STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CINAGRO FARMS, INC.,	)	Case No. 2017-CE-008-SAL
Respondent,	)	
and	)	
	)	48 ALRB No. 2
MARISOL JIMENEZ,	)	
Charging Party.	)	(July 28, 2022)

DECISION AND ORDER

The misclassification of workers as independent contractors has been a persistent problem in California. Our Legislature has responded by making clear the protection of workers is a fundamental public policy in this state. Classifying workers as employees is the central factor in ensuring workers possess all other labor protections provided under local, state, and federal law. This case involves an employer, respondent Cinagro Farms, Inc. (Cinagro), that admittedly misclassified its workers as independent contractors. A crew of workers complained about not receiving proper paystubs with their weekly paychecks, itself a consequence of Cinagro misclassifying them, asserting they needed proper paystubs for tax purposes, proof of medical insurance, or to prove Medi-Cal eligibility for their children. An administrative law judge (ALJ) found Cinagro unlawfully terminated the crew in response to their protected concerted complaints in violation of Labor Code section 1153, subdivision (a) of the Agricultural Labor Relations

Act (ALRA or Act). (Lab. Code, § 1153, subd. (a).)[12] The ALJ dismissed a separate allegation that Cinagro violated the Act by terminating the crew's foreman, Victor Mendoza.[3]

This case is now before the Agricultural Labor Relations Board (ALRB or Board) on exceptions filed by both Cinagro and the General Counsel to the ALJ's decision and recommended order. Based on the record before us, we invited additional briefing from the parties and interested amici on issues involving the misclassification of agricultural employees as independent contractors under the Act, as well as our authority to assess civil penalties undersection 226.8. (*Cinagro Farms, Inc*. (Mar. 28, 2022) ALRB Admin. Order No. 2022-01.) The parties and various amici filed briefs responding to the questions posed.[4]

Having considered the ALJ's decision in light of the record, the parties' exceptions, and the supplemental briefing we received, and consistent with the following discussion,[5] we affirm the ALJ's unfair labor practice finding as to the crew and the

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[1] The ALRA is codified at Labor Code section 1140 et seq.

[2] Subsequent statutory references are to the Labor Code unless otherwise indicated.

[3] The ALJ also dismissed a separate allegation in the unfair labor practice complaint that Cinagro retaliated against the crew for complaining about water. No party excepted to this finding.

[4] Briefs were filed by the following amici: United Food & Commercial Workers Western States Council and Teamsters Joint Council 7, California Rural Legal Assistance, Inc. and California Rural Legal Assistance Foundation, and Barsamian & Moody.

[5] Cinagro disputes a number of the ALJ's credibility determinations. The standards applied by the Board in reviewing such exceptions are well-established. (See,

dismissal of the separate allegation concerning foreman Mendoza.[6] In addition, we conclude Cinagro's misclassification of the crew, by itself, supports finding a separate violation of section 1153, subdivision (a).

We find that the Board has authority to assess civil penalties under section 226.8 and further find the record before us demonstrates "willful misclassification" of the crew by Cinagro within the meaning of section 226.8, subdivision (a).[7] Accordingly, we

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e.g., *George Amaral Ranches, Inc*. (2014) 40 ALRB No. 10, pp. 14-15; *P&M Vanderpoel Dairy* (2014) 40 ALRB No. 8, p. 17.) The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of all the relevant evidence demonstrates that they are in error. (*United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3, p. 2; *P.H. Ranch* (1996) 22 ALRB No. 1, p. 1, fn. 1; *Standard Drywall Products* (1950) 91 NLRB 544, 545.) In instances where credibility determinations are based on factors other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*S & S Ranch, Inc*. (1996) 22 ALRB No. 7, p. 4.) In addition, it is both permissible and not unusual to credit some but not all of a witness' testimony. (*Suma Fruit International (USA), Inc*. (1993) 19 ALRB No. 14, p. 4, fn. 5, citing 3 Witkin, Cal. Evidence (3d ed. 1986) § 1770, pp. 1723-1724; see *Wonderful Orchards, LLC* (2020) 46 ALRB No. 2, p. 4, fn. 5.) We have carefully reviewed the record in light of Cinagro's exceptions and find no basis to disturb the ALJ's credibility determinations.

[6] As we will explain, although we affirm the ALJ's dismissal of the allegation concerning foreman Mendoza, we find the record in this case illustrates a need to recognize an additional exception to the general rule that supervisors are not entitled to protection under the ALRA. That is, we conclude the protection of the Act should be extended to cover a supervisor who serves as a conduit for reporting employees' complaints about misclassification to their employer and then is discharged for doing so. The misclassification of workers is a special harm our Legislature has taken aggressive measures to combat, and the exception we recognize herein is consistent with this public policy. However, the record before us does not support application of this exception in this case to afford Mendoza a remedy.

[7] Notably, section 226.8, unlike the ALRA, does not exclude misclassified supervisory employees from protection. As will be discussed in greater detail, the record demonstrates that Victor Mendoza was terminated as a part of Cinagro's termination of

now issue a new order modifying the ALJ's recommended order and assessing civil penalties against Cinagro as well as directing Cinagro to comply with certain specific posting requirements mandated by section 226.8.[8]

BACKGROUND

I. Factual Background

We summarize the facts pertinent to our discussion, which generally are not in dispute. Cinagro grows a variety of vegetables in Ventura County, including kale, lettuce, radishes, cilantro, and parsley. Cinagro is owned by Anthony (Tony) Dighera. Charging party Marisol Jimenez is a farmworker who was part of a crew that started working at Cinagro in the fall of 2016. Victor Mendoza was the crew's foreman. Other workers in the crew included Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez, and Maria Angelica Santiago. Mendoza's supervisor at Cinagro was General Manager Rene Macias. Macias reported directly to Dighera.

Before being hired directly by Cinagro, foreman Mendoza and the crew were employed by farm labor contractor Mike's Farm Labor, which provided the workers to engage in farm work at Cinagro in about late summer or early fall 2016. After a couple of months working at Cinagro, Mike's Farm Labor transferred the crew to Art's Labor

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employees who had raised issues concerning their willful misclassification and thus is owed remedies under section 226.8 regardless of his status as a supervisor.

[8] We have modified the ALJ's notice-mailing remedy to cover the 12-month period from the date of the unfair labor practice, consistent with our precedent. (*Smith Packing, Inc*. (2020) 46 ALRB No. 3, p. 2, fn. 3; *United Farm Workers of America (Garcia)* (2019) 45 ALRB No. 8, p. 7; *Monterey Mushrooms, Inc*. (2019) 45 ALRB No. 1, pp. 13, 15.)

Service, another farm labor contractor. In about November 2016, and only a week or two after the switch between farm labor contractors, Cinagro hired Mendoza and the crew directly. Macias held a meeting with the crew to inform them of the transition to working directly for Cinagro, gave Mendoza and the workers application forms to complete as part of the hiring process, and also informed the workers that they would be receiving gross pay without deductions while the company transitioned and figured out what the requirements were. At some point after the crew started working directly for Cinagro, Macias added two workers to Mendoza's crew, Maria Lauriano and Ignacia Sanchez. Lauriano and Sanchez already were employed with Cinagro in a separate, smaller crew employed by Cinagro and supervised by Macias.

The crew typically worked Mondays to Saturdays, splitting time between Cinagro's two ranches, Fillmore and Moorpark (Tierra Rejada). Macias would tell Mendoza which ranch his crew would report to on a given day and what product they would be harvesting, and Mendoza would relay this information to the crew. Cinagro paid the crew on Fridays for work done the prior week. Macias would bring the checks to the field and hand them to Mendoza, and Mendoza would then distribute the checks to his crew.

A. The Crew's Paystub Complaints

After being hired directly by Cinagro in approximately mid-November 2016 and receiving their first paychecks, the workers complained to Mendoza and Macias about the form of the checks and lack of paystub information. The workers described the checks as "personal checks," but the checks did contain some basic Cinagro company

information, including the company name, address, and telephone number. However, the checks were personally signed and the payment amounts also were written by hand. It appears the workers' characterization of the paychecks as "personal checks" relates more to the lack of proper paystubs accompanying the checks setting forth information such as year-to-date pay, hours worked, rates of pay, payroll tax deductions, and other miscellaneous deductions.

The workers raised various complaints about the lack of information available with their paychecks, including that the information was needed for filing taxes and for proof of medical insurance. Several workers testified they needed proper paystubs to prove Medi-Cal eligibility for their children. The workers continued to raise concerns and express a need for proper paystubs with the legally required information, including directly to Macias into February 2017. The response the workers received remained virtually the same, with Macias stating they were "working on it" or that it was "in process." Ultimately, Cinagro never addressed or resolved the crew's complaints over the lack of proper paystubs.

Cinagro does not dispute it failed to provide the workers paystubs in compliance with section 226, subdivision (a). In fact, the record provides a troubling view into Cinagro's misclassification of its workers as independent contractors (see § 2775, subd. (b)), consequently resulting in a variety of wage and hour violations.[9] The record also suggests a failure by Cinagro to obtain workers' compensation insurance for

[9] As we discuss at pages 44-45, *infra*, we find Cinagro engaged in the willful misclassification of its workers as defined in section 226.8, subdivision (a)(1).

its employees, which is legally mandated in California. (§ 3700.)[10] Cinagro contracts with a bookkeeper, Barbara Ito, who has prepared payroll for agricultural employers in the Ventura area for about 25 years. Ito started doing payroll for Cinagro in February 2017. Dighera instructed her to treat the workers as "vendors," rather than employees. Ito testified that treating the workers as "vendors" meant classifying them as independent contractors. As a result, Ito's payroll for Cinagro accounted only for gross piece-rate wages based on the timesheets she received from the company, and the paychecks issued to the workers did not show any deductions and none were made. As of the date of the hearing in February 2021, Ito continued to process Cinagro's payroll in this manner. Ito testified that Cinagro is her only client that pays workers in this fashion.

B. The Circumstances Surrounding the Crew's Discontinuation of Work for Cinagro

In about mid-February 2017, about two weeks before the last day worked by Mendoza's crew, Macias hired a second crew. Macias testified about attendance problems in Mendoza's crew and also about problems with their customers rejecting the product harvested by Mendoza's crew. Macias believed this second crew had a better work ethic and did better quality work.

The last day worked by Mendoza and his crew was Saturday, March 4, 2017. Macias dismissed the crew at about noon, stating there was not enough work. The

[10] Maria Angelica Santiago testified regarding an incident at work where she cut her finger. She testified Dighera and Macias told her to take time off work to heal and provided her "creams," but urged her not to go to a doctor. Mendoza also testified Cinagro did not have workers' compensation insurance and described a separate incident where a worker cut himself while working.

other crew remained working. Macias told Mendoza he would call him about work on Monday.

Macias called Mendoza on Sunday, March 5, and told him there was no work Monday, March 6.[11] Mendoza informed the crew there was no work Monday. Given the lack of available work and doubts they would be asked to come back, the workers began looking for alternate employment. A few workers, including Jimenez, went to a nearby blueberry farm, Silent Springs, on Monday morning to seek work. While driving back from the blueberry farm they drove by Cinagro's Tierra Rejada (Moorpark) ranch and saw the other crew working. Jimenez called Macias and asked when their crew was going to be given work again, and Macias said he did not know and that there was no work "until further notice." Macias also said he did not know the other crew was working and he understood there was no work.

On Wednesday, March 8, Macias told Mendoza they were going to stop working for a few days due to lack of work and to come pick up checks for the crew. Jimenez, Cruz, and Duarte started working at Silent Springs picking blueberries that same day. On Friday, March 10, Mendoza met Macias to receive the crew's final paychecks. Mendoza testified Macias was "short" with him and seemed in a hurry. Macias told Mendoza that due to lack of work he did not know when the crew would be called back, but he would call if work became available. Macias never called Mendoza about returning to work.

[11] Macias testified he told Mendoza there was weeding work available, but the ALJ specifically discredited this testimony.

Mendoza arranged to deliver the checks to the crew at a park in Oxnard.[12] He told them what Macias said about a lack of work. He testified he and the crew understood Macias was not going to give them any more work. It is undisputed Macias never told Mendoza he or the crew were "fired." According to Mendoza, Macias' exact words were there was no more work "until further notice."

Yolanda Antonio Garcia and Rigoberto Perez obtained new employment at Deardorff Family Farms, where they previously had worked before going to Cinagro, beginning the following Monday, March 13.

The crew hired by Macias in about mid-February 2017 remained working for Cinagro after Mendoza's crew stopped working. That crew also was paid as independent contractors rather than employees. By early April 2017, that crew had grown from about 6-8 workers to 12. Dighera admitted there was plenty of work to do during that timeframe, and there was enough work to keep both crews employed during March of 2017. At the time Mendoza's crew stopped working with Cinagro in March 2017, none of the harvest periods for Cinagro's crops were over.

Jimenez filed the underlying unfair labor practice charge with the Oxnard sub-regional office on Monday, March 13, 2017.

DISCUSSION

I. The Board's ALJs Have Authority to Order Videoconference Hearings.

The hearing took place in late February 2021 in the midst of the COVID-19

[12] Macias personally delivered final checks to Lauriano and Sanchez at Cinagro's Moorpark ranch.

pandemic. The parties stipulated to conducting the hearing by videoconference. The ALJ opined at the hearing and in his decision that Board regulation 20269[13] grants parties a right to be physically present at an unfair labor practice hearing, but concluded this requirement was suspended by paragraph 11 of the Governor's Executive Order N-63-20. Though neither party excepts to the conduct of this hearing by videoconference, we take this opportunity to clarify the correct interpretation of Board regulation 20269 and make clear our ALJs do possess authority to conduct hearings by videoconference in appropriate circumstances. (See Board reg. 20262.)

Board regulation 20269 states any "necessary party" to an unfair labor practice case …

> … shall have the right to appear at the hearing in person, or by counsel or other representative; to call, examine, and cross-examine witnesses; to introduce all relevant and material evidence, except that the participation of any intervening party may be limited by the administrative law judge.

(Emphasis added.)

The ALJ interprets this regulation to mean parties have a right to physically appear "in person" at a hearing. This is too literal an interpretation. Rather, the regulation merely states parties may appear at a hearing in their own defense or through a representative. Indeed, the overall context of the regulation states the basic rule that parties, whether appearing in pro per or through counsel or other representative, have the right to examine witnesses and present evidence at the hearing.

[13] The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

The National Labor Relations Board (NLRB) has a similar regulation containing nearly identical language as is pertinent here. (29 C.F.R. § 102.38.) In two pandemic-era decisions the NLRB expressly rejected the argument that its regulation grants a party a right to be physically present at a hearing. (*William Beaumont Hospital* (2020) 370 NLRB No. 9; *XPO Cartage, Inc*. (2020) 370 NLRB No. 10.) In doing so, the NLRB flatly concluded "[t]he right to appear in person is the right to appear at a hearing at all, not the right to be physically present in a hearing room." (*William Beaumont Hospital, supra*, 370 NLRB No. 9, *3.) Consistent with the NLRB, we find our regulation 20269 does not grant parties a right to be physically present at a hearing.[14]

In sum, an ALJ's authority under Board regulation 20262 to conduct and regulate the course of a hearing includes the authority to conduct a hearing by videoconference. (Board reg. 20262, subds. (e)(1), (f).) Nevertheless, we express a strong preference for in-person hearings, and videoconferencing should be used as an exception to this general rule only where good cause exists. (See *William Beaumont Hospital, supra*, 370 NLRB No. 9, *2-4.)[15]

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[14] We further note courts have accepted videoconference as a viable means of conducting hearings or trials and have rejected due process arguments challenging such procedures. (See *William Beaumont Hospital, supra*, 370 NLRB No. 9, *4, fn. 2; *Gould Electronics Inc. v. Livingston County Road Commission* (E.D. Mich. 2020) 470 F.Supp.3d 735, 743 [instantaneous transmission of witness testimony via video allows both the court and parties to assess the witness' demeanor and credibility]; see also *Bao Xuyen Le v. Reverend Martin Luther King, Jr. County* (W.D. Wash. 2021) 524 F.Supp.3d 1113, 1119; *Liu v. State Farm Mutual Auto. Ins. Co*. (W.D. Wash. 2020) 507 F.Supp.3d 1262, 1265.)

[15] Unfair labor practice hearings are subject to Chapter 4.5, commencing with Government Code section 11400), of the Administrative Procedure Act (APA). (§ 1144.5, subd. (a).) This includes Government Code section 11425.20, which grants a

II. Cinagro Terminated the Crew In Violation of Section 1153, Subdivision (a).

Cinagro's single exception challenges the ALJ's finding the crew did not voluntarily quit but was terminated.[16] It is undisputed Cinagro never told the crew they were "fired" in express terms. In these circumstances, the Board's decisions in *Smith Packing, Inc*. (2020) 46 ALRB No. 3 and *Wonderful Orchards, LLC* (2020) 46 ALRB No. 2 set forth the applicable standards that guide our analysis.

A. The Workers Reasonably Believed Macias Fired Them.

Cinagro contends it did not fire the crew but rather they voluntarily quit. According to Cinagro, Macias informed Mendoza weeding work was available, but the crew didn't like performing that work. Cinagro further asserts the hiring of a second crew in mid-February 2017 was supported by legitimate business reasons and is not evidence a discharge occurred. Neither of these arguments are material to the inquiry here.

The record supports a finding the workers reasonably believed they had been discharged as of March 4, 2017, and that Cinagro had no intention of calling them back to work after that date. "[A] discharge occurs when 'an employer's conduct or words would reasonably cause employees to believe that they were discharged.'" (*Smith*

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general right of public observation at any hearing subject to the APA. (Gov. Code, § 11425.20, subd. (a).) Recently amended subdivision (b) of Government Code section 11425.20, sets forth certain public observation requirements when a hearing is conducted "by telephone, television, or other electronic means." (Assem. Bill No. 1578 (Reg. Sess. 2021-2022), § 11.) ALJs must be mindful of these requirements when conducting hearings via videoconference.

[16] Cinagro does not dispute the crew's concerted complaints regarding the lack of proper paystubs were protected under the Act.

Packing, Inc., *supra*, 46 ALRB No. 3, p. 8, quoting *Wonderful Orchards, LLC, supra,* 46 ALRB No. 2, p. 7.) This inquiry focuses on the perspective of the employee, not the employer, and whether the employee reasonably believed a discharge occurred. (*Smith Packing, Inc*., *supra*, 46 ALRB No. 3, p. 8.) The crew was dismissed early on March 4, while the other crew remained working. Macias told Mendoza there would be no work for his crew "until further notice," a message Mendoza passed on to the workers. The workers understood this to mean there would be no forthcoming work from Cinagro. In fact, three workers, Jimenez, Cruz, and Duarte, sought other employment the next workday, Monday, March 6, and while doing so, they saw the other crew working that day, despite Macias' statements there was no work.

The ALJ specifically discredited Macias' testimony he told Mendoza there was weeding work. We find no basis to disturb this finding. We likewise find it difficult to believe Macias' statement he was unaware the other crew was working on March 6. The record establishes the chain of command at Cinagro and how work instructions were passed down to Mendoza's crew. Dighera would receive orders and communicate those to Macias. Macias then would inform Mendoza and give instruction on the work to be done. Indeed, Mendoza took instruction from Macias on a daily basis, with Macias informing him at which ranch his crew would be working and what work they would be doing. The record sufficiently supports an inference the other crew took instruction from Macias the same way Mendoza's crew did. As such, we do not credit Macias' denial of

knowledge about the other crew working on March 6.[17]

In sum, we find the workers reasonably believed they had been terminated as of March 4 and that Cinagro had no intention of calling them back to work as of that date. At the very least, the record demonstrates the crew had serious doubts over the status of their employment with Cinagro after March 4, which Cinagro failed to clarify. (*Wonderful Orchards, LLC*, *supra*, 46 ALRB No. 2, p. 8 ["if the employer's acts created a climate of ambiguity and confusion which reasonably caused [employees] to believe that they had been discharged or, at the very least, that their employment status was questionable ... the burden of the results of that ambiguity must fall on the employer"].) As discussed below, we believe Macias' "don't call us, we'll call you" message to the crew, coupled with the fact the other crew remained working and, in fact, grew in size, is consistent with a termination having occurred and work being shifted to the other crew.

B. Cinagro Failed to Clarify to the Workers Their Employment Was Not Terminated.

Because the workers reasonably believed they had been terminated, or at least that their continued employment with Cinagro was unclear, the burden shifts to Cinagro to demonstrate it clarified the ambiguity or informed the workers they were not terminated. (*Smith Packing, Inc*., *supra*, 46 ALRB No. 3, pages 11-12; *Wonderful Orchards, LLC*, *supra*, 46 ALRB No. 2, p. 8; *Pennypower Shopping News, Inc*. (1980) 253 NLRB 85, enfd. (10th Cir. 1984) 726 F.2d 626, 630.) Cinagro fails to carry its burden.

[17] Cinagro's payroll records confirm the other crew worked on March 6.

Much of Cinagro's argument in this area relies on its contention Macias told Mendoza weeding work was available, a contention we reject as discussed above. Cinagro further contends Dighera did not call the workers to ask them to return to work because he discovered they already had secured employment elsewhere, including specifically at a nearby blueberry farm. However, the record establishes Dighera did not call the owner of the blueberry farm to confirm its employment of his former employees until after he received a copy of the unfair labor practice charge. Relatedly, Cinagro's contention the workers preferred their other jobs to Cinagro, and thus had no intention of returning, is speculative at best and without support. In fact, Duarte testified she would have returned to Cinagro had she been offered work because she made better piece-rate wages harvesting vegetables than blueberries.

Cinagro also argues the fact the crew did not receive their final paychecks until the next regular payday on Friday, March 10, supports a finding they were not terminated. We are not persuaded. As Cinagro notes, section 201, subdivision (a) requires an employer to issue a worker's final pay immediately upon a discharge. However, Cinagro's noncompliance with this statutory provision hardly would be the first or only Labor Code violation committed by this employer as evidenced in the record.

C. Cinagro's Termination of the Workers Was Unlawful.

Having found Cinagro terminated the workers, we turn now to the question whether it violated the Act in doing so. We apply well-settled principles to answer the question. (*Smith Packing, Inc., supra,* 46 ALRB No. 3, pp. 14-15.) In discrimination or retaliation cases under section 1153, subdivision (a), the General Counsel has the initial

burden of establishing a prima facie case. (*Id*. at p. 14.) "The General Counsel must show by a preponderance of the evidence that the employees engaged in protected concerted activity, the employer knew of or suspected such activity, and there was a causal relationship between the employees' protected activity and the adverse employment action on the part of the employer (i.e., the employee's protected activity was a 'motivating factor' for the adverse action)." (*Id*. at pp. 14-15, quoting *Kawahara Nurseries, Inc*. (2014) 40 ALRB No. 11, p. 11; see *Wright Line, A Div. of Wright Line, Inc*. (1980) 251 NLRB 1083, 1087.)

"Once the General Counsel has established a prima facie case of discrimination, the burden shifts to the employer to prove that it would have taken the same action in the absence of the protected conduct." (*Smith Packing, Inc*., *supra*, 46 ALRB No. 3, p. 16, quoting *Gerawan Farming, Inc*. (2019) 45 ALRB No. 7, p. 5.) "[I]t is not sufficient for the employer simply to produce a legitimate basis for the action in question. It must 'persuade' by a preponderance of the evidence that it would have taken the same action in the absence of protected conduct." (*Gerawan Farming, Inc*., *supra*, 45 ALRB No. 7, p. 5, quoting *Conley* (2007) 349 NLRB 308, 322, enfd. (6th Cir. 2008) 520 F.3d 629, 637-638.)

Cinagro does not dispute the workers' concerted complaints about their paystubs were protected under the Act or that it was aware of their protected complaints. However, in maintaining the workers were not fired but voluntarily quit of their own accord (an argument we have rejected), Cinagro proffers what may be understood as claims that legitimate business reasons supported its hiring of a second crew in mid-

February 2017. The ALJ concluded the hiring of the second crew, and its subsequent growth in the weeks after Mendoza's crew was terminated, evidenced Cinagro's unlawful intent to fire and replace Mendoza's crew. We agree.

The record establishes Mendoza's crew continued to complain about the lack of proper paystubs during February 2017, and Macias was aware of it. Macias hired this second crew in mid-February. Macias made no secret of his preference for this second crew during his testimony, including his opinion that they performed better work and were more reliable than Mendoza's crew. In doing so, Macias aired a number of grievances he had with Mendoza's crew, including their alleged (1) poor or unreliable attendance, (2) their disdain or unwillingness to perform weeding work, and (3) their poor harvesting work which resulted in many "callbacks," or product rejections by customers of Cinagro.

The record is clear, however, that nobody in Mendoza's crew ever received any sort of warnings or disciplinary notices due to attendance or performance issues. Nor did Cinagro offer any timesheets or other documentary evidence to support its accusations of spotty attendance by Mendoza's crew. In fact, the suggestion of these various performance issues is at odds with Cinagro's general contention it did not fire the workers.

Dighera testified there was enough work for both crews during the weeks after March 4, and the record establishes this second crew grew in the weeks after Mendoza's crew was terminated until it doubled in size by early April. In its exceptions Cinagro appears to suggest the rainy season during this time period resulted in more work

to be done and thus necessitated the hiring of the second crew in February. However, Cinagro took the position throughout the hearing that the rains during February and March 2017 resulted in days no work could be done, and thus contributed to there being less available work.

Ultimately, none of Cinagro's arguments are persuasive, and in combination all tend to further support the finding Cinagro terminated Mendoza's crew based on their protected concerted activity in violation of section 1153, subdivision (a).

