



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 14, 2019

Molly Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *NLRB v. Capay, Inc. d/b/a Farm Fresh to You*,
Board Nos. 20-CA-215451, 20-CA-215489, 20-
CA-215497, 20-CA-222184 and 20-CA-224294

Dear Ms. Dwyer:

I am enclosing an application of the National Labor Relations Board for enforcement of its order in this case, and a proposed judgment. Respondent expressly consented to the entry of this judgment in a stipulation contained in the record. I am also transmitting the certified record, including the order and the underlying agreement.

Please serve a copy of the application on Respondent, whose addresses appear on the service list. I have served a copy of the Board's application and proposed judgment on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of all correspondence the Court sends to counsel in this case, and a copy of the judgment issued.

Very truly yours,

/s/ David Habenstreit

David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2960

cc & documents to: Service List

SERVICE LIST

RESPONDENT:

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West Sacramento, CA 95691-3449

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CHARGING PARTY:

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REGIONAL DIRECTOR:

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National Labor Relations Board
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RESPONDENT'S COUNSEL:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|-------------------------------------|---|------------------|
| NATIONAL LABOR RELATIONS BOARD | : | No. |
| | : | |
| Petitioner | : | Board Case Nos.: |
| v. | : | 20-CA-215451 |
| | : | 20-CA-215489 |
| CAPAY, INC. D/B/A FARM FRESH TO YOU | : | 20-CA-215497 |
| | : | 20-CA-222184 |
| Respondent | : | 20-CA-224294 |

APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD
UPON STIPULATION OF THE PARTIES FOR CONSENT JUDGMENT

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board (the “Board”), pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(e)), applies to this Court for enforcement of its order against Capay, Inc. d/b/a Farm Fresh to You (“Respondent”), issued in Board Case Nos. 20-CA-215451, 20-CA-215489, 20-CA-215497, 20-CA-222184 and 20-CA-224294, on August 1, 2019. The Board is entitled to enforcement because Respondent has expressly consented to entry of this judgment in a stipulation that Respondent entered into during the proceedings before the Board. In support, the Board shows:

A. Jurisdiction of this Court

This Court has jurisdiction over this application under Section 10(e) of the Act (29 U.S.C. § 160(e)). Venue is proper in this Circuit because the activities

giving rise to this proceeding occurred in California. The Board's final order issued on August 1, 2019.

**B. The Respondent Entered into a Stipulation
Providing for Entry of an Order by the
Board and a Consent Judgment by the Court**

1. The Board entered an order against Respondent pursuant to a stipulation authorizing the Board to enter an order embodying its terms. The Board's order does not vary from those terms.

2. Paragraph VI of the stipulation authorized the Board to apply to an appropriate U.S. Court of Appeals for a judgment enforcing the Board's order, and provided that Respondent "waives all defenses to the entry of the judgment"

3. In support of this application, the Board is certifying and filing with this Court the record of proceedings before the Board, including the pleadings, stipulation, findings of fact, and order of the Board.

WHEREFORE, the Board respectfully requests that the Court, after serving a copy of this application upon Respondent, enter a consent judgment enforcing the Board's order in full. A copy of the proposed consent judgment is attached.

Dated in Washington, D.C.
this 14th day of August, 2019

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| NATIONAL LABOR RELATIONS BOARD | : | No. |
| | : | |
| Petitioner | : | Board Case Nos.: |
| v. | : | 20-CA-215451 |
| | : | 20-CA-215489 |
| CAPAY, INC. D/B/A FARM FRESH TO YOU | : | 20-CA-215497 |
| | : | 20-CA-222184 |
| Respondent | : | 20-CA-224294 |

JUDGMENT

THIS CAUSE was submitted upon the application of the National Labor Relations Board for the enforcement of a certain order on consent issued by it against Respondent, Capay, Inc. d/b/a Farm Fresh to You, its officers, agents, successors, and assigns, on August 1, 2019, in Board Case Nos. 20-CA-215451, 20-CA-215489, 20-CA-215497, 20-CA-222184 and 20-CA-224294; and upon the record in that proceeding, certified and filed in this Court enforcing the order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Ninth Circuit that the order of the National Labor Relations Board be, and the same is hereby enforced; and that the Respondent, Capay, Inc. d/b/a Farm Fresh to You, its officers, agents, successors, and assigns, shall abide by and perform the directions of the Board set forth in its order. (See Attached Order and Notice)

Endorsed, Judgment Filed and Entered

/s/ Molly Dwyer
Molly Dwyer
Clerk

NATIONAL LABOR RELATIONS BOARD

v.

