are behind each arm and others are in front of the machine. The arms contain conveyor belts that move produce placed on them by the workers from the ground level up to the workers on top of the machine. The crew members (except for those riding on the machine) move through the field with the machine, working on their hands and knees in the rows of spinach. They cut the spinach with a freshly sharpened, scythe-shaped tool and bundle it as they proceed. They place the bundles on the nearest conveyor band of the harvest machine. Each worker is responsible for four rows of spinach - the two rows on either side of the ground on which he/she is working.

In February, the alleged discriminatees worked on a crew under the direction of Foreman Hernandez. Supervisors Cruz and Haro were immediately responsible for the crews overseen by Foreman Hernandez.

CREDIBILITY

Very few credibility disputes are present on this record. When necessary, credibility determinations have been made based on the demeanor of the witnesses as well as the context of the testimony, the quality of the recollection, testimonial consistency, presence or absence of corroboration, weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.[9] Credibility findings need not be all-

[8] Sec. 1140.4 (b) of the Act.
[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.

or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony.[10] The facts set forth below are those found to be credible.

FACTS REGARDING LIABILITY

On February 18, the alleged discriminatees arrived at Respondent's spinach field before the 7 a.m. starting time,[11] sharpened their tools and donned boots and waterproof coveralls. When their shift time started, they performed morning exercises for 5-10 minutes. After completing the exercises, they went into the spinach field and were assigned positions directly in front of the harvesting machine. The harvesting machine was thus directly behind them moving toward them. On the previous day, it had rained. Rain began on February 18 about 15 minutes after their work started. Extrapolating from the 7 a.m. start time, adding 5-10 minutes for exercise, the employees began work at 7:05-7:10 a.m. and the rain would have begun around 7:20-7:25.

Alleged discriminatee Ruiz described the conditions of the field as the rain progressed, getting worse: "It's not good for us to be able to cut the vegetables. If you're using your knife the vegetable just – the knife just slides off of the vegetable. Your knees slide off as well. And you could cut yourself." Ruiz also testified that those in front of the machine (on this day the three alleged discriminatees) were more at risk than those behind or on the side. Ruiz noted that the driver of the machine is not focused on the workers in front of the machine.

As the field became more muddy and slippery, alleged discriminatee Ortiz felt that he could no longer cut the spinach safely. Ortiz explained that he had worked in the rain on other occasions and always continued working. This time, however, he was working in front of the harvester. In his view, this was a more dangerous position.

In any event, alleged discriminatee Ortiz stood up and tried to signal Foreman Hernandez by whistling and gesturing. Alleged discriminatee Ruiz

[10] See, e.g., *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.

[11] The alleged discriminatees differed in their testimony as to whether their starting time that day was 6 a.m. or 7 a.m. Payroll records indicated a 7 a.m. start time for that date. It is found that the workday began at 7 a.m.

observed this. All witnesses agreed that the harvesting machine is noisy. Although Foreman Hernandez turned to look at Ortiz, he was talking to Supervisor Cruz at that time and turned back, continuing to speak to Supervisor Cruz. Alleged discriminatee Ortiz moved away from his work site and sought shelter under a nearby shade structure.[12] If the machine was in the middle of a "block," alleged discriminatee Ortiz estimated the distance between the machine and where Foreman Hernandez and Supervisor Cruz were standing at the entrance as about one-half of the block. The shade structure was on the edge of the field, about one-half of the block in the opposite direction. It is set up in a non-production area, an area where the spinach has already been harvested and there are no cars or tractors in the area.

Shortly thereafter, alleged discriminate Ruiz also stood up and tried to signal Foreman Hernandez by raising his hand and yelling that he could no longer work in the muddy conditions. Ruiz called Foreman Hernandez's name several times and thought that Foreman Hernandez saw him standing up. However, Foreman Hernandez did not respond.

In Foreman Hernandez's view, although it had rained on the prior day and had begun to rain "just a little bit" around 7 a.m. on February 18, the rain did not affect the work. Foreman Hernandez did not provide further explication to his conclusory view that the rain did not affect the work. In other words, he did not indicate whether the ground was muddy, whether it would be difficult to firmly control a sharp knife in the rain, or whether working in front of the moving, noisy harvester machine might decrease the ability to work safely. Thus, his conclusory view is rejected. Foreman Hernandez did not recall which workers were working in front of the moving harvester machine.

In any event, alleged discriminatee Ruiz left his work site and walked over to alleged discriminatee Ortiz at the shade structure. Alleged discriminatee Flores followed alleged discriminatee Ruiz. The three discussed the weather in general – that it was raining too hard - and the difficulty they faced working with sharp

[12] This structure was referred to as the shade and the trailer. The record reflects that it was an open-air structure with a roof. There is no specific evidence regarding the typical usage of this structure. No evidence ties this structure to production work.

knives in the muddy conditions in front of the harvest machine. The parties agree for backpay purposes that the alleged discriminatees worked until 7:30 a.m.[13]

Supervisor Cruz initially spoke to the alleged discriminatees to find out why the alleged discriminatees were not working. Supervisor Cruz joined the alleged discriminatees at the shade structure. According to alleged discriminate Ruiz, Supervisor Cruz told the alleged discriminatees if they were not going to work, they needed to leave the field or he would call the police. Alleged discriminatee Ortiz responded that they were unable to work due to unsafe conditions - muddy and slippery conditions - and they would stay there and wait for the police. Alleged discriminatee Ruiz recalled that they were told they could not go back to work by Supervisor Cruz and that Supervisor Haro was going to speak to them. Supervisor Cruz left the three alleged discriminatees and reported the matter to Supervisor Haro.

OM Gomez testified that Supervisor Haro reported the work stoppage to him around 8 a.m. based on a report from Supervisor Cruz. Supervisor Haro told OM Gomez that Supervisor Cruz reported that three workers had quit working. OM Gomez told Supervisor Haro to find out why they were not working. OM Gomez testified that he advised Supervisor Haro to tell the three if they were not going to work, they had to leave.

In the meantime, the alleged discriminatees decided to return to work. The rain had decreased a bit and they were concerned about losing their jobs. As they walked back toward the field, Foreman Hernandez stopped them from returning. He told them they had to wait and speak with Supervisor Haro.

When Supervisor Haro arrived at the field, he testified that alleged discriminatee Ortiz spoke for the group and said they were not working due to the rain. Supervisor Haro testified he told them he would give them 15 minutes to get back to work. Otherwise, they needed to leave the field. Supervisor Haro testified that when he told the alleged discriminatees they had to leave if they were not

[13] This timeframe is supported by the testimony of Foreman Hernandez who recalled that he observed the alleged discriminatees work for about 30 minutes. At about that time, Foreman Hernandez left the area. When he returned, the alleged discriminatees were at the shelter. Foreman Hernandez called Supervisor Haro and reported the situation to him. This was around 7:45.

going to work, they asked what he was going to do if they did not leave. He responded, “Well, I could call the sheriffs to get you guys out.”