III. Cinagro's Misclassification of the Workers Constitutes an Independent Violation of Section 1153, Subdivision (a).

As indicated above, we requested supplemental briefing from the parties and any interested amici in light of the record before us and the evidence bearing on Cinagro's misclassification of its workers. We specifically asked whether our Board is bound by section 1148 to follow the NLRB's decision in *Velox Express, Inc*. (2019) 368 NLRB No. 61, where the NLRB found an employer's misclassification of workers, by itself, does not violate the National Labor Relations Act (NLRA).[18] We further asked, if we are not bound to follow *Velox* on this issue, whether we should find such conduct to constitute an independent violation of our Act.

Having considered the positions of the parties and amici, we conclude *Velox* is not "applicable" NLRA precedent that section 1148 obligates us to follow, and further that an employer violates section 1153, subdivision (a) when it misclassifies its agricultural employees as independent contractors. Accordingly, we find on the record

[18] The NLRA is codified at 29 U.S.C. § 151 et seq.

before us Cinagro violated the ALRA by misclassifying the crew.

A. *Velox* Is Not "Applicable" Precedent We Are Bound to Follow Under Section 1148.

Section 1148 generally requires the Board follow "applicable precedents of the [NLRA]." This rule is not absolute, however, and the Board may depart from NLRA precedent in certain circumstances, such as where the issue involves a matter of administrative procedure (*ALRB v. Superior Court* (1976) 16 Cal.3d 392, 412, superseded on other grounds in *Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063), where the language of our Act differs from the NLRA (*Cadiz v. ALRB* (1979) 92 Cal.App.3d 365, 374), or where the circumstances of California's agricultural industry warrants a different approach (*Arnaudo Brothers, L.P. v. ALRB* (2018) 22 Cal.App.5th 1213, 1227; *F&P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667, 673). California courts also have departed from the command of section 1148 where California law differs from federal law. (See *Tex-Cal Land Management, Inc. v. ALRB* (1979) 24 Cal.3d 335, 347-351 [while NLRA grants appellate review rights to aggrieved parties, section 1160.8 must be interpreted in light of California's constitutional provisions allowing summary denials by appellate courts]; *ALRB v. Superior Court* (1983) 149 Cal.App.3d 709, 718 [injunctions granted under section 1160.4 subject to automatic stay pending appeal pursuant to Code of Civil Procedure section 916].) In a similar vein, our Board is bound to follow the opinions of California courts under rules of stare decisis. (*Sarti v. Salt Creek Ltd*. (2008) 167 Cal.App.4th 1187, 1193; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see *State of California (Department of Personnel Administration)* (2008) PERB

Dec. No. 1978-S, p. 9 ["Court of Appeal decisions are binding precedent on administrative agencies"].) Thus, when confronted with an issue where the California Supreme Court rejected an argument advanced by the NLRB, our Board followed the position taken by the California Supreme Court. (*T.T. Miyasaka, Inc.* (2016) 42 ALRB No. 5, p. 2; *Premiere Raspberries, LLC* (2016) 42 ALRB No. 4, p. 2.)

In the present case, California law concerning the classification of workers substantially departs from that applied by the NLRB in several material respects bearing directly on the NLRB's rationale in *Velox* for concluding an employer's misclassification of workers, by itself, does not violate the NLRA. When these differences are viewed in conjunction with our Legislature's refusal to adopt the Taft-Hartley amendments that resulted in the NLRA's current definition of "employee," on which the NLRB also relied in reaching its conclusion, we find our departure from *Velox* on this issue is not only warranted but mandated.

The United States Supreme Court has found Congress intended the NLRB to "apply general agency principles in distinguishing between employees and independent contractors under the [NLRA]." (*NLRB v. United Insurance Co*. (1968) 390 U.S. 254, 256.) In *Velox*, the NLRB reiterated it applies the common law agency test to determine whether a worker is an independent contractor or employee. (*Velox*, *supra*, 368 NLRB No. 61, *9, 37, citing *United Insurance Co.*, *supra*, 390 U.S. at p. 256.) That test involves application of ten "nonexhaustive" factors enumerated in the Restatement (Second) of Agency (*SuperShuttle DFW, Inc*. (2019) 367 NLRB No. 75, *4-6), which the NLRB in *Velox* acknowledged often produces unpredictable, inconsistent, or unexpected

results. (*Velox, supra*, 368 NLRB No. 61, *37-38.) In concluding that misclassification does not constitute a standalone unfair labor practice under the NLRA, the NLRB placed much reliance on these aspects of the common law test it applies for determining employee status. (*Id*. at 27-41.) Indeed, following the Supreme Court's lead, the NLRB has adopted the position the Taft-Hartley amendments to the NLRA, which explicitly excluded independent contractors from the NLRA's definition of "employee" in NLRA Section 2(3) [29 U.S.C. § 152(3)], demonstrate Congress' clear intent to "preserve independent contractor relationships" and to prevent any chilling effect on an employer's ability to use such relationships. (*Velox, supra*, 368 NLRB No. 61, *41-42.) Our Legislature deliberately declined to adopt the Taft-Hartley language in our own Act's definition of "employee" in section 1140.4, subdivision (b). (*Hennigan v. United Pacific Ins. Co*. (1975) 53 Cal.App.3d 1, 8 ["The fact that a provision of a statute on a given subject is omitted from other statutes relating to a similar subject is indicative of a different legislative intent for each of the statutes"].)[19] Accordingly, the congressional intent to "preserve" the formation of independent contractor relationships cited in *Velox* cannot be imputed to the ALRA.

Furthermore, California has adopted a starkly different approach to independent contractor relationships, which have been prone to abuse by employers seeking to deny workers protections to which they otherwise are entitled or to gain advantage over their law-abiding competitors. There is no doubt the protection of

[19] Notably, the California Legislature did adopt other provisions of the Taft-Hartley Act. (See Lab. Code § 1155, which is similar to section 8(c) of the NLRA).

workers is a fundamental public policy in this state (*Ruiz v. Affinity Logistics Corp*. (9th Cir. 2012) 667 F.3d 1318, 1324, citing *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 352-355), and California has eschewed the type of convoluted and unpredictable approach to determining employee status as applied by the NLRB. In *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 955-957, the California Supreme Court adopted the "simpler, more structured" ABC test for determining whether a worker properly is classified as an employee or independent contractor. The Legislature subsequently codified this test in section 2775. Several features of this test bear heavily on our conclusion section 1148 does not bind us to the NLRB's position in *Velox*.

First, the ABC test is a far simpler test that will yield more consistent, predictable results. (*Dynamex*, *supra*, 4 Cal.5th at p. 955.) Second, the test presumes a worker is an employee. (*Ibid*.) Third, the hiring entity bears the burden of overcoming this presumption and establishing a worker is an independent contractor. (*Ibid*.; § 2775, subd. (b)(1).) The Legislature's adoption of the ABC test represents the latest step it has taken to combat the serious and persistent problem of worker misclassification in this state, in addition to substantial civil penalties on those who willfully misclassify, or aid in the willful misclassification of, workers. (§§ 226.8, 2753; see Assem. Bill No. 5 (2019-2020 Reg. Sess.) Stats. 2019, ch. 296, § 1; Sen. Rules Com., Office of Sen. Floor Analyses, Analysis of Sen. Bill No. 459 (2011-2012 Reg. Sess.) as amended Sept. 2,

2011, pp. 4-5.)[20]

Velox concluded an employer's classification of a worker as an employee or independent contractor constitutes a legal opinion privileged under NLRA section 8(c) [29 U.S.C. § 158(c)]. (*Velox*, *supra*, 368 NLRB No. 61, *27-28.) This conclusion was influenced by the complex common law agency test an employer must consider when determining how to classify its workers. (*Id.* at 37-38.) California has firmly rejected this type of rationale. Under California's adopted ABC test the legal analysis is simplified: all workers are presumed to be employees unless an employer demonstrates otherwise by satisfying the three specific criteria. (See § 2775.) But the more fundamental problem with *Velox*'s characterization of misclassification as speech is that it outright ignores the real-world implications, and impacts, flowing from the very act of classifying an employee as an independent contractor. (*Borello*, *supra*, 48 Cal.3d at p. 359 [recognizing an employer's misclassification of employees as independent contractors could allow "a disturbing means of avoiding an employer's obligations under [] California legislation

[20] Governor Newsom's signing message for Assembly Bill No. 5 identified the significant consequences of misclassification, and explicitly tied preventing misclassification to the ability of workers to form a union and have a voice at work. The signing message states, in part: "Assembly Bill 5 is landmark legislation for workers and our economy. It will help reduce worker misclassification—workers being wrongly classified as 'independent contractors,' rather than employees, which erodes basic worker protections like the minimum wage, paid sick days and health insurance benefits. [¶] The hollowing out of our middle-class has been 40 years in the making, and the need to create lasting economic security for our workforce demands action. Assembly Bill 5 is an important step. A next step is creating pathways for more workers to form a union, collectively bargain to earn more, and have a stronger voice at work -- all while preserving flexibility and innovation." (Governor's signing message to of Assem. Bill No. 5 (2019-2020 Reg. Sess.) Sept. 18, 2019, available at <https://www.gov.ca.gov/wp-content/uploads/2019/09/AB-5-Signing-Statement-2019.pdf>.)

intended for the protection of 'employees,' including laws enacted specifically for the protection of agricultural labor"].) It is hard to fathom how an employer's misclassification of an employee as an independent contractor as a means of avoiding its obligations — and the employee's rights — under California law is entitled to any more protection as "free speech" than an employer who posts a help wanted sign advertising "whites only." (*Aguilar v. Avis Rent A Car System, Inc*. (1999) 21 Cal.4th 121, 137, fn. 6; see Gov. Code, § 12940, subd. (a).)

Velox also opined that recognizing a violation based only on an employer's misclassification of a worker impermissibly shifts the burden of proof in unfair labor practice cases to employers. (*Velox*, *supra*, 368 NLRB No. 61, *44-45.) However, California law already places the burden on a hiring entity classifying its workers as independent contractors to prove its workers are not employees. (§ 2775, subd. (b)(1).) Indeed, workers are presumed to be employees unless the hiring entity carries its burden to prove otherwise under the ABC test.

In sum, in light of California's fundamental public policies protecting workers and combating the problem of worker misclassification in this state, and in recognition of the stark differences between the laws applied by the NLRB and those we must follow in California, we conclude *Velox* is not "applicable" precedent we are required to follow under section 1148.

B. The Misclassification of Workers Violates the ALRA.

Having found we are not bound to follow *Velox* on the question whether an employer's misclassification of workers, by itself, constitutes an unfair labor practice, we

further find such conduct must be recognized as constituting a violation of our Act.

The NLRB's conclusion in *Velox* that telling employees they are independent contractors is protected employer free speech disregards the fundamental import of the message being communicated, which actually is that the employees have no right to union representation, to engage in concerted activity for their mutual aid or protection, or to have any recourse before the NLRB. (See *Wal-Mart Stores, Inc*. (2003) 340 NLRB 220, 223-225 [employer committed unfair labor practice when it told department managers, who were not exempt statutory supervisors, they could not participate in union activities].) Misclassifying employees as independent contractors, at the very least, implicitly, conveys to the employees they have no labor rights, and therefore contains an inherent chilling effect on those employees' free exercise of protected rights.

Moreover, we fundamentally disagree an employer's classification of a worker as an employee or independent contractor appropriately may be considered protected "speech" under section 1155 (the ALRA equivalent to NLRA Section 8(c)). NLRA Section 8(c) "manifest[s] a 'congressional intent to encourage free debate on issues dividing labor and management.'" (*Intertape Polymer Corp. v. NLRB* (4th Cir. 2015) 801 F.3d 224, 238, quoting *Chamber of Commerce v. Brown* (2008) 54 U.S. 60, 67.) The statute thus is intended to protect an "employer's First Amendment right to express its views about unionism." (*UAW-Labor Empl. & Training Corp. v. Chao* (D.C. Cir. 2003) 325 F.3d 360, 369, citing *NLRB v. Gissel Packing Co*. (1969) 395 U.S. 575, 617-618.) Such speech generally is permissible and may not constitute evidence of an

unfair labor practice if it "contains no threat of reprisal or force or promise of benefit." (29 U.S.C. § 158(c); cf. § 1155; see *Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 250 [noting certain employer expressions have been found unlawful even without a threat or promise].) Telling a worker they are an independent contractor rather than an employee implicates none of these free speech concerns on which the statute is predicated.

We also disagree with the NLRB's conclusion in *Velox* that recognizing misclassification as an unfair labor practice impermissibly shifts to the employer the burden to disprove the violation. Take for example an employer who requires its employees sign an arbitration agreement that reasonably may be read or understood as precluding the assertion of claims before the NLRB. The NLRB holds such provisions unlawful. (*Murphy Oil USA, Inc. v. NLRB* (5th Cir. 2015) 808 F.3d 1013, 1019; *D.R. Horton, Inc. v. NLRB* (5th Cir. 2013) 737 F.3d 344, 363-364.) Following the NLRB's decision in *The Boeing Co*. (2017) 365 NLRB No. 154, which adopted a new standard for reviewing employer handbook provisions, the NLRB has found arbitration provisions that restrict employee access to the NLRB — even those that do not do so explicitly — are per se unlawful. (*Aryzta, LLC* (2020) 369 NLRB No. 55, *8; *Prime Healthcare Paradise Valley, LLC* (2019) 368 NLRB No. 10, *25-28.) But this is not to say the General Counsel has no burden of proof or that any burden has been shifted to the employer. The General Counsel must still allege and prove the maintenance of the unlawful arbitration agreement. Likewise, in a misclassification context the General Counsel must still establish the employer misclassified its employees by designating

them as independent contractors, after which the employer must satisfy the ABC test consistent with section 2775, subdivision (b) if it contends the workers are not employees. Thus, if anything, it means only that the General Counsel's burden is not a heavy one, not that the General Counsel has no burden at all.

Consistent with the NLRB, our Board has held arbitration agreements to be unlawful when employees reasonably may understand them as restricting access to our Board's processes. (*T.T. Miyasaka, Inc.*, *supra*, 42 ALRB No. 5, at ALJ Dec. pp. 16-20; *Premiere Raspberries, LLC*, *supra*, 42 ALRB No. 4, at ALJ Dec. pp. 17-20.) As the NLRB has found, this is because such a provision chills employees' exercise of rights under the Act. (See § 1152; 29 U.S.C. § 157.) An employer's conduct in misclassifying employees as independent contractors sends an equally harmful message to its employees by unlawfully communicating to them they have no rights under the Act or recourse before the Board, which itself directly chills employees' free exercise of rights under section 1152. (*T.T. Miyasaka, Inc.*, *supra*, 42 ALRB No. 5, at ALJ Dec. pp. 18-19; *Aryzta, LLC*, *supra*, 369 NLRB No. 55, *13; *Prime Healthcare Paradise Valley, LLC*, *supra* 368 NLRB No. 10, *25-28.)

Accordingly, we find an employer's misclassification of agricultural employees as independent contractors, by itself, unlawfully interferes with or restrains employees' free exercise of rights under section 1152, and therefore violates section 1153, subdivision (a).

C. Cinagro's Misclassification of the Crew Constitutes a Separate and Independent Violation of the Act.

Cinagro's misclassification of the crew before us in this case is undisputed and clearly demonstrated on the record. Cinagro's retained bookkeeper, Ito, testified Dighera instructed her to treat the workers as independent contractors rather than employees. Dighera admitted he understood the way he was paying the crew did not comply with the law, going so far as to say, "I didn't think there was any issue. I mean, do I know it's wrong? Absolutely. Was I concerned that somebody was going to say something about it? No."

The record before us amply supports finding Cinagro violated the Act by misclassifying the crew as independent contractors in violation of section 1153, subdivision (a). Cinagro admitted it misclassified its workers in its testimony and briefing. In its supplemental brief in response to our administrative order, Cinagro attempts to downplay the significance of its conduct by arguing it treated the workers like independent contractors only for purposes of compensation, but in other respects treated them like employees in terms of providing them tools, adhering to Cal/OSHA requirements by providing water and sanitation, and providing meal and rest breaks. Cinagro tries to bolster this argument by stating it never told the workers they were being classified as independent contractors. These statements indicate a fundamental misunderstanding of misclassification and neither argument is a defense to misclassification. Treating workers like independent contractors in some instances and like employees in other instances depending on when it is convenient to the employer is

not a defense to misclassification or a factor in determining if an individual is an employee or an independent contractor. Furthermore, telling the workers how they are classified has never been a factor in determining the proper classification of an individual as an employee or independent contractor, under *Borello* or the ABC test. There is no "partial misclassification" defense recognized under California law, and we refuse to recognize one here. An employer does not get to pick and choose what employment laws with which to comply, and an employer cannot reasonably expect to be absolved of the consequences of its unlawful actions by claiming it only partially deprived its workers the full protections to which they are entitled.[21]

Furthermore, contrary to Cinagro's protestations in its supplemental briefing, our finding a violation on these grounds falls well within established precedent regarding unalleged violations. "A violation not alleged in a complaint may nevertheless be found where the unlawful activity was closely related to and intertwined with the allegations in the complaint and the matter was fully litigated." (*Rincon Pacific, LLC* (2020) 46 ALRB No. 4, p. 14; *George Amaral Ranches, Inc*. (2014) 40 ALRB No. 10, pp. 16-17.) This standard surely is met in this case. Even though not alleged as a distinct cause of action, Cinagro's misclassification of the crew was alleged in the unfair labor practice complaint and was a topic interwoven into the very fabric of the entire case.

[21] Moreover, Cinagro certainly experienced some benefits or advantages over law-abiding competitors to the extent it evaded state and federal tax obligations and otherwise failed to secure legally required insurance coverages, such as unemployment or workers' compensation insurance. (*Dynamex, supra*, 4 Cal.5th at p. 913; Assem. Bill No. 5 (2019-2020 Reg. Sess.) Stats. 2019, ch. 296, § 1, subd. (b); see also §§ 90.3, 90.5.)

Cinagro's payroll practices and compliance with California wage and hour law were a subject of extensive testimony during the case, and Dighera admitted his awareness that his treatment of the workers was not consistent with California law. (*Pergament United Sales, Inc*. (1989) 296 NLRB 333, 334 [rule permitting finding violations not specifically alleged applies "with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witness"].) The workers certainly were aware of the ramifications of Cinagro's misclassification of them, as their complaints about their paystubs began immediately upon receiving their first paychecks from Cinagro. And while the crew did not specifically refer to being misclassified or being treated as independent contractors, the substance of their complaints, as well as the form of their paychecks and paystubs, undeniably relate to Cinagro's misclassification of them. Dighera's disregard for his obligations under California law is compounded by his cavalier lack of concern the workers would report his wage and hour violations. Such an attitude not only acknowledges the chilling impact experienced by the crew but reflects the unfortunate realities of the agricultural workforce, which is particularly vulnerable to exploitation and abuse.[22]

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[22] See *Caro-Galvan v. Curtis Richardson, Inc*. (11th Cir. 1993) 993 F.2d 1500, 1505-1506 [recognizing agricultural workers "have long been among the most exploited groups in the American labor force" while discussing legislative history of the Migrant and Seasonal Agricultural Worker Protection Act]; *F&P Growers Assoc.*, *supra*, 168 Cal.App.3d at p. 677 [describing vulnerabilities of farmworkers]; *Gallo Vineyards* (2004) 30 ALRB No. 2, p. 25 [acknowledging the "vulnerabilities of a heavily alien, non-English speaking workforce in an industry dominated by casual employment relationships"], disapproved on other grounds in *Gerawan Farming, Inc. v. ALRB* (2018) 23 Cal.App.5th 1129, 1230; *Guimarra Vineyards Corp*. (1977) 3 ALRB No. 21, p. 8; Thomas Sobel and Eduardo Blanco, Staff Proposal for an Education Access Regulation

Cinagro's claims a violation on these grounds is inappropriate because it admitted the workers' employee status in its answer to the unfair labor practice complaint also fails. Cinagro's admission of the workers' status as agricultural employees during the administrative proceeding fails to address or remedy its treatment of the crew during the time of the underlying events at issue.

For the foregoing reasons, we hereby find Cinagro violated section 1153, subdivision (a) by misclassifying the workers as independent contractors.

IV. As an Alleged Statutory Supervisor, Foreman Victor Mendoza Is Not Entitled to the Act's Protection on the Record Before Us.

Separate and apart from the crew itself, the General Counsel's complaint alleges foreman Victor Mendoza also is entitled to a remedy in this case under the authority of *Sequoia Orange Co*. (1985) 11 ALRB No. 21 on grounds his termination was the means by which Cinagro terminated the rest of the crew. The ALJ dismissed this allegation, reasoning Cinagro discharged the entire crew at the same time when it informed them there was no more work until further notice. He further found "Mendoza was not a means or mechanism of the unlawful firing of [the] workers, but rather a casualty of it." The General Counsel excepts to this finding and urges the Board to provide relief to Mendoza under the conduit theory of *Sequoia Orange*. Alternatively, the General Counsel proposes a different theory that supervisors should be afforded the Act's protections whenever they join in workers' complaints about statutory Labor Code

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for Concerted Activity (Nov. 23, 2015), available at <https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/06/StaffRecommendationWorksiteAccess.pdf>, pp. 4-5.

violations.[23]

As we explain more fully below, we affirm the ALJ's dismissal of the General Counsel's *Sequoia Orange* conduit theory for providing relief to Mendoza. However, consistent with our foregoing discussion regarding California's fundamental public policies of protecting workers and combating the problem of misclassification in this state through more vigorous and aggressive enforcement, we recognize today an additional exception to the general rule supervisors are not entitled to protection under the ALRA. Accordingly, as discussed more fully below, we will find a supervisor entitled

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[23] The General Counsel's unfair labor practice complaint alleges Mendoza "was a statutory supervisor for Cinagro within the meaning of Section 1140.4(j) …." Cinagro's answer admits this allegation. As such, Mendoza's supervisory status is removed as a disputed issue in the case (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 850, citing Witkin, Cal. Evidence (2d ed. 1966) § 501, p. 472), and we are not at liberty to disregard the General Counsel's pleading allegation. (*Arnaudo Brothers, LP* (2018) 44 ALRB No. 7, p. 7; *McKenzie Engineering Co*. (1998) 326 NLRB 473, 480 ["a complaint, no less than an answer, constitutes 'a "judicial" admission that is binding on the party making that admission'"].) While Mendoza's duties and responsibilities are not entirely developed in this case, perhaps owing to the General Counsel's pleading allegation he was a statutory supervisor, the evidence in the record suggests to us serious doubts whether he actually is a supervisor within the meaning of section 1140.4, subdivision (j). Rather, Mendoza appears more like the type of "lead" employee described in *Kawahara Nurseries* (2011) 37 ALRB No. 4. The record establishes Macias would contact Mendoza with specific instructions on where his crew would work and what they would be harvesting or work they would be performing, and Mendoza simply passed this information on to the crew. He did not appear to exercise any independent judgment in performing his duties. At hearing he also disclaimed having any authority to hire workers, and the record suggests he similarly lacked authority to fire or discipline workers. We urge the General Counsel to more carefully review the circumstances in which it alleges forepersons to be statutory supervisors. Our Board and the NLRB each have held it is important to exercise caution when making determinations regarding supervisor status because "the employee who is deemed a supervisor is denied the rights which the Act is intended to protect." (*Id*. at p. 10, quoting *Oakwood Healthcare, Inc*. (2006) 348 NLRB 686, 688.)

to a remedy under our Act where the supervisor serves as a conduit for reporting to their employer employee complaints about being misclassified and is then discharged for doing so. That said, notwithstanding our recognition of this new exception under the ALRA, we conclude the record still does not support application of this exception to extend coverage to foreman Mendoza.

A. Supervisors Generally Are Not Covered by the ALRA.

As a general rule, supervisors are excluded from the coverage and protections of the NLRA. (*Parker-Robb Chevrolet, Inc*. (1982) 262 NLRB 402; see 29 U.S.C. § 152(3).) The same is true under our Act. (*Ruline Nursery Co*. (1981) 7 ALRB No. 21, p. 8; see § 1140, subd. (j).) The rationale underlying the exclusion of supervisors from the NLRA's protections is grounded in the principle an employer should be able to "insist on the loyalty of its supervisors." (*Dang v. Maruichi American Corp*. (2016) 3 Cal.App.5th 604, 609-610, citing *Automobile Salesmen's Union Local 1095, etc. v. NLRB* (D.C. Cir. 1983) 711 F.2d 383, 386.) Thus, the NLRB has found "[t]he discharge of supervisors as a result of their participation in union or concerted activity--either by themselves or when allied with rank-and-file employees--is <u>not</u> unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act, employers largely may discipline or discharge supervisors without consequence for engaging in the same type of conduct for which it would be unlawful for the employer to retaliate against if engaged in by employees." (*Parker-Robb*, *supra*, 262 NLRB 402, 404, emphasis in original.)

The NLRB in *Parker-Robb* recognized two discrete exceptions to this

general rule when extending protection to a supervisor is necessary to vindicate or protect employees' rights under NLRA Section 7 [29 U.S.C. § 157]. (*Parker-Robb, supra*, 262 NLRB 402, 404.) Specifically, the NLRB will find an employer violates the NLRA by terminating a supervisor for (1) testifying against the employer during an arbitration or NLRB proceeding, or (2) refusing to commit an unfair labor practice. (*Ibid*.) In limiting the circumstances where the discharge of a supervisor will be found to violate the NLRA, the NLRB expressly rejected its previous "integral part" or "pattern of conduct" line of cases. (*Id*. at 402.) Under those cases, an employer's discharge of a supervisor could be found to violate the NLRA when it was aimed at interfering with or restraining employees' free exercise of protected rights or occurred within a larger pattern of conduct designed to interfere with employees' rights. (*Id*. at 402-403.) Despite overruling these prior cases, the NLRB nonetheless left intact its earlier decision in *Pioneer Drilling Co., Inc*. (1967) 162 NLRB 918, from which the "integral part" or "pattern of conduct" cases derived. In that case, the NLRB found the discharge of a supervisor violates the NLRA when it is the conduit by which the employer effects the discharge of the supervisor's crew in response to their concerted activity. (*Ibid*., enfd. in relevant part in (10th Cir. 1968) 391 F.2d 961; see *Automobile Salesmen's Union, supra*, 711 F.2d at p. 386.)

