Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SUPERIOR FARMING COMPANY, INC., Respondent,	)	Case No. 79-CE-58-D
and	)	
GUADALUPE GUTIERREZ ZACARIAS, Charging Party.	)	**7 ALRB No.** 39

DECISION AND ORDER

On November 7, 1980, Administrative Law Officer **(ALO)** Robert **LeProhn** issued the attached Decision in this proceeding. Thereafter, the General Counsel timely filed exceptions to the **ALO's** Decision and a brief in support of those exceptions. Respondent filed a reply **brief.**[1/]

Pursuant to the provisions of section **1146**[2/] of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (**ALRB** or Board) has delegated its authority in this

[1/]The General Counsel filed two exceptions to the **ALO's** Decision. The first was to the **ALO's** conclusion that the Charging Party was not a supervisor within the meaning of Labor Code section **1140.4(j)**. Although we view this question as a close one, and although both parties argued this case to the ALO as though supervisorial status had been proven, we affirm the **ALO's** conclusion. The General Counsel's second exception was to the **ALO's** recommendation that the complaint be dismissed. Respondent argues that this exception's breadth renders it meaningless. We find that the General Counsel's brief adequately identifies the portions of the ALO decision to which exception is taken and the portions of the record which support the exception.

[2/]All references herein are to the Labor Code unless otherwise stated.

The ALO found that the crew members did engage in protected concerted activity by requesting a higher rate of pay. The, ALO found that Respondent's senior management did not retaliate by discharging them for that reason, but that the crew members walked off the job because of the Charging Party's inaccurate report to them of Respondent's reaction to their request for a higher rate of pay.

Based on this mistaken interpretation of Respondent's labor coordinator's (Aurelia Menchaca) statements, Guadalupe Gutierrez Zacarias incorrectly notified his crew that they had been fired. But the ALO also found Zacarias was not a supervisor?' and that the statements of Zacarias to the crew were therefore not attributable to Respondent. Specifically, the ALO found Zacarias' "credited testimony [to be] conclusionary and Zacarias' conclusions . . . not [to be] binding upon Respondent since ... he was not a supervisor within the meaning of the Act." Decision, p. 9, fn. 6.

Under the recent decision of *the* California Supreme Court in Vista Verde Farms v. ALRB, supra,(1981) 29 Cal.3d 307, and this Board's decision in Perry Plants, Inc. (Mar. 16, 1979), 5 ALRB No. 17, it is clear that non-supervisors can effectively bind agricultural employers and labor organizations. See Oil Chemical

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[5/] **Supervisor** is defined by the Act in'section 1140.4 (j) as follows: "... any individual having, the ***authority, in*** the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a **merely** routine or clerical nature, but requires the use of independent judgment." See Miranda Mushroom Farms (**May** 1, 1980) 6 ALRB No. 22, pp. **9-10**; Perry Plants, Inc, (Mar. 16, 1979) 5 **ALRB** No. 17; Dave Walsh Company, **supra**, 4 ALPS No. 84.

non-supervisory employees. For example, the court pointed out that in I.A. of M. v. Labor Board (1940) 311 U.S. 72 [85 L.Ed. 50, 61 S.Ct. 831

> the employer argued that the NLRB had improperly held it responsible for organizational efforts of several low-level employees ("lead men") which it had neither expressly authorized nor ratified. Justice Douglas, writing for a unanimous Supreme Court, rejected the employer's contention, declaring: 'The employer ,,. may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondeat superior. We are dealing here . . . with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination or influence.... Thus, where the **employees** would have just cause to **believe** that **solicitors pro**fessedly for a **labor** organization were acting for and on behalf of management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates. ' . . . (311 U.S. at p. 80 [**85 L.Ed**, at p. 56].) **Observing** that whereas the lead men whose actions were in question 'were not high in the factory hierarchy and apparently did not have the power to hire or to fire [,]... they did exercise general authority over [other] employees and were in a strategic position to translate to their subordinates the policies and desires of the management'(ibid.), the **court** concluded that the Board could properly hold the employer responsible for their actions. Vista Verde v. ALRB, supra at 318-319 (emphasis the Court ' s).

We are presented here with a highly anomalous fact pattern Respondent argued to the ALO that one of its supervisors (Zacarias) mistakenly thought Respondent had ordered him to fire his own crew, contrary to the explicit instructions given Zacarias by Menchaca. After the discharge of his crew, Zacarias then filed charges under the Act. Although Respondent did not specifically address the issue of agency in the labor-management relations area, it made no effort to demonstrate that it disavowed Zacarias[1] instructions to the crew

practice of relaying orders through Zacarias, Respondent cannot now avoid liability for Zacarias' conduct by its own failure to adequately supervise him. **QCAW** V. NLRB_, **supra**,547 F.2d 584-5.

However, although Respondent must therefore be held to have violated section 1153(a) of the Act by virtue of the discharge of the crew, the uniqueness of the situation before us militates against imposing the standard remedial order. Menchaca's credited testimony demonstrates that Respondent had no intent to retaliate against the employees, however reasonable the employees may have been in believing themselves discharged. Therefore, although the crew members must be made whole for loss of wages and offered reinstatement, insufficient grounds are **presented to** require posting, mailing, or reading of our standard Notice. We further adopt the **ALO's** recommendation and dismiss the allegations of the complaint which assert the discharge of the Charging Party to be an unfair labor practice.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Superior Farming Co., Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any concerted activity protected by section 1152 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the

periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: November **6, 1981**

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Board Member

JEROME R. WALDIE, Board Member

CASE SUMMARY

Superior Farming Company, Inc. 7 ALRB No. 39
Case No. 79-CE-58-D

ALO DECISION

The ALO found that the Charging Party, a "crew pusher" for a labor contractor crew employed at Respondent operation, was not a supervisor, notwithstanding the apparent agreement of General Counsel and Respondent that he was a supervisor. The ALO then found that the Charging Party, in direct contravention of the instructions of Respondent's labor coordinator, told his crew they were discharged for protesting the lack of minimum hourly wage or increase in the piece rate. The ALO found that, because Charging Party was not a supervisor, his comments to the crew, although corroborated and credited, were not binding on Respondent. The ALO recommended that the complaint be dismissed.

BOARD DECISION

The Board affirmed the ALO's findings and rulings as to Charging Party's status but found that low-level supervisors and leadmen can effectively bind employers in the labor relations area, even absent authorization or ratification. Focusing on the employees discharged, the Board found that they were reasonable in believing that Respondent had discharged them for engaging in protected concerted activity, and therefore concluded that Respondent had violated section 1153(a) of the Act. Respondent offered no evidence that it had disavowed Charging Party's action or that due to Respondent's prior history, the discharged employees were unreasonable in believing that the Charging Party spoke for Respondent. However, the Board modified its usual remedy in this unique situation, based on the credited testimony of Respondent's labor coordinator, that no discrimination or discharge had been ordered. The Board ordered reinstatement and back wages for the employees, but not for the Charging Party, and did not order posting, mailing, or reading of a remedial Notice to Employees.

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

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

Agricultural Labor Relations Board
NOV 13 1980
RECEIVED
Exec. Secretary

In the matter of SUPERIOR FARMING COMPANY, INC., Respondent and GUADALUPE GUTIERREZ ZACARIAS, Charging Party	Case No. 79-ce-58-D

APPEARANCES:

John Patrick Moore, Esq.
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For the General Counsel

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By William A. Quinlan, Esq. and
Bert Hoffman, Jr., Esq.
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Fresno, California 93721

For the **Respondent**

STATEMENT OF THE CASE

Robert **LeProhn**, Administrative Law Officer: The above captioned case was heard before me in Delano, California, on **April 21, 23 and 24, 1980**.

Complaint and Notice of Hearing issued January 10, 1980 alleging that Superior Farming Company, Inc., hereafter Responds or Superior, violated Section 1153 (a) of the Agricultural Labor Relations Act in that it discharged Guadalupe Gutierrez Zacarias hereafter Charging Party or Zacarias, and his crew for engaging in concerted activity protected by Section 1152 of the Act. The complaint was based upon a charge filed by Zacarias on June 12,

thinning stone fruit. Their inexperience was an additional reason Menchaca did not hire them as Superior employees. However he was prepared to have them carried on the payroll of Joe Rodriguez, a labor contractor used by Superior, and Zacarias and his crew became one of the crews supplied by Rodriguez.,

Each of Respondent's ranches is supervised by an employee of Superior. Zacarias was directly responsible to the ranch supervisor.

As crew foreman Zacarias maintained a daily crew list which he turned in to Rodriguez. He translated instructions given him by Superior's supervisor into Spanish for the workers and translated their complaints regarding work into English for the supervisor. It does not appear that Zacarias independently constructed the crew in the manner in which the work was to be performed.

From time to time he was directed to lay off certain workers who failed to meet the Respondent's productivity requirements. There is no evidence Zacarias ever laid off a worker without instructions from the ranch supervisor or otherwise exercised any discretion regarding layoffs.

As workers were terminated, Zacarias' crew was brought up to strength by replacements provided by Superior and on occasion by new people provided by Zacarias. He did not participate in 'the decision regarding which source of replacements would be used; nor does it appear that he had any control over the crew size.

Respondent's policy regarding payment of an hourly minimum to workers whose production on a piece work basis was insufficient to earn that minimum was not explained to Zacarias.

Unlike the members of his crew, Zacarias was paid an hourly rate rather than a piece rate. His hourly rate was $4.54 as opposed to the workers' guarantee of $3.25. Additionally, he was paid for two hours per day more than the crew worked. The crew's hourly guarantee increased during the period they were employed at Superior.

2. Labor Contractor Joe Rodriguez .

Respondent denied in its amended answer that Rodriguez vas an agent of Respondent. Rodriguez was utilized as a labor contractor by Respondent at all times material: therefore for purpose of the Act he is deemed to be Respondent's supervisor, and Zacarias and his crew to be employees of Superior.-

D. Chronology of Events

April 2 to May 28, 1979

The Zacarias crew thinned apricots from April 2 until

rate for the first pick or in reducing the rate to 60 cents for the second pick. It is the harvest coordinator who sets the rate.

At the close of work on the 31st Veiss was at the edge of the orchard awaiting the crew sheet from Zacarias when an employee approached and stated she was not happy with the price and asked whether it could be raised back to 70 'cents per bucket. Veiss told her that he didn't have the authority to raise the price.. that he would ask the boss that night and see what he had to say .[1/]

On June 1st the crew started at the regular hour. Veiss visited the crew at a point in time when they had picked about a sin and a quarter of fruit, somewhere between an hour and an lour and a half after work commenced. He ascertained that the Fruit being picked was too small. He called Zacarias over to the Din and showed him the fruit. Veiss had him call the crew over to the bin. Zacarias then picked fruit from the bin which was too small and passed through the ring. He then picked a plum of minimum size which did not pass through the ring and passed this among the crew members for them to feel. Veiss also put fruit through his ring which fell to the ground. He admitted he could nave displayed anger because he was upset the fruit being picked vas too small . The members of the crew were not provided with rings .

The workers did not resume work upon completion of the demonstration. Someone asked Veiss whether he got the price raised. Veiss said no. Someone asked Veiss. why he couldn't raise the price. He said he didn't set the prices, that it was out of his hands. He said these were orders from the chief. The crew was upset and stood talking among themselves for five or ten minutes with no work being done. Veiss called Zacarias to the side and told him the price was set, and the crew would either have to go to work or go home.[2/] Zacarias did not respond. Veiss started to

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[1/] Veiss testified he talked to Binardi, the harvest coordinate?, that night. Binardi told him the price was fair.

[2/] Ronald Diaz Franco, General Counsel's witness, testified that' "He [Veiss] said that if we wanted to work to go ahead and work, but if not, for us to go home." Zacarias denied that Veiss made such a statement. His testimony was as follows: He told Veiss that people wanted to work by the hour because they didn't have rings. He said the workers wanted $1.00 per bucket or $3.55 per hour. Veiss then threw some plums on the ground and said he'd had a lot of difficulty with the crew. "I don't want so many problems with you [the crew] , take the ladders out to the avenue. All of you go home, I do not need you [the crew] go home. I have a lot of people who want to work." The crew took the ladders out and Zacarias 'told the people to wait while he went to talk to Menchaca.

No other witness testified to hearing the absence of a ring as a reason for wanting to work by the hour. There is no

started to leave to visit his other crews. At that point Zacarias was returning from the office. Veiss told him that he lad seen a couple of cars of workers leave, and if the crew vas not going to work, to make sure that the ladders were taken from the **rows.**

Menchaca testified he was away from the office when le got Veiss' radio call: that he arrived at the office a few minutes later and shortly thereafter Zacarias arrived. The Menchaca testimony regarding what transpired is as follows: Zacarias told him the people wanted a raise because they weren't making wages. Menchaca said he would get hold of the labor contractor and straighten the matter out. Rodriguez arrived at this point, and Menchaca instructed him to go tell ;he crew they're guaranteed the hourly minimum even if they don't make it on the piece rates. He told Rodriguez that if the piece rates are wrong, we will adjust them. Zacarias aas present during this conversation. When Zacarias departed no understanding had been reached that the rate would be increased.

Zacarias ' version of his conversation with Menchaca is as follows: he waited at the office 15 or 20 minutes for Menchaca to arrive. Menchaca asked him what the problem was. Zacarias responded that Veiss had fired the entire crew. He asked for another chance for him and his crew with another supervisor. He sought a place where they would be paid by the lour. Menchaca responded that if Veiss had fired the crew he wouldn't do anything. Rodriguez was present near the end of the conversation, but Zacarias did not speak to him and apparently Rodriguez said nothing.21

Menchaca denied that Zacarias told him that Veiss fired the crew or that the crew was leaving. Veiss had no authority to fire the crew.

When Zacarias returned to Ranch 85 where the crew had been working, he told them that the company didn't want to pay 70 cents and did not want to pay by the hour. He said he couldn't do anything; I think we should leave. Another worker testified hat Zacarias stated that he couldn't do anything about raising the 60 cents to 70 cents, . that the whole crew was fired, including

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5/ Rodriguez was not called to testify by either party. There is no evidence he was unavailable. Since General Counsel has the burden of proving its version of the conversation, a reasonable inference to be drawn from the General Counsel's failure to call Rodriguez is that his testimony would be adverse. However because Rodriguez, having interest allied to those of Respondent, could reasonably be anticipated by General Counsel to be hostile, no significance is attached to its failure to call him.

A preliminary question is whether Zacarias is a supervisor within the meaning **of the** Act. The complaint does not so allege. Respondent contends that Zacarias was a supervisor and, thus, the protections of the Act are not available to him. There is no evidence that Zacarias had independent authority to instruct, crew members how to harvest or thin stone fruit. While working under the supervision of Veiss, Zacarias merely' translated orders given by Veiss, a function not indicative of supervisorial status [**Miranda** Mushroom Farm, Inc., 6 ALRB No. 22 at page 9 (1980)] Zacarras did not **independently** instruct **employees** to redo imuroaerly harvested trees, rather it was Veiss who directed that trees-be redone and who gathered the crew together for the purpose of illustrating their errors.

There is no evidence that Zacarias issued warnings to his crew members [**c.f.** Paoli Chair Co. 213 **NLRB** 909, 920 (**1974**)]

Zacarias made no independent determinations regarding the lay-off of employees for unsatisfactory work. He was instructed to lay off employees not meeting productivity standards prescribed by Superior. His role was merely to ascertain whether or not those standards were met, **and** if not, to effect the person's layoff. Authority to lay off is an indicia of supervisory status only if ".. .the exercise of such authority is not of a mere routine or clerical nature, but requires the use of independent judgment." [Labor Code §1140.4(j)].

While it appears that the assignment of rows to particular employees in the crew was left to Zacarias, such authority is not indicative of supervisory status absent evidence that this function called : f or the exercise of independent judgment. [Anton **Caratan** & Sons, 4 **ALRB** No. 103 (1978)].

When Zacarias was made a crew leader, he was told to hire a crew of 18 to 20 workers. The authority to hire, standing alone would ordinarily suffice to establish supervisorial status, since the statutory indicia in **§1140.4** (j) are to be read disjunctively [Perry's Plants, Inc., **5 ALRB** No. 17 at p. 36 (1979). **ALO's** conclusions **adopted by Board**]. However, the record does not support the conclusion that the initial hire of the crew was an exercise of independent authority. Rather, Respondent's labor supervisor, **Menchaca,** determined who was to be hired, and as the record shows, declined to put any of the applicants provided by Zacarias on the Superior payroll. In effect, **Zacarias'** role was merely to round up applicants, and Menchaca determined whether Superior would employ them. When Menchaca declined to place the applicants on Superior's payroll, he arranged for them to be placed on the labor contractor's payroll: Zacarias played no role in this decision.

During the period **Zacharias had** a crew, it was necessary to **replace workers.** Some were transferred into the crew by **Respondent,** others were obtained by Zacharias; there is no evidence whether the additional workers provided by Zacarias were subject to approval by Menchaca or **whether** Zacarias had independent authority

Further illustrative of such unreliability is found in Zacarias' testimony regarding the preparation of his crew sheets and his testimony regarding the period for which his crew had been paid a piece rate of 70 cents per bucket. With respect to his crew sheets, Zacarias testified that he was instructed to record four, five or six hours for those workers who failed to produce enough to earn the hourly rate, rather than to pay the worker for eight hours. The purpose of such an approach being. to have the worker's hours coincide with his piece rate earnings for the day. This testimony was designed to establish the absence f any guaranteed minimum for the day. However, the crew sheets repared by Zacarias contradict his testimony. Those crew sheets now, for the most part, that all workers worked the same number f hours each day and that crew members who did not earn more under piece rate than the hourly rate received the hourly rate Dr all hours worked that day. Similarly, the same crew sheets Dr the Zacarias crew controvert Zacarias' testimony that his rew worked for two weeks or more at a piece rate of 70 cents per jacket. May 26th was the first day the crew picked rather than lined. Their picking on the 26th was in peaches at a rate of 3 cents per bucket. [11/]

Having credited Veiss and Diaz regarding what workers sre told during the interaction prior to the time Zacarias separted for the office, the conclusion follows that Veiss did not fire the crew; moreover, the words attributed to him by Diaz could not reasonably be construed by the workers as words of discharge. They were told work was available at 60 cents per bucket; as one worker testified, the crew was not willing to work for that rate. Their unwillingness to do so rather than their discharge was the reason the crew left the job.

Further evidence that Zacarias was aware that Veiss had not fired the crew is the credited testimony of Veiss that Zacarias asked him to contact Menchaca so that he could speak to him about getting the 70 cents. It is only in the context of believing himself still to be an employee of Superior that going through channels to speak to Veiss' superior makes sense.

When Zacarias returned from meeting with Menchaca, Diaz tisstified that Zacarias told the awaiting crew members that he couldn't do anything about getting the rate raised to 70 cents and that the whole crew was fired. Another witness of General Counsel testified that upon his return Zacarias said he had talked to Menchaca and that he had not been able to work anything out and for us to go home. % Since I have not credited Zacarias' testimony regarding his conversation with Menchaca and since Zacarias was not a statutory supervisor, the variance in the

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11/ Other instances in which the testimony of Zacarias has not been credited as set out above.

12/ Testimony of rebuttal witness Rodrigo Landin.