Watsonville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARDI GRAS MUSHROOM FARMS, Respondent, and MANUEL HERRERA, RAUL PEREZ, MIGUEL ALANIS, ROBERTO ALANIS, and ALEJANDRO GARCIA, Charging Parties.	)	Case No. 82-CE-125-SAL 10 ALRB No. 8

DECISION AND ORDER

On May 21, 1983, Administrative Law Judge (ALJ) Ann Fagan Ginger issued her attached Decision in this proceeding. Thereafter, Respondent timely filed exceptions to the ALJ's Decision and a brief in support thereof, and General Counsel timely filed an answering brief to the exceptions.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel. The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Mardi Gras Mushroom Farms, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act), or otherwise utilized his or her rights under 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 Manuel Herrera, Haul Perez, Miguel Alanis, Roberto Alanis, and Alejandro Garcia immediate and full reinstatement to their former 'or substantially equivalent positions, without prejudice to their seniority or other rights or privileges.

(b) Make whole the discriminatees named above for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our decision in Lu-Ette Farms Inc. (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 all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(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 during November and December 1982.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the time(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.

(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 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 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: February 14, 1984

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

Manual Herrera, Raul Perez, Miguel Alanis, Roberto Alanis, and Alejandro Garcia filed charges that Mardi Gras Mushroom Farms broke the law by firing them on November 4, 1982.

The Agricultural Labor Relations Board decided it was against the law for us to fire the five workers.

WE WILL pay Manuel Herrera, Raul Perez, Miguel Alanis, Roberto Alanis, and Alejandro Garcia for all losses of wages and other money they lost because they were fired wrongly.

FROM NOW ON we will not fire workers for talking about job problems with us in a group, or otherwise discriminate against any worker for discussing grievances in a concerted fashion.

The Board told us to put up this Notice. We will do what the Board ordered.

We also want to tell you that California law says you have certain rights, and all farm worker in California have these rights:

1. To organize yourselves;
2. To act together to help each other and to protect other workers;
3. To form unions, to join unions, or to help unions;
4. To vote in a secret ballot election to decide whether you want a union to represent you;
5. 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;
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT try to keep you from acting together with other workers to help and protect one another; we will not interfere with, restrain, or coerce you in the exercise of your right to act together.

THE FACTS: The five workers filed charges in the Salinas office of the Agricultural Labor Relations Board. The General Counsel looked into the charges and issued a complaint. The Board held a hearing in Watsonville where the workers and the company put on witnesses. The Board decided that we broke the Agricultural Labor Relations Act by firing five of our workers because they came together and said we laid off someone in the wrong order, out of seniority.

Dated: MARDI GRAS MUSHROOM FARMS

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 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of MARDI GRAS MUSHROOM FARMS, Respondent, and MANUEL HERRERA, RAUL PEREZ, MIGUEL ALANIS, ROBERTO ALANIS & ALEJANDRO GARCIA, Charging Parties.	)	Case Number: 82-CE-125-SAL

APPEARANCES:

General Counsel for the Agricultural Labor Relations Board:

DEVON ANN MCFARLAND
112 Boronda Road
Salinas, California 93907

For the Respondent:

HOWARD SILVER
Dressier, Quesenbery, Laws & Barsamian
116 Martinelli Street, Suite 8
Watsonville, California 95676

DECISION

Statement of the Case

ANN FAGAN GINGER, Administrative Law Judge: This case was heard before me in Watsonville, California on March 2, 1983. The moving papers consist of the General Counsel's complaint issued by the Salinas Regional Director on January 26, 1983, alleging unfair

labor practices ("ULPs") in violation of section 1153(a) of the Agricultural Labor Relations Act ("the Act") by Mardi Gras Mushroom Farms ("Respondent") and the Answer of Respondent dated January 28, 1983. The ULP complaints are based on the charge by the five Charging Parties filed on November 5, 19b2, that Respondent discriminatorily laid off or discharged the five for their protected concerted activities, and also refused to return personal property.

All parties have been duly served.

At the pre-heariny conference on March 2, 19b3, the parties stipulated that the five discriminatees were all agricultural employees within the meaning of the Act (RT II :1),[1/] and that Mike Posey, Leonandis Perez and Sylvestre Varya had all been supervisors within the meaning of the Act and agents of Respondent acting on its behalf at the time of the incident (RT II:1). Respondent and General Counsel ("GC") also stipulated that settlement efforts had failed (RT II:25), that the five discriminatees had stopped working for Respondent on November 4, 1982, that all five had been offered reinstatement later, and that four of the five had been reinstated by December 8, 1983, the fifth choosing not to return (RT II:3).

All parties were given full opportunity to participate in the hearing. On April 1, 1983, both parties submitted posthearing briefs.