In a decision predating *Parker-Robb,* our Board in *Ruline Nursery Co*. (1981) 7 ALRB No. 21, pp. 9-12 recognized three exceptions based in NLRA precedent where a supervisor may be entitled to the protections of our Act: (1) when the "supervisor was discharged for having refused to engage in activities proscribed by the Act;" (2) when the "supervisor is discharged for having engaged in conduct designed to protect

employee rights, such as giving testimony adverse to the employer in a NLRB proceeding;" or (3) when "the [supervisor's] discharge [is] the means by which the employer unlawfully discriminates against its employees." (*Ruline Nursery*, *supra*, 7 ALRB No. 21, pp. 9-11.) As can be seen, these exceptions are consistent with the NLRB's subsequent decision in *Parker-Robb*.[24]

The General Counsel prosecuted this issue entirely on the third *Ruline Nursery* exception and, specifically, under the authority of *Sequoia Orange*, *supra*, 11 ALRB No. 21, to which we now turn.

B. The Record Does Not Establish Mendoza's Termination Was the Means by Which Cinagro Effected a Termination of the Crew.

The Board in *Sequoia Orange* found the employer unlawfully terminated a crew of workers, including their foreman, after the foreman relayed a group complaint from the employees concerning the lack of fruit available for picking, which consequently affected their pay. (*Sequoia Orange*, *supra*, 11 ALRB No. 21, at ALJ Dec. pp. 86-88.) On the record before it, the Board concluded the foreman was entitled to a remedy on grounds his discharge was the means by which the employer effectuated the crew's termination. (*Id*. at ALJ Dec. p. 93 [finding "the retention of individual crew members was dependent on the continued retention of their individual foreman"].) To support this conclusion, the Board explained "testimony from a variety of witnesses

[24] The Board in *Ruline Nursery* also suggested a possible fourth exception when the discharge of a supervisor "is found to be an integral part of an employer scheme aimed at penalizing employees for having engaged in concerted activities." (*Ruline Nursery*, *supra*, 7 ALRB No. 21, p. 12.) This theory of violation was rejected by the NLRB in *Parker-Robb,* as discussed above.

established that the hiring of harvest crews, regardless of the labor supplier by whom they were paid, was effectuated through the hiring of a particular foreman, who in turn contacted and actually engaged the members of his crew." (*Ibid*.)

As noted, this theory as applied in *Sequoia Orange* finds its genesis in *Pioneer Drilling*, *supra*, 162 NLRB 918. The NLRB in that case held two supervisor well drillers who were fired by their employer were protected under the NLRA because their discharge was the means by which the employer rid itself of the pro-union crew. The record in that case clearly established there existed an oil drilling industry custom where the employment of a crew was directly contingent on the continued employment of their driller/supervisor. (*Id*. at p. 921.) Our Board in *Ruline Nursery* set forth the factors the General Counsel must prove to establish a prima facie case under this theory: "A prima facie case is made out in this category when [1] employees' tenure is expressly conditioned on the continued employment of their supervisor, [2] employees have engaged in protected concerted activities, and [3] their supervisor has been discharged as a means of terminating the employees because of their concerted activity." (*Ruline Nursery*, *supra*, 7 ALRB No. 21, p. 11.)

The Board also applied this theory in *Kaplan Ranch* (1979) 5 ALRB No. 40. There, the Board ordered reinstatement and backpay remedies to a pro-union crew boss who was discharged as a means for the employer to rid itself of the pro-union crew. As in *Pioneer Drilling* and *Sequoia Orange*, the record in *Kaplan Ranch* established the employment of a crew of workers was entirely contingent on the continued employment of their crew boss, finding "[t]he crew is attached to a particular crew boss. If the crew

boss quits or is discharged, the employment relationship between the employer and the members of the crew is automatically terminated." (*Id*. at ALJ Dec. p. 8.) As in *Pioneer Drilling*, *Kaplan Ranch* involved circumstances where crew bosses are hired for a job and then have responsibility to hire their own crew, and it was known and understood that the discharge of a crew boss meant the discharge of the entire crew.

In this case, the record does not establish the employment of Mendoza's crew was directly tied to his own continued employment or otherwise establish any industry custom in this regard. The record is undeveloped concerning the manner in which Mendoza's crew was formed when they worked for Mike's Farm Labor before they moved to Cinagro, or Mendoza's role in compiling the crew. It also appears that not all members of Mendoza's crew accompanied him to Cinagro when Mike's Farm Labor moved them there. The crew was all hired at the same time by Cinagro after its relationship with Art's Labor Service was terminated. The record shows Cinagro hired workers directly on multiple occasions, including two workers whom Macias assigned to Mendoza's crew. Mendoza also testified to a situation where a person approached him for work one day in the field and Mendoza claimed to have hired the individual only after checking with Macias and Macias instructing him to do so.

Contrary to *Sequoia Orange* and *Kaplan Ranch*, the foregoing indicates the continued retention of Mendoza's crew was not strictly tied to Mendoza's own continued employment. Put differently, we cannot say on this record that had Cinagro terminated just Mendoza by himself that such an action necessarily would have effectuated the automatic termination of the entire crew, or that the crew would have understood it to

have. Accordingly, we agree with the ALJ the facts fail to establish Mendoza's termination was the means by which Cinagro sought to effect a termination of the whole crew. Rather, as the ALJ observed, Mendoza was a casualty of the mass termination rather than the means by which to accomplish it.[25]

C. Supervisors Should Be Afforded the ALRA's Protections When They Are Discharged by Their Employer for Communicating Employees' Complaints About Misclassification.

Notwithstanding the general rule supervisors are not covered by our Act, the unique circumstances of this case illustrate the need to recognize an exception to this rule in addition to those stated in *Ruline Nursery*. As we stated above, the exceptions recognized by this Board in *Ruline Nursery* are consistent with the NLRB's subsequent decision in *Parker-Robb*. (See pages 33-35, *supra*.) However, the exceptions recognized in *Parker-Robb* are not exhaustive, and additional exceptions to the general rule supervisors lack coverage have been found.[26] Neither should *Ruline Nursery* be

[25] The ALJ invited the Board to consider recognizing a "reverse *Sequoia Orange*" theory to extend coverage to a supervisor in a case where the unlawful discharge of a crew leaves the supervisor without a crew to supervise. The Board does not view the record in this case to support such a finding. The General Counsel also proposed an alternative theory under which a supervisor is entitled to protection under the ALRA when the supervisor joins with employees in complaining about Labor Code statutory violations and then is discharged with the workers. We find this theory difficult to distinguish from the types of circumstances present in the "integral part" or "pattern of conduct" cases that *Parker-Robb* rejected. However, as discussed below, we recognize under California law a specific narrow exception in cases related to misclassification of employees as independent contractors.

[26] For example, the court in *NLRB v. Advertisers Manufacturing Co*. (7th Cir. 1987) 823 F.2d 1086, 1088 recognized another exception where an employer retaliates against a supervisor based on the pro-union activity of a relative of the supervisor.

understood as prohibiting our recognition of additional exceptions under the ALRA where warranted. In light of California's fundamental public policies of protecting workers and combating the practice of misclassifying employees as independent contractors, we conclude this is such a case where an additional exception under the ALRA is necessary. Accordingly, we find the protections of the ALRA should be extended to supervisors discharged by their employers in response to the supervisors serving as a conduit for reporting to the employer employees' complaints about being misclassified as independent contractors.

1. Supervisors Are Entitled to the Act's Protections When Reporting Employee Misclassification Complaints.

As we have explained, California has adopted a forceful approach to combatting the persistent problem of employers misclassifying of workers as independent contractors. In addition to civil penalties and other remedies available against employers who misclassify their employees, our Legislature has rewritten the standard by which employee status is determined through its adoption of the ABC test. This standard is predicated on a presumption of employee status designed to ensure workers receive the rights, benefits, and protections to which they legally are entitled. The ABC test further strives to safeguard such entitlements from deprivation by employers seeking to avoid their obligations under the law by placing on the employer the burden of proving independent contractor status based on specifically delineated criteria.

California's forceful policies aimed at combating the misclassification of workers reflect the basic fact that recognition of an individual's proper status as an

employee is the gateway upon which all other laws designed to protect workers depend. (*Dynamex*, *supra*, 4 Cal.5th at pp. 912-913.) When an employer misclassifies its workers it denies them rights and protections granted them by a panoply of laws, including, of course, their right to organize and engage in other activities protected by our Act. (See *Borello, supra*, 48 Cal.3d at p. 359.) Therefore, as the California Legislature and Supreme Court each have observed, the misclassification of workers as independent contractors is a special harm capable of inflicting dire consequences on the affected workers, and it demands more vigorous enforcement of our laws to prevent and deter such abuses.

In this case, Cinagro unlawfully terminated foreman Mendoza's crew in retaliation for their ongoing complaints that Cinagro refused to issue them paystubs with legally required employee deductions and information—a direct result of Cinagro misclassifying them as independent contractors. The record further illustrates some of the serious downstream consequences flowing from Cinagro's misclassification of the crew, including a failure to provide workers' compensation coverage for workers injured on the job or employees pleading for proper paystub information to demonstrate proof of eligibility for their children's Medi-Cal coverage.

Extending the protection of the Act to a supervisor who serves as a conduit for reporting their employees' complaints about being misclassified to their employer is not inconsistent with the policies underlying *Parker-Robb*. The NLRB in *Parker-Robb* determined supervisors should be entitled to the NLRA's protections only when doing so is necessary to vindicate employees' rights. (*Parker-Robb, supra*, 262 NLRB 402, 403.)

A supervisor who serves as a conduit in reporting employees' complaints about being misclassified to their employer is engaged in conduct designed to vindicate and protect the employees' rights, and the discharge of that supervisor strikes directly at the artery through which the employees' complaints could flow to those with the ability and authority to remedy them. These concerns are heightened in the context of our agricultural industry and a workforce that is particularly vulnerable and prone to abuse and exploitation, and the chilling effect on the employees in such a situation cannot be underestimated, let alone ignored. (See p. 30, fn. 22.) Discharging a supervisor in such circumstances thus interferes with the employees' free exercise of rights under section 1152 — which themselves are dependent on recognition of the workers' status as employees entitled to our Act's protections.

Nor does ordering the supervisor's reinstatement in such circumstances unfairly impinge on the employer's expectation of loyalty from their supervisors. (See *Automobile Salesmen's Union*, *supra*, 711 F.2d at p. 386.) A supervisor who reports to their employer complaints from the employees that they have been misclassified as independent contractors is not engaged in any conduct disloyal to their employer; the supervisor merely is the conduit from which such complaints pass from the employees to those with authority meaningfully address and remedy them. Certainly, it would be unlawful for the employer to discharge the complaining employees themselves in such circumstances, and we see no reason why the employer should be able to avoid this proscription by discharging the supervisor who carries their complaints. To the extent the employer in such a situation questions the loyalty of the supervisor entitled to

reinstatement upon returning to work, any such concerns from the employer are a matter of its own doing as a result of unlawfully discharging the supervisor and not through any disloyal action of the supervisor. (*Advertisers Manufacturing Co., supra,* 823 F.2d at p. 1089.)

In sum, we believe California's fundamental public policies of protecting workers' rights and taking aggressive steps towards combating the abuse of independent contractor relationships support recognition of an additional, narrow exception to the general rule supervisors are not covered by the ALRA. Therefore, a supervisor who serves as a conduit for communicating employees' complaints to their employer about being misclassified as independent contractors is entitled to protection under our Act where the employer discharges the supervisor for doing so. Such an exception is consistent with the purpose of the ALRA to safeguard and protect the rights of agricultural employees to engage in union or other concerted activities for their mutual aid and protection. (§§ 1140.2, 1152.) Misclassifying agricultural employees as independent contractors directly deprives the workers the rights our Act grants them. This exception we recognize today is consistent with our conclusion an employer violates the ALRA when it misclassifies its workers as independent contractors.

2. Notwithstanding Our Recognition of This New Exception, the Record in This Case Still Does Not Support Extending the Act's Protection to Foreman Mendoza.

Although we find this case demonstrates the need to recognize an additional exception to the general rule supervisors are not entitled to protection under our Act, as defined above, we conclude the record before us does not support application

of this exception to foreman Mendoza in this case.

The record establishes the workers approached Mendoza in the first instance to raise their concerns about the paystubs they received from Cinagro after Cinagro hired them directly. Mendoza raised the workers concerns with Macias and reported back to the crew Macias' typical response that Cinagro's management was "working on it." Mendoza told the workers they could speak with Macias directly, and they did. On at least two occasions Macias met with the crew in the fields to discuss their concerns and complaints about not receiving proper paystubs, and Mendoza would step away and perform other work while the crew met with Macias. Thus, the workers communicated directly with Macias, and they did so without relying on Mendoza to carry their concerns on their behalf.

The record before us does not establish that Mendoza was terminated for communicating the workers' paystub complaints to their employer, and therefore application of the narrow exception we have recognized is unsupported in this case. He was, as the ALJ characterized it, a "casualty" of his association with crew that the employer viewed as tainted by discontent over its misclassification of them. Therefore, we affirm the ALJ's dismissal of the General Counsel's allegation Cinagro violated the Act by terminating foreman Mendoza.

V. The Board Is Authorized and Obligated to Assess Penalties in This Case Based Upon Cinagro's Willful Misclassification of the Crew.

Having found Cinagro unlawfully misclassified its workers, we turn now to the question posed by our prior administrative order; that is, may we assess civil penalties

under section 226.8 if we find Cinagro's misclassification of the crew was "willful?" We do so find the record establishes Cinagro willfully misclassified the crew, and the statute mandates the Board assess penalties.[27]

A. Cinagro Willfully Misclassified the Crew.

Section 226.8, subdivision (a) expressly proscribes the "willful misclassification of an individual as an independent contractor." Subdivision (i)(4), in turn, defines "willful misclassification" to mean "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." This standard is met here. As we have discussed, the record clearly shows Dighera knew his classification of the crew and payment of their wages did not comply with California law. In fact, he admitted knowing he could be exposed to penalties or fines. The ALJ asked Dighera directly whether he was concerned about having penalties or fines imposed against him based on his unlawful payroll practices. Dighera admitted he generally was aware of the possibility, but he "wasn't concerned that it would be coming from somebody from the crew." In short, Dighera knew his classification of the

[27] The General Counsel's unfair labor practice complaint did not seek assessment of civil penalties under section 226.8. The ALJ, although explicitly asking Dighera about the prospect of penalties at hearing, also did not include provision for the assessment of civil penalties in his recommended order. However, matters of remedy are within the province of the Board and may be considered by the Board sua sponte. (*United Farm Workers of America (Garcia)* (2019) 45 ALRB No. 4, p. 19; *Premiere Raspberries, LLC* (2018) 44 ALRB No. 9, p. 5, fn. 3; *J & R Flooring, Inc*. (2010) 356 NLRB 11, 12, fn. 5 ["It is well settled that the Board has the authority to consider remedial issues sua sponte"]; *Care Initiatives, Inc*. (1996) 321 NLRB 144, 144, fn. 3; *Salem Hospital Corp*. (July 23, 2014) 2014 NLRB LEXIS 572, *2.) Thus, in considering a remedy of civil penalties in this case, our prior administrative order notified the parties of the issue and provided them the opportunity to respond.

crew was wrong, yet he proceeded with it regardless. Nor did he conform his payroll practices to the law after retaining a bookkeeper specializing in agricultural worker payroll, who testified Dighera continued to have her produce his payroll in this manner as of the time of the hearing before the ALJ.

B. Our Board Has Authority to Assess Civil Penalties Under Section 226.8.

Having found Cinagro engaged in the willful misclassification of its workers within the meaning of section 226.8, subdivision (a)(1), we conclude we not only are authorized, but obligated, to assess a penalty against Cinagro. Section 226.8 provides for the assessment of penalties by "the Labor and Workforce Development Agency [LWDA] or a court" upon making a finding of willful misclassification. (§ 226.8, subds. (b), (c).) The statute expressly defines LWDA to include "any of its departments, divisions, commissions, boards, or agencies." (§ 226.8, subd. (i)(2).) Our Board clearly falls within this definition. (§ 1141, subd. (a).) Moreover, by stating that an employer found to have engaged in the willful misclassification of workers "shall be subject to" a civil penalty, the statute imposes a mandatory obligation to assess the penalties upon making the predicate findings. (*The TJX Companies, Inc. v. Superior Court* (2008) 163 Cal.App.4th 80, 86 ["'Shall be subject to' imposes an obligation"]; see *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1211 [department's refusal to assess penalties under a similar statute "renders nugatory the statutory directive that [a] violation 'shall be subject to a civil penalty'"].)

Cinagro and its amicus, contend the Board lacks authority to assess civil penalties because such penalties are punitive in nature. (See *P&M Vanderpoel Dairy*

(2018) 44 ALRB No. 4, 8 [Board's authority to order affirmative action "is designed to achieve remedial, not punitive purposes"], citing *J.R. Norton Co. v. ALRB* (1987) 192 Cal.App.3d 874, 908.) Section 1160.3, which is largely modeled on NLRA Section 10(c) [29 U.S.C. § 160(c)], has been interpreted to limit the Board's remedial authority to order "punitive" remedies in unfair labor practice cases. However, our authority here stems from a completely separate and distinct statute — section 226.8. That statute not only authorizes but requires the assessment of the specified civil penalties when the statutory conditions are met. Thus, the citation of Cinagro and its amicus to the general rule that our Board lacks authority to order punitive remedies under section 1160.3 has no application here where a separate statutory scheme specifically authorizes and compels the assessment of penalties.[28]

Cinagro also contends we have no authority to assess penalties under section 226.8 because only the Labor Commissioner has authority to do so, citing *Noe v. Superior Court* (2015) 237 Cal.App.4th 316 as support for its position. The court in *Noe* held section 226.8 does not create a private right of action because the statute includes no language indicating the Legislature intended it to be enforceable directly by individuals

[28] In any event, even if the distinction between remedial and punitive remedies were relevant to the Board's authority to award civil penalties under section 226.8, civil penalties are not necessarily "punitive" in nature, but rather serve remedial purposes. (*Nationwide Biweekly Administration, Inc. v. Superior Court* (2020) 9 Cal.5th 279, 326 [describing civil penalties as "a type of remedy"]; *Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 294 [civil penalties are "not essentially penal in nature but remedial" because "their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives"], quoting *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148.)

seeking to collect the penalties it provides. (*Id*. at pp. 337-339.)[29] Rather, as the court observed, such penalties "may only be enforced by the state's labor law enforcement agencies" or through a representative action brought under the Private Attorneys General Act (PAGA). (*Id*. at p. 338.) In reaching its conclusion section 226.8 did not provide a private right of action, the court also opined subdivision (g) of section 226.8 authorizes only the Labor Commissioner to assess penalties and enforce the statute. (*Id.* at pp. 337-338.) We respectfully disagree with this dictum in *Noe* to the extent it suggests an interpretation of the statute where the Labor Commissioner alone has authority to assess penalties.[30]

It certainly is true subdivision (g)(1) of section 226.8 states the Labor Commissioner "may issue a determination that an employer has" willfully misclassified its employees as independent contractors. Subdivision (g)(2) then provides for the

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[29] Cinagro interchangeably refers to the penalties provided under section 226.8 as "statutory penalties" or "monetary penalties." These terms are not synonymous with "civil penalties," however. Unlike various "penalties" or "statutory penalties" that are recoverable by employees for certain Labor Code violations, "civil penalties" are "enforceable only by the state's labor law enforcement agencies." (*Noe, supra*, 237 Cal.App.4th at p. 338.)

[30] We also note the question in *Noe* was whether section 226.8 provided a private right of action to a plaintiff in a civil lawsuit. The case did not involve any issue concerning the full extent to which LWDA or any of its respective administrative bodies could assess penalties under the statute. The court in *Noe* observed subdivisions (b) and (c) allowed for the assessment of penalties by LWDA, and the court further recognized that civil penalties typically are enforceable "by the state's labor law enforcement agencies." Thus, we also disagree with Cinagro to the extent it claims the case holds only the Labor Commissioner may assess penalties and that no other LWDA entity may. "[A] case is not authority for a proposition that was not considered." (*Driscoll v. Superior Court* (2014) 223 Cal.App.4th 630, 642, citing *Vasquez v. State of California* (2008) 45 Cal.4th 243, 254.)

assessment of penalties by the Labor Commissioner following an inspection or investigation, while subdivision (g)(3) allows the Labor Commissioner to enforce the section under section 98 or in a civil action. Section 98 et seq. establishes a process, known as a "Berman" hearing procedure, by which an employee can seek administrative relief by filing a claim for unpaid wages directly with the Labor Commissioner. (See *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1127-1128.)

However, just as subdivision (g) states the Labor Commissioner may issue a determination an employer has misclassified its workers and assess penalties, so, too, do subdivisions (b) and (c) say the LWDA—including any of its boards, etc.—may issue a determination an employer has misclassified its workers, upon which the employer "shall be subject to a civil penalty." Any interpretation of the statute to say only the Labor Commissioner may issue determinations of willful misclassification and assess penalties completely disregards these separate and distinct provisions of the statute. Of course, it is an established "rule of statutory construction to give effect to all provisions of a statute whenever possible." (*Khajavi v. Feather River Anesthesia Medial Group* (2000) 84 Cal.App.4th 32, 49, citing *Paris v. Zolin* (1996) 12 Cal.4th 839, 845 ["Whenever possible a construction must be adopted which will give effect to all provisions of the statute"]; see *Kleffman v. Vonage Holdings Corp*. (2010) 49 Cal.4th 334, 343 ["when different words are used in contemporaneously enacted, adjoining subdivisions of a statute, the inference is compelling that a difference in meaning was intended"], quoting *People v. Jones* (1988) 46 Cal.3d 585, 596; see also *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1163 ["We do not need

unpronounceable Latin phrases ('expressio unius est exclusio alterius'), string citations, or Sutherland on Statutory Construction to know a statute made up of parts ought to be read as a whole, integrating its subdivisions so that each has meaning, the statute in its entirety makes sense and is faithful to the apparent legislative purpose"] (dis. opn. of Brown, J.).) Put differently, to suggest the statute vests in the Labor Commissioner exclusive authority to assess civil penalties by virtue of subdivision (g)(3) renders meaningless the separate provisions of the statute authorizing the LWDA, or any of its respective administrative bodies, to do the same.

Thus, while the Labor Commissioner clearly has authority under subdivision (g) to entertain and act upon wage claims brought directly to it by individuals who may have been misclassified by their employers, section 226.8 separately authorizes any LWDA entities to determine whether a matter before them presents a case of willful misclassification and, if it does, to assess penalties accordingly. Such an interpretation of the statute not only gives meaning to, and preserves the effectiveness of, all subdivisions within the statute, but also appears consistent with the Legislature's intent to create broader enforcement of our laws proscribing the misclassification of workers. (Sen. Rules Com., Office of Sen. Floor Analyses, Analysis of Sen. Bill No. 459 (2011-2012 Reg. Sess.) as amended Sept. 2, 2011, p. 2 [separately describing the grant of authority to the LWDA "to assess specified civil damages against … persons or employers violating these prohibitions," from the distinct authority granted "the Labor Commissioner to assess civil and liquidated damages against a person or employer based upon a determination that the person or employer has violated these prohibitions"], pp. 4-5

[describing the "comprehensive" approach of this bill to create "disincentives" to employers misclassifying workers and "act as a deterrent"].)

Accordingly, we find section 226.8, subdivision (b) authorizes our Board to assess civil penalties in this case based on Cinagro's willful misclassification of the crew. In addition, pursuant to subdivision (e) of section 226.8, Cinagro will be ordered to post the required notice concerning its willful misclassification of workers.

C. Determination of the Amount of Civil Penalties.

Although section 226.8, subdivision (b) compels the assessment of penalties upon our determination Cinagro engaged in the willful misclassification of workers, the statute does not fix the amount of penalties but gives a range in which penalties must be assessed. The amount of the penalties within the statutory range thus is left to our discretion. (*The TJX Companies, Inc*., *supra*, 163 Cal.App.4th at p. 86.) In this respect, the statute does not provide any instruction in terms of the factors to be considered in assessing the penalties. In such circumstances, the Board may look to similar statutes authorizing civil penalties for guidance regarding the types of factors to be considered. (See *U.S. v. Menendez* (C.D. Cal. Mar. 6, 2013) 2013 U.S. Dist. LEXIS 39584, *15.)[31]

[31] Section 226.8 subdivision (c) provides a higher penalty range between $10,000 and $25,000 if a court or the LWDA find that the employer has engaged or is engaging in a pattern and practice of misclassification. While there is clearly evidence that Cinagro's conduct was willful as discussed *infra*, there is insufficient evidence in the record to determine if Cinagro's actions constitute a "pattern and practice" within the meaning of section 226.8(c) and we will not assess the higher range of penalties authorized by section 226.8(c).

While many of the penalties available under the Labor Code are in fixed amounts, we have identified a number of statutes providing for civil penalties in amounts unfixed by statute and left to the discretion of a court or administrative body or officer.[32] Several factors commonly appear amongst these varied statutes which we find relevant to our inquiry under section 226.8, subdivision (b). Those factors are:

> (1) the nature of the violation;
> (2) the severity, gravity, or extent of the violation;
> (3) any history of prior employment related violations by the employer;
> (4) any good faith measures by the employer to comply with the law or other remedial measures taken;
> (5) the financial condition of the employer or the employer's ability to pay; and
> (6) any other matters justice may require.

