

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

D'ARRIGO BROTHERS CO.	)	
OF CALIFORNIA	)	
	)	
Respondent,	)	Case Nos. 83-CE-57-F
	)	85-CE-19-F
and	)	
	)	13 ALRB No. 1
	)	
UNITED FARM WORKERS	)	
OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

DECISION AND ORDER

On June 27, 1986, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision in this matter. Thereafter, Respondent timely filed exceptions to the ALJ's Decision along with a supporting brief, and the General Counsel filed a reply to Respondent's exceptions and a supporting brief.

The Board has considered the record and the ALJ's Decision in light of the Respondent's exceptions and the briefs of the parties and has decided to affirm the ALJ's rulings, findings, and conclusions<sup>1/</sup> and to adopt his recommended Order with

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<sup>1/</sup> To the extent that the ALJ's decision may suggest that the Board will examine whether an employer has "proper cause" for the discharge of an employee (see ALJD, p. 3), the Board disavows such an approach; the Board will consider only whether the discharge violates the Agricultural Labor Relations Act (Gourmet Farms, Inc. (1984) 10 ALRB No. 41).

modifications.

ORDER

By the authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent D'Arrigo Brothers Co. of California, Reedley District No. 3, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

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

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

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

(a) Offer to Javier Navarro immediate and full reinstatement to his former or substantially equivalent position

<sup>2/</sup> In modifying the ALJ's recommended order, we find that Respondent's exception concerning the extent of the mailing requirement for the Board Notice has merit, and the order is modified to limit the mailing requirement to workers employed by D'Arrigo for the period May 6, 1985 through May 6, 1986. Respondent's further exception that the posting, reading, and mailing requirements should be limited to Zavala's crew is without merit and contrary to Board precedent. (See, e.g., M. Caratan, Inc. (1980) 6 ALRB No. 14.) However, Respondent's exception that the reading, posting, and mailing should be limited to D'Arrigo's Reedley operations has merit in light of the separate certifications for D'Arrigo's California operations and the absence of any evidence of an interchange of employees between the San Joaquin Valley and Brawley/Salinas operations. We therefore limit the mailing, posting, and reading requirements of the order to D'Arrigo Bros, of California, Reedley District No. 3.

without prejudice to his seniority or other employment rights and privileges, and make him whole for all losses of pay and other economic losses he has suffered as a result of his discharge, the amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

( b ) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay periods and the amounts of backpay and interest due under the terms of this Order.

( c ) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purpose set forth in this Order.

( d ) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this order, to all agricultural employees employed by Respondent from May 6, 1985 to May 6, 1986.

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

( f ) Arrange for a representative or a Board agent to

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

(g) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and make further reports at the request of Regional Director, until full compliance is achieved.

DATED: February 5, 1987

JOHN P. McCARTHY, Acting Chairperson<sup>3/</sup>

PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

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<sup>3/</sup>The signatures of Board Members in all Board Decisions appear with the signature of the chairperson first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, D'Arrigo Brothers Co. of California, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging Javier Navarro because he engaged in protected, concerted activity. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that 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 unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

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

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge or layoff any employees for complaining about working conditions.

WE WILL reimburse Javier Navarro for all losses of pay and other economic losses he has suffered as a result of our discriminating against him plus interest and in addition offer him immediate and full reinstatement to his former or substantially equivalent position.

Dated:

D'ARRIGO BROTHERS CO. OF CALIFORNIA

By:

\_\_\_\_\_  
(Representative) (Title)

If you have a question about your rights as farmworkers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

D'Arrigo Brothers Co.  
of California  
(UFW)

13 ALRB No. 1  
Case Nos. 83-CE-57-F  
85-CE-19-F

ALJ DECISION

The Employer discharged an employee for alleged insubordination. The ALJ found that the employee's actions in protesting what he perceived as a change in working conditions constituted protected concerted activity and that the manner in which he made his complaint known did not deny him the protections of the ALRA. The ALJ concluded the Employer's subsequent discharge of the employee violated section 1153(a).

BOARD DECISION

The Board affirmed the ALJ's decision and adopted his recommended order with minor modifications.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: )  
D'ARRIGO BROTHERS, )  
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 Respondents. )  
and )  
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 UNITED FARM WORKERS )  
 OF AMERICA, AFL-CIO, )  
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 Charging Party. )  
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Case NO.85-CE-19-F  
83-CE-57-F

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Appearances:  
William J. Lenkeit, Esq.,  
for the General Counsel

Marion Quesenberry, Esq.,  
for the Respondent

I. STATEMENT OF THE CASE

On May 9, 1985,<sup>1</sup> the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union") filed a charge in case number 85-CE-19-F, alleging that D'Arrigo Brothers, variously referred to below as "Respondent," "the employer," or "the company," violated sections 1153(a) and (c) of the Act by discharging employee Javier Navarro. The charge was served on the employer on that same date. Based on this charge, the General Counsel for the Agricultural Labor Relations Board caused to be issued, on October 3, a complaint which incorporated its substance.<sup>2</sup>

Respondent duly filed an answer to the complaint which, in essence, denied the commission of any unfair labor practices.

Commencing April 16, 1986, a hearing was held before me in Fresno, California. The General Counsel and the Respondent appeared through their respective representatives. They were given full opportunity to examine and cross-examine witnesses, and to submit documentary evidence, oral argument, and post-hearing briefs.

