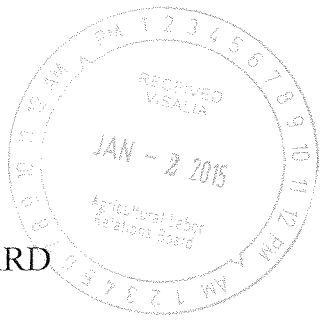


STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| In the Matter of: | ) | Case Nos. 2013-CE-028-VIS |
| | ) | 2014-CE-011-VIS |
| ARNAUDO BROS., LP, | ) | 2014-CE-012-VIS |
| ARNAUDO BROS., INC., | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| NOE MARTINEZ AND | ) | |
| | ) | |
| UNITED FARM WORKERS | ) | |
| OF AMERICA, | ) | |
| | ) | |
| Charging Party. | ) | |
| | ) | |

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**DECISION OF THE ADMINISTRATIVE LAW JUDGE**

THOMAS SOBEL, Administrative Law Judge: This case was heard by me in Tracy, California on October 14, 15, 2014.[1] Upon charges duly filed by Noe Martinez and the United Farmworkers of America[2] (the Union or UFW), General Counsel issued a First Amended Consolidated Complaint against Respondents, Arnaudo Brothers, LP and Arnaudo Brothers, Inc., alleging that they violated the Act 1) by threatening, or surveilling, or interrogating union supporters Noe Martinez, Rigoberto Ochoa, Javier Rojas, and Ivan Zuniga, 2) by laying them off, and 3) by summoning the sheriff to evict Zuniga. General Counsel also alleges that Martinez, Rojas and Ochoa made repeated attempts to be rehired after their layoffs, but Respondents unlawfully refused them rehire.[3]

Respondents deny the allegations of surveillance, threats, interrogation. They also contend that Martinez, Ochoa, Rojas and Zuniga were laid off for lack of at the end of their regular seasonal employment cycles, that they were within their rights to attempt to evict Zuniga because he was abusing the privilege of free housing, and that none of the alleged discriminatees was discriminatorily denied rehire.

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[1] The final brief was filed November 28, 2014.

[2] Among the allegations in the Complaint is one that the United Farmworkers of America is the certified bargaining representative of Respondent's agricultural employees. First Amended Consolidated Complaint, Para. 6. Respondent has denied this and continues to contest the present vitality of the certification. The question of the Union's status as certified representative is pending on the Board's remand of Arnaudo Brothers, LP and Arnaudo Brothers, Inc. (2014) 40 ALRB No. 3. It is of no moment in this case since employees can engage in protected union activities on behalf of an uncertified union.

[3] The First Amended Complaint (Para. 33) alleges that Respondent also refused to rehire Zuniga, but General Counsel presented no testimony concerning Zuniga's seeking, and Respondents' denying him, rehire. This allegation is dismissed.

## I.

## JURISDICTION

The alleged discriminatees are agricultural employees. Charging Party-Intervenor, the United Farmworkers of America, is a labor organization.[4] Respondent Arnaudo Brothers, LP has admitted it is an agricultural employer; Respondent Arnaudo Brothers, Inc. has denied it is one. However, for the purposes of this case, Arnaudo Brothers, Inc. has stipulated to joint liability should any unfair labor practice be found and any order issue pursuant to such a finding. Accordingly, unless it is otherwise necessary to do so, I will hereafter refer to Arnaudo Brothers, LP and Arnaudo Brothers, Inc. collectively as Respondents, ignoring any distinction between the two enterprises and without making any specific finding about their relationship.

## II.

## STATEMENT OF FACTS

### A. Background

*Respondents' employment cycles*: Respondents grow and harvest asparagus, canning tomatoes, and alfalfa.[5] Respondents' period of peak employment is the asparagus season, which typically runs from the beginning of March until April or May. During asparagus season, Respondents use two crews, one of which is run by a foreman

[4] Respondents have denied that the UFW is a labor organization; I take administrative notice pursuant to Evidence Code Section 452(g) that it is.

[5] There is little evidence concerning the alfalfa crop; nevertheless, Martinez testified he was sent to cut alfalfa by Renteria in January 2013. RT: I, pp. 127.

named Kim Taing.[6] After asparagus, Respondents grow and harvest canning tomatoes. The tomato season generally ends in September. After work in tomatoes ends, there is a slack or off-season, which runs from October until the asparagus season begins again in March of the next calendar year.

It is undisputed that after seasonal work in the tomatoes winds down, Respondents continue to employ some workers year-round. According to Ruben Renteria, an admitted foreman,[7] Respondents employ between 18 – 20 employees year-round for general maintenance work and as tractor drivers, mechanics, irrigators, and gardeners. General Counsel contends that Martinez, Rojas and Ochoa were among those who regularly worked during the slack seasons from the time each of them began to work for Respondents and that, because their 2013 layoff at the start of the slack season was a change in their previous employment patterns, it is evidence of discrimination.

*Free housing in the barracks*: Respondents also provide free housing in a barracks or bunkhouse on Canal Ranch and, during the pertinent time periods in this case, Ochoa, Martinez and Zuniga lived in these barracks. The parties presented no evidence about who was eligible to live in this housing except for 1) Leo Arnaudo's

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[6] Leo Arnaudo, testified he is Secretary of Respondent Arnaudo Bros. LP and has a "general partnership" in the corporation, from which I understand him to be part owner with his brother, Steve. Since he was testifying in both capacities, and since he admitted that Taing is a foreman, I find Taing to be an agent for both Respondents. All the references to "Arnaudo" hereafter refer to Leo Arnaudo.

[7] Respondent Arnaudo Bros. LP admitted that Renteria is its foreman; Respondent Bros. Inc. denied it even employs him. Since whatever Renteria did on behalf of the partnership will be attributed to the corporation by virtue of the stipulation, I will treat Renteria as Respondents' agent. See, n. 2, above.

testimony that it was reserved for Respondents' employees, and 2) Rojas' testimony that the employees who lived there were those who worked more or less year-round, RT: II, p. 43. Rojas' testimony cannot be wholly true since Zuniga, who, it is agreed, only worked seasonally for Respondents, also lived in the barracks. While Arnaudo's description of an "employee's only" policy makes sense, it is clear from the record as a whole that whoever was eligible to live in the barracks in the first place – only year-round employees or whichever employees got there first – Arnaudo generally tolerated workers' holding over after they were laid off:

> Q: [By General Counsel]: * * * Many of your workers live at the barracks, right?
>
> A: [Leo Arnaudo]: Not all of them.
>
> Q: But there are some workers that live there?
>
> * * *
>
> A: Oh, yeah.
>
> Q: Okay. And you don't charge them to live there?
>
> A: No.
>
> Q: So, it's a benefit that you provide to workers?
>
> * * *
>
> A: Oh, it's a benefit, yeah.
>
> Q: And it frustrated you that some workers that were not Arnaudo continued to live; isn't that right?
>
> A: Well, the ones that were working there and then went to work someplace else, yeah and they stayed there. They didn't make any effort to move. I just left them there.
>
> Q: Okay. Where –
>
> A: There was room in the barrack. They got along with the rest of the employees that were there, there was no fights you might say so it didn't bother me.
>
> Q: So you were generally okay with workers staying at the barracks even if they weren't working there so long as they didn't cause any trouble.
>
> A: Well, yeah. Not to stay there real long, but until they found housing I didn't chase them out.
>
> RT: II, pp. 185 – 186

It is undisputed that two of the alleged discriminatees in this case, Ochoa and Zuniga, held over in the barracks after they were laid off. Respondents only sought to evict Zuniga.