We think such factors are appropriate for the Board to consider in assessing penalties under section 226.8. Accordingly, in addition to the amount of the backpay remedies to be determined during subsequent compliance proceedings, the amount of the penalties to be assessed pursuant to section 226.8, subdivision (b) should be calculated in light of the foregoing factors and development of an appropriate record on such matters. (Board reg. 20290 et seq.; *George Arakelian Farms v. ALRB* (1989) 49 Cal.3d 1279, 1295 [evidence relevant to determining "the amount of damages rather than the fact of damages" appropriately considered during compliance proceedings]; see *Sandrini Bros.*

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[32] See, e.g., Bus. & Prof. Code, § 17206, subd. (b); Fin. Code, § 18349.5, subd. (i)(3); Food & Agr. Code, § 14027, subd. (a); Gov. Code, §§ 66641.5, subd. (a), 66641.9, subd. (a); Health & Saf. Code, §§ 8029, subd. (b), 25249.7, subd. (b)(2); Ins. Code, §§ 728, subds. (h)(2)-(3), 1748.5, subd. (h); Pub. Res. Code, §§ 30820, subd. (c), 30821, subd. (c); Pub. Util. Code, § 1701.6, subd. (d); Wat. Code, § 13385, subd. (e); see also § 2699, subd. (f).

v. ALRB (1984) 156 Cal.App.3d 878, 888.)[33] The region may proceed in compliance under Board regulation 20291, subdivision (c) or subdivision (e) as may be appropriate to commence proceedings by which to identify the appropriate amount of the civil penalty we hereby assess pursuant to subdivision (b) of section 226.8.

D. The Terminated Members of the Crew, Including Foreman Victor Mendoza, Must be Reinstated Pursuant to Section 226.8

Where, as here, the Board finds willful misclassification of individuals as independent contractors, section 226.8 mandates that the employer "[change] its business practices in order to avoid committing further violations". Where the employer's misconduct includes the termination of employees who complained about misclassification, such changes must include the reversal of such terminations and the reinstatement of the terminated employees. A contrary result would allow the employer to continue to take advantage of the elimination of those who opposed its unlawful practices as well as the resulting chilling of future employee complaints, which would be inconsistent with the text of section 226.8 and its underlying policies.

In this case, after employees complained about receiving paystubs that reflected

[33] Section 226.8, subdivision (b) states an employer shall be subject to a civil penalty upon the LWDA (or any of its respective entities) issuing a "determination" the employer has willfully misclassified an employee. Subdivision (i)(1) defines "determination" to include any agency order or decision for which the time to appeal has expired and no appeal is pending. The statute thus contemplates calculation of the specific amount of any penalty assessed in a subsequent proceeding after the threshold determination of willful misclassification is made and any administrative or judicial appeals therefrom exhausted or not pursued. This is consistent with our usual administrative processes for determining the extent of a respondent's monetary liability in compliance proceedings.

their illegal misclassification, Cinagro eliminated the complaining employees' entire crew, including Mendoza, their foreman. While the exclusion of supervisors from the coverage of the ALRA precludes ordering supervisors' reinstatement except in limited circumstances, no such supervisor exclusion exists under section 226.8, which applies to any employee, whether supervisory or rank-and-file. Accordingly, section 226.8 obligates Cinagro to offer reinstatement to the entirety of the improperly terminated crew, including Victor Mendoza, and we shall so order.[34]

ORDER

Pursuant to Labor Code section 1160.3, respondent Cinagro Farms, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

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

[34] The language of section 226.8 indicates that the employer's obligation to change its business practices is a prospective one designed to avoid further violations. As discussed above, reinstatement of employees retaliated against for raising misclassification concerns has such prospective effect. However, we do not believe that the payment of backpay, which would be a retrospective remedy, is encompassed within section 226.8. Crew members other than Victor Mendoza are, however, entitled to backpay under our unfair labor practice remedy. Likewise, we do not view violations such as Cinagro's presumptive failure to remit required payroll taxes and failure to secure workers compensation insurance as being within our authority to order under section 226.8 (although Cinagro would certainly be obligated to comply with all relevant laws on a prospective basis). Nevertheless, given that such violations are apparent, we direct the Region to report such violations to the relevant state and/or federal enforcement agencies if they have not already done so.

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

(c) Misclassifying agricultural employees as independent contractors.

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

(a) Rescind any discharge notices or any other such personnel notation regarding the events of March 4, 2017, and expunge such notices from its files.

(b) Offer Marisol Jimenez, Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez Martinez, and Maria Angelica Santiago immediate reinstatement to their former or substantially equivalent employment without prejudice to their prior rights and privileges of employment;

(c) Make whole Marisol Jimenez, Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez Martinez, and Maria Angelica Santiago, for all wages or other economic losses they suffered since March 4, 2017, as a result of their unlawful terminations, to be determined in accordance with established Board precedent. The award shall include interest to be determined in accordance with *Kentucky River Medical Center* (2010) 356 NLRB 6, and excess tax liability is to be computed in accordance with *Tortillas Don Chavas* (2014) 361 NLRB No. 10, minus tax withholdings required by federal and state laws. Compensation shall be issued to Marisol Jimenez, Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez Martinez, and

Maria Angelica Santiago, and sent to the ALRB's Oxnard Sub-Regional Office, which will thereafter disburse payment to them.

(d) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning March 4, 2017, and continuing to date, preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records, and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this order.

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

(f) Within 30 days after this Order becomes final, post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(g) Within 30 days after this Order becomes final, arrange for a representative of respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of

supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by respondent to all non-hourly wage employees in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after this Order becomes final or when directed by the Regional Director, to all agricultural employees employed by respondent at any time during the period from March 4, 2017, to March 3, 2018, at their last known addresses.

(i) Provide a copy of the Notice to each agricultural employee hired to work for respondent during the twelve-month period following the date this Order becomes final.

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

3. Having been determined to have engaged in the willful misclassification of workers, take the following additional affirmative actions pursuant to Labor Code section 226.8:

(a) Pay a civil penalty pursuant to section 226.8, subdivision (b), which shall be payable to the Labor and Workforce Development Agency for

enforcement of the state's labor laws;

(b) Offer Marisol Jimenez, Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez Martinez, Maria Angelica Santiago, and Victor Mendoza immediate reinstatement to their former or substantially equivalent employment without prejudice to their prior rights and privileges of employment.

(c) For one (1) year from the date this Order becomes final, display prominently on respondent's internet website, in an area which is accessible to all employees and the general public, or if respondent does not have an internet website, to display prominently in an area that is accessible to all employees and the general public at each location where workers were willfully misclassified, a notice signed by an officer setting forth all of the following:

(1) That the Agricultural Labor Relations Board, within the California Labor and Workforce Development Agency, has found that respondent committed a serious violation of the law by engaging in the willful misclassification of employees;

(2) That respondent changed its business practices in order to avoid committing further violations of this section.

(3) That any employee who believes that he or she is being misclassified as an independent contractor may contact the Labor and Workforce Development Agency. The notice shall include the mailing address, email address, and telephone number of the agency.

(4) That the notice is being posted pursuant to a state order.

DATED: July 28, 2022

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member

Cinthia N. Flores, Member

CHAIR HASSID, concurring

I concur with the Board's decision and write separately to address an important issue illustrated by the facts of this case and the subsequent procedural history. This case raised several issues relating to Labor Code section 1148 and the mandate to follow applicable NLRA precedent. As discussed at pages 20-24, *supra*, the Board has noted California's strong public policy of ensuring workers are properly classified, and finds that NLRA precedent relating to misclassification, which is treated very differently by the NLRB and which utilizes a different test for determining an employee's classification, is therefore not applicable.

However, notwithstanding issues of misclassification, this Board is mandated by section 1148 to follow applicable NLRA precedent in many other aspects, including the issue presented in this case relating to extending coverage of the ALRA to a supervisor. This issue regarding how the ALRB can determine if extending the protections of the Act to supervisors is appropriate reveals a much larger issue relating to whether there should be consideration of possible reform of section 1148.

Modeled after the NLRA, our Act expressly applies to *employees*; it does not directly extend protection to supervisors. One of the primary policy rationales under the NLRA and our Act is that the protections applicable to employees do not apply to supervisors because they are part of management, and in many cases an extension of management, and an employer thus should be able to rely on their loyalty. (See § 1140.4, subd. (j) [defining "supervisor" to include any individual having certain authority "in the interest of the employer"].)[35] This distinction between employees and supervisors makes obvious sense in the context of collective bargaining and labor relations generally. But we find this policy rationale significantly weakened, though not eliminated entirely, in matters such as the one in this case, where the workforce is unrepresented and a decision about representation is not an issue. Regardless, section 1148 mandates we follow applicable NLRA precedent.

In *Parker-Robb Chevrolet, Inc., supra,* 262 NLRB 402 the NLRB made a deliberate point to limit when coverage of the Act may extend to supervisors with a few

[35] See *Ruline Nursery Co*. (1981) 7 ALRB No. 21, p. 8-9.

notable extensions. While, these exceptions are not exhaustive, and the Board has the ability to create new exceptions as we do today, *Parker-Robb* severely constricts the Board's ability to create such exceptions. In *Parker-Robb* the NLRB expressly overruled the "integral part" and "pattern of conduct" cases because it found those cases "produced inconsistent decisions which cannot be reconciled with the statute, so that all concerned---employers, unions, and indeed, supervisors, themselves---have no clear guidelines as to when supervisors may be lawfully discharged." (*Parker-Robb*, *supra*, 262 NLRB 402, 403.) While the decision went on to specify the nature of the permissible exceptions there is a significant lack of clarity about what specifically the Board was rejecting when it jettisoned the "integral part" and "pattern of conduct cases," other than it seems the NLRB wanted to severely restrict extending protections of the NLRA to supervisors.

Parker-Robb stresses that any extension of coverage for a supervisor must stem from "the need to vindicate *employees'* exercise of their" rights. (*Parker-Robb*, *supra*, 262 NLRB 402, 403, emphasis added.) The NLRB went on to criticize a line of cases which extended coverage to supervisors when they "merely join[ed] with rank-and-file employee protected activity" and were "then subjected to the same discharge or disciplinary treatment unlawfully meted out to those employees." (*Ibid.*) The NLRB proceeded to express its caution that, while this was desirable from an "equitable standpoint, the 'integral part' or 'pattern of conduct' line of cases disregards the fact that *employees*, but not *supervisors*, are protected against discharge for engaging in union or concerted activity. The results must be the same under the Act whether the supervisors engage in union or concerted activity by themselves or along with employees." (*Ibid.*,

emphases in original.)

To put it plainly, I disagree with the NLRB's analysis in *Parker-Robb* and believe it was wrongly decided. In my view, extending the protections of the ALRA in this case to foreman Mendoza would be consistent with the policies of *our* Act and would not create confusion. I do not believe the chilling effect of a supervisor's discharge on the workforce can be so easily discounted. When employees engage in activity protected under our Act with the participation or support of their foreman or crew boss, their employer's firing of the supervisor for such reasons sends a clear message the employees are sure to get. The chilling effect in such situations on their own ability to freely exercise their rights cannot be underestimated, let alone ignored.

The facts of this case best fall within what the NLRB characterized as the "integral part" line of cases. Cinagro was not making a distinction between Mendoza and the crew; they were essentially treated the same and viewed as a whole. Mendoza did what he was supposed to do — he relayed the workers' complaints as he received them. He did not attempt to chill, restrain, silence or in any way frustrate the workers' lawful exercise of their rights under the Act, and for that he was punished the same as the workers who exercised their lawful right to ask for a proper paystub. Finding coverage for Mendoza under these circumstances is appropriate; to find otherwise sends a message that undercuts the policy objectives of the Act. Extending protection to Mendoza in these circumstances does not undermine or weaken the employer's expectation of loyalty from its management team. A question of representation is not at issue in this case, and Mendoza's actions were not bolstering management's lawful rights within the context of

a labor dispute or labor relations generally. In my view, his actions exemplify the primary policy rationale articulated in *Parker-Robb* — his actions vindicated the workers' exercise of their rights under the Act. The Act should not be construed to absolve an employer that commits violations against workers simply because the worker is a supervisor. Such a rationale contradicts the larger body of labor and employment policies of this state.

However, section 1148 imposes upon us a mandatory obligation we cannot avoid based simply on our own disagreement with the result reached. Regardless of whether the concerted activity relates to the violation of a statutory condition or a benefit for the workers (such as a pay increase), *Parker-Robb* prohibits extending coverage to a supervisor when they join in such concerted activity and are terminated.

Although section 1148 served an important purpose when our Act was adopted and our Board created, I believe this case exemplifies the need for legislative review. At the time the ALRA was enacted in 1975, it made sense for the Legislature to establish a body of decisional law and precedent to guide the Board and stakeholders alike so that all interested parties had a familiar well from which to draw, and stakeholders could conduct themselves accordingly in light established labor law principles under the NLRA.

However, almost 50 years have since passed since our Act was adopted, and the Board has developed its own body of law. Furthermore, the Board's unique position within California and its jurisdiction over agricultural workers merits different considerations. California has a longstanding and significant history of leading the Nation

on strong labor and employment protections for all workers. The very existence of the ALRB is but one example of California's progressive stance to provide robust labor protections for all workers. Additionally, the circumstances of the agricultural industry are different. In the context of this case specifically, the distinction between workers and appropriately classified supervisors oftentimes is thin. The imbalance of power between supervisors and upper management, and supervisors' vulnerability to exploitation, is practically the same as between front-line workers and front-line management. The Board agrees that the Act should not be universally applied to supervisors and that we are able to appropriately identify when coverage is appropriate. Additionally, rather than providing a stabilizing force, section 1148 circumscribes the Board's authority according to vacillations at the NLRB depending on which political party is in power.[36] In light of these considerations, the Legislature may wish to examine the benefits and shortcomings of section 1148 in the present day and evaluate whether it has served its purpose and if it is in need of reform.

[36] See, e.g., *May Dept. Stores Co. v. NLRB* (7th Cir. 1990) 897 F.2d 221, 224, fn. 5; *Hotel Employees & Restaurant Employees Union, Local 11 v. NLRB* (9th Cir. 1985) 760 F.2d 1006, 1007-1008; *NLRB v. Pincus Bros., Inc.-Maxwell* (3d Cir. 1980) 620 F.2d 367, 380, fn. 4 (conc. opn. of Garth, J.); *NLRB v. Children's Baptist Home* (9th Cir. 1978) 576 F.2d 256, 260 ["Periodic changes in public policy by executive branch officers … are an inherent aspect of a democratic political system"]; see *Browning-Ferris Indus. of Cal. v. NLRB* (D.C. Cir. 2018) 911 F.3d 1195, 1223-1224 (dis. opn. of Randolph, J.); *P&M Vanderpoel Dairy* (2014) 40 ALRB No. 8, p. 35, fn. 19 [noting "the NLRB has frequently reversed itself in many areas"] (conc. and dis. opn. of Gould, Chair).

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed with the Oxnard Sub-Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB determined that we violated the Agricultural Labor Relations Act by misclassifying agricultural employees as independent contractors and terminating employees for engaging in protected concerted activity. The ALRB has told us to publish this Notice. We will do what the ALRB has ordered us to do.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves.
2. To form, join, or help a labor organization or bargaining representative.
3. To vote in a secret ballot election to decide whether you want a union to represent you.
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board.
5. To act together with other workers to help and protect one another.
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT discharge you because you complain about wages, hours, and working conditions on behalf of yourself and your coworkers.

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

WE WILL make whole Marisol Jimenez, Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez Martinez, and Maria Angelica Santiago, for all wages or other economic losses that they suffered as a result of our unlawful discharge of them.

CINAGRO FARMS, INC.

Dated: _____ By: _____
Representative

Title: _____

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. The closest office is located at 1901 Rice Avenue, Suite #300, Oxnard, California. The telephone number is (805) 973-5062.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

CINAGRO FARMS, INC. 48 ALRB No. 2

(Marisol Jimenez) Case No. 2017-CE-008-SAL

ALJ Decision

The administrative hearing in this matter was held by videoconference due to the COVID-19 pandemic. The Administrative Law Judge (ALJ) determined that Board regulation 20269 provides parties a right to be physically present during a hearing, but that this requirement was suspended by Governor's Executive Order N-63-20. The ALJ concluded the workers were unlawfully fired after lodging complaints about the lack of proper paystubs with their paychecks which were prepared on the basis that Cinagro was classifying them as independent contractors. The ALJ also concluded foreman Victor Mendoza, as a statutory supervisor, was not entitled to a remedy along with the workers in the crew, and dismissed a separate allegation that Cinagro violated the Agricultural Labor Relations Act (ALRA or Act) by terminating Mendoza.

Board Decision

The Board clarified that Board regulation 20269 does not grant parties a right to be physically present at a hearing. While an ALJ's authority under Board regulation 20262 to conduct and regulate the course of a hearing includes the authority to conduct a hearing by videoconference, the Board emphasized that videoconferencing should be used as an exception to this general rule only where good cause exists. The Board affirmed the ALJ's unfair labor practice finding as to the crew. In addition, the Board concluded that Cinagro's misclassification of the crew, by itself, supports finding a separate violation of ALRA section 1153, subdivision (a). The Board also affirmed the dismissal of the separate allegation concerning foreman Mendoza; however, the Board stated that it will prospectively recognize an additional exception to the general rule that supervisors are not entitled to protection under the ALRA, and concluded the protection of the Act would be extended to cover a supervisor who serves as a conduit for reporting employees' complaints about misclassification to their employer, and then is discharged for doing so. The Board concluded that it has authority to assess civil penalties under Labor Code section 226.8, and that the record demonstrates "willful misclassification" of the crew by Cinagro within the meaning of section 226.8, subdivision (a). Finally, the Board concluded that Labor Code section 226.8 obligates Cinagro to offer reinstatement to the entirety of the improperly terminated crew, including foreman Mendoza.

Chair Hassid's Concurrence

Chair Hassid concurred with the Board's decision, but wrote separately to express her disagreement with the analysis by the National Labor Relations Board (NLRB) in *Parker-Robb Chevrolet, Inc.*(1982) 262 NLRB 402, a case which severely restricted extending

protections of the NLRA to supervisors, and which is applicable precedent the Board is mandated to follow by section 1148. Chair Hassid opined that the actions of foreman Mendoza vindicated the workers' exercise of their rights under the Act, and in her view, were the Board not constrained by section 1148, extending the protections of the ALRA in this case to Foreman Mendoza would be consistent with the policies of the Act. Chair Hassid proposed that the Legislature may wish to examine the benefits and shortcomings of section 1148 in present day and evaluate whether it has served its purpose and if it is in need of reform.

***

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CINAGRO FARMS, INC., Respondent, and, MARISOL JIMENEZ, Charging Party.	Case No. 2017-CE-008-SAL **NOTICE OF TRANSFER; and DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Board Regulation 20280,[1] the attached Decision of the Administrative Law Judge is deemed transferred to the Board on October 27, 2021. Exceptions, if any, are due on or before Tuesday, November 16, 2021; and Reply briefs, if any, are due on or before Monday, November 29, 2021. See Board Regulation 20282.

Dated: October 27, 2021

Santiago Avila-Gomez
Executive Secretary
Agricultural Labor Relations Board

[1] The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CINAGRO FARMS, INC., Respondent, and, MARISOL JIMENEZ, Charging Party.	Case No. 2017-CE-008-SAL

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Appearances:

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This matter was heard by Mark R. Soble, Chief Administrative Law Judge ("ALJ"), State of California Agricultural Labor Relations Board ("ALRB") on the seven days of February 23-26, 2021, and March 1-3, 2021.

I. JURISDICTION

The charge was filed in this matter on March 13, 2017. (GC Exhibit # 1) The charge alleges that Cinagro Farms, Inc. (hereafter "Cinagro") "discriminatorily terminated" the employment of Charging Party and her crew. The General Counsel served a complaint in this matter on June 10, 2020, which was three years and three months after the charge was filed. The June 10, 2020 Complaint stated that the worked were first directly hired by Cinagro in February 2017. (Complaint, page 3, lines 15-18)

The February 11, 2021 Amended Complaint states that workers were first directly hired by Cinagro in November 2016. (Amended Complaint, page 2, lines 19-21) The Complaint and Amended Complaint mention a single instance where a Cinagro supervisor asked the workers to purchase water. (Complaint, page 4, lines 2-5, and Amended Complaint, page 3, line 26, to page 4, line 1) The Complaint and Amended Complaint describe how the workers requested pay stubs showing payroll deductions, but that the company failed to provide the pay stubs. (Complaint, page 3, lines 10-24, and Amended Complaint, page 3, lines 6-20)

The Answer was filed in this matter on June 16, 2020. The Answer to the Amended Complaint was filed on February 11, 2021. Respondent presented as an affirmative defense both that the crew did not show up for work and quit. (Answer, at page 2, line 12, and Answer to Amended Complaint, at page 2, lines 12-13) The

Answer to the Amended Complaint deleted the defense in the initial answer that the crew's farm labor contractor (hereafter "FLC") did not show up leaving the crew with no supervision. (Answer, at page 2, lines 13-14)

At the December 7, 2020, Prehearing Conference, the General Counsel repeated these allegations. (Prehearing Conference Order, dated January 4, 2021, at page 2, line 14, to page 3, line 2) At that same Prehearing Conference, the Respondent stated that it did not have a model payroll system and eventually hired a new bookkeeper. (Prehearing Conference Order, dated January 4, 2021, at page 3, lines 4-6) The Respondent explained that the FLC stopped coming and the workers became unhappy and left, some to a nearby grower. (Prehearing Conference Order, dated January 4, 2021, at page 3, lines 5-9)

Respondent admits that the charge and complaint in this matter were properly filed and served. (Prehearing Conference Order dated January 4, 2021, at page 1, line 26.) Respondent admits that, during all pertinent time periods, it was an agricultural employer as defined by the ALRA. (Prehearing Conference Order dated January 4, 2021, at page 1, line 27.) Respondent admits that, during all pertinent time periods, Charging Party was a non-supervisory agricultural employee. (Prehearing Conference Order dated January 4, 2021, at page 1, line 28.)

II. FORMAT OF HEARING

Due to the COVID-19 pandemic, the General Counsel proposed that this hearing be conducted using a video-conference platform. The Respondent did not take a position one way or the other as to the format of the hearing. Generally, Title 2,

California Code of Regulations, section 20269, gives parties the right to appear in person at the hearing. This right was suspended by the Governor's Executive Order N-63-20, paragraph 11, dated May 7, 2020. In light of that suspension, the decision of how to best proceed and the format to be used therefore falls before the undersigned ALJ pursuant to Title 2, California Code of Regulations, section 20262. In the absence of any objection from the Respondent, the undersigned found the health and safety concerns to be valid and persuasive and ordered that the hearing would be conducted using a video-conference platform, namely Webex (Webex is similar to Zoom and FaceTime).[1]

The undersigned ALJ and counsel for both sides worked out an arrangement that ultimately worked well at hearing. We had the almost all of the witnesses go to an empty conference room in the building shared by the Oxnard ALRB Sub-Regional Office and the California Unemployment Insurance Appeals Board (hereafter "CUIAB"). An ALRB field examiner set up the laptop computer on Webex and wiped down the room with disinfectants between witnesses. The laptop was set up to show a head and shoulders view of the witness. I felt better able to make credibility determinations seeing the witnesses on Webex than I would have had all parties and witnesses been in person, thirty feet apart, and wearing masks for the entire day. And

[1] The General Counsel withdrew her request to have an out-of-state witness appear by telephone (audio-only), indicating that the witness would use her smart phone to appear via Webex with both audio and video. The ALJ indicated that he was prepared to disallow telephone (audio-only) testimony and that the General Counsel would have had to make alternate arrangements to give the witness internet/Webex access in that instance. (*Westside Painting, Inc.*, 328 NLRB 796, 796-797 (1999))

in person, those distance and masking precautions would have been minimally required given the seriousness of the pandemic at the time.

The witnesses were provided with a physical notebook binder with paper copies of the exhibits. Paper or PDF copies of these same exhibits were generally provided to all parties and counsel beforehand, as well as to the ALJ, court reporter and interpreter.

When the field examiner entered the room to provide technology assistance or to bring in a hearing exhibit, both she and the witness wore masks, but the witnesses were permitted to remove their masks when they were alone in the room. All parties, counsel and court reporters were told that video-recording of the hearing was strictly prohibited. I felt that the video-recording of witnesses could have a chilling effect on the future willingness of farmworkers to testify at ALRB hearing, especially since some of those farm workers may have immigration issues.

Respondent's counsel participated from his office, and the ALJ, interpreter and court reporter were all located in different buildings, indeed, even in different cities. While the new technology required a few additional breaks, the only challenge was on one occasion when the court reporter had trouble replaying a specific witness answer. As the hearing moved forward, the court reporter addressed that technical requirement.

I feel confident that all parties' due process rights were appropriately protected at this hearing. In addition to when health and safety needs require it, I would recommend to the Board allowing use of the video-conference platform for other simple hearings. I also believe that our use of paper exhibits made it much easier for

the witnesses, who likely held varying levels of experience using videoconference platforms.

III. ISSUES PRESENTED

1. Did the crew quit or were they fired, discharged or let go?

2. If the crew was fired, discharged or let go, was the reason for the end of employment in whole or in part because of the crew members' protected, concerted activity?

3. Does the time gap of three and a quarter years between the date of the charge and the date of the complaint provide any sort of defense to the Respondent?

4. If Respondent committed an unfair labor practice, is the foreperson eligible for a remedy along with his crew?

IV. WITNESS TESTIMONY

There were twelve witnesses in this case. The names of the witnesses are (1) Marisol Jimenez, (2) Hector Cruz, (3) Maria Duarte, (4) Yolanda Antonio Garcia, (5) Rigoberto Perez Martinez, (6) Maria Angelica Santiago, (7) Victor Mendoza, (8) Barbara Ito, (9) Marie Lariano, (10) Ignacia Sanchez, (11) Anthony George Dighera, and (12) Rene Macias Diaz.

1. Marisol Jimenez

In 2016, Marisol Jimenez first worked for Mike's Farm Labor. (Transcript volume one, page 33, lines 17-20; hereafter abbreviated 1/33:17-33:20.) In approximately October 2016, Marisol first worked at Cinagro with Art's Labor Contractor. (1/33:17-33:23 and 39:18-39:20) The crew typically worked six days per

week. (1/34:20-34:21) Her foreperson was Victor Mendoza. (1/34:11-34:15) The supervisor was Rene Macias. (1/34:16-34:17) The crew cut vegetables and was mostly paid piece-rate. (1/33:24-33:25, 1/35:23-36:1 and 1/127:17-127:24)

A. Pay Stub Issue

After three or four weeks, the crew changed from working for Art's Labor Contractor to working directly for Cinagro. (1/39:12-39:20 and 40:7-40:9) Unlike Art's Labor Contractor, Cinagro did not make payroll deductions nor provide a pay stub or paper explaining the payment. (1/39:21-40:40:2 and 1/42:18-42:24) Marisol was unhappy with this failure. (1/82:24-82:25) Rene told the crew that it was a new company and in the process of fixing its paperwork. (1/40:11-40:18).

In December 2016, Marisol and Hector Cruz spoke to Victor about the payroll paperwork and deduction situation. (1/46:9-46:14) In addition to being a fellow crew member, Hector was Marisol's partner. (1/131:19-131:20) Marisol asked Victor to inquire with Rene as to when they would be able to get their pay stubs. (1/46:18-46:21) Victor told them that he would speak to Rene and find out the response. (1/46:15-46:17) Approximately one week later, Marisol spoke to Rene by herself, expressing her need for the pay stub. (1/47:16-48:4) Rene stated that he was limited to passing the message along to the boss, and that there was nothing else he could do in that regard. (1/47:18-47:23)

In earlier February 2017, Marisol's crew met with Rene. (1/48:18-49:1) Marisol told Rene that they needed pay stubs to provide proof of employment. (1/49:16-49:19) Her colleague Yolanda Antonio spoke at the meeting, explaining that

she needed to be able to prove her income. (1/50:4-50:22) Colleague Maria Angelica also spoke, stating that she needed to obtain proof of income. (1/50:8-12) Additionally, colleague Rigoberto Perez spoke, indicating a need for the paycheck stubs. (1/50:2-50:6 and 1/51:2-50:7) Rene responded that he had given their messages on the topic to the boss. (1/50:13-50:18)

In late February 2017, Marisol's crew met with Rene. (1/51:19-51:22) Colleagues present at the meeting included Maria Angelica, Yolanda Antonio, Hector Cruz, Maria Duarte, Maria Laureano, Ignacia Sanchez, as well as herself, Victor and Rene. (1/52:1-52:4) Maria Duarte indicated that she immediately needed proof of employment. (1/52:10-52:15) Hector and Yolanda expressed similar sentiments. (1/52:16-53:6) Rene informed the crew members that the company was still working on the paperwork but that the company would provide an interim document at the end of the week. (1/53:9-52:13) The interim document did not have traditional payroll information. (1/54:7-54:12)

B. Water Issue

Marisol alleged that the company "never brought us water". (1/55:2-4) Marisol was emphatic that the company brought zero water, saying "no, never". (1/55:5-6) Marisol states that she and two co-workers, Hector Cruz and Maria Duarte, discussed the issue with Victor. (55:7-55:24) Victor told Marisol that he would mention it to Rene. (1/56:1-10)

Marisol later testified that she asked Rene about the water, saying that the company did not bring enough. (1/57:13-58/3) No one else was present during this first conversation about water. (1/58:17-58:19) Marisol asked Rene about the water on a second occasion when Hector Cruz was also present. (1/58:20-58:23) Rene told them that if they went to the store near the ranch he would reimburse them, though he never did. (1/59:3-59:21)

During cross-examination, Marisol recalled that Victor's truck had yellow water coolers that held water. (1/83:18-83:20) Marisol testified that the crew bought the water stored in those coolers. (1/83:21-83:23, 84:5-84:7 and 85:19-85:22) She also testified that the crew gave Victor money so that he could purchase the water in the morning. (1/86:7-86:11)

C. Last Day of Work

The last day that Marisol worked at Cinagro was Saturday, March 4, 2017. (1/60:2-60:5) Marisol was never told by Victor Mendoza that she had been terminated. (1/118:9-118:12) But Victor did tell her that Rene advised that there would be no work on Monday, March 6, 20217. (1/61:16-62:6)

On Monday, March 6, 2017, Marisol and two of her colleagues, Hector Cruz and Maria Duarte, went driving to look for work. (1/71:21-71:24 and 73:2-73:3) They drove by the Moorpark Cinagro Ranch and saw a crew working there. (1/72:24-73:1) Marisol then telephoned Rene. (1/73:4-73:6) Marisol had her phone on speakerphone and Hector and Maria could hear the conversation. (1/75:12-75:14) Rene told Marisol that his understanding was that no crew was working. (1/73:12-73:14) Marisol asked

when her crew was next getting work and Rene replied that he did not know, until further notice. (1/73:16-73:19 and 118:13-118:16) Rene never called or spoke with her thereafter either to offer work or otherwise. (1/119:16-119:20 and 1/120:20-120:24) Nor did Marisol ever call Rene after Monday, March 6. 2017. (1/129:1-129:6)

On that same Monday, March 6, 2017, Marisol applied for work harvesting blueberries at Silent Springs. (1/93:4-93:22) Silent Springs hired Marisol on Tuesday, March 7, 2017, and her first day of work was Wednesday, March 8, 2017. (1/95:15-95:17) Hector Cruz and Maria Duarte were also hired and started on those dates. (1/95:19-95:25) During March 8, 2017 to June 2, 2027, Marisol worked full-time with Silent Springs. (1/98:13-98:16)

On Friday, March 10, 2017, Marisol received her final Cinagro paycheck from Victor Mendoza. (1/121:5-121:8)

D. Telephoning Other Witnesses

During the thirty days prior to the hearing, Marisol telephoned Ignacia Sanchez. (1/106:20-106:23) Prior to that call, she had not spoken with Ms. Sanchez in a long time. (1/106:5-106:8) Marisol called Ignacia to find out if she was participating in the ALRB hearing. (1/107:17-107:21) Two weeks prior to the hearing, Marisol also called Maria Lauriano. (1/105:6-105:9) Marisol decided to call Ignacia and Maria after the General Counsel's Office told her that two other workers would be testifying at the hearing. (1/112:13-112:20)

2. Hector Cruz Vasquez

During the first half of 2016, Hector worked for the farm labor contractors at Houweling's Nursery. (1/140:1-140:10 and 149:1-149:11) For the first couple days the farm labor contractor was Mike's Farm Labor but it was called Art's Labor or Arturo Farms after that. (1/140:4-140:7 and 2/31:13-32:32:12) The farm labor contractors provided the workers with medical insurance. (2/38:13-38:16) In mid-October 2016, Hector started working for Cinagro, where he harvested vegetables. (1/140:15-140:19) There were some days where the crew just did weeding. (2/30:7-30:9) The foreperson for Hector's crew was Victor Mendoza and the supervisor was Rene Macias. (1/140:20-140:23 and 2/33:8-33:15) Initially, Hector's crew had approximately thirteen to fifteen workers but the number diminished over time. (2/24:9-24:12) Later on, Cinagro had a second separate crew. (2/28:24-29:7) The two crews never merged together. (2/29:8-29:16)

Hector's wages were calculated by piece rate, with a minimum hourly amount if his tallies did not meet a certain threshold. (1/143:13-143:15 and 142:2-142:11) Victor would inform Hector by telephone or text as to which of the two Cinagro ranches to report. (1/145:19-145:24 and 146:5-146:7)

A. Pay Stub Issue

After Cinagro replaced Art's Labor as Hector's employer, Cinagro paid Hector using personal checks. (1/141:19-141:20 and 150:3-150:6) What the crew members described as personal checks were company checks that were unaccompanied by a pay stub and provided no documentation to suggest that any withholding was done for

social security, insurance, etc. Hector recalled that when one worker was injured, the company gave the worker a personal check and told the worker to say that he was cut at home. (2/42:1-42:9) Rene Macias told Hector's crew that Cinagro had different checks because they were a small company that had just started, but that the checks would be different by the next week. (1/152:22-153:1) However, the type of check did not change by the next week. (1/153:2-153:3) In fact, in February 2017, Cinagro was still paying Hector's crew with checks that were unaccompanied by typical pay stubs, a concern which the crew repeatedly raised with Rene. (1/154:16-156:18, 2/6:9-7:1 and 2/34:19-35:7)

B. Water Issue

Hector indicated that there was a single instance when he went to purchase water. (1/9:15-9:17) On that occasion, water had "run out". (2/9:18-9:23) Rene asked him and Marisol to pick up water for that one day, but never reimbursed them. (2/10:1-10:10)

Hector confirmed that his foreman Victor had large ten or fifteen gallon water jobs on his truck and additionally provided cups. (2/37:16-37:20) Hector said that Victor would pay for half of the water and the crew would pay for the other half. (2/45:5-45:15)

C. Last Day of Work

After the last Friday that the crew worked for Cinagro, the crew was never called back. (2/10:11-10:22) On the next Sunday, Victor told the crew that Rene had told him there would be no work for that Monday. (2/11:18-11:20) Hector applied for a new

job the following Tuesday, March 7, 2017, and started at that job the next Wednesday, March 8, 2017. (2/18:22-18:25) On Tuesday, March 7, 2017, prospective workers had to arrive at the blueberry ranch by 5:00 a.m. because there were a lot of interested workers. (2/21:8-21:12) On the way back from submitting the applications, Hector and Marisol saw the other crew working at Cinagro and Marisol telephoned Rene. (2/21:13-21:18) During that call, Rene did not say anything about the crew being fired. (2/43:9-43:14) In fact, at no time has anyone from the company ever communicated that the crew was fired in those words. (2/44:14-44:17)

3. Maria Duarte Melgoza

Maria initially testified that she started working at Cinagro in February 2017. (2/53:11-53:12) She is close friends with Marisol and knew her long before working at Cinagro. (2/82:10-82:15) In fact, Maria traveled to California and was with Marisol for a few days in mid-January 2021. (2/112"20-112-23) At Cinagro, she picked vegetables and her crew foreperson was Victor. (2/53:15-53:19) If a worker met her quotas, she was paid piece-rate; otherwise, it would be hourly wages. (104:16-104:25) Victor would let the crew know whether to go to the Cinagro ranch in Moorpark or to the Cinagro ranch in Fillmore. (2/54:1-54:11) Maria recalled the crew having eight or nine members. (2/84:5-84:17)

A. Pay Stub Issues

Cinagro paid her with "personal checks". (2/54:23-53:25) By "personal checks", Maria meant that there was no pay stub showing deductions for things like social security or health insurance. (2/55:16-55:25) She asked the Cinagro supervisor

Rene about the missing pay stubs and Rene told her the company office was working on it. (2/57:1-57:18) The crew also met with Rene on the subject shortly before she stopped working at Cinagro. (2/58:5-58:24) At this meeting, Maria told people that she needed a paystub. (2/59:2-59:3) Her colleagues echoed these concerns to Rene at the meeting. (2/59:16-59:19) At first, Maria testified that Rene did not respond at all. (2/59:8-59:10) Then a minute later, Maria testified that Rene told the crew that the company office was working on it. (2/59:20-59:23)

B. Water Issue

At the same meeting where the crew discussed pay stubs with Rene, Maria spoke at the meeting and said that "the water wasn't good and Victor was the only one who would bring good water". (2/59:6-59:7) Victor brought water to her crew every day. (2/111:6-111:18) No one ever asked Maria to pay for the water that Victor brought on his truck. (2/111:24-112:2)

C. Last Day of Work and Shortly Thereafter

Maria stated that she stopped working at Cinagro because Victor told her that Rene said that the available work had decreased and that they would call back when there was work. (2/60:1-60:5 and 2/83:15-83:16) On the day Maria, Marisol and Hector applied at the blueberry ranch, Maria drove, and they also went by the Cinagro Moorpark ranch. (2/61:1-61:10 and 2/85:5-85:10) The three of them saw the other crew working and Maria took cell phone pictures. (2/61:11-61:15, 65:11-65:13 and 84:19-85:1) Maria identified these photos from among the exhibits. (2/64:9-67:21) Maria testified that what she saw with her eyes was clearer and sharper than her cell

phone pictures. (2/89:2-89:11) After they took the photos, they called Victor and told him that the other crew was working. (2/77:3-78:2) Victor told them that Rene said the company would let them know when there was more work. (2/79:1-79:3) They never received a call back from the company. (2/82:16-82:20 and 2/109:25-110:1) Nor did she thereafter ever call Rene to inquire about work. (2/109:10-109:14)

D. The Blueberry Farm

The blueberry farm offered medical insurance, paid sick leave and other benefits. (2/105:13-105:18) The blueberry farm also provided pay stubs showing payroll deductions. (2/105:19-105:21) The blueberry farm also paid with a piece rate formula. (2/105:22-105:25) Maria indicated that she met the piece rate threshold more easily at Cinagro because she had more experience harvesting vegetables than picking blueberries. (2/108:2-108:16)

4. Yolanda Antonio Garcia

Yolanda began working at Cinagro picking vegetables in an October, but she could not identify which year. (2/118:7-118:14) Yolanda recalled that she was there for approximately four to five months. (3/58:2-58:4) Her foreperson was Victor Mendoza and the crew was paid piece-rate. (2/118:15-118:19 and 2/120:13-120:15) Her crew typically worked at two ranches Monday through Saturday, Fillmore and Tierra Rejada (Moorpark). (2/119:21-120:121:3) She would only know which ranch to go to when she received a call from Victor passing along what he had heard from supervisor Rene. (2/120:4-120:19) The crew was typically paid on the following Friday after a payroll week ended. (3/68:21-68:24)

A. Pay Stub Issue

Unlike the farm labor contractor, Cinagro paid the crew using checks with no pay stubs or itemized deductions. (2/123:1-124:1, 2/127:11-127:14 and 3/20:6-20:8) Yolanda needed the pay stubs for her children's Medi-Cal. (2/127:15-127:19) Yolanda and her husband Rigoberto spoke with Victor about the pay stub issue. (2/129:1-129:11) Victor told Yolanda to discuss the issue with Supervisor Rene, which she did in February. (2/129:14-129:23) Rene told them that the company was working on it, but the company never provided pay stubs, just piece-rate tallies. (2/130:2-130:13) Yolanda spoke to Rene again and told him that Medi-Cal would not accept solely piece rate tallies because that did not comprise a pay stub. (2/130:14-131:21) Rene told Yolanda that the company was new and they were working on it. (2/130:23-131:2, 2/132:22-133:1 and 3/54:8-54:12)

Yolanda also recalled a meeting with the whole crew where both Rene and Victor were present. At this meeting, Yolanda, Marisol and others spoke about the need for the pay stubs. (2/133:23-134:18 and 134:24-135:6) Rene responded that the company was working on it and they would get pay stubs the next week, but the next week the attachment still only had piece rate information, but not pay stub deductions. (2/134:19-135:18, 3/39:18-40:6, 3/41:14-41:16 and 3/54:13-54:15)

On one occasion, Yolanda met Rene's boss, Tony, when he brought bread to the crew. (3/138:19-138:24) This took place about two weeks before the crew stopped receiving work. (2/139:24-140:2) Yolanda mentioned the pay stub issue, speaking in Spanish to Rene, who then translated her comment to English for Tony. (2/138:16-

139:2) After Tony responded in English, Rene told Yolanda in Spanish that the company was working on it. (2/139:2-139:3) However, the company never provided the pay stubs. (2/150:12-150:15)

B. Water Issue

Victor would bring water to the field every day. (2/151:1-151:4) Yolanda did not need to contribute money for the water on Victor's truck, but the crew was asked to donate their recyclables. (2/152:15-152:18, 3/28:17-29:1 and 3/44:2-44:13)

C. Last Day of Work

Yolanda learned from Victor that there would be no work until further notice. (2/135:23-135:24) They had called Victor on a Sunday since they did not yet have reporting location instructions for the next morning. (2/135:1-135:3) Victor did not say that he had been fired or terminated. (3/27:14-27:16) Yolanda tried twice to telephone Rene, but he did not answer. (2/136:15-136:17 and 3/30:1-30:9) Yolanda did not go to work at the blueberry farm. (1/96:11-96:13 and 2/140:21-141:3) Yolanda called Victor one more time during the week. (3/30:10-30:22) Victor indicated that he had heard nothing from Rene and that he (Victor) was going to start looking for work. (3/30:23-31:2 and 3/64:6-64:10) Rather, approximately a week later, Yolanda and Rigoberto went to work harvesting vegetables at Deardorff Farms in Oxnard. (2/142:4-142:16, 2/143:22-143:25, and 2/144:1-144:14, and 2/147:22-147:25) Unlike Cinagro, Deardorff provided insurance and pay stubs. (2/151:8-15)

5. Rigoberto Perez Martinez

Rigoberto first worked in Victor Mendoza's crew at Deardorff Family Farms, possibly for two years. (3/83:19-83:25, 3/111:8-111:16 and 3/133:25-134:3) When he worked at Cinagro, there were two ranches. (3/88:23-88:25) One ranch was in Fillmore and the other ranch was in Moorpark. (3/89:1-89:2) Victor Mendoza continued as his foreperson at Cinagro and would advise Rigoberto as to which ranch to report, either at work or via the telephone. (3/89:11-89:16) Victor's supervisor was Rene Macias. (3/89:24-89:25) Rigoberto's wife, Yolanda Antonio Garcia, was also in his crew. (3/128:9-128:22) Rene told Rigoberto that he and his wife Yolanda were good workers. (3/93:20-93:22 and 3/94:19-94:23)

At Cinagro, Rigoberto harvested green kale, black kale and red kale. (3/85:8-85:18) Rigoberto reported completed boxes to his foreperson, who recorded the tallies. (3/85:16-85:22) In this manner, Rigoberto typically worked ten hour days on Monday through Saturday and was paid piece-rate on a weekly basis. (3/87:11-87:14, 3/89:3-89:10 and 3/113:14-113:16)

A. Paystub Issue

When Rigoberto received his first Cinagro check, there was no accompanying paystub. (3/95:23-96:1) He and his wife spoke to foreperson Mendoza about the absence of a paystub. (3/96:4-96:12) Victor said that he would talk to the company and later relayed that Rene said that the paystub was not processed. (3/96:13-96:16) The next pay check also was unaccompanied by a paystub. (3/97:4-97:7) Rigoberto raised the issue again with Victor and thereafter also spoke about it with Rene. (3/97:8-

97:18) He and his wife explained to Rene that they needed the paystubs for their children to get services at medical clinics. (3/97:24-98:1) Rene advised Rigoberto and Yolanda that the company was in the process of creating paystubs. (3/97:17-97:19 and 3/98:2-98:4)

Cinagro eventually provided documents accompanying the paychecks, but they did not include the boxes or amounts. (3/98:5-98:15) After that, the crew spoke with Rene about the paystub situation in approximately February 2017. (3/99:15-99:24) Rene again reiterated that the company was in the process of generating paystubs. (3/100:9-100:10)

B. Water Issue

When Victor Mendoza was his foreperson at Deardorff farms, the employer provided water to his crew. (3/131:5-131:8) At Cinagro, Victor brought the crew water and they provided Victor with their recyclables. (3/132:6-132:12) Rigoberto never gave Victor cash for water at work. (3/132:13-132:16)

C. End of Work at Cinagro

Approximately three weeks after the above-described meeting with Rene, Cinagro stopped providing work. (3/100:18-100:22) Rigoberto called Victor, who advised him that there was no work until further notice. (3/101:1-101:5) Neither Victor nor Rene ever specifically said that he was fired or terminated. (3/114:12-114:25) Rigoberto called again and Victor told him the same thing, there was no work until further notice. (3/102:18-102:19) Rigoberto also called Rene directly, but Rene did not answer the phone. (3/102:19-103:2 and 3/130:9-130:12) Approximately seven

to ten days after work ended at Cinagro, Rigoberto went back to his prior employer, Deardorff Farms. (3/108:13-108:17 and 3/115:20-115:23) Deardorff Farms provided Rigoberto with both medical insurance and also provided drinking water. (3/116:10-116:22) Deardorff Farms provided paystubs to the workers and his amount of pay was almost the same. (3/117:13-117:22)

6. Maria Angelica Santiago

Maria Santiago worked at Cinagro harvesting vegetables. (3/154:13-154:154) Her foreperson was Victor, and the supervisor was Rene. (3/154:15-23)

A. Water Issue

Maria testified that the crew brought its own water. (3/155:155:20-155:23) Supervisor Rene did not bring the crew water. (3/156:17-156:23) While Rene did not bring drinking water to the crew, foreperson Victor did bring water on his truck for the crew every day. (4/18:17-18:22)

B. Paystub Issue

Cinagro did not provide the workers with paycheck stubs. (3/158:14-158:17) The crew complained about the absence of pay stubs. (4/22:11-22:19) Rene told the crew that the company was working on it. (2/22:20-22:22)

C. Finger Injury and Last Day of Work

During her last two weeks at Cinagro, Maria saw a second crew working at the farm. (28:25-29:9) On her last day while working at Cinagro, Maria cut her finger. (3/160:14-160:16) Thereafter, Rene and Tony arrived at the scene. (3/160:23-160:25) Maria's cut was very deep but the company discouraged her from going to the doctor,

only giving her ointment. (3/161:2-161:25) Rene told her to take the days that she needed for her finger to heal. (4/5:16-5:18) Maria later went to urgent care, where they provided Maria with paperwork saying that she could not work for two weeks. (3/162:7-162:14) The following Tuesday, Maria dropped off that paperwork with the company at their Fillmore site. (4/8:1-8:8 and 4/12:2-12:5)

On cross-examination, Maria acknowledged that her last day of work was Saturday, March 4, 2017. (4/11:4-11:6) Maria testified that she thought that the day that she cut her finger was the last day of work for her crew. (4/59:2-59:11) Respondent's Exhibit Number One shows Maria Santiago receiving pay for Friday, March 3, 2017, but not on Saturday, March 4, 2017. Based upon the testimony and documentary evidence, I find that it is most likely that Maria Santiago cut her finger on Friday, March 3, 2017. In any event, whether Maria's last day was March 3, 2017, or March 4, 2017, appears inconsequential to resolving the determinative issues in this matter.

After two weeks had passed, Rene called Maria and told her that she could pick up a paycheck for the two weeks because her finger was cut. (4/9:2-9:4 and 4/63:16-63:22) During that call, Maria asked if she could return to work. (4/9:4-9:5, 4/52:23-52:25, 4/57:1-57:4 and 4/58:8-58:13) Rene told Maria that there was no work at the moment and that he did not know if there would be future work. (4/9:7-9:16) Victor also indicated that there was no work until further notice. (4/16:1-16:4) Neither Rene nor Victor ever told Maria that she had been fired or terminated. (4/16:19-16:25) But no one from Cinagro ever called her after that to offer work. (4/9:20-9:24)

D. Employment at Blueberry Farm

Maria eventually sought work and was hired at the blueberry farm. (4/13:2-13:4 and 4/14:9-15:2) It may have been three weeks from Maria's last day at Cinagro until she started work with the blueberry farm. (4/29:21-29:24) The blueberry farm provided her with paystubs, drinking water and health insurance. (4/14:25-15:9) Maria received higher pay at the blueberry farm than what she had received at Cinagro. (4/15:19-15:22)

7. Victor Mendoza

Victor Mendoza had a crew with Mike's Farm Labor at Deardorff Farms. Marisol and Hector were also part of his crew at Deardorff Farms. (5/73:5-73:15) Victor knew crew member Marisol Jimenez even before he worked for Mike's Farm Labor. (5/63:9-63:19) Apart from work, Victor was friends with Marisol and her partner Hector. (5/64:14-64:16) Most of his crew came with him when the crew changed jobs. (5/73:21-73:23)

Victor Mendoza began working at Cinagro in summer 2016. (4/76:11-76:17) He initially went to work there through the same contractor, Mike's Farm Labor under which he had worked at Deardorff Farms. (4/76:18-76:24 and 5/29:14-29:16) Arturo, who was also known as Art, was Mike's brother or son. (4/78:23-78:25 and 5/94:1-94:3) After working for Mike's Farm Labor, the crew then worked for Art's Farm Labor. (5/30:6-30:9 and 5/31:3-31:5) Victor does not know why his crew was shifted from Mike's Farm Labor to Art's Farm Labor. When they moved to Cinagro, his crew had about ten workers. (4/77:10-77:14)

The crew harvested black kale, green kale, red kale, cilantro, radishes, cabbage, lettuce and anise. (4/85:15-85:18 and 5/82:20-82:24) As the crew foreperson, Victor was paid hourly. (4/77:7-77:9 and 4/85:19-85:21) After a couple months, the crew was directly hired by Cinagro. (4/77:24-78:18 and 5/31:6-31:9) Rene indicated that the work conditions were going to remain the same. (4/82:6-82:7) The crew was typically paid on a Friday for the preceding Monday through Saturday. (5/84:3-84:14)

At Cinagro, Victor received the crew's work instructions from Rene, who was the supervisor. (4/77:15-77:23 and 4/78:21-78:22) Rene would tell Victor where they were going to work the next day. (5/14:13-13:14) The only exception would be if it would rain. (5/14:2-14:3) Victor kept track of the number of boxes of vegetables harvested by each crew member and provided written tallies to Rene. (4/85:22-86:17) Rene added to his crew two workers that were already at Cinagro. (4/84:18-84:24 and 4/85:12-85:14) After the crew was directly hired by Cinagro, workers were given access to only a single bathroom in the field, whereas previously there had been separate bathrooms for male and female workers. (4/87:1-87:23) If workers had a complaint, Victor would inform Rene. (5/37:10-37:13 and 5/62:13-62:16)

A. Paystub and Deduction Issue

At Cinagro, the crew was typically paid on a Friday for the preceding week's work. (4/105:18-105:23) Cinagro paid the crew with checks that were unaccompanied by pay stubs and that did not specify the usual government deductions. (4/80:12-80:22) When Victor refers to the checks as personal checks, what he means is that the checks were handwritten and were unaccompanied by traditional paystubs. (5/32-32:19) The

crew talked to him about the lack of paystubs. (4/106:3-106:23 and 5/38:9-38:12) Victor told the crew that he would speak to Rene about it. (4/106:24-106:25) Later that day, Victor spoke with Rene on the telephone and asked about the missing paystubs. (4/107:1-107:10) Rene told him that he would inquire with the office about when paystubs would be available for Victor to pass that message along to the crew. (4/107:11-107:23)

When the crew received their next checks, there were still no pay stubs. (4/108:20-108:24) The crew then asked for a meeting with Rene on the subject. (4/108:25-109:2) Victor advised Rene that the crew wanted to meet with him and Rene showed up approximately one hour thereafter. (4/111:17-111:25) Victor did not hear the conversation because he was doing work over by the truck. (4/112:20-23) But immediately afterwards, Rene approached Victor and told him that he had advised the crew to wait a little bit longer for the office to process pay stubs. (4/113:2-113:20 and 4/114:24-115:1)

Following that meeting with Rene, when the crew received their next checks there was a document that accompanied the checks, but it was not a pay stub. (4/117:2-117:6) When the crew received this new document, they asked to speak again with Rene. (4/123:13-123:25) Victor again advised Rene that the crew wanted to speak with him. (4/124:4-124:6) Rene advised Victor that he would come to the ranch the following morning, which he did. (4/124:7-124:19) At the meeting, the workers again told Rene that they wanted a pay stub that specified the deductions. (4/124:20-124:23) Rene responded that he would call the office again to see what could be done.

(4/125:3-125:6) Rene later told Victor that he did not know how long that it would take to revise the pay stubs, news which Victor passed along to the crew. (4/126:2-126:13)

Victor also indicated that Cinagro did not provide the crew with worker's compensation insurance, knowing this from when two workplace injuries had occurred. (4/94:13-94:15)

B. Other Crew

When Victor first arrived at Cinagro, they were the only crew working there. (4/126:15-126:19) Later, there was a second crew at Tierra Rejada that worked separately from Victor's crew. (4/128:16-128:18, 4/129:18-129:25 and 5/40:5-40:6 and 5/40:17-40:19)

C. Water Issue

Victor testified that the farm labor contractor paid him one extra hour per day to move the bathroom and to set up water. (4/88:1-88:4 and 5/33:12-33:14) Victor alleges that Cinagro paid him only his regular work hours, not for the crew's water, which he had to pay for out of his own pocket. (4/88:6-88:9 and 5/33:15-34:6) See infra the testimony of Rene Macias who testified that the company paid Victor one extra hour per day which covered the expense of the water. (7/133:2-133:13) When Victor purchased water, he went to a machine outside a supermarket and used the machine to fill up the large plastic jugs on his pickup truck. (4/90:5-90:22 and 5/76:8-76:22) There were a couple of days when the company brought water, but he and the crew tasted the water and found it unsatisfactory. (4/89:5-89:16, 4/92:2-92:4, 4/92:17-

92:21, 5/34:14-34:17 and 5/77:11-77:22) Victor told Rene that the company's water tasted bad. (5/77:23-77:25)

D. Maria Santiago's Cut Finger

When crewperson Maria Santiago cut her finger, Victor reported it to Rene. (5/15:6-15:24) Victor had no knowledge of whether or not Maria was paid for her lost work time. (5/50:25-51:3)

E. Last Day of Work

Victor recalls that the crew's last day of work fell on a Saturday and that, on that day, the crew only worked until noon. (4/131:2-131:3) They stopped at noon because Victor called Rene and said that there was not enough work to keep going that day. (4/131:16-131:18) When Victor's crew stopped, the other separate crew was out there still working. (4/132:3-132:5) On that Saturday, Rene told Victor that he would let him know if there was work on Monday. (4/131:4-131:7) Rene then called Victor on Sunday and told him that there was no work for his crew the next day, Monday. (4/132:6-132:11) Victor passed this information along to his crew. (4/132:12-132:15) Rene called Victor that Monday and indicated that there would be no work the next day, Tuesday, and that Victor should advise the crew accordingly. (4/132:18-132:22)

Victor advised his crew that there was no work on Tuesday and while talking to two of the crew members, he was told that they saw the other separate crew working at Tierra Rejada on Monday. (4/132:23-133:7) On Wednesday of the same week, Victor then received a call from Rene. (133:15-133:17) In that call, Rene told Victor that, due to a lack of work, Victor's crew was going to stop working and that Victor's should

pick up the crew's checks on Friday. (4/133:18-133:19 and 4/144:17-144:19) In the same call, Victor told Rene that the other crew had worked on the Monday two days earlier and Rene denied it. (4/134:6-134:16)

In this last call on Wednesday, Rene told Victor that there was not a specific day to return to work. (4/134:24-135:2) On the Friday, Victor went to the Moorpark ranch to pick up checks from Rene for him and his crew. (4/135:3-135:10, 5/11:21-11:24, 5/46:14-46:20 and 5/8712-87:19) There were two checks for Victor and two checks for each crew member. (5/9:23-9:25) When Victor met Rene, he was told by Rene that due to lack of work, it was unknown when the crew would return to work. (4/135:14-135:21) Rene said that the crew was off until further notice. (5/88:25-89:2) Rene said that there wasn't much work, and that he would call Victor when there was work, but no call was ever received. (4/135:21-135:22, 5/5:25-6:4, 5/51:13-51:20 and 5/91:5-91:8) It was not the end of the harvest season for any of the crops, nor did Rene make such an allegation. (5/85:10-86:21)

Victor then made arrangements that same day to meet his crew members and distribute their checks. (4/136:6-136:12 and 5/46:25-7) When distributing the checks at a park in Oxnard, Victor told his crew what Rene had indicated. (4/136:13-136:16, 5/5:25-6:4, 5/47:8-47:10 and 5/49:8-49:11) The crew was bothered by that and understood Rene's comments to mean that Cinagro would not be calling them back for further work. (4/136:17-136:19, 4/140:23-141:2 and 5/90:4-90:7) Seeing the other crew still working, Victor's crew felt it was obvious that they were being fired. (4/144:2-144:3) Because Rene gave Victor two checks for each worker, this further

reinforced his believe that the company was firing his crew. (4/144:14-144:16, 4/146:23-147:6 and 4/148:3-148:4)

Victor did not find work until a few weeks after his last day of work at Cinagro. (5/53:9-53:13) Out of necessity, Victor sought jobs as a worker, not solely as a foreperson. (5/74:7-74:12)

8. Barbara Ito

Barbara Ito is the owner of a small bookkeeping business called Five Star Bookkeeping. (5/113:16-113:18) Barbara has run her business for approximately twenty-five years. (5/114:11-114:12) One of Ms. Ito's specialties is agricultural payroll. (5/114:7-10 and 5/114:19-144:20) At present, Barbara prepares payroll for eight agricultural employers. (5/115:5-115:8)

Barbara current performs payroll work for Cinagro. (5/115:21-115:23) She started performing work for Cinagro in February 2017. (5/116:1-116:7 and 5/117:17-117:19) Tony Dighera wanted Barbara to make the calculations so he could pay workers the correct wages for piece rate and hourly work. (5/117:21-118:1) Tony only had Barbara work on new payroll, he did not have Barbara review or work on past payroll. (5/156:6-156:9) The company provided Barbara with worker timesheets. (5/118:19-118:22) Tony Dighera instructed Barbara to calculate gross pay so Barbara did not calculate any withholding. (5/119:4-119:14 and 5/120:3-120:8) Tony told Barbara that the workers would be treated as vendors or independent contractors. (5/127:15-127:25) None of Barbara's other agricultural clients at the time treated the

workers as vendors. (5/137:8-137:10) To this date, that is how Barbara calculates the Cinagro payroll. (5/119:15-119:24)

Barbara recalled that in February 2017, a Cinagro employee named Arlis wrote by hand the employee checks out of the company checkbook. (5/120:17-120:23) Barbara prepared a document to accompany the checks which showed the hours worked, the pieces harvested, what each piece was worth, and the wage calculation. (5/122:6-122:14) Barbara then gave these documents to Arlis. (5/123:11-123:14) A few weeks later, Barbara began printing checks from her software program. (5/120:23-120:25) Barbara believes that General Counsel Exhibits Two, Three, Five, and Six are all documents that her office generated. (5/15-157:7) Barbara does not have in her office copies of any of the Cinagro checks. (5/170:18-171:2)

9. Maria Lauriano

Maria Lauriano first worked for Cinagro in 2015. (6/34:17-34:19) She was sometimes called Doña Marie. (7/136:10-136:11) Rene was the person who hired her. (6/49:21-49:24) She harvested vegetables, parsley and cilantro. (6/50:9-50:12) In 2015, Maria received instructions either from Rene or Andres. (6/51:1-51:4) Maria recalled receiving company checks, but not a paystub. (6/50:5-50:10) Later, Marie worked for Cinagro in 2016-2017. (6/35:9-36:3) When Victor arrived, Maria was put in his crew. (6/52:23-53:18) Ignacia was added to Victor's crew at the same time. (6/54:11-54:13 and 6/83:2-83:6) Maria and Ignacia often ate their lunch together and apart from the other members of Victor's crew. (6/14-87:21) At Cinagro, she was paid on a Friday or Saturday. (6/38:19-38:21) When the Assistant General Counsel asked

Marie if she recalled harvesting a particular vegetable on two specific days four years earlier, she did not. (6/61:15-61:17)

A. Water Issue

There was water for the workers in Victor Mendoza's truck. (6/43:25-44:4) The water was in yellow jugs. (6/51:9-51:11) Maria does not know how the water made its way into the jugs. (6/51:12-51:22) Maria was never asked to pay for water. (6/44:5-44:7) Maria never heard any of the crew complain about the water. (6/51:25-52:3) When asked slightly different questions, Maria repeatedly volunteered that the crew always had water. For example, when counsel asked if Rene had ever brought water the answer was that the crew always had water. (6/44:8-44:13) When asked if Marisol had raised the water issue with Maria in a phone call, Maria responded that the crew always had water. (6/46:2-46:8) Maria never raised concerns with either Victor or Rene. (6/47:24-48:5)

B. Paystub Issue

Maria did not remember a meeting where the crew complained about the missing paystubs. (6/52:4-52:7 and 6/52:11-52:16)

C. Crew Member That Cut Finger

Maria did remember that a female member of Victor's crew had cut her finger at work. (6/84:20-84:23) Maria recalled that the crewperson cut her finger and that someone drove the woman to the doctor. (6/84:24-85:2 and 6/88:9-88:12) Maria later conceded that she really didn't know if the worker went to the doctor or not, that Maria simply went back to work. (6/88:17-88:25)

D. End of work and Subsequent Employment

Rene never said that she was fired. (6/43:15-42:17) Rather, the company said that it was a layoff both because there had been a lot of rain and also because it was getting hot. (6/43:18-43:20) Maria seemed to try to work the "rain" topic into her testimony at times when it was not responsive the question proffered. (6/62:1-62:10) So the company just said that there would be no work until further notice and that they would let the workers know when to come back. (6/43:22-43:24) Maria received her last paycheck directly from Rene. (6/40:19-40:23) After her last day of work, Maria applied one week later for work at the blueberry farm. (6/41:4-41:9 and 6/41:18-41:21) Maria stayed at the blueberry farm until the season ended. (6/42:9-42:11)

E. Telephone Calls from Rene Macias and Marisol Jimenez

Around February 10, 2021, Marisol Jimenez called Maria and asked if she wanted to join the lawsuit. (6/36:18-36:20 and 6/45:8-45:18) Marisol did not say anything unethical to Maria and Maria hung up right after indicating "no" to Marisol. (6/86:10-86:20) This was the day after Rene had called her. (6/72:22-72:24 and 6/87:1-87:6) Rene had called to inquire if Maria could appear at this hearing. (6/77:6-77:9) Maria said that she did not want to join the lawsuit because the company treated the workers nicely, bringing them coffee and chicken. (6/46:20-46:21) Maria called Rene to tell him about Marisol's phone call. (6/70:1-70:23 and 6/73:3-73:5)

F. Transportation to Hearing

When Maria was asked if someone had driven her to the hearing, she replied, "A friend". (6/80:16-80:18 and 6/81:12) Maria was then asked if she had seen Rene that

morning, and she testified "No". (6/81:16-81:17) Her answer was refuted the next day by the testimony of Rene Macias, who admitted that he had drove Maria Lauriano to the hearing on the preceding day. (7/147:6-147:8) Rene testified that he had offered to reimburse Marie for Uber or gas money, but that she had asked him to drive her. (7/205:7-206:22)

10. Ignacia Sanchez

Rene was the person who first hired Ignacia to work at Cinagro. (6/108:12-108:13) Initially, Ignacia with a small group of workers at Cinagro, Victor's crew did not start until a later time. (6/108:10-108:11) Maria Lauriano also worked in that small group. (6/109:16-109:17 and 6/132:23-133:1) While in the small group of workers, Rene was the person who brought the water and bathrooms. (6/129:6-129:13) Ignacia has known both Rene and Maria for many years, but she did not know who owns Cinagro. (6/131:3-131:17) At Cinagro, Ignacia was paid on Fridays. (6/97:8-9715)

Ignacia works for a different company as a quality control inspector for chilies. (6/113:14-113:15) Ignacia spends about seven months working with the chilies. (6/113:23-113:25) Cinagro always gives her work when she returns from the chilies. (6/114:1-114:3) One time, when Ignacia went back from the chilies to Cinagro, Victor's crew was there. (6/113:13-113:16)

A. Water Issue

Ignacia testified that there was always water at the field when she worked at Cinagro. (8/112:2-112:5) Ignacia was not aware of either the company or the crew paying Victor to get water. (6/133:2-133:5) However, Ignacia would bring her own

water to work. (6/112:20-112:24) Ignacia never heard the workers in Victor's crew complain about water. (2/119:13-119:16) Nor was Ignacia ever at a meeting where the workers complained about the water to Rene. (6/119:17-119:19) Ignacia recalls the boss bringing Starbucks coffee and bread to the workers. (6/125:1-125:2)

B. Pay Stub Issue

Ignacia never heard the workers in Victor's crew complain about the lack of a paystub. (6/124:4-124:7) Nor did Ignacia recall whether Cinagro took payroll deductions from her pay. (6/111:10-111:14)

C. End of Work and Last Check

Victor called Ignacia and told her that there was no work until further notice. (6/102:1-102:2) Ignacia told Victor that she had found a job at the blueberry farm. (6/102:4-102:6)

The last day that Ignacia worked with Victor's crew was Saturday, March 4, 2017. (6/98:898:14) Ignacia went with Maria Lauriano to pick up her last check. (6/98:21-98:24 and 6/101:8-101:9) Ignacia received her last check from Rene. (2/106:5-106:8) In September 2017, Ignacia went back to work for Cinagro. (6/143:16-143:18)

D. Telephone Calls from Rene Macias and Marisol Jimenez

On approximately Monday, February 8, 2021, Ignacia received a telephone call from Rene Macias. (6/126:7-126:12) Rene told Ignacia that he needed her to testify at this hearing. (6/126:17-126:19) Approximately two days later, on Wednesday morning, February 10, 2021, Ignacia received a telephone call from Marisol Jimenez.

(6/102:7-102:18 and 6/126:11-126:12) Marisol told Ignacia that she had some questions related to a government investigation of Cinagro. (6/102:19-102:25) Ignacia testified that Marisol told her to say that the crew did not have water. (6/103:10-103:12) She added that Marisol then said Ignacia could just say that Victor had to go get bottled water. (6/103:19-103:20)

11. Anthony ("Tony") George Dighera

Tony Dighera is the sole owner of Cinagro, starting the company in approximately 2004. (7/29:3-29:7 and 7/78:18-78:20) The company grew row crops, including organic vegetables such as kale, cilantro, parsley and lettuce. (7/30:6-30:17) The company name Cinagro is "organic" spelled backwards. In approximately 2010, Tony hired Rene Macias to be the supervisor, and Rene continues in that capacity at present. (7/35:4-35:6 and 7/35:24-35:25) During the pertinent time periods, Rene was in the field most days. (7/35:9-35:23) Tony and Rene would communicate either in-person, by telephone call or by text message. (7/36:8-36:10 and 7/109:24-110:1)

Tony states that he was never in attendance for a meeting with workers during January 1, 2017 through March 4, 2017. (7/8:2-9:19) Tony was present on a couple of occasions when Rene showed the crew how to carefully bunch and pack a box. (7/40:4-40:25) If Tony was ever to talk to a worker, Rene would always have been his interpreter. (7/10:10-10:12)

A. Paystub Issue

As of 2016, Tony had always used labor contractors to provide workers. (7/4:11-4:14) The Victor Mendoza crew came to his company near the end of 2016.

(7/7:9-7:14) Workers were paid with company checks that had the dollar amount written in by hand and that were signed by Tony himself. (7/7:15-8:13) Workers were paid on a Friday following the last day of work of the previous week. (7/17:6-17:10)

Tony testified that his company's wage and hour practices did not comply with the law during that period of time. (7/19:4-19:7 and 7/91:1-91:16) Tony admitted that he was concerned that their practices could result in penalties or fines. (7/91:19-91:22) Tony had one office worker named Arlis, but it was Tony and Rene who handled the payroll. (7/58:21-58:23, 7/59:19-59:24 and 7/62:1-62:3) Tony eventually hired Barbara Ito to handle company payroll, something that she still does for the Cinagro. (7/57:3-57:7 and 7/60:23-60:25) Tony denies having instructed Barbara Ito to classify the workers as vendors. (7/61:5-61:7) Tony concedes that he did not request Barbara Ito to transition the workers from vendors to employees. (7/71:19-71:23)

When the company first absorbed the labor contractor crew, Tony had Rene explain that Cinagro was not set up to do regular payroll and that the company would get to it as soon as possible. (7/65:11-65:14, 7/66:12-66:21 and 7/69:11-69:12) Rene told Tony that the workers later inquired when the payroll issues were going to be straightened out. (7/64:20-64:22) Tony had Rene tell the workers that the company was working on it. (7/64:22-64:23) Tony conceded that due to other competing demands for his attention, he did not want to make the change. (7/66:21-67:2)

Tony does not recall hearing anything further on the subject after Barbara Ito took over responsibility for payroll. (7/72:16-72:22)

B. Water Issue

Victor was paid to bring water to the crew every day. (7/10:13-10:20) The company paid Victor an extra hour for every day to compensate him for bringing water to his crew. (7/11:11-11:14) The company has its own reverse osmosis water system at the Fillmore Ranch. (7/89:21-90:5)

C. Termination of Victor's Crew and Hiring of Separate Crew

Tony alleges that the attendance for Victor's crew got worse after they transitioned from the labor contractor to working directly for the company. (7/33:21-33:22) Tony recalled that during the last couple weeks, there were at least two days when Victor did not show up for all or part of a day. (7/45:11-45:16 and 7/46:5-46:18) Until the last couple weeks, Rene was not unhappy with Victor. (7/47:24-48:3 and 7/116:22-116:25) Tony and Rene never had a conversation about whether Victor's absences rose to a level that was detrimental to Cinagro. (7/117:18-117:24)

Rene never told Tony that he wanted to replace Victor's crew. (7/47:15-17) Tony never told Rene or Victor to tell the workers that they were terminated in 2017. (7/12:9-12:14) During this time period, Tony was dealing with extremely difficult family health issues. (7/25:14-25:21) Shortly before Victor's crew stopped working, Cinagro started a separate crew. (7/12:15-13:14:11 and 7/85:1-85:4) Tony testified that the hiring of the other crew was an indicator that the company had work that needed to be completed. (7/93:10-93:15 and 7/94:11-94:12) Eventually, Andres Cruz served as the foreman of the other crew. (7/62:10-62:22 and 7/58:5-58:6) Tony viewed the two crews as equally skilled. (7/86:11-86:18)

To Tony's knowledge, Rene never would have told Victor's crew that there was no work, except if due to weather conditions. (7/95:4-95:8, 7/96:5-96:8 and 7/102:3-102:9) Tony said that there was always work during that time period. (7/95:13-95:14) Rene told Tony that Victor's crew was not returning. (7/74:5-74:12) Tony understood that the crew had left to get a better job. (7/94:17-94:19) Tony received a phone call from Rene that no one had shown up. (7/94:21-94:23 and 7/99:12-99:24) Tony was unaware that any of the crew wanted to work that day. (7/97:1-97:4) When Victor's crew stopped working, the company needed more workers. (7/102:13-102:17)

D. Telephone Call to Josh Waters at Silent Springs Blueberry Farm

After Tony learned of the ALRB charge, he spoke with Josh Waters, co-owner of the Silent Springs blueberry farm. (7/75:8-75:22 and 7/113:2-113:4) It must have been Rene who told him that some of the former workers were now at the blueberry farm. (7/104:14-104:17) Josh Waters confirmed for him that some of Victor's crew listed on the ALRB charge now worked for Silent Springs. (7/75:23-76:1 and 7/77:3-77:10) Tony called Josh because confirming the employment status of his former workers might be helpful with respect to the ALRB charge. (7/104:18-106:12)

12. Rene Macias

In approximately 2008, Rene Macias started working at Cinagro. (7/172:7-172:10) In approximately 2011, Rene became Cinagro's general manager. (7/130:12-130:13 and 7/174:8-174:14) He does not have an ownership interest in the company. (7/174:15-174:16) Rene denied having spoken with Cinagro's attorney about his testimony in the month prior to the hearing. (7/147:14-148:11 and 7/202:11-202:22)

At the beginning, there was a small group of workers that included Ignacia Sanchez and Marie Lauriano. (7/174:17-174:20 and 7/199:4-199:7) Rene was the person who gave directions to those workers. (7/174:21-174:23) Then the company brought in the crew where Victor Mendoza was the foreperson. (7/130:14-130:16) The crew was initially brought in through farm labor contractors. (7/199:17-200:15) Rene was the person who gave instructions to Victor. (7/179:3-179:7)

Rene testified that he had a lot of problems with Victor's crew. (7/154:15-154:16, 7/176:19-176:21 and 7/201:7-201:10) Rene stated that the workers that Victor was bringing from Oxnard were not doing a good job. (7/154:15-154:18) There was one occasion when Victor needed to leave early and asked Rene to supervise his crew for the rest of the day. (7/193:21-193:25) Rene said that Tony frequently visited the crew, bringing warm beverages when the temperature was cold, and cold beverages when the weather was warm. (7/181:7-181:17) A second crew started work almost two weeks before Victor's crew ended. (7/130:21-130:24) Rene testified that the second crew was willing to do whatever was needed whether it was harvesting or weeding. (7/155:15-155:17) Rene also testified that the second crew did not have product rejected, which made his job less stressful. (7/201:14-201:18)

A. Water Issue

Victor was assigned to bring water to his crew. (7/132:16-132:21) Although Victor started and ended his day at the same time as the rest of his crew, Victor was paid one extra hour of time every day which covered his expense for the water. (7/132:2-132:13 and 7/186:1-186:25) Rene denied ever bring water to Victor's crew

from the company's reverse osmosis system. (7/188:1-188:8) Rene claimed that he always tasted the water to make sure that the taste was acceptable. (7/133:14-133:18)

B. Paystub Issue

There was never a meeting where the workers complained about the lack of a pay stub. (7/142:14-142:19) Rene testified that the workers brought up the paystub issue when they first started to directly work for the company, but never again raised the topic. (7/189:4-189:12 and 7/190:20-190:22) But Rene later conceded recalling workers who needed the paystubs for schools or Medi-Cal. (7/191:12-192:19) Rene testified that Tony told him that the change had been made. (7/203:7-203:11)

C. Worker Who Cut a Finger

Rene did recall that a worker in Victor's crew cut their finger. (7/204:1-204:3) Rene's recollection was that the worker came back to work after their finger had healed. (7/204:2-204:3)

D. Crew's Last Day

Following the crew's last day, Rene did not tell Victor that there was no more work. (7/153:5-153:6) Rene told Victor that the only work the next day was weeding in Moorpark. (7/153:2-153:8 and 7/208:22-209:5) Rene did not call Victor when the company received product orders because his crew was missing a lot and that were not enough orders to call the whole group back. (7/172:1-172:6) Rene testified that the second crew did mostly weeding the following week. (7/194:21-195:2) Rene told Tony when Victor's crew did not show up. (7/209:6-209:16) Tony told Rene that if

Victor's crew did not want to weed, the company would not force them to do so. (7/209:15-209:16)

One day when Rene left the Moorpark Ranch, he took a different route due to traffic and saw Ignacia Sanchez and Marie Lauriano crossing the street from the blueberry ranch. (7/138:18-138:25, 7/196:2-196:3 and 7/197:9-197:10) Even prior to seeing the workers leave the blueberry ranch, Rene presumed that they had left Cinagro because they did not like weeding. (7/207:8-207:13) Rene asked Ignacia and Marie who else from the crew worked there. (7/139:22-139:24) Rene also saw Marisol and Hector departing the blueberry ranch. (7/139:24-140:10 and 7/197:16-197:17)

E. Distribution of Final Checks

Rene gave most of the checks for the crew to Victor. (7/135:1-135:3) Most of the crew lived closer to Oxnard, those checks were given to Victor. (7/135:4-135:5) When Rene gave Victor those checks, he told Victor that there were not a lot of product orders. (7/137:10-137:11 and 7/148:13-148:19) Rene testified that he told Victor that there was weeding work available for his crew. (7/137:11-137:12 and 7/143:9-143:10) Rene indicated that Victor told him he would check because his crew did not like to weed. (7/137:13-14) Rene told Victor that if orders come in, the crew can go from weeding to harvesting. (7/149:18-149:23) Rene did not terminate Victor's employment. (7/144:17-144:18)

Two workers lived closer to Fillmore and Santa Paula and Rene gave checks directly to those two workers. (7/135:6-135:7) The latter two workers were Ignacia Sanchez and Marie Lauriano. (7/136:6-136:10) Rene testified that both of these

women were sometimes called Doña Marie. (7/136:10-136:11) Approximately three to four months later, Ignacia called Rene seeking work, but no one else did. (7/194:2-194:6)

V. DOCUMENTARY EVIDENCE

There were fifteen exhibits in this case. The exhibits include General Counsel's exhibit numbers one to thirteen, Respondent's exhibit number one, and a joint stipulation on authenticity and admissibility of exhibits. General Counsel's exhibit number thirteen was not offered for admission; all of the other exhibits were admitted either by stipulation or by ruling of the ALJ.

1. General Counsel's Exhibit Number One

This exhibit is a copy of the charge. The charge was filed on March 13, 2017. The charge states:

> On or around March 4, 2017, Cinagro Farms, Inc., through its representatives and agents, Rene Macias, and others, discriminatorily terminated the employment of Marisol Jimenez, Hector Vazquez, Maria Duarte, Victor Mendoza, Maria Santiago, Yolanda Antonio and Rigoberto Perez because they engaged in protected concerted activity.

The words "and others" are added to the list of names of discriminates along with an arrow. In both of the spots with the word "others" and the spot with the word "because" the photocopy seems to show a smudge or white-out tape under the word. I would urge the General Counsel to cross out corrections with only a single line rather than to use white-out so that no one falsely concludes that any changes were after the

date that the charge was filed. Either that or if the draft has not yet been stamped as filed, then re-write the document and have the charging party sign the new draft. The Respondent did not raise this issue and so I have treated the charge as if there were no smudges or white-out. The parties stipulated to the admission into evidence of General Counsel's Exhibit Number One. I accepted the parties' stipulation to admit exhibit one. (2/40:6-40:7) General Counsel's Exhibit One was admitted on February 24, 2021. (5/24:4-24:5)

The charge says nothing about personal checks, pay stubs or lack of access to water in the fields.

2. General Counsel's Exhibit Number Two

This exhibit shows March 10, 2017 pay information for foreperson Victor Mendoza. There is nothing in this exhibit which proves or disproves that Respondent paid the foreperson an extra hour of wages per day to cover the foreperson's expenses for getting water for the crew. On February 26, 2021, I admitted General Counsel's Exhibit Number Two into evidence. (4/120:2-120:14 and 5/24:4-24:5)

3. General Counsel's Exhibit Number Three

This exhibit shows March 10, 2017 pay information for crew member Rigoberto Perez. It is Bates number CP00005. I admitted General Counsel Exhibit Number Three into evidence.

4. General Counsel's Exhibit Number Four

This exhibit is comprised of five pages. Each page is a low quality color print of a photograph. The five pages have Bates numbers CP00008, CP00009, CP00010,

CP00011 and CP00012, respectively. The first page, CP00008, is a picture with a wire fence in the foreground, a field in the middle, and in the far background there is a hill. You can see a white pickup truck and another car off to the right. The second page, CP00009, shows multiple workers bent over in the field. The third page, CP00010, is even blurrier than CP0009. It seems to also show workers in the field, though if I saw CP00010 in the absence of other photos and testimony, I would be hard pressed to say that the workers were indeed workers. The fourth page, CP00011, and fifth page, CP00012, are similar to the first page, CP0008, except that CP0008 zooms slightly closer.

On February 24, 2021, I admitted General Counsel's Exhibit Number Four into evidence. (2/71:14-71:25, 2/73:9-73:13 and 5/24:4-24:5) However, my decision affords very little weight to these photographs. It was appropriate to admit the exhibit in conjunction with witness testimony. But it is the testimony and not the photographs upon which I ultimately needed to rely, given that the images were distant and blurry.

5. General Counsel's Exhibit Number Five

This exhibit is comprised of eight pages. The eight pages have Bates numbers CFI 011025 to CFI 011032. The exhibit appears to be payroll information for the other crew at Cinagro. The first page is payroll information for Cesar Miranda. The second page is payroll information for Blanca Alejandre. The third page is payroll information for Pedro Torres. The fourth page is payroll information for Isidro Villavicencio. The fifth page is payroll information for Jose Ismael Pineda. The sixth page is payroll

information for Emiliano Cruz. The seventh page is payroll information for Ruth Macinas. The eighth page is payroll information for Franco Olivares.

These pages appear to show payroll charts that begins on "Day 25" and that ends on "Day 4" of the following month. The parties stipulated that "Day 25" refers to February 25, 2017 and that "Day 4" refers to March 4, 2017. I accepted the parties' stipulation to admit this exhibit. (5/24:16-24:22)

I see that on March 1, 2017, and also on March 2, 2017, the crew spent the full day doing weeding. On those dates, both Cesar Miranda and the other crew members were paid $11.00 per hour.

6. General Counsel's Exhibit Number Six

This exhibit is comprised of seven pages. The seven pages have Bates numbers CFI 000071 through CFI 000077. The first page has summary information about six members of the crew documented in exhibit number five. Two of those eight workers, Pedro Torres and Jose Ismael Pineda, are not part of this exhibit. Of the remaining six pages, the first page is payroll information for Cesar Miranda. The second page is payroll information for Franco Olivares. The third page is payroll information for Ruth Macinas. The fourth page is payroll information for Emiliano Cruz. The fifth page is payroll information for Isidro Villavicencio. The sixth page is payroll information for Blanca Alejandre.

The parties initially stipulated to the authenticity (but not admission) of these documents as being Cinagro weekly payroll records for March 6-12, 2017. The parties later stipulated to the admission of Exhibits Six through Nine. (5/20:1-20:10) I

admitted General Counsel Exhibit Number Six into evidence. (5/23:2-23:4) These records appear to show that the crew worked on March 6, 8, 9, 10 and 11, 2017, but that the crew did not work on Tuesday, March 7, 2017.

7. General Counsel's Exhibit Number Seven

This exhibit is comprised of eight pages. The eight pages have Bates numbers CFI 000094 through CFI 000101. The first page has summary information about seven members of the crew documented in exhibit number five. One of those workers, Pedro Torres, is not part of this exhibit. Of the remaining seven pages, the first page is payroll information for Cesar Miranda. The second page is payroll information for Franco Olivares. The third page is payroll information for Ruth Macinas. The fourth page is payroll information for Emiliano Cruz. The fifth page is payroll information for Jose Ismael Pineda. The sixth page is payroll information for Isidro Villavicencio. The seventh page is payroll information for Blanca Alejandre.

The parties initially stipulated to the authenticity (but not admission) of these documents as being Cinagro weekly payroll records for March 13-19, 2017. The parties later stipulated to the admission of Exhibits Six through Nine. (5/20:1-20:10) I admitted General Counsel Exhibit Number Seven into evidence. (5/23:2-23:4)

8. General Counsel's Exhibit Number Eight

This exhibit is comprised of eight pages. The eight pages have Bates numbers CFI 000122 through CFI 000129. The first page has summary information about six members of the crew documented in exhibit number five. Two of those workers, Pedro Torres and Jose Ismael Pineda, are not part of this exhibit. There is one new worker,

Efrain Ramos Morales. Of the seven pages that follow the summary page, the first page is payroll information for Cesar Miranda. The second page is payroll information for Franco Olivares. The third page is payroll information for Ruth Macinas. The fourth page is payroll information for Emiliano Cruz. The fifth page is payroll information for Isidro Villavicencio. The sixth page is payroll information for Blanca Alejandre. The seventh page is payroll information for Efrain Ramos Morales.

The parties initially stipulated to the authenticity (but not admission) of these documents as being Cinagro weekly payroll records for March 20-26, 2017. The parties later stipulated to the admission of Exhibits Six through Nine. (5/20:1-20:10) I admitted General Counsel Exhibit Number Eight into evidence. (5/23:2-23:4)

9. General Counsel's Exhibit Number Nine

This exhibit is comprised of twelve pages. The twelve pages have Bates numbers CFI 000144 through CFI 000155. The first page has summary information about seven members of the crew documented in exhibit number five. One of those workers, Pedro Torres, is not part of this exhibit. There are four additional workers. One of those four workers is Efrain Ramos Morales, who worked the preceding week. There are three additional workers not listed in the prior payroll exhibits, namely, Medrano Ribaz, Miguel Torralva and Zulma Castro. Of the eleven pages that follow the summary page, the first page is payroll information for Cesar Miranda. The second page is payroll information for Franco Olivares. The third page is payroll information for Ruth Macinas. The fourth page is payroll information for Emiliano Cruz. The fifth page is payroll information for Jose Ismael Pineda. The sixth page is payroll

information for Isidro Villavicencio. The seventh page is payroll information for Blanca Alejandre. The eighth page is payroll information for Efrain Ramos Morales. The ninth page is payroll information for Medrano Ribaz. The tenth page is payroll information for Miguel Torralva. The eleventh page is payroll information for Zulma Castro.

The parties initially stipulated to the authenticity (but not admission) of these documents as being Cinagro weekly payroll records for March 27, 2017 to April 2, 2017. The parties later stipulated to the admission of Exhibits Six through Nine. (5/20:1-20:10) I admitted General Counsel Exhibit Number Nine into evidence. (5/23:2-23:4)

10. General Counsel's Exhibit Number Ten

This exhibit is comprised of twenty-four pages. The twenty-four pages have Bates numbers CFI 000176 to CFI 000199. The first page has summary information about twelve crew members, including six that were listed in exhibit five. Those six are Cesar Miranda, Franco Olivares, Ruth Mancinas, Emiliano Cruz, Isidro Villavicencio and Blanca Alejandre. It also has Efrain Ramos Morales who first shows up in exhibit eight, and Medrano Ribaz and Miguel Torralva, who first show up in exhibit nine. There are three additional workers, Jose Inez Perez, Marisol Hernandez and Candido Gonzalez.

The pages following the summary page fit into two groups. The first group is similar to the other payroll exhibits and comprises Bates numbers CFI 000177 through CFI 000188. These pages in sequential order are Cesar Miranda, Franco Olivares, Ruth

Macinas, Emiliano Cruz, Isidro Villavicencio, Blanca Alejandre, Efrain Ramos Morales, Medrano Ribaz, Miguel Torralva, Jose Inez Perez, Marisol Hernandez and Candido Gonzalez. The next eleven pages, Bates numbers CFI 0189 through CFI 000199, have the same information as Bates numbers CFI 000177 through CFI 000188, except the earlier pages are organized by worker and then by date, whereas the latter pages appear to be organized by worked than by crop.

The parties stipulated to the authenticity (but not admission) of these documents as being Cinagro weekly payroll records for April 3, 2017 through April 9, 2017. I admitted General Counsel Exhibit Number Ten into evidence. (5/147:1-147:25 and 5/150:3-150:5)

11. General Counsel's Exhibit Number Eleven

This exhibit is comprised of two pages. The first page is a document that shows the crops harvested by Yolanda Antonio on February 24, 2017. The second page is a document that shows the crops harvested by Yolanda Antonio on March 3, 2017. The documents show the company address, the check numbers, and minimum wage adjustments, but there is nothing that shows whether or not any deductions were made for things like taxes, social security, health care or workers' compensation insurance. The parties stipulated to admit this exhibit and I accepted the exhibit into evidence. (3/36:8-36:23, 3/41:18-42:20 and 3/45:15-46:16)

12. General Counsel's Exhibit Number Twelve

This exhibit (6/64:4-64:5) is comprised of fourteen pages with Bates numbers CFI 011001 through CFI 011014. On its face, it appears to show payroll information

from February 21, 2017 through February 25, 2017, for both the Victor Mendoza crew and also the Cesar Miranda crew.

For the Victor Mendoza crew, the exhibit shows the following workers: (1) Victor Mendoza (CFI 011001), (2) Rigoberto Perez (CFI 011002), Yolanda Antonio (CFI 011003), (4) Marisol Jimenez (CFI 011004, (5) Hector Vasquez Cruz (CFI 011005), (6) Maria Lauriano (CFI 011006), (7) Ignacia Sanchez (CFI 011007), and (8) Maria Duarte (CFI 011008). Page CF 011009 is blank.

For the Cesar Miranda crew, the exhibit shows the following workers: (1) Cesar Miranda (CFI 011010), (2) Maria A. Santiago (CFI 011011), (3) Franco Olivares (CFI 011012), (4) Ruth Monicas, which probably should read "Macinas" (CFI 011013), and (5) Emiliano Crus, which probably should read "Cruz" (CFI 011014).

Maria Angelica Santiago was a worker in Victor Mendoza's crew during February 27, 2017 through March 3, 2017. (See infra, Respondent's Exhibit Number One) There was no testimony indicating that Maria Santiago worked in both crews so it is possible that this exhibit just has her payroll information incorrectly grouped with the other crew.

During the dates covered, both the Mendoza and Miranda crews worked on green kale, black kale and spinach.

I admitted General Counsel's Exhibit number twelve into evidence. (6/64:4-64:5)

13. General Counsel's Exhibit Number Thirteen

This exhibit is comprised of twenty-five pages with Bates numbers CFI 001125 through CFI 001149. (6/138:19-138:21) None of the parties offered to admit Exhibit Number Thirteen into evidence. (6/147:3-147:8) Therefore, Exhibit Number Thirteen is not admitted into evidence.

14. Respondent's Exhibit Number One

This exhibit is payroll information for the Victor Mendoza crew. The exhibit is comprised of eleven pages, a cover page and a proof of service, followed by nine pages of payroll information. In order, these nine pages show: (1) Victor Mendoza, Yolanda Antonio, Maria Angelica Santiago, Maria Duarte, Ignacia Sanchez, Maria Lauriano, Hector Vasquez Cruz, Marisol Jimenez and Rigoberto Perez.

I note that on March 2, 2017, the crew appears to have solely done weeding. On the weeding day, the crew members were paid for eight hours of work, but foreperson Victor Mendoza was paid for nine hours, one more than the other crew members. There are various theoretical possibilities as to what the extra hour of pay could cover, such as picking up and paying for water, contacting crew members with work site information, receiving instructions from supervisor Rene Macias, or bringing equipment or bathrooms. Foreperson Mendoza received $14.00 per hour for the nine hours. The other crew members received $11.00 per hour for eight hours.

Comparing General Counsel's Exhibit Number Five and Respondent's Exhibit Number One, you can see the work performed by the Miranda crew and the Mendoza crew for the time period including February 27, 2017 through March 4, 2017. For

example, on February 27, 2017, both crews worked on black kale and spinach. As another example, on March 3, 2017, both crews worked on black kale and also did weeding. Finally, on March 4, 2017, both crews worked on both green kale and black kale.

The parties stipulated to admit into evidence Respondent's Exhibit Number One. Pursuant to the stipulation, I admitted Respondent's Exhibit Number One into evidence.

15. Joint Stipulation of Authenticity and Admissibility of Exhibits

This exhibit is a joint stipulation by the parties that I received and accepted. It is comprised of three pages. The first page is a cover page and is not numbered. The third page is a signature page.

With respect to the second page, the parties stipulated to the admission of two documents. The parties also stipulated to the authenticity of six documents.

The two exhibits where the parties stipulated to their admission are General Counsel's Exhibit Number Five and Respondent's Exhibit Number One.

The six exhibits where the parties stipulated as to their authenticity are General Counsel's Exhibit Number Two, and General Counsel's Exhibit Numbers Six through Ten.

VI. FINDINGS OF FACT AND CREDIBILITY DETERMINATIONS

1. Cinagro Farms, Inc. (hereafter "Cinagro" or "Respondent") is an agricultural employer. (California Labor Code section 1140.4, subdivision (c)) Cinagro grew vegetables, including kale, parsley and spinach, in Fillmore, Ventura County, California, and Moorpark (Tierra Rejada), Ventura County, California.

2. The following eight workers were agricultural employees: (1) Marisol Jimenez, (2) Hector Cruz, (3) Maria Duarte, (4) Yolanda Antonio Garcia, (5) Rigoberto Perez Martinez, (6) Maria Angelica Santiago, (7) Marie Lariano, and (8) Ignacia Sanchez. (California Labor Code section 1140.4, subdivision (b))

3. The following three persons were supervisors: (1) owner Anthony George Dighera, (2) general manager Rene Macias Diaz, and (3) foreperson Victor Mendoza. (California Labor Code 1140.4, subdivision (j)) During the pertinent time periods, owner Dighera was under a lot of stress due to personal and family health matters, and also due to the company's financial difficulties.

4. In summer 2016, owner Dighera retained a crew from a farm labor contractor, Mike Vasquez Farm Labor. This crew included foreperson Victor Mendoza, the workers listed in finding # 2 and possibly a few other workers. Barring bad weather, the crew typically worked six days a week, Monday through Saturday.

5. After a few months, Mike Vasquez Farm Labor transferred Victor's harvest crew to Art Vasquez Farm Labor Services. Mike and Art were related to each other. The crew continued to work for Cinagro in that capacity for a few more weeks without any changes in working conditions.

6. In approximately November 2016, Art Vasquez Farm Labor Services ended its relationship with Cinagro. Art Vasquez Farm Labor Services and Cinagro reached an understanding to allow Cinagro to directly hire Victor and his crew.

7. When Victor's crew worked for the two farm labor contractors, they were paid as employees and provided with a paystub that showed deductions and

withholding. After they were directly hired by Cinagro, they were incorrectly classified as vendors without the required deductions and withholdings for taxes and insurance. Cinagro did not provide the workers with worker's compensation insurance or health insurance.

8. Owner Dighera suspected that his method paying the workers was illegal and was apprehensive of problems arising from paying the workers as vendors. As a result, worker complaints regarding paystubs and deductions was concerning to the company. Nonetheless, Cinagro has continued to pay farm workers in this manner from that time up until the present.

9. When the workers in Victor's crew repeatedly raised the paystub issue with company supervisors, they were told in every instance that the company was working on it. The employees repeatedly explained that they needed the paystubs for routine aspects of life, like government programs, medical care and schools. When the crew told Victor about these concerns, he repeated their concerns to Rene but took no additional steps.

10. Owner Dighera conceded that company did not ever work on switching the workers from being vendors to being treated like employees as he surmised was required by the law. Eventually, Dighera hired a professional bookkeeper to assist with payroll functions. But the bookkeeper, Barbara Ito, testified that Dighera never asked her to change the workers from vendors to employees. Ito did produce for Dighera a document showed each worker's weekly piece-rate tallies, hourly work, and adjustments when piece-rate payments did not reach minimum wage thresholds.

11. Two workers, Marie Lauriano and Ignacia Sanchez, denied ever hearing the crew raise concerns about the lack of paystubs. Both of these workers were hired by the company prior to the arrival of Victor's crew. I discredited their testimony. Marie gave a purposefully evasive answer when asked who drove her to the hearing. She answered "a friend" when the correct answer was that general manager Macias drove her to the hearing. Ignacia also seemed biased toward the company. She works for another company as a quality control supervisor and then Rene regularly hires her back when the season ends at her other job. Despite having worked for the company on many occasions, she claimed not to recall whether Cinagro made payroll deductions. Ignacia may have felt pressured to say what she thought the company would want to hear. It is also possible that since Ignacia and Marie routinely had lunch and breaks together but away from the rest of the crew, that they did not hear some of the complaints expressed by other crew members to supervisors about the lack of paystubs.

12. Some of the workers described payments as being "personal checks". This would be incorrect. The workers were paid with company checks, although the lack of paystubs, deductions and withholdings may have confused the workers into thinking the hand-signed checks were "personal".

13. When working at Cinagro, Victor's crew was always provided with water. The company paid Victor an extra one hour per day more than the other crew members. Part of the reason for the payment of the extra hour was to cover Victor's time and expense to bring water for the crew, which he consistently did. Victor put the water in jugs on his pickup truck. Rene testified that Victor was paid one extra hour

and Victor denied it. I was not particularly persuaded by the testimony of either of them on the subject. Based solely on testimony, I would conclude that neither side established the facts based upon a preponderance of the evidence. But I found that the company payroll records seemed to support Rene's position that Victor was paid an extra hour per day. When the workers were paid piece rate, it was harder to directly compare the number of hours that Victor was paid compared to his crew. But on a day when the crew was paid hourly, the records illustrate that Victor was paid for one hour more than the workers in his crew. It is clear that the crew was not terminated because of any water issue.

14. While charging party Marisol Jimenez claimed that the company never brought water, her testimony was repudiated by most of the other witnesses, including her own partner. Later in her testimony, Marisol alleged that the workers paid for the water on Victor's truck, testimony that was also repudiated by most of the other workers. Some workers did say that at most they contributed some recyclables to Victor. The inaccuracy and shifting of Marisol's testimony caused me to generally discredit her testimony. I do not think Marisol was merely imprecise in her word choice, but rather that her testimony was subject to exaggeration and inaccuracy.

15. The company had a reverse osmosis water system at one of its ranches. On at least one or two days, general manger Macias or foreperson Mendoza brought the crew water from the company's system. But this was not the general routine. There also was a single day when either Victor was absent or the crew ran out of water, where

general manager Macias asked a couple of the workers to go to the store to get water. The workers gave Macias a receipt for the water, but were never reimbursed.

16. On or about February 20, 2017, Cinagro hired a new crew that did similar work to Victor's crew. The crew started with six workers but was expanded to ten workers on March 27, 2017.

17. The last day of work for Victor's crew was Saturday, March 4, 2017. On this day, one worker in Victor's crew cut her finger and required medical attention. The workers had recently reiterated their paystub concerns to management. It is possible that the worker injury further amplified the company's concern that the lack of paystubs, insurance deductions and tax withholding could essentially come back to bite them. Later that day, Victor asked Rene about the work on Monday, March 6, 2021. Rene advised Victor that he would let him know, as there were insufficient vegetables to be harvested. When Victor followed up with Rene, Rene told him that there was no work for his crew "until further notice". Victor told all of the crew members what Rene had said. Respondent's witness Ignacia Sanchez was very clear that Victor told her that Rene had said that there was no work until further notice. Rene testified that he told Victor that there was weeding work available, but I discredited this testimony.

18. During his testimony, it was evident that Rene disliked Victor and his crew. Rene seemed angry that Victor needed to leave early on one or two days to go to an appointment and that crew members were sometimes absent. The company did not provide records to corroborate this testimony. More importantly, the testimony was inconsistent with owner Digera's testimony and with the Respondent's roadmap at the

prehearing conference. The company always took the position that the crew quit and not that it was fired for attendance reasons. While there was testimony that on one occasion a supermarket rejected the product packed by the crew, owner Dighera was very clear that he needed the workers and that they were not fired because of any packing deficiency. It hardly seems coincidental that Rene brought in a new crew just two weeks before letting the old crew go, and that by the end of March 2017, the new crew was bigger than Victor's crew had been just four weeks earlier.

19. On Monday, March 6, 2017, three of the crew members traveled to the Silent Springs blueberry ranch. Already uncertain if work had ended at Cinagro, they dropped off job applications. On their way back home, they passed a Cinagro ranch and believed that they saw the other crew harvesting vegetables. From a distance, they took blurry cell phone photos of what they saw. One of the workers then called Rene to ask if the other crew was working, which he denied. Based upon a preponderance of the evidence, I find that Rene did not indicate that there was "weeding work" available during that phone call. Neither side called workers from the other crew to testify. The payroll records demonstrate that the other crew did in fact work on Monday, March 6, 2021.

20. Between being told that there was no work "until further notice" and being told false information about whether the other crew was working, the workers reasonably concluded that the company had terminated their crew. The workers shared what they saw and heard with the other crew members.

21. Within a day or two of dropping off the applications, some of the crew members started at the blueberry ranch. Others may have started at the blueberry ranch shortly after the first batch of them began. There was no testimony as to whether the blueberry harvest season differed from the vegetable harvest season, but the witnesses general conceded that the terms of employment were better at the blueberry ranch than at Cinagro. One worker did state that her familiarity with vegetable harvests made it easier for her to tally better piece rates with vegetables than with blueberries. The blueberry ranch provided paystubs, deductions, withholdings, worker's compensation insurance and health insurance. Two workers, Rigoberto Perez and Yolanda Antonio, did not go to the blueberry ranch but instead returned to Deardorff Farms on or about March 13, 2017, a farm where they had previously worked. That employer also provided paystubs, deductions, withholdings, worker's compensation insurance and health insurance.

22. On Friday, March 10, 2017, Rene personally gave Ignacia and Marie their last checks and gave the remainder of the checks to Victor to distribute to the other crew members. Rene was "short" with Victor and did not offer work to him or the crew.

23. Shortly after some of the workers started at the blueberry ranch, Rene testified that, one day due to traffic, he drove a different route than normal and happened to see some of the former crew members leaving the blueberry ranch. Rene spoke with Ignacia and Marie. The pair told him that they were working at the blueberry ranch as well as were some of the other former crew members. Marie

Lauriano testified that she and Ignacia Sanchez most likely started working at the blueberry ranch on Monday, March 13, 2017. The company did not introduce any personnel records from the blueberry ranch to attempt to rebut this testimony.

24. On March 13, 2017, the unfair labor practice charge was filed.

25. After owner Dighera became aware of the unfair labor practice charge in this matter, he contacted a co-owner of the blueberry ranch and confirmed which of his former workers were employed there.

26. On June 20, 2020, the complaint was filed in this matter.[2]

27. The General Counsel did not offer any evidence or explanation as to why the complaint followed three years and three months after the March 13, 2017 unfair labor practice charge, despite the case involving a small group of easily identifiable workers who mostly found similar or better paying work shortly after losing their jobs at Cinagro.

28. The General Counsel's Amended Complaint was filed on February 11, 2021, almost four years after Victor's crew was discharged.

[2] As noted in the NLRB Bench Book (January 2021), a complaint is not restricted to the precise allegations of the charge. The complaint may also allege matters relating to and growing out of the charged conduct. *NLRB v. Fant Milling Co.*, above, 360 U.S. 301, 309 (1959). The test is stated in *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988): If a charge was filed and served within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge. *See also Kumho Tires Georgia*, 370 NLRB No. 32, slip op. at 5 n. 15 (2020) ("The General Counsel is not required to plead the exact testimony in his complaint.")

29. Respondent concedes that it has never made offers of reinstatement to any of these workers, although it did later rehire Ignacia Sanchez. (7/73:15-74:24)

VII. FINDINGS OF LAW

California Labor Code section 1152 states that, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153."

California Labor Code section 1153, subdivision (a), states that, "It shall be an unfair labor practice for an agricultural employer to do any of the following: (a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152. . . ."

To establish a *prima facie* case of unlawful discrimination, the General Counsel must proof by a preponderance of the evidence that: (1) the employees engaged in protected concerted activity, (2) the employer had knowledge of such activity, and (3) that the protected activity provided a motive for the employer's adverse action. *H & R Gunland Ranches, Inc*. (2013) 39 ALRB No. 21, pp. 3-4; *Lawrence Scarrone* (1981) 7 ALRB No. 13, at p. 4. In the instant case, I find that the workers engaged in protected, concerted activity by repeatedly requesting a proper paystub and in so doing, impliedly

questioning why proper withholdings and deductions were not being made. The employer conceded that it had notice of these requests.

To the extent that there is any difference in testimony, I find that based upon a preponderance of the evidence, the crew members repeated these requests in close proximity to the time that they were discharged. The protected activity clearly provided a motive for the employer's adverse action. Owner Dighera conceded his apprehension over his decision to treat the workers as vendors rather than employees. The company tried to string the workers along with false promises that they were working on changing their payroll system, but four years later, the company still pays its direct hire workers as vendors.

The third element of the *prima facie* case, showing causal connection between the protected activity and the adverse action, may be established by circumstantial evidence. *H & R Gunland Ranches, Inc.* (2013) 39 ALRB No. 21, at p. 3. *See also East End Bus Lines, Inc.,* 366 NLRB No. 180, slip op. at 1 n. 7 (2018), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) ("In most cases only circumstantial evidence of motive is likely to be available.").

There are multiple factors that the Board and courts have considered to infer the actual motive for the adverse action. *H & R Gunland Ranches, Inc.* (2013) 39 ALRB No. 21, pp. 3-4. These factors may include: (1) The timing, or proximity of the adverse action to the concerted activity; (2) disparate treatment; (3) failure to follow established rules or procedures; (4) cursory investigation of the alleged misconduct; (5) false or inconsistent reasons given for the adverse action, or the late addition or shifting

of reasons for the adverse action; (6) the absence of prior warnings; and (7) the severity of punishment for the alleged misconduct. (*H & R Gunland Ranches, Inc*. (2013) 39 ALRB No. 21, pp. 3-4, *citing Miranda Mushroom Farm, Inc. et al.* (1980) 6 ALRB No. 22; *Namba Farms, Inc.* (1990) 16 ALRB No. 4.) *See also Shamrock Foods Co.,* 366 NLRB No. 117, slip op. at 27–28 (2018), *enfd. per curiam* 779 Fed. Appx. 752 (D.C. Cir. July 12, 2019).

In this instance, the proximity of the crew's last round of paystub complaints was very close in time to when they were discharged. The crew members had never been disciplined or warned about their work. There was a separate recently hired crew that was not discharged. The company also gave false testimony alleging that the Victor Mendoza crew quit.

1. The Victor Mendoza Crew Did Not Quit, They Were Fired

Given the chronology established at trial, the crew with eight workers reasonably concluded that they had been fired.[3] Two weeks before they were discharged, a new

[3] Even if the situation was beset by some degree of ambiguity, that is of no aid to the Employer here. A discharge occurs if an employer's conduct or words would reasonably cause employees to believe that they were discharged and in such circumstances it is incumbent upon the employer to clarify its intent. (*Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4; see also *American Protection Industries, et al.* (1991) 17 ALRB No. 21, ALJ Dec., p. 18; *Ridgeway Trucking Co.* (1979) 243 NLRB 1048, enf'd (5th Cir. 1980) 622 F.2d 1222; *NLRB v. Trumbull Asphalt Company of Delaware* (8th Cir. 1964) 327 F.2d 841, 843 ("It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated.") *H & R Gunland Ranches, Inc.* (2013) 39 ALRB No. 21, at pp. 5-6, footnote # 3. *See also Sequoia Orange, Co.* (1985) 11 ALRB No. 21, at pp. 95-96, discussing *Superior Farming v. A.L.R.B.* (1984) 151 Cal.App.3d 100. Even if a foreperson mistakenly informed his crew that they were discharged, the conveying of this mistaken information, which resulted in their dismissal, would have a coercive effect on the employees, thus giving rise to a violation of ALRA section 1153, subdivision(a). In *Superior Farming*, a crew leader relayed to a representative of management his crew's request for a wage increase. In that case, although the crew leader was not directly told

crew with six workers was hired. The new crew was hired at approximately the same date as the old crew had reiterated their pay stub concerns directly to owner Dighera. The new crew did the same type of work as the old crew. Then the old crew was told that there was no work until further notice. This occurred despite the owner testifying that there was still work to be done and the workers testifying that the harvest season was not over. The old crew was then told by the general manager that the new crew was also not working, but the old crew discovered that this was a false statement. Then later in the month, shortly after the old crew was discharged, the company expanded the new crew from six to ten workers. Only three days after handing the former crew their final checks on March 10, 2017, did Cinagro learn on March 13, 2017 from Ignacia Sanchez and Marie Lauriano that most of the former crew had in the prior week found work at a nearby blueberry farm.

2. The Crew Was Fired Because of Their Protected, Concerted Activity

With the General Counsel having established these facts, the burden then shifted to Cinagro show that it would have taken the same adverse action even in the absence of the employee's protected, concerted activity. *H & R Gunland Ranches, Inc.* (2013) 39 ALRB No. 21, at p. 4; *Woolf Farming Company of California, Inc.* (2009) 35 ALRB No. 2, pp. 1-2; *J & L Farms* (1982) 8 ALRB No. 46, p. 2; *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083, 1087. In the instant case, owner Dighera made it clear that the company did not fire the crew due to bad work or attendance

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that he or the crew had been dismissed, when he reported to the crew that such had been the case, the crew could reasonably believe that he was speaking on management's behalf.

issues. Dighera indicated that one supermarket was unsatisfied with how vegetables were packed, but that he was still happy to have the crew. The crew was not terminated in close proximity to the order that was canceled, but rather occurred substantially later after the crew reiterated their paystub concerns. The company took the position that it did not discharge the crew but rather was surprised and disappointed when it left. But it was very clear from the testimony of general manager Rene Macias that he was not disappointed that Victor's crew no longer worked at Cinagro. The company did not introduce any documents to show attendance records and provided only limited documents to show the distribution of work between harvesting and weeding. As a result, there were only two conclusions that the factfinder could reach, either the crew quit to search for not-yet obtained alternative employment or they were discharged for their protected, concerted activity. The latter is the conclusion best supported by the hearing testimony and exhibits. Cinagro failed to produce persuasive evidence that the crew quit. Given that the crew was discharged for its protected, concerted activity, the workers are entitled to reinstatement and backpay.

3. Does the time gap of three and a quarter years between the date of the charge and the date of the complaint provide any sort of defense to the Respondent?

A. The ALRA and NLRA provide statutes of limitation for filing a charge, not for filing a complaint.

The charge in this matter was timely filed. The charge provided the Respondent with enough information to investigate this matter. Indeed, the charge prompted owner

Dighera to promptly check with a nearby ranch as to whether some of his former workers had accepted employment there. The ALRA and NLRA only provide a statute of limitation for filing a charge, not a statute of limitation for a filing a complaint.

There is a reason that they are called statute of limitations and not regulations of limitation. Given that a statute of limitation already exists for filing a charge, without conducting legal research on the subject, it is not clear to me that the Board would even have the authority to adopt a "regulation of limitation". The Board does not have to follow NLRB precedent when there is something unique to agricultural workers. But Respondent does not articulate a basis for such a divergence.

B. The ALRA and NLRA generally disallow laches as a defense in unfair labor practice proceedings.

The Board has recently summarized why laches is rarely allowed as a defense in unfair labor practice proceedings. (*Rincon Pacific*, LLC (2020) 46 ALRB No. 4, at pp. 6-7) In *NLRB v. J.H. Rutter-Rex Manufacturing Co.* (1969) 396 U.S. 258, 264-265, the U.S. Supreme Court held that the NLRB "is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers."

In *Rincon*, the Board proceeded to list multiple cases where it had found laches inapplicable to unfair labor practices proceedings. *See, e.g., TriFanucchi Farms* (2014) 40 ALRB No. 4, p. 10 ("laches is not available as a defense to an unfair labor practice allegation under the ALRA"); *Stamoules Produce Co., Inc.* (1990) 16 ALRB No. 13, at

ALJ Dec. p. 3 (stating that administrative delay is not a basis for denying employees their statutory rights); *Tri-Fanucchi Farms* (1986) 12 ALRB No. 8, p. 5; *Ukegawa Brothers* (1982) 8 ALRB No. 90, pp. 67-68; *Mission Packing Co*. (1982) 8 ALRB No. 47, p. 2; *Golden Valley Farming* (1980) 6 ALRB No. 8, at ALJ Dec. p. 21 ("the doctrine of laches has no applicability in ALRB proceedings").

As noted in the NLRB Bench Book (January 2021), the NLRB generally does not apply the doctrine of laches to itself or the General Counsel. *Newark Electric Corp.,* 366 NLRB No. 145, slip op. at 1 n. 1 (2018); and *UPS Ground Freight, Inc.,* 366 NLRB No. 100, slip op. at 2 (2018). *See also Midwest Terminals of Toledo*, 365 NLRB No. 157, slip op. at 1 n. 1 (2017), reaffg. 362 NLRB 468 n. 1 (2015) (rejecting defense even though the supervisor allegedly made statement over 4 years before the hearing commenced and he no longer worked for the company and was unavailable as a witness), *enfd.* 783 Fed. Appx. 1 (D.C. Cir. 2019); *Teamsters Local 75 (Schreiber Foods),* 365 NLRB No. 48, slip op. at 5 n. 6 (2017) (rejecting defense even though the alleged unlawful events occurred in 1989 and the Board did not issue its second supplemental decision on remand from the court of appeals until 9 years after the court's remand order); *United Electrical Contractors Assn.,* 347 NLRB 1, 2–3 (2006) (denying motion to dismiss complaint against members of the employer association, notwithstanding the General Counsel's "inordinate and inexcusable" 5 ½ year delay in naming them as respondents, given the absence of any showing of prejudice); *Rogan Bros. Sanitation, Inc.*, 369 NLRB No. 53, slip op. at 5 n. 6 (2020) (rejecting defense despite 7-year delay between Board's original decision granting summary judgment

pursuant to the noncompliance provisions of a settlement agreement and issuance of backpay specification); *Human Development Assn.,* 348 NLRB 677 (2006) (rejecting defense despite the 13-year delay between enforcement of the Board's remedial order and issuance of the compliance specification), *enfd.* 275 Fed. Appx. 64 (2d Cir. 2008); and *Entergy Mississippi, Inc.,* 361 NLRB 892, 893 n. 5 (2014) (considerable delay by the Board in issuing the backpay specification did not warrant a reduction in the backpay award even assuming the delay contravened the APA*), affd*. in relevant part 810 F.3d 287, 298–299 (5th Cir. 2015).

In *Rincon*, the Board also notes that California state courts have held that, even where the elements are otherwise shown, equitable defenses such as estoppel and laches are not applied to a governmental agency where the result would be to frustrate strong public policy. (*Bib'le v. Committee of Bar Examiners of The State Bar* (1980) 26 Cal.3d 548, 553-554 ["Estoppel will not ordinarily lie against a governmental agency if the result will be the frustration of a strong public policy"]; *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 248 ["laches is not available where it would nullify an important policy adopted for the benefit of the public"], quoting *Feduniak v. California Coastal Commission* (2007) 148 Cal.App.4th 1346, 1381. *Rincon*, at pp. 7-8, footnote # 6.

In this instance, the Respondent has not demonstrated any prejudice due to the delay. Upon receiving the charge, the Respondent was able to investigate if the Mendoza crew was fired or quit. They were even able to promptly investigate the

subsequent employment of some of their former workers. The payroll documents largely speak for themselves.

Moreover, in this instance, there is no evidence of delay by the Charging Party. The charge was promptly filed on March 13, 2017. If there was any delay, it was by the General Counsel, not the Charging Party.

C. The General Counsel is encouraged to take advantage of the ALJ Unit to help expedite case resolution.

This case involves eight or nine workers and most of them found new employment within days or a few weeks after being discharged. The dollar amounts at issue are seemingly small.[4] The General Counsel should consider establishing a streamlined settlement program for simple unfair labor practice cases involving a small number of workers and a small amount of back-pay.

If it would add value to the process, the ALJ Unit would be willing to make judges available for pre-complaint settlement conferences.

D. The hearing process is not the best methodology for the Board to monitor any General Counsel case processing delay.

In its Reply Brief, Respondent requests that the ALJ make a recommendation to the Board regarding the delay in this matter between the filing of the charge and the filing of the complaint.

[4] During all seven days of this hearing, the General Counsel had four staff persons in attendance, while Respondent had only one attorney present.

In an unfair labor practice, ALJs are generally not going to inquire as to the reason for any General Counsel delay in filing a complaint. To make such inquiries would essentially require calling the attorneys as witnesses. Theoretically, I could solicit testimony about budget limitations, staff departures and illnesses, how long it took to locate witnesses, delays in document production, pandemic issues and when settlement offers were first made. In my opinion, those questions would only cloud the hearing process, not add value to it.

On the other hand, if the Board is concerned about case processing delays, the Board can effectively shine light in this area independently of the hearing process. For example, the Board could pass a regulation requiring the General Counsel to submit a quarterly list of cases where the charge is over two years old and the complaint has not yet been filed. For each of those cases, the Board could require the General Counsel to indicate (1) whether the Respondent has responded to all pending requests or subpoenas for documents, and (2) whether the General Counsel has provided the Respondent with a written settlement offer. Requiring such a public report might focus attention on the reasons for case processing delays.

4. Given that the Respondent committed an unfair labor practice, is the foreperson in this instance eligible for a remedy along with his crew?

ALRA protections afforded to agricultural employees are generally unavailable to supervisors. *Ruline Nursery Co.* (1981) 7 ALRB No. 21, at p. 8 (citing *Yoder Brothers, Inc.* (1976) 2 ALRB No. 4) Ruline outlines three established exceptions to the general rule. The three exceptions are not designed to protect the supervisor, but

rather to protect the workers. The first exception is when the supervisor is fired for refusing to commit unfair labor practices. *Ruline*, at p. 10. The first exception does not apply to Victor Mendoza. The second exception is when the supervisor is fired for engaging in activities to protect worker rights, such as by providing witness testimony at hearing. *Ruline*, at pp. 10-11. Victor Mendoza was fired four years before this hearing started so the second exception also does not apply to him. The third exception is when the supervisor firing is the means to unlawfully discriminate against the workers. *Ruline*, at p. 11.

A *prima facie* case is made out in the third category when (1) the employees' employment is expressly conditioned on the continued employment of their supervisor, (2) the employees have engaged in protected concerted activities, and (3) their supervisor is discharged as a means of terminating the employees because of their concerted activity. *Ruline*, at p. 11 (citing *Pioneer Drilling Co., Inc.*[5] *(1967) 162 NLRB 918 [64 LRRM 1126], enforced in pertinent part sub nom. Pioneer Drilling Co., Inc. v. NLRB (10th Cir. 1968) 391 F.2d 961 [67 LRRM 2956]; Krebs and King Toyota, Inc.* (1972) 197 NLRE 462 [80 LRRM 1570]; *VADA of Oklahoma, Inc.* (1975) 216 NLRB 750 [88 LRRM 1631])

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[5] The hearing testimony supports a finding that Mendoza conveyed the crew's paystub concerns to management. The testimony in totality does not support a finding that Mendoza told Macias that he joined in those concerns. Regardless, the mere participation of a supervisor in protected, concerted activity does not avail the supervisor protection under the NLRA or ALRA.

The *Pioneer Drilling* case instead involved a unique factual situation that whenever the driller (who served as the crew supervisor) was discharged, the other members of that crew were also automatically terminated. Thus, the employer was able to fire the driller as a means to get rid of pro-union crew members.

The General Counsel correctly notes that Victor assembled and hired his crew before arriving with the farm labor contractor at Cinagro. Victor engaged in many of the typical foreperson duties and was the primary conduit of information between management and the workers. Cinagro had also hired workers directly prior to the arrival of Victor and his crew with the farm labor contractor. Indeed, Cinagro added two of those workers to Victor's crew. There was also testimony that the crew worked when Victor was absent. But in *Sequoia Orange, Co.* (1985) 11 ALRB No. 21, ALJD p. 86-94, the employer fired the foreperson as a means to terminate the entire crew. In the instant case, Cinagro discharged the entire crew at the same time, telling them that there was no work until further notice and lying about the fact that the second crew was working. Mendoza was not a means or mechanism of the unlawful firing of workers, but rather a casualty of it. Nor is Mendoza's reinstatement required in order for Cinagro to offer reinstatement to the rest of the crew.

The question therefore is whether an exception presently exists when an entire crew is unlawfully discharged for protected, concerted activity and the foreperson's employment is expressly conditioned on having that crew to supervise. This exception is what I will call a "reverse Sequoia Orange". While the Board has the authority to consider and create such an exception, I find that under existing case law, no such exception presently exists. Accordingly, foreperson Mendoza is not entitled to reinstatement or backpay.

VIII. CONCLUSION AND ORDER

Pursuant to California Labor Code section 1160.3, respondent Cinagro Farms, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Immediately cease and desist from interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by California Labor Code Section 1152;
2. Immediately cease and desist from discriminating or retaliating against any agricultural worker because the worker has engaged in protected, concerted activity covered by California Labor Code Section 1152; and,
3. Immediately cease and desist from refusing to rehire its employees for engaging in concerted activity protected under California Labor Code section 1153, subdivision (a).

Cinagro Farms, Inc. shall take the following affirmative steps which are deemed necessary to effectuate the policies of the Agricultural Labor Relations Act:

1. Offer Marisol Jimenez, Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez Martinez and Maria Angelica Santiago immediate reinstatement to their former or substantially equivalent employment without prejudice to their prior rights and privileges of employment;
2. Make whole Marisol Jimenez, Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez Martinez and Maria Angelica Santiago for all wages or other economic losses they suffered since on or about

Monday, March 6, 2017 as a result of Cinagro Farms, Inc.'s refusal to rehire, to be determined in accordance with established Board precedent;

3. The award shall include interest to be determined in accordance with *Kentucky River Medical Center* (2010) 356 NLRB 6, and excess tax liability is to be computed in accordance with *Tortillas Don Chavas* (2014) 361 NLRB No. 10, minus tax withholdings required by federal and state laws;

4. Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records, and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this order ; and,

5. Compensation shall be issued to Marisol Jimenez, Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez Martinez and Maria Angelica Santiago and sent to the ALRB's Oxnard Sub-Regional Office, which will thereafter disburse payment to them.

Cinagro Farms, Inc. shall additionally take the following steps to provide notice to its agricultural workers:

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

2. Within thirty days after this Order becomes final, post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for sixty days, the period(s) and place(s) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed;

3. Within thirty days after this Order becomes final, arrange for a Board agent or representative of Cinagro to distribute and read the attached Notice, in all appropriate languages, to all employees then employed, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Cinagro 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;

4. Mail copies of the attached Notice, in all appropriate languages, within thirty days after this Order becomes final or when directed by the Regional Director, to all agricultural employees employed by respondent at any time during the period from July 1, 2016, to June 30, 2017, at their last known addresses;

5. Provide a copy of the Notice to each agricultural employee hired to work for respondent during the twelve-month period following the date that this Order becomes final; and,

6. Notify the Regional Director in writing, within 30 days after the date this order becomes final, of the steps respondent has taken to comply with its terms.

Upon the request of the Regional Director, Respondent Cinagro Farms, Inc. shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

Dated: October 26, 2021

Mark R. Soble
Chief Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed with the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB determined that we violated the Agricultural Labor Relations Act by terminating employees for engaging in protected concerted activity. The ALRB has told us to publish this Notice. We will do what the ALRB has ordered us to do. The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves.
2. To form, join, or help a labor organization or bargaining representative.
3. To vote in a secret ballot election to decide whether you want a union to represent you.
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board.
5. To act together with other workers to help and protect one another.
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT discharge you because you complain about wages, hours, and working conditions on behalf of yourself and your coworkers.

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

WE WILL make whole Marisol Jimenez, Hector Cruz, Maria Duarte, Yolanda Antonio Garcia, Rigoberto Perez Martinez and Maria Angelica Santiago for all wages or other economic losses that they suffered as a result of our unlawful conduct.

Cinagro Farms, Inc.

Dated: _____ By: _____

Title of Representative Signing Notice: _____

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. The closest office is the ALRB Oxnard Sub-Regional Office, 1901 N. Rice Avenue, Suite # 300, Oxnard, CA 93030-7912. The telephone number is (805) 973-5062. Another office is the ALRB Salinas Regional located at 342 Pajaro Street, Salinas, California. The telephone number is (831) 769-8031. This is an official notice of the ALRB, an agency of the State of California.

PLEASE DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

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

Case Name: CINAGRO FARMS, INC Respondent ,and

MARISOL JIMENEZ, Charging Party

Case No. Case No. 2017-CE-008-SAL

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

On October 27, 2021, I served the within **NOTICE OF TRANSFER; and DECISION OF THE ADMINISTRATIVE LAW JUDGE** 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:
  Robert P. Roy, General Counsel
  Michael P. Roy
  Ventura County Agricultural Association
  916 W. Ventura Boulevard
  Camarillo, California 93010
  Rob-VCAA@PacBell.net
  Mike-VCAA@PacBell.net

- **By Email** to the persons listed below and addressed as follows:
  Franchesca C. Herrera, Regional Director
  Monica Ortiz, Senior Legal Typist
  ALRB Salinas Regional Office
  FHerrera@ALRB.ca.gov
  Monica.Ortiz@ALRB.ca.gov

  Jessica Arciniega, Assistant General Counsel
  Amisha G. DeYoung-Dominguez, Assistant General Counsel
  Gabriela Vega, Field Examiner
  Sheila Fountain, Legal Secretary
  ALRB Oxnard Sub-Regional Office
  JArcinega@ALRB.ca.gov
  Amisha.DeYoung-Dominguez@ALRB.ca.gov
  Gabriela.Vega@ALRB.ca.gov
  Sheila.Fountain@ALRB.ca.gov

Julia L. Montgomery, General
CounselALRB Sacramento
Regional Office
JMontgomery@ALRB.ca.gov

No email address on file

By Certified Mail only to:

70210950000047476538
Marisol Jimenez
508 North Hill Street, # 10
Oxnard, California 93033

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 27, 2021, at Sacramento California.

Angelique Duran

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

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

Case Name: CINAGRO FARMS, INC., and,
MARISOL JIMENEZ.

Case No.: Case No. 2017-CE-008-SAL

I am a citizen of the United States and am employed in the County of Sacramento. I am over the age of 18 years and not a party to the within entitled action. My business address is 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On July 28, 2022, I served the within **Board Decision and Order, Cinagro Farms, Inc. (2022) 48 ALRB No. 2** on the parties in the above-entitled action as follows:

- **By Email** to the parties pursuant to Board regulation 20169 (Cal. Code Regs., tit. 8, §20169) from my business email address angelique.duran@alrb.ca.gov

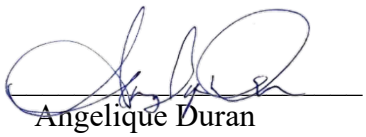
Robert P. Roy — Rob-VCAA@PacBell.net
General Counsel
Michael P. Roy — Mike-VCAA@PacBell.net
Ventura County Agricultural Association
916 West Ventura Boulevard
Camarillo, CA 93010

Julia L. Montgomery
General Counsel — Julia.Montgomery@alrb.ca.gov
Franchesca C. Herrera
Deputy General Counsel — Franchesca.Herrera@ALRB.ca.gov

- **By 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:

  Marisol Jimenez
  508 North Hill Street, #10
  Oxnard, CA 93033
  Certified Mail No.: 7021 2720 0002 2632 4563

Executed on July 28, 2022, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct.



Angelique Duran
Legal Secretary