

pursuant to Labor Code section 1160.3 and California Code of Regulations, title 8, section 20282, subdivision (a),² and requests that the Board overturn the ALJ and dismiss the complaint in this matter.

The Board has considered the ALJ's decision, the record, and the parties' exceptions and briefs, and has decided to affirm the ALJ's rulings, findings, and conclusions except where modified below, and to adopt his recommended remedy as modified.

I. Background

During the time-period relevant to this case, Rincon grew and harvested raspberries at several ranches near Oxnard, CA, including Limoneira Ranch, Mesa Ranch, Kotake Ranch, Navarro Ranch, and Santa Clara Ranch (also known as Central Ranch). In addition, during this time-period, Rincon had strawberry operations at one ranch in the Oxnard area.³ Rincon was one of several agricultural companies owned by Ken Hasegawa and was managed by a related company called Anacapa Property Management. Joe Lopez, who testified at the hearing, handled human resources for the farming companies through Anacapa Property Management. Jorge Aguilera was the grower supervisor for all Rincon Pacific ranches, and Fernando Camerena was his

² The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

³ At some point in 2014 or 2015, Rincon gradually started shutting down its raspberry operations for economic reasons. The record indicates that there was still raspberry work in July 2016 at Santa Clara, but this ranch closed permanently on July 31, 2016, and all workers at this ranch were laid off. Rincon currently produces strawberries.

assistant. Below Jorge Aguilera was Alberto Vasquez, who was the lead foreman over Rincon's raspberry ranches.

Each individual ranch had a ranch foreman, and under this individual were the crew bosses or row bosses of each harvest crew. Each crew also had a "puncher" whose primary duties involved inspecting baskets of fruit picked by harvesting employees for quality and correct packaging, and then "punching" each worker's badge with an electronic probe in order to track baskets harvested by each individual. In addition, there was evidence that punchers assisted prospective employees in filling out hiring documents.

In 2014, Gilberto Cervantes was a ranch foreman at Limoneira. Four harvesting crews worked at Limoneira during the 2014 harvest season. Each crew was comprised of approximately 40-50 workers.

The parties stipulated that approximately 46 raspberry harvesters engaged in a work stoppage at Limoneira Ranch on July 15 and 16, 2014. The workers walked off the job to protest Rincon's decision to transfer one of the punchers.

On July 16, 2014, two workers involved in the work stoppage filed separate ULP charges with the ALRB's Salinas regional office. The charging parties alleged that Rincon retaliated against them for engaging in the protected work stoppage. The next day, on July 17, the workers were reinstated.⁴

⁴ The reinstated workers continued with the harvest until November 18, 2014. The charges filed on July 16 were settled. As part of the settlement, the 46 workers received varying amounts of backpay.

On November 18, 2014, there was a toxic explosion at an industrial plant about three miles from Limoneira. Shortly after the explosion, county agriculture department officials informed Rincon that Limoneira had to be evacuated. Harvest work did not resume at Limoneira after November 18 due to concerns that the field and crop were contaminated. On November 28, Rincon management and supervisors met with the Limoneira harvest crews to inform them that the company was closing Limoneira permanently, that their employment was terminated, and that “[a]t the moment there [were] not job positions available at any other company ranch.”⁵ On December 31, 2014, the sublease on Limoneira terminated by its own terms.

On November 26, 2014, Limoneira harvest worker Juan Alvarez filed ULP charge no. 2014-CE-44-SAL, alleging that on or about November 18, 2014, Rincon discriminated against the workers who engaged in the July 2014 work stoppage and who participated in the investigation of the July 16, 2014 ULP charges by cutting their hours of work.

For reasons unclear in the record, the General Counsel did not issue a complaint in this matter until February 1, 2019. The complaint alleges that around late November, and through December 2014, a number of the Limoneira harvesters whose employment had been terminated on November 28, sought rehire at Rincon’s other

⁵ Another of Rincon’s raspberry ranches, Mesa Ranch, was permanently shut down around mid-December 2014. Mesa had three harvesting crews, or a total of approximately 90-100 employees.

raspberry ranches but were denied employment in retaliation for their involvement in the two-day shut down in July 2014.

Twelve former Limoneira workers testified at the hearing in this case, as will be discussed in more detail below. The workers testified that when they went in person to apply for work at Rincon's other ranches soon after Limoneira closed, they were told by individuals employed at the ranches that former Limoneira workers were on a list of people the company would not hire. Others testified that they were told there was currently no work available, and although they left their contact information to be called if work became available, they were never contacted.

Rincon has maintained throughout these proceeding that there was no "do-not-hire" list and that the reason that former Limoneira workers were not rehired was that they sought work at the other raspberry ranches when the season was winding down and harvest work was very limited.

II. Discussion and Analysis

A. The General Counsel's Delay in Issuing the Complaint Does Not Require Its Dismissal.

1. Respondent's Pre-Hearing Motion to Dismiss the Complaint.

Shortly after the General Counsel issued the underlying complaint, and prior to the hearing in this matter, on February 15, 2019, Rincon filed a motion to dismiss the complaint in this matter on the basis of the equitable doctrine of laches, and on the grounds that the complaint was barred by the six-month statute of limitations.

Rincon argued in its motion that following the filing of ULP charge no. 2014-CE-44-SAL, the General Counsel's investigation was sporadic, with long periods of time passing between the regional staff's communications with Rincon. Rincon argued that due to the passage of time between the filing of the charge and the issuance of the complaint, and due to the fact that it stopped producing raspberries altogether in 2016, it would be prejudiced in attempting to mount a proper legal defense.

On March 8, 2019, the ALJ issued an order denying Rincon's motion to dismiss. Citing *Tri Fannucci Farms* (2014) 40 ALRB No. 10 and *Newark City Electric Corp.* (2018) 366 NLRB No. 145, the ALJ concluded laches is not an applicable defense in ULP proceedings.

In its post-hearing brief, Rincon requested that the ALJ reconsider his prior order denying its motion to dismiss in light of the evidence presented at the hearing. The ALJ stated in his decision and order that he found no basis to reconsider his previous order.

2. Laches Is Not Available as a Defense in ULP Proceedings.

Rincon asserts the General Counsel's delay in issuing the unfair labor practice complaint unfairly prejudiced its ability to defend itself in this proceeding. While Rincon now alleges in its exceptions that this delay constitutes a procedural due process violation, it essentially is the same laches argument Rincon asserted before the ALJ. In either case, we find no merit in Rincon's argument regardless of the label attached to it.

In *NLRB v. J.H. Rutter-Rex Manufacturing Co.* (1969) 396 U.S. 258, 264-265, the United States Supreme Court found that the National Labor Relations Board

(NLRB) “is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers.” The NLRB has likewise held that the doctrine of laches is not generally applicable as a defense in its proceedings. (*Newark City Electric Corp.*, *supra*, 366 NLRB No. 145, *4, fn. 2; *Entergy Mississippi, Inc.* (2014) 361 NLRB 892, 893, fn. 5, *enfd.* in relevant part (5th Cir. 2015) 810 F.3d 287, 298 [“the United States and its agencies are not subject to the defense of laches when enforcing a public right”]; *F.M. Transport, Inc.* (1991) 302 NLRB 241, 241 [“The [NLRB] has consistently held that the doctrine of laches is generally inapplicable to Board proceedings”].)

Our own precedent is consistent with the foregoing, holding that laches is not available as a defense in ALRB unfair labor practice proceedings. (See, e.g., *Tri-Fanucchi Farms*, *supra*, 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”].)⁶

⁶ California state courts have also held that, even where the elements are otherwise established, equitable defenses such as estoppel and laches generally will not lie against 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
(Footnote continued....)

Accordingly, we affirm the ALJ’s rejection of Rincon’s laches defense. The General Counsel has offered no explanation or justification for the four-year delay in this case. That said, however, we will not punish wronged agricultural employees otherwise entitled to a remedy for the General Counsel’s administrative delays, which are not the fault of the workers and are beyond their control. (*J.H. Rutter, supra*, 396 U.S. at pp. 264-265.) Unfortunately, such delays in themselves operate to inflict their own harms on wronged employees entitled to a remedy.

3. Despite the Delay in Issuing the Complaint, Rincon had Adequate Notice and an Opportunity to Prepare a Defense.

Rincon’s attempt to recast its laches argument in its exceptions under a procedural due process theory similarly lacks merit. Due process generally requires only that a party be provided notice and an opportunity to be heard. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 927; *Wilson v. State Bar of California* (1958) 50 Cal.2d 509, 510; see *Premiere Raspberries, LLC* (2018) 44 ALRB No. 8, p. 5.) Rincon had both.

Rincon’s claims of prejudice in this case are based largely on its own destruction of records or failure to properly preserve information or contact information of potential witnesses.⁷ Rincon’s admitted destruction of records potentially relevant to

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.)

⁷ Rincon’s claims of prejudice before the ALJ, including in its pre-hearing motion to dismiss and the declarations accompanying it, are made in such conclusory fashion as to be afforded any weight. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26 [“declarations that lack foundation or personal knowledge, or that are argumentative, speculative, (Footnote continued....)"])

its defense of the complaint, or failure to preserve information relevant to its defense, does not support its argument it was prejudiced or denied due process in this case. It is undisputed Rincon received notice of the filing of the charge in 2014. It twice responded to subpoenas issued by the General Counsel during the four years between the filing of the charge and issuance of the complaint. The first of these subpoenas was served on Rincon in December 2016 and the second in July 2018. Thus, while the General Counsel's investigation may have been moving slowly, Rincon undoubtedly was aware its investigation of the charge remained pending.

More importantly, Rincon never received notice from the General Counsel of the dismissal of the charge. Board regulation 20218 [Cal. Code Regs., tit. 8, § 20218] requires the General Counsel to serve on a respondent notice it is dismissing an unfair labor practice charge, and it is undisputed Rincon never received such notice. Thus, to the extent there is an issue concerning the spoliation of evidence due to Rincon's failure to preserve records or contact information for potential witnesses, we conclude responsibility for such matters lies with Rincon. (*St. Anthony Hospital Systems* (1995) 319 NLRB 46, fn. 1 ["In adopting the judge's rejection of the Respondent's affirmative defense of laches, we note that the Respondent's argument that it has been prejudiced by delay is based, in part, on its own destruction of its own personnel records after the timely unfair labor practice charge had been filed"]; see also *Truck Ins. Exchange v. Workers'*

impermissible opinion, hearsay, or conclusory are to be disregarded"]; *Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 139 ["Statements and arguments by counsel are not evidence"].)

Comp. Appeals Bd. (2016) 2 Cal.App.5th 394, 402-403 [upholding board's rejection of laches defense where workers' compensation claim submitted to insurer seven years after accident because timely notice of injury and claim were provided to the employer].) In other words, to the extent Rincon's destruction of records or failure to maintain contact information for potential witnesses prejudiced its defense of the complaint, such prejudice is a result of its own actions (or inactions) and not attributable to the General Counsel or a result of the General Counsel's delays. Having received timely notice of the filing of the charge, Rincon acted at its own risk when it undertook to destroy potentially relevant records. Rincon never contacted the General Counsel to inquire about the status of its investigation of the charge or whether it had been dismissed. Rather, Rincon apparently chose to assume it had been dismissed, despite never receiving any notice of dismissal of the charge. In circumstances where a respondent is uncertain of the status of a charge, it is incumbent on the party to clarify the status of the matter with the General Counsel. (See *J.H. Rutter, supra*, 396 U.S. at p. 266.)

In sum, the record shows that Rincon had sufficient notice of the charge and investigation and the need to preserve records and evidence, but simply failed to do so.

B. The Allegations in the Complaint Were Sufficiently Related to Allegations in the Charge to Provide Rincon with Notice and an Opportunity to Prepare a Defense.

Both this Board and the NLRB have long held that a complaint is not limited to the precise allegations in the charge. As long as there is a timely charge, the complaint may allege any matter sufficiently related to or growing out of the charged

conduct. (*NLRB v. Fant Milling Co.* (1959) 360 U.S. 301, 308 [“Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power [footnote omitted] in order properly to discharge the duty of protecting public rights which Congress has imposed upon it”]; *Grandview Heights Citrus Assoc.* (1986) 12 ALRB No. 28, at ALJ Dec. pp. 31-32.)