*Arnaudo's animus:* In the Board's recent decision in *Kawahara Nurseries, Inc.* (2014) 40 ALRB No.11, the Board has made it clear that an employer's anti-union animus must be taken into account as background in determining motive. Accordingly, I cannot ignore Leo Arnaudo's open "dislike" of the UFW:

> Q: [By General Counsel]: You don't like the union, do you?
> A: [Leo Arnaudo] Well, as I stated before I like unions, but I just don't like your union.
> Q: So you don't like the UFW?
> A: Well, personally ---
> Q: And Mr. Arnaudo, you know that I am from the ALRB, and not from the Union, right?
> A: I know that. I know that, yes.
> Q: And you don't like the UFW, do you?
> A: Well, why should I like it when all my people are happy and there's nothing you can offer them really? That's my feeling. That's my feeling.
> Q: And you and your brother don't want the union at Arnaudo; isn't that right?
> A: Well, personally no.
>
> RT: II, p. 180

*The employment patterns of Martinez, Rojas and Ochoa*: Rojas, Martinez, and Ochoa all testified that, before they were laid off after the tomato harvest in 2013, they generally worked during the slack season doing a variety of tasks, such as cleaning the tomato harvesting machines, cleaning ditches, taking care of trees, cleaning up trash,

doing some irrigation work, sometimes driving tractors, and cutting alfalfa.[8] They acknowledged that the work they did was intermittent, but contended it was also regular, usually a couple of days a week, for most of each of the slack seasons during the course of their employment.

Thus, Rojas testified that he worked from about October 2010 to about February 2011, RT I: p. 45, ll. 7-9, from about October 2011 to about February 2012, RT I: p. 44, and from October 2012 to about February 2013, RT I: p. 44, ll. 17 -18. Martinez testified that he worked "all year, all three years" from 2010 until he was laid off, RT: I, p. 125, ll. 6 – 8. Ochoa, who worked for Respondents since 2007 (except for the 2012-2013 slack season when he could not work because of his injury), testified that throughout his employment with Respondents, he always had intermittent work after the end of the tomato harvest into the next year's asparagus season.

Despite the attention paid to General Counsel's attempts to obtain the work history of three men from Respondents during discovery[9], the only employment records in evidence are those supplied by Rojas[10], covering the period from 2011 through 2013,

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[8] As noted above, only Martinez testified he cut alfalfa and he did not do it every season he was employed by the Respondents. See, ftn.6 above.

[9] See, Notice in Lieu of Subpoena directed to Arnaudo Brothers, LP, dated September 12, 2014, Requests Nos. 5, 6, 7, attached to Respondents Petition to Revoke General Counsel's Notice in Lieu of Subpoena, dated September 19, 2014.

[10] On the first day of hearing, General Counsel contended that the records she received pursuant to my Order were incomplete since they only came from the partnership and not from the corporation and she had evidence that the discriminatees were sometimes paid by the corporation during the slack season. In fact, this is borne out by some of Rojas' records in evidence. See, GCX 11, p. 10, GCX 10, pp. 22, 24, 28, 30 – 35, and 37. Respondents' Counsel represented that this was an oversight and agreed to turn over the slack season employment records from the corporation. On the second day of hearing, and without demurrer or objection

and they do not support what, in light of them, appears to be his impressionistic testimony that he *always* had work through most of every slack season preceding his October 2013 layoff.

In the first place, the records begin in 2011 and Rojas testified he started working for Respondent in 2010. The records also indicate that he had wages for a little over three weeks in October 2011[11], no wages in November 2011, wages for only two weeks in December 2011[12] and then no wages until June 4, 2012.[13] Beginning with the 2012 – 2013 slack season, however, they show that he had wages from Respondents for the month of October, for the first four days in November,[14] for the weeks November 5 – 11, 19 – 25, and the week of November 26 – December 2[15], for the weeks of December 3 – 9, 10 – 16, and 24 – 30[16], for December 31, 2012, the entire month of January 2013 and into the second week of February 2013[17], almost to the start of the asparagus season.

I do not know what the absence of any of Rojas' payroll records for 2010 means in terms of his overall work history, but in the absence of any testimony that the records he provided might be incomplete for any of the seasons to which they do pertain, I take

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from General Counsel, Respondents' Counsel represented that he had turned over all the corporation's records.

[11] He had wages from Respondents for two days in the pay period September 26, 2011 thru October 2, 2011 and wages from October 10, 2011 thru October 30, 2011.

[12] See, GCX 11, p. 008 [Pay period 9/26 – 10/02, 2011]; pp. 009, 010, 011, 012 [Pay periods 10/10 -10/30/2011]; pp. 013, 014 [Pay periods 12/06 – 12/18, 2011.]

[13] GCX 10, p. 001.

[14] GCX 10, pp. 0023 - 0030

[15] GCX 10, pp.0031 - 0033

[16] GCX 10, pp. 0034, 0035, 0037

[17] GCX 9, pp. 001, 002, 004, 005, and 006

them as showing that, of the two full slack seasons preceding his October 2013 layoff, he worked only one of them (2012 – 2013.)

There is a small discrepancy between Martinez's summary testimony that he worked year- round for Respondents since he began to work for them and his year-by-year account of his work history. Thus, he testified that he worked very little in November and not at all in December 2010 and January 2011, RT I: p. 130, which means that in at least one of the three slack seasons encompassed within his tenure at Arnaudo Brothers, he did not have *regular* work during every slack season. Ochoa's summary account of his work history is not challenged either by any records in evidence or by any season-by-season testimony concerning it.

While, on this record, I am reluctant to find that Rojas' layoff at the start of the 2013 slack season represented a change in a long term pattern of slack season employment for him, proof that he had work during the 2012 – 2013 slack season, combined with Martinez's testimony that he had slack season employment during two of the three years preceding the preceding the 2013 – 2014 slack season, and Ochoa's testimony that, except for the period during which he was injured, he worked every slack season, was sufficient to shift the burden to Respondent to produce evidence that the employees were not given work during previous slack seasons.

Respondents, however, presented no records to show that over the course of Martinez's, Rojas' or Ochoa's employment with Respondent, the three men were given so little work during any of their previous slack seasons, that failing to give them work during the 2013-2014 slack season could not be considered a change in their

employment patterns. Instead, they contend that, since it is undisputed that the months after the tomato season were slow months, any work the employees received in previous seasons was "only because the company wanted them to earn some additional money. [Thus] Mr. Rojas testified that during the slow months of December, January, and February there were times he, Messrs. Ochoa and Martinez were given any kind of work so they could simply buy groceries." Post-Hearing Brief, p. 17.

I take it that Respondents are essentially contending that slack season work was something like a "benefit" rather than part of the employees' "tenure" or a "term" of their employment, and thus Respondents cannot be found to have violated 1153(c) by not providing them what little work might have been available during the 2013 – 2014 slack season. I reject the argument. In the first place, being given work 'to buy groceries' meets the definition of employment and, however, much or little the three employees worked during the previous slack seasons, I cannot regard whatever work they were given as a "gratuity." *Continental Radiator Corp. and Great Lakes, Inc.* (1987) 283 NLRB 234, 247 – 249. Moreover, even if it were the case that the three men worked only a couple of days of every month during their previous slack seasons, if Respondents' motive in declining or refusing to offer them any 2013 – 2014 slack season work was because of their union activities, it would still be an unfair labor practice. *Pinter Brothers, Inc.* (1977) 233 NLRB 575.[18]

[18] For now, I am not concerned with Respondents' motive in laying off the three men at the start of the 2013 slack season, but only with the different, preliminary question whether there was any evidence of a *change* in their employment patterns and I conclude that General Counsel has proved that there was.

*Zuniga's Employment Cycles*: Although it is undisputed that Zuniga was a seasonal employee, his account of his employment history was inconsistent. When he first testified, he stated that he started to work for Respondents in March 2012. RT: II, p. 32; a few moments later, he testified that he was living in the barracks from March 2011, which implies that he was working for Respondents in 2011, and on cross-examination he testified that he also worked for Respondents in 2010. RT: II, p. 86. To make matters even more confusing, he also testified that "for personal reasons" he did not work anywhere in 2012, RT: II, pp. 85 – 86.