Based upon the entire record in the case, including my observations of the demeanor of each witness as he testified, and, having read the briefs submitted following the close of the hearing, I make the following:

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<sup>1</sup>All dates refer to 1985 unless otherwise noted.

<sup>2</sup>The complaint also included an allegation based on charge number 83-CE-57-F. This charge was settled prior to the commencement of the hearing.

II. Findings of Fact

A. Jurisdiction

1. The Respondent is and was, at all times material, an agricultural employer within the meaning of section 1140.4(c) of the Act.

2. The Union was and is, at all times material, a labor organization within the meaning of the Act.<sup>3</sup>

B. The Facts Presented

The Employer is a California corporation which produces, harvests, packs, ships and sells a wide variety of fruits and vegetables and fiber and flat crops in California, Arizona, and other locations. Although the Union is certified as the exclusive bargaining representative of Respondent's employees at this location, there has not been an applicable collective bargaining agreement in effect since 1973.

The sole issue presented by the case is whether worker Javier Navarro was terminated for reasons violative of the Act, or whether the reason for his discharge was justifiable, lawful and for proper cause.<sup>4</sup> As will be developed, testimony concerning the events leading up to Navarro's discharge consisted of respectively divergent accounts supplied by witnesses called by General Counsel on the one hand, and

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<sup>3</sup> Respondent admitted its agricultural employer status in its answer. Administrative notice is taken of the status of the Union as a labor organization.

<sup>4</sup> Respondent gave "insubordination" as the stated basis for the termination.

Respondent's witnesses, on the other. The witnesses within a particular group supplied corroboration for the version proffered by that group.

Briefly stated, General Counsel's witnesses, three in number, attest that Javier Navarro objected to the assignment by his foreman of riders to employees who drove to work. The riders paid their fellow employees a certain sum daily or weekly for "gas money." These witnesses stated that Navarro, when he perceived that the foreman was ordering certain employees to give their riders to others, under penalty of discharge, questioned the foreman's authority to do so.

Respondent's witnesses, on the other hand, uniformly state that Navarro interjected himself into a conversation that the foreman was having with some workers at the end of the work day, that he did not fully understand what the conversation was about, and that he became abusive with the foreman, insulting him in front of five or six members of the crew.

This particular episode took place on Saturday, May 4. On the following Monday, Navarro was terminated.

The alleged discriminatee was hired in August of 1983 to work as a tractor driver. He attained a measure of seniority, and was assigned to other duties, rather than being laid off, when tractor work diminished.<sup>5</sup> In the period in question, Navarro was assigned to work in a thinning crew under foreman

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<sup>5</sup>Tractor drivers are accorded "super seniority" when they are placed in field crews. They retain the tractor driver rate of pay, which is higher than that of field workers.

Antonio Zavala.

During the course of his tenure with Respondent, Navarro engaged in various union and other protected activities. He was a crew representative who attended negotiation sessions and wore a Union button in the previous year. After the negotiations, Navarro stated, he repeatedly complained about the company's failure to adhere to certain work rules, such as not providing clean drinking water or observing proper break times. Respondent stipulated that it had knowledge of Navarro's union activities.<sup>6</sup>

Navarro testified that on Friday, May 3, he asked his foreman Zavala for permission to leave work early the next day so that he would be able to attend a Union march. He knew there was a small bit of work remaining on the particular plot where the crew was assigned. Navarro stated that he told the foreman that he could work until eleven o'clock, but would have to leave after that. Zavala responded, according to Navarro, that if he did not want to come to work the next day, he should not come. Navarro replied that was not what he was saying. The foreman repeated his previous remark, and then turned to the rest of the crew and told them that whoever did not come to work on Saturday should

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<sup>6</sup>Supervisor Jay Scott admitted that Navarro "complained about a lot of things" "almost every time I walked through the crew," such as whether the toilets were kept clean, the ground was too muddy or if the drinking water was too warm. If Scott, after investigating, found the complaints valid, he would instruct the foreman to act upon them. He further testified that employees were in effect encouraged to "complain" or bring work related problems to his attention.

forget about coming to work the following Monday.

Thereupon, according to Navarro, he told Zavala that he was going to talk to supervisor Dan Lynch about the problem, and obtain the permission to leave from him. After the worker spoke to Lynch on the telephone, Navarro testified, Zavala approached him and told the worker that whenever he had something to tell the foreman, he should tell him when no other workers were around. Navarro responded that he thought that the problem had been resolved.

Navarro reported to work as scheduled on the following day. Work itself was uneventful, and lasted until about eleven o'clock. Navarro testified that as he was putting his ladder away at work's end, he heard Zavala telling certain workers who drove others to work that they should give their riders to his friend, Baudelio Cortes, and help him with the gasoline, and that Zavala was going to leave the drivers with one rider each. Fellow worker Lorenzo Gallegos, a driver himself, answered Zavala, stating that he did not think this was fair, since the three riders he had helped him with the gasoline. Navarro then told the foreman that he had no reason for ordering the change, since this was a matter which had nothing to do with work.