1. References to the Reporter's Transcript will be abbreviated "RT," giving the volume and page. Although the Reporter's Transcript for the actual hearing is not numbered, it will be referred to as RT III since the two pre-hearing volumes are numbered I and II.

Background Facts

In October 1981 Respondent, Mardi Gras Mushroom Farms began operating a small mushroom harvesting company in Watsonville, of which Mike Posey became the owner and general manager, and his wife, Jean Posey, became the secretary and bookkeeper (RT III: 98,99,83). The Poseys live on the Company's property in a house located right behind the packing shed.

Respondent produces mushrooms for fresh market sale. Mushrooms are grown indoors in hothouses, propagated in beds arranged in tiers up the walls of the houses (RT III:6). A bed, once ready for picking, is picked every day and remains productive for about a month (RT III:8). The mushroom houses are kept dark and the pickers must work with a small light (RT III:6). The mushroom pickers cut the mushrooms with a short knife and place the cut mushrooms in plastic baskets according to the size and grade of the mushrooms (RT III:117). The plactic baskets are themselves placed in a picking rack (RT III:117) that the pickers carry with them as they pick beds. After the mushrooms are picked they are prepared for market in the packing shed, adjacent to the mushroom houses.

At the time of the incident that gave rise to the complaint, November 4, 1982, Respondent employed approximately twenty-five workers (RT III:8). Of these, 14 to 15 were mushroom cutters (RT III:107). Among the cutters were the five discriminatees: Manual Herrera, Miguel Alanis, Roberto Alanis, and Raul Perez, and Alejandro Garcia. The foreman of the cutting crew was Sylvestre

Vargas (RT III:10). Miguel Alanis and Manuel Herrera testified without contradiction that they were long-time residents of Watsonville (7 to 12 years); that they lived with their families (RT III:5,64); that they had been picking mushrooms for several years (RT III:5, 65), and had been working for Respondent since 1981 or earlier in 1982 (RT III:5, 64). Herrara testified that his wife also worked for Respondent, and continued to do so after Herrara was terminated (RT III:79).

Witnesses for General Counsel and Respondent agreed that Respondent was committed to following a simple seniority system on layoffs and hiring (RT III:101, 1U8); that all jobs in agriculture were scarce in November (RT III:40), and that work was much sought after (RT III:106,107,125), even to the point of unemployed workers paying an agent of Respondent for jobs (RT III:101-103, 105), so that more workers were hired than the Respondent needed, necessitating layoffs (RT III:107). Witnesses for both sides also agreed that discriminatees had applied for unemployment compensation after alleging that they had been fired (RT III:41); that Mike Posey had been interviewed by phone more than once by Employment Development Department ("EDD") concerning their claims (RT III:46, 122-123); that EDD had awarded compensation for the layoffs (RT III:41, General Counsel's Exhibits (GCX) 2 and 3), and that Respondent had not appealed from these decisions (RT III:124).

At the hearing on March 2, 1983, the only factual issues in dispute were whether, after a concerted action, that is, conversation with Mike Posey, the five had been fired by Respondent or had quit voluntarily; and whether two of the five

owned the picking baskets or racks they had been using while working for Respondent.

Layoffs

In the fall of 1982, Respondent found it necessary to lay off some of the pickers (RT III:13). Posey testified that this problem arose because Raul Perez (who became one of the discriminatees) "was selling jobs to pickers" (RT III:102), and, as a result, Posey had too many; he wanted 11; he had 14 or 15 (RT III:107). Perez was quoted as saying he accepted money for jobs but had not solicited it. He pleaded with Posey to give him back a job because "he had some pretty heavy financial burdens" (RT III: 107), and Posey agreed.

In mid-October Posey called a meeting of the workers in his office (RT III:13), where he assured them that any layoffs would be in order of simple seniority: whoever was hired first was the highest on the seniority list; the last hired would be first fired (RT III:101). At that meeting Posey laid off two pickers according to seniority (RT III:13, 53).

Production slowdowns necessitated other layoffs. About two weeks later, on November 3, 1982, a third picker, Jesus Alvarado, was also laid off (RT III:14, 108). Alvarado advised the rest of the pickers of his layoff, claiming he should not have been the one laid off. They agreed that Gabino Serrano was next on the seniority list, not Alvarado (RT III:57, 67, 81).

When Alvarado returned home that evening, he told his neighbor, Miguel Alanis, about his layoff, since Miguel had not worked that day. Miguel suggested to Alvarado that "he be present

the next day so that we could try to do something for him" (RT III: 15).

Concerted Activity and Result

When Alvarado reported to work the next morning, November 4, 1982, just before 6 a.m., he and the rest of the pickers congregated in the packing shed (RT III:15). At the hour for work to begin, the five discriminatees approached the picking foreman, Sylvestre Vargas, to ask about Alvarado's layoff, while the remaining workers went into the mushroom houses and started work (RT III:17). The five workers asked Vargas why Alvarado had been laid off when Posey had assured them that all layoffs would be in seniority order (RT III: 17). Vargas responded that it was a decision Posey had made, not he (RT III:17, 69). The workers then asked to speak with Posey, and Vargas called Posey (RT III:17, 69, 109) who did not normally arrive at work at that hour (RT III:70, 82).

Posey arrived at the packing shed within three to six minutes (RT III:18, G9); he was wearing jogging pants and a jacket (RT III:69) and was visibly angry according to both General Counsel's witnesses (RT III:69).

Respondent maintains that at the end of this incident, the five discriminatees had quit; General Counsel maintains they had been fired because of their concerted protected activity.

According to Posey, the conversation between Posey and Herrera proceeded as follows, with Herrera interpreting for both sides, and the four workers who spoke only Spanish occasionally stopping to talk among themselves and with Herrera, who then translated their decisions:

Manuel said that he . . . and the other pickers who were there, felt that there was a problem with the order in which some of the pickers had been laid off and that . . . that particular group was not going to pick until that problem was settled. (RT III:109-110)

I told him that I would not be able to verify the seniority list at that time, since Jean [Posey, secretary and bookkeeper] wasn't in the office yet, that it was a matter that we could discuss either at lunch or at break time or after work as we had with those matters in the past, but that for the time being I needed them to yet in and start picking.

[Manuel] interpreted what I said to the other pickers in that group, the four individuals . . . [Then] [t]hey had some conversation among themselves in Spanish. (RT III:110)

[Manuel] indicated that the pickers weren't happy with that and that there was either one or two of those guys that had been laid off there and wanted to go . . . back to work that day and that they needed an immediate decision . . . .

I told them that an immediate, right there on the spot examination of the records would not be possible because my wife gets the kids off to school . . . in the early morning and that it was something I didn't think I wanted to discuss any further and that they should get their racks and start picking. . . .

. . . I told them that we had a lot of mushrooms and that it was imperative that we take care of this matter at another time and get in and get them picked so we could get them cold and shiopped [sic] that day. . . . They had some conversation among themselves and Manny translated that back to me. (RT III:111)

Manny said that the pickers were not satisfied with that solution and that they weren't going to pick until the matter was resolved.

I told them that was their decision, that I wouldn't pursue it any further, but that I was going to call back the workers who were laid off, I think a day or two before them and nave them come in and pick the mushrooms.

They had some more conversation among themselves, . . . out in the packing room, and at that point, I went back into the office and I started to pick out some of the employment jackets for phone numbers, and then Manny came in the office by himself and said that if they were fired, they wanted their checks.

I told them that they weren't fired, and again expressed to them that I'd really prefer to have them go back to work, but if they didn't want to go back to work and that they wanted their checks, that I would have them prepared for them as soon as someone came in the office. (RT III:112)

MR. SILVER: Q Did Manuel say anything back to that?

THE WITNESS: A No, I don't believe so. (RT III:113)

This version of the incident is very similar to the version to which General Counsel's two witnesses testified. Manuel Herrera testified in Spanish, except when he repeated what Posey had said, at which point he reverted to English. According to Herrera, in the packing shed, Posey said to the five discriminatees:

"Listen you guys, I'm tired of this bullshit. I don't want to argue with you no more. My decisions are my decisions, and that's about it. You want to go back to work, go ahead. If you don't, leave whatever you got in your hands and beat it." (RT III:70)

After Posey left the shed, the five remained there for two minutes to decide what to do (RT III:33). Then Herrera went to Posey's office, where, according to Posey, he was already pulling employment files for telephone numbers to call replacements (RT III:112). At that point, according to Herrera, Posey shouted:

"That's it. No more. Go fuck up the streets. It's too late. Come and pick up your checks about ten o'clock in the morning and that's it. I don't want to see you here around the company no more." (RT III:78-79)

Miguel Alanis, who testified he knew little English, said that he did understand what Posey said at this point, in English: "It's too late. Everybody get out of here." (RT III:35)

At the conclusion of the hearing, the major issue in dispute was whether the five Charging Parties had been fired for their concerted activity or whether they had voluntarily quit because of it. A minor issue was whether Respondent had wrongfully retained personal property brought to work by two of the five Charging Parties, or whether the disputed picking baskets belonged to Respondent.

I. THE ALLEGED UNFAIR LABOR PRACTICE OF DISCHARGING FOR PROTECTED CONCERTED ACTIVITY

In order to establish that an employer has violated section 1153(a) of the Act by discharging employees, General Counsel must prove by a preponderance of the evidence that the employer knew about protected concerted activity engaged in by the

employees, and discharged them for that activity. Lawrence Scarrone (1981) 7 ALRB No. 13; United Credit Bureau of America (1979) 242 NLRB 138 [101 LRRM Mid 1277], enf'd (4th Cir. 1981) 643 F.2d 1017 [106 LRRM 2751],/America Machinery Company (1978) 238 NLRB 537 [99 LRRM 1290]; Super Valu Stores, Super Valu Xenia Division (1978) 236 NLRB 1581 [99 LRRM 1028].

In the instant case, the employer knew about the concerted activity of the Charging Parties because he participated in it immediately preceding the layoff or quit. The situation was the opposite of that in Matsui Nursery, Inc., 5 ALRB No. 60 (1979), in which the respondent had no knowledge of such activity at the time it made the decision to discharge the worker, and in S. Kurarnura, Inc., 3 ALRB No. 49 (1977), where it was necessary to prove that the employer had such knowledge. Here Respondent's witness testified unambiguously that the five discriminatees would not have left his employment but for their concerted activity in protesting a condition of employment at the start of a working day (RT III:110-13). The causal nexus between the concerted action and the firing is clear and immediate, unlike, e.g., the situation in Resetar Farms, 3 ALRB No. 18 (1977).

In the instant case, the concerted activity was a group protest about violation of seniority in a layoff. Seniority is an issue concerning the terms and conditions of employment; complaints or group protests about violations of seniority rules constitute protected concerted activity. Jack Brothers & McBurney, Inc. (1980) 6 ALRB No. 12; Spinoza, Inc. (1972) 199

NLRB 525 [81 LRRM 1290].

Those employees participating in the concerted activity need only have believed they had a grievance for the concerted activity to be protected. The correctness of the workers' belief is irrelevant and will not transform otherwise protected activity into unprotected activity. As the Board stated in Venus Ranches (1982) 8 ALRB No. 60 at p. 4: "Even if the employees' concerted protest . . . was based on an erroneously held belief, the protected nature of their conduct would not be affected. (The Marlin Firearms Co. (1956) 115 NLRB 1834 [39 LRRM 1111]; Cf., Bettcher Manufacturing Corp. (1948) 76 NLRB 526 [21 LRRM 1222]."[2]

In fact, Respondent's records confirm that Serrano was not laid off; Alvarado was. Serrano continued to work during the days Alvarado was laid off. (See time card for Gabino Serrano, Respondent's Exhibit (RX) 4, timecard for Jesus Alvarado, RX 5)

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2. General Counsel makes a compelling argument that the Charing Parties were actually correct in their belief that Alvarado had been laid off out of seniority order. Respondent's witness, Michael Posey, testified that:

> I sort of personally felt that the guy had paid for a job. He must have wanted to work pretty bad, and 1 had a difficult time laying him off after he had paid for a job in the first place, and yet if I followed the seniority list to the T, it would be necessary to lay him off. (RT III:125-127; there is no p. 126).

When a worker comes to the aid of another worker involved in a dispute with a supervisor that arises out of the employment relationship, this act constitutes protected concerted activity. Giannini & Del Chiaro Co., 6 ALRB No. 38 (1980). In Giannini, the protest concerned a supervisor's abusive treatment of a co-employee. The fact that the protesting employee engaged in a short, heated argument with the supervisor was held not to justify the employee's discharge, since concerted activity loses its mantle of protection only in flagrant cases in which the misconduct is so violent or of such a serious nature as to render the employee unfit for further service. In Giannini, as in the instant case, the activity remained peaceful and protected.

In Yamamoto Farms, 7 ALRB No. 5 (1981), the Board found that the employer violated section 1153(a) by discharging an employee because of his participation in a concerted protest against the discharge of another worker, somewhat similar to the situation in the instant case, although in Yamamoto Farms, the employee went further and threatened to get additional workers to join the protest.

When employees refuse to work as a manifestation of their concern over wages, this constitutes a protected concerted activity. Any employer action that tends to interfere with or restrain such concerted activity is a violation of section 1153(a) of the Act. Giumarra Vineyards, Inc., 7 ALRB No. 7 (1981). An employer violates section 1153(a) by discharging employees because they engage in a protected concerted work

stoppage and protest over wage rates. In Lawrence Scarrone (1981) 7 ALRB No. 13, the Board found a violation based on the timing and abruptness of the discharge, the employer's statement of intent, and the unconvincing reasons it offered to explain the discharges.

In the instant case, Posey, as agent of Respondent, clearly stated his intent as to the five discriminatees who took the initiative in trying to discuss a grievance with him in a concerted manner: They must choose between continuing to work for Respondent and continuing to press for settlement of the grievance further and keep their jobs. In fact, after a very few minutes of discussion, he was on his way to the office to call other workers to replace them (RT III:111-12). However, Respondent maintains that it did not discharge the Charging Parties; they quit voluntarily.

Burden of Proof and Basis for Decision

The General Counsel has the burden of proving an unfair labor practice charge by a preponderance of the evidence. Lab. Code, section 1160.3, Montebello Rose Co. v. ALRB (1981) 119 Cal. App. 3d 1, 20 n.11.

In this case, the decision on this issue must be based on the testimony and demeanor of two witnesses each for the GC and Respondent, on the weight to be given to the evidence, on established or admitted facts, inherent probabilities, and the reasonable inferences to be drawn from the record as a whole. El Rancho Market, 235 NLRB 468, 470 (1978).

Conflict in Testimony

There is remarkably little conflict in the testimony of General Counsel's and Respondent's witnesses concerning the events that occurred, and even the words spoken. There is a direct conflict as to the meaning of the words.

After describing the incident on November 4, 1982, including the conversations, Posey testified on direct examination:

Q Whose choice was it to get the [last pay] checks?
A It was their choice.
Q Did you want them to continue working?
A Yes.
Q Could they have continued working?
A Yes.
Q Were they fired?
A No. (RT III:113)

Discriminatees Alanis and Herrera testified that they tried to pick up their belongings and their checks because they understood they had been fired (RT III:37,38,46). Alanis came to this conclusion on the basis of his observations of Posey's temper (RT III:32,33), Herrera's translations of Posey's statements, and his own understanding of Posey's short statement: "It's too late. Everybody get out of here." (RT III:35,37). Herrera came to this conclusion on the basis of his understanding of Posey's statements, which he translated for the others (RT III:79).

The five discriminatees filed a complaint for unlawful discharge with the ALRB the next day, and for unemployment compensation soon after.

In the face of conflicting and contradictory interpretations of events on the key issue of discharge or voluntary quitting, this hearing was devoid of the kind of flamboyant crossexamination that sometiiTies raises the emotional level of the witnesses to a point similar to that present during the disputed conversation, leading witnesses to act and talk as they probably did at that time, forgetting the fact that they are testifying in a legal proceeding. For crossexamination to become an engine that leads to the discovery of truth, rigorous probing is often necessary. Lawyers undertake this kind of hard-driving crossexamination in courtroom trials, civil or criminal, when the stakes are high and the parties will probably have no further dealings with each other after the verdict.

Such may not be the case in an ALRB hearing between General Counsel and Respondent's counsel, who may appear on opposite sides of the table many times each year for many years. And in a case such as this, where the Charging Parties have already been returned to their jobs with Respondent, it may be argued that it is particularly inappropriate to crossexamine sharply because it might frustrate the underlying purpose of the Act, which is to bring labor peace to the agricultural fields of California. (Calif. Agricultural Labor Relations Act section 1)

In any event, the fact-finder is left with conflicting versions of the incident, which necessitate a consideration of demeanor and the other factors listed supra.

Demeanor

Notes made during the hearing concerning GC's witness Miguel Alanis indicate that he was "believable." He spoke at some length, and often spontaneously, as if not holding anything back. His testimony was based, in large part, on translations by Herrera of statements by Posey. It is clear that he drew his conclusions about Posey's statements not only from the translations, but also from his observations -- that Posey was talking in a loud voice (RT III:32), that Posey was visibly angry (RT III:32) --- and his own limited understanding of the key statement by Posey.

General Counsel's witness Manuel Herrera spoke easily as a witness. His demeanor indicated that he knew he was relied on as a translator both by the Respondent (RT III:110, 120) and by his fellow pickers (RT III:77,80), which gave him considerable authority in any conversation in which he participated. His testimony in English in answer to questions asked in English and not translated into Spanish (RT III:70,71,73,74,79) indicated considerable command of the English language.[3]

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3. In its posthearing brief, Respondent labels Manuel Herrera an "untrustworthy interpreter" (p. 4). However, the testimony of Respondent's witness indicates that Posey accepted Herrera as interpreter of his remarks in English to the workers (RT III:110,120), and there is no indication that he sought to briny in someone else to interpret, although he knows very little Spanish (RT III:120).
   The problem concerning Herrera's translation occurred when one of Respondent's agents, Leo Perez, disagreed with the way Herrera was translating. There is no evidence in the record as to the substance of the disagreement, as to Perez proficiency in either language, or as to who was correct. In any event, this alleged error concerned a translation from Spanish to English, not Herrera's ability to comprehend English or to translate from English to Spanish.

Michael Posey's demeanor on the stand was that of someone who was accustomed to being in command of a situation and could handle a confrontation with his employees when he called them to his office to discuss expected layoffs (as he did in October, 1982) (TR III:100), but could not brook challenges to his authority:

> I told them . . . it was something I didn't think I wanted to discuss any further and that they should get their racks and start picking. (TR III:111)

> I told them that was their decision, that I wouldn't pursue it any further, but that I was going to call back the workers who were laid ,off, . . . and have them come in and pick the mushrooms. (RT III:112)

During most of his testimony, Posey testified formally and deliberately, with his arms folded, occasionally using a lawyer's phrase ("to the best of my recollection . . ." (RT III:108)). He was cautious: he did not recall exactly when Respondent company was organized (RT III:99), who called him from the packing shed to come speak with the workers (RT III:109), whose layoff the workers were protesting, or when he laid the workers off (RT III:107). Near the end of his testimony, he began to relax and said, in answer to a question about how he knew the ownership of the racks:

> I just know because they're all my racks. I purchased them, thirteen of them, at one time. (RT III:115)

Jean Posey testified for Respondent very briefly in an efficient manner. Her testimony was not contested.

Weight To Be Given to the Evidence

The EDO forms made available by Respondent from its files (TR III:123), in response to GC' s subpoena, were admitted after testimony by both sides that both the discriminatees and Respondent's agent had been interviewed by EDD more than once before its decision was made (RT III:43,123) and that Respondent had not appealed from the EDD decision (RT III:124), which was based on discriminatees[1] having been fired rather than having quit. (GC's Exhibits 2 and 3)

In a case in which the EDD decision is critical to the decision of the ALRB, it way become necessary to determine the weight to be given to an EDD decision as documented by an EDD form.[4] In the instant case, little weight was given to the EDD decision. The forms were cumulative evidence that the discriminatees thought they had been discharged and that they needed income from unemployment compensation at a time when few jobs were available in the area, although other credible evidence was offered on both points.

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4. in support of the admissibility of the EDD decision for the truth of the finding that Respondent had discharged the Charging Parties, GC referred to Western Publishing Co., Inc. (1982) 263 NLRB 145 [111 LRRM 1537]; Duquesne Electric and Manufacturing Company, 212 NLRB , [87 LRRM 1457], and NLRB v. Duquesne Electric and Manufacturing Co. (3d Cir. 1975) 518 F.2d 701 [89 LRRM 2681], granting enforcement of the NLRF order.
In opposition to admissibility of the EDD forms, Respondent cited Bolsa Drainage, Inc., 101 LRRM 1372 (1979) and Justak Bros., 106 LRRM 1301 (1981).

Estaolished or Admitted Facts

There is no question that the five workers engaged in concerted activity -- meeting together with the employer to discuss a grievance concerning a term or condition of employment, namely, a layoff that did not follow seniority. There is no question that this activity is protected under the Act as an aspect of the right to self-organization, and to engage in concerted activities for mutual aid or protection. (Section 1153)

Inherent Probablities

In Abatti Farms, Inc. v. Agricultural Labor Relations Bd., 107 Cal. App. 3d 317, 327, the Court of Appeal discussed the effect of an employer's statements to its employees, holding that:

The test is the effect of the speech in context (Labor Board v. Virginia Power Co. (1941) 314 U.S. 469 [86 L.Ed. 348, 62 S.Ct. 344]). The United States Supreme Court restated the test in NLRB v. Gissel Packing Co., supra, 395 U.S. 575, 617 to 618 [23 L.Ed.2d 547, 580]: "Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, as employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in section 7 and protected by section 8(a)(l) and the proviso to section 8(c). Any any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. . . ."

While the issue in Abatti Farms and Gissel Packing was employer comments concerning labor unions and their organizing efforts, the

shrewd observation about the ways employees "pick up intended implications" of their employer is apposite here.

Again in NLRB v. Hilton Mobile Homes, 387 F.2d 7,9 (1967), the Eighth Circuit Court of Appeals decided that "Whether Hilton's [the employer's] statements constituted an unlawful dischage depends on whether they would reasonably lead the employees to believe they had been discharged [citations omitted]" In NLRB v. Colnfort, Inc., 365 F.2d 867, 874, the Eighth Circuit had held: "The fact that Respondent's employees received no formal notice of discharge, as was Respondent's customary practice, is immaterial, if they could logically infer that their employment status had been terminated at that point." The facts in another NLRB case are quite similar to those in the instant case. In Ridgeway Trucking Co., 243 NLRB 1048, 1049 (1979):

> . . . [The general manager] Surbaugh ordered the drivers engaged in the work stoppage to leave the premises unless they were going to go to work. As evidenced by their subsequent actions, this statement was construed by them to mean that they were discharged. Thus," in response to Surbaugh's statement, they immediately requested that they be paid on that day, Tuesday, despite the fact that Friday was the normal payday. In addition, they further requested that they be allowed to remove all their personal belongings from the company trucks. Surely, both requests must have made it obvious to Surbaugh that the employees believed that they had been discharged by their failure to heed his order to return to work. Yet Surbaugh did nothing to dispel or disabuse them of that belief. To the contrary, the readiness with which he agreed to their requests, coupled with his failure to try to correct any misapprehensions which his actions towards their work stoppage had created, is consistent with a discharge action and could only have served to reinforce their belief that

they indeed had been discharged. Thus, the obvious explanation for Surbaugh's conduct during the incident was that he, too, knew that they had been discharged when they chose to disregard his ultimatum to return to work or leave.

To counter the charge that Respondent violated section 1153(a) by interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in section 1152, particularly the employees' right to self-organization and to engage in concerted activity for the purpose of mutual aid and protection, Respondent, in its posthearing brief, listed a series of actions by its owner and agent, Michael Posey. Posey was asked by his counsel for specific examples of labor disputes that had arisen and how he handled them (RT III:100). He replied:

> What happens is if we have an incident that involves the picking crew, incidents arise as to days off, picking role assignment, dirty mushrooms, that sort of thing, we bring the picking crew in and discuss it among the picking crew. If we have a problem with the outside crew or the packing crew or sometimes we have a problem that involves maybe the packing crew and the pickers, and then we would bring them both in. It's an open discussion. (RT III:100)

As further proof of Posey's "open door" policy, his counsel cited the fact that Posey had rehired Raul Perez after discharging him as foreman for selling jobs (RT III:102-107)

The differences between these two incidents, and the concerted action of November 4, 1982, are instructive. In his general description, Posey indicated that "we bring in" the crew involved in the grievance. He took the initiative; he called the meeting;

he picked the time and place and subject matter, which might involve his complaints against quality of work (dirty mushrooms) or worker complaints (days off, picking role assignments). GC witness Alanis testified that the workers did not ask any questions at such a meeting (TR III:55).

In the case of the rehiring of Perez, Manual Herrera came in with Perez to ask to get his job back as a picker. Herrera acted as translator (and perhaps also as supporter and fellow worker). Perez pleaded for his job in the traditional ways that existed before the ALRA and the ALRB, saying that "he had some pretty heavy financial burdens and that he realized that what he did was not the proper thing but that he would at least like to have a job back as a picker and that he was a good picker and that he would do a good job for me, . . . " And, "based on that, I gave him a job as a picker." (RT III:107)

However, on November 4, 1982, the situation was quite different. The workers came in a group of five; they came at a time they selected and convenient for them, not for the employer; they did not plead to have seniority followed; they stated their complaint and said they wanted an answer before going to work. (At the same time, they made no threats, sought to involve no other workers, and did nothing to violate the Act.)

This organized, peaceful, determined, dignified effort was not what Respondent had in mind as part of his "open door" policy. In response, he refused to discuss the matter further at that time; he did not seek to find the seniority records in the office himself; he did not ask the Company secretary to come to work

early to find the records, any of which actions would have been a response common in the agricultural fields since passage of the Act.

Reasonable Inferences To Be Drawn Prom the Record as a Whole

The conclusion of the Charging Parties that they had been fired for their concerted activity is highly plausible, falling within a common pattern of employer-employee disputes. It involves a small grower living with his family on the premises, who is suddenly called from his early morning routine by a group of pickers with a grievance about seniority in a layoff the previous day. He dresses quickly, comes to the meeting already angry, asserts his authority over the pickers, explaining the obvious -- that the mushrooms must be picked promptly so that they will not spoil. When his employees do not promptly accept his ultimatum and return to work, he leaves the room.

The pickers talk among themselves very briefly and agree to go to work "and after he [Posey] got composed again, we would talk to him about this problem." (RT III:33) It is November, and they all know they cannot get other jobs in mushrooms at this season, and probably cannot get other jobs then, either. They also know they have families to support and cannot bring home as much money from unemployment compensation as they can from wages.

But when their spokesperson follows the owner to his office, he finds that the owner has already started the process of calling for replacements. He and the other pickers conclude that they have been fired for raising the seniority issue, and they prepare

to leave the premises.

While the Respondent's counsel argues in his posthearing brief that this was not the outcome, and while he asked the owner a series of questions to which the owner answered that he did not fire the pickers, the owner had previously testified, on direct examination, that

". . . I wouldn't pursue it any further, but that I was going to call back the workers who were laid off . . . and have them come in and pick the mushrooms." (RT III:112)

Since the owner had been laying off pickers to get down to the appropriate number (RT III:108), he would not call other pickers unless he had decided to replace the pickers who had just argued a grievance with him.

The fact that the owner rehired these discriminatees within a matter of weeks strengthens the plausibility of this scenario, since he could have "cooled off" and decided he should not have fired them in the first place.

The only evidence that the workers intended to quit over Jesus Alvarado's layoff is Posey's uncorroborated testimony. The afternoon when Alvarado advised the pickers of his layoff, they merely "commented some" about it (RT III:67). They took no action at that time, although that might have been the most logical time to act.

Alvarado returned to work the next day only because Miguel Alanis told him to return so the workers might "try to do something for him." (RT III:15) The next morning the workers planned to "let the case of Jesus Alvarado be known" before they started working (RT III:68). There is no testimony that the

workers planned to quit over Alvarado's layoff.

Such an intent cannot be inferred, particularly since one of the five, Raul Perez, had recently pleaded to yet back his job due to "some pretty heavy financial burdens" (RT III:107), and the others knew there is little or no work for farmworkers in the Watsonville area in November (RT III:40).

The General Counsel proved by a preponderance of the evidence that the discriminatees believed they had been fired for protesting the layoff of another worker out of seniority, and that they acted on this understanding. Posey's testimony that he "was going to call back the workers who were laid off" does not contradict their understanding that they had been fired; on the contrary, it supports this analysis of the event.

II. THE ALLEGED REFUSAL BY RESPONDENT TO RETURN THE WORKERS' PERSONAL PROPERTY

The Charge in this case alleges that Respondent "refused to return personal property" to the Charging Parties. This personal property was identified in testimony as picking baskets (also known as picking racks). In its posthearing brief, Respondent says that General Counsel's witnesses "lied" about the ownership of the picking baskets.

The total testimony about the ownership of the baskets consists of the following statements by the following witnesses:

Posey testified that the discriminatees who claimed that they brought the picking racks with them to work for him had not done so "to my knowledge" (RT III:115). He also testified that '"I

purchased them, thirteen of them, at one time." (RT III:115) On November 4, 1982, according to his testimony, he had 14 or 15 pickers (RT III:107). He did not testify how the 13 baskets were used by the 14 or 15 pickers, since each one used his own basket (RT III:8,115).

Alanis testified that he and his brother (another Charging Party) had brought the baskets with them from a previous employer (RT III;61). No claim was made that the other three discriminatees had brought their own baskets.

These statements of the opposing parties can be reconciled. Posey could have purchased 13 baskets and Miguel Alanis and Roberto Alanis could have brought baskets obtained from a previous employer.

However, the Complaint does not mention this issue and GC did not seek relief concerning return of these baskets.

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Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following:

Findings of Fact and Conclusions of Law

I. Jurisdiction

Mardi Gras Mushroom Farm is a grower and shipper of fresh market mushrooms located in Watsonville, California, and is an agricultural employer within the meaning of section 1140.4(c) of the Act.

The five Charging Parties are agricultural employees within the meaning of section 1140.4(b) of the Act.

II. The Alleged Unfair Labor Practice of Discharging for Concerted Activities

The General Counsel did prove, by a preponderance of the evidence, that Respondent employer violated section 1153(a) of the Act by discharging the five Charging Parties who were its employees because of their protected concerted activities, thus interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in section 1152 of the Act, and thereby did engage in an unfair labor practice affecting agriculture within the meaning of section 1153(a) of the Act.

III. The Alleged Charge of Refusing To Return Personal Property of Two of the Charging Parties

The General Counsel did not prove, by a preponderance of the evidence, that Respondent refused to return to two of the discriminatees their "personal property," as alleged in the Charge

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On the basis of the entire record and on the Findings of Fact and Conclusions of Law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended

O R D E R

By authority of section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that Respondent, Mardi Gras Mushroom Farms, its officers, agents, successors and assigns, shall:

1. Cease and desist from discharging workers because they engage in protected concerted activities, including meeting together with an agent of Respondent to protest working conditions.

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

   (a) Make whole Manuel Herrara, Raul Perez, Miguel Alanis, Roberto Alanis, and Alejandro Garcia, for any losses suffered by the unlawful acts of Respondent, reimbursement to reflect any wage increase, increase in work hours or bonus given by the Respondent since the discriminatory acts, plus interest at the rate determined in the manner set forth in Lu-Ette Farms, Inc. , 8 ALRB NO. 55;

   (b) Make a public statement in English and Spanish to the Respondent's employees during peak season stating that Respondent will not engage in the conduct complained of here;

   (c) Post a Notice in English and Spanish containing the terras of the Board's Order in writing in conspicuous Places on Respondent's property during next peak season;

   (d) Deliver the Notice containing the terms of the Board's Order in writing to its employees during next peak season;

   (e) Mail a Notice containing the terms of the Board's Order in English and Spanish to the last home address of all Respondent's employees employed since November 3, 1982;

   (f) Preserve and, upon request, make available to this

Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports and other records necessary to analyze backpay due to the discriminatee suffering from financial hardship;

(g) Make periodic reports prior to and during next peak season to the designated agent of the Board, under penalty of perjury, illustrating compliance with the Board's order.

Dated: May 31, 1983

Ann Fagan Ginger

ANN FAGAN GINGER
Administrative Law Judge