Zuniga's testimony concerning his seasonal cycles within his years of employment is not only marred by similar inconsistencies, but also contradicted by the allegations in the complaint. Thus, he testified that he generally lived in the barracks and worked from March through September in 2011, 2013 and 2014, RT: II, pp. 32 – 22, but he admitted that he only worked from March until June in 2013 because, according to him, he was fired, RT: II, p. 33, and the complaint itself alleges that he was laid off in June 2014. Accordingly, even if it were true that he worked from March through September in 2011, which I do not find, it is not true that he worked from March to September in either 2013 or 2014.

Renteria testified that Zuniga only worked for two years for Respondents, 2013 and 2014. I will have more to say about Zuniga's reliability as a witness later; for now,

I find, in accord with Renteria's testimony[19], that Zuniga worked only two seasons for Respondents, that he did not generally work for Respondents from March through September, and that his layoff in June 2014 mirrored his layoff in June 2013.

## B. Chronology of events concerning Martinez, Ochoa, and Rojas

### Winter 2012

Rojas, Martinez and Ochoa all testified that sometime in the winter of 2012, UFW organizers Victor Roque and Alejandro Gutierrez visited the bunkhouse, where Martinez and Ochoa were living, to talk to the employees.[20] Rojas testified he was there by happenstance since he was just visiting. Roque testified there were between 5 – 8 employees at the meeting, RT: II, p. 9. Martinez testified approximately 10 employees were there, RT: II, p. 139.

The meeting took place outside the bunkhouse. It is undisputed that the bunkhouse is situated quite close to the house where Ruben Renteria lives.[21] No witness testified either that Renteria was in his residence when the organizers met with the employees or that they saw Renteria's observing the meeting. Nevertheless, both Martinez and Ochoa testified that, shortly after the meeting, Renteria came into the bunkhouse and told the workers something to the effect that, if they continued to support the Union, Leo Arnaudo would kick them out of the barracks. RT: I, p. 147,

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[19] As will be more fully discussed below, I also have doubts about Renteria's reliability as a witness; nevertheless, in view of Zuniga's confusion about when he worked for Respondents, I credit Renteria on this point.

[20] Martinez put this first meeting in November; Rojas in December; Ochoa put it at the end of 2012.

[21] The proximity of Renteria's house to the bunkhouse may be seen in GCX 4.

RT: II, p. 131- 34. Renteria denied making any such statement at any time. RT: II: p. 241.

Rojas and Martinez testified they continued to meet with UFW representatives during the remainder of 2012. These meetings, too, took place outside the bunkhouse.

Winter 2013

I can take administrative notice that the parties were referred to Mandatory Mediation on February 13, 2013. See, *Arnaudo Bros. LLP* (2013) 40 ALRB No. 2. On that same day, the UFW emailed Respondents' counsel that Pedro Lopez, Pedro Teta, Noe Martinez, Andres Hernandez, and Rodolfo Ramos were going to be on the Union's negotiating team.[22]

Spring 2013

Rojas testified that sometime in March, 2013, Renteria came into the bunkhouse and told him and a number of other employees that if "someone was in the Union, he [meaning Leo] was going to fire them and me and kick them out of the bunks. . . ." RT: I, p. 62. I have already related that Renteria denied every saying that Leo would kick any employee who supported the Union out of the barracks; he also denied ever saying

[22] Renteria testified that at some time, Arnaudo told him that he had a list of Union supporters and that Martinez's name was on it. RT: II, p. 239. Whether Arnaudo was referring to a separate "blacklist", or to e-mails like the one discussed above from the Union naming the members of the negotiating team or, as will later be discussed, to the sign-in sheets from the negotiation sessions is not clear from the record; nevertheless, Arnaudo's statement to Renteria implies his knowledge of his employees' union activities.

to any of the alleged discriminatees that "if [only] they would stop supporting the Union, they could continue to work for the company." RT: II, p. 234[23]

Martinez testified that sometime in the spring, perhaps in April or May, Leo Arnaudo approached him and, with Renteria interpreting, asked him if he was supporting the Union. RT: I, 154, 157.[24] Martinez said he was. Renteria denied hearing Arnaudo's making any statement to Martinez about the latter's supporting the Union while he was interpreting for Arnaudo, RT: II, pp. 238 – 239, and Arnaudo denied ever asking Martinez if he supported the Union. RT II: 160.

July 2013

On July 11, 2013, ALRB agents came to the bunkhouse to interview witnesses for an upcoming hearing. Martinez testified that shortly after this meeting, Renteria and Leo Arnaudo came to the field where he was cleaning tomatoes and called him over. Renteria, interpreting for Arnaudo, asked Martinez if he was going to attend the hearing. RT I: p. 167. According to Martinez, he said that he hadn't decided yet.[25]

Arnaudo admitted having a conversation with Martinez about an upcoming hearing. When first questioned by his Counsel, he testified that he had Renteria tell

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[23] There is not perfect congruence between the form of the threats the alleged discriminatees testified Renteria made and the form of Renteria's denials. Nevertheless, I am taking his denials that he ever told the employees that either their employment or their continued residence in the barracks was contingent on their ceasing to support the Union as denials of the threats the employees attributed to him. People are not recording devices who can relate verbatim statements made to or by them.

[24] According to Rojas, a number of employees were present when Renteria spoke to him in March, including Noe Martinez. RT: I: p. 63 Martinez himself did not testify to a springtime threat from Renteria, but from Leo Arnaudo, although he added that Renteria was translating for Arnaudo during the incident he related. RT: I, p 155, 157.

[25] Although Renteria initially testified that Martinez said he was going to attend the hearing, RT: II, p. 237, upon being presented with an earlier declaration in which he stated that Martinez said he wasn't sure if he was going to attend, Renteria acknowledged that his declaration was more accurate, RT: II, p. 267.

Martinez: "I understand there is a hearing going on and you have a right to go to it, you know. You have the right to whatever side your thoughts are and you're welcome to go, but anytime you are not working in the field that's when your pay stops." RT: II, p. 163 [See also, RT II: p. 164: "Well, what I recall is that if he went to the hearing that's when his day's hourly would end. Then if he had time to come back to the field . . . his pay period would start again."][26]

On cross-examination, Arnaudo testified that it was Martinez who approached him and Renteria as they were driving through the field to tell them that he had an "order" or "command" to appear at a hearing, whereupon he expressed his concern about the crew's being a man short while Martinez was at the hearing. RT: II, p. 188. When pressed by General Counsel about whether it was he or Martinez who initiated the conversation, Arnaudo testified that it was Martinez. When he was read an earlier declaration in which he stated that it was he who asked Renteria to call Martinez over, Arnaudo elaborated that he had heard from Renteria that there was going to be a hearing and when he saw Martinez, he asked Renteria to call him over to tell him that when he was not at work, he would not be paid. RT: II, pp. 191 – 192. See also, RT: II, pp. 236 et seq.

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[26] In between the first and second answers related above, Respondent's Counsel asked Arnaudo if he remembered that he and Renteria wanted to know whether "[Martinez] was going to be at work that day." RT: II, p. 164. General Counsel's objection to this question was sustained as leading. When Respondent's Counsel asked Arnaudo again asked if Arnaudo remembered "needing to know whether Martinez] was going to go there and testify", General Counsel again objected to the question as leading, and the objection was again sustained. When his Counsel then asked what else he recalled saying, Arnaudo repeated that he told Martinez that his hourly pay would end while he was away at the hearing, but that he would be paid if he returned to work. RT: II, p 164.

