Visalia, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

VISALIA CITRUS PACKERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 83-CE-41-D 83-CE-42-D 83-CE-47-D 83-CE-51-D 10 ALRB No. 44

DECISION AND ORDER

On December 14, 1983, Administrative Law Judge (ALJ) Barbara Moore issued the attached Decision in this matter. Thereafter General Counsel, Respondent and the Charging Party, United Farm Workers of America, AFL-CIO (UFW or Union) each filed exceptions to the ALJ's Decision, and briefs in support thereof, and General Counsel and Respondent filed reply briefs.

Pursuant to the provisions of California Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings, and conclusions except as modified herein, and to adopt her proposed Order, as modified.

[1/] All section references herein are to the California Labor Code unless otherwise specified.

Respondent Visalia Citrus Packers (VCP), a commercial packing house, employs two labor contractors to harvest oranges in the Visalia area. In February of 1983, the UFW began an organizing campaign at VCP, and an election was held on March 1, 1983. The first tally of ballots showed the Union prevailing with 41 votes to 39 for No-union. Five ballots were challenged, and Respondent filed election objections. On June 3, 1983, an amended tally was issued after the Regional Director issued a report recommending all five ballots be opened. Two of the five challenged ballots were opened because Respondent did not oppose the recommendation regarding them, and the Union lost its two vote lead. The vote was then 41 to 41, with three challenged ballots still unresolved. An investigative hearing in late July of 1983 was held to resolve the remaining three challenges and Respondent's election objections. VCP withdrew challenges to the ballots of discriminatees Raul Rodriguez and Manuel Rentena midway through the hearing. (See Visalia Citrus Packers (1984) 10 ALRB No. 32.)

The first of the instant unfair labor practice charges was filed on March 14, 1983. The five alleged discriminatees, all union supporters, were all either fired or laid off within two weeks of the certification election. Allegations regarding Rogelio Chavez and his cousin Mario, both employees of labor contractor Erma Lee Gabinette and both fired within days of the election, figured prominently in Respondent's objections petition, or and the challenge to Mario's ballot was litigated at the representation hearing. Students Raul Rodriguez and Manuel

Renteria, who had worked in contractor Ralph Diaz' crew on weekends and holidays and during the summer, cast the two challenged ballots which were withdrawn during the representation hearing. They were both laid off the day after the election. The fifth alleged discriminatee, Raul Rivera, a good friend and crew mate of Rogelio, was fired the day after Rogelio.

We approve of the ALJ's recommended disposition of the charges relating to the firings of the Chavez cousins[2/] and Rivera and the layoff of Renteria.[3/] We reject her conclusion that the layoff of Rodriguez and the subsequent refusal to rehire him did not violate the Agricultural Labor Relations Act (ALRA or Act).

Both Raul Rodriguez and Manuel Renteria were laid off on March 2, one day after the election. Rodriguez' uncle Juan was told by supervisor Virginia Saucedo not to bring his nephew Raul, or his wife, Carmen, to work anymore. Juan passed the order on to Raul's father, Francisco, who testified that he asked Saucedo on the next day the reason for the layoffs and she claimed

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[2/] We reject Respondent's argument that the timing of Rogelio's discharge was controlled by his own conduct, since it is not the proximity of the election to the dispute between Chavez and Gabinette that we find critical but the relation between the election and the resolution of the dispute. Respondent's argument that General Counsel failed to establish a suspension or warning policy is also without merit. General Counsel showed that similar misconduct in the past had been ignored by Gabinette until supplemented by actual physical threats. Respondent's erroneous claim that the ALJ's "mixed motive" theory was not even litigated by the General Counsel is belied by General Counsel's introduction of evidence of Gabinette's past response to insubordination.

[3/] No exceptions were taken to the ALJ's proposal to dismiss the allegations relating to Raul Rivera.

she had "orders" but she could not tell "how or why." Francisco also testified that he regularly asked Saucedo if he could bring Raul during the spring following the election and she regularly turned him down, saying she did not know when he could return and "all she did was receive orders."[4/] According to contractor Gabinette, picking was heavy in early March.

VCP manager Bob Bellar testified that he was surprised to see that Rodriguez and Renteria had voted since he had what he considered to be a well-established and long-standing policy prohibiting the minor children of regular employees from working weekends and vacations unless there was enough work to keep the steady employees busy. Supervisor Saucedo and the regular workers who testified denied knowledge of such a policy, and Claude Lawson, the field man whom Bellar claims to have instructed regarding the policy, did not testify. Bellar admitted that, after laying off Raul and Manuel, he permitted a third child to continue working. He claims that he had feared unfair labor practice charges if he terminated her because her name was on the eligibility list submitted for the election. We agree with the ALJ that Bellar's explanation was unpersuasive, especially given the undisputed evidence that Manuel and Raul actually worked during the eligibility period and should also have been included

[4/] Saucedo denies this but was specifically discredited by the ALJ. She credited Rodriguez based on his "expansive, voluble" demeanor.

on the list.[5/] Bellar also failed to explain how the policy regarding minors could have encompassed activist Juan Rodriguez' wife, Carmen.

The ALJ found that the timing and unevenness of Respondent's enforcement of the "minor policy" was suspicious. However, she concluded that the suspicions were "undermined" by 'the fact that "the real union supporters" were not laid off.

We agree with the General Counsel and the UFW that the ALJ erred in her assumption that an employer would not lay off a part-time family member in order to retaliate against the more active fulltime members. The National Labor Relations Board (NLRB or national board) has recognized the intimidating effects of firing or laying off relatives of union activists. (See Forest City Containers (1974) 212 NLRB 38 [87 LRRM 1056], Amerace Corp. (1975) 217 NLRB 942 [89 LRRM 1187], Ridgely Manufacturing Co. (1973) 207 NLRB 83 [85 LRRM 1158], Champion Papers, Inc. (6th Cir. 1968) 393 F.2d 388 [68 LRRM 2014].) The timing of the layoffs the day after the election, the internal inconsistencies in manager Bellar's testimony, the contradictions between his testimony and that of supervisor Saucedo, the uneven enforcement of the policy and the inclusion of Carmen Rodriguez

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[5/] The challenges to the ballots of Raul and Manuel were based on the allegation that they had not worked during the eligibility period. Bellar claims to have been told at the time of the election by Lawson and Saucedo that Rodriguez and Renteria did not work during the eligibility period. Saucedo testified that she had always known they worked during that period and was never questioned about their eligibility. Bellar also claimed to have reviewed the payroll records to determine their eligibility. Later he changed his testimony to deny having personally reviewed the payroll records.

in the layoff all undermine Respondent's defense that the termination of Haul Rodriguez was based on a nondiscriminatory policy. We find that the discharge of Raul Rodriguez derived from Respondent's intent to intimidate the Rodriguez family, well-known union supporters. We therefore reject the ALJ's conclusions that the discrimination against the Rodriguez family through a discharge of a relatively innocent family member is not unlawful. We will accordingly order that Rodriguez be made whole for his wrongful discharge.