Zavala told Navarro not to meddle, it was not his problem. Navarro protested that the people could not be ordered what to do in their private lives. Zavala again warned him not to interfere, that he was "getting into more problems than you're already in." Zavala then told Gallegos and the rest of the

workers that was the way it had to be, to give up their riders, because that was the way that he "was telling them to do it." He told Navarro that if he did not leave, he was going to get a warning slip. Navarro testified that he responded that a "warning was going to look real good afterwards--after work and for a matter that had nothing to do with work." Zavala replied, "Just wait and see. I'll give it to you."

When Navarro reported to work that following Monday, he received a warning notice dated 5/4/85, which stated that Navarro worked for the crew on Friday, that he had a quarrel with the crew boss, that his work was not done right, and that he talked too much. As Navarro was being given the slip, supervisor Jay Scott approached. Navarro spoke to him, telling him that he objected to Zavala wanting people to ride with his friend Baudelio, and to Zavala stating that if they would not go to work with his friend there were other people who wanted to work there that would. Scott answered that he did not see any problem with that; Navarro then told Scott that he was representing the workers and that he had resolved problems in the past. Navarro asked the supervisor whether he thought it was right that Zavala made it a "condition" that if the people wanted to work "for them to come with whoever you want them to come with." Scott reiterated that he saw no problem with that.

Navarro then told Scott that the worker always wanted to resolve the problems there, but that if he was not being listened to then he would have to go to the ALRB or the Farm

Workers' Union. Scott replied that Navarro could go wherever he pleased.<sup>7</sup>

After having received permission to leave from Zavala, Navarro then left work to go to the Union office to file a charge with the ALRB. Navarro returned during the lunch break, and worked until the end of the day. After work had finished, Navarro received his termination notice and final pay check.

Significantly, during cross-examination, Navarro stated that at the time that he was terminated, Cortes was driving the foreman to work. This fact figures centrally in analyzing the conflicting versions of events which witnesses supplied, as will be discussed below.

Navarro denied making any derogatory remarks about his foreman, such as that he had no schooling, or no experience. He further denied being angry with the foreman on the day that the ride situation was discussed.

Lorenzo Gallegos, a worker in the Zavala crew, was called to testify on behalf of the General Counsel. He corroborated Navarro's assertion that Zavala had told workers on Friday, May 3, that if they did not come to work the next day they should not report on Monday. Gallegos further corroborated certain elements of the conversation which took place between Zavala, Navarro, and some members of the crew on Saturday. Gallegos stated that Zavala told the workers who had riders that

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<sup>7</sup>Notably, absent from Scott's testimony was any reference to this exchange. The account must therefore be credited in this particular.

they should let their riders go with a friend of his so that he could use some of the gas money to help pay for his new truck. Gallegos also testified that Zavala told the drivers that if they did not give their riders to his friend, he would not give them any work.

Gallegos, like Navarro, stated that when Navarro told the foreman that he could not "meddle with the people that we were giving a ride to because it was none of his business," Zavala told Navarro that he should leave because the matter did not concern him. When Navarro persisted, Zavala repeated that it would be better if Navarro left.

Gallegos asserted that prior to that day, he had three riders who came to work with him. Afterwards, he had only two. Gallegos also stated that later that Saturday at his home he had a conversation with Zavala, who told him not to pick up his riders, that his friend was going to pick them up. When Gallegos told the foreman that his riders did not want to go with Zavala's friend, who was also present during this conversation, Zavala said that there were "other people that wanted to work."<sup>8</sup>

Gallegos averred that following that Saturday, Zavala's friend Cortes had "about eighteen" riders that he took to work with him in his truck. He also stated that when Navarro spoke to Zavala on Saturday, Navarro was not angry; rather, it was the foreman who was angry with the worker.

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<sup>8</sup>When Zavala testified, he was not asked to confirm or deny any of the assertions made by Gallegos.

Ignacio Vasquez, another of General Counsel's witnesses, substantiated Navarro's account of his exchange with Zavala on Friday regarding leaving work early on Saturday, and the foreman's remark to the crew that if they did not come to work on Saturday they should not report on Monday.

Like Gallegos, Vasquez stated that on Saturday, Zavala told members of the crew that they should divide up their riders so that they would be shared with his friend, in order that Cortes would have money to pay for the truck which he had recently bought. At that time, Vasquez had been riding with Tomas Ortiz. After that Saturday, he rode in Zavala's truck which he stated was being driven by Cortes. Vasquez paid Cortes three dollars per ride. Vasquez stated that the reason that he switched to Zavala's truck was that he was told that if he did not ride with the foreman, then he should look elsewhere for work. He further testified that there were about twelve people riding in the truck with him at first. When the crew started to work in the grapes, there were about eighteen riders.

Vasquez also corroborated, in principal part, Navarro's account of the exchange between Navarro and the foreman on Saturday. Vasquez testified that Navarro told the foreman that day that "there was no law to back up Zavala to obligate us to go ride in the truck," and that Zavala responded by telling Navarro not to interfere "because those were things that didn't concern him."

As previously noted, the witnesses called by Respondent

presented a substantially different account of the events that led up to Navarro's termination. Regarding the exchange that took place between Navarro and the foreman on Friday, Zavala stated that Navarro asked him for permission to leave work early, about 10:30 or 11:00, and that the foreman told Navarro that there would be no problem, since they were going to finish early. Navarro, according to Zavala, responded that whether the crew finished early or not, he was going to leave, that the foreman "knew nothing" and that Navarro was going to talk to supervisor Lynch about the problem. Zavala repeated that he could leave early, since they would be finished early, and that there would not be a problem. Navarro again stated that he had to talk to Lynch, because the foreman "didn't know anything," that he "had no experience." Zavala stated that it was not necessary for Navarro to say those things, that regardless the crew would be finishing early that Saturday. Before leaving work on Friday, Navarro told his foreman that he did not want to work with him because he "didn't know." Zavala denied saying anything to the crew during the course or as a result of this conversation. However, he altered this assertion immediately thereafter by testifying that he told the crew that they should not miss coming to work the next day because they were going to finish that ranch.