Renteria told a slightly different version about how the encounter with Martinez came about. According to him, sometime before the Board hearing, when he and Arnaudo were driving around, Arnaudo asked him if he knew that that he (Arnaudo) was going to unavailable for a couple of days because of the hearing. Since they were near the field at the time, Arnaudo asked him to speak to Martinez to find out if he was going to go to the hearing so Renteria could fill his place in the crew. According to Renteria, they stopped by the field and Arnaudo had him tell Martinez that it was okay for him to go, but they wanted to know "so he could put someone in his place." RT: II, pp. 236 - 37

August 2013

It is undisputed that on August 5, 2013, the Union notified Respondent's counsel that Ochoa, Martinez, Zuniga, and Rojas were on the negotiation committee and that the parties met on August 9, 2014. However, only Rojas and Ochoa were present at the meeting. See GCX 2, Sign-in Sheet.

On October 2, 2013, the Union notified Respondents' counsel that Ramon Tellez, Salvador Aceves, Victor Aguirre, Jesus Montejano, Martinez, Rojas, and Ochoa were on the negotiating committee. On October 3, 2013, Martinez, Ochoa, and Rojas, among others, attended a negotiation session with Respondents' representatives. See, GC X. 3.[27]

[27] The Sign-in sheet in evidence indicates that two other employees were also present at the session, Ramon Tellez, and Salvador Aceves. There is no evidence that these men were laid off, but the fact that not all alleged Union supporters were laid off, does not mean that the

Martinez, Ochoa, and Rojas are Laid Off

Martinez, Rojas and Ochoa were laid off on October 18, 2013. At the time they were laid off, Renteria merely told them there was no more work until further notice. RT: I, p. 171, RT: I, p. 65. Ochoa testified that in addition to him, Martinez, and Rojas, another employee named Jose Molina, was also laid off. RT: II, p. 136 –138. There is no question that Respondent continued to offer work to some employees after the October layoffs of the three men. Exactly how much work was available (and how many employees had such work) is not entirely clear, but it appears from the testimony of both Rojas and Martinez that it could not have been more than four or five.[28] Respondents put in no evidence that other employee were laid off at the same time.

Martinez, Rojas and Ochoa Seek Rehire

It is undisputed that after he was laid off, Ochoa continued to live in the barracks. According to him, sometime in the beginning (January or February) of 2014, Arnaudo came to the barracks and complained that "he was living in the barracks and working someplace else." When Ochoa asked Arnaudo for a job, Arnaudo just laughed. Still later, after Ochoa remained in the barracks and Arnaudo came again to complain

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layoff of some Union supporters cannot be considered discriminatory. *Kawahara Nurseries, Inc.* 40 ALRB No. 11, p. 22

[28] Rojas testified that because he continued to live in the barracks after he was laid off, he could tell how many residents continued to work after October 18. According to him, there were between 8 – 10 employees residing in the barracks before the layoff. Since he also testified that, besides him and Martinez, another employee named Molina was also laid off, this means that between 5 -7 employees must have continued working. Martinez testified that there was only work for four or five after the men were laid off, RT I: p. 173 ll. 20 – 25 [There was work for four or five.] RT I : 175 [There was work for four.] Since Martinez's figures are consistent with the range of Ochoa's figure, I find that no more than five barracks residents continued to work. What is clear is that work continued to be available: what remains to be decided is why the employees who were laid off were selected for layoff.

about his holding over, Arnaudo accused him of "supporting the people from the Union." When Ochoa denied this, Arnaudo asked him to take his rosary and swear that he wasn't going around with people from the Union." RT: II, pp. 142 – 43. Ochoa took no oath, but continued to stay in the barracks. He eventually left.

Arnaudo denied having any one-on-one conversations with Ochoa about remaining in the barracks; according to him, he always spoke to the employees through Renteria. Renteria testified he was present at only one conversation between Arnaudo and Ochoa during which Arnaudo told Ochoa that if he wasn't going to work for him, he should leave the barracks. RT: II, p. 249. According to Renteria, Ochoa offered to pay rent, but Arnaudo refused to accept any. When asked what else was said between the two men, Renteria testified that Ochoa said he was making more money working elsewhere and living rent-free at the barracks. RT: II, p. 251 – 252. Moments later, he also testified that Ochoa told Arnaudo that if only Arnaudo would give him his job back, he would come back to work, RT: II, p. 253. Upon being re-asked a similar question, he now testified that Ochoa did not say he would return to work if only Arnaudo were to give him his job back, RT: II, p. 254.

Rojas testified that after his layoff, he called Renteria 2 -3 times a week for approximately three weeks to ask for work and he went to the ranch two or three days a week for three weeks to ask for work. RT I: p. 72. Martinez testified he asked Renteria twice for work within a few days after he was laid off. RT I: 175.

It is undisputed that the three men started a job at Pallet King sometime in "the first two days" of November 2013. RT: I, p. 78. It is also undisputed that the men had

steadier work at Pallet King than they would have had during the slack season at Respondents. RT: I, p. 104, RT: I, p. 180.

### C. Chronology of Events Concerning Ivan Zuniga

Zuniga started work in March 2013. According to him, he was stopped in June by Renteria who told him there was no more work for him because he belonged to the Union's negotiating committee. RT II: p. 33, ll. 13-18[29]. However, there is no evidence that Respondents had any knowledge that Zuniga was on the negotiation committee until the first email to Respondents' counsel in August 2013. When asked by General Counsel why he believed his name was on a committee list, Zuniga explained that when he joined the committee, he was told his name would be on the list and this was why Renteria told him that "there wasn't going to be work for me because my name was on the – the sheets, the sheet from the negotiations." RT: II, pp 36-37.[30] Not only does Zuniga's name not appear on either of the sign-in sheets for the negotiation sessions, but also no negotiations had even taken place by June 2013.

In any event, Zuniga testified he asked foreman Kim Taing in 2014 to return to work and Taing told him he would have to talk to Renteria and Arnaudo "because they

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[29] No charge was ever filed in connection with this incident, and I take it that General Counsel intends it only as background, See, Post-Hearing Brief, p. 1, 8.

[30] At the hearing, there was a question whether the Interpreter had accurately translated the part of Zuniga's testimony which refers to his name appearing on the "sheets from the negotiations." General Counsel, who speaks Spanish, contended that the translation should have been "list of committee members"; Respondent's counsel, who also speaks Spanish, contended that the translation "sheets [or] sheet from the negotiations" was correct. The Interpreter stood by his translation: Renteria supposedly told Zuniga there was no more work for him because his name was 'on the negotiation sheets', RT: II, p. 38. In the absence of any further exploration about what Zuniga meant when he testified that Renteria said 'sheets from the negotiations', I find that Zuniga meant what the parties themselves referred to as the sign-in sheets.

were in charge and because [he] was part of the Negotiating Committee [and] he didn't want any problem so he sent [him] to them." RT: II, p. 39. Taing did not testify.

According to Zuniga, he happened to be visiting a friend in March 2014 when Renteria approached him and asked him if he wanted to come back to work because he needed loaders in asparagus. RT: II, p. 40. After Zuniga said he wanted to return, Renteria now added that he would only give him work on the "condition that he would not be part of the Negotiating Committee anymore, that I wouldn't have anything to do with the Union anymore – because there were a lot of problems with the company." RT: II, p. 41. Renteria denied having such a conversation, RT: II, p. 234.

Zuniga returned to work in March 2014 in Taing's crew.

It appears to be undisputed that while Zuniga was working in Taing's crew, Taing was not giving breaks. Zuniga testified that sometime in April, 2014, he complained to Taing about the lack of breaks. Taing told him that if he did not like it, he could quit. Zuniga testified that he also called Union representative Heriberto Fernandez to complain. Fernandez testified that, as a result of Zuniga's call, he spoke to both Taing and Renteria about the problem.[31] Renteria admitted that he had heard that Taing was not giving breaks, but, according to him, he did not hear about the problem from Fernandez, but directly from members of the crew. According to him, he spoke to Taing about the problem and he and Taing also spoke to the Mexican members of the crew to assure them they would get breaks. RT: II, p 213 I credit Fernandez's testimony

[31] Fernandez testified that he did not tell either man that it was Zuniga who called him about the problem.

that he complained to both Taing and Renteria about the problem. Even though Fernandez testified that he did not tell either Taing or Renteria that it was Zuniga who complained to him about the problem, I also find it more likely than not that Taing told Renteria that Zuniga had complained about the lack of breaks.