We agree with the ALJ's conclusion that no causal connection was established by the General Counsel between Respondent's anti-union animus and Renteria's discharge. The only evidence suggesting a violation regarding Renteria's discharge was his friendship with Raul Rodriguez and an ambiguous policy. While we do not find the reason purporting to justify the discharge of Renteria to be convincing, insufficient proof as to Respondent's actual motivation was adduced.

We also find that Respondent violated sections 1153(c) and (a) by refusing to rehire Raul Rodriguez when he returned to Visalia on July 26 from summer classes at UCLA. The hearing on the VCP election case was in progress at the time, and the challenge to Raul's ballot was still unresolved. Raul's father Francisco testified credibly and without specific rebuttal[6/]

[6/] Saucedo testified on rebuttal that she told Francisco she could not rehire Raul because the picking was slow and she had been told not to hire anybody. She did not specifically deny having made the comment about Raul's participation in the

(fn. 6 cont. on p.7)

that Saucedo angrily told him Haul could not return to work because "you want to bring back Raul because he had to go and testify at [the RC hearing]." Crediting such overt evidence of retaliation,[7/] we do not require General Counsel to prove the existence of a job vacancy at the time of each-application since the futility of reapplication is apparent. (See J. R. Norton v. ALRB (1984) ___ Cal.App.3d ___ [205 Cal.Rptr. 165].) (See also Sam Andrews' Sons (1982) 8 ALRB No. 69, citing Shawnee Industries, Inc. (1963) 140 NLRB No. 139 [52 LRRM 1270].)

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Visalia Citrus Packers, its officers, agents, successors, and assigns, shall:

(fn. 6 cent.)

representation case hearing. In any case, we are entitled to conclude that because a witness has dissimulated about some things, her entire testimony is to be distrusted. (Nelson v. Black (1954) 43 Cal.2d 612; Stadley v. Pinebland Co-op Assn. (1962) 203 Cal.App.3d 390, 396; Cottle v. Gibbon (19621 200 Cal.App.2d 1,7.

[7/] Saucedo's comment indicates to us that the refusal to rehire Raul when he returned from UCLA also violates section 1153(d). Raul's testimony at the RC hearing was necessary to defeat Respondent's challenge to his ballot, enabling his union support to bear fruit and affect the election result. Given the well-known union sympathies of Raul's family and our finding of discrimination in Raul's layoff, as well as the evidence of employer knowledge of Haul's own -- albeit limited union activity and Respondent's insistent challenge to his --vote, it can be inferred that Respondent knew that Raul and his family had cast their ballots for the union and that it retaliated against him for that reason. Since Respondent's refusal to rehire Raul was alleged and litigated as a violation of section 1153(c) and (a), and a finding that section 1153(d) was also violated would not affect the remedy, we decline to find a violation of section 1153(d).

1. Cease and desist from:

(a) Discharging, laying off, refusing to rehire or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because she or he or members of his or her family have engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining or coercing any agricultural employee in the 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 Rogelio Chavez and Haul Rodriguez immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Rogelio Chavez for all losses of pay and other economic losses he has suffered as a result of his discharge on March 9, 1983, 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. (1982) 8 ALRB No. 55.

(c) Make whole Raul Rodriguez for all losses of pay and other economic losses he has suffered as a result of his layoff on March 2, 1983 and denial of rehire on July 28,

1983, 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. (1982) 8 ALRB No. 55.

(d) 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 period and the amount of backpay due under the terms of this Order.

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

(f) 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 at any time from March 2, 1983, until March 2, 1984.

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

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice,

in all appropriate languages, to all of its agricultural 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 and/or their rights under the Act. The Regional Director shall determine a 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.

(i) 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 therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: October 19, 1984

PATRICK W. HENNING, Member

MEMBER McCARTHY dissenting in part:

I would affirm the Administrative Law Judge's (ALJ) Decision in its entirety. Unlike my colleagues, I do not disagree with the analysis and conclusions of the ALJ concerning the layoff of either Raul Rodriguez or Manuel Renteria.

Dated: October 19, 1984

JOHN P. McCARTHY, Member

MEMBER CARRILLO dissenting in part:

The majority opinion, in declining to find a violation in the layoff of Manuel Renteria, is internally inconsistent. The majority (myself and Member Henning) rejects Respondent's defense that the layoffs of Raul Rodriguez and Manuel Renteria were based on a nondiscriminatory policy of prohibiting the minor children of regular employees from working weekends and vacations unless there was enough work to keep the steadies busy. If Rodriguez' layoff was in fact motivated by the intent to intimidate his family, as found by the majority, the "policy" can only have been a pretext developed to disguise Respondent's unlawful intent. Manuel Renteria was concededly a victim of that policy. Legal precedent is well-established -- and the logic seems clear -- that when both union supporters and nonsupporters are affected by a simultaneous layoff, the layoff of the nonsupporters violates the Act if it was intended "to give color to a ... defense" that the layoff was

nondiscriminatory. (Howard Johnson Company (1974.) 209 NLRB 1122 [86 LRRM 1148]. See also Goshen Litho, Inc. (1972) 196 NLRB 977, 989-992 [80 LRRM 1829] enforced in pertinent part in 476 F.2d 662 [83 LRRM 2001] (2d Cir. 1973).) In Howard Johnson the Board, while accepting the Administrative Law Judge's (ALJ) finding that layoffs were economically motivated, found that layoffs of union nonsupporters, allegedly included with union supporters "so it wouldn't look too bad," violated the National Labor Relations Act because of the causal connection between their layoff and that of the union supporters. In Goshen the National Labor Relations Board adopted the ALJ's finding that layoff of the nonunion balance of a crew was intended to disguise the discriminatory intent to layoff pressman Gillespie, the one strong union adherent of the crew. The ALJ, while discrediting testimony of a supervisor's explanation that it "wouldn't look good" if only Gillespie were laid off, inferred from the lack of legitimate business motivation for the layoffs that the purpose for laying off Gillespie was to discourage support for the union and the purpose for laying off the rest of the crew was "to conceal that purpose and give color to Respondent's economic defense." (196 NLRB 977 at 992.)

The same conclusion, in my view, is inescapable here. Respondent's only explanation for the layoff of Renteria is its decision to enforce a policy which this Board finds in effect to be pretextual and discriminatory in its intent. What more

could be needed to find a causal connection between Respondent's antiunion animus and Renteria's discharge?

Dated: October 19, 1984

JORGE CARRILLO, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Delano Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we, Visalia Citrus Packers, 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 laying off Raul Rodriguez on March 2, 1983 because of the union activity of Rodriguez' family members and by refusing to rehire Raul Rodriguez on July 28, 1983 because of his expected involvement in the Union's opposition to the challenge ballot proceedings and by discharging Rogelio Chavez, on or about March 9, 1983, because he engaged in union 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 farm workers 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 to obtain a contract covering 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 or protect one another; and
6. To decide not do do any of these things.

WE WILL NOT discharge, lay off, refuse to rehire or in any other way discriminate against, interfere with, or restrain or coerce you or any member of your family because of the exercise of your or any member of your family's right to act together with other workers to help and protect one another or any other right mentioned above.

SPECIFICALLY, WE WILL NOT hereafter layoff, discharge or refuse to rehire any employee for engaging in protected union activity or to discourage an employee's family members from engaging in protected union activity.