Foreman Hernandez joined Supervisor Haro when he spoke with the alleged discriminatees at the shelter. Foreman Hernandez recalled that Supervisor Haro asked the alleged discriminatees why they were not working and they responded that it was due to the rain. Foreman Hernandez also agreed that when Supervisor Haro was asked what would happen if the alleged discriminatees did not leave, Supervisor Haro stated that he would call the sheriff. Supervisor Haro told the alleged discriminatees that if they were not going to work, they needed to leave the field. Foreman Hernandez estimated this conversation lasted about 20-30 minutes.

The alleged discriminatees more or less agreed with Supervisor Haro’s testimony. According to the alleged discriminatees, Supervisor Haro approached the group driving a four-wheel drive vehicle. It was so muddy, he could not drive it all the way to the shade shelter. He told them if they were not going to work, they needed to leave or he would call the police. Although the workers told Supervisor Haro they would return to work when the rain lightened, he told them if they didn’t leave in 15 minutes, he would call the police.

In another phone call from Supervisor Haro to OM Gomez, Supervisor Haro reported that he had told the three alleged discriminatees they had to leave and if they did not leave, the sheriff would have to be called. OM Gomez testified that he told Supervisor Haro not to call the sheriff.

According to the alleged discriminiatees, while they were left waiting under the shade structure, they decided that they would return to their positions in the field. It was by now time for the first morning rest break. According to Foreman Hernandez’s worksheet information, the first morning break on February 18 occurred at 9 a.m. Foreman Hernandez agreed that the alleged discriminatees joined the 9 a.m. rest break. At the end of the rest break, according to the alleged discriminatees, they joined the crew to return to work.

As they approached their work area, according to the alleged discriminatees, Foreman Hernandez stopped them and asked if they were returning to work. Alleged discriminatee Ortiz explained that they were willing to work but the rainy conditions had forced them to stop temporarily. According to alleged discriminatee

Ortiz, Foreman Hernandez said the three of them needed to leave. "If not, somebody was going to come and kick us out. He already had been given the power from above. He already had orders from someone above, that the police was going to come and kick us out."

Alleged discriminatee Ortiz asked if they had been fired. Foreman Hernandez responded that they were suspended for the remainder of the day.[14] Thus, the alleged discriminatees left the premises.[15] Foreman Hernandez denied having this conversation or any other conversation with the alleged discriminatees following the break. Foreman Hernandez denied that Supervisor Haro instructed him to prohibit the three alleged discriminatees from returning to the field while Supervisor Haro agreed he told the alleged discriminatees that if they were not going to work, they needed to leave the field. Supervisor Haro testified that he was given this instruction by OM Gomez. Foreman Hernandez's testimony that he did not speak to the alleged discriminatees after the morning break is thus discredited.

There is little disagreement between the versions of events from these witnesses. However, where there is conflict, the alleged discriminatees' version of this particular scenario is credited.[16] This credibility finding is made based upon the relatively forthright demeanors of the alleged discriminatees. Supervisor Hernandez's denial that he spoke to the alleged discriminatees when they attempted to return to work is therefore discredited. It is found that he told the alleged discriminatees that they were suspended for the remainder of the February 18 workday.

[14] Foreman Hernandez's denial that he told the alleged discriminatees they could not return to the field for the remainder of the day is discredited as inconsistent with the testimony of the alleged discriminatees.

[15] According to Supervisor Haro, Foreman Hernandez told him that the alleged discriminatees told him that they were not going back to work. Rather, they were going to make a complaint. Foreman Hernandez did not corroborate this statement. The alleged discriminatees did not corroborate this statement. Supervisor Haro also testified that he was instructed by OM Gomez that no disciplinary action would be taken against the three alleged discriminatees, Supervisor Haro said that was not typical. OM Gomez did not corroborate this statement. It is thus discredited. In fact, the alleged discriminatees were suspended.

[16] The alleged discriminatees denied that they spoke to the General Counsel prior to the hearing in order to prepare their testimony. The General Counsel, speaking as an officer of the court, stated that this testimony was in error and acknowledged that the alleged discriminatees were prepared for the hearing by the regional office. Respondent urges that all testimony of the alleged discriminatees should be stricken for this reason. However, Respondent's blanket request to discredit the alleged discriminatees is overbroad. Their testimony that they were not prepared by the General Counsel for testifying is discredited. The remainder of their testimony is credited based upon their general demeanor and the fact that Respondent's witnesses for the most part agreed with their version of the events in the field leading to their suspension.

On the following day, February 19, the three alleged discriminatees returned to work. Operations Manager Gomez and Supervisor Haro spoke to them around noon and apologized for the way they were treated the previous day, specifically regarding the threat to call the police. Operations Manager Gomez told them no further disciplinary action would be taken because of the rain.

Thus, the credited facts indicate and it is found that the three alleged discriminatees began work on February 18 around 7 a.m. About 7:30 a.m. they left their working positions in front of the harvesting machine fearing for their safety in front of the moving machine, on their hands and knees in the muddy, rainy conditions, working with sharp knives. Thereafter, around 9:15, they were suspended for the remainder of the day. Supervisor Haro told them they had to leave the field and Foreman Hernandez told them they were suspended for the day. On February 19, they returned to work.

ANALYSIS REGARDING LIABILITY

1. The Alleged Discriminatees Were Engaged in a Protected Work Stoppage

Based on the undisputed facts, it is found that the three alleged discriminatees engaged in a protected-concerted work stoppage due to their perception that it was dangerous to work in front of the harvesting machine on their hands and knees in the mud and rain with sharp knives.[17] It is further found that they were threatened with police action due to their protected-concerted work stoppage and they were suspended because they engaged in the protected-concerted work stoppage. Such threat and suspension are unlawful.

[17] On brief, Respondent suggests that the ALRB should apply § 502 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 143, to the instant case. and argues that the General Counsel did not prove that working conditions were "abnormally dangerous" under § 502. Sec. 502, states, inter alia: "nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under the Labor Management Relations Act." The National Labor Relations Act (NLRA) and the LMRA are two separate legislations. Although the ALRA is based on the NLRA, there is no legislative requirement that the ALRB follow a section of the LMRA, which deals with private lawsuits by unions against employers, restrictions on payments to employee representatives, boycotts and other unlawful combinations. There do not appear to be any ALRB decisions containing reference to "abnormally dangerous" working conditions as envisioned in § 502 and there is no allegation in the amended complaint of "abnormally dangerous" working conditions nor did the General Counsel adopt such an allegation in the pleadings, at the hearing, or in its post-hearing brief. Thus, Respondent's argument is rejected.

There is no dispute that the alleged discriminatees quit working, one after the other, and engaged in conversation under the shade structure. Their conversation included their views about the fact that they were working in front of a large, moving machine in the rain and in slippery mud with sharp scythe-like knives. There was concern that the driver of the machine might not see them. Ruiz had tried to yell to his supervisor over the noise of the rain and the harvester machine but his supervisor did not acknowledge him. There would be, therefore, some question about visibility and noise. It is clear from this discussion that the discriminatees concertedly quit working due to a controversy about their working conditions;[18] i.e., a labor dispute.[19]

Employees who engage in a protected-concerted labor dispute are protected from discrimination. In 1962, the U.S. Supreme Court addressed a similar situation.[20] Seven employees arrived at work in bitterly cold weather only to discover that the factory furnace had broken down the night before and had not been repaired. There had been a running dispute between these employees and the company over the heating of their work area. The employees were unrepresented by any union. They discussed the matter and decided they could not work in the conditions. They left as a group. The Court held that the walkout grew out of a labor dispute, that is, out of a controversy concerning terms, tenure or conditions of employment.[21] Thus, the walkout was protected by the National Labor Relations Act (NLRA).[22] The Court held that, "the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not."[23]

About 50 years later, the same result was reached in *Atlantic Scaffolding Co.*[24] Unrepresented employees quit working due to a wage dispute with their employer. Because the case did not present a mixed motive situation, the NLRB rejected the *Wright Line* analysis of an administrative law judge, which she used to

[18] See *Eastex, Inc. v. NLRB* (19788) 437 U.S. 556, 565 (employee action which seeks to improve terms and conditions constitutes concerted activity). As the Supreme Court stated in *Washington Aluminum*, supra, 370 U.S. at 16, the reasonableness of employees' concerted action is not at issue in determining whether a labor dispute existed.
[19] See National Labor Relations Act (NLRA), § 2(9), 29 U.S.C. § 152(9): "The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment. . . ." See ALRA § 1140.4(h) which is identical to the NLRA section quoted here.
[20] *NLRB v. Washington Aluminum Co.* (1962) 370 U.S. 9.
[21] Id. at 370 U.S. 15.
[22] Id.
[23] Id. 370 U.S. at 16.
[24] (2011) 356 NLRB 835.

determine whether the employer violated Section 8(a)(1) of the NLRA[25] by discharging employees for engaging in a work stoppage over a pay raise.[26] The NLRB held that *Wright Line* was not the appropriate analysis because the existence of a violation did not turn on the employer's motive. Similarly, the ALRB does not utilize a mixed motive analysis when the reason given for discharge was the protected concerted activity of employees.[27]

Rather, when the conduct for which the employees were disciplined constituted protected, concerted activity, the only issue is whether their conduct lost the protection of the Act because it crossed over the line separating protected from unprotected activity.[28] Employee activity may lose the protection of the Act if it is unlawful, violent, or in breach of contract.[29] When an employer asserts that employees were disciplined because they would not return to work after beginning a work stoppage, the assertion suggests that the employees were discharged because the work stoppage itself is the cause for discipline.[30]

Thus, in *Atlantic Scaffolding,* the employer provided scaffolding at an oil refinery during a maintenance "turnaround." During such turnarounds, individual refinery units were shut down for inspection and maintenance. The employer's client provided strict deadlines for the turnaround work in order to minimize loss of revenue.

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[25] Sec. 8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1), provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the right to engage in concerted activities for their mutual aid or protection. This same violation is set forth in §1153(a) of the Act, providing inter alia: "It shall be an unfair labor practice to interfere with, restrain, or coerce agricultural employees in the exercise of their right to engage in concerted activities for their mutual aid or protection."

[26] *Atlantic Scaffolding,* supra, 356 NLRB at 838 (finding the judge erred in analyzing the protected-concerted work stoppage under *Wright Line: "Wright Line* is not the appropriate analysis, as the existence of the 8(a)(1) violation does not turn on the employer's motive." See also *CGLM, Inc.* (2007) 350 NLRB 974, fn. 2, enfd. (5th Cir. 2008) 280 Fed.Appx. 366 (rejecting application of *Wright Line* to discharge of employees engaged in a work stoppage where the "very conduct for which employees are disciplined is itself protected concerted activity," quoting *Burnup & Sims, Inc.* (1981) 256 NLRB 965, 976.

[27] See, e.g., *Sabor Farms* (2016) 42 ALRB No. 2 and ALJD, p. 15, fn. 3.

[28] *Atlantic Scaffolding,* supra, 356 NLRB at 838 citing *Phoenix Transit System* (2002) 337 NLRB 510, 510, enfd. mem. (D.C. Cir. 2003) 63 F.3d.Appx. 524.

[29] *Washington Aluminum Co.,* supra, 370 U.S. at 17; see also *United Farms Workers of America* (2018) 44 ALRB No. 6, p. 7, fn. 5 (there are no facts suggesting that employees were engaging in any unlawful or violent conduct, citing *Washington Aluminum).*

[30] *Atlantic Scaffolding Co.* (2011) 356 NLRB at 838 citing *CGLM, Inc.*, supra, 350 NLRB at 979-980; see also *Hy-Brand Industrial Contractors, Ltd.* (2018) 366 NLRB No. 94 (adopting the ALJ's application of *Atlantic Scaffolding Co.* to find the employer unlawfully discharged employees for engaging in protected work stoppages).

No union represented the employees. Just prior to the turnaround start date, employees learned their employer was not going to grant a rumored pay raise for the turnaround work. Rather, the employer announced an incentive bonus which employees could lose based on attendance, safety, and duration of employment throughout the project. On the day before the project began, employees signed a letter demanding a pay raise. On the date the project began, about 100 of the 240-250 employees presented the letter. These employees were asked to return to work while the employer considered their demands. The employees refused and remained on refinery premises for over an hour. When asked, they complied with the employer's request to leave the area for safety reasons. Further off-site discussions ensued. A few days later, 77 employees who had not returned to work were discharged.

The NLRB found that the peaceful work stoppage was protected and the employer violated the NLRA in discharging employees for engaging in the work stoppage.[31] The NLRB rejected the employer's argument that the work stoppage deprived the refinery of the use of its property for an unreasonable period of time and found no meaningful impairment at all of property rights. [32] Thus, it was unnecessary to balance competing property rights and employee statutory rights.[33]

Applying the above principles to the instant case, it is found that the alleged discriminatees engaged in a peaceful work stoppage. Moreover, the record unequivocally demonstrates that the employees never lost the Act's protection. By remaining in the shade shelter, they acted peacefully and ultimately complied with requests that they relocate and leave the property. There is no evidence that the shade shelter plays any part in production. They remained at the shade shelter under threat of police action only long enough to speak with members of management about their collective concerns. They did not interfere with production work of other employees.

[31] Id. 356 NLRB at 836.
[32] Id. 356 NLRB at 837, fn. 9: Employees who occupied a facility for several hours and refused to state their grievance were unprotected. *Waco, Inc.* (1984) 273 NLRB 746, 746-747. Employees may persist in an in-plant protest for a reasonable period of time but there comes a point when the employer is entitled to reclaim its entire premises. *Cambro Mfg. Co.* (1993) 312 NLRB 634, 636.
[33]Id. 356 NLRB at 837. Had such balancing been required, the NLRB noted a 10-factor test for balancing the competing rights in the context of a work stoppage, citing *Quietflex Mfg. Co.* (2005) 344 NLRB 1055, 1058.

Were it necessary to balance employer property rights against the employees' statutory rights,[34] the balance would strongly indicate no impairment of employer property rights.[35] Thus, the employees peacefully stopped working due to their perception that conditions were dangerous. Their work stoppage did not deprive Respondent access to its property. There is no specific evidence regarding any effect of the work stoppage on production. However, it is not considered an interference with production when employees withhold only their own services.[36] The employees had an adequate opportunity to present their grievance because they stayed in the shade structure for about an hour and a half after being warned to leave the property or suffer police action in the context of another statement that a different supervisor would come to talk with them. They were in the shade structure from about 7:30 a.m. to 9 a.m. They did not remain beyond their shift and did not attempt to seize the employer's property. The reason for their discipline was their work stoppage. Weighing these factors, it is concluded that the work stoppage was protected at all times.

Thus, there is no dispute that the three alleged discriminatees acted concertedly, as a group, in their refusal to work. There is no dispute that they communicated to Respondent that their reason for stopping work was concern about their working conditions. It has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not."[37] Discrimination against employees for engaging in a concerted work stoppage violates the Act.[38]

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[34] The locus of accommodation between employer and employee rights may fall at differing points depending on the nature and strength of Section 7 rights and private property rights asserted in any given context. *Hudgens v. NLRB* (1976) 424 U.S. 507, 522.

[35] The factors for determining whether employee or employer rights should prevail in the context of an on-site work stoppage are set forth in *Quietflex Mfg. Co.* (2005) 344 NLRB 1055, 1056-1057. These factors include (1) the reason for the work stoppage, (2) whether the work stoppage was peaceful, (3) whether the work stoppage interfered with production or deprived the employer of access to its property, (4) whether employees had adequate time to present their grievances to management, (4) whether employees were given any warning that they must leave the premises or face discharge, (6) the duration of the work stoppage, (7) whether employees were represented or had established grievance procedures, (8) whether employees remained on the premises beyond their shift, (9) whether the employees attempted to seize the employer's property, and (10) the reason for which employees were ultimately disciplined.

[36] Id., 344 NLRB at 1056 fn. 6, citing *Golay & Co., Inc.* (1966) 156 NLRB 1252, 1262, enfd. (7th Cir. 1966) 371 F.2d 259, 262, cert. denied (1967) 387 U.S. 944, holding it is not considered an interference of production where the employees do not more than withhold their own services.

[37] *Washington Aluminum*, supra, 370 U.S. at 16.

[38] *Washington Aluminum*, supra, 370 U.S. at 18; *Eastex* [full cite], *Atlantic Scaffolding*, supra, 356 NLRB at 839; *Hy-Brand Industrial Contractors*, supra, 366 NLRB No. 94, ALJD at 5.

Respondent's argument that the conditions were not as dire as the alleged discriminatees believed is without merit. Respondent argues, in effect, that the alleged discriminatees' perception of the safety of their working conditions was flawed. Of course, pursuant to Supreme Court precedent, even were this true, it is irrelevant.[39]

Thus, Respondent asserts that the rain was light on February 18 and did not warrant any concern about danger in working. As a practical matter, the alleged discriminatees were the ones working on their hands and knees in front of a moving machine during the rain. Their testimony alone describes the circumstances under which they were working. The ground and the spinach were wet and slippery. An objective observation. They were using sharp knives to cut. An objective observation. They were working in front of a moving machine. An objective observation. They had never refused to work in the rain on a prior occasion. However, they had never been placed in front of a moving machine on those occasions. Based upon these objective observations, were it necessary to make a finding regarding reasonableness, it is found that their determination that the conditions were unsafe was reasonable.[40]

Further, it is noted that Respondent's evidence regarding the condition of the field is based on the testimony of FOM Gomez that the rain was light from his location some miles away from the field. FOM Gomez was not at the field. The alleged discriminatees were.[41] Their credible uncontradicted evidence indicates objectively that the field was muddy when they started working and became muddier as the rain continued. FOM Gomez did not testify that he had seen the field on the previous day when it also rained or on the date of the work stoppage. No Respondent witness controverted the objective observation of the alleged discriminatees about the muddy, slippery condition of the field.

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[39] *Washington Aluminum,* supra 370 U.S. at 16, as quoted above, "[I]t has long been settled that the reasonableness of workers' decisions to engaged in concerted activity is irrelevant to the determination of whether a labor dispute exists." [footnote quoting *NLRB v. Mackay Radio & Telegraph Co.,* (1938) 304 U.S. 333, 344].

[40] Were it necessary to determine that the alleged discriminatees' beliefs were honest and reasonable, the record fully supports such a finding. However, even were their conclusions and concerns unreasonable, this would not defeat their status as participants in a work stoppage. See *Washington Aluminum,* supra, 370 U.S. at 16.

[41] Similarly, Supervisors Haro and Cruz and Foreman Hernandez were not on their hands and knees in the rows of spinach. Tellingly, their testimony was not about the condition of the field but about the amount of rain. Even were this testimony credited, it does not speak to the conditions in the field.

Respondent also relies on the testimony of Foreman Hernandez that it had quit raining by the time he spoke to the alleged discriminatees. Even were this true, it would not speak to the condition of the field. However, this particular testimony was not corroborated by any other witness and it is therefore discredited. Finally, Respondent relies on a precipitation report from the Palm Springs Airport indicating trace amounts of precipitation at 7 a.m. at that location. In the hours from 9 p.m. February 17 until 3 a.m. February 18, the report indicates a total one-quarter of an inch of precipitation. This record is entitled to little weight as there is no evidence regarding the proximity of the airport to the field.

Respondent's argument that the conditions were not as dire as the alleged discriminatees stated is irrelevant, lacks a basis on the record, and is without merit. Thus, it is rejected.

2. Application of California Appellate Court Decision to the Facts of This Case is Unwarranted

Respondent asserts that a contrary California Appellate Court decision, *Bertuccio v. ALRB,*[42] controls the outcome of this case. In that case, the court reversed the ALRB's finding that the employer had violated the Act by failing to bargain about a change in rules regarding cutting lettuce in the rain. In the past, the employer had always ceased lettuce cutting during periods of rain while requiring that employees continue cutting anise and cardone during rain. On this occasion, the employer required lettuce cutting during periods of rain. Some, but not all employees, engaged in work stoppages in protest of the change in the rule.

To resolve the duty to bargain issue, the *Bertuccio* court applied a balancing test weighing management's interest in its business against labor's interest and the amenability to collective bargaining of a decision to change the rule regarding working in the rain to cut lettuce. Weighing these factors, the court found for the employer due to a compelling business reason that cutting continue despite the rain with minimal impact on conditions of employment.[43]

Further, the *Bertuccio* court considered the unlawful discharge allegation: whether workers who refused to cut lettuce in the rain because they believed their collective-bargaining agreement or past practice provided that lettuce would not be

[42] (6th Cir. 1988) 202 Cal.App. 3d 1369.
[43] Id. 202 Cal.App. 3d at 1402-1403.

cut in the rain were improperly discharged. These employees asserted a contract right. Although the *Bertuccio* court quoted language from the California Supreme Court defining the appropriate analysis for determining whether concerted activity is protected,[44] it did not apply that analysis nor did it apply the analysis for protected activity arising from assertion of a contract right. Rather, it held:[45]

> But it should also be apparent that the right to interrupt the employer's economic activities by a spontaneous work stoppage cannot reasonably be predicated solely on workers' subjective perceptions of distinctions between comfortable and uncomfortable working conditions, or the distinctions between anise and cardone, on the one hand, and lettuce, on the other. The record before us does not support the Board's conclusion that this was protected concerted activity. It follows that the brief suspension of the 15 workers cannot be regarded as an illegal interference with the workers' rights under the labor statute.

Respondent's argument that the above holding is binding herein is rejected. Had the *Bertuccio* court treated this analysis as concerted activity arising from perceived violation of a contract right, a different result would have been reached. Had it applied the test it articulated to determine whether concerted activity is protected, it would have reached a different result.

With all due respect to the California Appellate Court, the dismissive holding regarding workers' subjective perceptions cannot overrule United States Supreme Court authority to the contrary. In *Washington Aluminum*[46] the United States Supreme Court ruled that the reasonableness of employees' decision to stop work due to their concerns is irrelevant to a determination of whether a protected work stoppage exists. Thus, the *Bertuccio* court's analysis denies the validity of employees' perceptions in contravention of a United States Supreme Court decision.[47]

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[44] *Nash-DeCamp Co. v. ALRB* (1983) 146 Cal.App. 3d 92, 104: Concerted activity is protected if there is a work-related complaint, a specific remedy for this complaint is sought in furtherance of a group activity, and the activities is not unlawful or otherwise improper.

[45] *Bertuccio*, supra, 202 Cal.App. 3d at 1404.

[46] 307 U.S. 9, 16.

[47] Further, because employees in *Bertuccio* were invoking the terms of their collective-bargaining agreement, the court's holding should have taken into consideration the holding of the U.S. Supreme Court in *NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 831-832 (employee invocation of right rooted in collective bargaining agreement is "concerted" activity even though the employee may not have cited the agreement and even though the assertion is incorrect). See also, *NLRB v. Farmer Bros. Co.* (9th Cir. 1993) 988 F.2d 120 (employee assertion of

Moreover, the California Appellate Court did not apply its own test for determining the legality of the work stoppage. The California Appellate Court did not find that the workers' activity was "unlawful or otherwise improper." It simply found that the "subjective" motivation[48] for the work stoppage was insufficient reason to interrupt the employer's economic activity. This holding contravenes *Washington Aluminum* and is rejected.

3. VPI is not a Custom Harvester

Finally, Respondent claims that it is not properly named as the agricultural employer in this case because VPI acted as a custom harvester with regard to its services to Respondent. Section 1140.4(c) of the Act provides that an employer, engaging a farm labor contractor "shall be deemed the employer for all purposes under this part." Accordingly, if VPI acted as an FLC, Respondent was properly named as the employer in this action. Respondent asserts that VPI should have been named as the employer in this action because VPI is a "custom harvester," not an FLC. Thus, Respondent argues that the case against it must be dismissed.

The General Counsel asserted that Respondent was precluded from litigating the custom harvester issue because the same issue was litigated by these same parties in a prior case.[49] Indeed, issue preclusion prohibits re-litigation of the same issue argued and decided in a previous case even if the second suit raises different causes of action.[50] Thus, in the current litigation, which will be referred to as *Ocean Mist II*, issue preclusion would ordinarily prohibit re-litigation of the custom harvester issue because the same issue was resolved between the same parties in a prior case.

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contractual right to be place on permanent hire list was protected when he honestly and reasonably believed that he had a valid contractual right).

[48] "Subjective motivation" is an inaccurate phrase for the workers' thought process. Subjective thoughts are typically those influenced by personal feelings, tastes, or opinions. The record contained objective evidence that the workers reasonably and honestly perceived that they were being asked to perform a task, cutting lettuce in the rain, in violation of their collective-bargaining agreement. It is not necessary that the employees' belief be correct. *NLRB v. City Disposals Systems* (1984) 465 U.S. 822, 840 (an honest and reasonable invocation of a collectively-bargained right constitutes concerted activity regardless of whether the employee turns out to have been correct in his belief that his right was violated).

[49] *Ocean Mist Farms* (2014) 41 ALRB No. 2 (*Ocean Mist I*).

[50] *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824-825, citing *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828; *Teitelbaum Furs* (1962) 58 Cal.2d 601, 604): The claim preclusion doctrine, formerly called res judicata, prohibits a second suit between the same parties on the same cause of action. *Kim v. Reins International California, Inc.* (2020) 9 Cal. 5th 73, 91. Claim preclusion is not at issue here.

If, however, controlling facts or legal principles have changed significantly, any changed facts or legal principles of significance may be re-litigated.[51] The legal principles regarding custom harvester status have not changed since December 2012, the date the *Ocean Mist I* unfair labor practice charge was filed. However, Respondent asserted that controlling facts have significantly changed. Thus, at the current hearing, evidence of post-December 2012 significant change in custom harvester criteria was allowed.

The evidence regarding VPI's changes was adduced pursuant to testimony of VPI General Manager Matthew Barreras (GM Barreras). No documents were provided regarding any costs or dates of purchase of equipment. Respondent acknowledges that custom harvester status is an affirmative defense.[52] Thus, Respondent bears the burden of proof as to its affirmative defense that VPI is a custom harvester.[53] Any evidentiary ambiguities in its evidence will be found against Respondent.[54]

The Board developed the "custom harvester" distinction in response to arguments that some labor suppliers were excluded entirely from statutory responsibility.[55] "Custom harvester" is a term of art developed to categorize labor suppliers who provide more than the traditional labor contractor.[56]

In *Ocean Mist I,* the Board rejected Respondent's argument that VPI was a custom harvester and held that VPI was a farm labor contractor.[57] The facts in *Ocean Mist I* were based on record evidence adduced at hearing on September 23 and 24, 2014. The unfair labor practice charges in *Ocean Mist I* were filed on December 14, 2012 and April 8, 2013. Thus, the evidence which was offered for consideration in *Ocean Mist I* would have been for a time period in existence in 2012 and 2013.

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[51] *Herrera v. Wyoming* (2019) 139 S.Ct. 1686, 1697 (citing *Montana v. United States* (1979) 440 U.S. 147, 157-158: a prior judgment is conclusive absent a significant change in controlling facts or legal principles since the prior judgment).
[52] Respondent's Post-Hearing Brief at p. 14.
[53] Party asserting affirmative defense bears the burden of production and the ultimate burden of proof. *Sunrise Mushrooms, Inc.* (1996) 22 ALRB No. 2, pp. 7-8; see also Cal. Evid. Code §§ 110 and 115.
[54] See, *Jordan Brothers Ranch* (1983) 9 ALRB No. 41 pp. 3-4 indicating that burden of production is on party asserting custom harvester status (employer that asserted employees worked directly for a custom harvester submitted insufficient evidence to prove custom harvester status).
[55] *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, 768-769.
[56] See *S & J Ranch* (1984) 10 ALRB No. 26, pp. 5-7.
[57] *Ocean Mist I,* Id. 41 ALRB No. 2 at 16.

In *Ocean Mist I,* the Board noted that VPI was responsible for hiring, firing, compensation, and supervision of employees, all of which is typical for an FLC.[58] The Board also relied on the fact that VPI did not have total control over the harvest, did not market the produce, did not ship the produce to market,[59] and did not have exclusive control over the terms and conditions of employment.[60] No evidence of significant change in these criteria was presented at the hearing in *Ocean Mist II*.

Further, in *Ocean Mist I*, in addition to the above factors, the Board adopted the ALJ's findings regarding custom harvester status.[61] The ALJ found FLC status based on the following indicia:[62]

1. VPI is licensed as a farm labor contractor.
2. VPI provides labor for a fee.
3. VPI hires, fires, compensates, and supervises its employees.
4. The only service it provides to Respondent, not commonly provided by other farm labor contractors, is that it delivers the produce to Respondent's coolers.
5. VPI bears the risk of loss while transporting the crops, and possibly in those few instances where it has an ownership interest in the land.
6. There is little if any evidence that VPI's business decisions affect the opportunity for profit or loss in the harvests.[63]
7. Respondent determines which fields are to be harvested, the amount of produce to be harvested, and inspects the produce for quality and packing.
8. VPI does not market the produce and does not ship it to market.
9. VPI does not have exclusive control over the terms and conditions of employment of its employees. Respondent sets a number of minimum standards for these conditions.
10. Respondent provides safety training and workers compensation counselling and assistance.

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[58] *Ocean Mist I,* Id. 41 ALRB No. 2 at 17, citing *San Joaquin Tomato Growers, Inc.* (1993) 19 ALRB No. 4, p.5.
[59] *Ocean Mist I,* Id. 41 ALRB No. 2, p. 16, quoting the ALJD, pp. 19-20.
[60] *Ocean Mist I,* Id.
[61] *Ocean Mist I,* supra, 41 ALRB No. 2, pp. 16-18.
[62] *Ocean Mist I,* supra, 41 ALRB No. 2, ALJD pp. 19-20.
[63] Respondent's evidence that VPI is now compensated on a per unit basis does not indicate it has an increased risk of loss. Moreover, as the General Counsel points out, compensation on a per unit basis is consistent with a conclusion that VPI is a FLC. *San Joaquin Tomato Growers* (1993) 19 ALRB No. 4, pp. 4-5 citing, inter alia, *Joe Maggio, Inc.* (1979) 5 ALRB No. 26, p. 6.

11. Respondent sets minimum and maximum staffing levels.
12. Respondent's managers assist in the investigation of disciplinary matters and there is evidence that in at least one instance Respondent overruled the actions of a VPI supervisor.

There is no evidence that any of these indicia has significantly changed since the Board's prior opinion.[64] Thus, these findings are binding. In its prior opinion, the Board also noted the ALJ's finding that there was insufficient evidence to determine whether VPI furnished sufficient costly or specialized equipment to consider this as a factor in favor custom harvester status.[65] Respondent claims this factor has significantly changed since the issue was last litigated.

The Board has found that provision of costly or specialized equipment is a characteristic of a custom harvester.[66] This factor and others cited in *Tony Lomanto,*[67] are used to differentiate between labor contracts and custom harvesters. If the employer is something more than a mere labor contractor, and could be considered a statutory employer, the Board then considers which of the two entities is the more stable for collective-bargaining purposes.[68] However, as the Board has noted regarding furnishing costly specialized equipment, this is the lowest threshold for finding a custom harvester.[69] And, of course, the cost factor is relative.

GM Barreras testified that VPI owned two spinach harvesting machines with a fair market value of $300,000 in 2017. These were purchased in 2012 (no date in 2012 was mentioned) and modified since then (no date was specified for the modifications) to replace plastic packing belts with stainless steel belts and to

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[64] Respondent's evidence that VPI moved in 2018 from an office leased to it by Respondent to a new office on property that it owns is not relevant to the time period at issue here. Similarly, Respondent's evidence that VPI's exclusive arrangement with Respondent changed in the summer of 2017 for select programs is not relevant to the time period at issue here. Further, were the time frame in the appropriate period, this evidence would be relevant to a joint employer analysis rather than a custom harvester analysis. There is no need to reach the joint employer analysis in this case because Respondent has not shown significant change since *Ocean Mist I.*

[65] Id. at 41 ALRB No. 2, p. 16-17.

[66] *San Joaquin Tomato Growers, Inc.*, supra, 19 ALRB No. 4 at p. 6, citing *Tony Lomanto* (1982) 8 ALRB No. 44, p. 9; *Kotchevar Brothers* (1976) 2 ALRB No. 45, p. 6.

[67] Supra, 8 ALRB No. 44 at pp. 5-6.

[68] *Henry Hibino Farms, LLC,* (2009) 35 ALRB No. 9, p. 3-4.

[69] *San Joaquin Tomato Growers,* supra, 19 ALRB No. 4, p. 11: "In most of the Board's previous cases, a custom harvester has been found only when the harvesting entity has provided significant additional services, such as full management responsibility or packing and shipping [citations omitted]. In the cases which have arguably reflected the lowest threshold for finding a custom harvester, the harvesting entities provided services not provided [here] which the Board found to be significant." [citing *Tony Lamanto* 8 ALRB No. 44 (specialized equipment) and *Kotchevar Brothers,* 2 ALRB No. 45 (costly equipment and hauling)].

replace the rails on the spinach harvesting machine by converting them to hydraulic-powered belts.

VPI custom built cauliflower machines costing $120,000 for one and $150,000 for another. No dates were provided for this.

In 2017, VPI had nine head lettuce machines, three more than in 2012. "Those are going for about $300,000. . . ." VPI also had eight romaine machines, three to four more than in 2012. The romaine machines were "about $330,000."

From 2012 to 2017, VPI had purchased "close to ten" new tractors. GM Barreras testified that the cost of these ranged from $55,000 to $60,000.

Twenty new trailers were purchased from 2012 to 2017. Typically, VPI buys used flat trailers. The price is in the range of $11,000 to $15,000. Ten were purchase during that period. Additionally, ten hydraulic custom trailers ranging from $15,000 to $20,000 were purchase during that period.

New semi-trucks, which pull trailers, purchased during this period number "close to eight." They cost $120,000 plus $20,000 for setup. Fifteen new pickup trucks purchased during this period cost "close to $45,000 or $50,000." Two service trucks (also called stake-bed trucks) were purchased. "Those would run about $60,000." Two service trucks for use by mechanics were purchased for "close to $150,000."[70]

Further, VPI increased their fleet of buses by purchasing five new buses for $100,000 each. VPI also purchased two smaller used buses for about $45,000 each. Some of these purchases were to replace outdated equipment. The increase in number of buses was four.

After fully considering Respondent's evidence presented herein, the evidence continues to be insufficient to consider these criteria as a factor in favor of determining custom harvester status. In agreement with the General Counsel, it is noted that no documentary evidence regarding exact amount for purchase or valuation of specialized equipment was presented. Thus, the recollection of GM Barreras is not entitled to the same weight as company purchase document. Nevertheless, it is found that GM Barreras provided credible testimony. His background indicates that he was knowledgeable about the purchase and valuation of equipment. However, he presented estimates only of the valuation of equipment,

[70] It is unclear if each truck cost $150,000 or whether the two trucks together cost $150,000.

both specialized and non-specialized. This testimony was accepted and will be weighted less than documentary evidence regarding the valuations.

Tractors, trailers, trucks, and buses do not appear to be specialized equipment.[71] Rather, this equipment could be used for support in planting or cultivation of any crop. Although this equipment may be costly in the aggregate, it is not specialized or tied specifically to the harvest at Respondent's fields. Moreover, the evidence appears to indicate that many of these purchases were typical cycles of purchasing and replacing such items. Not only is the equipment lacking in specialization, the equipment was not relatively costly when considered singularly.

Of potential relevance is the post *Ocean Mist I* purchase of specialized harvesting equipment for spinach, cauliflower, and lettuce. However, the record does not always indicate whether the equipment was purchased as replacement for prior equipment or when and how many were purchased.

According to GM Barreras, the spinach machines were purchased in 2012 and modified thereafter. Their fair market value in 2017 was estimated at $300,000. Because there is no evidence that the purchase was post-December 14, 2012, this ambiguity is resolved against Respondent and it is found that the spinach machines were purchased prior to that date, that is, prior to the *Ocean Mist I* unfair labor practice charge filing, and modified after that date. Because the evidence is ambiguous as to whether the two machines together had a fair market value of $300,000 or whether each had that value, this ambiguity is also resolved against Respondent and it is found that this is the fair market value for the two spinach machines. On the basis of this record evidence, a significant change cannot be found in the post-*Ocean Mist I* modification of two machines which were costly, specialized equipment.

No date at all was given for acquisition of the custom-built cauliflower machines. One cost $120,000 and the other $150,000. Assuming for the sake of

[71] See, e.g., *Sutti Farms* (1982) 8 ALRB No. 63 ALJD p. 11 (tractors did not qualify as costly or specialized equipment); see also, *S and J Ranch, Inc.*, supra, 10 ALRB No. 26 at pp. 6-7 (The Board affirmed the hearing officer's finding that the entity in question was not the appropriate employing entity. It disagreed, however, with the hearing officer's finding that the entity was a "mere" labor contractor. Instead the Board found the entity was a "labor contractor plus." The Board stated that it was not prepared to classify the entity's equipment in the aggregate as non-specialized and non-costly. This, however, did not alter the finding that the entity was not a custom harvester. Cf., *Kotchevar Brothers,* supra, 2 ALRB No. 45 at pp. 6-7 (entity found to be custom harvester by assumption of responsibility for getting the grapes to the winery and providing costly equipment (forty pairs of tractors with gondolas).

argument that these machines were built after December 14, 2012 and were utilized for service to Respondent, there is simply no basis for comparison to pre-December 14, 2012 facts. Thus, it is impossible to understand whether other cauliflower machines existed prior to that time. On the basis of this record, it is not possible to find a significant change by acquisition of custom-built cauliflower machines.

Finally, the record indicates that since December 14, 2012, VPI purchased three additional head lettuce harvesters and three to four additional romaine lettuce harvester machines. According to VPI GM Barreras, these additional machines cost $300,000 to $330,000 each. These machines were added to already existing fleets of lettuce harvesting machines. Prior to December 14, 2012 there were six head lettuce and five romaine lettuce harvesting machines.

The evidence thus indicates that VPI added additional specialized lettuce harvesting machines to an already existing fleet. Addition of further specialized lettuce harvesting equipment, not tied in any way to the operations at issue here – which is spinach harvesting - does not appear to be significant. Moreover, were this acquisition considered significant, it is not costly.[72] Thus, this acquisition is insufficient alone to alter the ultimate finding that VPI is not a custom harvester.

Although provision of specialized or costly equipment is one of the *Lomanto* factors, the ultimate issue, as stated above, is a policy consideration aimed at assigning employer status to the entity with a long-term interest in the operation.[73] Insufficient evidence has been presented warranting a reversal of the finding in *Ocean Mist I.* Respondent's affirmative defense that VPI is a custom harvester is rejected.

ALLEGED DENIAL OF DUE PROCESS CLAIMS

Respondent asserts that it was denied due process because the General Counsel did not take any witness declarations from key witnesses before

[72] See *San Joaquin Tomato Growers,* supra, 19 ALRB No. 4, p. 7, (investment in equipment costing $263,300 while not insubstantial is not costly enough to warrant significant weight in favor of finding custom harvester status, citing *Jordan Brothers Ranch* (1983) 9 ALRB No. 41, pp. 5-6 (equipment costing approximately $315,000 (Exh. B attached to ALJD) was not costly; *Sequoia Orange Co.* (1985) 11 ALRB No. 21, p. 9, affirming ALJ's analysis at ALJD pp. 70-80 (at p. 76: regarding specialized equipment which might be deemed costly in the aggregate or when considered within the context of the particular entity which owns it but pales in comparison to the grower's investment); cf., *S & J Ranch Inc.,* supra, 10 ALRB No. 26 at p. 7 (Board "not prepared to classify [entity's] inventory as non-specialized and non-costly; nevertheless finding entity was not a custom harvester).

[73] *Rivcom v. ALRB,* supra, 34 Cal.3d at 768; *S and J Ranch,* supra, 10 ALRB No. 26, p. 6.

proceeding to issue complaint in this case. Further, Respondent asserts that it was subjected to "trial by ambush."

As Respondent correctly notes, Section 20274, California Code of Regulations, requires that any written declarations be produced, upon motion, following direct examination of a witness. Respondent made motions for the declarations of General Counsel witnesses alleged discriminatees Ortiz and Ruiz. General Counsel responded that no declarations had been taken.

Respondent acknowledges that its arguments were rejected in *Giumarra Vineyards* (2005) 3 ALRB No. 21. Respondent's argument has been rejected on numerous occasions since then. See, e.g., *Dole Farming* (1996) 22 ALRB No. 8, p. 2 at n. 2 (declining to revisit this issue and holding that employer was not prejudiced.

Further, Respondent asserts that failure of the General Counsel's office to take declarations in this case was prejudicial. Respondent argues that *Giumarra* envisioned that employee declarations would be taken as part of the investigation of an underlying unfair labor practice charge. This argument has also been rejected. *P & M Vanderpoel Dairy* (2014) 40 ALRB No. 8, p. 34 ("We find no merit in [the employer's] argument that the General Counsel was required to take workers' declarations during the unfair labor practice investigation.")

Thus, it is found that Respondent's arguments regarding denial of due process are without merit. They are thus rejected.

BACKPAY SPECIFICATION

At hearing, the General Counsel provided a revised backpay specification. In order to compute backpay for the revised specification, Field Examiner Berenice Vanegas testified that she utilized Respondent's weekly payroll details to examine crew earnings for February 18, the date the alleged discriminatees were suspended. She eliminated a crew member with substantially higher earnings and another with substantially lower earnings than the rest of the crew.