On June 16, 2014, Renteria told Zuniga there would be no more work for him. Zuniga testified that he was the only one laid off. Renteria admitted that when he told Zuniga there was no more work for him, work was available, but he explained that he gave this work to some of the women in the crew who had been with him longer. See, RT: II, p. 244. In view of Respondents' failure to introduce any employment records for any of its crews, I view Renteria's testimony on this point with distrust. Evidence Code § 412.

Zuniga testified that the day after he was laid off, Renteria came to the bunkhouse where he was sleeping and told him to hide his car "because Leo was going to run him off." RT: II p. 50. He added that Renteria also told him that "Leo was mad at [him] because he continued belonging to the – the Union." RT: II, p. 51. Renteria was not asked whether he made this statement and I find that he did. The day after that conversation, Renteria came to the bunkhouse and told Zuniga that Leo Arnaudo wanted to talk to him. Arnaudo asked him why he was still there. Zuniga replied that he had no place to go. RT: II p. 57. Arnaudo told him there was no more work for him. When Zuniga said he saw others still working, Arnaudo told him he that if he did not leave, he was going to call the sheriff, RT II, p. 57. Arnaudo denied having any such conversation with Zuniga. RT: II, p. 169.

Zuniga further testified that after his encounter with Arnaudo, he spoke to the Union and to the ALRB and was told that Arnaudo was required to give him notice before he could be forced to leave. RT: II pp. 57- 58. He also filed a charge. Two days after he filed the charge, Arnaudo came back and asked him again why he had not left yet. Zuniga told him he had to receive "a formal paper explaining – explaining why he was throwing him off the property." RT: II, p. 60 At this point, according to Zuniga, Arnaudo called the Sheriff.

It is undisputed that a Deputy came out. Meanwhile, Zuniga had reached Heriberto Fernandez who called Renteria and asked to speak to Arnaudo. Fernandez told Arnaudo he could not just kick Zuniga out of the barracks, RT: II, p. 112. When he was initially cross-examined, Fernandez stated that Arnaudo told him "he was kicking Ivan out because he hasn't – because he hadn't worked there. And that was kind of the gist of what happened there." RT II: pp 112 – 113.[32]

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[32] On further cross-examination, Fernandez testified:

> I am missing a very big piece here. * * * [H] used these words – Leo went on to talk about the negotiations between the Union and the company. He talked about having an election and – a workers' election. And he also talked about – he kind of went on a rant about that he's not technically required to recognize the Union because it wasn't his ranch. And he – and he mentioned that he thought Ivan Zuniga was a "Union plant," his words, "plant." [RT: II, p 120 -21]

Arnaudo denied ever telling Fernandez that Zuniga was a "plant." RT II: 174. I decline to credit Fernandez's testimony about Arnaudo's calling Zuniga a 'plant.' As noted above, Fernandez twice failed to mention the 'plant' remark, first, on direct examination and next when he was initially cross-examined. Since Respondents' motivation in evicting Zuniga is the critical issue in the allegations of the complaint concerning their treatment of him, and Arnaudo's regarding Zuniga as a Union 'plant' bears directly on that issue, it seems no more likely to me that Fernandez would initially fail to mention such a statement than it seems likely for a witness called to testify about a conversation he had with a defendant about a crime would initially fail to mention that the man or woman accused of it confessed.

Arnaudo initially denied that he ever spoke to a Sheriff about evicting Zuniga. He acknowledged calling the Sheriff once, but, according to this initial testimony, it was not because Zuniga was holding over, but because a houseboat was playing loud music on the river near his ranch. RT: II, pp. 171, 193. Although on cross-examination, he continued to maintain that he did not call the Sheriff to evict Zuniga, he also acknowledged that he took the "opportunity," as it were, to ask the Deputy about "what rights" he had as an employer/landlord to eject an employee/tenant. RT: II, p. 194, 195. The Sheriff's call log is in evidence and it shows that the sheriff's office was contacted by a "Pam" calling from Leo Arnaudo's office about "a problem he [Arnaudo] was having with a worker he was trying to evict." Since Arnaudo admitted that a 'Pam' works in Respondents' offices, I find that Arnaudo was responsible for calling the Sheriff about evicting Zuniga.

## III.

## CONCLUDING FINDINGS

### Credibility

Because a good part of this case turns on the question whether certain statements were made, to the extent a witness has given me cause to doubt his credibility and, therefore, to discount his testimony, I can simplify my consideration of the case.

*Doubts about Zuniga*: I begin with my doubts about Zuniga because, of all the witnesses, I have the least confidence in his testimony. My doubts begin with his account of Renteria's telling him he was being laid him off in 2013 because he was on the negotiating committee. Since Respondents were not notified that Zuniga was on the

committee until August 5, 2013, Renteria could not have said this in June 2013. The same problem infects Zuniga's attempt to explain his answer. When Zuniga was asked by General Counsel why he thought his name might be on a list of committee members before he was even named to the committee, Zuniga answered that it "was because my name was on . . . the sheets, the sheet from the negotiations." Since 1) no negotiations had taken place by June 2013, and 2) when they did take place, Zuniga's name never appears on the "sheet or sheets from the negotiations", his testimony concerning Respondents' motive for laying him off must be considered false on two counts.

It is undisputed that by the time Zuniga returned to work in the 2014 asparagus season, Respondents had been notified that he was on the negotiating committee and it is not, therefore, inconsistent with the rest of the record for 1) Taing and Renteria to have known this and 2) for Taing and Renteria to have made the statements attributed to them. What makes little sense to me on the record as a whole, however, is why, if (as Taing supposedly told Zuniga), Renteria and Arnaudo were leery about re-hiring Zuniga because of his union activities, Renteria would solicit Zuniga, as Zuniga testified he did, to return to work. Even though, according to Zuniga, Renteria conditioned his return upon Zuniga's promise not to take part in union activities, if Renteria was reflecting Respondents' concerns about having a union activist in their midst, it seems more likely that he would have just barred the gates against the activist as opposed to offering him a job contingent upon his promise to refrain from union activities. I do not credit Zuniga's testimony that Renteria sought a promise from Zuniga not to take part in union activities.

While the same consideration does not directly settle the question whether Taing might have told Zuniga that only Leo or Renteria could hire him in 2014, I have enough reason to distrust Zuniga as a witness that unless his testimony be corroborated by that of other witnesses or be otherwise supported by the record as a whole, I will not rely on it alone for any finding of fact.

Thus, I do not find 1) that Renteria told Zuniga he was laying him off in 2013 because he was on the negotiating committee; 2) that Renteria told Zuniga in 2013 that there was not going to be work for him because his name was on the list of committee members or on the "sheets" for the negotiations; 3) that Taing told Zuniga in 2014 he would have to talk to Renteria or Arnaudo about returning to work; and 4) that Renteria told Zuniga he could only come back to work on the condition that he refrain from union activities.[33]

*Doubts about Arnaudo*: Leo Arnaudo was bold in both his frankness and in his lack of candor. While he freely admitted his animus towards the Union, See, e.g. RT: II, p. 180, I find his testimony was false about why the Sheriff came to the barracks the day that he spoke to Zuniga and Fernandez. Although he explained that, at 85, he was simply confused about how the Sheriff happened to come to the barracks, his attempt to salvage his initial account by insisting that, since he had called the Sheriff about the problem with the houseboat, he merely took the opportunity to ask him about how to

[33] These findings do not settle the issue of Respondents' calling the Sheriff to evict Zuniga since they only concern his credibility about statements allegedly made before he was rehired in 2014 and determining what happened after that does not depend on his testimony alone.

evict Zuniga, seemed too alert to permit me to conclude that his original account was the result of confusion. A false account like the one Arnaudo originally told goes a long way towards corroding credibility. This is not to say that I decline to credit all his testimony. Indeed, as will be discussed below, I credit his more expansive account of his conversation with Martinez about the latter's going to the Board hearing on the grounds that it has the ring of truth.

