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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SALINAS REGIONAL OFFICE

In the Matter of: CINAGRO FARMS, INC., Respondent, And MARISOL JIMENEZ, Charging Party.	CASE NO. 2017-CE-008-SAL RESPONDENT'S REPLY BRIEF IN RESPONSE TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE [TITLE 8, CCR § 20282(b)]

Pursuant to Title 8, California Code of Regulations, Section 20282(b), Respondent Cinagro Farms, Inc., respectfully files its Reply Brief in Response to the General Counsel's Exceptions to the Decision and Order of the ALJ, Mark R. Soble, dated October 27, 2021.

I. LEGAL ISSUE

THE ALJ CORRECTLY FOUND THAT THE GENERAL COUNSEL FAILED TO PROVE BY A PROPONDERANCE OF THE EVIDENCE TAKEN THAT THE DISCHARGE OF FOREMAN VICTOR MENDOZA WAS A VIOLATION OF LABOR CODE SECTION 1153(a).

Preliminary Statement

The ALJ's analysis of this issue is found at pages 69-71 of his Decision. The ALJ correctly ruled that under Ruline Nursery Co. (1981) 7 ALRB No. 21, citing to Yoder Brothers, Inc. (1976) 2 ALRB No. 4, the General Counsel failed to prove by a preponderance of the evidence taken, one of three established exceptions to the rule that supervisors are excluded under the ALRA or Act, in order to find that Foreman Mendoza's conduct was protected under the Act.

After properly evaluating each of the three exceptions, the ALJ correctly found that while Cinagro Farms discharged the entire crew at the same time, informing them that there was no work until further notice, Victor Mendoza was not fired as a **means** to terminate the entire crew. As stated by the ALJ: "Mendoza was not a means or mechanism of the unlawful firing of workers, but rather a casualty of it". As a result, the ALJ's specifically rejected the General Counsel's argument that Sequoia Orange Co. (1985) 11 ALRB No. 21, ALJD p. 86-94, was controlling in the present case. [ALJD:71] Accordingly, Foreman Mendoza is not entitled to reinstatement or backpay. [Id.] In so finding, the ALJ also noted that Mendoza's reinstatement was not required in order for Cinagro to offer reinstatement to the rest of the crew in support of his rejection of the Sequoia Orange precedent.[1]

II. LEGAL ARGUMENT

A. The General Counsel's Factual Citations to her Exceptions are riddled with a number of inaccuracies.

In reviewing the General Counsel's Memorandum of Points and Authorities in support of her Exceptions, a number of the citations to the administrative record are either incorrect,

[1] In replying to the General Counsel's Exceptions to this portion of the ALJ's Decision, Respondent in no way is conceding that Foreman Victor Mendoza was actually terminated by the Respondent. Rather, he voluntarily relinquished his employment after the remainder of his crew had already done so within days of their last day of work on March 4, 2017.

misstated or embellished upon. For example, at page 5, section (d), the General Counsel claims that Respondent hired a new crew "without a foreman" in mid-February 2017. This is incorrect. A second crew was, indeed, hired in mid-February 2017 to assist the first crew with production needs, the crew did not contain four or five people plus a foreman named Cesar Miranda, but rather, the Foreman Miranda as well as seven (7) crew members. [GX-5] The General Counsel also makes the assertion that Miranda was not a foreman and that Cinagro only attempted to label Miranda as a foreman at the hearing conducted in this matter. [RT/7:131:3-10] The transcript merely indicates that Mr. Miranda was the supervisor of the other crew and at some point, he was not supervising the crew anymore. [The relevance of this assertion is not relevant to the General Counsel's Exception.] In another section of her Memorandum, at page 7, line 9, the General Counsel states "GM Macias ended the call by "firing Foreman Mendoza and his crew". [RT/4:134; 135:2] A review of Volume 4 of the transcript at page 134, cited in the General Counsel's Memorandum, does not remotely support this assertion:

"Q. When you talked to Rene on Wednesday, did he tell you what the next workday would be for you and your crew?

A. No, he didn't. He said that there wasn't a specific day to return to work."

Next, General Counsel states that Foreman Mendoza handed each worker two Cinagro checks. [RT/4:144:14; 144:16; 5:9:14-25; 17:2-5] Yet, from a review of the transcript Volume 5 at pages 14-25, Foreman Mendoza testified that he received "two checks aside from the other people's checks." There was no clarification in the record as to whether he received two checks for each of the workers. [See, RT/5:10-11 in which Assistant General Counsel's objection was not sustained as to the translation. RT/5:10-11] More importantly, General Manager Macias testified that he only provided one paycheck to Foreman Mendoza for the pay

period that ended or about March 4, 2017. The workers in the Mendoza crew acknowledged receiving only one check on Friday, March 10, 2017, the crew's regular payday. [RT/5:42:19-24; 47:12-14; 84:3-14]

Again, at page 7 of the General Counsel's Memorandum, lines 24-26, in which she alleges that "Owner Dighera knew workers alleged that Respondent terminated Foreman Mendoza and his crew's employment because they complained about the paystubs and other working conditions. [RT /7:73:11-14]" A review of the transcript cited merely indicates that the owner, Tony Dighera, admitted that he was aware that Marisol Jimenez filed an unfair labor practice charge against the employer on March 13, 2017. [The filing of this charge which, at best, is an unsupported allegation, is not evidence that Mr. Dighera knew that Foreman Mendoza and his crew were terminated, contrary to the General Counsel's assertion.

Lastly, at page 8 of the Memorandum, the General Counsel states "Instead, Cinagro hired new workers. [RT/2:15:22-24; 138:8-9; 3:103:9-11; 5:91:5-8; 7:102:17-18]" General Counsel makes this "out of the air" statement implying that Cinagro should have clarified that it did not terminate the crew's employment, but instead, "Cinagro hired new workers." The General Counsel fails to state when those additional workers were hired. This did not occur until three work weeks later starting the week of March 27, 2017. This is when the production increased. Yet within a week, following their last day of work on March 4, 2017, all of the crew members had obtained better, alternative employment elsewhere.

B. Contrary to the General Counsel's assertions, Cinagro did not discharge Foreman Mendoza as a means to discharge his entire crew.

Contrary to the General Counsel's assertion above, the alleged discharge of Foreman Mendoza did not qualify for any of the judicially-recognized exceptions set forth in Ruline Nursery Co. (1981) 7 ALRB No. 21 at p.p. 8-13. The ALJ properly analyzed the facts

presented in the proceeding and determined that the General Counsel had not proven by a preponderance of the evidence the existence of any of the Exceptions to the Ruline rule of law.

There is no evidence presented to support the conclusion that Foreman Mendoza engaged in any form of protected activities under the Act. It is clear from the entire record that when employees had a complaint about working conditions, Foreman Mendoza was merely asked to **convey** those concerns to Mr. Macias for resolution. [RT/5:37:10-13] Mr. Mendoza testified that he never negotiated on behalf of the employees. [Id. at 37:21-24] Indeed, he also admitted that he merely acted as a conduit to convey the questions, concerns and complaints of crew members to Mr. Macias. At no time did Mr. Macias obtain any resolution of their concerns. [RT/5:3-23; 37:10-24] Furthermore, Foreman Mendoza never stopped the crew from making complaints, including the lack of paystubs and drinking water. [RT/5:32:17-23]

Therefore, based upon the administrative record taken as a whole, it is clear that Mr. Mendoza merely conveyed the concerns of the crew members to the crew boss Rene Macias to see if they could be resolved. At no time did Mr. Mendoza engage in any form of protected concerted activity nor was his conduct protected under the auspices of Sequoia Orange Company (1985) 11 ALRB No. 21.

C. The General Counsel's Second Cause of Action demonstrates that it was not proven by a preponderance of the evidence taken.

It is generally known that terminating a supervisor merely because he participated in union activity is not unlawful because supervisors are not protected by Section 7 of the NLRA. This is because employers are allowed to insist on the loyalty of their supervisors. Discharging a supervisor may constitute an unfair labor practice in violation of Section 8 only in certain limited circumstances – when it directly interferes with non-supervisory employees' Section 7 rights to organize, [or engage in protected concerted activities].

Specifically, the NLRB has recognized three exceptions in which an employer violates Section 8 of the NLRA by terminating a supervisor for:

1. Giving testimony that is adverse to the employer's interest either at an NLRB proceeding or during the processing of an employee's grievance;
2. Refusing to commit unfair labor practices; or
3. Failing to prevent unionization.

In each of these situations, the NLRB has opined that termination "directly" interferes with the Section 7 rights of other employees to organize [or engage in protected concerted activities.] [See, e.g., Parker-Robb, supra, (1982) 262 NLRB 402, 404; affirmed, Automobile Salesmen Union v. NLRB (D.C. Cir. (1983) 711 F.2nd 383][2]

Thus, the discharge of supervisors merely because of their participation in union or concerted activity is not unlawful,[3] because supervisors (unlike employees) are not protected by Section 7 or the NLRA. [or Section 1152 of the ALRA] [Id. at 262 NLRB 402, 404] Even when the termination of a supervisor is part of "a pattern of conduct aimed at coercing employees in the exercise of their Section 7 rights" there will be no violation, unless the discharge directly interferes with their Section 7 rights of the statutorily protected employees. [Automobile Salesmen, 711 F.2nd 383 386-388]

This issue has also been litigated before the Agricultural Labor Relations Board (ALRB) on numerous occasions.

For example, in the seminal case of Ruline Nursery, 7 ALRB No. 21 (1982), the Board adopted the position that "the fact that a supervisor's discharge may have a tendency to restrain or

[2] Section 1148 of the ALRA requires the ALRB to follow applicable NLRA precedents.

[3] General Counsel cites in her Memorandum that Foreman Mendoza complained about a lack of paychecks "for the people, including me..." [Memo at p. 3, line 23] Such conduct is not protected under the Act if committed by a supervisor. [See, e.g., Park-Robb Chevrolet, Inc. (1982) 262 NLRB 402, 404, affirmed, Automobile Salesman Union v. NLRB (D.C. Cir. 1982) 711 F. 2nd 383]

coerce employees in the exercise of protected rights does not establish a violation of Section 1153(a). [Stop and Go Foods, Inc. (1979) 246 NLRB No. 170, 103 LRRN 1046]

The Board went on to explain the applicable **exceptions** that must be demonstrated by the General Counsel in order to prove such a violation of Section 1153(a).

First of all, to make out a prima facie case within the first category of exceptions, it must be shown that a supervisor was discharged for having refused to engage in activities proscribed by the Act. [Ruline at page 9 and NLRB cases cited therein.] In the present case, there are no facts in the administrative record demonstrating that Foreman Mendoza was discharged for a refusal or failure to prohibit the employees' engagement in protect concerted activities. Indeed, the opposite was the rule. The Charging Parties were consistently allowed to complain about a variety of issues that were conveyed to management, without retaliation. [RT/5:62:17-23] None of the Charging Parties were ever disciplined while employed with the Respondent. [RT/5:201-202] The ALJ ruled that this exception did not apply. [ALJD:70]

The second exception to the general rule that supervisors may be discharged, at will, occurs when the supervisor is discharged for having engaged in conduct designed to protect employee rights, such as giving testimony adverse to the employer in an NLRB proceeding. [Id. At page 10 citing to NLRB applicable precedent.] Here, there is no allegation in the First Amended Complaint nor evidence in the administrative record that Foreman Mendoza's testimony conduct served as a basis for Foreman Mendoza's discharge. Foreman Mendoza's testimony occurred over five (5) years after his employment ended at Cinagro Farms. Therefore, this exception has no application to the present case. Once again, the ALJ agreed with Respondent. [ALJD:70]

The third exception to the general rule is based on the discharge being the **means** by which the employer unlawfully discriminates against its employees. This third exception is contained in the General Counsel's Second Cause of Action in the Complaint, and cites to Sequoia Orange Co.

(1985) 11 ALRB No. 21. In addressing the inapplicability of Sequoia Orange Co. it should be noted that a prima facie case is made out in this category when the crew employees' tenure is expressly conditioned on the continued employment of their supervisor, employees have engaged in protected concerted activities, and their supervisor has been discharged as a means of terminating the employees because of their concerted activity. [Id. at page 11 and NLRB cases cited therein.] Once again, this exception to the general rule does not apply here because there was absolutely no evidence offered to show that the employment of any of the Respondent's employees was conditioned on the continued employment of their supervisor, Foreman Mendoza. The ALJ properly evaluated the record evidence and ruled accordingly. [ALJD:70-71] The General Counsel has failed to proffer any evidence to overrule the ALJ's findings. Thus, Mendoza's alleged termination does not fall within this third category of exceptions. [ALJD:71]

Sequoia Orange Co., **supra**, relied upon by the General Counsel, involved facts demonstrating that the employer's failure and refusal to recall three foremen was done with the intent, and had the "effect" of, avoiding the recall of agricultural employees because of their union activities and support. Thus, Sequoia is not an appropriate legal precedent, as it does not bear any resemblance to the factual record before the ALJ in the present case. Substantial evidence from both crew employees and Foreman Mendoza demonstrates that none of them had been informed that they were terminated from Respondent. More importantly, the mere fact that many members of the crew had worked in the past at Mike's Farm Labor, Cinagro and Art's Farm Labor, with the same Foreman Mendoza, does not require an inference that employment of these employees was "expressly conditioned" upon the continued employment of Mr. Mendoza. The ALJ addressed this issue and ruled that the General Counsel failed to prove this third exception. [Id.]