Worker Baudelio Cortes testified similarly to Zavala that when Navarro asked on Friday if he would be able to leave work early the next day, and Zavala replied that there was only a

small amount of work left and that it would be okay, Navarro responded by saying that the foreman "didn't know anything," that Navarro was going to talk to "the American," "the bigger man" about the problem.<sup>9</sup>

Zavala provided the following version of his exchange with Navarro on the following day. As Navarro was leaving the work site in his truck, he noticed the foreman speaking to a group of workers. Navarro then "came over to where the people were and he told them not to believe that which I was telling them because I didn't know anything, that they could come to work on foot, in a car or by plane." The foreman then told Navarro that he should not be telling the workers that because he "wasn't saying anything bad to the people." Navarro stated to the workers that they could come to work any way they wanted to, and that if there was something wrong they could go to the Union. Zavala answered that Navarro should not talk like that because the foreman was not saying anything wrong. Navarro continued to talk, telling the foreman "you don't have any schooling, you don't know anything regarding the job. You don't know what is to be a foreman." Zavala then told Navarro that he did not have any right to talk to him that way because he did not know whether the foreman had any schooling or not. Navarro responded by accusing him of being a shitty worker.

Zavala then warned Navarro not to continue, because he

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<sup>9</sup>If, as Cortes maintained, Zavala had no problem with Navarro's leaving early, Navarro's purported subsequent remarks would make no sense.

was going to be issued a warning notice for what had happened the previous day. Zavala stated that he did not give Navarro the notice at that time because he did not have his pickup there. Navarro answered "Okay, give it to me, I don't care." Zavala said that he would do so on the following Monday. Zavala stated that the reason he decided to give Navarro the warning was because the worker had "incriminated"<sup>10</sup> him a lot.

Zavala denied that he told any workers that they had to ride with anyone in particular, or that if they did not follow his directive, they would have to find some other work. He averred that he simply told the workers that they should help each other out by sharing riders and the cost of gasoline, that he didn't care how they got to work.<sup>11</sup>

On the following Monday, Zavala gave Navarro a warning notice based on his conduct the previous Friday. Navarro told the foreman that he was going to take the slip over to the Union. Navarro left the work site about nine and returned at about noon, at which time he served Zavala with a copy of an unfair labor practice charge.<sup>12</sup>

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<sup>10</sup>Such was the word offered in the translation of Zavala 's testimony.

<sup>11</sup>Zavala had also been called as an adverse witness by the General Counsel. While his account at that time paralleled that which he proffered when subsequently called by Respondent, in his initial testimony he stated that on Saturday Navarro said that he was going to speak to Dan Lynch about the problem. Zavala omitted this detail the second time he testified.

<sup>12</sup>The charge was presumably the outgrowth of Navarro's receipt of the warning notice.

After Zavala gave Navarro the warning notice on Monday, supervisor Jay Scott arrived at the work site. Zavala related to Scott what had happened with Navarro on the previous Saturday. Scott agreed with the foreman that as a result of Navarro's actions that day, the worker should be terminated "because he spoke that which he should not have said."

Zavala stated that when Cortes brought riders to work, the foreman did not ride with him. Zavala did not receive any money from Cortes because "that is something I could not do, that is, take money from anyone."<sup>13</sup>

Testimony was elicited from Zavala that for about seven months in 1985, Zavala had his license suspended. During this period, the foreman was driven to work in a company pickup by Cortes.<sup>14</sup> Although Zavala was initially confused as to the dates when he was being driven to work,<sup>15</sup> as will be discussed below, it was later developed that at the time of Navarro's termination, Cortes was not bringing any other workers to work because he was providing a ride to the foreman in the company truck, and was not allowed to bring any riders with him.<sup>16</sup>

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<sup>13</sup>Area Manager Dick Binns subsequently testified that should any of his supervisors receive such money it would be cause for termination.

<sup>14</sup>Binns testified that Cortes was paid by the company for the time he spent performing this service.

<sup>15</sup>Zavala initially testified that during the time of the events in question, he was driving himself to work.

<sup>16</sup>Zavala stated that his license had been suspended for a number of months because he had had no insurance when his vehicle was involved in an accident. He thought he had the problem

Jay Scott, when called to testify, stated that on the morning of Navarro's termination, he saw Zavala writing out a warning slip. The foreman asked Scott what he should put on the paper, since he had already issued Navarro one warning for his conduct the previous Friday. Upon hearing from Zavala that Navarro "had berated him in front of . . . some crew people," that he told the foreman that he was "stupid and uneducated," and not "worth a shit," he advised Zavala to put the word "insubordination" on the notice, and told him that the worker would be discharged at the end of the work day. It was Scott, therefore, who made the ultimate decision to terminate Navarro. Scott had concluded that Navarro had questioned the foreman's authority and insulted him, and that such behavior would not be tolerated in the work force. The reasons for Navarro not being immediately informed of this decision were that the office needed time to prepare his final paycheck, and that Scott believed that disciplining of workers should take place without others being present in order that an incident be avoided.