*Some doubts about Renteria*: When Respondents' Counsel asked Renteria about any conversations he had with Ochoa about the latter's holding over in the barracks, Renteria initially testified that Ochoa told Arnaudo he was going to continue to live there while working elsewhere because it was so much cheaper, which clearly implies that Ochoa was not interested in returning to Respondent's employ. A few moments later, when Renteria was asked if Ochoa ever asked Arnaudo for his job back, Renteria said that he did, which is not only inconsistent with the testimony I have just related, but also corroborates at least part of Ochoa's testimony about his conversation with Arnaudo. When Respondent's Counsel again pressed Renteria about whether Ochoa asked for a job, Renteria now answered, "No." These shifts in his testimony -- from supporting Respondent's theory of the case[34], to undercutting it, and back to supporting it, -- give me some caution about his veracity even though I also found him candid (as in his testimony about Arnaudo's knowing who supported the Union) and even though

[34] Renteria's initial testimony that Ochoa told Arnaudo he was going to continue working elsewhere while living at the barracks is consistent with Respondent's theory that Ochoa chose not to return to work because he could make more money elsewhere, See RT I, p. 21, ll. 1 – 6.

the employees themselves appeared to trust him (as in Zuniga's testimony that Renteria told him to hide his car. RT: II, p. 50.)

With these general considerations in place, I turn to the allegations in the complaint.

The allegations of surveillance, threats and interrogation

General Counsel's proof of both threats and surveillance[35] depends on:

1) Ochoa's and Martinez's testimony that in late 2012, after Roque first met with the employees, Renteria came into the bunkhouse and told the employees living there that Leo would kick them out of the barracks if they continued to support the Union;

2) Rojas' testimony that in spring 2013, Renteria came into the bunkhouse and told him and other employees that Leo that would fire him and kick the others out of the barracks if they continued to support the Union.

As noted above, Renteria denied both making any threats and creating the impression of surveillance, Arnaudo denied ever asking, and Renteria denied ever hearing Arnaudo ask, if Martinez still supported the Union. Since resolution of these matters comes

[35] Although no testimony puts Renteria in his house at the time any of the meetings outside the barracks, let alone establishes that he was observing the employees' meetings with union representatives, based upon the threats Renteria is alleged to have made, General Counsel contends that he must have been observing the meetings. However plausible the inference may be, a finding of employer surveillance requires proof that Renteria was *actually* on the scene. On the other hand, proof that an employer says (or implies) that he knows employees have engaged in union activity is said to create an impression of surveillance. *Bay Corrugated Container* (1993) 310 NLRB 450, 455, *Grouse Mountain Associates II* (2005) 333 NLRB 1322. To the extent, then, that General Counsel proves that Renteria made the threats attributed to him, she has established threats that imply knowledge of the employees' union activities (and, therefore, that Respondents created the impression of surveillance,) but she has not proved surveillance.

down to a credibility resolution[36], for the reasons stated above, I do not credit either Renteria's or Arnaudo's denials.

Accordingly, I find that in late 2012 and in spring 2013 Renteria threatened the barracks' residents and created the impression that Arnaudo was keeping them under surveillance.[37]

Interrogation

Before considering whether or not any of these alleged incidents constitutes unlawful surveillance, I must initially determine what occurred. General Counsel's proof of interrogation consists of testimony that:

1) In April or May of 2013, Arnaudo asked Martinez if he was supporting the Union;

2) In July 2013, Leo and Renteria came to the field where Martinez was working and asked him if he was going to testify at an upcoming ALRB hearing.

3) Sometime in the beginning of 2014, Arnaudo confronted Ochoa about his remaining in the barracks and during the ensuing conversation, Arnaudo asked Ochoa to swear on his rosary that he was not supporting the Union.

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[36] Respondent contends that the employees' accounts about Renteria's threats of eviction cannot be credible because 1) none of the employees allegedly threatened by Renteria in winter 2012 and spring 2013 was evicted and 2) none of the employees ceased their union activities. Respondents' Post-Hearing Brief, pp. 21-22 However, it is common enough in, among other areas of life, politics, foreign policy, and even parenting for threats to be more often made than carried out and to be ineffective despite having been made, and I do not decline to credit the employees' accounts on the grounds that the threats they related were neither carried out rigorously nor effective.

[37] While our Supreme Court has made it clear that "only surveillance [and by extension an impression of surveillance] which 'interferes with, restrains or coerces union activities' is prohibited," *Karahadian Ranches, Inc. v Agricultural Labor Relations Board* (1985) 38 Cal 3d 1, 8, a threat about adverse treatment which at the same time implies that an employer has been keeping track of its employees' union activities, must be considered to have such prohibited tendencies.

*Did Arnaudo ask Martinez if he was supporting the* Union: As noted above, both Arnaudo and Renteria (who interpreted for Arnaudo) denied that Arnaudo ever asked any employee if he supported the Union. Because of my doubts about Arnaudo's and Renteria's credibility, absent some reason to distrust Martinez's testimony, I find, as Martinez testified, that Arnaudo queried him about his support for the Union at the barracks.

*Did Arnaudo ask Martinez in the fields if he was going to testify at the hearing*: All the witnesses agree that Arnaudo, Renteria interpreting, had a conversation with Martinez about Martinez's attending the ALRB hearing. All that Martinez testified occurred was that Arnaudo asked him if he was going to the hearing. Arnaudo and Renteria dispute that Arnaudo asked such a question.[38]

There is no question that Arnaudo's testimony about what occasioned his stopping by the field to talk to Martinez, and exactly what he said when he and Renteria did stop, was quite fluid. While ordinarily I might find such shifts in his testimony to tell against the credibility of his account, especially when, as noted above, I have other

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[38] There are a number of differences between Arnaudo's accounts of his conversation on direct and on cross-examination. When he first testified on direct examination, Arnaudo related that he told Martinez he did not care about his testifying, but that he wanted Martinez to know he would not be paid for the time off. Counsel's next question to him about whether he remembered anything about his and Renteria's wanting to know if he was going to be working was objected to as leading and the objection was sustained. Renteria's wanting to know if he was. On cross-examination, he at first related that Martinez approached him to tell him he had a command or order (which I take to mean a subpoena), upon hearing which he (Arnaudo) expressed his concern about the crew's being a man short. RT: II, pp. 188 – 190. When shown his declaration in which he stated that it was he who asked Renteria to call Martinez over, Arnaudo admitted he initiated the conversation at which point his account again diverged from his earlier account since he now added that he told Martinez that if he were not at the hearing all day, he could return to work and "put his hours in." RT: II, pp. 191 – 193.

reasons for questioning his candor, in the case of his field encounter with Martinez, I credit his and Renteria's testimony that there was more to their conversation than Arnaudo's merely asking Martinez if he were going to attend the hearing, which is all that Martinez related.

Based upon Arnaudo's testimony as whole, including 1) his resentment that the Union could assert representational rights after such a lapse of time since certification and 2) his frustration with Zuniga's and with Ochoa's holding over in the barracks, Arnaudo also struck me as someone who does not like to feel he is being taken advantage of, and I find that he spoke to Martinez in order to advise him that he was not going to pay him for the time he spent at the hearing.[39] However, since it makes sense that Arnaudo would want to know if Martinez were going to testify before advising him that he would not be paid for doing so, I also find that Arnaudo did ask him if he were going to attend the hearing. Finally, since both Arnaudo and Renteria emphasized that Arnaudo was wary about even speaking to Martinez, I also find, as both of them testified, that Arnaudo prefaced his remarks by telling Martinez he had a right to go.