WE WILL reinstate Raul Rodriguez and Rogelio Chavez to their former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because of their layoff, discharge or denial of rehire, plus interest.

Dated: VISALIA CITRUS PACKERS

By: _____
(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. 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

VISALIA CITRUS PACKERS

10 ALRB No. 44
Case Nos. 83-CE-41-D
83-CE-42-D
83-CE-47-D
83-CE-5l-D

ALJ Decision

ALJ found prima facie case of discriminatory discharge met as to three workers fired within two weeks of representation election and discriminatory layoff of a part-time employee who was the son of known union activists but found no prima face case was made that the simultaneous layoff of another part-time worker, the son of other union supporters, was discriminatory since the evidence was inadequate to prove employer knowledge of his parents' union support. As to two of the three dischargees, ALJ found Respondent met its burden of proving it fired them because of their misconduct and dismissed the allegations as to them. The third she found to have been a "true case of mixed motive" but that the labor contractor would probably not have fired him for his insubordination alone. The ALJ also found that the suspicions regarding the layoff of the union activists' son, were undermined by the fact that "the real union supporters," his father and uncle, were retained. She found that Respondent's later refusal to rehire this same individual was unaccompanied by adequate proof that a vacancy in fact existed at the time of application.

Board Decision

The Board adopted the ALJ's recommendation as to all three discharges but Members Henning and Carrillo found that the layoff and later refusal to rehire one of the part-time employees, son of the known union activists, did violate section 1153(c) and (a) of the Act and rejected Respondent's defense that the layoff was made pursuant to a nondiscriminatory policy not to permit students who are children of regular employees to work weekends and vacations unless there was enough work to keep the steady employees busy. As to the later refusal to rehire the same individual, the majority credited his father's testimony that the supervisor explained her refusal to rehire his son because of his planned participation in a representation case hearing. The majority therefore found unnecessary additional evidence that a vacancy existed. Member Carrillo dissented from the majority's (Henning and McCarthy) failure to find a violation in the layoff of the other student, given that his layoff was explained by the same student "policy" which the majority opinion had discredited. Member McCarthy, concurring and dissenting, would have adopted the ALJ's Decision in its entirety.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case Nos. 83-CE-41-D
	)	83-CE-42-D
VISALIA CITRUS PACKERS,	)	83-CE-47-D
	)	83-CE-51-D
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

Appearances:

Derek Ledda
Delano, California
for the General Counsel

Pedro Duran
Delano, California
for the Charging Party

William S. Marrs
Valencia, California
for the Respondent

Before: Barbara D. Moore
Administrative Law judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA D. MOORE, Administrative Law judge:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This case was heard by me on September 12, 13, 14, 15, 19, 20 and 21, 1983,[1/] in Visalia, California, based on a complaint issued on May 15, 1983. The complaint is based on four charges filed by the United Farm Workers of America, AFL-CIO (hereafter UFW, Union or Charging Party) with the Agricultural Labor Relations Board (hereafter Board or ALRB) during March. Copies of the charges, the complaint and notice of hearing were all duly served on Respondent Visalia Citrus Packers (hereafter Respondent, VCP or the Company).

General Counsel amended the complaint at the hearing. As amended, the complaint alleges that Respondent violated sections 1153(a) and (c) of the Agricultural Labor Relations Act (hereafter the Act of ALRA)[2/] by discharging Raul Rivera, Rogelio Chavez and Mario Chavez and laying off Manuel Renteria and Raul Rodriguez[3/] because of their Union activities.

In its answer, filed on May 24, 1983, Respondent denied that it had violated the Act in any way and asserted various affirmative defenses. Respondent contends that Raul Rodriguez and Manuel Renteria were not allowed to work on some weekends and holidays because of a non-discriminatory policy preventing children

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1. All dates refer to 1983 unless otherwise noted.

2. All section references are to the California Labor Code unless otherwise specified.

3. The amended complaint also alleges refusals to rehire Raul Rodriguez while he was laid off including a separate refusal to rehire him on July 27 after he had worked for a time and then left work. This conduct is the subject of charges numbered 83-CE-122-D and 83-CE-232-D respectively. (II: 2.)

of regular employees from working when there is not sufficient work for the regular full-time employees. The Company asserts that Rogelio Chavez was fired for insubordination, Mario Chavez was fired for brandishing a gun, and Haul Rivera was either discharged for being insubordinate or voluntarily quit.

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. The General Counsel and Respondent each filed a post-hearing brief. Upon the entire record, including by observations of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following findings of fact and conclusions of law.[4/]

I. Jurisdiction

Respondent is an agricultural employer within the meaning of section 1140.4(c). The UFW is a labor organization within the meaning of section 1140.4(f). Each of the alleged discriminatees is

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4. Respondent moved to strike all evidence related to the discharge of Rogelio Chavez. The California Unemployment Insurance Appeals Board has rendered a decision finding that Mr. Chavez was discharged for cause, and Respondent argues that General Counsel is collaterally estopped from "relitigating" the issue. Respondent further urges that I make a finding of fact "consistent with and in conformity with" the finding of that board.

Precedent of the National Labor Relations Board (hereafter NLRB) is clearly contra to Respondent's position (H.M. Patterson & Sons, Inc. (1979) 244 NLRB 489 [102 LRRM 1067].) As the NLRB has noted, its decision, and that of its Administrative Law judges, "'must be based upon an independent consideration and evaluation of the evidence received in the unfair labor practice proceeding.'" (Justak Brothers and Company, Inc. (1981) 253 NLRB 1054 [166 LRRM 1301] aff'd (7th Cir. 1981) 664 F.2d 1074 [108 LRRM 3178], quoting from Bolsa Drainage, Inc. (1979) 242 NLRB 728- [101 LRRM 1372] aff'd (9th Cir. 1981) 639 F.2d 789 [108 LRRM 2344]. Accordingly, the motion is denied.

an agricultural employee as defined in section 1140.4(b). Erma Lee Gabinette, Joe Vigil, Ray Vigil, Virginia Saucedo and Bob Bellar are supervisors within the meaning of section 1140.4 (j). All jurisdictional facts were admitted by Respondent in its answer.

II. Company Operations

Respondent is a commercial packing house located in Visalia, California. The Company harvests and packs oranges in Visalia and the surrounding area. Bob Bellar has been the manager of the Company since 1968. (VII:17.) The Company employs two labor contractors to harvest the oranges. Ralph Diaz is the contractor in the North area (Ivanhoe-Woodlake area). Virginia Saucedo works for him and supervises the workers in the northern crew.

Erma Lee Gabinette and her brother, Joe Vigil, are the labor contractors in the South area (Delano). They both supervise the workers in the southern crew although Ms. Gabinette is in charge and usually does any firing and hiring.

The Company employs two field representatives who, among other things, coordinate the picking of the oranges with the packing. In the company hierarchy, they are the link between Bellar and the labor contractors. Bellar does not spend a lot of time in the fields and relies on them to carry out his directives. The field representative in the north is Claude Lawson. In the south, it is Ray Vigil, the brother of Ms. Gabinette and Joe Vigil.

