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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC.,
Respondent,
and,
UNITED FARM WORKERS OF AMERICA, and,
JUAN MANUEL JUÁREZ HERNANDEZ,
Charging Parties.

Case Nos.: 2015-CE-007-VIS
2015-CE-008-VIS
2015-CE-014-VIS
2013-CE-064-VIS

**DECISION AND RECOMMENDED
ORDER OF ADMINISTRATIVE
LAW JUDGE**

Appearances

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DECISION

The broad issues in these consolidated cases are:

- Whether the General Counsel carried the burden of persuasion to show by a preponderance of the evidence that a motivating factor in Gerawan Farming, Inc.'s (Gerawan or Respondent) failure to recall four agricultural employees was their union or other protected conduct.

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- If a preponderance of the evidence supports an inference that union or protected conduct was a motivating factor in failure to recall, whether Gerawan demonstrated that the same action would have taken place in the absence of the union or protected conduct.

Hearing was held in Fresno from May 22-24, 2018. All parties were provided an opportunity to call and fully examine the witnesses.¹ On the record as a whole,² including the briefs of all parties, and after assessing the relative credibility of various witnesses,³ the following findings of fact and conclusions of law are made.

I. Legal Standard

A. Wright Line Shifting Burden Analysis

In order to determine whether an adverse employment action is unlawful, the *Wright Line*⁴ causation test is utilized. This test has a shifting burden of analysis. Unfortunately, throughout the years, the elements of this test have been mischaracterized or stated in different ways. This lack of consistency is cause for confusion on the part of litigants and judges. Thus, before analyzing the facts of this case, a few words are warranted regarding evolution of *Wright Line*.

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¹ Gerawan argues that it did not have the opportunity to fully cross-examine one of the alleged discriminatees because the General Counsel did not provide all of the statements made or adopted by the witness as requested by Gerawan and required by Rule 20274 (a). After full argument regarding this matter, Gerawan was ordered to proceed with cross-examination. Gerawan stated it would file a request for special permission to appeal this ruling pursuant to Rule 20242(c) and thereafter cross-examined the witness. Relying on *Premiere Raspberries* (2012) 38 ALRB No. 11, pp. 8-9, by Order of June 28, 2018, pp. 2-3, the Board denied the request for special permission to appeal because an appeal of an evidentiary ruling that can be addressed effectively through exceptions is not a collateral order subject to interlocutory review.

² All parties agree that Gerawan is an agricultural employer within the meaning of § 1140.4(c) of the Agricultural Labor Relations Act (ALRA). All parties agree that the Charging Party United Farm Workers of America (UFW) is a labor organization within the meaning of § 1140.4(f) of the Act.

³ Specific credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to the factual findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

⁴ *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083 enfd. (1st Cir. 1981) 662 F.2d 899, cert. denied, (1982) 455 U.S. 989.

1 The source of the shifting burden of analysis is a 1977 Supreme Court case, *Mt. Healthy City*
2 *School District Board of Education v. Doyle*.⁵ In that case, the School District did not renew
3 Doyle's contract because he communicated with a local radio station and because he made an
4 obscene gesture to two girls in connection with their failure to obey commands he made in his
5 capacity as cafeteria supervisor. The Court found that Doyle's communication to the radio
6 station was constitutionally protected First Amendment speech.⁶

7 The lower court found that Doyle's protected speech, a non-permissible reason for
8 failure to renew, played a "substantial part" in the decision not to renew Doyle's contract. The
9 lower court held that if a non-permissible reason, such as exercise of First Amendment rights,
10 played a substantial part in the adverse employment decision, the decision is unlawful even in the
11 face of other permissible grounds.⁷ Thus, the lower court employed no shifting burden and
12 provided no opportunity for the school district to prove that Doyle would not have been retained
13 even absent his exercise of free speech. The lower court held, based on the finding that free
14 speech played a substantial part in failure to retain him, that Doyle was entitled to reinstatement
15 with backpay.

16 On review, the Court stated:⁸

17 A rule of causation which focuses solely on whether protected conduct play a
18 part, "substantial" or otherwise, in a decision not to rehire, could place an
19 employee in a better position as a result of the exercise of constitutionally
20 protected conduct than he would have occupied had he done nothing. The
21 difficulty with the rule enunciated by the District Court is that it would
22 requirement reinstatement in cases where a dramatic and perhaps abrasive
23 incident is inevitably on the minds of those responsible for the decision to rehire,
24 and does indeed play a part in that decision – even if the same decision would
25 have been reached had the incident not occurred. The constitutional principle at
26 stake is sufficiently vindicated if such an employee is placed in no worse a
27 position that if he had not engaged in the conduct. A borderline or marginal
28 candidate should not have the employment question resolved against him because
of constitutionally protected conduct. But the same candidate ought not to be
able, by engaging in such conduct, to prevent his employer from assessing his
performance record and reaching a decision not to rehire on the basis of that

27 ⁵ 429 U.S. 274.

28 ⁶ *Id.* at 284.

⁷ *Id.*

⁸ *Id.* at 285-286.

1 record, simply because the protected conduct makes the employer more certain of
2 the correctness of its decision.

3 The Court thus formulated a causation test for instances in which constitutionally
4 protected actions formed a basis for the discipline:⁹

5 Initially, in this case, the burden was properly placed upon [Doyle] to show that
6 his conduct was constitutionally protected, and that this conduct was a
7 "substantial factor" – or, to put it in other words, that it was a "motivating factor"
8 in the [School] Board's decision not to rehire him. [Doyle] having carried that
9 burden, however, the District Court should have gone on to determine whether the
10 [School] Board had shown by a preponderance of the evidence that it would have
11 reached the same decision as to [Doyle's] re-employment even in the absence of
12 the protected conduct.

13 In adopting *Mt. Healthy*, the NLRB held that whether an employer's adverse
14 employment action was motivated by employee protected activity should be assessed by
15 applying a shifting burden analysis as follows:¹⁰

16 Initially, the employee must establish that the protected conduct was a
17 "substantial" or "motivating" factor. Once this is accomplished, the burden shifts
18 to the employer to demonstrate that it would have reached the same decision
19 absent the protected conduct.

20 In other words, an inference of motivation is found if the General Counsel
21 satisfies the initial burden of persuasion.¹¹ Once this is established, the burden shifts to the
22 employer to demonstrate that the same action would have taken place in any event.¹²

23 In *Director, Office of Workers' Compensation Programs, DOL v. Greenwich*
24 *Collieries*, the Court noted that over the years, articulation of the term "burden," was blurred by
25 careless usage of the terms "burden of proof," "burden of persuasion," and "burden of
26 production."¹³ The Court held that "burden of proof," as utilized in the Administrative

27 ⁹ Id. at 287 (footnote omitted).

28 ¹⁰ *Wright Line*, supra, 251 NLRB at 1087.

¹¹ "First, we shall require that the General Counsel make a *prima facie* showing sufficient to
support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*,
supra, 251 NLRB at 1089.

¹² Id.

¹³ (1994) 512 U.S. 267, 272.

1 Procedure Act (APA),¹⁴ referred to the “burden of persuasion,”¹⁵ that is, “the notion that if
2 evidence is evenly balanced, the party that bears the burden of persuasion must lose.”¹⁶ This is
3 distinguished from the “burden of production,” “a party’s obligation to come forward with
4 evidence to support its claim.”¹⁷ Finally, the Court acknowledged that it had earlier reached a
5 contrary conclusion in *NLRB v. Transportation Management Corp*¹⁸ holding that the APA
6 burden of proof provision determines only the burden of going forward, not the burden of
7 persuasion. The Court rejected this prior *Transportation Management Corp.* holding.¹⁹

8 In 1996, the NLRB recognized the modification required in *Greenwich Collieries*
9 as a change in phraseology.²⁰ Utilizing the modification, the NLRB noted that the General
10 Counsel’s burden is to “persuade that antiunion sentiment was a substantial or motivating
11 factor.” If the General Counsel satisfies this burden, “The burden of persuasion shifts to the
12 employer to prove its affirmative defense that it would have taken the same action even if the
13 employees had not engaged in protected activity.”²¹

14 Throughout the process of adoption of *Mt. Healthy* and *Greenwich Collieries*, it
15 cannot be too strongly emphasized that the shifting burden analysis is a test of causation. Thus,
16 when further development of the elements of the initial burden of persuasion were enunciated, it
17 was unnecessary to add an element of causation. The entire test is one of causation.

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24 statutes. ¹⁴ 5 U.S.C. §554. The APA is the procedural underpinning of the NLRA and other federal

25 ¹⁵ *Greenwich Collieries*, supra, 512 U.S. at 276.

26 ¹⁶ Id. at 272.

27 ¹⁷ Id.

28 ¹⁸ (1983) 462 U.S. 393, 404 fn. 7.

¹⁹ *Greenwich Collieries*, supra, 512 U.S. at 277-278.

²⁰ *Manno Electric, Inc.* (1996) 321 NLRB 278, 283 fn. 12 (*Greenwich Collieries* merely suggests a “change in phraseology” and “does not represent a substantive change in the *Wright Line* test.”). enfd. (5th Cir. 1997) 127 F.3d 34.

²¹ Id.

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B. NLRB Elements of the Initial Burden of Persuasion

To satisfy the initial burden of persuasion as to causation, the General Counsel must show three elements by a preponderance of the evidence: activity, knowledge, and animus.²² The NLRB has expressed these three elements as follows:²³

[T]he elements required to support the General Counsel’s initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer.

There is no “nexus” element in the initial burden of persuasion because such an element would be superfluous.²⁴ Causation or motivation is assessed by application of *Wright Line*. The lack of a “nexus” element in the NLRB articulation is a matter of pure logic. Thus, in a somewhat oversimplified mathematical sense, the General Counsel’s *Wright Line* burden of persuasion might be summarized as: Inference of Motivation equals Activity plus Knowledge plus Animus (IM = A + K + A).

In legal lexicon, if the General Counsel satisfies the initial burden of persuasion by a preponderance of the evidence (showing that there was activity, knowledge, and animus), *Wright Line* assesses this showing as supporting an inference that protected activity was a substantial or motivating factor in the adverse employment action.

Although various NLRB Members have advocated for addition of a fourth element of nexus, that is, a showing of causal connection between the animus and the adverse

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²² *Kitsap Tenant Support Servs.* (2018) 366 NLRB No. 98, slip op. at 11, citing *Libertyville Toyota* (2014) 360 NLRB 1298, 1301 and fn. 10, enfd. sub nom. *AutoNation, Inc. v. NLRB* (7th Cir. 2015) 801 F.3d 767; *Austal USA, LLC* (2010) 356 NLRB 363 at 363; see also, *Mesker Door, Inc.* (2011) 357 NLRB 591, 592 n. 5 (“The judge incorrectly described the General Counsel’s initial burden as including a fourth ‘nexus’ element.”)

²³ *Kitsap*, supra, 366 NLRB No. 98, p. 11.

²⁴ See *Kitsap*, supra, 366 NLRB No. 98, pp. 11-12 fn. 25: “Thus, [Chairman Ring] agrees that there is no separate and distinct ‘nexus’ element that the General Counsel must satisfy under *Wright Line*. He emphasizes, however, that *Wright Line* is inherently a causation test. Thus, identification of a causal nexus as a separate element the General Counsel must establish to sustain his burden of proof is superfluous because ‘[t]he ultimate inquiry’ is whether there is a nexus between the employee’s protected activity and the challenged adverse employment action. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327-1328 (D.C. Cir. 2012).” See also, *Advanced Masonry Systems* (2018) 366 NLRB No. 57, pp. 3-4 fn. 8.

1 employment action,²⁵ the NLRB has never adopted such a requirement.²⁶ It is superfluous and
2 logically inconsistent with *Wright Line*, which is a causation test adopted by the NLRB and
3 approved by the United States Supreme Court. Nexus is already built into the formula.

4 To be clear, however, the NLRB from time to time expressed the General
5 Counsel's burden as requiring four elements: activity, knowledge, animus, and causal
6 connection.²⁷ More recently, as seen from the discussion above, the NLRB appears to require
7 rigorous articulation of the initial burden as requiring only the three elements of activity,
8 knowledge, and animus. In its recent cases, the NLRB has specifically rejected nexus as part of
9 the initial *Wright Line* showing.²⁸

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16 ²⁵ For instance, former NLRB Members Schaumber and Johnson, and former NLRB Chairman
17 Miscimarra emphasized that *Wright Line* is ultimately a causation test. In their views, a fourth element, causal
18 connection or nexus, should be required between the animus and the action. See former Member Schaumber:
19 *Shearer's Foods, Inc.* (2003) 340 NLRB 1093, 1094 fn. 4; former Member Johnson: *St Bernard Hospital &*
20 *Health Care Center* (2013) 360 NLRB 53 fn.2; former Chairman Miscimarra concurring: *Starbucks Coffee Co.*
21 (2014) 360 NLRB 1168, 1172 fn. 1. Chairman Ring and former Chairman Kaplan do not advocate adding a fourth
22 element to the test. They find it logically superfluous. See *Advanced Masonry Systems*, supra, 366 NLRB No. 57,
23 slip op. at 3-4 fn. 8 (former Chairman Kaplan); *Kitsap Tenant Support Services*, supra, 366 NLRB No. 98, slip op
24 at 11-12 fn. 25 (Chairman Ring).

25 ²⁶ See, e.g., *Neises Constr. Corp.* (2017) 365 NLRB No. 129, slip op. at 1-2, fn. 6.

26 ²⁷ Although not an exhaustive list by any means, in various cases the NLRB articulated the
27 *Wright Line* initial burden as a four-part test with nexus as the fourth factor or has adopted without comment the
28 decisions administrative law judges with the same misstatement. See, e.g., *American Gardens Management Co.*
(2002) 338 NLRB 644, 645 (Four elements in initial showing: activity, knowledge, adverse action, nexus);
Tracker Marine, LLC (2002) 337 NLRB 644, 646 (Board adopted without comment the ALJ's recitation of a
four-part initial burden: activity, knowledge, adverse action, nexus); *American Federation of Teachers of New*
Mexico (2014) 360 NLRB 438, 448 (same). More recent NLRB precedent, cited above, appears to consistently
utilize a three-prong initial burden with no causal connection or nexus requirement. See also, *Libertyville Toyota*,
(2014) 360 NLRB 1298, 1301 fn. 10: "Even though there are a handful of instances in which Board panels,
without purporting to modify or add to the longstanding *Wright Line* test, have in passing referred to a "nexus"
element, those decisions are not to the contrary, given the overwhelming number of cases in which the Board has
stated the *Wright Line* test precisely as we do here. We note that such cases do not reflect a different approach as,
in none of the cases cited by our colleague, was such a "nexus," or the lack thereof, the basis for the Board's
holding."

28 ²⁸ *TM Group, Inc.* (2011) 357 NLRB 1186, 1186 fn. 2: "Contrary to the judge's statement of the
Wright Line standard, however, "nexus" is not an element of the General Counsel's initial burden. See, e.g.,
Mesker Door, 357 NLRB [591, 592] fn. 5 (2011). . . ."

1 C. ALRB Elements of Initial Burden of Persuasion

2 In *Martori Bros. Distributors v. ALRB*,²⁹ the court adopted the *Mt. Healthy-*
3 *Wright Line* “but for” test as the appropriate test to be utilized by the ALRB in dual motivation
4 cases:

5 Labor Code section 1148 provides that “[t]he board shall follow applicable
6 precedents of the National Labor Relations Act, as amended.” In light of the
7 recent *Wright Line* decision, the ALRB henceforth should apply this “but for”
8 standard in assessing the dual motive for discharge of agricultural workers under
9 the Agricultural Labor Relations Act. When it is shown that the employee is
guilty of misconduct warranting discharge, the discharge should not be deemed an
unfair labor practice unless the board determines that the employee would have
been retained “but for” his union membership or his performance of other
protected activities.

10 Although the ALRB has embraced *Wright Line*’s shifting burden analysis, it has
11 not until recently utilized the three elements (activity, knowledge, animus) of the NLRB’s
12 requirements for the General Counsel’s initial burden of persuasion.³⁰

13 Rather, the ALRB has generally required that the General Counsel show activity, knowledge,
14 and nexus to satisfy the initial burden of persuasion. For instance, in a post-*Martori Bros.* 1981
15 case,³¹ the following was stated:

16 To establish a prima facie case of discriminatory discharge or discriminatory
17 refusal or failure to rehire, the General Counsel must show by a preponderance of
18 the evidence that the employee was engaged in protected activity, that Respondent
19 had knowledge of such activity, and that there was some connection or causal
relationship between the protected activity and the discharge or failure to rehire.

20 In subsequent cases, the ALRB followed the burden-shifting test of *Wright Line*
21 but did not utilize the three elements articulated by the NLRB – activity, knowledge, and animus
22 – which satisfy the General Counsel’s initial burden and create an inference of unlawful

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27 ²⁹ (1981) 29 Cal.3d 721.

³⁰ *Sandhu Brothers Poultry and Farming* (2014) 40 ALRB No. 12.

28 ³¹ *Verde Produce Co.* (1981) 7 ALRB No. 27, at pp. 2-3, issued three months after *Martori Bros.*, supra, citing *Jackson and Perkins Rose Co.* (1979) 5 ALRB No. 20, p. 5; see also *Nash de Camp Co.* (1982) 8 ALRB No. 5, slip op. at 2, finding no causal connection or nexus.

1 motivation. For example, in *Bruce Church, Inc.*,³² the ALRB held that the General Counsel must
2 establish activity, knowledge and nexus by a preponderance of the evidence.

3 In 1987, the ALRB specifically adopted *Wright Line* in all cases involving dual
4 motivation.³³ Despite adopting *Wright Line*, the ALRB did not state the three elements – activity,
5 knowledge, and animus – that were necessary under NLRB precedent to satisfy the General
6 Counsel’s initial burden of persuasion. Subsequent ALRB decisions up to and including
7 *Kawahara Nurseries*³⁴ continued to utilize the nexus element rather than animus.³⁵

8 All parties to this proceeding have cited to ALRB authority enunciating the three-
9 pronged General Counsel initial burden as including activity, knowledge, and causal
10 connection.³⁶ However, a month after *Kawahara Farms* was issued, the ALRB issued *Sandhu*
11 *Brothers*.³⁷ Relying on NLRB authority in *Donaldson Bros. Ready Mix, Inc.*³⁸ the ALRB stated
12 in *Sandhu Brothers*:³⁹

13 The General Counsel satisfies this [initial] burden by showing that (1) the
14 employee was engaged in protected activity, (2) the employer had knowledge of
15 the protected activity, and (3) the employer bore animus toward the employee’s
16 protected activity.

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20 ³² *Bruce Church Co., Inc.* (1983) 9 ALRB No. 75, ALJD at p. 10; see also *Ranch No. 1* (1986)
21 12 ALRB No. 21, slip op. at 5-6, fn. 5; *D'Arrigo Brothers* (1987) 13 ALRB No. 1, adopting judge’s articulation at
ALJD p. 19.

22 ³³ *Sam Andrews’ Sons* (1987) 13 ALRB No. 15 at pp. 6-7. See also, *California Valley Land Co.,*
23 *Inc.* (1991) 17 ALRB No. 8 pp. 6-7 (also setting out two-part *Wright Line* analysis but not mentioning the
elements of the initial General Counsel showing as activity, knowledge, and nexus).

24 ³⁴ (2014) 40 ALRB No. 11, p.11.

25 ³⁵ See, e.g., *Bruce Church, Inc.*, (1990) 16 ALRB No. 3, slip op. at 14; *T.T. Miyasaka, Inc.*
26 (1990) 16 ALRB No. 16 at pp. 20-21; *California Valley Land Co., Inc.* supra, 17 ALRB No. 8, slip op. at 6-7.
Other cases have expressed the same concept as nexus or causal connection by utilizing the term “motivation” as
27 the third prong of the General Counsel’s initial burden of persuasion. See, e.g., *H & R Gunlund Ranches* (2013)
39 ALRB No. 21, p. 3; *McCaffrey Goldner Roses* (2002) 28 ALRB No. 8, pp. 5-6.

28 ³⁶ General Counsel Brief at 20 citing *Lawrence Scarrone* (1981) 7 ALRB No. 13, p. 5; Charging
Party Brief at p. 2, citing *California Valley Land Co. and Woolf Farming Co. of California, Inc.* (1991) 17 ALRB
No. 8 at pp. 6-7; Respondent Brief at p. 13, citing *Lawrence Scarrone*, supra.

³⁷ (November 13, 2014) 40 ALRB No. 12.

³⁸ (2004) 341 NLRB 958, 961.

³⁹ *Sandhu Brothers*, supra, 40 ALRB No. 12 at p. 14.

1 The ALRB did not specifically state in *Sandhu Brothers* that it was changing its
2 prior three-element standard. However, because the ALRB is bound by NLRB precedent,⁴⁰ it is
3 submitted that the better approach is set forth in *Sandhu Brothers*. That standard will be utilized
4 here.⁴¹

5 **II. Facts and Analysis**

6 **A. Nature of Seasonal Work in Gerawan's Peach and Nectarine** 7 **Orchards**

8 The employment actions at issue took place in Gerawan's peach and nectarine
9 orchards. Specifically, the work performed for crew bosses Francisco Maldonado (Maldonado),
10 Manuel Ramos (Ramos), Alfredo Zarate (Zarate), and Carlos Rodriguez (Rodriguez) is
11 involved.⁴² The peach and nectarine season moves through various cycles including winter
12 pruning, followed by spring thinning, and concluding with harvesting including summer pruning.

13 In the winter months, after the trees have lost their leaves, the workers prune
14 them. This usually happens in November and December and into early spring. During this winter
15 pruning cycle, the crews also truss the trees with two circles of string or other supporting
16 material. The trussing provides circumference support for the branches when the fruit becomes

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20 ⁴⁰ Cal. Labor Code, § 1148: "The [ALRB] shall follow applicable precedents of the National
21 Labor Relations Act, as amended."

22 ⁴¹ California State law does not appear to be contrary to *Sandhu Brothers*. Although many
23 California courts have followed and adopted *Wright Line*, the only California State holding regarding the General
24 Counsel's initial burden of persuasion is contained in *Babbit's Eng'g & Mach. v. ALRB* (4th Dist. 1984) 152
25 Cal.App.3d 310. There the court stated that the General Counsel's evidence allowed the ALRB to draw an
26 inference of causal connection between the discharges and antiunion animus. (Id. at 330). This statement is
27 consistent with *Mt. Healthy*. However, the court also stated that the General Counsel "is obliged to prove by a
28 preponderance of the evidence that the employee was engaged in union activity. . . . and that there was some
connection or causal relationship between the union activity and the discharge." Id. at 343 [ellipsis in original court
recitation], relying on *Jackson & Perkins Rose Co.* (1979) 5 ALRB No. 20, p. 5 (complaint dismissed for lack of
knowledge and animus)." This statement is somewhat ambiguous as to whether causal connection is an inference to
be drawn from the evidence produced by the General Counsel's evidence or an actual holding that causal connection
is one of the elements of the General Counsel's burden of persuasion. Under these circumstances, it would appear
that there is no clear California State law contrary to the ALRB enunciation in *Sandhu Brothers*.

⁴² The parties agree that crew bosses Maldonado, Ramos, Zarate, and Rodriguez are supervisors
within the meaning of § 1140.4(j) of the Agricultural Labor Relations Act (ALRA), California Labor Code §§ 1140-
1166.3. These crew bosses lay off and recall employees utilizing their independent judgment.

1 heavy in the summer. The winter pruning crew is usually 18-20 employees to start and can
2 increase to 26-37⁴³ during the winter pruning cycle.

3 After about a one or two-week break following winter pruning, the spring
4 thinning cycle usually begins in April and continues into mid-May. The spring thinning crew
5 begins around 17-29⁴⁴ strong and can sometimes increase to around 40⁴⁵ employees.

6 After another short break, the harvesting cycle begins around May 20 and ends in
7 September or October. At its peak, there may be as many as 30-45⁴⁶ employees in a harvesting
8 crew. Summer pruning occurs during harvesting as each block is finished. This summer pruning
9 is performed in order to allow light to reach as much of each tree as possible in the coming
10 spring thus enhancing blooming potential. At the end of the harvest season, the crew may be
11 reduced to only eight employees to complete the summer pruning.

12 B. Alleged Refusal to Recall Eliazar Mulato (Mulato) and Rafael
13 Marquez Amaro (Marquez)

14 The first amended consolidated complaint (the complaint)⁴⁷ alleges that
15 agricultural employees⁴⁸ Mulato and Marquez were laid off in October 2013 and were not
16 recalled during 2013 winter pruning or 2014 spring thinning, as was the prior practice. The

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22 ⁴³ For example, payroll records for Maldonado's January 2012, 2013, and 2014 crews show that
the largest employee complements were 26, 37, and 29 respectively.

23 ⁴⁴ Payroll records for Maldonado's March and April 2012, 2013, and 2014 indicate employee
complements of 25, 29, and 17, respectively, following a one or two week break. Zarate's April 1, 2015 employee
24 complement was 32 workers while Rodriguez' was 33.

25 ⁴⁵ Although the payroll records show a clear break between winter pruning and spring thinning,
there are no clear breaks between spring thinning and harvesting. Using the dates that Maldonado supplied, i.e.,
spring thinning typically occurs from April to mid-May, the payroll records indicate maximum spring thinning
26 crews of 35, 41, and 31 in 2012, 2013, and 2014 respectively.

27 ⁴⁶ Payroll records indicate Maldonado's crew reached a high of 45 employees in 2012, 41
employees in 2013, and 31 employees in 2014.

28 ⁴⁷ The backpay specification which was consolidated with the complaint was severed prior to
hearing. Thus, this hearing involved only the liability phase of the proceeding.

⁴⁸ There is no dispute that Mulato and Marquez were at all relevant times agricultural employees
within the meaning of § 1140.4 (b) of the Act.

1 complaint alleges that failure to recall Mulato and Marquez until May 2014 violated § 1153 (a)
2 and (c) of the ALRA.⁴⁹ Both Mulato and Marquez worked for crew boss Maldonado.

3 1. Facts

4 Mulato began working for Gerawan in June 2010 on Maldonado's⁵⁰ crew. In
5 agreement with Maldonado, Mulato explained that employees were laid off during breaks
6 between the cycles of work. For instance, there might be a one to two week break between the
7 winter pruning and the spring thinning cycles or between the spring thinning cycle and
8 harvesting and another break between harvesting and winter pruning. As each year progressed
9 through the various cycles of work, Maldonado called Mulato to let him know when he should
10 report back from layoff for the next cycle of work. In fact, Maldonado also routinely provided
11 Mulato with a ride to work.

12 Marquez began working in Maldonado's crew in October 2011. Marquez rode to
13 work with David Clemente. Marquez was routinely laid off and recalled from layoff during the
14 seasonal cycles. Marquez found out about recall through his ride, David Clemente. Marquez
15 usually had one to two days' notice of recall.

16 Around the spring of 2013, Mulato began supporting the United Farm Workers of
17 America (UFW). Mulato spoke with his co-workers about the UFW and distributed UFW flyers
18 to his co-workers. Mulato told Maldonado that he supported UFW because UFW supported the
19 workers and protected them from abuses on the job. In May or June 2013, Mulato requested
20 permission from Maldonado to attend negotiations between Gerawan and the UFW. He also
21 recalled attending mediation sessions between Gerawan and the UFW in Modesto around July
22 2013. In mid-November 2013, Mulato joined other workers, including co-worker Marquez, at
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26 ⁴⁹ The relevant underlying unfair labor practice charge, 2013-CE-064-VIS, was filed on
27 December 23, 2013, alleging failure to recall due to union activity. The complaint alleges violation of §1153(a).
28 However, the parties fully litigated the case as if §1153(a) and (c) were at issue. Thus, both subsections of the Act
will be considered. See, e.g., *Signal Produce Co.* (1980) 6 ALRB No. 47, p. 4 fn. 1.

⁵⁰ Maldonado began as a general laborer at Gerawan in 2008. He became a crew boss eventually
and served in that capacity in the 2013-2014 season. In 2018, Maldonado quit working at Gerawan. Currently, he
is remodeling houses.

1 Gerawan offices in Kerman where employees asked Gerawan to sign a contract with UFW. In
2 late August 2013, Mulato asked Maldonado if he could collect signatures for the UFW.
3 Maldonado reported this request to human resources manager Jose Erevia (Erevia) and to
4 Gerawan counsel.

5 Like Mulato, in 2013 Marquez began supporting the UFW. He attended
6 negotiating sessions and UFW meetings. At negotiations, Marquez expressed work problems
7 such as pressure from the crew bosses, calling human resources with problems and not receiving
8 a return call, and the go around employees were given. At this time, he also attended a mediation
9 session in Modesto. On these occasions, Marquez asked Maldonado's permission to attend and
10 Maldonado gave permission. At work, Marquez handed out UFW flyers to his co-workers.
11 Marquez wore a red UFW t-shirt to the fields. He also wore it on Fridays when he went to the
12 packinghouse where the owners gave out free fruit. In late August, Marquez joined Mulato in
13 requesting permission to gather UFW support. In November 2013, Marquez joined other pro-
14 UFW employees at the Gerawan offices in Kerman to support UFW's request that Gerawan sign
15 a contract.

16 Mulato and Marquez were credible witnesses. Although much of their testimony
17 was about facts that occurred five years in the past, they specifically recalled their activities.
18 Further, Maldonado agreed that Mulato and Marquez engaged in open Union activities and he
19 was aware of their activities.

20 Thus, in 2013, Maldonado became aware of Union activity at Gerawan.
21 Maldonado attended training sessions conducted by Gerawan regarding union procedures. He
22 also attended supervisory training conducted by the ALRB on August 24, 2013. Maldonado
23 agreed that during the harvest season, Mulato and Marquez asked if they could collect signatures
24 for the union. Maldonado agreed that he was interviewed by the ALRB probably four times in
25 2013. Maldonado agreed that he was aware that Mulato and Marquez were UFW supporters and
26 that they asked for permission to attend negotiation sessions on several occasions in the first half
27 of 2013. Maldonado was also aware that Mulato and Marquez distributed UFW literature at work
28 during breaks. Maldonado agreed that they were both outspoken union supporters.

1 Prior to the time he engaged in Union activity, Mulato rode to work with
2 Maldonado and moved Maldonado's truck around the fields. Mulato felt that Maldonado was a
3 good friend. After Mulato began supporting the UFW, Maldonado no longer let Mulato drive his
4 truck and no longer provided Mulato with a ride to work each day. Mulato began riding with
5 David Clemente after Maldonado quit giving him a ride.

6 Maldonado agreed that Mulato had in the past ridden with him to work and
7 moved Maldonado's truck around in the fields from one row to another to move the umbrellas.
8 Maldonado agreed that he and Mulato got along well.

9 In mid-October 2013, the harvest crew, including Mulato and Marquez, were laid
10 off. At that time, the harvest crew were tying the trees around their circumferences to reinforce
11 the branches during the next growing season. As was typical, Maldonado told Mulato he was laid
12 off until further notice.

13 Mulato did not receive further notice. This was not typical of the years Mulato
14 worked with Maldonado. Each time employees were recalled, Maldonado would call Mulato and
15 give him notice of when to return from layoff.⁵¹

16 However, Maldonado did not call Mulato or Marquez to return to work when the
17 2013-2014 winter pruning cycle began. When he heard nothing about the winter pruning recall,
18 Mulato called Maldonado's cell phone on an unspecified date in November 2013 but there was
19 no answer.⁵² Marquez also called Maldonado but Maldonado did not answer. That same week in
20 November 2013, Mulato called human resources manager Jose Erevia (Erevia). Erevia told
21 Mulato that the crew was full but if more workers were needed, Mulato would be called. In 2014

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25 ⁵¹ Marquez recalled that when this layoff occurred it might have been the time Maldonado told
26 him to call into a central number to find out when to report back to work.

27 ⁵² Mulato remembered the date of this call was during the week Maldonado started back to
28 work. Extrapolating from the payroll records, this would have been the first week of November. Maldonado
agreed that in late 2013 he changed his phone number. This came about when he changed carriers in order to have
more cell coverage. He did not attempt to keep his old number when he made this provider change. "It didn't
seem important." He gave his new number to the office and also to David Clemente. Maldonado explained that he
gave the number to the drivers but not to many of the workers.

1 during the thinning season, Mulato went to the fields with Marquez seeking work. They spoke to
2 Maldonado who told him the crew was full but he would call if he needed more workers.

3 While laid off, Marquez called the office and asked about jobs. He was told that
4 only the foreman knew about personnel. Mulato and Marquez also went to the fields in April
5 2014 and asked Maldonado for work. Maldonado told them the crew was full and he had a whole
6 line of people waiting. Marquez asked for Maldonado's cell number. Maldonado declined to give
7 it to him and said he would call. Maldonado told Marquez to leave his phone number and
8 Marquez complied. However, Maldonado did not call. Mulato observed the crew performing
9 winter pruning work. Some of them were new to the crew.

10 According to Maldonado, shortly after the October 2013 layoff, he visited
11 supervisor Antonio Franco (Franco) to see if there was any work. Franco told him to report with
12 a crew of eight workers. Payroll records indicate that on November 2, 2013, Maldonado and a
13 crew of eight workers reported for work and continued through November 15, 2013. Some of the
14 crew of eight had only a month or two of prior experience with Gerawan. Maldonado agreed that
15 he called driver David Clemente (Clemente) when he obtained the recall for eight employees. He
16 told Clemente to report and bring along three specific employees. Maldonado knew that
17 Clemente gave rides to Mulato and Marquez. However, he did not specify either of them.

18 Maldonado explained that the three employees he named for recall were selected
19 based upon the work that was being performed. That work was tying the circumference of the
20 trees for reinforcement. "They [the three specifically-recalled employees] did the job best
21 from . . . amongst the crew." Maldonado testified that his brother had told him that these
22 employees were good workers.⁵³ When the size of the crew grew the following week,
23 Maldonado did not call Mulato and Marquez for the stated reason that they had not contacted

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27 ⁵³ The record does not reflect that Maldonado and his brother discussed these workers in terms
28 of tying the circumference of trees. Maldonado's testimony was about his brother's description of their general
working qualities. Maldonado testified that the crew of eight was assembled based on their skills for the particular
task rather than on their general skills. This testimony is internally inconsistent and discredited.

1 him about work. Of course, both had tried but could not do so because they did not have his new
2 phone number.

3 On November 18, 2013, the crew increased to 18 and up to 24 by the end of 2013.
4 At this point, the crew was engaged in the normal winter pruning cycle. Neither Marquez nor
5 Mulato were recalled for this work. Maldonado agreed that some of the employees were new
6 hires and some who were recalled did not have as much experience with Gerawan as Marquez
7 and Mulato. Maldonado had Marquez' and Mulato's phone numbers. He testified he did not
8 recall them because there were so many people calling him for work and neither Marquez nor
9 Mulato called him. Although Maldonado could not recall the specific individuals he hired for the
10 winter pruning season and did not recognize their names when they were read from the payroll
11 records, he insisted that all of them had a lot of experience working elsewhere. Maldonado
12 testified that he did not take Marquez' and Mulato's Union activity into consideration when they
13 were not recalled.

14 Maldonado's testimony regarding the rationale for not recalling Mulato and
15 Marquez is unbelievable. Mulato and Marquez had three and two years of experience,
16 respectively, performing work on Maldonado's crew. Maldonado testified that he was satisfied
17 with their work and had no problems with them. Further, Maldonado testified that he preferred to
18 hire experienced individuals for his crew – those who would do a good job, were reliable, and
19 would show up for work. He gave no specific reason for failure to recall Mulato and Marquez in
20 November except that the employees he recalled were recommended by his brother and he
21 selected them based on the tying work that was being performed. Records indicate that these
22 employees had little experience with Gerawan. Thus, Maldonado's testimony that he chose other
23 employees for recall based on experience with the particular work is discredited. Maldonado's
24 testimony that he did not recall Mulato and Marquez is rejected as inconsistent with his
25 agreement that he had a new cell phone number that he did not give to Mulato and Marquez and
26 because it is inconsistent with his prior practice of recalling employees by phoning them or their
27 rides.

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1 During the spring thinning cycle,⁵⁴ Maldonado remembered that Marquez and
2 Mulato came to the fields in March 2014 and asked for work. He told them he could not hire
3 them – he could not take any more people. Maldonado asked for their phone numbers and said he
4 would call them back when he had authority to hire more people. However, he did not do so.

5 On May 2, 2014, Mulato and Marquez were offered employment with crew boss
6 Ramiro Cruz. They both returned to work at Gerawan performing spring thinning and then
7 harvesting peaches in the summer.

8 2. Analysis
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10 As stated above, in analyzing dual motivation discrimination cases, the ALRB
11 utilizes the test set forth in *Wright Line*⁵⁵ in order to assess whether employer action is motivated
12 by unlawful reasons. Under this test, the General Counsel shoulders an initial burden of
13 persuasion to show by a preponderance of the evidence that union or other protected conduct was
14 a motivating factor, in whole or in part, for the employer's adverse employment action.

15 Proof of such unlawful motivation may be based on direct evidence or can be
16 inferred from circumstantial evidence.⁵⁶ The unexplained timing of an adverse employment
17 action may be indicative of animus (NLRB)⁵⁷ or motivation (ALRB).⁵⁸ Other factors such as
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23 ⁵⁴ Respondent asserts on brief that Marquez and Mulato visited the field asking for a job after the
24 2014 spring thinning season. The record, however, indicates that the employees visited Maldonado in March 2014
at the very beginning of the 2014 spring thinning season when Maldonado had just a few people. (Vol. II, p. 50:19-
25 25-51:1-7).

26 ⁵⁵ *Wright Line*, supra, 251 NLRB at 1087; see also *Am. Gardens Mgmt. Co.*, supra, 338 NLRB at
27 645 fn. 7 (endorsing application of *Wright Line* to allegations of discrimination for filing an unfair labor practice
charge or giving testimony before the Board).

28 ⁵⁶ *H & R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21, p. 3; *Brink's, Inc.*, supra, 360 NLRB
1206 fn. 3; *Camaco Lorain Mfg. Plant* (2011) 356 NLRB 1182, 1184-1185.

⁵⁷ *N.C. Prisoner Legal Services* (2007) 351 NLRB 464, 468, citing *Davey Roofing, Inc.* (2004)
341 NLRB 222, 223; *Electronic Data Sys. Corp.* (1991) 305 NLRB 219, 220, enf'd. in relevant part (1993 5th Cir.)
985 F.2d 801.

⁵⁸ *H & R Gunland Ranches*, supra, 39 ALRB No. 21, p. 3.

1 disparate treatment and failure to follow established rules or procedures are sometimes found
2 indicative of animus⁵⁹ or true motive.⁶⁰

3 Finally, the ALRB requires that the General Counsel's initial showing in a failure
4 to recall situation is that the employee applied for an available position for which the employee
5 was qualified and was then unequivocally rejected.⁶¹ However, where the employer has a
6 practice or policy of contacting former employees to offer them re-employment, the requirement
7 may be satisfied by proof of the employer's failure to offer the employee work when the work
8 became available.⁶²

9 To rebut the General Counsel's evidence, the employer must show that it would
10 have taken the same action in the absence of the employee's protected conduct.⁶³ The employer's
11 defense that it would have taken the same action in any event fails by definition if the General
12 Counsel shows that the employer's rationale for its adverse action is pretextual – either false or
13 not actually relied upon.⁶⁴

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19 ⁵⁹ See, e.g., *CNN America, Inc.* (2014) 361 NLRB 439, 457-458; *Brink's, Inc.* (2014) 360
NLRB 1206, n. 3.

20 ⁶⁰ *H & R Gunlund Ranches*, supra, 39 ALRB No. 21, pp 3-4: The inference of the true motive of
21 an adverse action may be proven by circumstantial evidence of 1) timing, 2) disparate treatment, 3) failure to
22 follow established rules or procedures, 4) cursory investigation of alleged misconduct, 5) false or inconsistent
reasons given for the adverse action, or belated addition of reasons for the adverse action, 6) the absence of prior
warnings, and 7) the severity of punishment for the alleged misconduct.

23 ⁶¹ See *McCaffrey Goldner Roses*, supra, 28 ALRB No. 8, p. 6 (General Counsel must show
employee applied for available position for which he was qualified and was unequivocally rejected); *Vessey & Co.*
v. ALRB (1989) 210 Cal.App.3d 629, 661 (same).

24 ⁶² See, e.g., *H & R Gunlund Ranches*, supra, 39 ALRB No. 21 at p. 4 (In situations where the
25 employer has a practice or policy of contacting former employees to offer them re-employment, proof of the
26 employer's failure to rehire at a time when work was available satisfies the requirement of application and
rejection for available position which employee was qualified for); *Giannini Packing Company* (1993) 19 ALRB
No. 16, ALJD at 17-18 (additional requirement that a position have been available is satisfied by evidence that the
employer "had a policy of contacting former employees to offer them reemployment.")

27 ⁶³ *Wright Line*, supra, 251 NLRB at 1089.

28 ⁶⁴ *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, 759 fn. 7 (where ALRB concludes that
employer's purported business justification is pretextual, *Wright Line* dual motive analysis is irrelevant since there
is only one remaining cause: union animus); *David Saxe Prods. LLC* (2016) 364 NLRB No. 100, slip op. at 4;
Rood Trucking (2004) 342 NLRB 895, 898 (quoting *Golden State Foods Corp.* (2003) 340 NLRB 382, 385).

1 Preliminarily, it is noted that the crew bosses were solely responsible for
2 assembling the crew at the beginning of each cycle of each season. The record indicates that
3 once a crew boss is notified of the recall date, the crew boss calls employees or employees'
4 drivers to let them know when to return to work.

5 a. General Counsel's Initial Showing

6 • Activity and Knowledge

7 Respondent does not dispute activity or knowledge of alleged discriminatees
8 Mulato and Marquez. They began supporting the UFW in the spring of 2013. Their crew boss
9 Maldonado as well as Gerawan negotiators were aware of their activity. Maldonado was aware
10 that Mulato and Marquez were outspoken UFW supporters and that they distributed UFW
11 literature at work on break time. Maldonado's knowledge is imputed to Respondent.⁶⁵ In 2013,
12 Mulato and Marquez routinely attended negotiation sessions between the UFW and Gerawan in
13 Modesto. Mulato joined other employees at Gerawan headquarters requesting the Gerawan sign
14 a contract. Marquez wore his Union t-shirt to the packinghouse where the owners handed out
15 free fruit on Fridays. Thus, it is found that the General Counsel has shown by a preponderance of
16 the evidence that Mulato and Marquez were engaged in Union activity and that Respondent had
17 knowledge of their activity.

18 • Animus

19 Maldonado agreed that he and Mulato got along well. Prior to learning of
20 Mulato's Union sympathies, Maldonado drove Mulato to and from work each day and allowed
21 Mulato to drive his truck from row to row to move umbrellas. Once Maldonado learned of
22 Mulato's Union sympathies, he quit giving Mulato rides and no longer allowed Mulato to drive
23 his truck. Nothing other than Mulato's status as a Union supporter can support this change in
24 Mulato's duties. The timing of this action is indicative of animus.

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27 ⁶⁵ *Vincent B. Zaninovich & Sons, Inc.* (1999) 25 ALRB No. 4, p. 1-2, affirming ALJ pp. 23-25
28 (knowledge of protected activity held by supervisors is imputed to employer); cf. *Warmerdam Packing Co.* (1998)
24 ALRB No. 2, p. 2 fn. 3 (supervisory knowledge not imputed where evidence shows information was not
passed on to higher official who made decision regarding the adverse employment action).

1 Further, Maldonado's disingenuous explanation for failure to recall Mulato and
2 Marquez is indicative of animus. Prior to the 2013-2014 winter pruning season, Maldonado
3 obtained a new phone number. He did not reveal his new number to Mulato or Marquez.
4 However, his stated reason for failing to recall them was that they did not call him. Maldonado
5 knew this was impossible for them to do. This testimony has been previously discredited in the
6 fact section.

7 Finally, in early November 2013, Maldonado was given authority to hire a crew
8 of eight. Whether this was unusual, as Respondent portrays it, or the normal course of business,
9 Maldonado's explanation for failure to select admittedly good workers Mulato and Marquez and
10 instead selecting others he had never worked with before is incredible and unworthy of belief.
11 This action is also indicative of pretext.⁶⁶

12 • Practice or Policy of Contacting Former Employees for Rehire

13 The record reflects a definite practice on the part of crew boss Maldonado, to
14 contact the former crewmembers at the beginning of each cycle of work, i.e., at the beginning of
15 spring thinning, harvest, and winter pruning. It is further undisputed that the crew bosses do not
16 always personally call each and every former crewmember. Rather, as to employees who ride
17 with a coworker, the crew bosses routinely contact the driver and request that the driver contact
18 his/her riders about the recall. This method of communicating recall was utilized by the four
19 crew bosses uniformly.

20 Thus, Maldonado was responsible for assembling his crew for each cycle of work.
21 Maldonado built his crews by calling drivers and employees. He preferred to hire experienced,
22 reliable employees. Mulato and Marquez were recalled season after season and year after year
23 and met the experience and reliability criteria for recall.

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28 ⁶⁶ See, e.g., *Stamoules Produce Co.* (1990) 16 ALRB No. 13, ALJD at 33, cited by the Charging
Party (sudden and unexplained deviation from prior practices were false and pretextual, giving rise to an inference
of unlawful motive)

1 Respondent relies on the prior testimony of Erevia to the general effect that the
2 crew bosses recall former crew members who stay in touch with them during layoff. Erevia
3 stated that employees who always show interest in coming back are recalled if the crew boss
4 wants to recall that person. Except for Erevia's non-specific testimony, this record does not
5 contain any testimony to that effect. None of the crew bosses except Maldonado testified that
6 staying in touch during layoff was a criteria regarding which employees to recall. Maldonado's
7 testimony in this regard has been discredited.

8 Respondent also claims that the General Counsel's evidence depends on an
9 erroneous assumption that the recall procedures were consistent and systematic. Respondent
10 avers that its recalls are fast-paced and informal and no universal criteria are utilized in the recall
11 process.

12 Respondent's arguments are rejected. Respondent cites no authority or testimony
13 that would require a formally consistent and systematic recall process. The practice utilized by
14 the crew bosses may, indeed, be fast-paced and informal but this does not mean there is no
15 practice at all. In fact, there is a well-established informal practice of recalling former
16 crewmembers at the beginning of each cycle of a season. It is concluded that the General
17 Counsel has shown by a preponderance of the evidence that these Gerawan crew bosses had an
18 informal practice of contacting former crewmembers to offer them reinstatement at the beginning
19 of each seasonal cycle.

20 Having found activity, knowledge, and animus, as well as a practice of contacting
21 former crewmembers to offer re-employment, it is concluded that the General Counsel has
22 satisfied the initial burden of going forward. The General Counsel's evidence provides an
23 inference that Union activity was a motivating factor in Gerawan's failure to recall the
24 employees. The burden now shifts to Respondent to show that it would not have recalled these
25 employees in the absence of their activity on behalf of UFW.

26 b. Respondent's Burden to Show Mulato and Marquez Would
27 Not Have Been Rehired Absent Their Protected or Union
28 Activity

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1 The evidence regarding Mulato and Marquez indicates that when employees were
2 laid off in mid-October 2013, Maldonado told them they would be recalled by further notice. It
3 was typical that Maldonado would call Clemente, who provided transportation for Mulato and
4 Marquez. There is no evidence that prior to November 2013 Maldonado had ever named the
5 specific employees Clemente should bring with him.

6 Maldonado explained that when he phoned Clemente for the November 2013
7 winter pruning recall, he gave Clemente the specific names of Clemente's former riders that he
8 wanted Clemente to bring. Although Maldonado knew that Mulato and Marquez rode with
9 Clemente, Maldonado specifically named three other employees that Clemente should bring with
10 him.⁶⁷ Neither Mulato nor Marquez were named by Maldonado. The three employees
11 Maldonado named for recall were, according to him, selected on the basis of the winter pruning
12 work to be performed: tying the circumferences of the trees for reinforcement. The record does
13 not support a finding that this is specialized work. It is performed by all workers each season.
14 Indeed, Mulato and Marquez were performing this work when they were laid off in mid-October
15 2013.

16 Nevertheless, Maldonado testified that the three other specifically recalled
17 employees who rode with Clemente did the best job from among the prior crew. This statement
18 is inconsistent with Maldonado's testimony that Mulato and Marquez worked as well as any
19 other workers and he had no problems with their work. Further, the explanation that he asked
20 only for these three specific employees due to their tying skills is belied by the fact that he could
21 not remember their prior employment. Thus, Maldonado's testimony that he asked for three
22 specific employees due to their specialized skill has been discredited. These reasons are simply
23 pretext.

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28 ⁶⁷ Two of the eight recalled employees had terrible attendance records. Others had very little
experience. On hearing their names, Maldonado testified he could not recall them.

1 The fact that Maldonado deviated from past recall protocol by naming three
2 specific Clemente riders for general labor is found to be false and pretextual. Further, Maldonado
3 made himself unreachable by Mulato and Marquez by virtue of his new phone number.⁶⁸ Finally,
4 when Mulato and Marquez went to the orchards during the 2014 thinning cycle, Maldonado
5 again told them the crew was full but he would call if more workers were needed. Maldonado did
6 not call but continued to hire employees without Gerawan experience.

7 These excuses for failure to recall Mulato and Marquez are unworthy of belief.
8 They deviate from prior practice and constitute pretext, leaving only Union animus as the reason
9 for discharge. Thus, Gerawan has not shown that Mulato and Marquez would not have been
10 recalled absent their Union activity. It is accordingly found that Mulato and Marquez were not
11 recalled during winter pruning 2013 or spring thinning 2014 in violation of §1153 (a) and (c) of
12 the Act.

13 c. Juan Manuel Juárez Hernandez (Juárez)

14 The complaint alleges that Respondent refused to recall agricultural employee⁶⁹
15 Juárez in retaliation for his protected concerted and union activities and in retaliation for
16 testifying in an ALRB hearing and participating in an ALRB investigation.⁷⁰ The complaint
17 alleges that failure to recall Juárez from March 24, 2015 until April 12, 2015 violated
18 sections 1153 (a), (c), and (d) of the ALRA.

19 1. Facts

20 Juárez began working for Respondent in either 2008 or 2009. His supervisor from
21 the beginning was crew boss Manuel Ramos (Ramos). Each time Juárez was recalled, he testified
22 that he received a call from Ramos, or Ramos' son-in-law, or Miguel Miranda Alvarez

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25 ⁶⁸ Maldonado testified that he hired new workers because they called him on his phone.
26 Although Maldonado declined to give Mulato and Marquez his new phone number, the new employees apparently
27 were given it. Maldonado's testimony that he did not hire Mulato and Marquez because they did not call him is
28 unworthy of belief.

⁶⁹ There is no dispute that Juárez was at all relevant times and agricultural employee within the
meaning of §1140.4(b) of the Act.

⁷⁰ The relevant unfair labor practice charges were filed on April 8 (by Juárez) and April 9, 2015
(by UFW), in Cases 2015-CE-007-VIS and 2015-CE-008-VIS, respectively.

1 (Miranda). In any event, one of them told Juárez the date to report. Ramos testified he called
2 Miranda, who provided Juárez a ride to work, to let Juárez know of the recall.

3 When in conflict, the testimony of Juárez is credited over that of Ramos. Ramos
4 did not have good recollection of many details regarding his crews from past years. On the other
5 hand, an employee who counted on calls to let him know when to report for work following
6 layoff would logically remember these events clearly. Thus, it is found that Ramos or Ramos'
7 son-in-law as well as Miranda usually called Juárez to let him know when to return.

8 Typically, the call to return to work came one or two days prior to the report date.
9 Ramos' team performed spring thinning and harvesting but did not work the winter pruning
10 cycle.

11 In 2014, spring thinning work began in March or April. Ramos granted Juárez
12 permission to be absent from work for two weeks telling him there would be work when Juárez
13 returned. When Juárez returned, Ramos put him back to work for the remainder of the season.

14 After he returned to work in 2014, Juárez spoke with Union organizers who
15 visited during lunch. He wore a Union t-shirt to the packing facility when he went to pick up free
16 fruit on Fridays. Juárez testified in an ALRB hearing in October 2014. His testimony was
17 generally about Ramos' activity in assisting decertification efforts.⁷¹ After Ramos observed
18 Juárez talking with Union representatives at a negotiation session, according to Juárez, Ramos
19 told him he should ask the Union for a job. Ramos' warm greetings to Juárez ceased around this
20 time as well. Coworker Miguel Miranda Alvarez (Miranda) attended the union negotiations with
21 Juárez. Miranda observed Juárez wearing a UFW t-shirt at the packing plant when they went to
22 pick up free fruit from the company.

23 The parties stipulated that crew boss Manuel Ramos testified at the ALRB hearing
24 on March 3, 2015, from approximately 11 a.m. until 5 p.m. During this period, his testimony was

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28 ⁷¹ See *Gerawan Farming, Inc.* (2016) 42 ALRB No. 1, ALJD pp. 114-115, remanded *Gerawan Farming Inc. v ALRB* (May 30, 2018) Fifth Appellate District Court of Appeal F073720.

1 interrupted by a discussion between counsel and the administrative law judge about exhibits.
2 Ramos also testified on March 4, 2015 from 9 a.m. until approximately 10:30 a.m.

3 Thus in March 2015, Ramos testified in the same ALRB hearing that Juárez had
4 in October 2014. At that hearing, Ramos was asked about Juárez' purported earlier testimony
5 that Ramos offered to pay \$10 per hour to workers who joined a particular anti-union protest.
6 The question did not accurately reflect Juárez' prior testimony. Ultimately, Ramos was not
7 allowed to answer the question because it mischaracterized Juárez' testimony.

8 The 2015 spring thinning season began two weeks after Ramos gave his
9 testimony. Juárez did not receive word of recall from Ramos or his son-in-law. Nevertheless,
10 Juárez found out on a Sunday in late March through a friend, Miranda, that work had started on
11 the prior day, a Saturday. Miranda told him that Ramos had called everyone else plus there were
12 new employees. Juárez called Ramos on the next Tuesday and asked for work. Ramos told him
13 the crew was full. There were already 20 workers. Juárez asked how there could already be new
14 crewmembers who had never worked there before. Juárez asserted that he had more right than
15 those new members to be on the crew.

16 Miranda worked on Ramos' crew from 2010 to 2015. Each year he worked for
17 Ramos, he received a call from Ramos or Ramos' son-in-law, one or two days before he needed
18 to report for work. Miranda drove other crewmembers, including Juárez, to work. Due to a
19 November 2014 injury, Miranda did not work for the rest of the year. In March 2015, Miranda
20 received a call from Jaime Mendoza, who is in charge of injured employees, to report to work to
21 begin spring thinning work. Miranda did not see Juárez at work. He did see three new employees
22 who had not been with the crew in 2014. Miranda called Juárez to see if he needed a ride. Juárez
23 told Miranda he had not received a call to come to work.

24 Juárez went to the field on a Wednesday in early April 2015 to ask for work.
25 Ramos told him the crew was full. Juárez questioned Ramos, "[H]ow is it possible that you're
26 giving them (the new people) the chance when I've been working with you for so many years?"
27 According to Juárez, Ramos said he was sorry and told Juárez to look for work with other crews.

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1 On April 8, 2015, Juárez filed an unfair labor practice charge with the ALRB
2 alleging retaliation in failure to recall him.⁷² On April 12, 2015, Ramos called Juárez and told
3 him he had a position available for him. Juárez returned to work the following day.

4 It is unclear whether Ramos knew about the unfair labor practice charge when he
5 recalled Juárez to work. Juárez testified, “He called me and said my job was there when I wanted
6 it. And he said I could go back the following week and to get back to work. But then after he
7 found out about the complaint, everything changed rather quickly.”

8 Both Juárez and Miranda testified that Ramos told them at an unspecified time
9 that if he had ten workers like them, he would only need a ten-member crew to do what 30
10 members of his crew did. Ramos did not recall making such a statement.

11 Ramos has worked for Gerawan about 40 years. For the last 18-20 years he has
12 been a crew boss. A few days before work is to begin, Ramos typically receives a call from
13 Gerawan giving him the start date. Ramos lets various workers who live in Reedley know about
14 the start date. Ramos also typically advises the workers who drive others to the fields when the
15 start date will be.

16 Ramos recalled that Juárez worked on his crew for 3 or 4 years. Ramos testified
17 that Juárez worked just as well as the rest of the crew – not better and not worse – “I’ve always
18 had a good crew.” He had no more problems with Juárez than he had with anyone else. When
19 Ramos wanted Juárez to work, he communicated with Miguel Miranda, the person who gave
20 Juárez a ride. Miranda gave rides to 5-8 employees. Ramos did not typically speak to Juárez by
21 phone. Ramos does not remember March-April 2015 employees on a payroll list of employees
22 read to him.

23 Ramos remembered that in 2013 there were some protests at Gerawan related to
24 Union issues. Ramos remembered that in 2014 there were also activities related to the Union at
25 Gerawan. Ramos testified that he did not know whether Juárez was involved in these or not.

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⁷² That is charge 2015-CE-007-VIS, one of the underlying charges in this proceeding.

1 Ramos said that when the Union came to discuss matters with his employees, he moved to
2 another area and did not look in the direction of the Union organizers.

3 Although Ramos recalled testifying in a proceeding involving an election, he
4 stated that he did not remember the substance of his testimony and did not remember if there was
5 testimony about Juárez. Ramos refused to state a preference for hiring experienced employees.
6 Ramos claimed any individual could be trained in three or four days.

7 To the extent Ramos testified that he could not remember whether Juárez wore a
8 Union shirt, spoke to Union representatives, or testified in an NLRB proceeding, his testimony is
9 discredited. Rather than attempting a thoughtful search of his memory in these areas, Ramos
10 appeared to seek automatic refuge in a faulty memory. Moreover, his testimony that he removed
11 himself from the area and could not see through the leaves when the Union representatives came
12 to the orchards appears improbable and, in any event, would not rule out seeing things before
13 removing himself.⁷³ Thus, Juárez testimony is credited when in conflict with the testimony of
14 Ramos. Thus, it is found that Ramos observed Juárez' Union activity including his Union shirt.
15 Ramos saw Juárez at negotiations speaking to Union representatives, and Ramos knew Juárez
16 testified at the ALRB hearing. Further, Ramos' testimony that he did not necessarily prefer
17 hiring employees with experience is disingenuous and is not credited.

18 2. Analysis⁷⁴

19 a. General Counsel's Initial Showing

- 20 • Activity and Knowledge

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25 ⁷³ Respondent notes that there is no evidence that crew bosses saw the UFW organizers when
26 they took access "as they [the crew bosses] adhered to instructions from both upper management as well as the
27 ALRB to leave the area when the UFW took access." (R Brief, p. 2:17-20) The record is devoid of any such
instructions to leave the area. Similarly citing prior cases involving these parties, the General Counsel notes that in
2013 Gerawan held many union-related meetings with its supervisors. The cited prior cases do not discuss union-
related supervisory meetings and no finding regarding such meetings may be made here.

28 ⁷⁴ The *Wright Line* analysis applies to cases of alleged discrimination based on Union activity as
well as alleged discrimination based on testifying before the ALRB. *Nakasawa Farms* (1984) 10 ALRB No. 48, p.
7.

1 The record as a whole indicates activity and knowledge regarding Juárez. He
2 began engaging in Union activity in 2014 by speaking to Union organizers who came to the work
3 place and wearing a Union t-shirt to the packinghouse on Fridays to receive fresh fruit from the
4 owners. In late 2014, he testified at an ALRB proceeding regarding decertification activity and
5 his testimony was highlighted to Ramos when Ramos testified in the same proceeding just two
6 weeks before Ramos formed his 2015 spring thinning crew. It is therefore found that the General
7 Counsel has shown by a preponderance of the evidence that Juárez was engaged in Union
8 activity and Respondent had knowledge of that activity.

9 • Animus

10 After Juárez began his open Union activity, Ramos' attitude toward him changed
11 from friendly to unfriendly. Ramos no longer provided Juárez a ride to work and no longer let
12 him drive Ramos' truck to move umbrellas at work. Further, Ramos indicated a degree of animus
13 toward Juárez based on what Ramos thought Juárez had testified before the ALRB.

14 Juárez, an openly pro-Union employee, testified at an ALRB hearing in October
15 2014 about crew boss Ramos' activity in assisting decertification efforts. Ramos testified at the
16 same ALRB hearing on March 3, 2015. Ramos was examined about the prior testimony of
17 Juárez, albeit mischaracterized as claiming that Ramos told employees they would be paid \$10
18 per hour to attend an anti-union rally. Several weeks after Ramos testified, he assembled his
19 spring thinning crew without including Juárez. After five or six years of recall pursuant to the
20 ordinary practice, he was not recalled following his testimony. The timing of this action is
21 indicative of animus.⁷⁵

22 Additionally, when Ramos was asked about testifying in the earlier ALRB
23 hearing, he indicated animus against Juárez by strongly protesting:

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27 ⁷⁵ Respondent's argument that Juárez applied for work when no opening was available is
28 rejected. The practice or policy of contacting former employees for rehire satisfies the requirement that the
employee applied for an available position for which the employee was qualified. See discussion supra regarding
H & R Gunlund Ranches, supra, 39 ALRB No. 21 at p. 4.

1 Q. When you came to the hearing several years ago you learned that Juan
2 Juarez had testified that you sent people to the anti-Union protest?

3 A. Well, if he did it, I don't know why he did it because -- because I never --
4 I've never sent anybody to protest and I have no interest in that.

5 • Practice or Policy of Contacting Former Employees for Rehire
6 Ramos usually received a call from Gerawan a few days before each cycle of
7 work. After that, he was responsible for bringing a crew to the orchard on the start date. He
8 usually called the same people from season to season to be part of his crew. Ramos also called
9 drivers, such as Jaime Cortez or Miguel Miranda, who routinely brought in other crew. The
10 drivers then called each of their riders to report the recall. Ramos also asked his son-in-law to
11 make calls to other former crewmembers.

12 Ramos testified that he did not call individual employees. He just called their
13 rides. Juárez testified he was contacted directly by Ramos' son-in-law as well as by Miranda.
14 These facts indicate that in the case of Ramos' crew, there was a practice or policy of contacting
15 former crewmembers for rehire.

16 Accordingly, it is found that the General Counsel has carried the initial burden to
17 show activity, knowledge, animus, and a practice of contacting former employees for recall.
18 Thus, a preponderance of the evidence indicates that a motivating factor in failure to recall
19 Juárez was his Union activity and his testifying in an ALRB hearing. The burden of persuasion
20 now shifts to Respondent to demonstrate that it would have taken the same action in the absence
21 of Juárez' Union activity and his testimony before the ALRB.

22 b. Respondent's Burden to Show that Juárez Would Not Have
23 Been Rehired Absent His Protected or Union Activity and
24 His Testifying Before the ALRB

25 Regarding Juárez, crew boss Ramos testified to no reason for failure to recall him.
26 Moreover, he did not credibly explain why so many new employees with no experience at
27 Gerawan were hired instead of Juárez.⁷⁶ Ramos confirmed that Juárez worked with him for a
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⁷⁶ No doubt crew boss Ramos as well as the other crew bosses are excellent teachers and can train new employees as necessary. Other crew bosses, however, agreed that they preferred hiring experienced'

1 number of years and was as good as any other employee. This may appear to be faint praise but
2 all of the crew bosses who testified described their crews in the same manner. Perhaps more
3 telling is the fact that Ramos allowed Juárez to leave for several weeks in 2014 and immediately
4 put him back to work on his return. At a minimum, this indicates a degree of comfortable
5 satisfaction with Juárez' work and his dependability.

6 Respondent speculates that Ramos did not call driver Miranda in 2015 because he
7 thought Miranda was on sick leave. Ramos did not testify that this is why he did not call
8 Miranda. There is no evidence regarding why Ramos' son-in-law did not contact Juárez.
9 Moreover, the record is silent regarding how Juárez was transported to work in 2014 after
10 Miranda was injured and whether this driver might have been recalled or not. Accordingly,
11 Respondent's speculative argument that due to Miranda's injury, Ramos simply could not
12 contact a ride for Juárez fails.

13 Based on this record, it is found that Juárez would have been recalled if he had
14 not engaged in Union activity and had not testified before the ALRB. The normal procedure for
15 recall was telephone contact to the employee or the employee's driver shortly before work was to
16 start. Juárez had been recalled in this fashion for five or six years. No reason has been presented
17 for failure to call Juárez or his ride.

18 Thus, in the absence of demonstrating that it would have taken the same action
19 even in the absence of Juárez' Union activity and his testimony before the ALRB, it is found that
20 Gerawan refused to recall Juárez in retaliation for his Union activities and in retaliation for his
21 testifying in an ALRB hearing. This action violated §1153(a), (c), and (d) of the Act.

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27 workers. Ramos testified that he could train a new employee in three days and had no preference for hiring
28 experience. This testimony is so contrary to common sense and principles of expedience and efficiency as to be
unlikely and unworthy of belief. It cannot be credited. The trustworthiness of this testimony is further belied by
the payroll records which indicate that numerous employees were recalled year after year, season after season.

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c. Alberto Bermejo Cardosa (Bermejo)

The complaint alleges that agricultural employee⁷⁷ Bermejo was not recalled in April 2015 because of his union or protected concerted activity in violation of §1153 (a) and (c) of the ALRA.⁷⁸

1. Facts

Bermejo began working for Gerawan crew boss Alfredo Zarate (Zarate) in August 2011 and worked on Zarate's crew until October 2013. In 2014, Bermejo worked for Gerawan crew boss Rodriguez. Bermejo worked the entire 2014 season with Rodriguez but was not recalled in 2015 by either Zarate or Rodriguez. It is this failure to recall that is at issue.

At the end of Gerawan's harvest seasons in 2011 and 2012, Bermejo and other crew members followed Zarate to work for an independent contractor pruning grape vines for a different farming operation, i.e., not for Gerawan. However, in 2013, Zarate did not take Bermejo with him to work with the grapes. When Bermejo sought work at Gerawan with crew boss Zarate for the spring thinning of 2014, Zarate told Bermejo that his crew was full. Bermejo then began working with Gerawan crew boss Rodriguez. There is no allegation of unfair labor practice regarding failure to recall Bermejo to Zarate's crew for the spring thinning of 2014.

Bermejo was involved in activities on behalf of UFW in 2013 and 2014. During breaks and lunch, he distributed pro-Union flyers and invited coworkers to support the UFW. Bermejo attended negotiation sessions. He asked permission from crew boss Rodriguez to leave work early to attend these meetings and permission was granted. Bermejo also attended an ALRB hearing with a coworker in August 2014 to support the UFW. Zarate agreed that among

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⁷⁷ There is no dispute that Bermejo was at all relevant times an agricultural employee within the meaning of §1140.4(b) of the Act.

⁷⁸ The unfair labor practice charge in Case No. 2015-CE-014-VIS was filed by UFW on May 18, 2015, alleging that Respondent's refusal to recall Bermejo was discriminatory and in retaliation for his Union activity.

1 workers on his crew, Bermejo was one of the most active Union supporters. Zarate agreed that
2 Bermejo had a UFW sticker on the back of his car.

3 Bermejo worked the entire 2013 season on Zarate's crew. He received his final
4 paycheck in October 2013 at a store where employees gathered to receive their checks. Bermejo
5 recalled speaking to Zarate at this gathering. There was a lot of small talk but at one point, Zarate
6 noted that Bermejo had a UFW sticker on his car. Zarate told Bermejo to remove the sticker.
7 Zarate also told Bermejo that he was not getting the work with the grapes because Bermejo was
8 causing "trouble" at Gerawan by handing out union flyers.

9 Alfredo Zarate, crew boss, has worked for Gerawan since 2008. His work has
10 been with peaches and nectarines in Reedley and Kerman. As crew boss, Zarate forms the crew,
11 directs the work by explaining what is to be done, watches that everyone is working, and
12 monitors the quality of work. He hires the number of laborers initially set by Gerawan at the
13 beginning of each cycle of work.⁷⁹ As work progresses, additional workers are added. Gerawan
14 gives him one or two days' notice of the date to begin working. Zarate prefers to hire workers
15 with prior experience.

16 Zarate also works for an outside contractor when there is no work at Gerawan. He
17 is a crew boss for the outside contractor too and he uses the same crew at both the outside
18 contractor and Gerawan. Thus, he simply lets his outside crew know that they will be moving to
19 Gerawan on a certain date. If employees working with him for the outside contractor have not
20 worked for Gerawan previously, he sends them to register at Gerawan before work at Gerawan
21 starts.

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27 ⁷⁹ Zarate testified that he started letting some workers know about recall in 2015 if the worker
28 had been asking about a start date. If workers had not asked about a start date, he did not contact them. Zarate
could not remember whether Bermejo was one of the workers who asked him for a start date. Citing this
testimony, Respondent contends that Zarate denied ever calling workers to recruit them to work in his crew.
Respondent's characterization is unhelpful and, in fact, an overstatement of the testimony.

1 As crew boss at Gerawan, Zarate reports employee problems to Gerawan. As a
2 result, written warnings, suspensions, as well as other discipline may issue. Zarate does not
3 receive copies of these documents and does not keep track of written warnings, suspensions, or
4 other discipline. Zarate can hire employees who have been disciplined in the past. However, if an
5 employee has been fired, the employee is not eligible for rehire.

6 Although Zarate did not remember the years that Bermejo worked on Zarate's
7 crew, the parties agree it was in 2012 and 2013. In 2012, Bermejo began working in Zarate's
8 crew for the outside contractor and then followed with Zarate to Gerawan. Zarate testified, "Yes.
9 He's a good worker. Yes, he's – he's a worker. He – he got it – he did his job, but sometimes
10 there's problems and sometimes he came in late." Zarate agreed that Bermejo was one of six
11 tractor drivers on the crew and that this position entailed additional responsibility and training.⁸⁰

12 Zarate was asked, "Do you recall any protests at Gerawan in 2013?" and
13 responded, "Well, the guys were out there with the crews They . . . came around lunchtime
14 to – to share and pass out their things, their flyers." From employees, Zarate learned the material
15 were "something about the Union and protesting."

16 Zarate agreed that Bermejo supported the Union, had flyers, wore a UFW t-shirt,
17 and had a UFW sticker on his car. Zarate denied telling Bermejo that he should take the sticker
18 off if he wanted to find work. Zarate denied any discussion with Bermejo about the sticker. "No.
19 One is free. One is free. So, no, no, no, no. No." This denial is not credited. Based on Zarate's
20 demeanor, it must be concluded that his testimony was given as if by rote repetition of guidance
21 or advice provided after the fact rather than what was actually said at the time of the
22 conversation with Bermejo. Accordingly, it is found that Zarate told Bermejo he should remove
23 the Union sticker from his car if he wanted work.

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⁸⁰ Only four tractors are utilized each day, according to Zarate. However, there are six tractor drivers per crew just in case there are absences.

1 Zarate testified that he remembered Bermejo asking for work at the start of a
2 season but he could not recall what year it was. Zarate had a full crew but thought that Bermejo
3 had gone to work for a different crew boss after he told Bermejo that his crew was full. Based on
4 other record evidence, it must be inferred that the year was 2014.⁸¹

5 Normally Bermejo waited to hear from crew boss Zarate. However, in 2014, he
6 did not hear from Zarate so Bermejo contacted Zarate when the thinning season was beginning in
7 late March 2014. Zarate advised Bermejo to listen to the phone message system in order to know
8 when work with start. This was not the past method for recall. In any event, Bermejo listened to
9 the message system for a few days and eventually heard a message about where work was going
10 to start. He reported for work on that date.

11 When Bermejo reached the orchard, Zarate told him the crew was full and he
12 could not work. On this particular date, Bermejo recognized most of the workers from the year
13 before. As Bermejo was leaving, crew boss Rodriguez saw him and put him to work on his crew.

14 The parties stipulated that Zarate testified in an ALRB hearing⁸² on February 9,
15 2015, from 8:41 a.m. until 5 p.m. He also testified on February 10, 2015 from 8:41 a.m. until
16 approximately 10:30 a.m.

17 Zarate agreed that in 2015, when work was “well along,” thus after Zarate’s
18 testimony at the ALRB, Bermejo asked for work but there “wasn’t any room. . . . We were
19 already full.” Zarate was unaware whether Bermejo found work with another Gerawan crew boss
20 at that time. Once again, payroll records reflect that new names appeared on Zarate’s crew list.⁸³

21 Bermejo was disciplined twice in 2014 while he worked on Rodriguez’ crew. On
22 August 30, 2014, he received a one-day suspension for failing to pick in his assigned area. He

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26 ⁸¹ Zarate’s 2014 spring thinning crew included individuals who had not worked for Gerawan in
27 2013 including Margarito Diaz, Evaristo Diaz, Santiago Diaz, and Fortino Avolos.

28 ⁸² This was the ALRB hearing in *Gerawan Farming, Inc.* (2017) 42 ALRB No. 1, remanded
Gerawan Farming Inc. v ALRB (May 30, 2018) Fifth Appellate District Court of Appeal F073720.

⁸³ These included Jesus Gadea, Bernardo Gadea, Jose Manuel Pineda, and David Wilman Perez
Sanchez.

1 received a two-day suspension for picking green fruit on September 4, 2014. The record clearly
2 indicates that crew bosses can rehire employees who have received discipline short of discharge.

3 Bermejo continued his activities on behalf of UFW throughout the 2014 season.
4 He distributed UFW flyers, attended, and spoke at contract negotiation sessions. At times,
5 Bermejo sought permission from Rodriguez to attend these meetings. Rodriguez also attended
6 the ALRB hearing on decertification which was ongoing in 2014 and 2015. Rodriguez thought
7 Bermejo was reliable and did a good job during the 2014 season. Bermejo was laid off with the
8 rest of Rodriguez' crew at the end of the 2014 season.

9 In March 2015,⁸⁴ Bermejo called both Zarate and Rodriguez to ask for work. Both
10 said they already had a full crew. In May 2015, Bermejo went to the orchards and spoke with
11 Zarate and Rodriguez who, again, said they were full. Bermejo walked row by row through the
12 orchard and was able to observe employees who were working. There were employees who had
13 not been on the crews in 2014. On a couple of other occasions in May 2015, Bermejo visited
14 Gerawan seeking work. He could not recall the names of the crew bosses he spoke with on those
15 occasions. He thought he spoke to five, six, or seven crew bosses. He also went to the Gerawan
16 offices in Kerman to ask other crew bosses for work. In the end, he was unable to find work at
17 Gerawan in 2015.

18 Crew boss Rodriguez testified he usually starts with a crew of around 12 to 18
19 employees at the beginning of the thinning season. The crew gradually expands to as many as 38
20 employees. A portion of each year's crew includes prior employees. In 2014, Alberto Bermejo
21 worked for him. This was the only season that Bermejo worked on his crew and Rodriguez was
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25 ⁸⁴ Bermejo was an intelligent, thoughtful witness. Based on his testimony, it is found that Bermejo
26 called in March 2015 and visited the fields in May 2015. Bermejo could not remember if he called at the beginning
27 of the thinning season in March or later in May. He thought it was at the start. However, in the spring of 2015,
28 Bermejo's mother became ill and he was her transportation: "I think it was probably around May [when I visited the
fields] because when I called all the foremen – I think I called before May. But since they didn't give me any work
then I needed to put the effort in right away because my mother got sick. . . . then I didn't put the effort into start
right away to look for work until my mother got somewhat better, and then I started looking for work again." He
explained that he was unable to verify that he called in March because his phone no longer worked. (Tr II, pp. 90-
91). Based on this testimony, it is found that Bermejo called in March 2015 and visited the fields in May 2015.

1 satisfied with his work. Rodriguez observed that Bermejo appeared to be experienced. Once the
2 harvest season began, Rodriguez assigned Bermejo to tractor work. Rodriguez found Bermejo to
3 be reliable. He did a good job while he worked in the crew during 2014.

4 Rodriguez testified that he knew nothing about protests or workers being in favor
5 of the Union. Similarly, Rodriguez testified, "I don't have any reason to talk about the Union or
6 anything else. I just go to work and that's what I do." When asked whether Bermejo wore a
7 Union t-shirt and baseball cap, Rodriguez replied, "Like I said, I'm not noticing how people are
8 dressed. I'm noticing how they are working." This portion of Rodriguez testimony is particularly
9 unreliable, highly improbable, and is therefore discredited. From all accounts, the crew bosses
10 went to ALRB training. The Union activity in the fields was open for all to observe. Thus, it is
11 found that Rodriguez knew of the Union effort at Gerawan and observed that Bermejo wore a
12 Union t-shirt and baseball cap.

13 On an unspecified date in 2015, Rodriguez received a call from Gerawan letting
14 him know when work would begin. Rodriguez did not recall whether Bermejo called him in
15 2015 seeking work. He did not keep any records about who called or asked for work. However,
16 Rodriguez testified that after he heard when work would start, he let all those know who had
17 been asking about work.⁸⁵

18 Rodriguez expressed dissatisfaction about Bermejo's leaving work in 2014:⁸⁶

19 [H]e would leave and then the tractor would be just sitting there full of fruit. And
20 so I had to put somebody else on it so that they could take it when he would
21 leave. . . . He told me that at some -- at a certain hour he was -- he was going to go
22 over there during the workday.

23 On the record as a whole, it is found that Rodriguez dissatisfaction stemmed from
24 Bermejo's attendance at contract negotiation meetings and ALRB hearings.

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27 ⁸⁵ Citing Rodriguez' testimony, Respondent states on brief that Rodriguez denied ever calling
28 workers to recruit them to work in their crews. This statement on brief mischaracterizes Rodriguez' cited testimony.
See Vol. I, 108:6-7 (After receiving notice from Gerawan in 2015 that spring thinning would begin in a few days,
Rodriguez let workers know the start date: "The ones that were asking about when we were going to start. The other
ones that didn't, no.")

⁸⁶ Tr. I, p. 117:2-7.

1 Rodriguez was not aware of any reason why Bermejo did not begin work in 2015 in his
2 crew. However, by the time Bermejo came to the field to ask for work, Rodriguez had no
3 vacancy. Vacancies may have arisen after that date but Rodriguez did not fill those vacancies
4 with Bermejo because he had no contact information for him. Rodriguez stated that he did not
5 deny work to anyone. In filling the mid-season vacancies, he gave opportunities to those who
6 were new to the work but also hired those who already knew how to work.⁸⁷

7 2. Analysis

8 a. General Counsel's Initial Showing

9 • Activity and Knowledge

10 Bermejo openly distributed pro-Union flyers and spoke with co-workers in
11 support of the Union in 2013. He attended negotiation sessions with the permission of crew
12 bosses Zarate and Rodriguez and he attended an ALRB hearing with a co-worker to support the
13 UFW. Gerawan management and crew bosses were able to observe these activities as well. Thus,
14 both crew boss Zarate and crew boss Rodriguez were aware of Bermejo's Union activity. It is
15 found that the General Counsel has shown by a preponderance of evidence that Bermejo was
16 engaged in Union activity and Respondent had knowledge of his activity.

17 • Animus

18 Bermejo was told by Zarate in October 2013 to remove a UFW sticker from his
19 car. During this same conversation, Zarate told Bermejo he was causing "trouble." Zarate also
20 expressed concern that his crew was losing work at a vineyard (not at Gerawan) due to that
21 trouble. In this context, the use of the general term "trouble" may be reasonably understood as
22 indicative of trouble from supporting the Union. These comments are indicative of animus.
23 Zarate did not rehire Bermejo when the 2014 season began. Instead, Bermejo found work with
24 crew boss Rodriguez.

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28 ⁸⁷ In May 2015, when Bermejo visited the orchards and asked for work, Rodriguez and Zarate
both hired four or five workers who had no experience with Gerawan.

1 Thereafter, Zarate testified before the ALRB in February 2015. In forming their
2 crews for the 2015 spring thinning, both Zarate and Rodriguez hired numerous workers without
3 prior Gerawan experience while denying Bermejo a place on their crews. Such deviation from
4 past practice is indicative of animus. Further, Rodriguez had no stated reason for failure to rehire
5 Bermejo apart from his taking time off during 2014 for what Rodriguez knew was Union
6 activity.

7 • Practice or Policy of Contacting Former Employees for Rehire

8 In the same vein, Zarate and Rodriguez are responsible for hiring. Zarate and
9 Rodriguez agreed that Bermejo was a good worker. Zarate testified that he would have rehired
10 Bermejo in 2014 but Bermejo was already working with another crew that spring.⁸⁸ Rodriguez
11 rehired as many people “as the boss allows me to get.” Rodriguez found it best to hire former
12 crewmembers rather than to train new employees. However, if there are not sufficient numbers
13 of former crew, he will hire new employees and train them. Rodriguez routinely called the same
14 people from season to season and year to year.

15 Having presented credible evidence of activity, knowledge, animus, and a practice
16 of contacting former employees for rehire, the General Counsel has satisfied the initial burden. A
17 preponderance of the evidence supports an inference that Bermejo’s union activity was a
18 motivating factor in the April 2015 failure to recall him. The burden now shifts to Gerawan to
19 prove that Bermejo would not have been recalled in any event.

20 b. Respondent’s Burden to Show that Bermejo Would Not Have
21 Been Rehired Absent His Union Activity

22 It is clear that Bermejo was disciplined twice in 2014 while on Rodriguez’ crew.
23 However, the record indicates these disciplinary actions were not the cause for failure to recall.

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27 ⁸⁸ The General Counsel argues that Zarate’s refusal to hire Bermejo in 2014 was due to anti-
28 union animus. There is no allegation of an unfair labor practice in refusal to rehire Bermejo in 2014. To the extent
the General Counsel makes the argument that Zarate’s failure to rehire Bermejo in 2014 was an unfair labor
practice, it is disregarded.

1 In fact, Rodriguez was not aware of any reason why Bermejo did not begin the
2 2015 season with his crew. Failure to recall Bermejo is simply unexplained by Rodriguez.

3 Respondent argues that Bermejo was not recalled because by the time he asked
4 for work, the crew was full. This argument assumes workers are only recalled if they ask for
5 work. However, the record is replete with evidence that former crewmembers are routinely
6 recalled without making a specific request for recall. Thus, this argument is rejected. In the
7 absence of any other evidence, it is found that Respondent has not shown that it would not have
8 recalled Bermejo absent his Union activity. Thus, it is found that Respondent violated §1153(a)
9 and (c) of the Act by failure to recall Bermejo in April 2015.⁸⁹

10 III. CONCLUSION

11 In each case, the General Counsel's evidence has created an inference that the
12 failure to recall the employees was due to their Union activity by showing activity, knowledge,
13 animus, and a practice of recall. No cogent reasons have been advanced for failure to recall the
14 alleged discriminatees as a part of this normal recall process.

15 Gerawan has not shown that it would have taken the same action even absent the
16 employees' Union activity. In fact, just the opposite is shown. The normal process for recall is to
17 request members of the laid-off crew to return. No specific credible reason has been offered by
18 Gerawan indicating that the alleged discriminatees would not have been recalled in any event.
19 The employment records do not offer reasons for failure to recall. All alleged discriminatees
20 were good, experienced employees. Replacement worker status indicates new employees were
21 utilized in many instances rather than recalling the experienced alleged discriminatees.

22 Thus, it is concluded that Respondent Gerawan failed in each instance to prove
23 that it would not have recalled the alleged discriminatees absent their union activity.
24 Accordingly, it is found that Respondent violated the Act by failure to recall the four alleged
25 discriminatees.

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28 ⁸⁹ Arguments regarding whether Bermejo was available for work once he became his mother's
care giver are relevant to the compliance phase of these proceedings.

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REMEDY

It is recommended that Gerawan be ordered to cease and desist from failing to recall employees due to their Union activity or due to their testimony before the ALRB. It is further recommended that Gerawan make the alleged discriminatees whole for their losses due to Gerawan's unlawful activity. The backpay periods for Mulato and Marquez run from October 2013 until May 2014 when they were recalled. The backpay period for Juárez is from March 24, 2015 to April 12, 2015. Bermejo's backpay period will run from the date he should have been recalled in April 2015 until the date he is offered reinstatement. Thus, Bermejo is owed an offer of reinstatement plus backpay. Finally, the standard remedies regarding preservation of records, posting and mailing Notices, and Board agent distribution and reading of the Notice are recommended.

Based on these findings of fact and conclusions of law and the record as a whole, it is recommended that the following Order be issued.

ORDER

Pursuant to section 1160.3 of the Act, the Agricultural Labor Relations Board hereby ORDERS that Respondent Gerawan Farming, Inc., a California corporation, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Failing to recall or otherwise retaliating against any agricultural employee because the employee has engaged in protected, concerted and/or Union activity as defined in section 1152 of the Act; and

(b) Otherwise interfering with or restraining any employee in the exercise of the rights guaranteed under section 1152 of the Act.

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

(a) Offer seasonal employment to Alberto Bermejo Cardoso who was not recalled in April 2015.

(b) Make whole Eliazar Mulato, Rafael Marquez Amaro, Juan Manuel Juárez Hernandez, and Alberto Bermejo Cardoso, who were not recalled for unlawful reasons, for all wages or other economic losses that they suffered as a result of Gerawan's unlawful failures to recall them. The award shall include interest to be determined in accordance with *Kentucky River Medical Center* (2010) 356 NLRB 6 (daily compound interest adopted).

1 (c) Preserve and, upon request, make available to the Board or its agents for
2 examination and copying, all payroll records, time cards, personnel records, and all other
3 records relevant and necessary for a determination by the Regional Director of the losses due
4 under this Order. Upon request of the Regional Director, records shall be provided in electronic
5 form if they are customarily maintained in that form.

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

9 (e) Post copies of the Notice, in all appropriate languages, at conspicuous
10 places on Respondent's property, including places where notices to employees are usually
11 posted, for sixty (60) days, the times and places of posting to be determined by the Regional
12 Director. Respondent shall exercise due care to replace any copies of the Notice which may be
13 altered, defaced, covered or removed. Pursuant to the authority granted under section 1151(a)
14 of the Act, give agents of the Board access to its premises to confirm the posting of the Notice.

15 (f) Mail signed copies of the attached Notice in all appropriate languages
16 within 30 days after the date this Order becomes final or thereafter if directed by the Regional
17 Director to the last known address of all agricultural employees it employed, including those
18 employed by farm labor contractors, during the planting and harvesting periods or other
19 relevant periods of employment from November 2013 to date.

20 (g) Grant ALRB agents access to work sites where the agricultural
21 employees in the bargaining unit work at mutually arranged times in order to distribute and
22 read the attached Notice to them and to answer questions employees may have about their
23 rights under the Act outside the presence of supervisory personnel.


24 (h) Compensate employees for the time spent during the Notice reading and
25 the following question and answer period at the employees' regular hourly rates, or each
26 employee's average hourly rate based on their piece-rate production during the prior pay
27 period.

28 (i) Provide access during the notice-posting period to ALRB agents to
ensure compliance with the notice-posting requirements of this ORDER.

(j) Provide a signed copy of the Notice to each person it hired for work as
an agricultural employee during the 12-month period following the issuance of the ALRB's
Order in this case.

(k) Notify the Regional Director in writing within thirty (30) days after the
date of issuance of this Order of the steps Respondents have taken to comply with the terms
and, on request, notify the Regional Director periodically in writing of further actions taken to
comply with the terms of this Order until notified that full compliance has been achieved.

DATED: August 27, 2018


Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

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NOTICE TO AGRICULTURAL EMPLOYEES

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 refuse to recall you from layoff because of your support for the United Farm Workers of America (UFW),

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

WE WILL offer Alberto Bermejo Cardosa immediate employment to his former position or, if that position is no longer available, to a substantial equivalent position,

WE WILL make whole Eliazar Mulato, Rafael Marquez Amaro, Juan Manuel Juárez Hernandez, and Alberto Bermejo Cardosa, who were not recalled for unlawful reasons, for all wages or other economic losses that they suffered as a result of our unlawful failures to recall them.

DATED: _____

GERAWAN FARMING, INC.
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.

1 STATE OF CALIFORNIA
2 AGRICULTURAL LABOR RELATIONS BOARD

3 PROOF OF SERVICE
4 (1013a, 2015.5 C.C.P.)

5 **Case Name:** GERAWAN FARMING, INC., Respondent, and,
6 JUAN MANUEL JUÁREZ HERNÁNDEZ, and
7 UNITED FARM WORKERS OF AMERICA, Charging Parties.

8 **Case Numbers:** 2015-CE-007-VIS, 2015-CE-008-VIS, 2015-CE-014-VIS, and
9 2013-CE-064-VIS

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

14 On August 27, 2018, I served the within **DECISION AND**
15 **RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE** on the
16 parties in said action, by **EMAIL AND CERTIFIED U.S. MAIL or HAND**
17 **DELIVERED** and placing a true copy thereof enclosed in a sealed envelope with
18 postage thereon fully prepaid, in the United States mail, at Sacramento, California
19 addressed as follow:

20 Ronald H. Barsamian, Esq.
21 Barsamian and Moody, APLC
22 1141 W. Shaw Avenue, Suite 104
23 Fresno, CA 93711-3704

24 **Email**
25 Laborlaw@theemployerslawfirm.com
26 rbarsamian@theemployerslawfirm.com
27 9414-7266-9904-2964-1997-95

28 David A. Schwarz, Esq.
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Executed on **August 27, 2018**, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct.


Annamarie Argumedo
Senior Legal Typist