The alleged discriminatees received $5.50 total compensation from VPI for February 18. Field Examiner Vanegas testified that the Region determined that

none of the alleged discriminatees were able to secure any interim earnings on February 18 other than $5.50 which they earned before the work stoppage. They returned to work on February 19. Thus, the backpay calculation required deducting $5.50 from the gross backpay figure for net backpay wages of $56.97 for each alleged discriminatee.[74] Interest[75] on this amount and excess tax liability[76] were calculated through January 23, 2020 utilizing NLRB software recently acquired by the Region.[77]

Respondent's original Answer contained a general denial of the backpay specification. It did not propose an alternative method of backpay calculation. Section 20292(b) of the California Code of Regulations requires a respondent to specifically state the basis of its disagreement with the backpay specification method of calculation. Further, a respondent must furnish the appropriate facts and figures supporting its basis for calculation including an alternate methodology. By an Amended Answer filed January 17, 2020, Respondent set forth an alternate methodology with supporting facts and figures.

General Counsel strenuously objected to the late filing of the Amended Answer and argued that it should be rejected. Nevertheless, the filing was allowed at hearing.

The purpose of a backpay order is to restore an employee to the same position he or she would have enjoyed had there been no discrimination.[78] The Board has broad discretion in choosing an appropriate backpay method that is practical, equitable, and in accordance with the policies of the Act.[79] The method utilized by Field Examiner Vanegas was straightforward and clear. Respondent's records for the crews' wages for that date were utilized to make the calculations. Thus, it is found that the backpay method utilized was reasonable and consistent with the policies of the Act and it is approved.

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[74] This amount is lower than that set forth in the First Amended Complaint. This revised amount represented the most recent calculations of the Region. These more recent amount will be utilized herein.
[75] In order to return the employees to the status quo ante, daily compound interest on backpay awards is routinely granted pursuant to *Kentucky River Medical Center* (2010) 356 NLRB 6. See, e.g., *Reveille Farms, LLC* (2019) 45 ALRB No. 6, pp. 9-10.
[76] The Board routinely utilizes excess tax liability pursuant to *Tortillas Don Chavas* (2014) 361 NLRB 101. See, e.g., *David Abreu Vineyard Management, Inc.* (2019) 45 ALRB No. 5, pp. 8-9; *Gerawan Farming, Inc.* (2019) 45 ALRB No. 7, pp. 32-33.
[77] The NLRB backpay calculation program, BackpayTEC, calculates daily compound interest.
[78] *Arnaudo Brothers* (1982) 7 ALRB No. 25, p.2, citing cases.
[79] Id. 7 ALRB No. 25, p. 3.

Respondent did not brief any of its prior arguments regarding the backpay calculations, perhaps because the ultimate calculations of the General Counsel were less than $1 different than those proposed by Respondent. However, failure to brief its argument regarding the excess tax component of the make-whole order was punitive requires a finding that such argument has been waived and it is hereby deemed waived.

Based upon the above findings of fact and conclusions of law, it is recommended that Respondent make whole the employees as set forth in the revised backpay specification as revised by the testimony of the compliance officer. Further, the standard remedy for posting, mailing, and reading the Notice to employees is recommended. No compelling reasons for deviating from these standard remedies has been advanced.

ORDER

Pursuant to Labor Code section 1160.3, Respondent Ocean Mist Farms, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Threatening to call the police because employees engaged in a protected-concerted work stoppage in violation of section 1153(a) of the Act.
   (b) Suspending its employees for engaging in a protected-concerted work stoppage protected in violation of section 1153(a) of the Act.
   (c) 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) Make Juan Antonio Ortiz, Fabian Ruiz, and Esau Flores whole for all wages and economic losses they suffered on February 18, 2017, as a result of their suspensions. Loss of pay and other economic losses have been determined in accordance with established Board

precedent. Interest determined in the manner set forth in *Kentucky River Medical Center* (2010) 356 NLRB 6 and excess tax liability computed in accordance with *Tortillas Don Chavas* (2014) 361 NLRB 101 minus federal tax withholdings required by federal and state laws has been calculated, current to January 23, 2020. Further interest and excess tax liability will be calculated in the same manner. Compensation shall be issued to Juan Antonio Ortiz, Fabian Ruiz, and Esau Flores and sent to the Region, which will thereafter disperse payments to Juan Antonio Ortiz, Fabian Ruiz, and Esau Flores;

(b) 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 required in this Order.

(c) Post copies of 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, and exercise due care to replace any Notice that has been altered, defaced, covered, or removed.

(d) 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, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any question 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.

(e) Mail copies of the attached Notice, in all appropriate languages, within thirty (30) days after the issuance of this Order to all agricultural employees employed by Respondent at any time during the period February 18, 2017, to date, at their last known addresses.

(f) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the 12-month period following the issuance of a final order in this matter.

(g) Notify the Regional Director in writing, within thirty (30) days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

Dated: August 25, 2020

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL WORKERS

After investigating a charge filed in the Visalia Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by suspending employees for engaging in a protected work stoppage. The ALRB ordered us to post and publish this Notice. We will do what the ALRB has ordered us to do.

We also want to inform you that the 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 threaten to call the police because you stop work as a group due to concerns about the safety of your working conditions.

WE WILL NOT suspend you because you stop work as a group due to concerns about the safety of 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 WILL make whole Juan Antonio Ortiz, Fabian Ruiz, and Esau Flores for all wages or other economic losses that they suffered as a result of our unlawful suspension of them.

DATED: _____

OCEAN MIST FARMS

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
(Code Civ. Proc., §§ 1013a, 2015.5)

Case Name: OCEAN MIST FARMS, Respondent, and,
JUAN ANTONIO ORTIZ, Charging Party.

Case No.: 2017-CE-006-VIS

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

On **August 25, 2020**, I served the within **DECISION AND RECOMMENDED ORDER** 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:

Howard A. Sagaser, Esq. Ian B. Wieland, Esq. Sagaser Watkins & Wieland PC 5260 N. Palm Avenue, Suite 400 Fresno, CA 93704	has@sw2law.com ian@sw2law.com 9414-7266-9904-2968-9478-42
Juan Antonio Ortiz 83801 Dr. Carreon Blvd., Apt. 1501 Indio, CA 92201	No email on File 9414-7266-9904-2968-9478-59
Esau Flores 50675 Chiapas Drive Coachella, CA 92236	No email on File 9414-7266-9904-2968-9478-66
Fabian Ruiz 88700 70th Avenue, Space 332 Thermal, CA 92274	No email on File 9414-7266-9904-2968-9478-73

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

Chris A. Schneider, Regional Director Laura Camero, Legal Secretary ALRB Visalia Regional Office 1642 West Walnut Avenue Visalia, CA 93277-5348	Chris.Schneider@alrb.ca.gov Laura.Camero@alrb.ca.gov

Christopher Mandarano Assistant General Counsel Berenice Venegas, Field Examiner Rosario Miranda, Senior Legal Typist ALRB Indio Sub-Regional Office 81-713 US Highway 111, Suite A Indio, CA 92201	Christopher.Mandarano@alrb.ca.gov Berenice.Venegas@alrb.ca.gov Rosario.Miranda@alrb.ca.gov
Julia L. Montgomery, General Counsel Silas Shawver, Deputy General Counsel Nancy Craig, Assistant General Counsel ALRB General Counsel 1325 J Street, Suite 1900-A Sacramento, CA 95814-2944	jmontgomery@alrb.ca.gov sshawver@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 **August 25, 2020**, at Sacramento, California.

A Argumedo

Annamarie Argumedo
Senior Legal Typist