Baudelio Cortes corroborated Zavala's version of the Saturday incident. The worker stated that Zavala was telling some workers to take riders and get help with the gasoline expenses when Navarro intervened and told the workers that Zavala didn't know anything, that they should not pay attention to the

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cleared up in May, when he obtained the necessary insurance and purportedly submitted the proper form evidencing same to the DMV. Apparently, however, the DMV did not receive the form at that time, and Zavala had to resubmit it. Zavala did not actually get his license back until August.

foreman, that they could come to work in a car, in an airplane, anyway that they wanted to, that Zavala had no schooling, he knew nothing, and the "work is shit."<sup>17</sup> Cortes denied that Zavala told any workers that they had to ride with anyone, or that he threatened them with being replaced if they did not ride with a particular individual. He stated that he actually had bought a new truck about that time. When he eventually took riders to work, the maximum number he had was seven or eight, never twelve or eighteen. The riders paid him three dollars per day for the gasoline. He did not give any of this money to Zavala.

Cortes was the first witness to specifically note that when Zavala and Navarro had the confrontation which led to Navarro's termination, Cortes was taking Zavala to work in the company pickup, and his own truck was being taken apart. He did not begin to bring riders to work until after he stopped driving the company truck, which occurred in about August. Cortes began driving the foreman to work when the thinning began, which, according to his estimate, took place in early April. Cortes later stated that he started to take Zavala to work when the worker first began working for the company, in March or April of 1985. Cortes was in fact hired because Zavala needed a driver.

Vicente Hernandez, another workers in the Zavala crew, testified in conformity with the accounts of the Navarro-Zavala discussions provided by Zavala and Cortes. He stated in addition

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<sup>17</sup>Cortes noted that this last comment was made in English, although the rest of Navarro's remarks were apparently made in Spanish.

that at the time of the incidents in question, he himself was bringing riders to work, and that he had about four workers riding with him. Hernandez reported that at times, workers would ask the foreman about rides and that the foreman would refer these people to those who would drive. Hernandez denied that Zavala ever demanded that he share his riders with any other drivers.

Worker Tomas Ortiz similarly testified that on Saturday, May 4, Zavala was talking to several workers, telling them that "he was going to divide this among all of us so we could help ourselves with the gasoline." According to Ortiz, when Navarro approached and began to tell the foreman that he could not force the workers to ride with whomever the foreman wanted, "Tony [Zavala] was telling us something and Javier arrived, telling us something that was not what he was talking about."

Ortiz noted that after Navarro made the above remark, he was told by Zavala not to get involved because he was not in the conversation. "Then Javier told Tony that he didn't know how to govern the people, that he was a foreman who knew nothing." Ortiz denied that the foreman threatened anyone with loss of their jobs if they did not ride with the person that the foreman wanted.

At that time Ortiz had been driving fellow employee Ignacio Vasquez to work and continued to take Vasquez to work until some time thereafter, when Vasquez was laid off. When

Vasquez returned to work, he was driven by Baudelio Cortes.

Antonio Zavala, when recalled as a witness for the Respondent, clarified some of the points made in his prior testimony. As previously outlined, the warning notice which he gave to Navarro, based on his conduct on May 3, noted that his work was not being done right and that he talked too much on the job. Zavala explained that Navarro often fell behind in the work, that he was performing his duties improperly, and that he was talking a lot on the job. The foreman had told Navarro that it was permissible to converse on the job as long as his work was being done well.

Zavala recalled in greater detail the dates when Cortes acted as his chauffeur, driving the foreman's pickup and the foreman to work. As testified to by Cortes, Zavala was driven to the job by the worker from the time the thinning season began. Prior to that time, during the pruning, Zavala was driven to work by his assistant, Elias Francisco. However, during the thinning season, Francisco needed to take his own pickup to work because it was needed for hauling equipment. Zavala stated that Cortes drove him to work during the months of April, May, June and August. It was during this period that Zavala had his license suspended.

The company has a series of work rules which are posted at various locations on its work sites. The rules are prefaced by the statement that the "failure of any employee to follow these rules could be reason for immediate dismissal." Rule 5

states: "Employees shall not use abusive or threatening language towards their fellow employees or company officials."

Respondent also has a formal warning system described by manager Dick Buins as follows: ". . . if a crew member . . . is . . . doing something wrong . . . if he will not take correction . . . if the individual does not adhere to our rules and regulations, the performance of the work, . . . after a reasonable amount of time, we would issue a warning card. . . . [O]n the third time of the same offense the person would be terminated."

### III. ANALYSIS AND CONCLUSIONS

As a general rule, in order to establish a violation of sections 1153(a) and (c) of the Act stemming from an employee discharge, the General Counsel has the burden of establishing, by a preponderance of the evidence, that the employee participated in union or other protected, concerted activity, that the employer had knowledge of such participation, and that there was a causal connection between that activity and the employee's discharge. Once the General Counsel has established these prima facie elements of his case, the burden of proof then shifts to the employer to demonstrate that the discharge would have taken place even in the absence of any protected, concerted activity, i.e., there existed a legitimate business reason for the employer to take the disciplinary action which it did. Martori Brothers Distributors v. A.L.R.B. (1981) 29 Cal.3d 721; N.L.R.B. v. Transportation Management Corp. (1983) 462 U.S. 393; Royal

Packing Co. (1982) 8 ALRB No. 74; Lawrence Scarrone (1981) 7 ALRB No. 13; Yamano Farms. Inc. (1985) 11 ALRB No. 16; The Garin Company (1985) 11 ALRB No. 18.