CAPAY, INC. D/B/A FARM FRESH TO YOU

ORDER

Capay, Inc. d/b/a Farm Fresh to You, West Sacramento, California, its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

1. Suspending, discharging, demoting, or making unilateral changes to the terms and conditions of employment of the employees in the following appropriate unit (the unit) without first giving notice and an opportunity to bargain in good faith with the Bakery, Confectionery, Tobacco Workers & Grain Millers Union, Local 85 (the Union) as the exclusive collective-bargaining representative of the unit:

All full-time and regular part-time warehouse employees employed by Respondent at its facility located at 3880 Seaport Boulevard, West Sacramento, California, including packers, lead packers, prepping, and lead prepping employees, and excluding maintenance, shipping, clerical, supervisory, and guard employees as defined by the Act.

2. Changing Personnel Policies without first giving the Union notice and an opportunity to bargain about the change.
3. Issuing discipline to employees based on inconsistent application of the Bathroom Break Policy.
4. Inconsistently applying the number of errors an employee is allowed to make per week prior to receiving discipline (Error Policy) without first giving the Union notice and an opportunity to bargain.
5. Issuing discipline to employees based on the inconsistent application of the Error Policy.
6. Discharging, suspending or demoting employees without first giving the Union notice and an opportunity to bargain over the discharge, suspension, or demotion.

7. Denying injured employees modified duty because of their union membership or support, or because they engage in protected concerted activity.
 8. Maintaining a policy that denies off-duty employees access to the worksite without prior authorization from their supervisor.
 9. Denying off-duty employees access to the worksite because of their protected concerted activity.
 10. Interfering with employee Section 7 rights by directing employees not to speak with other employees on break time, directing employees not to speak about non-work-related matters, denying employees the right to speak with other employees, interfering with employee break times, sequestering employees from other employees, or imposing more onerous working conditions on employees.
 11. Engaging in surveillance of employees' protected concerted activity, not to include the legitimate use of video cameras throughout the facility to preserve food safety.
 12. Threatening employees with reprisals for engaging in protected concerted activity.
 13. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.
- B. Take the following affirmative action necessary to effectuate the policies of the Act.
1. Upon the Union's request, rescind the prohibition against unit employees using the restroom when their Lead is not in the production area to grant permission, and provide the Union the opportunity to bargain over the Bathroom Break Policy.
 2. Remove from the Respondent's files all references to the discipline issued to Leticia Aracely Bribiesca and any other employees based on the inconsistent application of the Bathroom Break Policy and notify the employees in writing that this has been done and that the discipline will not be used against them in any way.
 3. Upon the Union's request, revert the Error Policy to allow unit employees four (4) errors per week before being subject to discipline and provide the Union an opportunity to bargain over the Error Policy.

4. Remove from the Respondent's files all references to discipline issued under the inconsistent application of the Error Policy to employees who made four (4) or less errors per week, including, but not limited to, the discipline referenced in subparagraph 7(g) of the Consolidated Complaint, and notify the employees in writing that this has been done and that the discipline will not be used against them in any way.
5. Immediately, and no later than five (5) days from the approval of this Stipulation, provide the Union with an opportunity to bargain over paycheck distribution dates until agreement or impasse is reached.
6. Provide advance notice to the Union and, upon the Union's request, bargain in good faith with the Union before discharging, suspending or demoting any unit employees, unless exigent circumstances prevent such notice.
7. Remove from the Respondent's files all references to the Respondent's January 24, 2018, suspension of Leticia Aracely Bribiesca without giving the Union notice and an opportunity to bargain, make her whole for any wages and other benefits she may have lost because the Respondent suspended her without giving the Union notice and an opportunity to bargain about the suspension, and notify her in writing that this has been done and that the suspension will not be used against her in any way.
Bribiesca did not lose any wages or benefits as a result of her suspension.
8. **Within fourteen (14) days of the issuance of the Board's Order, make Rosalba Cecilia Reyes whole for any wages and other benefits she may have lost because the Respondent denied her modified duty, which has been offset by the temporary disability benefits she received through the Workers' Compensation Appeals Board, by paying her \$2,105.81, less appropriate withholdings. The Respondent shall complete and file with the Regional Director for Region 20 a report for the Social Security Administration provided by Region 20 allocating the backpay to the appropriate calendar year, which Region 20 will transmit to the Social Security Administration.**
9. Revise the policy that denies off-duty employees access to the worksite without prior authorization from their supervisor to make it consistent with current Board law and give the Union notice and the opportunity to bargain over the revision.
10. Within fourteen (14) days of service by the Region, post at its facility in West Sacramento, California, copies of the attached Notice (Notice)

marked "Appendix A." Copies of the Notice, on forms provided by Region 20, after being signed by the Respondent's authorized representative, shall be posted for a period of sixty (60) days, in conspicuous places, including all places where notices to its employees are normally posted. The Respondent will take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility in West Sacramento, California, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former unit employees employed by the Respondent at any time since October 1, 2017.

11. Within twenty (20) days of the issuance of the Board 's Order, file with the Regional Director of Region 20 of the Board, a sworn affidavit from a responsible official describing with specificity the manner in which the Respondent has complied with the terms of the Board's Order, including the locations of the posted documents.

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

**PURSUANT TO A STIPULATION PROVIDING
FOR A BOARD ORDER AND A CONSENT JUDGMENT
OF ANY APPROPRIATE UNITED STATES COURT OF APPEALS**

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose a representative to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT suspend, discharge, demote, or make unilateral changes to the terms and conditions of employment of you employees in the following appropriate unit (the unit) without first giving notice and an opportunity to bargain in good faith with the Bakery, Confectionery, Tobacco Workers & Grain Millers Union, Local 85 (the Union) as the exclusive collective-bargaining representative of the unit:

All full-time and regular part-time warehouse employees employed by Respondent at its facility located at 3880 Seaport Boulevard, West Sacramento, California, including packers, lead packers, prepping, and lead prepping employees, and excluding maintenance, shipping, clerical, supervisory, and guard employees as defined by the Act.

WE WILL NOT change our Personnel Policies applicable to you without first giving the Union notice and an opportunity to bargain about the change.

WE WILL NOT discipline you based on inconsistent application of our Bathroom Break Policy.

WE WILL NOT inconsistently apply the number of errors you are allowed to make per week prior to receiving discipline (Error Policy) without first giving the Union notice and an opportunity to bargain.

WE WILL NOT discipline you based on the inconsistent application of the Error Policy.

WE WILL NOT discharge, suspend, or demote you without first giving the Union notice and an opportunity to bargain over the discharge, suspension, or demotion.

WE WILL NOT deny you modified duty because of your union membership or support, or because you engage in protected concerted activity.

WE WILL NOT maintain a policy that denies off-duty employees access to the worksite without prior authorization from their supervisor.

WE WILL NOT deny you access to the worksite because of your protected concerted activity.

WE WILL NOT interfere with your Section 7 rights by directing you not to speak with other employees on break time, directing you not to speak about non-work-related matters, denying you the right to speak with other employees, interfering with your break times, sequestering you from other employees, or imposing more onerous working conditions on you.

WE WILL NOT engage in surveillance of your protected concerted activity (not to include the legitimate use of video cameras throughout the facility to preserve food safety).

WE WILL NOT threaten you with reprisals for engaging in protected concerted activity.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce you in the exercise of your Section 7 rights.

WE WILL, upon the Union's request, rescind the prohibition against unit employees using the restroom when their Lead is not in the production area to grant permission, and provide the Union the opportunity to bargain over the Bathroom Break Policy.

WE WILL remove from our files all references to the discipline issued to Leticia Aracely Bribiesca and any other employees based on the inconsistent application of the Bathroom Break Policy and notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL, upon the Union's request, revert the Error Policy to allow unit employees four errors per week before being subject to discipline and provide the Union an opportunity to bargain over the Error Policy.

WE WILL remove from our files all references to discipline issued under the inconsistent application of the Error Policy to employees who made four (4) or

less errors per week, including, but not limited to, the discipline referenced in subparagraph 7(g) of the Consolidated Complaint, and we will notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL immediately, and no later than five (5) days from the approval of this Stipulation, provide the Union with an opportunity to bargain over paycheck distribution dates until agreement or impasse is reached.

WE WILL provide advance notice to the Union and, upon the Union's request, bargain in good faith with the Union before discharging, suspending or demoting any unit employees, unless exigent circumstances prevent such notice.

WE WILL remove from our files all references to the January 24, 2018, suspension of Leticia Aracely Bribiesca without giving the Union notice and an opportunity to bargain, make her whole for any wages and other benefits she may have lost because we suspended her without giving the Union notice and an opportunity to bargain about the suspension, and notify her in writing that this has been done and that the suspension will not be used against her in any way.

WE WILL make Rosalba Cecilia Reyes whole for any wages and other benefits she may have lost because we denied her modified duty, to be offset by any temporary disability benefits she received through the Workers' Compensation Appeals Board.

WE WILL revise the policy that denies off-duty employees access to the worksite without prior authorization from their supervisor to make it consistent with current Board law, and give the Union notice and the opportunity to bargain over the revision.

WE WILL NOT, in any like or related manner, interfere with your rights under Section 7 of the Act.

CAPAY, INC. D/B/A FRESH FOOD TO YOU

The Board's decision can be found at www.nlrb.gov/case/20-CA-215451 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| NATIONAL LABOR RELATIONS BOARD | : | No. |
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| Petitioner | : | Board Case Nos.: |
| v. | : | 20-CA-215451 |
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| CAPAY, INC. D/B/A FARM FRESH TO YOU | : | 20-CA-215497 |
| | : | 20-CA-222184 |
| Respondent | : | 20-CA-224294 |

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, authorized by Section 102.115, Rules and Regulations of the National Labor Relations Board, Series 8 (29 C.F.R.), certifies that the documents annexed hereto constitute the entire record of a proceeding had before the Board and known upon its records as Case Nos. 20-CA-215451, 20-CA-215489, 20-CA-215497, 20-CA-222184 and 20-CA-224294.

The attached documents are as follows:

| <u>Date</u> | <u>Document Description</u> | <u>Pages</u> |
|-------------|---|--------------|
| 08/01/19 | Decision and Order, <i>Capay, Inc. d/b/a Farm Fresh to You and Bakery, Confectionary, Tobacco Workers & Grain Millers Union, Local 85</i> , Case Nos. 20-CA-215451, 20-CA-215489, 20-CA-215497, 20-CA-222184 and 20-CA-224294 | 8 |
| 02/21/19 | Formal Settlement, <i>Capay, Inc. d/b/a Farm Fresh to You and Bakery, Confectionary, Tobacco Workers & Grain Millers Union, Local 85</i> , Case Nos. 20-CA-215451, 20-CA-215489, 20-CA-215497, 20-CA-222184 and 20-CA-224294 (conformed copy) | 12 |

| <u>Date</u> | <u>Document Description</u> | <u>Pages</u> |
|------------------------------|---|--------------|
| 02/21/19 | Formal Settlement, <i>Capay, Inc. d/b/a Farm Fresh to You and Bakery, Confectionary, Tobacco Workers & Grain Millers Union, Local 85</i> , Case Nos. 20-CA-215451, 20-CA-215489, 20-CA-215497, 20-CA-222184 and 20-CA-224294 (copy signed by Company and Union) | 12 |
| 02/23/18 thru 09/28/18 | Exhibits to Formal Settlement, <i>Capay, Inc. d/b/a Farm Fresh to You and Bakery, Confectionary, Tobacco Workers & Grain Millers Union, Local 85</i> , Case Nos. 20-CA-215451, 20-CA-215489, 20-CA-215497, 20-CA-222184 and 20-CA-224294 | 27 |

IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being duly authorized, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 14th day of August, 2019.

/s/ Roxanne Rothschild
Roxanne Rothschild
Executive Secretary
NATIONAL LABOR RELATIONS BOARD

(seal)

UNITED STATES COURT OF APPEALS
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| | : | 20-CA-222184 |
| Respondent | : | 20-CA-224294 |

CERTIFICATE OF SERVICE

The undersigned certifies that one copy each of the Board's application for enforcement, proposed judgment, certificate of record and mediation questionnaire, in the above case, has this day been served by first class mail upon the following parties at the addresses listed below:

Brenda Phillips, V.P. of Human Resources
Capay, Inc. dba Farm Fresh To You
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West Sacramento, CA 95691-3449

Larry M. Kazanjian, Attorney
Palmer Kazanjian Wohl Hodson LLP
2277 Fair Oaks Blvd., Suite 455
Sacramento, CA 95825-5500

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dated in Washington, D.C.
this 14th day of August, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

CAPAY, INC. D/B/A FARM FRESH TO YOU

Respondent

ITEMS SHOWN ON BOARD'S CERTIFICATE
OF RECORD ARE CONTAINED HEREIN