The Company is characterized by having many long-term employees both among its supervisory and rank and file personnel. Ms. Gabinette has worked at VCP for approximately 10 years, 6 of

these as a labor contractor. (V:41.) Joe[5/] has worked for the Company for about 8 years, the last 5 as a labor contractor. (II:61.) Virginia Saucedo has been with the Company for nineteen years. (II:72.)

Many of the alleged discriminatees were long-term employees. Rogelio Chavez worked at VCP for 8 years (III:2); Mario Chavez for 5 years (III:126). Haul Rodriguez has worked in the crew ever since his family began work at VCP in 1977, some 6 years (IV:37.) Manuel Renteria and his family have worked for Respondent for about 2 or 3 years (11:76; IV:61). Raul Rivera, on the other hand, worked at VCP for only a few months (II:65).

Before firing Rogelio, Ms. Gabinette had fired only two other workers. In 1982, she fired a mother and daughter. The daughter accused Ms. Gabinette of underestimating the number of boxes she had picked, called her a cheater and said Gabinette stole from all the pickers. Gabinette walked away, but the girl sought out her mother who physically accosted Ms. Gabinette and threatened to beat her up. At that point, Gabinette fired them both. (I:67-68.) Ms. Gabinette said since the election on March 1, she had fired Rogelio, Enrique Rivera, Efrain Chavez and Salvadore Figueroa. (II:9.)

In order to visualize the circumstances surrounding the discharges of Rogelio Chavez and Raul Rivera, it is helpful to have an understanding of how oranges are picked. Generally, every four

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5. Several individuals in this case have the same surname. For simplicity's sake, I will refer to them in the decision by their given names.

rows of orange trees are separated by a drive. In the morning, fork lift drivers box the groves. This involves taking bins and placing them in the drives. Each worker is assigned to pick a set of trees, usually consisting of two trees to the right and two to the left of the drive. Each worker fills her/his own bin and is paid only for full bins.

When they box the grove, the fork lift drivers assess the amount of fruit to be picked and estimate the number of bins required. Nonetheless, at the end of the day there will be some bins which are not filled. These are called started bins. After the workers finish picking a drive, the fork lift driver moves all the started bins to one location at an outer edge of the grove. Workers finish their workday at different times. At that time, if they have a started bin to fill, they go to the central location and fill their own bins. (II:30-31.) This procedure allows the bins to be easily hauled away to the packing house and obviates the need to move started bins around at different times to different places wherever workers might be when they got ready to leave for the day. Although this is the typical practice, fork lift drivers on occasion would move started bins for workers who so requested if the request could be easily accommodated. (II:33.)

III. BACKGROUND

In February, the UFW began an organizing campaign at VCP. Both the Union and the Company waged a vigorous campaign. Respondent hired the labor consulting firm of Mark Roberts Associates whose representatives spoke frequently with Company supervisors and rank and file employees. Similarly, Union

representatives met with workers in the fields before and after work and during lunch time. An election was held on March 1. Election objections were filed, and a hearing was held by an Investigative Hearing Examiner (THE) of the Board. The IHE issued his decision, which is currently on appeal to the Board, on October 14.

IV. THE DISCHARGES AND LAY OFFS

A. Rogelio Chavez

Erma Lee Gabinette was Rogelio's supervisor for the entire 8 years he worked at VCP. She acknowledged that prior to the incident on March 9 when she fired him, she had not had any problems with him. The problems began in 1983. (I:71.) She also acknowledged that she knew Rogelio was a vocal union supporter. (I:70-71.)

On March 9, Rogelio was nearing the end of his work for the day. He had a started bin left from earlier in the day. He yelled to Ms. Gabinette who was some distance away. She walked over towards him, and as she got closer and could hear him better, asked what he wanted. He told her he wanted the fork lift driver to move his started bin over to the western edge of the grove where he was finishing picking. She told him that the started bins had already been moved over to the eastern edge and that he should go over there. He responded that he had just seen his started bin about 2 drives to the south. (Resp. Ex. 3.) He insisted he wanted it moved to where he was.

Rogelio admitted there were other bins on each side of his bin, and Respondent's witnesses credibly testified that it would not be normal procedure to move a bin where Rogelio wanted.

Nonetheless, Ms. Gabinette did not tell him that the bin could not be moved, rather, she only told him to get the fork lift driver himself.

The crux of the dispute is the ensuing verbal exchange. Rogelio maintains he simply told Ms. Gabinette that it was not his job, that she was the forelady and it was her job, and she should go. (III: 6.) He testified she then told him that no dirty worker was going to yell at her. (III: 6.)

She then told him that he was fired. He testified she also said many other abusive, offensive things but that he did not really pay attention to her because he could not say anything back. (III: 87-88.) He asked Ms. Gabinette if he would be paid for his started bin since normally workers were only paid for full bins. She said "no" and turned and walked off. He went over to the edge of the grove and sat down to wait for the workers he rode with to finish working. Ray Vigil came over and asked what had happened and told Rogelio he would pay him for his started bin. (III:12.)

Ms. Gabinette's version is significantly different. After she told Rogelio to get the fork lift driver himself, she asserts he refused and said "what the hell" or "what the fuck" was she there for; that she "wasn't worth a damn as a crew boss." (VI:77; 96-98.) At that point, she told him he was fired and told him to leave. He just laughed and made no move to obey her order. She then left to get Ray Vigil to order Rogelio to leave. She denied calling him a "dirty worker" or making any abusive comments when she fired him.

Ray walked over to Rogelio and told him to leave. Ms. Gabinette arrived shortly after that, and, as Rogelio was walking

away, he told her that even though he had a started bin, to her it was full, i.e. he expected to be paid for it.

I credit Ms. Gabinette's version based on logic, on inconsistencies in Rogelio's rendition and on demeanor.[6/] Initially, Rogelio said he did not go ask the fork lift driver himself because he did not have the authority to do so. (III: 7.) Later he admitted that a worker could ask a fork lift driver to move a bin (III: 10), that he had done so in the past (III: 76, 79), and that on this occasion he did not do so because he did not see any of the drivers. (III: 89-90.)

Sometimes inconsistencies resulted from his tendency to overstate matters. For example, he testified that Ms. Gabinette was less friendly after the Union came on the scene. He then expanded this statement to contending that after the Union organizers cane out, "... she would not allow us to do any more talking, no, there was no more talking." (III: 16.) On cross-examination he retracted that statement and said Ms. Gabinette did not stop him from talking to other workers. (III: 24.)

This tendency to exaggerate cropped up at various points. I put his testimony that Ms. Gabinette called him a "dirty worker" in this category. He admitted he did not tell the ALRB agent about this but said it was because he didn't think it was important. In testifying, Mr. Chavez showed himself to be quite astute, and the

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6. I do not rely on Resp. Ex. 15. Ms. Gabinette explained the alteration of the document and although her explanation is not so improbable that I believe she fabricated the entry, it is nonetheless odd. Since there is otherwise ample evidence in the record, I find it unnecessary to rely on Gabinette's notation.

care with which he avoided Respondent counsel's attempts to catch him in inconsistencies evidenced a sophistication about the issues and the process. I thus find it highly improbable that he would not have recognized the significance of his supervisor making such a remark. I believe, rather, that he later embellished the incident.

In addition to inconsistencies and exaggerations, Rogelio's demeanor while testifying indicated more of a concern to keep his story straight, to paint an innocent picture of himself and his cousin Mario and to outwit Respondent's counsel than a sincere effort to tell the truth.

When asked if he had called Ms. Gabinette "chingada" and said what the fuck was she there for, Rogelio first said he did not recall. When pressed by Respondent's counsel as to whether he did not recall or did not make the comment, Rogelio said:

> Had I told her those words, I would remember those words. I would remember. Maybe she's the one that got herself confused, because she was the one that kept on talking. She's the one that kept on arguing. She must have been the one who said those things. (III: 92.)

The witness' response was facile, and his demeanor evidenced an effort to be clever and turn a potentially damaging area of the conversation away from himself rather than an effort to answer the question. The attitude that came through was that he was being overly clever.

Francisco Bermudez, a fellow worker and friend of Rogelio, essentially corroborated much of Rogelio's story but specifically failed to corroborate Rogelio's contention that Ms. Gabinette made offensive remarks to Rogelio after she told him he was fired. (IV: 22.)

Although the disparate versions of whether Rogelio laughed at her and whether she verbally abused him concern matters which came after she fired him, they shed light on what went before.

Rogelio[1]s laughing at her order was both consistent with the attitude he evidenced during trial, and it is consistent with Gabinette's seeking out Ray Vigil. Ms. Gabinette testified she did not generally have any difficulty handling the male members of her crew. Her demeanor at hearing was that of a self-reliant individual. It would not have been in keeping with that personality or with her past history to have sought out Ray rather than dealing with Rogelio herself. For her to resort to that step indicates a reaction from Rogelio other than a simple question of was he going to be paid for his bin and quiet acquiescence in his being fired as he paints the picture.

Finally, in his testimony regarding Mario Chavez' case, Rogelio clearly lied. (See discussion, ante, p. 13.) Based on all the foregoing factors, I credit Gabinette rather than Rogelio.

B. Mario Chavez

Mario Chavez is Rogelio's cousin. He worked at VCP for five years before he was fired on March 13. He wore a union button and talked to union organizers at work. He, Rogelio, Raul Rivera and Francisco Bermudez were part of a group of about six employees who closely associated with one another at work. The others were all said by the employer to make no secret of their support for the Union, and while Respondent did not admit knowledge of his Union activity it does not argue that it was unaware of Mario's support for the Union.

On the day of the election, Rogelio and Mario Chavez were standing around their vehicle after having voted. Jose Luis Aguilar, a fellow employee at VCP, came out from having voted. Aguilar was wearing a jacket and had his arms folded across his chest. Mario Chavez approached him and said, in effect, that if Aguilar had a piece, i.e. a gun, he better take it out because he, Mario, had one. Chavez then pulled a pistol up from his waistband so that part of the barrel was visible. Aguilar protested he didn't have anything and unfolded his arms and pulled open his jacket to demonstrate that he wasn't carrying a gun. Chavez laughed at him and someone behind Aguilar said to leave Chavez alone, that Chavez thought he was "quite the little man." (II: 50-52.)

After this incident Aguilar left the voting area. He told his family about the incident.[7/] The Company obtained a declaration from Aguilar (Resp. Ex. 12), and Bob Bellar asked Ray Vigil to investigate. Vigil talked to Aguilar and reported to Bellar about 2 or 3 days after the election that Aguilar affirmed the incident occurred. It was at this point that Bellar learned who Aguilar and Mario Chavez were. (I: 50.) Bellar did not instruct Ray to talk to Mario, and Ray did not do so.

Following this discussion with Ray, Bellar spoke with the Company attorney, Bill Marrs, who said he wanted to think about the matter, (I: 53.) Bellar discussed the situation several times with

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7. I find it unnecessary to resolve the testimonial conflicts as to how the Company, especially Bellar, learned of the incident. The discrepancies of who told whom may well be the result of the passage of several months and the fact that a lot was going on the day of the election. All the versions are in basic agreement as to the essential facts relating to the gun incident.

Ray and Marrs. (VIII: 23-24.) On the afternoon of March 9, Bellar was radioed by Ray Vigil and informed that Rogelio had been fired. Bellar determined at that point that he should let Mario go before someone got hurt. He conferred with Marrs who concurred and Bellar determined to fire Mario. The next two days Mario was not at work. Bellar had to go away on a family emergency and thus instructed Ray Vigil to terminate Mario.

I have credited Aguilar's version of the gun incident at the election. Mario and Rogelio Chavez denied that it occurred. I do not credit them because of various inconsistencies in their testimony.

Rogelio denied ever seeing Mario with a gun and denied having gone target shooting with him. (III:44-46.)[8/] Mario stated that Rogelio knew he had a gun, had seen it, and they had been target shooting together once. Further inconsistencies in Rogelio's testimony also cast doubt on his credibility. (See discussion, supra, at pp. 9-10.)

Mario denied ever carrying a gun to work, and I credit the testimony of Ernie Vigil that Mario had shown him a gun at work several times in about November of 1982. Although Ernie is the brother of Ray and Joe Vigil and of Erma Lee Gabinette, he is also a drinking companion of Mario's and pointed out that Mario was in no

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8. Rogelio's entire testimony regarding the gun was disingenuous. His demeanor clearly demonstrated a desire to avoid saying anything damaging to Mario and an effort to keep one step ahead of Respondent's counsel's questions. When counsel asked Rogelio if he had ever used Mario's gun after Rogelio had testified previously he had never seen Mario with a gun, Rogelio said "what gun" (III:46) and smiled in a way indicating that his chief concern was keeping his story straight and that he had managed to do so.

way threatening when he showed Ernie the gun but was just joking around. He showed no proclivity to exaggerage or to try to paint the incidents as more condemning than they apparently were.

Further, as discussed below, I do not credit Mario's version of what occurred when he was fired. Based on the inconsistencies in their accounts regarding the gun and inconsistencies in other parts of their testimony, I do not credit their denial that the election site incident occurred.[9/] Further, it strains credulity that Aguilar would have concocted such a story and even told it to his parents and company officials when there is no motive for having done so.

On Sunday, March 13, Mario came to Ray's house to get his check. Vigil told Mario he was instructed to fire him because of his gun play at the election. Chavez smiled and replied, "My gun play? Ok." Chavez then left and drove away with Raul Rivera.

I have credited Ray Vigil's account of the firing. Overall I found him to display a more honest, forthright demeanor than Mario. His testimony did not have inconsistencies such as Mario's. Moreover, he did not appear to have an axe to grind or to be vindictive toward Mario. Further, his account has the ring of truth because the behavior he ascribed to Mario was consistent with the

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9. I do not rely on Resp. Ex. 16 as impeaching Mario's credibility. On examination, it is clear that the signature on the gun registration forra is not the same as 'the signature on Mario's declaration. (Resp. Ex. 9.) The signature on the declaration is that of the alleged discriminatee in this case. Since the signature on the gun registry is not his, and there is no evidence to indicate that the Mario Chavez who registered a gun is the same Mario Chavez in this case, I do not rely on the exhibit. (California Evidence Code section 1417.)

demeanor Mario displayed at hearing. He smiled frequently when asked about the gun incident and his possession of a gun. It was both a response to nervousness and an effort to appear unconcerned in a tense situation. It is wholly consistent that faced with being fired he would react by acting as if it were of no consequence.

C. Haul Rivera

On March 10, the day following Rogelio's discharge, Joe Vigil was assigning sets to the pickers. He had given sets to approximately three-fourths of the crew. Haul Rivera, Roberto Bermudez, Francisco Bermudez, Efrain Chavez, Salvadore Toledo and Enrique Rivera arrived. (VI: 15.) By the time they arrived, Joe was assigning sets in a portion of the drive that had already been picked. (IV: 22.) The sets consisted of 3 trees to the north of the drive and two to the south. The set he assigned Rivera consisted of only two unpicked trees -- the most northerly and most southerly trees in the set. Joe testified without contradiction that there was enough fruit on the two trees to fill a bin and that other workers were assigned sets with only two trees. (VI: 29.) Every worker had a tree on the extreme northern end of the five trees to pick. (VI: 47.)

Rivera began to argue with joe and complained about having to pick the most northerly or third tree. He asked why Joe had not put the bin by the tree to the north. Joe told him there was not a regular drive by that tree. Pivera then demanded to know who had set out the bins. When Joe said he had boxed the drive, Rivera told him he was no damn good as a fork lift driver.

Joe told Rivera that he was assigned to pick the set and

asked whether he was going to do it. Rivera angrily refused, and Joe told him if he wasn't going to pick then he should take his ladder out. Rivera became more angry, threw his ladder against a tree and loudly told Joe if he wanted the ladder out to take it himself because he wasn't going to do it. (IV: 12.) Joe then told Rivera he was fired.

Rivera started walking out with several of his friends and told Joe that he knew the law and Joe couldn't fire him for that. Vigil retorted he too knew the law and could fire Rivera for the way he was acting. Rivera left saying that things were not going to end like that, that he would turn Joe over to the Union and would see him in court. (II: 63-64; VI: 13.)

Joe acknowledged Rivera was a vocal union supporter who made no secret of his views. Rivera was also a good friend of Rogelio Chavez (II: 65) who, of course, had been fired just the preceding afternoon.

Joe Vigil was a credible witness. He did not exaggerate, and he answered questions forthrightly. He was matter of fact and not defensive about Rivera's union activities. He freely admitted knowing of them. Rivera did not testify, and although Francisco Bermudez testified about the firing of Rogelio Chavez and came to work with Rivera on the 10th, he was not asked about Rivera's discharge. Finding Vigil credible, and in the absence of contradictory testimony, I credit his account of Rivera[1]s discharge.

D. Raul Rodriguez and Manuel Renteria

Both of these individuals are high school students who worked for VCP on weekends and holidays and during summers. Both

worked in Virginia Saucedo's crew. Haul's father, Francisco (Pancho) Rodriguez, and his father's brother, Juan Rodriguez, also worked in Virginia Saucedo's crew. Juan's wife, Carmen, has worked in the same crew on occasion and has done so since 1977. (IV: 155-156.) Elias and Isaura Renteria, Manuel's parents, also work in Saucedo's crew.

Francisco and Juan Rodriguez spoke to union organizers at work when Saucedo was near enough to observe them although not near enough to overhear. (IV: 102-103; 142.) Claude Lawson, the field representative and an admitted supervisor (VII: 48), also saw Francisco speak to organizers. On occasion, Raul was also present. (IV: 148.) Juan and Francisco each wore a union button to work. (IV:101, 141.) Elias Penteria was also briefly present during the discussions with organizers at work " a little bit . . . . [a]s he was going by" (IV: 150). Francisco had union meetings at his house. Elias Renteria was present at some of the meetings. There is no evidence the company was aware of the meetings at Francisco's house. Nor is there any evidence that the Company knew that any members of the Rodriguez or Renteria families signed authorization cards or that Francisco yelled out "Viva Cesar Chavez" at work. There is also no evidence of any union activity on the part of Manuel Renteria or Carnen Rodriguez.

Saucedo denied knowing that any of the Rodriguez family or the Renteria family were union supporters. (II: 102-103.) She acknowledged she had seen Juan and Francisco speak to union organizers but added that the organizers talked to all the workers. (VIII: 103.) She denied seeing Juan and Francisco wear union

buttons. (VII: 103.)

Raul and Manuel voted challenged ballots in the March 1 election. Bob Bellar did not know them and asked Claude Lawson, Ralph Diaz and Virginia Saucedo who they were (VIII: 32-33.) At that point he and was told they were students. (VII: 38.) When Bellar asked if they had worked during the eligibility week, he was told they had not. He did not learn that they had worked that week until July when the hearing on the objections to the election was held. (VII: 43.)

Bellar reminded Lawson that the Company had a policy of not allowing students who were children of regular employees to work unless there was enough work to keep the steady employees busy. (VII: 38.) He told Lawson the students could not work until he (Bellar) told Lawson it was ok, however, based on advice from his attorney, Bellar said Gloria could work because she had worked during the eligibility week. It is clear that this policy had not been enforced anytime in the recent past, if ever. Virginia Saucedo was not even aware that such a policy existed. No reason appears why Bellar determined to enforce it now other than that he had assumed Lawson had been applying the policy, and he now had reason to believe Lawson had not. Bellar, however, was aware that Gloria de la Cruz, the only other student in the crew, had worked the eligibility week and knew she was a student when he was compiling the eligibility list. (VII: 34.)

Lawson told Saucedo not to use the students unless they were needed to supplement the regular workers. She told Juan not to bring his wife Carmen to work and to tell Francisco that she did not

need his son Raul. (II: 83; IV: 156.) She also told Elias Renteria not to bring his son Manuel to work but did not tell Gloria's father not to bring her.[10/]

Saucedo testified that neither Francisco nor Elias asked why their sons could not come back to work and that Juan did not ask for work for his wife until sometime in April. Francisco and Juan both maintain they regularly sought work for their family members.

Francisco testified at the trial. He is an expansive, voluble person. It would not be in keeping with that nature not to talk to Ms. Saucedo about why Raul could not work. Raul had worked regularly for several years, and I find it unlikely that Francisco would not have raised the matter. I therefore credit Francisco. Further, I credit Juan Rodriguez. He was a sincere, forthright witness who answered questions carefully and thoughtfully.

In June, Saucedo told both Raul's and Manuel's parents that they could work for the summer. Bellar had told Claude Lawson that the two could come back to work because the Company usually lost some pickers to other crops and could use extra help. (VII: 39.) Manuel returned to work and worked throughout the summer. (VII: 5.) Raul worked for about two weeks and then left to attend classes at UCLA. When he did not show up for work for a couple of days, Saucedo asked where he was and Francisco told her. Either directly or indirectly she indicated Raul might not be able to come back to

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10. At a later date, her father was requested not to bring her to work. On one occasion she was working on a school day. The other occasion was not described. I credit Bellar's testimony that when Gloria's father persisted in bringing her to work, Bellar perceived it to be a situation one just had to put up with.

his job. Bellar had told Lawson, who apparently instructed Saucedo, that if anyone left during the summer they should not be rehired until work began to pick up. (VII:45.)

Raul returned on July 27th or 28th and Saucedo told his father that Raul could not work. On that same day, she refused to rehire a worker, Augustine Lopez, who had been an observer for the Company at the March election. (VII: 6-7.) The Company called Raul in September and told him he could return to work. At the time of the hearing, he had been working for a few days.

ANALYSIS AND CONCLUSIONS

In adjudicating cases of discriminatory discharge, this Board has adopted the standard set forth in Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169][11/] aff'd 662 F.2d 899 [108 LRRM 2513], as applied by the NLRB. The General Counsel must establish that the employees' protected activity was a motivating factor in the employer's decision to discharge them. The burden of production and the burden of persuasion then shift to the Respondent who must demonstrate that the adverse action would have been taken even if the employees had not engaged in the protected activity. (Royal Packing Company (1982) 8 ALRB No. 74.)

Direct evidence of intent is rarely available, and circumstantial evidence may be used to infer motive. (S. Kuramura, Inc. (1977) 3 ALRB No. 49, review den. by Ct.App., 1st Dist., Oct. 26, 1977, hg. den. Dec. 15, 1977.) The timing of a discharge is

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11. The United States Supreme Court recently upheld the NLRB allocation of the burden of. proof set forth in Wright Line. (N.L.R.B. v. National Transportation Management Corp. (1983) __ U.S. ,76 L.Ed.2d 667, 51 U.S.L.W. 4761.)

always a critical factor to consider in such cases. (Lawrence Scarrone (1981) 7 ALRB No. 13, review den. by Ct.App., 5th Dist., Oct. 22, 1982.) Similarly, the abruptness of a discharge is a factor indicating unlawful motive. (Charles S. McCauley Associates, Inc. (1980) 248 NLRB 346 [103 LRRM 1439].)[12/]

Raul Rivera, Rogelio Chavez and Mario Chavez each engaged in activities in support of the Union. All were known by management as supporters of the Union. The key question with regard to each is whether this support was the motivating factor in their discharges.

A. Rogelio Chavez

The timing of Rogelio's discharge, less than 2 weeks after a tight election in which he was a vocal and visible union supporter, raises an inference of unlawful motive. The abruptness of and the severity of the discipline also indicate a discriminatory motive. The firing of such a long term employee with no history of disciplinary problems over a short verbal confrontation is exceedingly harsh. Gabinette's acknowledgment that she had no problems with Rogelio until 1983 also suggests that it was his outspoken behavior in support of the UFW that she regarded as "a problem." Based on the foregoing, I find that General Counsel has established a prima facie case.

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12. General Counsel impliedly argues that I should consider Respondent's no representation campaign as evidence of a general hostility to the Union which should be considered in establishing a discriminatory motive. Respondent's campaign was protected free speech. There is no evidence of unlawful threats or promises. Absent such, the mere expression of anti-union views does not tend to prove anti-union animus. (Monrovia Nursery Company (1983) 9 ALRB No. 15.)

Respondent contends that Rogelio's request to have his bin moved was unreasonable and that he was trying to provoke Gabinette. Respondent asserts he then became insubordinate and was properly dismissed.

There is no evidence to indicate why Rogelio would have determined to set such up a confrontation. Further, Gabinette's response belies Respondent's position. I thus reject Respondent's first contention. I do, however, find that Rogelio's derogatory comment was offensive and insubordinate. Coming as it did in front of the other workers, it was an affront to the forewoman's authority. In such an instance, Gabinette had a legitimate basis for firing him. But would she have done so absent his past union activity?

This is a true case of mixed motive. Gabinette was genuinely and justifiably offended by Rogelio's remarks. Nonetheless, Gabinette's past history demonstrates that Rogelio's conduct would not likely have resulted in his being fired. She simply walked away from a worker who had accused her of cheating. She did not even warn the woman. Only when the woman's mother physically accosted Gabinette did she fire them both. This was the only time in over 6 years that she had fired a worker.

The organizing campaign, representing as it did a potential shift in the balance of power and authority, is the factor which explains Gabinette's strong response to Rogelio's transgression. The dynamics in the crew were changing and she perceived Rogelio as beginning to cause "problems" during this time. Anxious to preserve her authority in the face of a perceived overall threat to it, she

reacted more strongly to Rogelio than her past behavior would suggest. Their vested interests clashed over what might well have remained a minor incident.

I find that absent his participation in the union campaign, Gabinette would not have fired Rogelio for his conduct. I therefore find that Respondent has violated section 1153(c) and, derivatively, section 1153(a) of the Act.

B. Raul Rivera

The timing of Rivera's discharge, both its proximity to the election and coming on the heels of his friend Rogelio[1]s discharge, suggests a discriminatory motive. I find, however, that he was fired not for his union activity but because of his conduct toward his supervisor, Joe Vigil. Rivera's behavior provided Respondent with ample grounds for firing him. There is no evidence that Vigil would have tolerated such conduct in other employees.

Rivera was a relatively new employee. Vigil gave him several opportunities to follow his orders, and Rivera only became progressively more antagonistic with no provocative conduct by Vigil. Vigil, in effect, warned Rivera by telling him to take his ladder out if he wasn't going to pick the set assigned to him. It was only after Rivera then told Vigil to take the ladder out himself and threw it to the ground that Vigil fired him.

I find that Respondent has established that Rivera would have been fired even absent his union activity. I recommend dismissal of this charge.

C. Mario Chavez

General Counsel asserts that Bellar used the election site

gun incident as a pretext to fire Mario for his union activity. To support this view, the General Counsel argues that Bellar's investigation into the incident was insufficient and that Bellar's delay in firing Mario demonstrates that Bellar's true concern was not that incident.

Neither argument is persuasive. The simple fact that Bellar did not contact Mario does not make the investigation unreasonable. Bellar had Aguilar's declaration and a report from Ray Vigil, a man he obviously trusted, that Ray had talked to Aguilar and believed him. In the course of the investigation, Bellar was told Mario had shown off a gun at work and had been arrested for illegal possession of a gun.

The two earlier incidents compounded his concern over what action to take regarding Mario. He was still struggling with the problem when he learned that Rogelio had been fired. Bellar was then also prompted to act.

Bellar delayed making his decision for some 5 days, but I do not construe that as evidence that he was not truly concerned with the incident. Rather, the delay is consistent with the demeanor he displayed at the hearing -- that of a thoughtful, careful man. Perhaps his most telling testimony was that he had never been through such a situation and did not know what to do.

He did not act precipitously but discussed the matter with Ray vigil and with his attorney, both of whom he clearly relied on. His decision to fire Mario after hearing about Rogelio's firing could evidence a discriminatory motive; it could just as easily be a case of realizing he had to make a decision about Mario and having

had someone else act prompted him to act also. There is no suggestion that any other employee showing off a gun would have been tolerated.

Evidence which only creates a suspicion or gives rise to inconsistent inferences is not sufficient to establish a violation. (Schwob Mfg. Co. v. N.L.R.B. (5th Cir. 1962) 297 F.2d 864 [49 LRRM 2360].) I therefore recommend dismissal of this charge.

D. Manuel Renteria and Raul Rodriguez

I find that General Counsel has failed to establish a prima facie case that Manuel Renteria was laid off because of his union activity or his family's, specifically his father's (Elias) support for the Union. There is no evidence that Manual supported the Union personally. The only evidence of family union activity is that Manuel's father spoke with organizers in the field "[a] little bit . . . [a]s he was going by." A relative's union activity may be the cause for an employee's discharge or layoff and in such a case the layoff or discharge would be unlawful. (Bakersfield Foods Co., inc. (1959) 123 NLRB 1130 [44 LRRM 1087].)

Here, though, there is a paucity of evidence that Respondent was even aware of Elias' activities. Juan and Francisco Rodriguez were observed by Saucedo talking to organizers, as were many other employees. Since Elias' brief contact with organizers was when the Rodriguezes were present, Saucedo may have seen him there. I find that there is insufficient evidence to establish

employer knowledge of Ellas' union activity.[13/]

Even were I to find such employer knowledge, I would still find no violation of the Act. If the Company intended to discourage union activity, it seems most odd that it would chose to lay off Manuel rather than his father. Since Manuel engaged in no union activity, Respondent's message would be so obscure as to be lost. Moreover, since Manuel worked only occasionally, the impact of his layoff would be less significant to the family than laying off his father. Again, this reduces the efficacy of Respondent's message and thus undermines General Counsel's position.

While the layoff of Manuel shortly after the election may be peculiar or even suspicious, suspicion alone does not suffice to establish an illegal act. (Rod McLellan Company (1977) 3 ALRB No. 71, review den. by Ct.App., 1st Dist., Div. 4, Nov. 8, 1977, hg. den. Dec 15, 1977.) The causal connection between the layoff and Elias Renteria's union support is too tenuous. Thus, I recommend dismissal of this allegation.

As with Manuel, General Counsel asserts that Raul was penalized for his union activity or because of the union support of his family, namely his father and uncle. Raul's union activity was minimal -- he was sometimes around when his father and uncle spoke to organizers.

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13. I decline to find employer knowledge simply because the employer was taking an active role in the election campaign, talking to workers and, presumably, attempting to ascertain if it had sufficient support to win its campaign. (Monrovia Nursery Company, supra, 9 ALRB No. 15.)

While an employee need not be an ardent union activist before his support for the Union may support an inference of retaliation for that support, among the factors to examine in a discrimination case are the extent to which the alleged discriminatee engaged in union activity and the extent of employer knowledge of that activity and conduct or statements by the employer showing state of mind. (Monrovia, supra; C. Mondayi & Sons (1979) 5 ALRB No. 53, review den. by Ct.App., 1st Dist., Div. 2, June 18, 1980; hg. den. November 26, 1980.)

Here the union activity is not strong. It is not at all clear that Respondent was aware of Haul's activity. I find, however, that Respondent did know of his family's activity. Virginia Saucedo knew the Rodriguez family well. I find it unlikely that she did not notice that Juan and Francisco wore union buttons.

General Counsel adduced no evidence of anti-union statements or conduct by Ms. Saucedo or other employer representatives other than these layoffs. I find no evidence of a concerted campaign by Respondent's manager to weed out union adherents as General Counsel argues. Bellar credibly testified he had no involvement in the discharge of Raul Rivera or Rogelio Chavez. The north and south crews have separate labor contractors, and there is no evidence of collusion or common scheme between them.

As with Manuel Renteria, no reason appears why Respondent would have chosen to lay off Raul Rodriguez because of the activity of his father and uncle in order to retaliate against them, the family and/or to serve as an example to other employees as opposed to acting directly against Juan and Francisco. Certainly an

employer need not lay off all union supporters before a violation may be found. But laying off the least active, least visible family member who works only part time belies the conclusion that the layoff was because of union activity.

The timing of Raul's layoff, right after the election, raises some suspicion. Also problematical is the fact that Gloria de la Cruz was not laid off. Respondent's stated reason, that she was on the eligibility list, is not persuasive. I see no apparent reason for differentiating between her and Raul and Manuel who had voted challeged ballots. Moreover, Bellar testified that later her father was asked not to bring her to work. In one instance, she was working on a school day. There is no explanation regarding the other instance. This inconsistency is likewise suspicious.

Despite the suspicion raised by these factors, it is outweighed by the fact that Respondent laid off only Raul and took no action against his father and uncle who were the real union supporters. The surrounding facts do not tend to reinforce the inference of unlawful motive.[14/] Rather, they undermine it.

I find that General Counsel has failed to prove by a preponderance of the evidence that Raul Rodriguez was laid off because of his or his family's union support, and I recommend dismissal of this allegation.

General Counsel also contends that Raul was discriminatorily refused rehire in July. To establish a discriminatory refusal to rehire, General Counsel must show that the

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14. Bruce Church, Inc. (1981) 6 ALRE No. 3

discriminatee applied for work, that work was available, and that the employer's policy was to rehire former employees. (Rigi Agricultural Services, Inc., (1983) 9 ALRB No. 31.)

General Counsel has failed to establish that work was available. Saucedo had been told not to rehire anyone who left during the summer until work picked up again, and Francisco admitted he had an idea when Raul left for UCLA that he might not be able to get his job back when he returned. On the same day Saucedo refused to rehire Raul Rodriguez, she refused to rehire an employee who, like Raul, had left work during the summer. That employee had been an observer for Respondent in the March election. There is no evidence that this was an instance of using conduct toward a non union supporter to camouflage discrimination against a union activist. (American Rolling Mill Co. (1942) 43 NLRB No. 181 [11 LRRM 69].) General Counsel has failed to establish the requisite nexus, and I thus recommend dismissal of this allegation.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Visalia Citrus Packers, 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 she or he has engager; in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

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

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

(a) Offer to Rogelio Chavez immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other employment rights or privileges.

(b) Make whole Rogelio Chavez for all losses of pay and other economic losses he has suffered as a result of his discharge on March 13, 1983, 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.

(c) 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 period and the amount of backpay due under the terms of this Order.

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

(e) 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 at any time from March 13, 1983, until the date of the issuance of this Order.

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

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural 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 and/or their rights under the Act. The Regional Director shall determine a 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.

(h) 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 therewith, and continue to report periodically thereafter, at the Regional Director's request, until

full compliance is achieved.

Dated: December 14, 1983

Barbara D. Moore

BARBARA D. MOORE
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 issued a complaint that alleged that we, Visalia Citrus Packers, 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 Rogelio Chavez, on or about March 9, 1983, because he engaged in union 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 farm workers 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 to obtain a contract covering 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 or protect one another; and
6. To decide not to do any of these things.

WE WILL NOT DISCHARGE or in any other way discriminate against, interefere with, or restrain or coerce you because of your exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that it was unlawful for us to discharge Rogelio Chavez because he engaged in union activity. WE WILL NOT hereafter discharge any employee for engaging in such protected union activity.

WE WILL reinstate Rogelio Chavez to his former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse him for any pay or other money he has lost because of his discharge, plus interest.

Dated: VISALIA CITRUS PACKERS

By: _____

(Representative) (Title

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question, contact the Board at 627 Main Street, Delano, California, (805) 725-5770.

DO NOT REMOVE OR MUTILATE.