General Counsel here did make out the requisite prima facie elements for his case. It was basically undisputed that Javier Navarro participated in union and other protected, concerted activities and that Respondent was aware of that participation. Since Navarro's responsibilities as crew representative in negotiations pre-dated by at least six months the discharge here complained of, any causal connection between those activities and the discharge is tenuous at best. Thus, Navarro's purported complaints about the abuse of supervisorial discretion in ordering certain drivers to relinquish their riders and the compensation they received therefor to Cortes, must constitute protected concerted activity within the meaning of the statute, and provide the motivation for Navarro's discharge in order for a violation to be found.

A review of the testimony clearly shows a seemingly irreconcilable divergence of views as to what actually transpired on Saturday, May 4 between Navarro and his foreman. I am unable to conclude, however, that either of the two basic accounts was wholly unreliable, or totally undeserving of credence. This is especially so because each version was corroborated by witnesses who were apparently neutral and disinterested. By the same token, I cannot wholly accept as accurate either the account of Navarro or that essentially supplied by his foreman.

Navarro's version cannot be accepted in toto since the central fact that prompted him to intervene in the Saturday discussion, Zavala ordering drivers, upon penalty of discharge, to relinquish their riders to his friend Cortes, was proven by uncontroverted evidence to be a factual impossibility: Zavala could not force the reassignment of riders to Cortes since Cortes was, at that time, driving Zavala to work in the company truck, not his own, and could not take any riders with him.<sup>18</sup> However, it does appear likely that on the day in question Zavala broached the subject of changing rider assignments since he felt that his suspended license would soon be restored, as he did obtain insurance that May and submitted documentation to the Department of Motor Vehicles at that time. It is also logical that he would suggest that workers ride with Cortes since that worker would resume driving to work in his own vehicle in the event Zavala's license was returned, and Cortes had helped Zavala get to work.

Zavala's recollection of events proved to be somewhat imperfect. Zavala had great difficulty recalling the periods during which his license had been suspended and when he required a driver to take him to work. His testimony on this particular issue was altered repeatedly. Other elements of Zavala's testimony demonstrate that he was not being entirely candid. For

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<sup>18</sup>This finding is made notwithstanding the testimony of Ignacio Vasquez to the contrary, to the effect that following May 4 he rode to work in "Tony's truck." Vasquez appeared somewhat confused as to the exact dates when he switched drivers, particularly since Ortiz himself stated Vasquez continued to ride with him following that Saturday until laid off.

example, Zavala denied that he told the crew on Friday, May 3, that they would, in effect, risk losing their jobs if they failed to report for work on Saturday. This denial makes little sense in light of the corroborated testimony of other witnesses that the statement was in fact made, that the company placed great importance on the finishing of that particular piece of work, and that the statement, in and of itself, was a fairly innocuous assertion of the foreman's authority to insure that he had the necessary work complement to complete an assigned task.

On balance, it seems that an accurate factual account of the Saturday confrontation between Navarro and Zavala would contain a synthesis of both of their recitations. As previously noted, it is sensible that Zavala would attempt to assist Cortes in procuring riders at that time, particularly because, as witnesses testified, Zavala would regularly try to refer riders to their fellow workers who drove. It would also appear likely that Navarro would demonstrate a lack of respect for his foreman, as he had done on the previous day when he admitted that he told Zavala he was going over the foreman's head regarding the request to leave work early that Saturday, and had prompted the foreman to issue him a warning notice for their "quarrel" on Friday.

Notwithstanding the foregoing, given the legal principles applicable to the case, it is not necessary to resolve absolutely these factual discrepancies. The view of the evidence which seems the most logical is that Navarro perceived that the foreman was abusing his authority as he partially overheard

Zavala's comments to workers at the end of Saturday's work. Although his assessment of the situation on Saturday was not an accurate one,<sup>19</sup> Navarro had the right to voice a protest about a matter which he felt affected the terms and conditions of employment of his fellow employees.

It has been recognized by this Board that within the panoply of rights granted employees in section 1152 is the right of employees to present grievances on matters affecting their terms and conditions of employment, as such rights may be construed as engaged in by workers for "mutual aid or protection." While mere "griping" about employment conditions is generally not considered protected activity, "when the griping coalesces with expression inclined to produce group or representative action, the statute protects the activity." Jack Brothers and McBurney (1980) 6 ALRB No. 12; see also J.R. Norton (1982) 8 ALRB No. 89. Navarro's intervention in the discussion after work on May 4 was just such an expression, as he sought to assert himself as the representative of his fellow workers, as he had done in the past, and to encourage them to resist what he believed to be the imposition by the foreman of an unreasonable condition of employment. I specifically find, therefore, that

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<sup>19</sup>Several witnesses, including Zavala and Navarro, stated that during the course of the Saturday dialogue Navarro was told not to interfere, or words to that effect. This remark would make sense in light of Navarro's less than complete understanding of the situation, and would also seem to incite Navarro's ire since he conceived of himself as a spokesman for his fellow workers, one who repeatedly brought work problems to management's attention.