In *Redd-I, Inc.* (1988) 290 NLRB 1115, 1118, the NLRB applied a three-factor test for determining whether new allegations in a complaint are “closely related” to those in the original charge. Factors considered are: 1) whether the new allegations are of the same class, or involve the same legal theory; 2) whether the new allegations arise from the same factual situation or sequence of events; and 3) the Board “may” consider whether a respondent would raise the same or similar defenses to both allegations. Our Board has adopted this test and applied it in a number of cases. (See, e.g., *California Artichoke & Vegetable Corp.* (2015) 41 ALRB No. 2, pp. 13-15; *Kawahara Nurseries* (2014) 40 ALRB No. 11, p. 10.)

More recent NLRB cases have examined the scope of the permissible variance between the charge and complaint and have further discussed *Redd-I, Inc.*’s three factors. For example, in *Nickels Bakery of Indiana* (1989) 296 NLRB 927, 928, footnote 5, the NLRB held that the new allegation does not have to allege a violation of the same section of the Act. In addition, the NLRB will find that the second factor has been satisfied “where the two sets of allegations ‘demonstrate similar conduct, usually during the same time period, with a similar object,’ or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an

overall plan to undermine union activity.” (*Carney Hospital* (2007) 350 NLRB 627, 630; *Charter Communications, LLC* (2018) 366 NLRB No. 46, *8, fn. 7, enfd. (6th Cir. 2019) 939 F.3d 798.) The NLRB also noted in *Carney Hospital* that the third prong of the *Redd-I* test is not mandatory as indicated by its language (“may” not “must”). (*Carney Hospital, supra*, 350 NLRB 627, 628, fn. 8.)

Rincon cites to *S.S. Kresge Co. v. NLRB* (9th Cir. 1968) 416 F.2d 1225 and *Reebie Storage & Moving Co., Inc. v. NLRB* (7th Cir. 1995) 44 F.3d 605 in support of its argument that the “closely related” test was not met in this case. Rincon argues that the failure to rehire allegations did not arise out of the same sequence of events as the allegation in the original charge.

We agree with the ALJ’s conclusion that the complaint allegations are closely related to the allegations of the underlying charge. The failure to rehire allegations logically stem from the charge allegations involving a discriminatory reduction in hours, and thus can be viewed as involving a similar pattern of conduct to punish workers who had exercised their rights by engaging in a work stoppage and who participated in an ALRB investigation.

In arguing that the allegations in the complaint were not part of the same sequence of events as allegations in the original charge, Rincon emphasizes that the workers who participated in the July 2014 work stoppage were quickly put back to work, and suffered no adverse consequences through the rest of the harvest season. However, this does not foreclose a finding of an unlawful failure to rehire at a later date. This Board has recognized that in seasonal employment, “the season following protected union or

other concerted activity is often the first opportunity for an employer to retaliate for such conduct without blatantly seeming to discriminate.” (*Gerawan Farming, Inc.* (2019) 45 ALRB No. 7, p. 11; *Tsukiji Farms* (1988) 24 ALRB No. 3, at ALJ Dec. p. 65, citing *Sahara Packing Co.* (1978) 4 ALRB No. 40, at ALJ Dec. p. 15.) We also have found in this context that “it would be misleading to place undue emphasis on the time periods involved and forget that, in seasonal employment, re-employment is generally the first opportunity for more subtle discrimination to occur.” (*Sahara Packing Co., supra*, 4 ALRB No. 40, at ALJ Dec. p. 15.) Thus, the passage of time between the concerted activity and the alleged unlawful retaliation in this case does not in and of itself support the conclusion that the allegations in the charge and complaint did not arise out of the same protected activity.

In *California Artichoke & Vegetable Corp. dba Ocean Mist Farms*, the original charge alleged that workers were unfairly disciplined the day after they engaged in a December 2012 walkout. The complaint, which issued in 2014, alleged that the employer also retaliated against the charging party by denying his time off request in March 2013, and then refusing to rehire him in April 2013. The Board, applying *Redd-I, Inc.*, found that the new allegations were closely related, arose out the same protected activity, and were subject to the same defenses. As such, the new allegations were not time-barred. (*California Artichoke & Vegetable Corp. dba Ocean Mist Farms, supra*, 41 ALRB No. 2, pp. 12-13.)

Rincon further argues that it was denied due process by the addition of three new discriminatees, Maria Rangel, Rosa Navarro, and Marco Torres, less than two

business days before the hearing in this matter. These individuals were not part of the July 2014 work stoppage and were not mentioned in the original ULP charge.

In support of its argument, Rincon cites *NLRB v. Complas Industries, Inc.* (7th Cir. 1983) 714 F.2d 729. There, the court found the employer's due process rights were violated when a complaint was amended during the hearing to add a claim of unlawful interrogation of a single employee. The original complaint alleged only that a different employee had been unlawfully fired. The court held that under the circumstances, the respondent was denied due process because the original complaint did not give any indication of the unlawful interrogation claim, and the new claim was made in an amended complaint during the course of a one-day administrative proceeding. In addition, despite the respondent's repeated objections to the amending of the complaint, an adjournment of the proceeding to provide respondent with a meaningful opportunity to meet the amended claim was not provided. (*Complas Industries, Inc., supra*, 714 F.2d at p. 734.)

In contrast, in the instant case, the unpled allegations as to Rangel, Navarro, and Torres were closely related to the other failure to rehire claims, and as all three testified at the hearing, *their* claims were fully litigated. Indeed, the theory of the case as to these individuals is identical to other pled allegations. 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. (*George Amaral Ranches, Inc.* (2014) 40 ALRB No. 10, pp. 16-17, citing *Doral Hotel &*

Country Club (1979) 240 NLRB 1112, fn. 4; *Airborne Freight Corp.* (2004) 343 NLRB 580, 581; *Pergament United States* (1989) 296 NLRB 333, 334.)

Based on the foregoing analysis, we find that the allegations in the complaint were sufficiently related to the allegations in the original charge to have provided Rincon with notice and an opportunity to put on a defense, and that the ALJ properly considered ULP allegations regarding Rangel, Navarro and Torres.⁸

C. We Find No Grounds to Overturn the ALJ’s Credibility Determinations.

In general, once an exception to an ALJ’s decision is filed, the Board is responsible for making factual determinations based upon an independent review of the entire record. (Lab. Code, § 1160.3; Cal. Code Regs., tit. 8, § 20286; *Vessey & Co. v. ALRB* (1989) 210 Cal.App.3d 629, 657.) The Board is the ultimate finder of fact and is free to make factual findings contrary to those of the ALJ based upon its own views of the weight of the evidence. (*Vessey & Co., supra*, 210 Cal.App.3d at p. 657.)

Despite the general rule that the Board reviews the record de novo, the Board affords deference to the credibility determinations of an ALJ. 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.

⁸ The ALJ did not mention Maria Rangel in the section of his decision entitled “Lack of Complaint Allegations re Marcos Torres and Rosa Gregoria Navarro.” This must have been an oversight as Rangel testified at the hearing, and the ALJ credited her testimony in his decision.

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.)

The ALJ clearly sets forth reasons for his credibility determinations in his decision. He finds most witnesses credible based on a combination of factors, including demeanor, consistency and the presence of corroboration. Contrary to Rincon's argument, the testimony of the former Limoneira employees does not appear to be rehearsed or scripted. The details recalled by the witnesses as they described their efforts to seek rehire varied. Moreover, the ALJ did not make lop-sided credibility determinations in favor of the General Counsel as Rincon argues.⁹ He discredited the uncorroborated testimony of General Counsel witness Gloria Espinosa and discredited the testimony of General Counsel witness Alexis Rodriguez because it was vague and

⁹ Cf. *NLRB v. Advance Transp. Co.* (7th Cir. 1992) 979 F.2d 569, 573 [no bias shown in mere fact ALJ credited General Counsel's witnesses over employer's]; *NLRB v. Del Rey Tortilleria, Inc.* (7th Cir. 1986) 787 F.2d 1118, 1121 ["there is nothing inherently arbitrary ... in believing one side's witnesses and not the other's"], quoting *Conair Corp. v. NLRB* (D.C. Cir. 1983) 721 F.2d 1355, 1367-1368.

lacked specificity and foundation. The ALJ explained that he did not credit Rincon's witness Maria Chavez (Mari) because her testimony that none of the prospective employees she spoke to in late 2014 or early 2015 told her they were from Limoneira Ranch was not believable in light of conflicting testimony from several workers who applied for work at Central Ranch, where she worked.

Accordingly, we find no basis to overturn the ALJ's determinations with respect to witness credibility, as they are supported by the record.

D. The Record Supports the ALJ's Finding that Punchers and Row Bosses Acted as Rincon's Agents When They Spoke to the Limoneira Workers Seeking Rehire.

Rincon argues the complaint did not specifically allege that Rincon's punchers and row boss employees were acting as Rincon's agents, and it thus failed to provide Rincon adequate notice that this issue would be litigated at the hearing. In support of its argument, Rincon cites to *J.R. Norton Co. v. ALRB* (1987) 192 Cal.App.3d 874 and *Sunnyside Nurseries, Inc. v. ALRB* (1979) 93 Cal.App.3d 922. However, in these two cases, the courts reversed the Board's finding violations of the Act where the complaints failed to allege the violations that the Board found. In contrast, the complaint here not only alleged that various Limoneira workers were denied rehire at Rincon's other raspberry ranches, but also that its punchers and row bosses refused to rehire some workers. As the ALJ stated in his decision, all that is required in a complaint is that there is a plain statement of the conduct alleged to be an unfair labor practice so that a respondent can put on a defense. (*American Newspaper Publishers v. NLRB* (7th Cir. 1951) 193 F.2d 782, 800, *affd.* (1953) 345 U.S. 100.) As the ALJ concluded, the General

Counsel is not required to plead her evidence or the theory of the case in the complaint. (*McDonald's USA, LLC* (2015) 362 NLRB 1347, citing *North American Rockwell Corp. v. NLRB* (10th Cir. 1968) 389 F.2d 866, 871.) We therefore uphold the ALJ's determination that the complaint adequately put Rincon on notice of the conduct alleged to have been violations of the Act.

Rincon argues that the record does not support the ALJ's conclusion that the punchers and row bosses were acting as Rincon's agents and speaking on behalf of Rincon regarding the availability of work. Rincon additionally asserts that "ample testimony" establishes that the punchers and row bosses had only a clerical role when it came to hiring. The General Counsel responds that the record establishes that Rincon conferred actual hiring authority on the punchers and row bosses, citing an April 4, 2014 memorandum from Rincon management addressed to "all persons in charge of directing or hiring a group of employees, for example, supervisors, foremen, row bosses and punchers."

We do not find that the record establishes that the punchers and row bosses had actual authority to hire. Although the ALJ found that Rincon HR Director Joe Lopez stated that row bosses hired employees on occasion, this is an overstatement of Lopez's testimony. When asked during the hearing whether row bosses had independent authority to hire, Lopez testified that "they seek first approval from the ranch foreman or supervisor." Later, as Lopez explained how the crew bosses assisted the foremen, he testified that if a foreman had positions to fill, he or she might ask a crew boss to call people. In addition, crew bosses would advise foremen if there were vacancies that

needed to be filled. This testimony supports a finding that while row bosses were often involved in assisting with hiring, the ultimate authority for hiring in the fields rested with the ranch foremen.

In evaluating whether the row bosses and punchers acted as Rincon's agents, the ALJ properly applied the standard set forth in *Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307. In *Vista Verde Farms*, the California Supreme Court followed NLRB precedent concerning an employer's liability for unfair labor practices caused by non-supervisory employees acting as agents of the employer. The court held that "even when an employer has not directed, authorized or ratified improperly coercive actions directed against its employees, under the ALRA an employer may be held responsible for unfair labor practice purposes if the workers could reasonably believe that the coercing individual was acting on behalf of the employer." (*Vista Verde Farms, supra*, 29 Cal.3d at p. 322.)

Rincon argues that the April 4, 2014 memorandum is not relevant to the issue of whether a reasonable person would believe that Rincon's punchers and row bosses spoke for Rincon about the availability of work. The purpose of the memorandum was solely to advise foremen not to give special treatment to relatives of current employees. Moreover, there was no evidence that employees and job applicants were aware of the contents of the memorandum. Rincon further argues that all of the charging parties were pre-existing Rincon employees, and they would have known after working with the punchers and row bosses that those individuals did not have supervisory authority.

However, whether the row bosses and punchers had actual supervisory authority is not dispositive of the issue of whether they acted as agents in this case. In *Superior Farming Co. v. ALRB* (1984) 151 Cal.App.3d 100, the Fifth District Court of Appeal followed *Vista Verde Farms* and upheld the Board's conclusion that the employer was liable for the actions of a non-supervisory crew leader who mistakenly informed members of his crew that they were fired. The court found that under the circumstances, it was reasonable for the crew to believe that the crew leader spoke on behalf of the employer. (*Id.* at p. 119.) A number of key facts supported this finding. The crew leader regularly translated the supervisor's instructions into Spanish for the crew and the crew's complaints into English to the supervisor. At times, the crew leader was directed to lay off workers who did not meet the employer's productivity standards, but he never did so without instructions from the supervisor. The court found that "[a]lthough [the crew leader] exercised very little independent judgment as a 'crew boss,' he regularly translated orders given by his superiors to the crew and acted as a 'conduit' to relay work instructions and pay rates. Given [his] role as the interface between the crew and management and his frequent duties as a conveyor of management policy to those under him, there is substantial evidence to support the conclusion that the crew reasonably believed [the crew leader] was acting on management's behalf in delivering the news of the 'discharge.'" (*Ibid.*)

The court rejected the employer's argument that the crew leader's actions could not be imputed to the company absent company knowledge of the wrongful conduct. This argument was foreclosed not only by the subjective test set forth in *Vista*

Verde Farms but also by the terms of ALRA section 1165.4, under which the question of agency does not necessarily depend upon actual authorization or subsequent ratification of the actor's conduct.¹⁰ (*Superior Farming Co., supra*, 151 Cal.App.3d at p. 122.)

In *Paul W. Bertuccio* (1979) 5 ALRB No. 5, the Board held that an unlawful interrogation regarding a union election conducted by a non-supervisory employee was attributable to the employer. The co-owner of a family farm testified that the employee in question was her "assistant," who kept track of workers' time and productivity. In the absence of supervisors, the employee would watch over operations and relay information to the owners if anything came up. The Board concluded that under the circumstances, it was reasonable for employees to believe that the employee was acting as an agent of the employer because of the "cloak of authority" which the employer had given to her. (*Paul W. Bertuccio, supra*, 5 ALRB No. 5, p. 3.)

In *Tsukiji Farms, supra*, 24 ALRB No. 3, the Board found that employees could have reasonably believed that a non-supervisory employee had authority to act on behalf of the employer. Workers could talk to the individual in question or to the company's owners in order to start work. Although the employee did not have the authority to hire within the meaning of the ALRA, the issue was the workers' subjective belief and the employee's apparent authority. The evidence showed that the workers viewed the employee and the company's two owners as equally able to give them work,

¹⁰ ALRA section 1165.4 states: "For the purpose of this part, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

and were unaware of any limitations on the employee's ability to hire. (*Tsukiji Farms, supra*, 24 ALRB No. 3, at ALJ Dec. p. 15.)

There is evidence in the instant case that row bosses and punchers acted as conduits of information about work related matters between Rincon supervisors and the crew members. For example, Gloria Espinosa, who served as both a row boss and as a puncher, testified about her duties in each position testified that she gave her phone number to crew members because at a worker orientation, Rincon supervisors informed workers that if they could not reach their foreman, they should call the row boss or puncher if they were going to be late or absent. Her duties included checking on crew members to make sure they were doing their jobs well, and if a worker wanted a day off, she would relay the request to the foreman, and then let the worker know the foreman's answer.

In addition, the record is clear that the punchers and row bosses regularly helped job applicants fill out their hiring paperwork and collected necessary personal information such as social security numbers, I.D. information, addresses and phone numbers. This was clearly still the practice when the former Limoneira workers visited other ranches to seek rehire. For example, Juan Alvarez described seeing Joaquin assisting the person in charge by helping others fill out their paperwork.¹¹ Norma

¹¹ In his decision, the ALJ states that Juan Alvarez went to Navarro Ranch looking for work and spoke to "Joaquin, the foreman." The ALJ later refers to Joaquin as a foreman. We disagree that the record establishes that Joaquin was a ranch foreman. Instead, Alvarez testified that he thought Joaquin was someone in charge because he was helping people fill out work applications, and that "he was like a secretary of the person
(Footnote continued....)

Martinez observed the row boss, Juan, filling out paperwork at Santa Clara Ranch when she sought work there. Although the punchers and row bosses did not have the independent authority to hire, the record supports a finding that it was reasonable for employees to view these individuals as having been given a “cloak of authority” by Rincon. (*Paul W. Bertuccio, supra*, 5 ALRB No. 5, p. 3.)

There is also evidence that row bosses and punchers regularly conveyed information to job seekers about whether work was available. Flora Reyes, who was a puncher at Navarro and then later at Limoneira, testified that she wrote down names and numbers of those seeking work, and when the foreman told them it was OK to hire personnel, a puncher or a row boss would call the job applicants back. This is consistent with HR Director Lopez’s description of the interaction between job seekers, crew bosses and foremen. Lopez testified that at times a crew boss would call his foreman to tell him people had approached him (the crew boss) about work and the foreman would tell the crew boss whether they needed help or not. Lopez also testified that a crew boss might also call the foreman to advise him that they needed help. Lopez further testified that a foreman also spoke to a crew boss when there were positions that needed to be filled, and that the crew boss would call people whose numbers he had.

in charge.” Jose Alvarez (Juan’s brother) testified that Joaquin had taken the place of “the daughter of Mr. Serafin” who had been in charge of the ranch. When Juan Alvarez went to apply for work at Navarro Ranch, Joaquin was sitting at a table filling out applications for new hires, and he carried a walkie-talkie and called the foreman in Juan’s presence to let the foreman know he was there. Although the record does not establish that Joaquin was a ranch foreman, the record does support a finding that Joaquin was likely a row boss, and that he acted with apparent authority when he spoke to the Alvarez brothers.

Norma Martinez testified that it was her understanding from the previous times when she went to look for work “we would look for the puncher or row boss and they were the ones who would give us a job.” Indeed, most of the former Limoneira workers testified that they sought out and spoke to punchers and row bosses when they went to other ranches to seek re-hire. In sum, it is apparent from the record that punchers and row bosses frequently acted as the interface between job seekers and management.

Accordingly, the record supports the conclusion that when various punchers and row bosses told former Limoneira workers they were on a list of people the company would not hire or when they told them there was currently no work available, it was reasonable for the discriminatees to believe that the punchers and row bosses spoke on behalf of Rincon. (*Vista Verde Farms, supra*, 29 Cal.3d at p. 322; *Superior Farming Co., supra*, 151 Cal.App.3d at p. 119.) Thus, we uphold the ALJ’s conclusion that the punchers and row bosses were acting as Rincon’s agents.¹²

E. The Record Supports a Finding That Personnel at Rincon’s Other Ranches Were Given Instructions Not to Rehire People from Cervantes’ Crews at Limoneira Ranch.

Former Mesa Ranch foreman Guadalupe Vega testified that in October or November 2014, lead foreman Alberto Vasquez gave him a list of names and told him to be careful about hiring individuals on the list because they had been involved in a strike

¹² Rincon contends that testimony regarding statements made by punchers and row bosses were inadmissible hearsay. This contention is premised on Rincon’s argument the punchers and row bosses were not agents of Rincon, which we have rejected. We conclude the statements are not barred as hearsay. (Evid. Code, § 1222; *Kophammer Farms* (1982) 8 ALRB No. 21, p. 4, fn. 4.)

at Limoneira Ranch. The ALJ found Vega to be a “consistent, responsive, detailed witness who was not shaken by argumentative questions on cross-examination.” Vega’s testimony about the existence of a “blacklist” of former Limoneira workers is corroborated by other credited testimony.¹³ The ALJ rejected Rincon’s argument that there was no evidence that the list was distributed to several ranches. The ALJ found that a reasonable inference could be drawn that Vasquez would not have simply given the list to one foreman at a single ranch, and he found that the references to the list made by hearing witnesses supported the inference. The ALJ also noted that Vasquez was never called to deny Vega’s testimony.¹⁴

Juan Alvarez testified that he was told by Joaquin at Navarro Ranch that he was on a list of people he could not hire. Jose Alvarez also stated that Joaquin told him that he and his brother were on a list, and that he had been instructed not to give them

¹³ Vega testified that General Counsel Exhibit 3 was the list that Vasquez gave him. When this document was shown to Lopez during the hearing, he explained that the two pages were piece rate sheets showing the productivity of the day’s activity by harvesters in Cervantes’ crews on July 15, 2014. While we find no reason to doubt that Lopez’s description of this document was accurate, we also find no reason to disturb the ALJ’s finding that Vega credibly testified that Exhibit 3 was the document given to him by Vasquez. (*Corralitos Farms, LLC* (2013) 39 ALRB No. 8, p. 7.)

¹⁴ Rincon states in its exceptions to the ALJ’s decision that it could not locate Vasquez due to the passage of time and due to the fact that it had ceased raspberry operations in 2016. Although Rincon made a general assertion in its post-hearing brief that due to the passage of time all of its supervisors, foremen, crew bosses and punchers had left the company and that it had difficulty in trying to find witnesses to come forward, it asserted no such objection at hearing. (See *Smith Packing, Inc.* (2020) 46 ALRB No. 3, p. 7; see also p. 9, fn. 7, *infra*; *Gdowski, supra*, 175 Cal.App.4th at p. 139; *Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 454 [“These unsworn averments in a memorandum of law prepared by counsel do not constitute evidence”]; *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1090.)

work. Jose further testified that at Santa Clara Ranch he spoke to a female puncher who looked at a list and then told him there was no work. Gloria Espinosa testified that when she, Luis Espinosa, and Alexis Rodriguez sought work at Central Ranch, a puncher named Mari asked where they were from and checked a list.

Other witnesses testified about being told by a puncher or row boss that they had been told not to rehire former Limoneira workers or former workers from Gilberto Cervantes' crew. Javier Reyes testified that he spoke to Benjamin, a row boss at Navarro, who told him he had work in his crew, but that he had received orders from supervisors that there was no work for those from Limoneira because of the "commotion" there. Norma Martinez described her interaction with Mari at Santa Clara Ranch, who Martinez knew from her prior work at Mesa Ranch. Mari was initially friendly, but when Martinez told Mari she had been working with Cervantes at Limoneira, Mari's smile disappeared, and she told Martinez "we're not taking anybody from there."¹⁵

Accordingly, we find the record supports the ALJ's finding Rincon personnel at other ranches were instructed not to hire former Limoneira workers.

F. The General Counsel Established a Prima Facie Case of Discriminatory Failure to Rehire.

In discrimination cases under ALRA section 1153, subdivision (a), the General Counsel has the initial burden of establishing a prima facie case. "The General Counsel must show by a preponderance of the evidence that the employees engaged in

¹⁵ The ALJ did not credit Mari's testimony that she did not know Norma Martinez, and that no former employees from Limoneira approached her in late 2014 or early 2015 seeking rehire.

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)." (*Gerawan Farming, Inc., supra*, 45 ALRB No. 7, pp. 3-4.) "With respect to the third element of causal connection, the Board may infer a discriminatory motive from direct or circumstantial evidence." (*Id.* at p. 4.)

In cases such as this one, where the alleged adverse employment action is the failure to rehire an employee, the General Counsel's prima facie case must also include a showing that the employee applied for an available position for which they were qualified and were unequivocally rejected. (*Gerawan Farming, Inc., supra*, 45 ALRB No. 7, p. 4.) If the employer has a practice or policy of contacting former employees to offer them re-employment, then the prima facie showing can be satisfied by proof of the employer's failure to offer the employee work when work became available. (*Id.* at pp. 4-5.)

"Once the General Counsel has established a prima facie case of discrimination, the burden shifts to the employer to prove that it would have taken the same action in the absence of the protected conduct." (*Gerawan Farming, Inc., supra*, 45 ALRB No. 7, p. 5.)¹⁶ "[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

¹⁶ This burden shifting analysis has long been known as the "Wright Line" causation test after the NLRB's decision in *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083, enfd. (1st Cir. 1981) 662 F.2d 899, cert. den. (1982) 455 U.S. 989.

evidence that it would have taken the same action in the absence of protected conduct.”
(*Ibid.*, quoting *Conley* (2007) 349 NLRB 308, 322, enfd. *Conley v. NLRB* (6th Cir. 2008)
520 F.3d 629, 637-638.)

“Where it is shown that the employer’s proffered reasons are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis.” (*Gerawan Farming, Inc.*, *supra*, 45 ALRB No. 7, p. 5, citing *Premiere Raspberries, LLC dba Dutra Farms* (2013) 39 ALRB No. 6, p. 8.)

1. Protected Concerted Activity and Employer Knowledge.

There is no dispute that approximately 46 Limoneira employees engaged in protected concerted activity in mid-July 2014 when they engaged in a work stoppage and filed ULP charges with the ALRB. Nor is it disputed that Rincon had knowledge of this activity. Although three of the alleged discriminatees did not participate in the mid-July walk out,¹⁷ these individuals identified themselves as having worked at Limoneira when they sought rehire at Rincon’s other ranches. The record reflects that Rincon treated all former Limonera employees as ineligible for rehire as a class based on the protected activity that occurred there, regardless of whether particular individuals actually participated in the activity. Where an employer takes action against employees based on protected group activity, the General Counsel is not required to prove specific individual employees engaged in the protected concerted activity. (*Merchants Building*

¹⁷ Maria Rangel, Rosa Navarro, and Marco Torres.

Maintenance, LLC (2012) 358 NLRB 578, 590, citing *St. John's Community Services--New Jersey* (2010) 355 NLRB 414, 415, fn. 3; see also *Kawano, Inc.* (1978) 4 ALRB No. 104, p. 8 [“where the alleged discrimination is not directed at individuals, but at a group, the burden as to each named discriminatee may be met by a showing that the group was treated discriminatorily and that the named discriminatee is a member of the group”].)

2. The Causal Relationship Between the Employees' Protected Activity and the Adverse Employment Action.

Rincon points out that company owner Ken Hasegawa testified that he had no ill-will toward the employees who engaged in the work-stoppage, and that there were no adverse actions taken against the Limoneira workers after they went back to work directly afterwards. Indeed, the members of Cervantes' crews worked four more months without incident until the explosion forced the closure of the Limoneira on November 18, 2014.

Under some circumstances, a four-month passage of time between the protected activity and the adverse action might tend to cut against finding the requisite causal relationship. However, as discussed above, this Board has recognized that in seasonal employment, “the season following protected union or other concerted activity is often the first opportunity for an employer to retaliate for such conduct without blatantly seeming to discriminate.” (*Gerawan Farming, Inc., supra*, 45 ALRB No. 7, p. 11; *Tsukiji Farms, supra*, 24 ALRB No. 3, at ALJ Dec. p. 65, citing *Sahara Packing Co., supra*, 4 ALRB No. 40, at ALJ Dec. p. 15.) In this case, the passage of time does not militate against a finding of causal connection.

In many cases, the discriminatory motive element of the prima facie case must be inferred from circumstantial evidence in the record. In this case, the authorized admissions by Rincon's agents provide direct evidence that the alleged discriminatees were refused rehire based upon the prior work stoppage at Limoneira. For example, as stated above, Guadalupe Vega credibly testified that Alberto Vasquez gave him a list of names and told him to be careful about hiring individuals on the list because they had been involved in a strike at Limoneira. Benjamin, a row boss at Navarro told Javier Reyes he had work in his crew, but that he had received orders from supervisors that there was no work for those from Limoneira because of the "commotion" there.

We uphold the finding that that the General Counsel made the requisite showing of a causal connection between the protected concerted activity and the refusal to rehire.

3. The Alleged Discriminatees Applied for Available Positions for Which They Were Qualified.

Rincon asserts that all of the alleged discriminatees sought rehire during the down season for raspberry harvesting work. According to Rincon, it was reducing its raspberry operations in late 2014, Mesa Ranch was shut down in December 2014, and Navarro also was being partially shut down.¹⁸ Rincon also cites its employee handbook, which states that permanently laid off Rincon employees had no seniority or "bumping rights," for the proposition former Limoneira workers would have been rehired only if

¹⁸ There was testimony that between 90 and 100 people were laid off from Mesa Ranch in mid-December 2014.

work was available at the time they applied. Rincon further alleges that none of the alleged discriminatees reapplied for work when the 2015 harvest season began and harvest work was more plentiful.

The record supports the finding that each of the 12 discriminatees sought rehire soon after they were laid off from Limoneira Ranch. Juan Alvarez and his brother Jose sought work in early November at Navarro Ranch. The week of December 1, 2014, they also went to Santa Clara, Navarro, and Kotake Ranches. Flora Reyes sought work at Navarro Ranch in mid-December. Javier Reyes sought work at Navarro Ranch in early December. Gilberto Cervantes sought harvesting work at Navarro Ranch at the end of November.¹⁹ Norma Martinez sought rehire at Santa Clara Ranch in late November. Luis Espinosa went to Navarro Ranch a week after the layoff from Limoneira, and in late November or early December, he sought work at Santa Clara Ranch. Gloria Espinosa went to Santa Clara Ranch in late November or early December, and then in mid-December she looked for work at Navarro Ranch. Alexis Rodriguez sought rehire at Santa Clara Ranch in late November or early December. Maria Rangel went to Santa

¹⁹ Rincon asserts that Gilberto Cervantes was a statutory supervisor at the time of the mid-July walk out and implies that he is not entitled to the Act's protection. Cervantes, however, was no longer a statutory supervisor at the time he sought harvesting work. There is no evidence that Cervantes was denied rehire based upon his conduct as a supervisor. Rather, as we have discussed above, the evidence is that Rincon treated those who previously worked at Limonera as categorically ineligible for rehire based upon the protected activity that occurred there, and it was on this basis that it refused to hire Cervantes as a rank and file worker. (See *Babcock & Wilcox Construction Co.* (1988) 288 NLRB 620, 641 [former supervisory employee unlawfully refused rehire as a rank and file employee because the employer was concerned he would engage in union activity once rehired].)

Clara Ranch twice, in late November then again in early December. She also sought rehire at Navarro Ranch in early or mid-December. Finally, Rosa Navarro and Marco Torres looked for work at Central Ranch in early December, and then they went to the main Rincon Pacific office to seek rehire later in December.

There is evidence that Rincon had jobs available in late 2014 and was hiring workers. The parties stipulated that Rincon hired 16 new raspberry harvest workers between November 19, 2014, and June 1, 2015. Eight of the new hires occurred between November 19 and December 10, 2014.²⁰

While the record supports Rincon's contention that the raspberry harvest was winding down in late November and early December, the parties stipulated that there were seven harvest positions filled by new hires at Navarro during the approximate time the alleged discriminatees sought rehire. In addition, Javier Reyes testified that Benjamin, a row boss at Navarro, told him that he had work in his crew in early December, just not for former Limoneira workers. Flora Reyes sought work at Navarro in mid-December, and testified that the puncher, Dorotea, told her they were hiring, but not on the particular day Reyes sought work.

Santa Clara/Central Ranch also was accepting applications during this timeframe. For example, Norma Martinez testified that she saw about five people filling

²⁰ In addition, the stipulation shows that the individuals hired between November 25 and December 4, 2014, were hired at Navarro Ranch. The stipulation further shows that the individuals hired between May 18 and June 1, 2015, were hired at Kotake Ranch.

out applications at Santa Clara when she sought work there in late November, and the puncher, Mari, told Norma Martinez they were hiring.

The parties' stipulation shows that eight additional harvesting positions were filled in May and June 2015. Although there is no evidence that any of the alleged discriminatees applied for rehire in the spring of 2015, their encounters with ranch personnel at the end of 2014 would have given them a clear message that further applications would be futile, excusing them from returning to apply for work. (*Grand View Heights Citrus Assn.* (1986) 12 ALRB No. 28, p. 6.)

In addition to harvesting work, the record also shows end of season clean-up work starting to occur around the relevant time-period. Both Jose and Juan Alvarez testified that they had been involved in clean-up work at Rincon's other raspberry ranches in the past. Juan testified that when he helped clean-up at Navarro it took about 50 people to do the work. He also testified that when he did clean-up work at Kotake, it took about 40 people approximately six weeks.²¹

Accordingly, the record shows that Rincon was hiring and taking applications at its remaining raspberry ranches during the relevant timeframe, and we uphold the ALJ's finding that the General Counsel met her burden of showing that the former Limoneira employees applied for available positions for which they were qualified, and were denied rehire.

²¹ We do not believe the record supports the ALJ's conclusion that there were jobs available in November and December 2014 in Rincon's strawberry operation near Oxnard, as the record is unclear whether strawberries were being harvested at the same time discriminatees in this case sought rehire.

G. Rincon Failed to Show That It Would Have Taken the Same Action Absent the Protected Conduct.

Rincon contends that it demonstrated it had a legitimate reason for not hiring the 12 former Limoneira workers. First, Rincon argues that there was very little work during the “down season” when the workers sought rehire as harvesting season did not begin until May 2015. Second, Limoneira workers did not have “bumping” rights or preferential treatment over others seeking work. Third, Rincon was in the process of downsizing its raspberry operations.

While Rincon’s raspberry operations may have been diminishing during the relevant time period, Rincon’s claim that the former Limoneira workers were not rehired simply because they did not visit the ranches precisely at the time personnel was filling jobs is unavailing. Many of the workers testified that they left contact information with the appropriate people at the ranches but were never called back. Most importantly, the statements by Rincon’s agents provide direct evidence that the alleged discriminatees were refused rehire because they engaged in the prior work stoppage at Limoneira.

Therefore, we agree with the ALJ’s conclusion that Rincon failed to rebut the General Counsel’s case. (*David Abreu Vineyard Management, Inc.* (2019) 45 ALRB No. 5, p. 4; *L.S.F. Transportation, Inc.* (2000) 330 NLRB 1054, 1074-1075 [“Where the reason advanced by an employer for a discharge either did not exist or was in fact not relied on, the inference of unlawful motivation established by the General Counsel remains intact, and is indeed logically reinforced by the pretextual reason proffered by the employer”], *enfd.* (7th Cir. 2002) 282 F.3d 972.) For the reasons set forth above, we

affirm the ALJ's conclusion that Rincon's failure to rehire the 12 laid-off agricultural employees violated of ALRA section 1153, subdivision (a).²²

H. Rincon's Exceptions With Respect to the Recommended Remedy.

Rincon filed four exceptions to the ALJ's proposed remedy. The first exception is to the section of the proposed order that allows the Regional Director to calculate the rate of pay for employees attending the reading of the notice of employee rights. Second, Rincon objects to the date for the mailing notice. Third, Rincon argues that it should not have to provide the notice to newly hired strawberry workers. Finally, Rincon argues that the reinstatement remedy is not possible because its raspberry operations have been closed for the last four years.²³

²² The ALJ also concluded, without analysis, that Rincon violated section 1153, subdivision (d). While we agree that the alleged violation of section 1153, subdivision (d) properly was at issue in this proceeding as both the ULP charge and the complaint alleged such a violation, we find that the record before us does not support finding a subdivision (d) violation. A violation of ALRA section 1153, subdivision (d) is not derivative in nature, but rather requires an independent and separate analysis. (*Arakelian Farms* (1983) 9 ALRB No. 25, at ALJ Dec. p. 90.) To establish a violation of subdivision (d), it must be shown that the employer discriminated against an employee who filed a charge, testified in a proceeding, or otherwise participated in an ALRB proceeding. (*Ben and Jerry Nakasawa* (1984) 10 ALRB No. 48, p. 7; *Bacchus Farms* (1978) 4 ALRB No. 26, pp. 5-6.) The July 2014 ULP charges pertaining to the work stoppage at Limoneira were filed by Gloria Espinosa and Juana Fajardo. However, there was no evidence presented that either was denied rehire for this reason. Nor was there evidence presented in this case that Limoneira workers who provided statements or information to ALRB employees or otherwise participated in the investigation of these charges were denied rehire in retaliation for having done so.

²³ The General Counsel asserts in her reply to Rincon's exceptions that "the Board should modify the ALJ's recommended makewhole remedy to extend to all Limoneira workers according to proof, regardless of whether they went through the futile gesture of showing up at a Rincon ranch and asking for work." This is the first time in these proceedings that the General Counsel has raised the issue of extending the remedy
(Footnote continued...)

1. Rate of Compensation for Workers During Notice Reading.

Section 2(f) of the ALJ's proposed remedial order is the Board's standard notice and reading provision that allows the Regional Director to determine a "reasonable rate of compensation" to be paid to workers who are usually paid on a non-hourly wage basis for the time that they spend when ALRB staff comes to the workplace to read the notice and to conduct a question and answer period. This provision is intended to ensure that workers do not lose wages while they participate in the reading.

Rincon argues Labor Code section 226.2, subdivision (a)(4) requires only that workers paid on a piece-rate basis be paid at the minimum wage during the notice-reading period, and that this provision in the remedial order exceeds the Regional Director's authority to determine a remedy under Labor Code section 11160.3 and is punitive.

We reject Rincon's argument that Labor Code section 226.2, subdivision (a)(4) limits a worker's right to a reasonable rate of compensation during a notice reading remedy. "The Board has broad discretion in fashioning remedies which will effectuate the purposes of the act" (*Jasmine Vineyards, Inc. v. ALRB* (1980) 113 Cal.App.3d 968, 982), and has made it clear that workers attending a notice reading are entitled to be compensated at a rate that ensures they do not *lose* pay as a result of their attendance. (*Monterey Mushrooms, Inc.* (2019) 45 ALRB No. 1, p. 12.) It would be absurd to penalize the workers by reducing their ordinary pay in order to attend a

beyond the 12 discriminatees in this case. Because this matter has not been litigated, we deny the General Counsel's request.

reading concerning Rincon's violations of the Act. The principles of the Act dictate that workers should receive a fair approximation of the pay they ordinarily would receive. In situations where workers are paid on a piece-rate basis, the Board orders the Regional Director to determine the rate of pay. (See, e.g., *Gerawan Farming, Inc.*, *supra*, 45 ALRB No. 7, p. 34; *Monterey Mushrooms, Inc.*, *supra*, 45 ALRB No. 1, p. 15.) This is consistent with longstanding Board precedent, which has never been seriously disputed. After the Regional Director determines the reasonable rate of pay in compliance proceedings in this case, Rincon will have the opportunity to challenge these calculations should it have a basis for arguing that employees will be paid more than they reasonably would be entitled to during the notice reading.

2. Dates of the Notice Mailing Period in the Proposed Order.

The order requires that Rincon mail the Notice to Agricultural Employees to all workers employed by Rincon at any time during the time-period of May 15, 2014, to May 15, 2015. Rincon argues that the date of May 15, 2014, has no relevance to the ULP charge in this case. The date of the alleged violation in the charge begins November 18, 2014. Rincon points out that Board precedent establishes a mailing period of one year from the date of the ULP. Rincon proposes that the appropriate mailing period is December 1, 2014 to December 1, 2015.

The General Counsel states that she has no objection to the modification of the mailing period, but her position is that December 1, 2014, is an incorrect start date because the ULP began not with the first refusal to hire which was in November, but with the institution of Rincon's policy of blacklisting Limoneira workers. The General

Counsel argues that the first manifestation of the policy was in October or November 2014 when foreman Vasquez gave foreman Vega the “do not hire” list. The General Counsel proposes a notice mailing time-period of October 1, 2014, to September 30, 2015.

We disagree with the General Counsel’s proposed mailing time-period. Foreman Vega testified that he “ignored” the list given to him by Vasquez and hired people when he needed them from wherever they came. The Alvarez brothers testified that they went to Navarro Ranch seeking a transfer around “three weeks before work ended at Limoneira,” and were told by row boss Joaquin that they were on a list, but it is not clear whether this was three weeks before the November 18, 2014 explosion, or three weeks before the Limoneira workers received written notice on November 28, 2014, that they were being permanently laid off. Most witnesses described seeking work a few days after this later date.

On the record before us, we accept Rincon’s proposal that the appropriate mailing period is December 1, 2014 to December 1, 2015, and the order will be modified accordingly.²⁴

3. The Requirement that Rincon Provide the Notice to Newly Hired Strawberry Workers.

Section 2(h) of the order requires Rincon to provide a copy of the notice to new hires during the twelve-month period following the issuance of a final order in this

²⁴ We further note the December 1, 2014 date is consistent with the commencement of the backpay period ordered by the ALJ.

matter. Rincon opposes this because there is no evidence that any of its other crews of agricultural employees had any knowledge of the underlying incident. Rincon states that its raspberry operations ceased completely in July 2016, and the only agricultural operations it currently maintains are two strawberry operations, one in Ventura County and one in the Santa Maria area.

Under Board precedent, the party opposing a standard Board remedy has the burden to show compelling reasons for departing from the standard remedy, such as showing the violation was “isolated” or “technical” in nature. (*Vincent B. Zaninovich & Sons* (1999) 25 ALRB No. 4, p. 2, fn 2.) There is nothing in the record in this case to indicate that the violations were either isolated or technical. (See *Wonderful Orchards, LLC, supra*, 46 ALRB No. 2, pp. 13-14.) Indeed, this matter involves 12 discriminatees from one ranch who were subsequently denied rehire at several ranches. We find this exception to be without merit.

4. The Reinstatement Remedy in Light of the Closure of Rincon’s Raspberry Operations.

Rincon argues that requiring it to offer reinstatement to the discriminatees is inconsistent with Labor Code section 1160.3. Rincon’s position is that because all of its raspberry operations were closed in 2016, an order of reinstatement is beyond the scope of the Board’s authority and would be punitive. Moreover, Rincon argues, the reinstatement order is premised on the false assumption that strawberry harvest work is the same as raspberry harvest work.

We disagree. Although an employer need not offer reinstatement to a position that no longer exists for valid business reasons, the employer is nevertheless required to offer reinstatement to a substantially equivalent position. (*Ukegawa Bros. et al.* (1990) 16 ALRB No. 18, p. 5.) While Joe Lopez testified that raspberry harvesters tend not to like harvesting strawberries, because strawberry work is more labor intensive, this does not foreclose a finding that work in strawberries is substantially equivalent to raspberry harvesting. Moreover, this is an issue that is more appropriately addressed in the compliance process.

ORDER

Pursuant to Labor Code section 1160.3, respondent Rincon Pacific, LLC, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to rehire its employees for engaging in concerted activity protected under section 1153, subsection (a) of the Agricultural Labor Relations Act (Act).

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

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

(a) Offer Juan Alvarez, Jose Antonio Alvarez, Gilberto Cervantes, Flora Reyes, Norma Martinez, Maria Rangel, Javier Reyes, Gloria Espinosa, Luis

Espinosa, Rosa Gregoria Navarro, Marco Torres and Alexis Rodriguez immediate reinstatement to their former or substantially equivalent employment without prejudice to their seniority or other rights and privileges of employment.

(b) Make whole Juan Alvarez, Jose Antonio Alvarez, Gilberto Cervantes, Flora Reyes, Norma Martinez, Maria Rangel, Javier Reyes, Gloria Espinosa, Luis Espinosa, Rosa Gregoria Navarro, Marco Torres and Alexis Rodriguez, for all wages or other economic losses they suffered since on or about December 1, 2014, as a result of the refusal to rehire, 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 Juan Alvarez, Jose Antonio Alvarez, Gilberto Cervantes, Flora Reyes, Norma Martinez, Maria Rangel, Javier Reyes, Gloria Espinosa, Luis Espinosa, Rosa Gregoria Navarro, Marco Torres and Alexis Rodriguez and sent to the ALRB's Salinas Regional Office, which will thereafter disburse payment to them.

(c) 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. Upon request of the Regional Director, the records shall be provided in electronic form if they are customarily maintained in that form.

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

(e) 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.

(f) 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.

(g) 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 December 1, 2014, to December 1, 2015, at their last known addresses.

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

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

DATED: October 7, 2020

Victoria Hassid, Chair

Isadore Hall, III, Member

Ralph Lightstone, Member

Cinthia N. Flores, Member

MEMBER BROAD, concurring:

While I agree with my colleagues that the defense of laches is inapplicable to unfair labor practice cases under the ALRA, the problem of undue delay between the

filing of a charge and the issuance of a complaint still needs to be addressed in a comprehensive and consistent way.²⁵ In this case, there was a delay of more than four years between the date the charge was filed and the date the complaint was issued. Such a lengthy delay, absent extraordinary circumstances, seems excessive. One of the fundamental principles of our system of administrative law is that it is supposed to provide for the swift resolution of claims. Such a need is made all the more imperative by the predominantly seasonal and short-term nature of agricultural employment. To solve the problem of undue delay in future cases, I believe the Board should promulgate a regulation establishing a reasonable time limit for the issuance of complaints. Enacting a regulatory time limit would provide both uniformity and predictability for all parties.

²⁵ As the United States Supreme Court recognized in *NLRB v. J.H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, even though the defense of laches may be inappropriate in NLRB cases, that does not make the delay in the case acceptable. On the contrary, the Court characterized the four-year delay in that case as “deplorable.” (*Id.* at pp. 265-266.)

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed with the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB determined that we 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 like or related manner interfere with, restrain, or coerce employees from exercising their rights under the Act.

WE WILL make whole Juan Alvarez, Jose Antonio Alvarez, Gilberto Cervantes, Flora Reyes, Norma Martinez, Maria Rangel, Javier Reyes, Gloria Espinosa, Luis Espinosa, Rosa Gregoria Navarro, Marco Torres and Alexis Rodriguez for all wages or other economic losses that they suffered as a result of our unlawful conduct.

RINCON PACIFIC, LLC

Dated: _____

By: _____

Representative

Title: _____

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 342 Pajaro Street, Salinas, California. The telephone number is (831) 769-8031.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

RINCON PACIFIC, LLC
(Juan Alvarez, et al.)

46 ALRB No. 4
Case No. 2014-CE-044-SAL

ALJ Decision

On December 9, 2019, the Administrative Law Judge (ALJ) issued a decision finding that Rincon Pacific, LLC (Rincon) violated section 1153, subdivisions (a), and (d) of the Agricultural Labor Relations Act (ALRA or Act) by failing to rehire 12 laid-off agricultural employees because they had engaged in a work stoppage several months earlier. As a remedy for the violation, in addition to the standard cease and desist and noticing remedies, the ALJ recommended that Rincon offer immediate reinstatement to each discriminatee, and that each discriminatee receive back pay for the period beginning December 1, 2014.

Board Decision

The Board affirmed the ALJ's factual findings and legal conclusions consistent with its own decision, and adopted his recommended remedy as modified. With respect to Rincon's assertion that the General Counsel's delay in issuing the unfair labor practice (ULP) complaint unfairly prejudiced its ability to defend itself in this proceeding, the Board concluded that laches is not available as defense in ULP proceedings and further that the General Counsel's delay did not prejudice Rincon or deny it procedural due process. The Board concluded that personnel at Rincon's other raspberry ranches were given instructions not to rehire individuals from its Limoneira Ranch after the ranch was shut down because crews from Limoneira had been involved in protected concerted activity several months earlier. Thus, the Board affirmed the ALJ's conclusion that Rincon violated section 1153, subdivision (a) of the Act. However, the Board found that the record did not support finding that Rincon violated section 1153(d) of the Act. The Board explained that a violation of ALRA section 1153, subdivision (d) is not derivative in nature, but rather requires an independent and separate analysis, and there was no evidence presented in this case that employees were retaliated against for filing a charge or otherwise participating in an ALRB proceeding.

Concurrence

Board Member Broad concurred with the Board's decision. He wrote separately to state that while he agrees that the defense of laches is inapplicable to ULP cases under the ALRA, he believes that the Board should promulgate a regulation establishing a reasonable time limit for the issuance of complaints.

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RINCON PACIFIC, LLC,

Respondent,

and

JUAN ALVAREZ, ET AL.,

Charging Parties

Case No.: 2014-CE-044-SAL

DECISION AND RECOMMENDED
ORDER

Appearances:

For the General Counsel:

Andres Garcia, Assistant General Counsel
Silas Shawver, Deputy General Counsel

For the Respondent:

Rob Roy, Attorney

DECISION AND ORDER

John J. McCarrick, Administrative Law Judge. This case presents threshold issues of whether certain employees of Respondent are supervisors or agents authorized to make certain statements binding on Respondent and whether Respondent had adequate notice that the issue of agency would be litigated in this case. After those issues are resolved, the issue of whether Respondent refused to hire or rehire employees because

they engaged in protected concerted activity and filed unfair labor practice charges will be considered.

STATEMENT OF THE CASE

On November 26, 2014¹, Juan Alvarez (Alvarez) filed a charge with the Agricultural Labor Relations Board (Board) in Case 2014-CE-044-SAL, alleging that Rincon Pacific, LLC, (Respondent) violated section 1153(a) of the Agricultural Labor Relations Act (Act) by discriminating against its employees for engaging in a work stoppage. On February 1, 2019, the Regional Director of the Salinas Regional Office of the Board issued a complaint alleging that Respondent violated section 1153(a) and (d) of the Act by instituting a policy of refusing to rehire laid off employees Flora Reyes (Reyes), Gilberto Cervantes (Cervantes), Juan Alvarez (J. Alvarez), Antonio Alvarez (A. Alvarez), Julio Garcia (Garcia), Javier Reyes (Reyes), Arturo Alvarado (A. Alvarado), Diana Alvarado (D. Alvarado), Juana Fajardo (Fajardo), Luis Espinosa (L. Espinosa), Gloria Espinosa (G. Espinosa), Alexis Rodriguez (Rodriguez), Norma Martinez (Martinez), Maria Gregoria (Gregoria), Adrian De Jesus (De Jesus), and Celene Zamudio (Zamudio) because they had engaged in protected concerted activity and filed unfair labor practice charges. Respondent filed a timely answer denying it had committed any unfair labor practices.

¹ The date in the Complaint is in error and should read 2014.

I took testimony in this case from May 16-18, 2019, in Oxnard, California. Having considered the entire record including the testimony of the witnesses and the briefs filed by General Counsel and Respondent, I make the following:

FINDINGS OF FACT

Respondent admitted that it is an agricultural employer within the meaning of the Act. Respondent admitted that Alvarez has been employed as an agricultural employee of Respondent harvesting berries and that Jorge Aguilera (Aguilera) and Alberto Vasquez (Vasquez) were statutory supervisors at all times material herein, having the authority to discipline and fire employees under their supervision.

Respondent's Business and Chain of Command

At all times material herein, Respondent has grown and harvested raspberries at its ranches in Oxnard, California,² including Limoneira, Mesa, Kotake, Santa Clara (Central) and Navarro. Respondent was one of several companies owned by Ken Hasegawa (Hasegawa) and was operated by Anacapa Property Management (Anacapa) and later Rincon Fresh. Respondent's upper management included Hasegawa, Chad Ianneo (Ianneo), COO and President of all farming operations and Joe Lopez (Lopez) at Anacapa, handled all human resources for Respondent.

Under Ianneo was Jorge Aguilera (Aguilera), the grower supervisor who supervised foremen at all of Respondent's ranches. Under Aguilera was Alberto Vasquez (Vasquez) who was lead foreman over all of Respondent's ranches. At each ranch there

² Respondent is no longer engaged in the production of raspberries but has converted all of its operations to the growing of strawberries.

was a foreman who supervised all ranch employees, a puncher and row or crew boss. Punchers kept track of how many boxes fruit pickers brought in and for the quality of the fruit and row bosses kept track of work quality.

Punchers and Row Bosses as Respondent's Agents

The Facts

General Counsel contends that punchers and row bosses, sometimes referred to as crew bosses³, were Respondent's agents. Respondent contends that because General Counsel's complaint failed to allege Respondent's row bosses and punchers were its agents, it failed to provide Respondent with adequate notice in order to defend that the row bosses and punchers were not its agents.

While the ranch foremen generally hired ranch employees, at times they were assisted by punchers and row bosses. On occasion punchers would assist new employees fill out their hiring documents. According to Respondent's HR Director Joe Lopez, on occasion row bosses hired employees.⁴ As a puncher Flora Reyes assisted prospective employees in filling out employment forms and on occasion called employees in to work. According to Guadalupe Vega (Vega), Respondent's Meza ranch foreman, either Vasquez or Aguilera gave him a memo⁵ dealing with hiring of family members. The memo provides:

³ Transcript Volume III, page 113.

⁴ See Transcript Volume III, page 51-52, 113.

⁵ General Counsel's exhibit 4.

MEMORANDUM

****This memorandum is for all persons in charge of directing or hiring a group of employees. For example; Supervisors, Foremen, Row Bosses and Punchers****

Beginning 4/24/2014, the hiring of family members shall be strictly supervised. Hired family members should be treated strictly as regular employees. Special privileges should not be conceded. In the case that the company discovers special treatment toward hired family members, disciplinary action shall be taken and you may possibly be terminated.

The Law

The Board and the California Supreme Court have followed NLRB precedent concerning respondent liability for unfair labor practices caused by its agents. In *Vista Verde Farms v. ALRB*, (1981) 29 Cal 3d 307, 322, the Supreme Court found that under the Act's liberal application of agency principles, an employer may be found liable for the unauthorized or unratified improperly coercive actions directed against its employees if the workers could reasonably believe the coercing individual was acting on the employers' behalf.

In *Corralitos Farms, LLC*, (2013) 39 ALRB No. 8, slip opinion at page 17, citing *Vista Verde Farms, supra* and *Omnix International Corp.*, 286 NLRB 425 (1987), the Board found that punchers were not respondent's agents since there was insufficient evidence to conclude that employees would reasonably perceive that the punchers were speaking for the employer. In making this finding, the Board relied on the fact that punchers simply inspected boxes of fruit for quality control and that there was no other evidence that they held a special status that would make it reasonable for employees to perceive they were acting on behalf of management.

In this case both punchers and row bosses had duties that distinguish them from the punchers in *Corralitos Farms, LLC, supra*. As Respondent's human resources director Lopez testified, on occasion row bosses hired employees. There is ample credible and uncontradicted testimony, *infra*, from employees Flora Reyes, Juan and Antonio Alvarez and supervisor Guadalupe Vega that row bosses and punchers often assisted in the hiring process by filling out new employees' paperwork or by calling new employees in to work. Confirming this testimony, it is apparent from its 2014 memorandum GC #4 that Respondent considered row bosses and punchers to be involved in hiring or directing new employees.

Based upon this evidence, I conclude that the duties of row bosses/crew bosses and punchers in the hiring process would lead a reasonable person to conclude that the row bosses and punchers were speaking for Respondent concerning the availability of work at its ranches. I find that row bosses and punchers were Respondent's agents. Since they were Respondent's agents with respect to hiring issues, their statements to prospective employees may be considered admissions, not hearsay, and admissible in the record.

Adequacy of the Complaint

General Counsel must plead specific violations of the Act in the complaint in order to afford a respondent due process in order to adequately provide respondent with the opportunity to address those allegations. *JR Norton Co. v. ALR B*, (1987) 192 Cal App. 3d 824, 888; *Sunnyside Nurseries, Inc., v. ALR B*, (1979) 93 Cal App 3d 922, 933. All that is required in a valid complaint is that there be a plain statement of the

things charged to constitute an unfair labor practice that respondent be put on his defense. *American Newspaper Publishers v. NLRB*, 193 F. 2d 782, 800 (7th Cir. 1951); *affd.*, 345 U.S. 100 (1953). General Counsel is not required to plead evidence or the theory of the case in the complaint. *McDonald's USA, LLC.*, 362 NLRB No. 168 (2015).

The complaint herein alleges that Respondent violated section 1153(a) and (d) of the Act by instructing its hiring staff to refuse to rehire its Limoneira Ranch employees because they engaged in protected concerted activity and for filing unfair labor practice charges with the ALRB. Complaint paragraphs 17 through 22 specify which laid off employees sought rehire by Respondent, when and where they sought rehire and who told them there was no work. Paragraphs 18 and 19 allege Respondent's punchers told the employees they were not eligible for work or did not hire them.

Respondent cites two cases in support of its argument that it was denied due process because the complaint does not allege that punchers and row bosses were agents of Respondent. In both *JR Norton and Sunnyside Nurseries, supra*, the courts reversed the Board's finding of violations of the Act where the complaints failed to allege the violations found. These cases are inapposite to the facts herein. In both *JR Norton and Sunnyside Nurseries*, the complaint failed to put respondents on notice as to which sections of the Act they had violated. Herein, the complaint has alleged specific violations of the Act based upon Respondent's refusal to rehire employees. No new allegations have been alleged during the hearing or post hearing. The complaint put Respondent on notice not only that its hiring staff but also that its punchers refused to rehire some employees. While General Counsel has an obligation in the complaint to put

Respondent on notice of which sections of the Act it is alleged to have violated, there is no obligation to plead evidence as to who specifically refused to rehire laid off employees or to divulge the theory of the case that they were Respondent's agents.

I find that Respondent has not been denied due process herein since it has been put on notice of the alleged violations of the Act in the complaint.

Respondent, in its brief, requests reconsideration of my March 8, 2019, Order Denying Motion to Dismiss Complaint in which I addressed Respondent's contention that the complaint herein was barred by the doctrine of laches and the statute of limitations. I find no basis in the record herein to reconsider my previous order.

Background

The record reflects⁶ that on July 15 and 16, 2014, about 46 out of about 200 of Respondent's raspberry harvesters engaged in a work stoppage at Respondent's Limoneira Ranch near Oxnard, California. On July 16, 2014, unfair labor practice charges were filed in cases 2014-CE-024 and 025 SAL with the Oxnard subregional office of the Board. Respondent's Limoneira employees returned to work on Jul 17, 2014 and continued working until November 18, 2014. On August 26, 2015, the General Counsel and Respondent settled the charges in cases 2014-CE-024 and 025 SAL. As part of the settlement the following employees, inter alia, received backpay: Flora Reyes (Reyes), Gilberto Cervantes (Cervantes), Juan Alvarez (J. Alvarez), Antonio Alvarez (A. Alvarez), Julio Garcia (Garcia), Javier Reyes (Reyes), Arturo Alvarado (A. Alvarado),

⁶ See General Counsel's exhibit 1, joint stipulations as to facts and exhibits

Diana Alvarado (D. Alvarado), Juana Fajardo (Fajardo), Luis Espinosa (L. Espinosa), Gloria Espinosa (G. Espinosa), Alexis Rodriguez (Rodriguez), Norma Martinez (Martinez), Maria Gregoria (Gregoria), Adrian De Jesus (De Jesus), and Celene Zamudio (Zamudio).

On November 18, 2014, due to a nearby toxic explosion, Respondent halted work at the Limoneira Ranch and on November 28, 2014, Respondent permanently laid off all of its Limoneira raspberry harvesters. On December 31, 2014, by its terms, Respondent's lease at the Limoneira Ranch expired.

Limoneira Employees who Sought Rehire

Juan Alvarez

Juan Alvarez was employed by Respondent as a harvester from 2012-2014 at several of its ranches, including Limoneira until it closed in November 2014. Juan Alvarez also did clean-up work on strawberry fields at season's end that took four to six weeks utilizing 40 to 60 employees. About three weeks before work at Limoneira ceased Alvarez looked for work at Respondent's Navarro Ranch. There he spoke to Joaquin, the foreman. Alvarez believed Joaquin was a foreman at the ranch since he was at a desk filling out applications for new employees. When Alvarez said he was waiting for a transfer from Limoneira to Navarro and was looking for work, Joaquin said Alvarez was on a list of the most wanted that he couldn't hire. Juan Alvarez testimony was corroborated by his brother Jose. I credit Juan Alvarez testimony as it was uncontradicted and consistent. In my observation Juan Alvarez seemed a credible witness.

Jose Antonio Alvarez

Jose Antonio Alvarez worked for Respondent as a harvester from 2012-2014. He worked at several of Respondent's ranches including at Limoneira until it closed, and he was laid off. Jose Alvarez also did clean-up work at seasons end. Within a few days of his November 28, 2014 layoff, Jose Alvarez looked for work at Respondent's other ranches, including Navarro. At Navarro, together with his brother Juan, Jose Alvarez spoke with Joaquin who was filling out applications for new hires. When Joaquin learned Jose had worked at Limoneira Ranch, Joaquin asked Alvarez, "What have you done? You are first on the list with instructions not to give you work." I credit Jose Alvarez testimony. It is consistent with his brother Juan's testimony and had a sense of credibility based upon my observations.

Gilberto Cervantes

Gilberto Cervantes worked for Respondent as a field worker in its raspberry field from 2008-2014. In his capacity as a field worker for Respondent, Cervantes has driven a tractor, picked berries, irrigated the fields, planted vines and created the hoop structures housing the berry vines. Cervantes also did tear down work where the raspberry fields were dismantled. From 2008 to 2014 Cervantes worked at Respondent's Central Ranch (also known as the Santa Clara Ranch) where his supervisor was Jorge Aguilera. During this time, Cervantes also worked at Respondent's other raspberry ranches including Navarro Ranches 1, 3 and 5, Kotaki and Limoneira. In 2012, Cervantes was appointed supervisor at Limoneira by Aguilera and Serafin Ortiz. According to Cervantes, Respondent's hiring practices were the same at all of Respondent's ranches.

Applications were given out to prospective employees by the ranch foreman who would decide whether to hire the applicant.

In November 2014 there was an explosion near the Limoneira Ranch and all employees had to leave the fields. This was the last day Cervantes worked for Respondent. On November 28, 2014, Respondent gave Cervantes a formal layoff letter.⁷

At the end of November 2014, Cervantes went with Luis Espinosa to Respondent's Navarro #1 ranch, another of Respondent's raspberry ranches, to look for work. Cervantes spoke with Dorotea Hernandez, a puncher, to whom he gave his phone number but never received a call from Respondent. Cervantes was a credible witness who was not contradicted and gave testimony in a very specific and knowledgeable manner.

Flora Reyes

Cervantes wife, Flora Reyes, was employed by Respondent as a harvester and puncher at several of Respondent's ranches including Limoneira until the Limoneira Ranch closed in November 2014. As a puncher, Reyes was responsible for quality control of the fruit and counted the boxes picked by each employee. While working as a puncher at Respondent's Kotake Ranch in 2012, she also helped prospective employees fill out job applications about six times a month. On occasion she called employees in to begin work. As a puncher at Limoneira Ranch, Reyes did not assist with hiring as her husband, Gilberto Cervantes, performed this job. After being laid off at Limoneira,

⁷ Joint Exhibit 3

Reyes and Gloria Espinosa went to Respondent's Navarro #1 Ranch where they spoke to puncher Dorotea Hernandez who said Respondent was hiring at that ranch but not that day. They returned later and spoke to Dorotea about work and Dorotea asked where they had worked. When they said Limoneira, Dorotea said she had a list of Limoneira employees and put their names in a notebook. Reyes was not rehired by Respondent. Dorotea did not testify. I credit Reyes testimony as it was not contradicted, was specific and generally believable.

Norma Martinez

Norma Martinez was employed by Respondent from 2013-2014 where she worked at three of Respondent's ranches including Limoneira until Respondent closed that ranch in November 2014. After the explosion that closed Limoneira, Martinez went to Respondent's Santa Clara (Central) Ranch with Maria Rangel to look for work. Present were row boss Juan and puncher Mari. Martinez observed about five new pickers having their hiring paperwork being processed by Juan. Martinez had worked with Mari in the past at Respondent's Meza Ranch where Mari was a puncher. At Meza, Mari had told employees when they were going to be laid off and when they might be called back to work. After initially saying Respondent was hiring at Santa Clara after Martinez told Mari she had worked at Limoneira, Mari said they were not hiring since Martinez had worked at Limoneira. Martinez was not offered work by Respondent. Martinez admitted that she was unable to do harvesting for four weeks after the explosion due to a work-related injury. I found Martinez to be a responsive witness who testified in much detail. I credit her testimony. While Mari, also known as Mana Maria Chavez, testified that no

prospective employees in late 2014 or early 2015 said they were from Limoneira Ranch, I find this not credible in view of the testimony of several employees who applied for work at the Santa Clara Ranch and told her they had worked at Limoneira. While she said she had no list of employees from Limoneira Ranch who should not be hired, this is in contradiction of Vega's testimony and the list he was given. I do not credit Mari's testimony.

Maria Rangel

Maria Rangel worked for Respondent as a berry picker at Limoneira Ranch in 2013 and 2014. She was laid off by Respondent after the explosion at Limoneira Ranch. In addition to accompanying Martinez to Central Ranch and asking for work there, she sought work at Respondent's Navarro Ranch and left her name with the ranch foreman Chenco. She was not rehired by Respondent. I credit Rangel's testimony.

Javier Reyes

Javier Reyes worked for Respondent at several of its ranches from 2012- November 2014. Reyes worked at Limoneira in 2014. A week after being laid off from Limoneira, Reyes went to Respondent's Navarro Ranch to look for work. He spoke with Benjamin, a row boss, and asked if there was work. Benjamin said there was no work for those who had worked at Limoneira. Reyes left his name and phone number but received no offer of employment from Respondent. I credit Reyes' uncontradicted testimony.

Gloria Espinosa

Gloria Espinosa was employed by Respondent from 2013-2014. While working at Limoneira Ranch in 2014 she was both a puncher and row boss. After her lay off from

Limoneira Ranch after the explosion, Espinosa went to Respondent's Central and Navarro Ranches to look for work with Luis Espinosa, Alexis Rodriguez and Flora Reyes. At Central Ranch the employees said they were looking for any work. They spoke with a puncher named Mari. When Espinosa said they were from the Limoneira Ranch, Mari checked a list and told them to leave phone numbers. Later in her testimony, Espinosa said Mari told them they would not be hired since they were from the Limoneira Ranch. However, on cross examination, when Espinosa was asked to repeat her testimony with Mari at the Navarro Ranch, she failed to state Mari told the employees they would not be hired because they were from Limoneira Ranch. Flora Reyes and Luis Espinosa did not corroborate Espinosa's testimony about Mari telling employees they would not be hired because they were from Limoneira Ranch. Alexis Rodriguez said that he went to look for work with Luis and Gloria Espinosa and that a lady said she had a list of employees from the company and they could leave their names. I do not credit Espinosa's testimony that Mari said they would not be hired since they were from the Limoneira Ranch. I will otherwise credit her testimony since much of it is corroborated by other witnesses. Gloria Espinosa was not rehired by Respondent.

Luis Espinosa

Luis Espinosa worked for Respondent from 2013- November 28, 2014 as a picker. He worked at Respondent's Limoneira Ranch from April to November 28, 2014. A week after his layoff at Limoneira, Luis Espinosa went to Respondent's Navarro Ranch with Gilberto Cervantes. They spoke with puncher Dorotea and asked if they were hiring. They left their names and phone numbers with Dorotea. Luis also went to Respondent's

Central Ranch with Alexis Rodriguez and Gloria Espinosa. Luis and Alexis went to a trailer where they spoke with a female puncher and asked if there was work. When they told her they were from Limoneira Ranch, they were told to leave their names and phone numbers. Luis Espinosa was not rehired by Respondent. I credit Luis Espinosa's testimony.

Rosa Gregoria Navarro

Rosa Navarro worked for Respondent for two years, ending on November 28, 2014, at Limoneira Ranch where she worked as a picker. Navarro said she looked for work a month later but was unable to describe the name of the ranch or where it was located. She said she looked for work with her husband Marcos Torres and Maria Alejandro Torres. Rosa Navarro said that Norma Martinez did the driving. The following day she went to another ranch with her husband but was unable to identify the ranch. She said she spoke with an unnamed puncher who asked where they had worked. When they said Limoneira, the puncher looked at a list and said there was no work for Gilberto's crew because they are strikers. Navarro also looked for work at two other ranches but was again unable to identify if these were ranches owned by Respondent. Finally, Navarro went to Respondent's office and asked a clerk if there was work. They said they had worked with Gilberto at Limoneira. Navarro was not offered rehire by Respondent. Navarro's testimony lacked foundation to determine if she applied for work at Respondent's ranches. However, it is clear that she applied for work at Respondent's office and from her husband, Marco Torres' testimony below that she applied for work at Respondent's Central ranch.

Marco Torres

Torres was employed by Respondent as a picker. He does not know the dates of his employment but said he worked for Gilberto Cervantes, presumably at Limoneira Ranch. Torres does not know when he ceased work at Limoneira but there is no dispute that all employees were laid off on November 28, 2014. A few days later, Torres said he looked for work at a ranch on Rice and Rose roads in Oxnard, California but does not know if Respondent owned this ranch. Two days later he and his wife Rosa Navarro went to a ranch on the 118 highway with Norma and Maria, last names unknown. They asked for work from a man sitting at a table. Torres does not know what the man's job was. A few days later Torres and his wife went to Respondent's Central Ranch and spoke with an unknown man, whose position was unknown to Torres. Torres asked if there was work and gave his name. The man looked at a list and said there was no work. Torres corroborated his wife's testimony that they went to Respondent's office and asked for work from a clerk. Torres said they were given no answer to their request. Finally, Torres said he and his wife went to a ranch off highway 126. They asked a man at a gate to the ranch if there was work and when their names were given to him he looked at a list and said there was no work. There is no foundation this was Respondent's ranch. Torres was not rehired by Respondent. There is credible testimony from Torres that both he and his wife applied for work at at least one of Respondent's ranches and at Respondent's office.

Alexis Rodriguez

Alexis Rodriguez worked for Respondent as a picker for about four to five months in 2014 at the Limoneira Ranch until it was closed after the explosion. He sought work with Luis and Gloria Espinosa. Rodriguez has no independent recollection of which ranches he went to with the Espinosas. From their testimony it appears they went to Respondent's Central Ranch. He said they went to where the workers were located and a lady said she had a list of people that got let go from the company. Rodriguez testimony was vague and lacked specificity and foundation. I will credit it only to the extent it is corroborated by other credible testimony. Both Luis and Gloria Espinosa testified they looked for work at Respondent's Central Ranch with Rodriguez. Luis made no mention of this conversation in his testimony and Gloria's credible testimony is that a puncher looked at a list and told them to leave their phone numbers. I do not credit Rodriguez that the puncher said she had a list of employees the company let go. Rodriguez was not rehired by Respondent.

The Blacklist

In October and November 2014, Guadalupe Vega (Vega) was employed by Respondent as a ranch supervisor at its Meza Ranch. Vega's supervisors were Jorge Aguilera and Alberto Vasquez. Vega had the authority to hire employees and is a supervisor within the meaning of the Act. Vega testified without contradiction that in October or November 2014, Vasquez came to Meza Ranch and spoke with him about

hiring. Vasquez gave Vega a list of employees⁸ and told him to be careful hiring anyone on this list as they were involved in a strike at Limoneira Ranch.⁹ I will credit Vega's testimony as he was a consistent, responsive, detailed witness who was not shaken by argumentative questions on cross examination.¹⁰ A list of Limoneira employees was mentioned by Respondent's supervisors and agents when former Limoneira employees sought work after the close of Limoneira Ranch. Thus, Juan Alvarez and his brother Jose gave credible testimony that foreman Joaquin told them they were on a most wanted list of employees he could not hire. Flora Reyes said that when she sought work, Puncher Dorotea told her she had a list of Limoneira workers. Alexis Rodriguez and Gloria Espinosa were also told about a list of employees by puncher Mari at Central Ranch when they sought work.

Complaint Allegations Lacking Supporting Evidence

Complaint allegations 19, 21 and 22 allege that Respondent's Limoneira Ranch employees Julio Garcia, Arturo Alvarado, Diana Alvarado, Juana Fajardo, Maria Gregorio, Adrian De Jesus and Celene Zamudio were not rehired by Respondent. No evidence was presented by General Counsel concerning these employees. In its brief General Counsel withdrew the allegations that the above individuals were refused rehire by Respondent. The withdrawal of the allegations is granted.

⁸ General Counsel's exhibit 3.

⁹ Vasquez did not testify at the hearing.

¹⁰ I find no evidence that General Counsel's exhibit 3 is not an authentic document or was tampered with in any way.

Lack of Complaint Allegations re Marcos Torres and Rosa Gregoria Navarro

At the hearing herein, General Counsel offered evidence that Respondent failed to rehire its employees Marcos Torres and Rosa Gregoria Navarro. However, there is no allegation in the complaint alleging that Respondent's refusal to rehire them violated the Act.

General Counsel contends that the allegations of the complaint concerning refusal to rehire Limoneira employees are sufficiently broad to encompass individuals who are similarly related but not named in the complaint where the issues were fully litigated.

An unpleaded matter may support an unfair practice finding if it is closely related to the subject matter of the complaint and has been fully litigated. *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004); *Pergament United States*, 296 NLRB 333, 334 (1989). This is particularly true where the unpleaded claim relies on the same theory of liability. *United States Postal Service*, 352 NLRB 923, 923 (2008). The ALRB has adopted the NLRB rule regarding related but unpled allegations. *George Amaral Ranches, Inc.*, (2014) 40 ALRB No. 10, page 17.

Here while the complaint failed to specifically allege that Respondent violated the Act by failing to rehire Marcos Torres and Rosa Gregoria Navarro, these unpled allegations are closely related to numerous other employees who the complaint alleges Respondent refused to rehire. With respect to Torres and Navarro, General Counsel's theory of the case is identical to other pled allegations. Moreover, the allegations regarding Navarro and Torres were fully litigated at the hearing, as both testified. I will consider allegations that Respondent refused to rehire Navarro and Torres.

The alleged violations of the Act

Complaint paragraphs 24 and 25 allege that Respondent violated sections 1152 and 1153(a) of the Act by refusing to rehire workers from its Limoneira Ranch for engaging in protected concerted activity. Complaint paragraphs 26 and 27 allege that Respondent violated sections 1152 and 1153(d) of the Act by refusing to rehire its Limoneira Ranch employees for filing unfair labor practice charges with the Board.

Refusal to rehire

In *H&R Gunlund Ranches, Inc.*, (2013) 39 ALRB No. 21 pages 3-4, the ALRB held that in refusal to rehire cases General Counsel must establish the employee engaged in protected-concerted activity, that the employer had knowledge of that activity, that the employer's action was taken at least in part due to that protected activity, that the employee applied for an available position for which they were qualified and that they were unequivocally rejected for employment. Once these initial showings are made, the burden shifts to the employer to establish that it would not have hired the applicants even in the absence of their protected activity. See also *FES, a Division of Thermo Power*, 331 NLRB 9 (2000); *Toering Electric Company*, 351 NLRB 225 (2007).

Here the record reflects that on July 15 and 16, 2014, about 46 out of about 200 of Respondent's raspberry harvesters engaged in a work stoppage at Respondent's Limoneira Ranch. As a result of the work stoppage, unfair labor practice charges were filed against Respondent in cases 2014-CE-024 and 025 SAL and on August 26, 2015, the General Counsel and Respondent settled cases 2014-CE-024 and 025 SAL with employees receiving backpay.

There is no dispute that about 46 of Respondent's employees engaged in protected concerted activity at the Limoneira Ranch in July 2014. Nor is there any dispute that Respondent was aware of the activities of those employees. Thus, General Counsel has established the first two elements of its prima facie case.

There is also ample evidence after the shutdown of the Limoneira Ranch and the layoff of the Limoneira employees, many of the former Limoneira employees made efforts to apply for work at Respondent's other ranches. Thus, from early November 2014 through January 2015, 12 of Respondent's former employees from Limoneira Ranch applied for work at Respondent's other ranches or at its office, including: Juan Alvarez, Jose Antonio Alvarez, Gilberto Cervantes, Flora Reyes, Norma Martinez, Maria Rangel, Javier Reyes, Gloria Espinosa, Luis Espinosa, Rosa Gregoria Navarro, Marco Torres and Alexis Rodriguez. All were told there was no work. None were hired. The record also reflects that all of the employees were qualified for the jobs they applied for, harvesting berries.

Respondent contends they were not hired because there was no work. But the record belies this contention. There is testimony that Flora Reyes was told by puncher Dorotea Hernandez at Navarro Ranch that Respondent was hiring when Reyes went to apply for work. When Norma Martinez went to the Central Ranch looking for work, she observed the row boss, Juan, hiring about five individuals. During the same visit to Central Ranch, Martinez was also told by puncher Mari that Respondent was hiring. This testimony is corroborated by evidence that between November 25, 2014, and June 1, 2015, Respondent hired 16 new raspberry harvesters for the first time at its Oxnard

ranches.¹¹ While Respondent contends that the dates of hire of these new employees establishes that there was limited work available and that there was no work on the dates the alleged discriminatees herein sought work, the facts establish that Respondent hired raspberry harvesters at the time the Limoneira workers sought work. In addition, according to HR Manager Lopez, there was shut down work at Limoneira Ranch that did not occur until well after November 28, 2014, as well as at Meza Ranch in November and December 2014 and clean up work at other Ranches at the season's end at about the time the Limoneira employees were laid off. According to Lopez he did not know if there was a special crew that did tear down and clean up.

There is ample evidence that the true reason Respondent failed to hire any of the Limoneira workers is because they engaged in protected activity. Many of the Limoneira employees were told that because they had worked at Limoneira Ranch they would not be hired. Thus when Juan and Jose Alvarez told foreman Joaquin at the Navarro Ranch that they were from Limoneira Ranch, he said he could not hire them. Javier Reyes was told by row boss Benjamin at Navarro Ranch there was no work for Limoneira employees.

It is clear from October or November 2014 conversation between foreman Vega and Vasquez at Meza Ranch that the real reason Respondent failed to rehire any Limoneira employees was due to the July 2014 work stoppage. The purpose of the visit could not be plainer when Vasquez gave Vega a list of Limoneira employees and told

¹¹ Joint exhibit 1.

him to be careful hiring anyone on this list as they were involved in a strike at Limoneira Ranch. Respondent's contention that there is no evidence of such a list being distributed at other ranches is of no avail. Vasquez was lead foreman over all of Respondent's ranches. A reasonable inference can be drawn that Vasquez would not have simply given this list to the foreman at one ranch. Indeed the reference by other foremen, punchers and crew bosses to a list of employees when Limoneira employees sought work, supports this inference. Moreover Vasquez was never called to deny Vega's testimony.

It was pretext that the Limoneira employees were not hired because there was no work. The real reason for failing to rehire the above named Limoneira employees was that they engaged in a strike. The strike and concomitant filing of unfair labor practice charges cannot be reasonably distinguished. I conclude that Respondent's failure to rehire the Limoneira employees was motivated not only by their strike activity but by their concurrent filing of unfair labor practice charges.

I find that General Counsel has established a prima facie case that Respondent refused to rehire the Limoneira employees because of their protected concerted activity and filing of unfair labor practice charges. Thus the burden shifts to Respondent to establish it would not have hired the Limoneira employees in the absence of their protected activity.

Wright Line

Respondent's defense is essentially it did not hire Limoneira employees because there was no work for them. This defense must fail. As stated above, there was work for the Limoneira employees not only in the raspberry fields where Respondent hired after

Limoneira closed but also in its strawberry fields. There is evidence that Respondent was growing strawberries in 2014 in the Oxnard area. To suggest that Respondent's raspberry pickers were not qualified to harvest strawberries is belied by the July 15, 2016 letter¹² sent to Respondent's raspberry harvesters advising they could apply for strawberry jobs when Respondent closed its Santa Clara raspberry ranch. Moreover, it is clear that this defense is nothing but pretext, as Respondent's true motivation was communicated to Vega and to employees who were told they would not be hired because they had worked at Limoneira, a code word for engaging in protected activity. It was futile for the Limoneira employees to apply for jobs at any of Respondent's ranches as they had all been blacklisted.

Conclusions of Law

I find that General Counsel has established that Respondent violated sections 1152, 1153(a) and (d) of the Act when it refused to rehire the above named Limoneira Ranch employees.

Remedy

General Counsel contends that the standard remedies of posting, mailing and reading the Notice to Employees is necessary because the evidence reflects that Respondent's unlawful conduct was neither isolated nor minimal. I agree. The Board has broad discretion in fashioning remedies to effectuate the purposes of the Act. *United Farm Workers of America*, (2018) 44 ALRB #6 at page 13. In addition any departure

¹² General Counsel's exhibit 5.

from the Board's standard non-economic remedies of posting mailing and reading notices must be established by Respondent by compelling evidence. *Id.* at 13. The evidence shows that Respondent's unlawful conduct occurred in the presence of many employees at multiple locations. I find no compelling reasons herein to depart from the Board's standard non-economic remedies.

ORDER

Pursuant to Labor Code section 1160.3, Respondent, Rincon Pacific, LLC., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to rehire its employees for engaging in protected-concerted activity protected under section 1153(a) of the Agricultural Labor Relations Act (Act).

(b) Refusing to rehire its employees for filing unfair labor practice charges with the Agricultural Labor Relations Board, protected under section 1153(d) of the Agricultural Labor Relations Act (Act).

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

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

(a) Offer Juan Alvarez, Jose Antonio Alvarez, Gilberto Cervantes, Flora Reyes Norma Martinez, Maria Rangel, Javier Reyes, Gloria Espinosa, Luis Espinosa, Rosa Gregoria Navarro, Marco Torres and Alexis Rodriguez immediate reinstatement to

their former or substantially equivalent employment without prejudice to their seniority or other rights and privileges of employment;

(b) Make Juan Alvarez, Jose Antonio Alvarez, Gilberto Cervantes, Flora Reyes Norma Martinez, Maria Rangel, Javier Reyes, Gloria Espinosa, Luis Espinosa, Rosa Gregoria Navarro, Marco Torres and Alexis Rodriguez whole for all wages and economic losses they have suffered since on or about December 1, 2014, as a result of their refusal to rehire. Loss of pay or other economic losses are to be determined in accordance with established Board precedent. Such amounts shall include interest to be determined in the manner set forth in Kentucky River Medical Center (2010) 356 NLRB No. 8 and excess tax liability 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 Juan Alvarez, Jose Antonio Alvarez, Gilberto Cervantes, Flora Reyes Norma Martinez, Maria Rangel, Javier Reyes, Gloria Espinosa, Luis Espinosa, Rosa Gregoria Navarro, Marco Torres and Alexis Rodriguez and sent to the Region, which will thereafter disburse payment to these individuals;

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all record relevant and necessary to a determination by the Regional Director of the back pay amounts due under the terms of this Order. Upon request of the Regional Director, the records shall be provided in electronic form if they are customarily maintained in that form;

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

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

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

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order to all agricultural employees employed by Respondent at any time during the period May 15, 2014, to May 15, 2015, at their last known addresses.

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

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

Dated: December 9, 2019



John J. McCarrick
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by refusing to rehire employees for engaging in protected concerted activity and for filing unfair labor practice charges with the ALRB. The ALRB has told us to post and publish this Notice. We will do what the ALRB has ordered us to do.

We also want to inform you that the ALRA is a law that gives you and all other farm workers in California the following 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 ALRB;
5. To act together with other workers to help and protect one another;
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that;

WE WILL NOT refuse to rehire employees who engage in protected-concerted activity.

WE WILL NOT refuse to rehire employees who file unfair labor practice charges with the ALRB.

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

WE WILL offer to Juan Alvarez, Jose Antonio Alvarez, Gilberto Cervantes, Flora Reyes Norma Martinez, Maria Rangel, Javier Reyes, Gloria Espinosa, Luis Espinosa, Rosa Gregoria Navarro, Marco Torres and Alexis Rodriguez reinstatement to their former or substantially equivalent positions of employment and make them whole for all loss of pay or other economic loss they have suffered as a result of our unlawful conduct.

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 ALRB. One office is located at 342 Pajaro Street, Salinas, California 93901. The telephone number is (831) 769-8039.

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

DO NOT REMOVE OR MUTILATE