As a furtive gesture to prove that Foreman Mendoza's actions were protected, the General Counsel requests the Board to create a new "exception to supervisory exclusion." [GC's Memo at

p. 13, lines 13-24] In support of this novel exception to the Ruline rule, General Counsel argues that "the company targets the supervisor and discharges him in a wholesale manner along with his crew because he shared and relayed his and his crew's complaints about the company's potential Labor Code violations... [and that] such actions interfere with the worker's right and ability to complain through their supervisor about the company's potential statutory violations." [Id. at p. 13: lines 15-19]

The General Counsel further argues that this unrecognized exception would "deter supervisor's from conveying worker's complaints and closes the line of communication between workers and upper management." Furthermore, extending such coverage to supervisors in such a circumstance will "also discourage employers from discriminating against supervisors who convey complaints about potential legal violations and may help increase employer compliance with the Labor Code." [Id. at p.13, lines 19-20]

Lastly, by allowing supervisors to benefit from the Act's reinstatement remedy of the supervisor, "would strengthen the crew's right under the Act to engage in concerted protected activity by complaining to their foreperson." [Id. at p. 13: line 25; 14: 1-4] To hold otherwise, would "discourage workers from complaining to their foremen and sends the message that involving the foreman will get him fired instead of their complaints being addressed." [GC Memo at p.p. 13-14]

Respondent disputes the need for the suggested creation of still another exception to the general rule outlined in Ruline Nursery Co. supra. First of all, the NLRB has routinely rejected efforts to recognize an additional exception. [See, Ruline Nursery, supra, 21 ALRB No. 7 at p. 12, fn. 6 (Slip Opinion)] Secondly, this is not an egregious case where the employer has otherwise engaged in widespread employer misconduct, and the employer has not created a pervasive atmosphere of coercion that employees cannot reasonably be expected to perceive the distinction

between the employer's right to discharge its supervisors for certain conduct and the employee's right to engage in the same activities freely without fear of retaliation.

Third, the present case is to be distinguished from cases where there is general knowledge that the employer has informed the supervisor, as well as his crew, that they were terminated. Here, there was no overt knowledge that the crew and its foreman were discharged. Lastly, assuming that there was a reasonable belief on the crew's part that the supervisor was discharged for assisting the employees in the exercise of their rights under the ALRA, a violation of the Act would still not be made out. It is clear that it is the employer's *reason* for the discharge, i.e., the cause of the discharge, and not its probable effect on employees that determine whether the discharge was unlawful. [Ruline, supra, at p. 13] The present case does not present such facts that would warrant the Board to create an additional exception.

Therefore, an employer may generally discharge a supervisor for any reason, or for no reason, without violating the ALRA, unless one of the three exceptions have been proven. [See, Ruline Nursery Co. supra, 7 ALRB No. 21 p. 13, slip opinion] Here, the General Counsel has failed to demonstrate a prima facie violation of the Act under one of the three recognized exceptions. [Ruline supra, p. 14, footnote 9]

VI. CONCLUSION

For all the foregoing reasons, it is clear that Foreman Mendoza's mere act of passing along worker complaints to his superior, Supervisor Rene Macias, without more, does not constitute a protected concerted activity. [Parker-Robb, supra, (1982) 262 NLRB 402, 404] More importantly, Mr. Mendoza's actions do not qualify for any of the recognized exceptions to this general rule in Ruline, pages 13-14. Thus, the ALJ properly found that the General Counsel had failed to establish a prima facie violation under any of the recognized exceptions.

WHEREFORE, Respondent respectfully requests that the ALJ's conclusion that Foreman Mendoza was not entitled to reinstatement or backpay be affirmed.

DATED: December 13, 2021

Respectfully submitted,

BY: _____

Robert P. Roy
Michael P. Roy
Attorneys for Respondent
Cinagro Farms, Inc.

PROOF OF SERVICE

I, Aggie Salanoa, declare as follows:

I am a citizen of the United States, employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the within action; my business address is: 916 W. Ventura Blvd., Camarillo, CA 93010.

On December 13, 2021, I served the attached:

RESPONDENT'S REPLY BRIEF IN RESPONSE TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE
[TITLE 8, CCR § 20282(b)]
[Case No. 2017-CE-008-SAL]

By Electronic File: The above referenced documents were "e-filed" today to the following parties at the listed e-file address; and

By Certified Mail: The above-referenced documents were mailed to the specified parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Camarillo, California; and

By Electronic Mail: The above-referenced documents were e-mailed, as noted, to the following parties at the listed e-mail addresses.

DISTRIBUTION LIST

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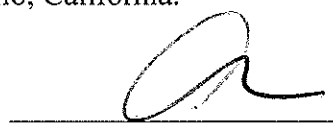
I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 2021, at Camarillo, California.



Aggie Salanoa