Navarro's complaints about riders to the foreman on May 4 constituted protected, concerted activity. Notwithstanding this conclusion, however, it remains to be determined whether Navarro, while engaging in protected, concerted activity, conducted himself in such an objectionable manner as to provide the company with a legitimate, just cause for his discharge.

Workers are not expected to exhibit exemplary or even courteous behavior when they express job-related complaints to supervisors:

[F]lagrant conduct of an employee, even though in the course of section 7 activity [the N.L.R.A. counterpart of section 1152] may justify disciplinary action on the part of the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the Act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect . . . . N.L.R.B. v. Thor Power Tool Company (7th Cir. 1965) 351 F.2d 584, 587; see also Golden Valley Farming (1980) 8 ALRB No. 8.

In Giannini & Del Chiaro (1980) 6 ALRB No. 38, the Board applied the aforementioned rule of law. There, a worker protested the way in which a supervisor was treating another employee. The supervisor swore at the protesting employee and told him he was fired. Their argument became more heated and insults and obscenities were exchanged. As the supervisor walked to his pickup, purportedly to get a warning notice, the protesting employee encouraged other employees to gather around and witness the dispute. The warning slip was not issued, the two men calmed down, and everyone resumed working. Later that day, the supervisor contacted the ranch manager, told him about

the earlier dispute and another incident involving the same employee when that employee had refused a foreman's order. The manager recommended that the employee be fired, and he was so informed that evening.

In ruling that the employee was discharged for reasons violative of section 1153(a) of the Act, and rejecting the employer's argument that his acts did not constitute protected concerted activity and that the employee was lawfully discharged for insubordination, the Board stated: "The law allows employees leeway in presenting grievances related to their working conditions. Such activity loses its mantle of protection only in flagrant cases in which the misconduct is so violent or of such serious nature as to render the employee unfit for further service. [Citing cases.] As long as the character of the conduct is not indefensible in the context of the grievance involved, the activity remains protected. [Citing cases.]" 6 ALRB NO. 38, p. 4.

The recent case of V. B. Zaninovich & Sons (1986) 12 ALRB No. 5, further explicates and re-affirms this rule of law. Zaninovich additionally contains many similarities to the Navarro discharge under consideration. In that case, an "outspoken [union] advocate" whose "union activity was known to Respondent" (Gonzalez) met with fellow employees to discuss the difficulties experienced by one of their number (Sanchez) in having a relative re-hired. The group decided to assemble the following day at the company offices to discuss the problem with

management.

That next day, Sanchez went into the office to speak with one of the owners while Gonzalez and twenty other workers waited outside. After Sanchez reported to the group the result of his discussion, the workers remained dissatisfied. They went in the office en masse, with Gonzalez acting as spokesperson and interpreter. Gonzalez accused the owner of giving Sanchez the "runaround" on the employment question, and also stated that the group was protesting "discrimination" in the crew. The owner denied the accusation, and his uncle, also present, became angry and shouted at Gonzalez, telling him he was a "troublemaker," that he did not represent the workers, and demanded that he leave the office. Gonzalez refused to obey, and continued to speak and interpret. The uncle repeated the demand that Gonzalez depart several times, and even attempted to escort him from the office. Gonzalez replied in effect that he would leave only after he had finished.

Sanchez ultimately convinced Gonzalez that he should leave the office, whereupon the employment matter was resolved by the owner, Sanchez, and his wife.

The following day, Gonzalez received a warning notice for insubordination. As this was the third such notice he had received that year, Gonzalez was terminated pursuant to company policy.

Respondent there argued that Gonzalez<sup>1</sup> activity was not protected since the worker knew that the Sanchez matter had been

resolved<sup>20</sup> and seized the opportunity to provoke a confrontation, construing Sanchez' report in a way that suited his purposes. In short, Gonzalez was acting in bad faith. The Board found, however, that Gonzalez did have a legitimate basis for talking to the owner, given the uncertainty about the employment offer.

In this respect, Zaninovich is similar to the case under consideration since Navarro may have used the Saturday discussion among Zavala and certain crew members as a means to continue his dispute with foreman. Navarro's disagreement with him may well have carried over from the previous day, if not in subject matter, at least in sentiment.<sup>21</sup> This may also explain Navarro's impetuosity, interjecting into a conversation that he only partially understood, and Navarro's readiness to believe that Zavala was unfairly throwing his weight around. Nonetheless, as in Zaninovich, Navarro had a legitimate basis for expressing concern: he understood the foreman to be wrongfully threatening workers with job loss if they did not relinquish their riders and the money they paid to his friend Cortes.

More importantly, also like the instant case, "[a]t issue [in Zaninovich] is a conflict between an employer's right to engage in concerted activity and the Employer's right to

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<sup>20</sup>Prior to the group's entry into the office, Sanchez had reported to them that his relative had been promised rehire within the week. The workers questioned the sincerity of the offer.