*Did Renteria ask Ochoa to swear on his rosary that he no longer supported the Union:* Asking an employee to take an oath not to continue to support a Union is a form of inquiry because it seeks to determine if the employee remains a Union supporter. Since Arnaudo was never asked whether or not he asked Ochoa to take such an oath,

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[39] I specifically do not credit Arnaudo's and Renteria's testimony that Arnaudo also spoke to Martinez in order to find out if he was going to be at work so Renteria could obtain a replacement for him. Arnaudo's testimony was simply too consistent that the reason he asked Martinez if he were going to the hearing was in order to tell him he would not be paid for me to treat the "replacement" testimony as other than the afterthought that it appears to be.

Ochoa's testimony is uncontradicted. Accordingly, I find that Arnaudo essentially asked Ochoa if he were willing to renounce the Union.

Legal Conclusions

As Respondent correctly points out, an employer does not necessarily violate Labor Code Section 1153(a) merely by questioning an employee about his or her Union sympathies. This is so because violations of Section 1153(a) require a showing that the conduct complained of has a tendency "to interfere, restrain or coerce" employees in the exercise of their rights. Labor Code § 1153(a), *Karahadian Ranches, Inc. v Agricultural Labor Relations Board* (1985) 38 Cal 3d 1, 9. Our Board has adopted the NLRB approach laid out in *Rossmore House* (1984) 269 NLRB 1176, enf'd. sub nom. *Hotel Employees and Restaurant Employees Union v. National Labor Relations Board*, (9th Cir.) 760 F2d 1006, under which the National Board takes into account a variety of factors in determining "whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act." *Rossmore*, *supra*, at p. 1177. See, *Oasis Ranch Management*, (1992) 18 ALRB No. 11, *Premiere Rasberries LLC, dba Dutra Farms* (2013) 39 ALRB No. 6. Some of the factors to be taken into account in determining unlawful tendency are the background against which it takes place, the nature of the information sought, the identity of the questioner, the place and method of the alleged interrogation, whether the employee is an active and open union supporter, and any history of anti-union animus on the part of the employer. Whatever the exact criteria used, the fundamental goal is to determine the

likely effect of the employer's inquiry upon an employee's Labor Code Section 1152 rights.

With this end in mind, I have little difficulty in finding that Arnaudo's asking Ochoa to take an oath on his rosary that he would no longer support the Union was unlawful. No matter what else might be said to interfere with, restrain or coerce an employee in the exercise of his or her Section 1152 rights, asking him or her to promise not to exercise them certainly appears likely to have that tendency.

I also find that Arnaudo's coming to the barracks to ask Martinez if he was supporting the Union violated the Act. His question took place against a background of Renteria's having already conveyed both threats to, and the impression of continuing surveillance of, the barracks' residents' union activities, even as Respondents were actively rejecting the Union's claim to representational status. Under such circumstances, questioning a union sympathizer's support of his union seems likely to convey a suggestion that the employee reconsider his loyalties.

It remains to consider Arnaudo's conversation with Martinez in the field before the hearing.

I have found that Arnaudo did ask Martinez if he were going to attend the hearing, but I have also found that he did so to advise Martinez that he was not going to be paid for the time he spent at the hearing and that he was careful to advise Martinez that he had a right to go and to testify.

Since it is well-established that an employer commits no unfair labor practice by not paying an employee for time spent testifying against it, *General Electric Company*

(1977) 230 NLRB 683, the question becomes whether a statement of Respondents' intention to remain within the law, even if it can be construed as spiteful, is prohibited under the Act. Since Arnaudo prefaced his comments with the assurances that Martinez had a right to testify, and since they contained neither promise of benefit nor threat of reprisal or force[40], I conclude they are protected under Labor Code Section 1155.[41]

The Layoffs of Martinez, Rojas and Ochoa

In *Kawahara Farms, Inc.* 40 ALRB No. 11, the Board recently reiterated that in cases involving allegations of discrimination in employment, the General Counsel has the initial burden of establishing by a preponderance of evidence that the employee engaged in protected or lawful activity, that the employer knew or suspected that they did so, and that there was a causal relationship between the employee's protected activity and the adverse employment action taken against them. If the General Counsel establishes such a prima facie case, the burden of persuasion shifts to the employer to

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[40] Even taking into account, the admonition of the Supreme Court *in National Labor Relations Board v Gissel Packing Co.* (1969 395 US 575, 617, that "the economic dependence of employees upon their employer [which] makes it likely that [employees will] pick up on the intended implications" of employer statements, it is still necessary to determine if the statements may be taken to imply a promise of benefits or a threat of reprisal or force. The only "promise of benefit" that might be extracted from the message Arnaudo intended to, and did, deliver would be that Martinez would be paid *if he worked* instead of testifying, and the only threat that might be extracted is that Martinez would not be paid *while he was testifying.* I cannot construe an employer's statement that he will only pay for work performed as an unlawful promise of "new" benefits, *San Clemente Ranch, Ltd.* (1999) 25 ALRB No. 5, pp. 4 - 5; and I cannot treat advising an employee he will not be paid for *not working* as a "reprisal."

[41] I am not overlooking my findings that I have found that other threats were directed at the employees, but, as long as employers do not interfere with the rights of their employees, they can go up to the limits of the law in expressing their opinions about their employees' choices. With respect to his remarks to Martinez, I find Arnaudo stayed within proper boundaries.

prove by a preponderance of the evidence that the adverse action would have been taken absent the employee's protected or lawful activity.

There is no question that by the time of all the layoffs in this case, Respondents had knowledge of the union activities of Martinez, Ochoa and Rojas, and they do not dispute either of the first two elements of the standard test for discrimination. It remains to determine if General Counsel has proved that their support of the union was a motivating factor in Respondents' decision to lay off the three men in October. For their part, Respondents contend that it is undisputed that the men were laid off during the slack season when work generally dries up and their layoff was for lack of work.

I have found that Arnaudo harbored animus towards the Union, that Renteria conveyed threats to the barracks' residents and the impression that their Union activities were being watched, that Arnaudo interrogated Martinez about his continued support for the Union, and that he asked Ochoa to swear on his rosary that he no longer supported the Union. I have found there was sufficient proof of a change in the employee's pattern of slack season employment that the burden of producing evidence there was no change, had fallen to Respondent, who did not meet it. Accordingly, I find that General Counsel has made out a prima facie case of discrimination that the layoffs of Martinez, Rojas and Ochoa was discriminatory. The burden thus shifted to Respondent to produce evidence that it would have taken the same action in the absence of the employees' union activities.

In view of Respondents failure to produce such evidence, I find General Counsel's case to be unrebutted and I further find that, in laying off the three men, Respondent discriminated against them.

The Layoff of Zuniga

As with the layoffs of the three October discriminatees, the same elements must be considered with respect to Zuniga's layoff. General Counsel contends that Zuniga was an early Union activist who began supporting the Union in 2012. Rojas did testify that "Ivan", who I assume is Zuniga, was present at a meeting in front of the barracks in 2012, but 1) Zuniga himself testified he was not working anywhere in 2012 and 2) even when he did work for Arnaudo, he generally only worked from March to September, which, absent some additional explanation that accounts for his being at the barracks in 2012 when he was not working for Respondents, makes his presence there in November or December 2012 unlikely.

The earliest documented evidence of Zuniga's Union activities is his being named as a member of the negotiating committee in August 2013. Accordingly, I find Zuniga engaged in Union activities and Respondent had knowledge of them by that date. Although the fact that Respondent re-hired Zuniga in 2014, despite such knowledge, cuts against any inference that his being on the committee played any role in his 2014 layoff, I have also found that Zuniga complained to Taing about the crew's not receiving breaks, that Fernandez called Taing and Renteria to complain about the problem, and that it is more likely than not that Taing told Renteria that it was Zuniga who complained to him and to Fernandez. Since these complaints took place so close in

time to the June layoff of Zuniga, and since I have also found that Renteria told Zuniga that Leo was "mad at him for supporting the Union", I find that General Counsel has made out a prima facie case that Zuniga was laid off for his complaints about the lack of breaks and for his contacting the Union about them.

The burden thus shifted to Respondent to introduce evidence that it would have laid off Zuniga in the absence of his union activities. Respondents contend that Zuniga's layoff was normal in that he was laid off in June 2013 and he was laid off along with other employees in 2014. While I have not found that the Zuniga's 2013 layoff was in any way suspicious, I have declined to credit Renteria's testimony about the general layoff in 2014 since Respondents produced no records to substantiate their claim that other employees were laid off at the same time. Accordingly, I find that Respondents unlawfully laid off Zuniga in June 2014.

Did Respondents seek to evict Zuniga because he filed a charge

The elements of the General Counsel's burden of proof with respect to alleged violations of 1153(d) are the same as those with respect to 1153(c). General Counsel must prove by a preponderance of the evidence that the alleged discriminatee filed a charge, that Respondents knew he did so, and that there was a causal connection between the filing of a charge and the adverse action taken against the employee.

General Counsel contends that after Zuniga filed a charge, Arnaudo came to the barracks and asked Zuniga to leave and within minutes called the Sheriff to seek to

have him evicted.[42] This is certainly true, but it is also true that Arnaudo threatened to call the Sheriff *before* Zuniga filed the charge and, more important, that Zuniga only filed the charge *after* Arnaudo threatened him with the Sheriff. The 'arrow of time' thus runs in the wrong direction and I cannot find that Arnaudo's carrying through on a threat made before Zuniga filed his charge was motivated by his filing the charge. I dismiss this allegation of the complaint.

The Refusals to Rehire

General Counsel contends that Ochoa, Martinez and Rojas all asked for work and were refused rehire. Generally speaking, among the essential elements of a prima face case of a refusal to hire is proof that the employer was hiring at the time application was made, See, *FES, A Division of Thermo Power* (2000) 331 NLRB 9:[ "To establish a discriminatory refusal to hire, the General Counsel must . . . show the following . . .: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to announced or generally known requirements of the positions for hire . . .; and (3) that anti-union animus contributed to the decision not to hire the applicants." *FES, supra*, at p. 19] In this case, General Counsel has not shown that Respondent was hiring at the time any of the three men sought rehire; instead, she relies on proof that there continued to be work available for them which they were qualified to do. See, Post-Hearing Brief, pp. 33 – 34. However, proof that an employer was still providing

[42] The First Amended Consolidated Complaint alleges that Respondent threatened Zuniga with arrest when it called the sheriff. See, First Amended Consolidated Complaint, Para. 45. There is no proof of this.

work to some is not the same as proof that it was seeking to hire anyone else. Accordingly, I dismiss these allegations of the complaint.[43]

## RECOMMENDED ORDER

Pursuant to Labor Code section 1160.3, Respondents Arnaudo Bros. LP and Arnaudo Brothers, Inc. and their officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Creating the impression of surveillance of any agricultural employee's protected activities;

   (b) Interrogating agricultural employees about their union activities and support;

   (c) Threatening employees with loss of employment for their support of the Union;

   (d) Laying off or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in union activities protected under Section 1152 of the Agricultural Labor Relations Act (Act).

   (e) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Labor Code § 1152.

[43] Since I have dismissed the refusal to hire allegations, there is no need to reach the issue raised by Respondent that because the three men were earning more money at Pallet King, they were not sincerely interested in returning to work for Respondents. See, *Toering Electric Company* (2007) 351 NLRB 225

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

(a) Offer to Noe Martinez, Rigoberto Ochoa, Javier Rojas, and Ivan Zuniga immediate reinstatement to their former or a substantially equivalent position without prejudice to their seniority or other rights and privileges of employment;

(b) Make whole Noe Martinez, Rigoberto Ochoa, Javier Rojas, and Ivan Zuniga for all wage losses and other economic losses they have suffered as a result of Respondent's discrimination against them, such losses to be computed in accordance with Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondents since the unlawful layoff. Such amounts shall include interest thereon, computed in accordance with *H&R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21.

(c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning July 30, 2010, 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 Recommended Order.

(d) Upon request of the Regional Director, sign the Notice of 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 agricultural employees then employed by Respondent, 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 October 18, 2013 to October 18, 2014, at their last known addresses.

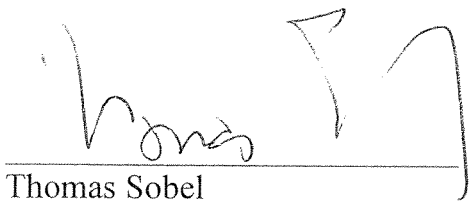
(h) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order in this matter.

(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.

(j) All other allegations contained in the Amended Complaint are hereby dismissed.

DATED: December 30, 2014



Thomas Sobel
Administrative Law Judge

## NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged that we, Arnaudo Brothers LLP and Arnaudo Brothers, Inc. had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by interrogating employees about their Union activities, by creating the impression that we were surveilling the Union activities of our employees and by laying off Noe Martinez, Javier Rojas, Rigoberto Ochoa, and Ivan Zuniga because they supported the United Farm Workers of America (UFW.)

The ALRB has told us to post and publish this Notice.

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; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

**WE WILL NOT** lay off or otherwise discriminate against agricultural employees because they join, support or assist the UFW or any other union.

**WE WILL NOT** interrogate employees concerning their Union activities, sympathies and desires; , or those of other workers

**WE WILL NOT** convey the impression of surveillance of the Union activities of any employee;

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce employees in the exercise of any of the rights listed above.

**WE WILL** offer Noe Martinez, Javier Rojas, Rigobertyo Ochoa, Javier Rojas, and Ivan Zuniga employment in the positions they previously held, or, if their positions no longer exist, to substantially equivalent employment, and make them whole for all losses in pay or other economic losses they suffered as the result of our unlawful conduct.

ARNAUDO BROTHERS, LP AND ARNUADO BROTHERS, INC.

DATED

By: _____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1642 West Walnut Avenue, Visalia, California 93277. The telephone number is (559) 627 - 8031.
This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

Dated: December 30, 2014

THOMAS SOBEL
Administrative Law Judge, ALRB

Arnaudo Brothers, LP
Arnaudo Brothers, Inc.
2013-CE-028-VIS, et al.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

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

On December 30, 2014, I served the within **DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the parties in said action, by fax and certified mail at Sacramento, California addressed as follows:

**CERTIFIED MAIL**

Silas Shawver
Abdel Nassar
ALRB Visalia Regional Office
1642 W. Walnut Avenue
Visalia, CA 93277-5348
**fax: (559) 627-0985**

Algeria de la Cruz
Cristina Pena
SALINAS ALRB Regional Office
342 Pajaro Street
Salinas, CA 93901
**fax: (831) 769-8039**

Robert K. Carrol
Rachel Fischetti
NIXON PEABODY LLP
One Embarcadero Center, 18th Floor
San Francisco, California 94111-3600
**fax: (415) 984-8300**

**HAND DELIVERED**

Sylvia Torres-Guillen
General Counsel
ALRB
1325 J. Street, Suite 1900-A
Sacramento, CA 95814

**CERTIFIED MAIL (cont)**

Mario Martinez
Edgar Aguilasocho/ Aida Sotelo
UFW Legal Dept.
1227 California Avenue
Bakersfield, CA 93304-1403
**fax: (661) 324-8103**

Executed on December 30, 2014, at Sacramento, California. I certify (or declare), under penalty of perjury that the foregoing is true and correct.

*Sonia Louie*