<sup>21</sup>According to Zavala, similar words, to the effect that the foreman "knew nothing," were uttered by Navarro during the two incidents.

maintain order and respect in the conduct of its business.  
(United States Postal Service (1983) 268 NLRB 274 [114 LRRM 1281].) "The Board in Zaninovich explicitly recognized that because of the confrontational and adversarial nature of organizing campaigns, collective bargaining and grievance processing, "'tempers of all parties flare and comments and accusations are made which would not be acceptable on the plant floor.'" (United States Postal Service, supra, 268 NLRB at 275.)" 12 ALRB No. 5, p. 12. The opinion then quotes language from another Postal Service case which is particularly apt:

[The NLRA] has ordinarily been interpreted to protect the employee, against discipline from impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts. Both the Board and the courts have recognized that some tolerance is necessary if grievance meetings are to succeed at all; as we have noted before, 'bruised sensibilities may be the price exacted for industrial peace.' [Citations omitted.] United States Postal Service v. N.L.R.B. (1981) 652 F.2d 409 [107 LRRM 3249].)

Another point of similarity between Zaninovich and the present case is that in neither situation did there exist a contractually sanctioned formal grievance mechanism. Yet in both cases employees were encouraged to voice their job complaints to superiors. Thus in that case, as well as here, "the conduct in question . . . did occur in a setting which calls for greater leeway for impulsive behavior." 12 ALRB No. 5, at p. 12.

In the instant case, Navarro's remarks to Zavala, while somewhat impertinent and discourteous, were not so egregious as to deny Navarro of the Act's protection. No violence or threats were involved; with one minor exception, no profanity was used.

Occurring after the work day was over, the exchange did not disrupt company operations or distract employees from the performance of their duties. Only a relatively small number of employees witnessed the confrontation As stated in Zaninovich, Navarro's conduct "was not so aggravated as to remove it from the scope of tolerance that must be afforded to participation in a grievance meeting" (12 ALRB No. 5 at p. 11) , Zavala's "bruised sensibilities" notwithstanding. Balancing "the employer's right to engage in concerted activity" against "the employer's right to maintain order and respect," the balance must be tipped in the employee's favor in this situation.

A final consideration underscores the unlawful nature of Navarro's discharge. Given the regrettable but by no means severe nature of Navarro's remarks to Zavala, it would appear that termination for such statements would be unduly severe and discipline disproportionate to the offense. Respondent had a warning policy whereby an employee might be discharged for three offenses within a certain period. While Respondent may have had a work rule prohibiting the use of "abusive or threatening language" while talking to a supervisor, I have found, as discussed above, that Navarro's statements were not threatening, nor were they overly abusive. Although a warning notice might certainly have been in order for Navarro's behavior that Saturday,<sup>22</sup> I cannot conclude that these actions, in and of

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<sup>22</sup>Significantly, General Counsel did not allege that the warning notice that Navarro received for his conduct on Friday, May 3, was prompted by unlawful considerations, although a

themselves, should warrant termination under Respondent's own rules. Discipline such as termination which does not appear to be commensurate with the offense committed can provide evidence that the discharge would not have occurred "but for" a worker's participation in protected, concerted activities. (See Rigi Agricultural Services, Inc. (1982) 9 ALRB No. 31.<sup>23</sup>)

I therefore find that Respondent violated section 1153(a) of the Act by discharging Javier Navarro.

RECOMMENDED ORDER

By authority of Labor Code section 1160.3 the Agricultural Labor Relations Board (Board) hereby orders the Respondent D'ARRIGO BROTHERS, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging, laying off or otherwise discriminating against any of its agricultural employees in regard to hire or tenure of employment because of their protected activities.

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

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charge based on this notice had been filed. That notice states that it was issued, in part, because Navarro that day had a quarrel with the crew boss.

<sup>23</sup>General counsel also argued that Navarro's discharge was in part prompted by the fact that he had filed a charge resulting from his receipt of a warning notice for Friday's conduct. However, the evidence was insufficient to establish that Respondent was aware of the charge at the time the decision to terminate him was made.

exercise of the rights guaranteed them by section 1152 of the Act.

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

( a ) Offer to Javier Navarro immediate and full reinstatement to his former or substantially equivalent position and make him whole for all losses of pay and other economic losses he has suffered as a result of the discrimination against him, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

( b ) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay periods and the amounts of backpay and interest due under terms of this Order.

( c ) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purpose set forth hereinafter.

( d ) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this order, to all agricultural employees employed by

Respondent from January 1, 1984 to the date of issuance of this Order.

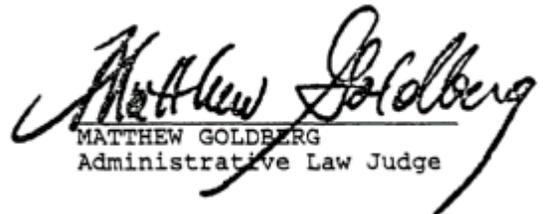
( e ) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

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

( g ) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the

steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: June 27, 1986

  
MATTHEW GOLDBERG  
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, D'ARRIGO BROTHERS, had violated the law. After a hearing at which each said had an opportunity to present evidence, the Board found that we did violate the law by discharging Javier Navarro because he engaged in protected, concerted activity. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that 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 unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another, and
6. To decide not to do any of these things.

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

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge or layoff any employees for complaining about working conditions.

WE WILL reimburse Javier Navarro for all losses of pay and other economic losses he has suffered as a result of our discriminating against him plus interest and in addition offer him immediate and full reinstatement to his former or substantially equivalent position.

D'ARRIGO BROTHERS

By:

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(Representative)

(Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE.